
Alf Ross: Towards a Realist Critique and Reconstruction of International Law

Alejandro Lorite Escorihuela*

Abstract

The question asked by this article is whether it is possible to adopt a conception of international law based in one way or another on a species of legal realism. The suggested exploration revolves around Ross' association with Scandinavian legal realism and the quest for a consistent expression that this association would then take in Ross' dealings with the law of nations. After presenting Ross' legal realism as essentially guided by a meta-theoretical standpoint in turn dictated by an implicit allegiance to philosophical positivism, the article reconstructs the meanders of the critique of international law and its subsequent reconstruction as flowing from Ross' legal scientism. Against a background of various shades of realism in legal theory, I finally and forcefully propose a confrontation between Ross and three other figures of the legal-realist pantheon, in search of a form of lineage between legal and political realism that may support the coherence of Alf Ross' theoretical trajectory. Thus treated, the initial question ends up being far more significant on its own than through the answers it apparently fails to find along the way.

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On dit en Suède: Qu'est-ce que Dieu ne peut faire, pas plus que l'homme ? Et l'on répond: Tirer un vieillard chauve par les cheveux... Si la science juridique comprenait cette 'blague' dans toute sa profondeur, elle jetterait par-dessus bord toutes les théories juridiques jusqu'ici élaborées.

A. V. Lundstedt¹

1 Introduction: Introducing Scandinavia

The impact of thinking upon wishing which, in the development of a science, follows the breakdown of its first visionary projects, and marks the end of its specifically utopian period, is commonly called realism. Representing the reaction against the wish-dreams of the initial stage, realism is liable to assume a critical and somewhat cynical aspect. In the field of thought, it places its emphasis on the acceptance of facts and on the analysis of their causes and consequences. It tends to depreciate the role of purpose and to maintain, explicitly or implicitly, that the function of thinking is to study a sequence of events which it is powerless to influence or alter.²

In these words penned on the eve of World War II, British historian Edward Hallett Carr characterized the natural development of science and, more particularly, as grandfather of modern political realism in international relations theory, the necessary swing of the pendulum that should affect the course of scientific investigations in international affairs. E. H. Carr is usually credited with the first call for a departure from utopian thinking in order to foster the development of a 'science of international politics', still at that time stuck in its infancy,³ and the first attempt at theorizing on the meaning of 'realism' in that enterprise. In his scholarly writings, the Danish legal philosopher Alf Ross expressed a similar concern in legal theory and advocated a change of mood, method and perspective in the description of legal phenomena, with inevitable consequences for the discipline of international law. His first monograph translated into English displayed a programme-title announcing a several decade long undertaking to radically reconsider the study of law from the perspective of a 'realistic jurisprudence',⁴ with a view to providing it with the means of living up to the disciplinary title of 'legal science'. The object of the following pages will be to take a look at the discussion of international law in Ross' *Textbook of International*

¹ 'In Sweden, they ask, "What can God do that man cannot?" And they answer, "Pull a bald old man's hair..." If legal science could understand the deeper meaning of this "joke", it would throw out every legal theory so far conceived.' Lundstedt, 'La part de responsabilité de la science juridique dans le destin des peuples', in *Introduction à l'étude du droit comparé: Recueil d'études en l'honneur d'Edouard Lambert* (1938) 26.

² E. H. Carr, *The Twenty Years' Crisis: 1919–1939* (1939, reprinted 1964) 10.

³ *Ibid.*, at 1.

⁴ A. Ross, *Towards a Realistic Jurisprudence: A Criticism of Dualism in Law* (1946) [hereinafter cited as *TRJ*].

Law⁵ against the backdrop of his project of introducing realism in legal science, as theorized in his works on jurisprudence.

The inter-war period was, as we know, particularly fertile in calls for theoretical renewal and transformation in domestic and international law, under the impulse of various trans-disciplinary influences and under various banners and school affiliations. Proposals for a partial or global revamping of the traditional approach to the field of international law were for a great part, but not exclusively, an extension of developments led by philosophers and theorists within domestic legal systems. As far as Alf Ross is concerned, the label stapled on a career which began some 70 years ago usually reads 'Scandinavian Realism' and makes him for the historical record a brother-in-arms with three other horsemen of the legal apocalypse, namely, Axel Hägerström (1868–1939), Anders Vilhelm Lundstedt (1882–1955) and Karl Olivecrona (1897–1980), more restrictively known as the 'Upsalla School' or the Hägerström-Lundstedt school.⁶ If we overlook for a moment the details of the scholarly kinship between Alf Ross and the three Swedish historical figures of Scandinavian Realism,⁷ the Danish one is usually credited with the highest level of sophistication in the exposition of that brand of realistic jurisprudence,⁸ which, seen in conjunction with the attention he devoted to the problems of international law, might make a good case for reserving him a seat on the pantheon of the European tradition in the Law of Nations.

Before dipping a foot in the Rossian universe, a few words need to be said on the idea of a European contribution to international law in terms of a call for realism. When 'legal realism' is mentioned, academic memory wanders rather on to the other side of the Atlantic and the legal revolution launched in almost all aspects of legal practice and thinking in the United States of America by a movement self-chastened 'legal realism', and known as 'American legal realism' to the rest of the world.⁹ Usually linked to the legacy of US Supreme Court Justice Oliver Wendell Holmes, and later on

⁵ A. Ross, *A Textbook of International Law* (1947) [hereinafter cited as TB]. The other relevant monograph by Alf Ross which deals with international legal matters is his *Constitution of the United Nations: Analysis of Structure and Function* (1950) [hereinafter cited as CUN].

⁶ Slagstad, 'Norwegian Legal Realism since 1945', 35 *Scandinavian Studies in Law* (1991) 217; Hart, 'Scandinavian Realism', reprinted in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (1983) 161.

⁷ In the pages below, reference will be made to the relations between Lundstedt and Ross, but it is already interesting to note that in Lundstedt's self-reflexive introduction to his *Legal Thinking Revised*, Ross is nowhere to be seen, unlike Olivecrona, and the unavoidable Hägerström (*Legal Thinking Revised* (1956), at 10 *et seq.*).

⁸ Hart, *supra* note 6, at 161.

⁹ Classic works on American Legal Realism include W. Fisher III, M. J. Horwitz and T. A. Reed (eds), *American Legal Realism* (1993); M. J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (1992), esp. at 169–192; N. Duxbury, *Patterns of American Jurisprudence* (1995), at 65–159; J. H. Schlegel, *American Legal Realism and Empirical Social Science* (1995); W. L. Twining, *Karl Llewellyn and the Realist Movement* (1973); and L. Kalman, *Legal Realism at Yale, 1927–1960* (1986). Countless shorter pieces have been dedicated to the origins, nature and impact of the Realist movement in the USA, one of which is particularly interesting as a theoretical parallel to Ross' own self-situation: White, 'From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America', 58 *Virginia Law Review* (1972), at 999 *et seq.*

formalized and introduced to the world mainly by Karl N. Llewellyn,¹⁰ this many-sided, many-headed and many-layered body of scholarship,¹¹ for all its revolutionary impact on the legal system of the United States of America, spent its bottomless energy exclusively on the reform of American legal practice, education and scholarship, and its most prominent leaders remained remarkably silent on matters of international law.¹² The fact that Alf Ross published his *Textbook* almost when his legal-realist manifesto was freshly off the press is of interest to those of us who might be interested in knowing what ‘realism’ would look like in international legal scholarship and practice. This might be more pressing precisely if we think of a possible ‘European’ contribution to international law which would adopt an outlook usually credited to the twin (legal) culture from across the pond. This interest should moreover be fuelled by the fact that Alf Ross presented his work specifically as a contribution to American-Scandinavian scholarly exchange and dialogue.¹³ Throughout Ross’ dialogue with the American realist movement and his Scandinavian partners on the one hand, and with his European opponents or targets on the other hand, a lingering question hovering over this discussion will be that of the possible varieties of realism, both within Ross’ self-perception and from the historian’s standpoint. ‘Realism’ seems intuitively to be a very broad concept travelling across

¹⁰ See generally K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962). The self-definition of Legal Realism in the United States was triggered by an exchange between Karl Llewellyn and Harvard Law School Dean Roscoe Pound. The key moment is Llewellyn’s reply to Pound’s own reaction to an initial piece by Llewellyn: Llewellyn, ‘Some Realism about Realism — Responding to Dean Pound’, 44 *Harvard Law Review* (1931) 1222 *et seq.* See also Twining, *supra* note 9, at 71–73.

¹¹ The picture of the Scandinavian Realist group that will be given in the following pages, although referring only to its arguably historical representatives, is that of a much more coherent group in terms of theoretical orientations than the American Legal Realists ever admitted to be. Karl Llewellyn and Jerome Frank insisted on the very loose character of the ‘movement’, made coherent only by its adherence to a shopping list of academic/disciplinary commitments, called ‘common points of departure’ by Llewellyn. See Llewellyn, ‘Some Realism about Realism’, *supra* note 10, at 1235 *et seq.* Jerome Frank sarcastically describes the assumption about a Realist ‘school’ in the USA:

(1) Jones disagrees with Smith about the tariff. (2) Robinson disagrees with Smith about the virtues of sauerkraut juice. (3) Since both Jones and Robinson disagree with Smith about something, it follows that (a) each disagrees with Smith about everything, and that (b) Jones and Robinson agree with one another about the tariff, the virtues of sauerkraut juice, the League of Nations, the quantity theory of money, vitalism, Bernard Shaw, Proust, Lucky Strikes, Communism, Will Rogers — and everything else. Llewellyn, Green, Cook, Yntema, Oliphant, Hutcheson, Bingham, and Frank [NA: the big fish of US Realist intelligentsia] in their several ways have expressed disagreement with conventional legal theory. . . . One sees, so to speak, the hair of Green, the eyebrows of Yntema, the teeth of Cook, the neck of Oliphant, the lips of Llewellyn. . . . The picture is the image of an unreal imaginary creature, of a strange, misshapen, infertile, hybrid.

(*Law and the Modern Mind* (1970) ix–x.).

¹² One exception might be Yntema, ‘Le droit international: Aide ou obstacle à la modification pacifique des rapports internationaux?’, in *Introduction à L’étude du droit comparé: Recueil d’études en l’honneur d’Edouard Lambert*, Vol. 5 (1938), at 134–143.

¹³ TRJ, 9; See also A. Ross, *On Law and Justice* (1959) ix [hereinafter cited as LJ].

disciplinary boundaries and adopting a variety of shapes and disguises;¹⁴ so my attempt at clarifying Ross' specific contribution should place Ross' realism in the best light possible, not only according to his own account of the realist enterprise but also in its dialogue with competing theoretical projects, both within and outside the shade of Realism.

In Section 1 I will suggest examining the 'critical' dimension of Alf Ross' work as a significant approximation to the meaning of the realistic enterprise he purported to undertake for the legal sciences. I will in particular suggest that the meta-theoretical stance taken by Alf Ross as a philosopher laying out the criteria of 'science', is significant for his self-identification as an advocate of realism. Section 2 will look at the 'reconstructive' segment of Ross' project, taken as a separately presented phase of the realist revolution, and stemming from the initial critical step of the overall master plan. The aim will be to project the symmetry of what Ross himself called 'critique and reconstruction' onto his writing on international law, and against the backdrop of a broader vision the coherence of which will be assumed and actively sought throughout this article. For this purpose, the source of Ross' originality in international legal scholarship will be traced back to the jurisprudential writing on which Ross explicitly based his contribution to international law. By way of an attempt at some sort of evaluation of that very coherence, Section 3 will try a comparative approximation to the relationship between Alf Ross' evolving framework and the developments proposed by other figures anchored in a mode of legal realism, namely: Hans J. Morgenthau, Myres S. McDougal and Anders V. Lundstedt. These unlikely comparative glimpses will help highlight the relationship between legal realism and international law in the political framework of international affairs, and the purity of lineage between the legal and political realisms sustaining Alf Ross' later work on the United Nations.

2 Realism and the Project of Critique: The Indictment of Magic and the Call for Enlightenment

A *The Rhetorical Rage of Science*

The reader who leafs through Ross' *Textbook of International Law* will probably be struck by the frequent encounters with assertions such as the following: that international law could possibly apply to individuals is, for instance, labelled a 'logical

¹⁴ The term 'realism', generally borrowed in its technical sense from philosophy, has already there a variety of meanings. See e.g. Hirst, 'Realism', in P. Edwards (ed.), *The Encyclopedia of Philosophy*, Vol. 7 (1972) 77–83. A helpful historical account of realism in political thinking is provided by M. J. Smith, *Realist Thought from Weber to Kissinger* (1986). For the possible semantic fluidity of 'realism' in internationalist thinking, see e.g. Der Derian, 'Introduction: Critical Investigations', in *International Theory: Critical Investigations* (1995) 1–5.

monstrosity’;¹⁵ the dominant theory of sovereignty, relying on ideas of ‘supersensual force’, ‘supernatural sources of power’,¹⁶ and a ‘mystico-magical train of thought’¹⁷ is ‘a disgrace’;¹⁸ the theory of state succession is ‘absurd’;¹⁹ tacit consent in the theory of sources is a ‘forcible fiction’,²⁰ as are the dominant attempts to objectify or rationalize the process of judicial decision²¹ or the contractualist/consensualist conception of the act of recognition;²² the constitutive theory of state recognition is in itself purely ‘speculative’, an ‘absurd theory’ and an ‘imaginative lucubration’;²³ theoretical discussions on the binding nature of international law are ‘sham theories about sham problems’;²⁴ the element of *animus possidendi* in the doctrine of acquisition of territory is an ‘empty phantom’;²⁵ and the doctrine of diplomatic protection is permeated by ‘metaphysical ideas’.²⁶

A comprehensive inventory of the rhetorical arsenal of theoretical deprecation deployed in the *Textbook* could, and certainly should, form the object of a separate piece. Moreover, if we turn to Ross’ works on general legal theory, we will find a similarly overwhelming display of offensive accusations, both aimed at the conceptual edifice of current legal systems, and thrown at the face of canonical scholarly references in the field. In terms of past or rival jurisprudential works, Alf Ross acknowledges only two strong influences on himself: Axel Hägerström and Hans Kelsen.²⁷ Or rather, he acknowledges unequivocally his debt to Hägerström,²⁸ the

¹⁵ *TB*, at 20.

¹⁶ *Ibid.*, at 39.

¹⁷ *Ibid.*, at 43.

¹⁸ *Ibid.*, at 41.

¹⁹ *Ibid.*, at 126.

²⁰ *Ibid.*, at 22.

²¹ *Ibid.*, at 82.

²² *Ibid.*, at 119.

²³ *Ibid.*, at 118.

²⁴ *Ibid.*, at 48.

²⁵ *Ibid.*, at 147.

²⁶ *Ibid.*, at 264.

²⁷ *LJ*, at x. Alf Ross had a particularly intense dialogue with Kelsen, through book reviews and reciprocal references. See e.g. Ross, ‘Book Review: What is Justice? by Hans Kelsen’, 45 *California Law Review* (1957) 564 and also 2 *Jus Gentium* (1950) 250. Kelsen took Alf Ross seriously enough to answer his criticisms here and there: see for instance, H. Kelsen, *Théorie pure du droit* (1962), at 282 *et seq.* (the four-page-long footnote (1) is dedicated to answering Alf Ross’ take on validity in *TRJ*); and also H. Kelsen, *General Theory of Norms* (transl. by Michael Hartney, 1991) 206–207 (where Kelsen started discussing Alf Ross’ theory of norms as imperatives in terms of what he saw as an impermissible conflation of the ‘is’ and the ‘ought’), and 414–415 (where Kelsen praises Ross’ non-cognitive theory of judicial interpretation, a conception that he shared). The question of the theoretical affinities between the Pure Theory of Law and Ross’ legal realism is a complex one, and the efforts by Ross to distance himself from Kelsen are certainly not the end of the story. Since this topic is largely outside the present discussion, an interesting reference for an attempt at comparing the two could be: J. E. Pérez, *Kelsen y Ross: formalismo y realismo en la teoría del derecho* (1980).

²⁸ See e.g. *TRJ*, at 10 and 215 *et seq.*

father of Scandinavian Realism,²⁹ and thanks Kelsen for his insistence on systematics and consistency,³⁰ as well as proclaims him the most important legal philosopher of the century,³¹ only to turn against him later on.³² But Ross, with varying attention yet always equally informed knowledge, also discusses and disciplines monumental figures like Ihering or Hegel (a variation of Natural Law developed with ‘fantastic nonsense’),³³ as well as twentieth century heavyweights like Gény, Renard, Verdross and Gurvitch.³⁴ What about fellow Realists? The statement by Alf Ross himself, asserting that his enterprise (although under the generic ‘realistic’ umbrella) was unique,³⁵ finds clear expression in his unequivocal critique of American Legal Realism — with which he otherwise felt a special need for dialogue³⁶ — as a misguided set of enterprises.³⁷ If we add to the number of casualties the victims of fellow Scandinavian Realist Anders V. Lundstedt, who assaulted, in addition to the unavoidable Kelsen,³⁸ the likes of Roscoe Pound, Jerome Frank and even Oliver Wendell Holmes as closeted metaphysicians or failed legal scientists³⁹ (not to mention his repetitive and merciless references to the whole of the *Freirechtsbewegung*⁴⁰), we develop a picture of

²⁹ Some precursors include Anders Sandoe Ørsted and Leo Petrazhitzky. See R. W. M. Dias, *Jurisprudence* (1985), at 461. Karl Olivecrona edited the English translation of some of Hägerström’s key texts on legal theory, as A. Hägerström, *Inquiries into the Nature of Law and Morals* (1953). For a very brief sketch of the historical origins of Scandinavian Realism, see M. Martin, *Legal Realism: American and Scandinavian* (1997), at 126–127.

³⁰ *LJ*, at x. Ross terms the Pure Theory of Law a ‘unique performance in modern philosophy of law’, distinguished by ‘outstanding acumen’, ‘brilliant dialectic’ and ‘inexorable logic’ (*LJ*, at 67).

³¹ *Ibid.*, at 2.

³² See e.g. *TRJ*, at 166 *et seq.* or *LJ*, at 70.

³³ *LJ*, at 249–257.

³⁴ *TRJ*, at 38.

³⁵ See *TB*, Preface.

³⁶ *LJ*, at ix.

³⁷ See e.g. *TRJ*, at 171–173.

³⁸ Kelsen stands most notoriously as the chief target of the Scandinavians, since all four of them attacked him in various ways and with various degrees of violence. See e.g. Hägerström, *supra* note 29, at 257 *et seq.* (Kelsen approaches to ‘primitive superstition and mediaeval [*sic*] scholasticism’ (*ibid.*, at 271)); see also K. Olivecrona, *Law as Fact* (1938), at 17–21 (ironizing on Kelsen’s calling the point of contact between the realm of the ‘is’ and the realm of the ‘ought’ in the Pure Theory of Law a ‘great mystery’: ‘That is to state the matter plainly. A great mystery it is and a great mystery it will remain for ever’ (*ibid.* at 21)).

³⁹ Lundstedt, *supra* note 7, at 343 (‘the whole of [Pound’s] doctrine . . . is thoroughly based on metaphysics’, at 392 (‘[Holmes’ observations] do not bear witness to any markedly scientific method’); *ibid.*, at 396 (‘in spite of Frank’s intention, his book [*Law and the Modern Mind*] does not yield very much profit to legal science’).

⁴⁰ See e.g. Lundstedt, *supra* note 7, at 24–31. Maybe it is best here, as I will allow myself to do in the rest of this discussion, to let Professor Lundstedt speak in his own very expressive voice:

[D]ans la littérature juridique que je connais, il n’y a aucune théorie qui ne soit ‘coupée’ de métaphysique. Tel est évidemment le cas de la science juridique traditionnelle. Mais tel est aussi le cas de la science juridique contemporaine. Il en est ainsi évidemment de cette science juridique qui se conçoit comme une renaissance du droit naturel. Je rappelle à ce propos les théories de Saleilles, de Charmont, de Gény, de Krabbe, de Stammler et d’autres. Il en est ainsi aussi de l’idéal juridique de Demogue, et des théories d’allure positiviste, qu’elles se réclament d’Austin, de Bergbohm ou de Jellinek, ou qu’elles se présentent comme du positivisme sociologique à la Duguît. Il en est enfin ainsi des nombreuses théories du droit libre, et de la soi-disant théorie sociologique du

Scandinavian Legal Realism as a radically critical — and in their own view, isolated — movement, sparing no one in their evaluation of past and current accounts of the law. Yet the rhetorical display mounted by Ross, and equally by Olivecrona and Lundstedt, against dominant legal constructions does not denote random furore and delirium; instead the three of them plunder a limited and very specific lexical field which provides a link between jurisprudence and international law as well as between realism and critique.

Alf Ross' scattered criticisms of prevailing doctrines in international law are anchored in a much deeper dimension of the theoretical enterprise that associates him with the other Scandinavians under the heading of realism. The question here is: What is the place and meaning of the critical side of Ross' writing in his realist enterprise? Ross shares with his fellow Scandinavian Realists a common rhetorical weaponry of labels aimed, as witnessed above, at casting legal errors into the pits of either metaphysics or absurdity. The unifying impulse behind the raging attacks sampled above can be rationalized as the critical standpoint of science and the defence of science in the study of law.⁴¹ Ross singles out the problematic pervasiveness of metaphysical notions and the consequences those notions have for the logical language of legal science as a science, so that metaphysics ('mystico-magical train of thought') and logical errors ('absurd') repeatedly appear as negatively defining the scope of scientific knowledge: the critique of legal theory is a call for scientific enlightenment against what Ross considers medieval obscurantism relying on magical or metaphysical thinking. Realism is thus felt as a messianic wake-up call. It is no accident, in my view, that in Ross' case, as in the case of the other Scandinavians, major theoretical endeavours are substantially dedicated to exposing, challenging, critiquing and eventually dismissing theoretical accounts of the time.⁴² Although Alf Ross was far from sharing Lundstedt's often arrogantly disparaging tone,⁴³ the array

droit à la Kornfeld, et de la doctrine de Roscoe Pound, bien que, selon cet auteur, le droit soit une institution sociale pour la satisfaction des besoins sociaux. . . Bien que Kelsen ait des conceptions un peu différentes, il est indéniable qu'il est un métaphysicien du droit des plus purs.

'From what I know of the legal literature, there is no theory which is not "cut" with metaphysics. This is clearly the case for traditional legal science. But it also holds for contemporary legal science. This is obviously true of that brand of legal science that sees itself as a rebirth of natural law. In this respect, I would mention the theories of Saleilles, Charmont, Gény, Krabbe, Stammler and others. This is however also the case for Demogue's legal ideal and of seemingly positivist theories, whether they invoke Austin, Bergbohm or Jellinek, or whether they are put forward as sociological positivism à la Duguit, for example. Lastly, this also covers the numerous free law theories and Kornfeld's so-called sociological theory of law, as well as Roscoe Pound's writings, despite this author's claim that law is a social institution for the satisfaction of social needs . . . Although Kelsen has somewhat different ideas, he is undoubtedly one of the purest among legal metaphysicians.' (Lundstedt, *supra* note 1, at 24–25.)

⁴¹ Martin, *supra* note 29, at 151–153. The titles of Lundstedt's works always offer a good way to summarize (or caricature) certain characteristic aspects of Scandinavian Realism: e.g. A. V. Lundstedt, *Die Unwissenschaftlichkeit der Rechtswissenschaft* (1932).

⁴² Michael Martin repeatedly emphasizes that the main thrust of Scandinavian Realism is 'critical' (*supra* note 29, at 139 *et seq.*).

⁴³ See R. W. M. Dias, *supra* note 29, at 463; for a taste of Lundstedt's characteristic tone, see for instance the introduction to his *Superstition or Rationality in Action for Peace? Arguments against Founding a World Peace on the Common Sense of Justice* (1925).

of epithets is a mark and original feature of Ross' contribution among the pantheon of legal theorists. The specificity of Scandinavian Realism, as expressed in Ross' own version of it, lies not only in the choice of linguistic repertory, but, as opposed for instance to American Realism, in the motivation of critique as the standpoint of a philosophy defining the criteria of science.⁴⁴

The corrosive rhetoric sampled above is aimed at ridding legal inquiry of mistakes, and Ross believes that he is the only one to have taken an irreproachably scientific perspective.⁴⁵ The main theme running through Ross' considerations is that of doing away with metaphysical interpretations of law and legal concepts, to 're-interpret these in a realistic direction'.⁴⁶ This metaphysical, 'pre-scientific' mode of thinking pervades all branches of the law, despite the natural changes that teachings of modern science should have brought about a long time ago, so that legal thinking is burdened with empty concepts (that is, concepts having as a reference a metaphysical plane the existence of which is excluded by modern science) which, as Ross wants to describe it, result in logically impaired constructions. International law suffers the same kind of ruthless check-up, the reasons and tools for which need to be systematically sought for in Rossian jurisprudence. The *Textbook of International Law* is naturally and explicitly introduced as a theoretical work dealing with the fundamental concepts of the discipline, on the basis of Ross' systematic considerations presented mainly in his manifesto *Towards a Realistic Jurisprudence*, to which Ross refers the readers of the *Textbook*.⁴⁷

The emphases, directions and even conclusions of Ross' academic work varied in the course of his scholarly career,⁴⁸ and it is always important to situate his more fully developed contribution to international law against the backdrop of his continuously developing theses on law and legal science in general (from *Towards a Realistic Jurisprudence* to *Directives and Norms*, through *On Law and Justice*). The overall approach and underlying obsession remain, however, the same, and the introductory words consistently refer to the same overall drive behind the accumulation of pages over a 30-year long career:⁴⁹

The leading idea of this work is to carry, in the field of law, the empirical principles to their ultimate conclusions. From this springs the methodological demand that the study of law must follow the traditional patterns of observation and verification which animate all modern empirical science; and the analytical demand that the fundamental legal notions must be

⁴⁴ A brief comparison of Scandinavian and American Realism addressing the link between the hunt of metaphysics and the specificity of the Scandinavian version of scientism is attempted by Michael Martin, *supra* note 29, at 123–126.

⁴⁵ *LJ*, Preface; See also Lundstedt, *supra* note 7, at 5.

⁴⁶ *TRJ*, at 145.

⁴⁷ *TB*, Preface.

⁴⁸ See e.g. *TRJ*, at 74. The shifts of focus between *Towards a Realistic Jurisprudence*, *On Law and Justice* and *Directives and Norms* will be given some interpretation below, against the backdrop of the idea of reconstruction in a realist project such a Ross' enterprise. See *infra* Section 4F.

⁴⁹ *LJ*, Preface.

interpreted as conceptions of social reality, the behavior of man in society, and as nothing else.⁵⁰

The realistic flavour of this concern is strengthened by its kinship with similarly alarmed voices among consecrated or self-proclaimed Realists. The locution 'legal science' finds a prominent place in the lexical field, first of all, of the other three Scandinavian Realists,⁵¹ but also of the main figures of American Legal Realism.⁵² However, when Ross calls for a reform of the study of law along scientific lines, the critical impulse stems specifically from the necessity imposed by 'science' to rid jurisprudence and all branches of law of metaphysics as the negative of science, in that the metaphysical precisely refers to another reality, another modality of the real, which then compels legal science to break the unity of science and scientific method:⁵³ the metaphysical is by (etymological) definition not empirical, it is therefore not real, since there is only one reality.⁵⁴ The point of view of science is the methodological expression of realism, its critical mode serves to spare legal science from burdensome 'excursions into the imaginary world of metaphysics', as Olivecrona expressed it.⁵⁵

The methodological consequence of this self-imposed duty of reforming the limping legal sciences is that the object of Alf Ross' work in jurisprudence, as well as in international law, will naturally be the disciplinary vocabulary, techniques and architecture shared by the community of specialists, and their scientific analysis, diagnosis and prognosis to spot and correct views that are 'at variance with the methodical principles which are the basis of all modern science and which have proved their fruitfulness by the magnificent results to which they have led'.⁵⁶ Echoing the calls of logical positivism⁵⁷ and analytic philosophy, the task taken up by Ross as a legal philosopher is thus above all critical and analytical:⁵⁸ examining current usage and understanding, as well as the implicit assumptions, of the legal conceptual architecture to evaluate its scientific value before rebuilding it accordingly.⁵⁹ In his

⁵⁰ *LJ*, at ix.

⁵¹ See e.g. Karl Olivecrona's preface to Hägerström, *supra* note 29, at xxi. Lundstedt, *supra* note 7, at 5: 'I have tried, no more or less, to help lay the basis for a *scientific* approach to matters of law, in other words, to make of jurisprudence a science' (emphasis in the original).

⁵² Representative of the focus on scientificity in the canon of American Legal Realism are such pieces as Cook, 'Scientific Method and the Law', 13 *American Bar Association Journal* (1927) 303, or Yntema, 'The Rational Basis of Legal Science', 31 *Columbia Law Review* (1931) 925.

⁵³ Slagstad, *supra* note 6, at 217–218. See also Martin, *supra* note 29, at 123–124.

⁵⁴ See *ibid.*, at 131: 'As far as ... Scandinavian Realists are concerned, to show that some idea is metaphysical is tantamount to show that it refers to nothing in the real world.' Lundstedt's characterization of Kelsen as metaphysical is symptomatic: '*...il est indéniable qu'il [Kelsen] est un métaphysicien du droit des plus purs. Il déclare nettement qu'il transpose le droit dans un monde autre que celui où nous vivons.*' 'he [Kelsen] is undoubtedly one of the purest among legal metaphysicians. He clearly states that he is transposing law into a world separate from the one in which we live.' (See Lundstedt, *supra* note 1, at 25.)

⁵⁵ Olivecrona, *supra* note 38, at 94.

⁵⁶ *TB*, at 48.

⁵⁷ On the link between Ross and logical positivism, see for instance Martin, *supra* note 29, at 125.

⁵⁸ For a representative expression in philosophy of Ross' stance, see e.g. A. J. Ayer, *Language, Truth and Logic* (1952) (reprint of the 2nd edition of 1946) 46 *et seq.*

⁵⁹ *TRJ*, at 141.

most acclaimed theoretical achievement, while making explicit his own assumptions about the task of legal philosophy underlying the rest of his work, Ross asserts categorically: '[Philosophy] is no theory at all, but a method. This method is logical analysis. Philosophy is the logic of science, and its subject is the language of science.'⁶⁰ Accordingly, Ross takes upon himself the essential mission of legal philosophy, that is, pursuing research 'into what often constitutes premises taken for granted by the jurist'.⁶¹ As a legal philosopher, he is therefore not starting from scratch and, in his quest for a comprehensive description of the legal phenomenon, his basic material is the 'tradition' in the field,⁶² the 'prevailing' doctrines⁶³ which he subjects to analysis. This is, in his view, the methodical way to go about understanding what law is,⁶⁴ since if the science in place is bad science and therefore yields bad understanding, analysis of the current ways of studying the law will point us to the object they have not managed to grasp.

The important thing here is that Ross has a project of analysing, cleansing and repairing or rebuilding, in the same way as the writings of the American Realists purported first to deal a blow at the theoretical and methodological foundations of the then perceived dominant mode of legal thinking, in order to rebuild at some later point in time.⁶⁵ The difference here is that Ross presents himself as a philosopher and, as such (that is, as he understands it), looks at legal science as a scientific language.⁶⁶ When he will step down to make his own contribution to the field as a legal theorist, he will enter the field of this specific scientific language, but the first step is that of 'looking down upon' the study of law, as he says, to tell us what it is, what it is not, and what it should be.⁶⁷ Ross himself points to the crucial problem that the limits between legal studies or legal theory on one side, and legal philosophy on the other (supposedly 'one storey higher'), are not clear.⁶⁸ But all of legal studies is rotten and sanitization cannot come from the inside, but only from an external point of view, with the point of view of science as the absolute reference. Echoing Carr, analysis is called upon to save legal

⁶⁰ *LJ*, at 25.

⁶¹ *LJ*, at 25.

⁶² *TRJ*, at 159.

⁶³ E.g. *TB*, at 41.

⁶⁴ *TRJ*, at 141.

⁶⁵ See the classic statement about the temporary divorce of the 'is' and the 'ought' in law in Llewellyn, *supra* note 10, at 1235, 1242 and 1245.

⁶⁶ Ross' stance on the mission of philosophy as meta-theory, and jurisprudence as meta-legal-theory, derives obviously from the brand of philosophy he is (or can be seen to be) associated with. The self-definition of philosophy as a 'second-order' discipline looking down on the language and reasoning of, as well as the meanings generated in, the various fields of human knowledge is closely linked to the erstwhile absorption of philosophy by logical positivism. Ayer's take on the mainly critical dimension of philosophy is echoed in a very clarifying way in the introductory discussion presented in M. Bevir, *The Logic of the History of Ideas* (1999), at 6 *et seq.* The distinction between American Realism and Scandinavian Realism is mainly suggested here to be linked to a divergence in philosophical grounding (logical positivism on one side, and generally pragmatism on the other), because Alf Ross' reliance on a very specific vision of philosophy is key to understanding his enterprise.

⁶⁷ *LJ*, at x.

⁶⁸ *LJ*, at 26.

science from its unrealistic wanderings: realism is therefore a call for scientific enlightenment, after drifting around in circles for far too long, astray in the middle ages of thought. Hence the necessity to go back to the nature of legal analysis itself in order to understand the depth of the accusations levelled against the science of international law, this compound of ‘sham theories’ and ‘imaginative lucubrations’. But we still need to clarify how the critique unfolds from the standpoint of jurisprudence before witnessing the bad shape in which international law finds itself.

B *Magic and Logic*

The focus on the language of legal science helps explain the link that Alf Ross draws between the problem of metaphysics in law and the logical-linguistic deficiencies of legal constructions. Traditional jurisprudence misuses empty concepts by reifying the complex factual realities they are supposed to cover into abstract entities belonging on an alternative ontological plane. This is unfortunate if legal science aspires to the status of science, since metaphysics helps bypass and thus distort the more realistic way of conceptualizing the ‘law in action’, that is, the factual reality covered by those constructions.⁶⁹ These concepts, once closely analysed, are therefore potentially disposable in that the reality of the legal phenomenon may be described without arguably feeling the need to resort to them. Moreover, logical deductions from these concepts are impossible, fostering a consistently unscientific misuse of legal language under the guise of logic.

The nature of this problem of unscientificity is best explained by the analogy Ross draws between the notion of a concept like ownership, seemingly central to any legal system, and a key, yet hardly comprehensible, notion used by ‘primitive peoples’ of the South Pacific.⁷⁰ This strict analogy allows him to consider that ‘our terminology and our ideas bear a considerable structural resemblance to primitive magic thought concerning the invocation of supernatural powers which in turn are converted into factual effects’.⁷¹ The mediating element, be it labelling the taboo behaviour as ‘tū-tū’ or claiming any independent meaning for a concept like ownership, can be done away with once we reach scientific enlightenment, to be potentially replaced by a presentation of the law with meaningful concepts and propositions dealing with the actual facts covered by the mystic notion: ‘the notion that between purchase and access to recovery something was created that can be designated as ownership is nonsense’.⁷² As Ross says, it is certainly the task of legal science to simplify the realities hidden behind metaphysical notions, but the problem here is that this task ‘has largely been anticipated by prescientific thought’,⁷³ so that syllogisms derived from the notions in place (like ownership) seem to be meaningful but are in truth grossly polluted by metaphysics. Concepts like ownership seem to have an independent

⁶⁹ *LJ*, at 19.

⁷⁰ Ross, ‘Tū-tū’, 79 *Harvard Law Review* (1957) 812 [hereinafter cited as *Tū-tū*].

⁷¹ *Ibid.*, at 818.

⁷² *Ibid.*, at 820.

⁷³ *Ibid.*, at 821..

meaning and are used as such, whereas in reality nothing can be deduced from such notions, since they have no factual reference in the external world.⁷⁴ The bulk of Ross' critical analysis in general jurisprudence is devoted to equally reified core notions like 'rights' or 'duty', deemed to have no more meaning than 'tû-tû',⁷⁵ that is, notions that have kept their magical meaning by 'structural petrification' despite 'the metamorphosis of ideas in the course of history'.⁷⁶ This is carried forward by the increasing attention paid by Alf Ross to the correct philosophical-scientific understanding of the nature and uses of language in law, the object of his last work on legal theory.⁷⁷

International law, as a sub-discipline purporting to belong to the legal sciences, is approached in the same way: the aim of Ross' treatise is 'an analysis of the fundamental concepts and problems of International Law on the basis of a specifically Scandinavian view of the nature of law and the aims of jurisprudence', a view, again, that has no counterpart in Anglo-American literature.⁷⁸ It should be noted that Lundstedt and Ross, among the Nordic Realists, paid special attention to the law of nations,⁷⁹ and although they did so in different periods and drawing a different set of conclusions, both followed the general line of focusing chiefly on the academic discipline and theoretical structures in place and grimacing at the unavoidable mushrooming of metaphysical delirium.⁸⁰

The basic point of departure of the analysis is the very definition of International Law, a close examination of which reveals that it is grounded in the idea of sovereignty, with a conceptual combination that evinces a violation of the basic criteria of scientificity, that is, the rules of formal logic which forbid circularity and contradiction.⁸¹ The erroneous or absurd legal constructions are, unsurprisingly, closely connected to the survival of pre-enlightenment magical beliefs. These first steps highlight how Ross follows the general propositions of his jurisprudential manifesto: the current understanding of international law is based on assumptions that need to be corrected to serve the valuable purpose of 'scientific classification' and systematization.⁸² What is more concretely the nature of the problem in the basic concept of international law? In the most harshly summarized way, the Rossian argument goes as follows: International Law is defined as the law obtaining between states, but states are in turn defined against the criterion of sovereignty, and

⁷⁴ See the analysis of a typical syllogism involving ownership in *Ibid.*, at 823.

⁷⁵ *Ibid.*, at 825.

⁷⁶ *TRJ*, at 223. Other traditional distinctions are occasionally attacked by Ross on the basis of their arbitrariness or uselessness, like that between 'substance' and 'procedure' in the context of Art. 27(3) of the UN Charter. (*CUN*, at 79.)

⁷⁷ A. Ross, *Directives and Norms* (1968) [hereinafter cited as *DN*].

⁷⁸ *TB*, Preface.

⁷⁹ Even though Karl Olivecrona did not write Lundstedt-style pamphlets or a manual on international law, he still dedicates some reflections of his *Law as Fact* to the law of nations (*supra* note 38, at 193 *et seq.*).

⁸⁰ See again representative statements by Lundstedt in his *Supersition*. . . *supra* note 43, at 8–14 and the already quoted 'La part de responsabilité de la science juridique dans le destin des peuples', *supra* note 1.

⁸¹ *TB*, at 12–13 (especially footnotes 1 and 2, at 12).

⁸² *TB*, at 16; *CUN*, at 190.

sovereignty at the end of the day means direct subjection to international law.⁸³ This is a circular, and viciously circular, definition, with the consequent theoretical result of rendering the concept of international law ‘unmeaning’, according to Ross’ neologism, that is, tautological, logically useless and finally empty of any independent meaning.⁸⁴ Breaking the tautology is a possible option in current thinking if we allow sovereignty to snatch for itself a seemingly independent meaning, which in this case would by necessity be metaphysical: the notion that sovereignty could possibly be a non-factual quality granting to a factual reality special consequences (derived from that very quality) in the realm of causation. The obvious ‘absurdity’ of a circular definition at the core of the science of international law is thus overlooked by prevailing scholarship because of ‘emotional ideas of the sublimity and sacredness of the power of the state’ associated with the idea of sovereignty. Sovereignty, clearly a ‘highly confused’ concept,⁸⁵ is seemingly granted ‘more or less consciously’ an independent meaning that really belongs outside this world, and that in its best tentative scholarly expositions reveals itself to be little more than ‘ordinary nonsense’.⁸⁶

Ross’ enterprise in international law starts therefore with this characteristic attack on sovereignty, and moves on to other cornerstones of traditional thinking in international law associated with the same species of faulty science and handed down by the ‘scientific tradition’.⁸⁷ On the basis of a call for the reconceptualization of these core notions, Ross wants to provide a new systematic exposition of international law. In the case of sovereignty, the unscientific character of the construction of a definition of international law is corrected by the provision of a new criterion for the concept of state, that is, the idea of ‘self-governing community’, a notion that for Ross finds a factual correspondence and avoids the traps laid by the ever lurking metaphysical usurpers.⁸⁸ In this way, Ross reframes International Law as the law between self-governed communities, a definition that highlights the essential nature of international law and allows a clear and meaningful presentation of the whole field along logical structural lines.⁸⁹ The necessity inherent in science of maintaining goals of clarity and systematic exposition is thwarted precisely by prevailing doctrinal accounts of the law of nations in the further explanation of legal subjectivity, in that according to tradition individuals may under exceptional circumstances be granted the quality of international subjects. For Ross, this is a ‘logical monstrosity’ because international law is defined conceptually as against domestic law, and therefore as the law regulating relations between states (or self-governing communities). Allowing ‘exceptions’ to enter the definition of a concept is like saying that a triangle may under

⁸³ *TB*, at 11 *et seq.*

⁸⁴ *Ibid.*, at 12.

⁸⁵ *Ibid.*, at 112.

⁸⁶ *Ibid.*, at 34.

⁸⁷ *Ibid.*, at 16.

⁸⁸ *Ibid.*, at 14.

⁸⁹ *Ibid.*, at 17–19.

exceptional circumstances have four sides.⁹⁰ In various ways, Ross points to the tight connections existing between the commands of logic, the nature of scientific exposition and the banishment of metaphysically inspired or tainted modes of reasoning, evincing all along a tight affiliation with logical/empirical positivism. Further evidence is given in his more detailed discussion of substantive doctrines in the second part of his *Textbook*.

The aforementioned characterization by Ross of the element of *animus possidendi* in the law of territorial acquisition stems from similar concerns and theoretical developments. Ross sees the reasoning of the Permanent Court of International Justice (PCIJ) in the *Eastern Greenland* case (1933)⁹¹ as an example of the brooding presence of magical conceptions of sovereignty: the idea of expressing a will to rule a region by legislative acts is precisely an 'empty phantom' associated with the metaphysical mode of existence of sovereignty. The only appropriate interpretation of the ruling should be very specifically that in cases like that of Eastern Greenland, where effective occupation is not necessary because enduring and uncontested occupation of part of a rounded-off territory is already manifest, the expression of the will to extend the occupation to the rest of the region should be sufficient to give rise to a legal claim to be respected by other states.⁹² According to Ross, the PCIJ reached a defensible result, but by means of an unfounded construction derived from an unconscious attachment to a fetishized notion of sovereignty. The PCIJ should have simply stayed clear of conceptions of sovereignty implying invisible connections transpiring from some floating entity called the state onto a thing called territory.

Moving to another example, the theory of the 'fundamental rights of states', termed a 'sorry picture of methodical and systematic confusion', is criticized along the same lines, for its reliance on metaphysical ideas of rights derived from natural law. Although the exposition of the critique of 'rights' — which is awarded a good place in the hit list of Ross and other Scandinavian Realists for its embodiment of the most conspicuous symptoms of the disease under scrutiny⁹³ — would require more space (and is not particularly necessary here), suffice it to say that we find again a tautological construction with very familiar features in the theory of 'fundamental rights'. The fundamental rights to independence or non-intervention 'presuppose the legal limit which they are meant to define',⁹⁴ in that they say that a state should be left alone to deal with its own affairs, without adding anything to any material rule that would delimit the spheres of competence between states in such and such area. Either the fundamental rights purport to attach to the state a special quality derived from the fact that they are sovereign, which leads us again on the dangerous path of magical delirium, or they reiterate the contents of other material rules, in which case they do

⁹⁰ *Ibid.*, at 20.

⁹¹ PCIJ, Series A/B, No. 53 (1933).

⁹² *TB*, at 146–147.

⁹³ See e.g. *TRJ*, 163 *et seq.*, 194 *et seq.* and *LJ*, 189 *et seq.*; Olivecrona, *supra* note 38, at 75 *et seq.*; Lundstedt, *supra* note 7, at 93 *et seq.*

⁹⁴ *TB*, at 192.

not make any scientific sense.⁹⁵ A last example taken from the initial miscellany of Ross' attacks on traditional doctrines could be that of the theory of recognition. The so-called 'constitutive theory' — which gives to the act of individual or collective recognition the power of contributing to the (legal) existence of a new state as a subject of international law — is, thus presented, an unmistakable fiction under Ross' inquisitorial gaze. It is depicted as a consequence of the 'false theory of international law as a conventional law' (all obligations being derived from consent, any new obligation for or between the old states and the new states should arise from an expression of consent, in this case formalized as recognition),⁹⁶ which gives rise to serious logical problems (if the recognition is a form of agreement, how could a not yet existing state agree to anything?),⁹⁷ and is manifestly out of touch with reality in that it actually concludes that states remain outside international law between the time of their independence and the time of their recognition.

To sum up, Alf Ross would like to lay out a presentation of international law consistent with his commitment to a scientific outlook on, or rather from the perspective of, jurisprudence. His mission as a legal philosopher is that of critique: his is a call for enlightenment, for a step out of medieval scholastics. In terms of his approach to international law, the specificity of his critical attitude is that it stems from outside the discipline. His critique of sovereignty is the direct outcome of, and can be measured against, Ross' embrace of a shade of logical positivism or logical empiricism at the philosophical level. Criticism is not motivated by dissatisfaction with the results of a particular doctrine in practice or the consistency of a particular theoretical approach; criticism is the first step in the approach of the conceptual framework of international law as a scientific language, against the meta-theoretical yardstick of science posited by philosophy.

Familiar critiques of legal positivism in the inter-war period, like those of James L. Brierly or Hersch Lauterpacht, were propelled by the theoretical deficiencies of consensualism or the politically/historically misguided interpretations of sovereignty.⁹⁸ Ross' attack of legal positivism is launched in the name of positivism itself:

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, at 119; *CUN*, 31.

⁹⁷ *TB*, at 120.

⁹⁸ See e.g. J. L. Brierly, *The Law of Nations: Introduction to the International Law of Peace* (1928), at 61 *et seq.* Brierly highlights the historical 'exportation' of sovereignty, as a basis for consensualist/voluntarist theory of international law, from domestic politics to the law of nations: 'Little harm would be done if the word when applied to states had come to have a purely formal meaning, as it has in the phrase "our sovereign Lord King", but in fact the old associations of a power essentially not controlled by law still cling to our notions of the state in its external relations, though they have largely disappeared in the relations between a state and its own citizens.' (*ibid.*, at 62.) This is the real basis for the ultimate impossibility of explaining what is the real relationship assumed to exist between legal obligation and consent (*ibid.*, at 37–39). Brierly's historical analysis of the misappropriation of the term sovereignty by international law and its impact on the division of legal thought into the naturalist/positivist dyad, can be found in his famous 1928 Course at the Hague Academy on 'The Basis of Obligation in International Law', reprinted in Sir Hersch Lauterpacht (ed.), *The Basis of Obligation and Other Papers by the Late James Leslie Brierly* (1958), at 19 *et seq.* See also his 'The Sovereign State Today' in the same volume, at 348 *et seq.* Sir Hersch's parallel critique of sovereignty and its corollary voluntarist positivism (which are in

legal positivism is inherently deficient as a theoretical framework when set against the backdrop of the requirements of scientificity (that is, philosophical positivism). Repeatedly, Ross attacks legal positivism as a very peculiar and somewhat illegitimate offspring of positivism.⁹⁹ It really turns out to be a distortion of what positivism is all about, and it should therefore be rejected.¹⁰⁰ Strictly speaking, 'legal positivism' should be nothing but positivism as applied to the study of law, and the brand of positivism evinced in the traditional theory of sources in international law,¹⁰¹ which is really to be understood as derivative of Austinian jurisprudence,¹⁰² is itself not far from magical babble, particularly in its voluntarist dimension (as Hägerström had consistently shown for any expression of the 'will theory' in law¹⁰³).¹⁰⁴ Therefore Alf Ross' treatment of what we would nowadays see as dominant positivist thinking¹⁰⁵ echoes his parallel observations on natural law theories, and is therefore consistent with the position assumed by Ross that positivism, the way he sees it, is

Lauterpacht linked to the more specific question of the supposed nature of international law as a 'weak' law or a sheer 'law of coordination') is expressed as early as 1927 in his *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1970), at 71–72. It finds a fuller shape in his 1937 General Course at the Hague Academy, reprinted in E. Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht*, Vol. I (1970), at 207 *et seq.* A symptomatic statement by Lauterpacht concerns the way international lawyers have to face up to the fact that the political import of sovereignty and voluntarist positivism is a danger to the idea of international law. For Lauterpacht, no reasons have been advanced why

the science of international law should cease to emphasize the essential incompatibility which exists between international law, conceived as a true system of law, and the assertion of the sovereignty of the State in its traditional manifestations. The transformation of international law into a system meriting its place in jurisprudence is not a matter of pure form. It is a conscious and deliberate development, tending to submit the sovereignty of States not only to the binding effect of obligations, which they have voluntarily assumed, but to the larger and even more fundamental social duty of accepting and observing the law as it has been modified by the will of the community, expressed objectively and in conformity with justice and progress. ('The Organization of Peace and the Revision of the 'Status Quo', in *Ibid.*, at 443–444.)

⁹⁹ See e.g. *TB*, at 95. See a similar concern with Lundstedt, *Legal Thinking Revised*, *supra* note 7, at 23.

¹⁰⁰ See Ross, 'Validity and the Conflict between Legal Positivism and Natural Law', reprinted in S. L. Paulson and B. L. Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 151 [hereinafter cited as *Validity*].

¹⁰¹ *LJ*, at 105 (esp. footnote 1).

¹⁰² *Validity*, at 150.

¹⁰³ See Hägerström, *supra* note 29, 17 *et seq.*

¹⁰⁴ See Ross' critique of the consensualist interpretation of *pacta sunt servanda* and customary law in *CUN*, at 31 *et seq.* (where Ross says that customary law is a form of qualified majority-based 'legislation', and not of contract in any way).

¹⁰⁵ In the words of Professor Ian Brownlie:

Positivism provides the actual theoretical and political basis of the unity of international law as a system; however, certain manifestations of positivistic doctrine pose serious threats to the unity of the system. The notion of positivism in international law is derived from the premise that the binding nature of international law stems from the consent of States either in the form of treaties or in the form of their participation in the creation of rules of customary law. While this crude notion of positivism is nearly always moderated by other elements such as the reference to general principles of law, the elements of policy, and legal reasoning, positivism is the general approach, whether or not the label is accepted. (*Proceedings of the American Society of International Law*, 80th session (1986) 156.).

meta-theoretical (positivism is not *a* method or theory, positivism is *about* method and *about* theory).¹⁰⁶ This is the detailed way to understand how the critical dimension of Ross' personal contribution to the theoretical debates in international law is grounded in his own brand of realism, unsurprisingly called sometimes 'philosophical realism'.¹⁰⁷ To insist a little more on this last point, the transatlantic dialogue can be mentioned again.

Alf Ross' realism is assumed by him to be naturally the only legitimate form of realism. But Alf Ross — again like Olivecrona and Lundstedt — was aware of the existence of American Legal Realism as an apparent echo of his own theoretical labours. Alf Ross interprets American Legal Realism's critical side as primarily a form of rule-scepticism and anti-conceptualism as applied to the examination of the process of adjudication.¹⁰⁸ This is no doubt a partially correct assessment — although the loose coherence of US Legal Realism makes it much more complex than that — and the closest that we get on the American side to a critique of metaphysics in the language of law serves mainly the purpose of debunking the use of empty concepts by courts in a way that serves to cover for arbitrary decisions.¹⁰⁹ The historic assault performed by Felix Cohen on metaphysical aspects of legal constructions was precisely an attack on conceptualism in adjudication in order to foster the development of a 'functional' approach to legal decision-making along the lines of philosophical Pragmatism,¹¹⁰ in so many complicated ways associated with American Legal Realism.¹¹¹ Characteristic critical writings by American Legal Realists relating to the question of conceptualism¹¹² are, for all sorts of local and historical reasons, tied up to the assessment of the methods of judicial decision-making, which is not the task directly taken up by Alf Ross. The Rossian attack on metaphysics is the negative side of the Realist enterprise, otherwise described by Ross in these explicit terms: '[T]he most effective way to vanquish metaphysics in law is simply to create a scientific theory of

¹⁰⁶ Ross uses the term 'meta-ethical' as opposed to 'ethical' in his criticism of Alfred Verdross, to highlight the fact that the naturalist standpoint from where Verdross attacks (legal) positivism is a moral, that is, an 'ethical' position. Whereas (real) Positivism is not concerned with ethics, Ross says, but with meta-ethics, meaning that positivism addresses the 'logic of moral discourse', as opposed to morality itself (supposing that this would have any meaning at all if we accept the premises of philosophical positivism about morality), in exactly the same way in which the first pages of *On Law and Justice* assert that legal philosophy (being impregnated by logical positivism) has as its object the language of law. See *Validity*, at 157. See also *supra* note 66.

¹⁰⁷ See Slagstad, *supra* note 6, at 217.

¹⁰⁸ *TRJ*, at 68.

¹⁰⁹ The key historic text here is Cohen, 'Transcendental Nonsense and the Functional Approach', 35 *Columbia Law Review* (1941), at 799 *et seq.*

¹¹⁰ *Ibid.*, at 826 *et seq.*

¹¹¹ For an account of the connections between Pragmatism and anti-formalism in the first stages of the development of legal realism in the USA, see e.g. M. White, *Social Thought in America: The Revolt against Formalism* (1976), at 11 *et seq.* and Duxbury, *supra* note 9, at 125 *et seq.* See also Martin, *supra* note 29, at 11–14.

¹¹² Classics would be Dewey, 'Logical Method and the Law', 10 *Cornell Law Quarterly* (1924) 17, or the acclaimed and immediately adopted piece by Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913) 29.

law whose self-sufficiency will push metaphysical speculations into oblivion along with other myths and legends of the childhood of civilization.¹¹³ If American Legal Realism in its most characteristic and symptomatic expressions, lost all interest in any conceptual definition of law,¹¹⁴ the purpose for Alf Ross of a realistic jurisprudence is precisely to repair the pervasive damage done by the enduring presence of metaphysics, and reconstruct legal science as a science to get to a legitimately conceptual understanding of law.¹¹⁵ If American Legal Realism has been rationalized as an opponent of the 'classical legal thought' dominant in the courts of the United States of America at the turn of the century, characterized by its adherence to various brands of formalism and conceptualism,¹¹⁶ the Rossian shade of Scandinavian realism is explicitly opposed to what Ross terms 'jurisprudential idealism', manifested in blind adherence to metaphysical referents in legal language, and based therefore on an ontological dualism clearly at odds with the unity of science and the uniformity of reality.¹¹⁷

In the evolving project set out by Ross, reconstruction therefore follows naturally from critique. And the reconstructive effort is naturally dictated by the initial dissatisfaction that triggered the bitter attacks against dominant jurisprudence. It is nothing new that critique is more than the first step of reconstruction, in that the mode of criticism necessarily informs the project of reconstruction (which is arguably another way of saying that the project of reconstruction starts by a critical reconstruction of the target), insofar as a global project like the one pursued by Ross is deemed to be coherent. But reconstruction requires a layout of the basis on which legal studies should proceed in order to get back on the tracks of science. As initially noted, the American Legal Realists, as the supposedly most coherent exposition of what legal realism could look like, provided little guidance on international law. I have tried to delineate Alf Ross' specific contribution in terms of a philosophically-minded and philosophically-grounded critique of the disciplinary language of the law of nations. Now I would like to enter the reconstructive side of the project, to follow again in good faith for a few more steps the Realist revolution set in motion by Ross. As Ross comments, the scientific theory is guided by an epistemological point of view: from the critique of metaphysics as the unreal, Ross needs to explain how legal theory is now to be tied to the real, and what this real really is.¹¹⁸

¹¹³ *LJ*, at 258.

¹¹⁴ See e.g. Llewellyn, 'A Realistic Jurisprudence — The Next Step', 30 *Columbia Law Review* (1930), at 431–432.

¹¹⁵ *LJ*, at 67.

¹¹⁶ See e.g. Horwitz, *supra* note 9, at 16–17.

¹¹⁷ *LJ*, 65 ff; see also the criticism of 'Geneva idealism' in *CUN*, at 16 and 73.

¹¹⁸ *LJ*, 258 *et seq.*

3 Realism and the Project of Reconstruction: Epistemology and Ontology, the Rise and Fall of Antinomies, and Hollow Words

I have submitted that the subjective coherence of the project as ‘critique and reconstruction’ can be found in the combination of the two separate perspectives of legal science and legal philosophy, as presented by Ross himself. For the reconstructive move, to follow Ross’ spatial metaphor, he needs to step down from the philosophical level and describe his own take on all things legal. Once again, the coherence of Ross’ proposals for the science of the law of nations is firmly rooted in his general philosophy of law, by which we forcibly need to take another detour.

A Return to Ontology and the Facts of Law

The title of Olivecrona’s most notorious contribution summarizes the fundamental ontological viewpoint shared by the four Scandinavians, despite their subsequent differences in analysis and theoretical constructions: law is a fact.¹¹⁹ As mentioned earlier, clarity and systematics are inherently good in scientific methodology, but the treatment of the ‘real’ object of legal science, being then naturally circumscribed by the negation of the ‘metaphysical’, must obey its goal as a social science, that is, to describe reality.¹²⁰ As far as the Scandinavians are concerned, they unanimously rely on the ontology and epistemology of Axel Hägerström,¹²¹ which in philosophical lingo we might call, respectively, external realism¹²² and empiricism. This is undoubtedly the distinguishing element of the Scandinavian gang in the Realist rebellion.¹²³

¹¹⁹ Karl Olivecrona, *supra* note 38; see also an article-long version of the argument in Olivecrona, ‘Law as Fact’, in P. Sayre (ed.), *Interpretations of Modern Legal Philosophies* (1947), at 542–557.

¹²⁰ Geoffrey Marshall, in his simulation of a dialogue between a puzzled yet curious North American lawyer and a Scandinavian realist, summarizes the ramifications of the assertion of ‘law as fact’: ‘is it necessary to treat all statements which are not simply descriptive of events as descriptive of imaginary events or of psychologically induced fictions? Something of this kind seems to be behind the assertion that a positivist theory must deal only with observable facts of positive law. And ‘deal with’ here seems to mean ‘contain only statements which describe events and indicate causes and effects.’ (See Marshall, ‘Law in a Cold Climate’, *Juridical Review* (1956) 267.).

¹²¹ See generally Hägerström, *supra* note 29. A helpful, although fairly critical account of Hägerström’s epistemology and its links to his discussion of law can be found in Bjarup, ‘Epistemology and Law According to Axel Hägerström’, 29 *Scandinavian Studies in Law* (1985) 13–47.

¹²² The term ‘external realism’ is borrowed here from analytic philosopher J. R. Searle, *The Construction of Social Reality* (1995) 150 *et seq.* Jes Bjarup prefers to call Hägerström’s ontology ‘naïve realism’ (see Bjarup, *supra* note 171, at 19). Incidentally, Bjarup refers to Hägerström’s realism also as ‘direct idealism’, which in that case means that nothing stands in the way of cognition between mind and world (see Bjarup’s intriguing analogy between Lenin’s and Hägerström’s respective stances on the theory of knowledge, *ibid.*, at 20).

¹²³ Martin, *supra* note 29, at 127 *et seq.*; Hart, *supra* note 7, at 161; R. W. M. Dias, *supra* note 29, at 461; Bjarup’s following dramatic assertion might be truer of Lundstedt and Olivecrona than of their Danish colleague, but carries nonetheless some truth across the board: ‘... there is a mutual dependence between Hägerström and his devoted pupils. Hägerström is the light, and they reflect it. He who is not with Hägerström is *eo ipso* against him. . . Hägerström is only what other people regard him as being. And his acolytes regard him as a God.’ (Bjarup, *supra* note 171, at 39.) It should be pointed out that one

External realism might even be further specified as psycho-physicalism without excessive concern for verbosity (i.e. all of reality is comprehensively reducible to physical objects and psychological states).¹²⁴ We may further add, as an extension of the commitment to ontological realism — which thus defined excludes meta-physics by etymology — that they all share in one form or another Hägerström's ethical theory, which again in the philosophical canon would find a reserved spot under the label of emotivism or 'emotive theory of values' (i.e. all propositions of a moral or more generally normative nature are reducible to (necessarily subjective) psychological states and emotions — hence the nickname of 'Hurrah-Boo theory of ethics').¹²⁵ An automatic consequence of emotivism is that moral propositions cannot be 'objective' without referring to rationalized and reified subjective experiences, that is, supernatural realities. Moral subjectivism and relativism are therefore closely tied to this set of philosophical stances.

To situate this against more familiar reconstructive moves in legal theory, Alf Ross accepts the typical division between 'is' and 'ought' in the analysis of law. In terms of the is/ought division laid out by Karl Llewellyn, Alf Ross clearly delimits legal science to the realm of the 'is' — that is, in his case, the realm of psycho-physical facts — since valuations concerning the shape that the law ought to take are not within the realm of scientific investigation.¹²⁶ Any attempt by legal science to confuse the investigation of the factual reality of law and the normative evaluation of the contents of the law derails legal science towards metaphysics again, insofar as that would mean considering that there is any way to discuss values in objective terms. The is/ought

underlying theme of Bjarup's take on Hägerström's epistemology is that a key to understanding Hägerström is his hardly concealed megalomania and self-satisfaction, which goes hand in hand with Bjarup's insistence on the cultish flavour of the Hägerström movement (particularly within its Swedish kernel). Hence the repeated use of words like 'henchmen' or 'followers' to mention scholars who accepted (blindly) Hägerström's core philosophical stance (*ibid.*, at 40–41). Alf Ross, as pointed out in the first section above, mentions Hägerström as a strong influence (beside the references in the text of his books and articles) in the prefaces of *TRJ* and *LJ*. But his indebtedness is certainly never expressed in the truly passionate and reverent way displayed by Lundstedt. See especially *Legal Thinking Revised*, *supra* note 7, at 7 *et seq.*, where Bjarup's depiction comes to life in Lundstedt's telling anecdote of 'two cocky boys' (Swedish graduate students in philosophy) challenging him on the correct interpretation of Hägerström's gospel.

¹²⁴ A good informative reference is here 'Psychologism', in P. Edwards (ed.), *The Encyclopedia of Philosophy*, Vol. VI (1972) 520–521. A contemporary discussion of external realism, empiricism, and the correspondence theory of truth (as well as the different links between them) can be found in Searle, *supra* note 77, at 149 *et seq.*

¹²⁵ See e.g. Brandt, 'Emotive Theory of Ethics', in Paul Edwards (ed.), *The Encyclopedia of Philosophy*, Vol. I (1972), at 493–496. A famous exposition of this position can be found in Ayer, *supra* note 58, at 103 *et seq.* and 20–22 (a defence of Ayer's point of view for the second edition).

¹²⁶ Lundstedt puts it, as bluntly as always, in the following manner: 'The exclusion of allowing value judgments to enter into scientific reasonings as premises or arguments is obvious — if one has decided that science (disregarding abstract mathematics and pure logic) must be empirical, i.e., based on empirical knowledge. Evaluations have nothing to do with such knowledge, as they cannot be any statements of reality, of true facts. Nothing is changed in this respect by the fact that a value judgment in jurisprudence can often be shared by the majority in the community and is sometimes even almost unanimous.' (*supra* note 7, at 48.).

distinction posited by the American Realists as a (temporary) divorce between the examination of the current state of the law as enforced by the (US) court system, on the one hand, and the normative reform projects propelled by it, on the other, must obviously be distinguished from the is/ought distinction announced by Kelsen at the heart of the Pure Theory of Law. Although Kelsen bases his enterprise of building a legal science with an autonomous object on a similar distinction — which highlights the value-free nature of the Pure Theory¹²⁷ — his ontological distinction between is and ought (the realm of the ‘ought’ (*Sollen*) being a parallel plane to that of factual reality, defined by the substitution of norms for facts, and imputation for causation)¹²⁸ is unsurprisingly anathema to Alf Ross. The interlinked dimensions of philosophical realism just alluded to comprise the substantive aspect of Alf Ross’ realist enterprise, and form the backbone of his theoretical developments, especially from his *Critique of Practical Reason*¹²⁹ on to *On Law and Justice*. Our present concern requires highlighting their mark on his international legal writings, through their revamping of legal science.

B Magic and Logic (bis): Metaphysical Dualisms and Logical Antinomies

Each of the three Scandinavians who developed Hägerström’s philosophical system into a theory on the nature of law picked a preferred angle of attack to dismantle the prevailing scholarship. The crux of Olivecrona’s argument dealt with the idea of the binding force of law and the relationship between law and force.¹³⁰ Lundstedt displayed a consistent obsession with legal positivism and what he called the ‘legal ideology’ or the conception of ‘material law’ lurking behind the factual workings of the legal machinery, as related in particular to the implicit belief in the reality of

¹²⁷ See H. Kelsen, *Introduction to the Problems of Legal Theory*, (a translation of the first edition of the *Reine Rechtslehre* or Pure Theory of Law) (Transl. by B. L. Paulson and S. L. Paulson (1992)), at 31–33, or e.g. Kelsen, ‘Droit et Etat du point de vue d’une théorie pure’, *Annales de L’Institut de Droit comparé de l’Université de Paris* (1936), at 21–22.

¹²⁸ H. Kelsen, *Introduction to the Problems of Legal Theory*, *supra* note 127, at 22–23; see also generally the chapter of the *General Theory of Norms* dedicated to answering the variously expressed denial of the is/ought dichotomy: *General Theory of Norms*, *supra* note 27, at 62 *et seq.* With Ross among others in mind, Kelsen there poetically proclaims:

The relation between Is and Ought is one of irreducible duality. In spite of the incontrovertible difference between Is and Ought, there have been attempts, and still are attempts — most recently in connection with the question of the applicability of logical principles to norms — to deny directly or indirectly the duality of Is and Ought: for instance, claims that an Is is implicit in an Ought, or an Ought is an Is, or that Is is founded on an Ought, or Ought on an Is, or that a certain Ought is connected with a certain Is in such a way that one of the two is ‘correlated with’ or ‘coordinated with’ or ‘parallel to’ the other, or can be translated into the other. (*ibid.*, at 63.).

¹²⁹ A. Ross, *Kritik der sogenannten praktischen Erkenntnis, zugleich Prolegomena einer Kritik der Rechtswissenschaft* (1933).

¹³⁰ See e.g. Olivecrona, *supra* note 38, at 142 *et seq.*

justice.¹³¹ Ross' target and object of reflection, as the subtitle of his Realist manifesto indicates, was the dual content of the concept of law, as implying both an empirical reality and the seemingly non-empirical dimension of legitimacy or validity. In short, announces Ross, '[o]ur task is to do away with the metaphysical interpretation of the notions of validity, and re-interpret these in a realistic direction'.¹³² In all these concepts and constructions, the three Scandinavians found traces of magical or mystical thinking, which had to be tackled and overcome, again in light of the commands of the ubiquitous and imperial reference to science. In the case of Ross, his treatment of the question of validity is the basis for his theory of the sources of law, and more particularly his reframing of the sources of international law. Once again, to reconstruct Ross' contribution, we have to slide from general philosophy to jurisprudence, before eventually reaching international law.

Starting from the idea that the object of the science of law is the 'law in force', Ross notes that the positivity of law conveys either the notion that the law is historically and authoritatively established, or alternatively the idea that it is effectively observed: 'in both ways it is expressed that the law is fact, which is the subject of empirical, not of rational knowledge'.¹³³ But the question as to the ways in which a system of rules effectively observed comes to be labelled 'legal' requires some investigation into both the usage of the concept of law, and the assumptions concealed therein, as well as the more explicit theoretical constructions of the concept. Ross announces immediately his main finding:

Characteristic of the concept of law is the belief in an incarnation of the valid, the metaphysical, the ideal in the realm of the actual, the physical, the real. The law is not, like morality, pure ideality. But neither is it, like the tyranny of crude power, a purely empirical reality. The law is both, valid and factual, ideal and real, physical and metaphysical, but not as two things coordinated, but as a manifestation of validity in reality, which only thereby qualifies as law. The concept of law, therefore, consistently leads to a spiritualistic metaphysic, to the assumption that there exist elements within the physical world which in their innermost essence are incarnations of spiritual principles or rational ideas expressing supertemporal values.¹³⁴

Both his powerful analysis of the misguided historical distinction between natural law and positive law, and his survey of more contemporary conceptual constructions confirm the idea that beyond the variously developed systems lies a common and basic conception of law as handed down by tradition and bearing the inescapable mark of metaphysical dualism.¹³⁵ As the scanner of analysis sheds light on the inner structure of the different and often antagonistic treatments of the concept, it appears that no matter how openly these learned constructions welcome and embrace or else deny

¹³¹ See e.g. Lundstedt, *supra* note 7, at 31 *et seq.* And especially his piece 'Law and Justice: A Criticism of the Method of Justice', in P. Sayre (ed.), *Interpretations of Modern Legal Philosophies* (1947), at 450–483, as well as *Law and Justice* (1952).

¹³² *TRJ*, at 145; *LJ*, at ix.

¹³³ *TRJ*, at 19.

¹³⁴ *Ibid.*, at 20.

¹³⁵ *Ibid.*, at 32 and 44.

and reject such dualism, all theories are stuck in an unavoidable combination of metaphysics and empiricism. The best proof of the dualistic core of the concept of law is provided by the scholarly attempts at trumping it, which unsurprisingly end up as scientific failures, or need to be reinterpreted as actually accepting that dualism. In particular, Kelsen's attempts at reconstructing the validity pole of the dyad as a formal non-metaphysical realm of the 'Ought' ends up formalizing the concept to 'a fundamental form of thought co-ordinate with that of the knowledge of reality', a 'mode of thought empty in itself'¹³⁶, by sticking to an analytic distinction between the two sides instead of yielding to their necessary synthetic union.¹³⁷ Those who champion the other pole, that of factual experience privileged by American Legal Realists, are no better off in that they seem blind to the very question:

If the law is defined as a certain actual behavior, dualism is, indeed, avoided to begin with. Statements about the law will be purely theoretical statements about what happens or what will happen. But this results in a complete 'disruption' of the concept of law. For the question will arise how social conduct which is law can be precisely delimited from all other social conduct. Such a delimitation cannot take place without going back to the notions of validity which it was attempted to avoid.¹³⁸

Unsurprisingly therefore, Ross concludes his detailed survey of the then recent legal-theoretical work by 'praising' Georges Gurvitch for having expressed in the most monumentally explicit and naive way the idea of core dualism through a theory he himself labelled 'ideal-realism'.¹³⁹ Gurvitch is worthy of compliment only because of his naive (although fairly sophisticated) embrace of metaphysical dualism, but there is obviously nothing to be proud of when one boisterously adheres to metaphysical thinking.

The following steps in Ross' endeavour are dedicated to further systematizing the problems posed by dualism, in the shape of a series of 'antinomies', before getting down to solving these scientific aberrations by a process of what Ross calls 'dissolution and reconstruction' (echoed in the next chapter by the general expression of Critique and Reconstruction):¹⁴⁰ 'It then becomes the inevitable task of thought to reduce this dualism, dissolve the antinomies, and reconstruct the concept of law.'¹⁴¹ Dissolution of the antinomies stemming from the dual nature of law could be understood therefore as the process by which 'irrational realities are substituted for rationalized fictions',¹⁴² the meaning of which will become a little clearer shortly.

The basic antinomy of the concept of law, according to Ross' preceding exposition of its basic elements, is that: on the one side, 'the validity of law is determined relatively to certain relevant, historical phenomena' and, on the other side, 'the relevant

¹³⁶ *Ibid.*, at 44.

¹³⁷ *Ibid.*, at 48.

¹³⁸ *Ibid.*, at 49.

¹³⁹ *Ibid.*, at 51–52.

¹⁴⁰ *TRJ*, at 53–158 (antinomies of the concept of law and dissolution/reconstruction; antinomies of the sources of law and dissolution/reconstruction).

¹⁴¹ *Ibid.*, at 76.

¹⁴² *Ibid.*, at 202.

historical phenomena are determined relatively to the validity of the law as law'.¹⁴³ Put in dialectic practice, this means that wherever we start from, that is, from the factual experience of law or the specificity of law as law, we end up falling back on the alternative — just like the initial account of the problem pre-supposed. Thus Kelsen seeks to escape from facts but needs facts to pick a *Grundnorm* compatible with the actual functioning shape of the legal system;¹⁴⁴ and Jerome Frank flees from the shadow of validity through the so-called predictive theory of the nature of law, only to fall back on the necessary assumption of the distinctive nature of 'the legal' that might allow for a difference to be made between a judge and a brutish bully.¹⁴⁵

The antinomy provokes either (diachronically) an infinite regress problem or (synchronically) a circular movement,¹⁴⁶ which is projected onto the theory of sources.

A legal source is at the same time an active factor (cause) and a validity-creating factor (reason), at the same time a factor empirically motivating the actual behaviour of the authorities who apply the law and a factor which is superempirically the source of the specific character of legal validity associated with this behaviour (in distinction from a system of merely factual compulsory acts).¹⁴⁷

Again, we encounter the expression of the 'metaphysical union of reality and validity',¹⁴⁸ a dualism equally expressible in antinomies contrasting the empirical nature of sources (they are part of any legal system of law and must therefore vary) and their supra-empirical status (they must be grounded on something else for their own validity); and the same goes for the concept of subjective rights and objective law.¹⁴⁹ And again, Kelsen and Frank are taken as contrasting manifestations (and extreme polarized stances on the factual/ideal divide) of the impossibility of getting out of the logical trap.

If it were only another case of assault and battery on formal logic, the exposition of the antinomies would be just one more example of Ross' perhaps excessively obsessive mind. But the root of the logical flaw of these antinomies in core legal notions like the concept of law itself and the doctrine of sources lies in the systematic construction of the supra-empirical pole of the alternative. Legal science as a science cannot rely on metaphysically soiled concepts: 'Like all other knowledge of phenomena, a knowledge of the juridical phenomena can only be gained through experience, in the present case, experience of psycho-social phenomena.'¹⁵⁰ Hence the dissolution of the scientific aberration begins with the reconceptualization of the dyadic constructs into monadic concepts outside of metaphysics and within reality: 'Since, then, neither 'reality' nor 'validity' can be eliminated from the concept of law, the dialectic can only

¹⁴³ *Ibid.*, at 57.

¹⁴⁴ *Ibid.*, at 59.

¹⁴⁵ *Ibid.*, at 65 and 70.

¹⁴⁶ *Ibid.*, at 73.

¹⁴⁷ *Ibid.*, at 129.

¹⁴⁸ *Ibid.*, at 127.

¹⁴⁹ *Ibid.*, at 171.

¹⁵⁰ *Ibid.*, at 140.

be overcome by showing that reality and validity — rightly interpreted — are not irreducible categories excluding one another.¹⁵¹ In short, the Kelsenian ‘ought’, as envisaged by Ross, must disappear. This result is thus reached through the ontological annihilation of the alternative plane of reality embodied in the notion of validity: ‘validity (value or duty) is nothing objective or conceivable whatsoever, it has no meaning, is a mere word’.¹⁵² Validity refers to ‘conceptually rationalized expressions of certain subjective experiences of impulses’ and it is the ‘subjective experience of certain disinterested behaviour attitudes’ which the mind ‘owing to a natural illusion rationalizes in the idea of ‘validity’ as something objectively given’.¹⁵³ The science of law being ‘a branch of the doctrine of human behaviour, . . . the legal phenomenon must be found within the field of psycho-physical phenomena constituting the domain of psychology and sociology’.¹⁵⁴ The elements of the concept of law and their dissatisfactory relationship in the prevailing doctrines are therefore reconceptualized for what they really are, that is, psycho-physical facts: an ‘interested behavior attitude’ (the fear of compulsion relied on by the previous realists), a ‘disinterested behavior attitude’ (the attitude of obedience bearing traditionally the stamp of ‘validity’) and an actual, ‘inductive’ relationship between them, meaning the historical (and conceptual) interpretation of the dialectic between power (imposed behaviour) and legitimacy (spontaneous respect for the system).¹⁵⁵ The key is therefore the replacement of an empirically unverifiable or unknowable sphere of reality (‘pseudo-reality’, says Ross) by a truly scientific understanding of the elements which were supposed to inhabit it, so that eventually the ‘legal ideology of validity’ is explained as a rationalization of synchronic and diachronic interaction between belief (the rising of legal consciousness) and fact (the workings of the legal machinery and the experience of compulsion).¹⁵⁶ As implied by the dominant construction now cast aside, the two elements are inseparable,¹⁵⁷ but are now both ontologically part of the real world and epistemologically subject to experience/observation: thus the dualism and the antinomies have disappeared and validity becomes part of reality.¹⁵⁸ Retrospectively, since Alf Ross relies on the concept of law as handed down by tradition, the antinomies appear therefore as the ‘logicized expression of the interaction between actual compulsion and validity’.¹⁵⁹

¹⁵¹ *Ibid.*, at 77.

¹⁵² *Ibid.*, at 77.

¹⁵³ *Ibid.*, at 77; one can find very similar fragments in Lundstedt (e.g., *Legal Thinking Revised*, *supra* note 7, at 46 *et seq.*, where Lundstedt carries the critique of the subjective nature of the ‘ought’ into the field of adjudication, a privileged target of Lundstedt’s anti-metaphysical criticism).

¹⁵⁴ *TRJ*, at 78.

¹⁵⁵ American Legal Realism and Kelsen are then reinterpreted by Ross in terms of this new picture, with the help of thought experiments about an imaginary world where the emergence of regular behaviour is linked to the recurrent intervention of supernatural beings in the life of men (*TRJ*, at 79–81).

¹⁵⁶ *TRJ*, at 86.

¹⁵⁷ See the didactic chart in *TRJ*, at 89–90.

¹⁵⁸ *TRJ*, at 90.

¹⁵⁹ *Ibid.*, at 93.

C A New Look at the Theory of Sources

The same line of reconstruction is extended to the theory of sources. Again, all knowledge is knowledge through experience, and 'legal knowledge presents no specific problem', so that any conception of the source of law as a specific epistemological basis is absurd.¹⁶⁰ Once it has been made clear that the concept of law must rely on the dialectic of external compulsion and belief, the notion of source must be re-conceptualized to do away with any metaphysical doctrine of formal stamping having as its function to 'solve the curious enigma how certain specially qualified events in the empirical world are capable of producing but merely causal effects'.¹⁶¹ The traditional ontologically dual concept of law is replaced by law as a complex social fact, so that automatically 'the law does indeed consist partly of norms, but not in the traditional sense of specific meanings or statements about normative validity, but exclusively as an integral element of the legal phenomenon, i.e. as psycho-physical facts, expressions which partly reflect, partly again create real behaviour attitudes'.¹⁶² Law as fact is what in the social reality constitutes the punctual experience of law as the result of the dialectics of belief and compulsion,¹⁶³ and therefore the focus is not on the rationalized experience as norm, but on the legal decision by the authorities. 'A source of law is what actually furnishes the motive of the judge in such a way that his decision also acquires the stamp of validity.'¹⁶⁴

As Ross notes, and as should be painfully expected by now, the understanding of the sources of law, as well as the judicial process and the doctrines of legal interpretation, must undergo 'a radical change in character if the juridical phenomena themselves, not the juridical rationalizations, are made the starting point of our considerations'.¹⁶⁵ In particular, any idea of formal sources as the entrance gate to the realm of law, as for instance expressed in Article 38 of the Statute of the International Court of Justice (ICJ), is sheer metaphysics¹⁶⁶ derived from magical delusions about the power of formal ritual over the physical world (in Hägerström's characterization of the historical core of Roman law). There is no distinction between formal and material sources, and the objectified, and therefore meaningless, science of law as dogmatic reproduction of legal phenomena in terms of norms and legal propositions should be rejected for a sociological analysis of the process of authoritative decisions (to borrow a more McDougalian terminology).

All this, to which Ross dedicates long and systematic sections of his treatise and which he repeats in *On Law and Justice* is summed up for the purpose of understanding the place of sources in international law in the following dramatically condensed way:

To a realistic view the validity of the law is in the last resort a manifestation of certain

¹⁶⁰ *TRJ*, at 140.

¹⁶¹ *TB*, at 80.

¹⁶² *TRJ*, at 96.

¹⁶³ In the Commentary on the Charter, Ross allows himself to speak of a 'combination of force and moral obligation which is called law' (*CUN*, at 16).

¹⁶⁴ *TRJ*, at 146.

¹⁶⁵ *Ibid.*, at 148.

¹⁶⁶ *TB*, at 94.

socio-psychological facts. For the genesis and development of these, however, the regular ‘enforcement’ by the courts of law is of decisive importance . . . The same interest is at the bottom of jurisprudence as a practical branch of learning. From this point of view another task will devolve on the doctrine of sources, viz. an analysis of the general factors determining the content of the concrete legal ideas. This analysis is best carried out where the legal ideas are put to the most thorough and serious test, viz. in the concrete judicial decisions immediately before their enforcement. Here, after mature deliberation, thought is converted into action, which itself reacts on the thoughtful conception of the law. The judicial decision is the pulse of legal life, and it is here that the analysis of the legal sources comes into play. A source of law, then, means the general factors (motive components) which guide the judge when fixing and making concrete the legal content in judicial decisions.¹⁶⁷

The formal doctrine of sources of international law not only is erroneous, as already noted, in that there is no distinction between formal sources and material sources,¹⁶⁸ but it also consists itself in a rationalization of practice, and has acquired its authority through the progressive idealization of actual practice:¹⁶⁹ it is analogous therefore to a ‘scientific theory’.¹⁷⁰ This permits finding a solution to the logical problem posed by the metaphysical root of sources doctrine, that is, the paradoxical exposition of the sources of law in a norm the very authority of which the sources are supposed to explain.¹⁷¹ In particular, the traditional theory of sources, bearing the stamp of metaphysics, seems to support a formalistic, hypothetico-deductive understanding of the process of juridical interpretation; this is again ludicrously wrong¹⁷² and a close analysis of the process of judicial decision reveals the creative role of the judge. This anti-formalist line of argument, although anchored in the epistemological architecture laid out by Ross, is in its negative expression a common feature of all Realists,¹⁷³ as well as other types of anti-(legal) positivist jurisprudence otherwise qualified as un-realistic by ‘authentic’ realists.¹⁷⁴ In the case of Ross, however, the reconstruction of law as an empirical phenomenon on a par with any other legitimate object of science implies that the factual situation of the judge making a decision constitutes a

¹⁶⁷ *Ibid.*, at 80 (emphasis in the original text).

¹⁶⁸ *Ibid.*, at 82.

¹⁶⁹ *Ibid.*, at 83.

¹⁷⁰ *Ibid.*, at 93.

¹⁷¹ *Ibid.*, at 93 and the first antinomy of the sources of law in *TRJ*, at 131 *et seq.*

¹⁷² *TB*, at 79 and 92; *TRJ*, 148 *et seq.*; *CUN*, 190–191, where Ross uses the consecrated Iheringian label of ‘conceptual jurisprudence’ to describe formalist/deductivist legal reasoning.

¹⁷³ See again the classic reference Horwitz, *supra* note 9, at 198 *et seq.* For the lineage between sociological jurisprudence, progressivism and legal realism through a unifying reaction to legal formalism, see Duxbury, *supra* note 9, at 32 *et seq.*

¹⁷⁴ The critique of deductivism in judicial decision-making is central to the *Freirechtsbewegung* and the trend of sociologically oriented jurisprudence represented by, for instance, François Gény in France and Roscoe Pound or Benjamin Cardozo in the United States. See e.g. F. Gény, *Méthode d'interprétation et sources en Droit Privé positif: Essai critique* (2e éd., 1919) 66 *et seq.*; Pound, ‘The Theory of Judicial Decision’, 36 *Harvard Law Review* (1922), at 640 *et seq.*, 802 *et seq.*, 940 *et seq.*; and the famous ‘Mechanical Jurisprudence’, 8 *Columbia Law Review* (1908), at 605 *et seq.*; B. Cardozo, *The Nature of the Judicial Process* (1921); Hermann Kantorowicz, ‘Some Rationalism About Realism’, 40 *Yale Law Journal*, (1934) 1240. For a representative text of the so-called *Interessenjurisprudenz*, see P. Heck, *Das Problem der Rechtsgewinnung* (1932).

psycho-physical phenomenon consisting of a multitude of factors influencing the options considered by the judge. Ross naturally rejects any reconstruction of the theory of sources that would rely on such references as the idea of justice, or social utility or (social) science.¹⁷⁵ Ross thus explicitly or implicitly dismisses grand reconstructive projects variously self-termed 'scientific' and having as one of their aims the theorization of the judicial method or the theory of sources as an objective/scientific/rationalizable process (such schemes as those of François Gény, Philipp Heck, Georges Gurvitch, Hermann Kantorowicz, and many other names in some way associated with the sociological trend in jurisprudence).¹⁷⁶ Moreover, any normative theory of sources, such as that exemplified in the Statute of the ICJ, is a 'fictive rationalization',¹⁷⁷ since any doctrine of sources cannot but be descriptive of what actually happens in the judicial decision.¹⁷⁸ In the particular case of international law, this description of the mechanism of sources thus allows naturally for a shameless consideration of 'non-traditional' sources, like the UN General Assembly resolutions.¹⁷⁹

The emotivist stance taken up by the Scandinavians moreover leads to the conclusion that the normativity of law is not essentially different from that of morals as a normative system,¹⁸⁰ so that there is no problem in saying that subjective factors, such as morals, enter the blend of 'co-operating factors' accounting for the decisions of judges like those of the ICJ.¹⁸¹ In short, Ross, like Kelsen, has no problem, against the background of the general theoretical framework adopted, to see in the process of legal interpretation an act of volition more than cognition.¹⁸²

Whatever we may think of the problematic details left to be solved after this reconceptualization of sources, all this talk about the social-psychological reality generates for Ross the mootness of traditional questions about the binding nature of international law,¹⁸³ the relationship between international law and sanction,¹⁸⁴ and more generally the question as to whether international law is really law.¹⁸⁵ As presented by Ross himself in *Towards a Realistic Jurisprudence*, the reconsideration of law in a realist direction leading to the strict appraisal of the legal phenomenon as fact, was meant to have many radical consequences for the shape of legal science. I alluded in the previous section to the criticisms addressed at prevailing substantive doctrines

¹⁷⁵ *TB*, at 82.

¹⁷⁶ *TRJ*, at 144.

¹⁷⁷ *Ibid.*, at 142.

¹⁷⁸ *Ibid.*, at 132; *LJ*, at 103–104. Max Sorensen gives a very succinct account of Ross' doctrine of sources as a 'discipline descriptive', on which he based his *Les sources du droit international: Etude sur la Jurisprudence de la Cour Permanente de Justice Internationale* (1946) 24.

¹⁷⁹ *CUN*, at 60.

¹⁸⁰ See e.g. *Validity*, at 154–155; and Ross, 'Book Review: What is Justice? by Hans Kelsen', 45 *California Law Review* (1957) 564.

¹⁸¹ *TB*, at 82.

¹⁸² *TRJ*, at 149–150.

¹⁸³ *TB*, at 46–48.

¹⁸⁴ *Ibid.*, at 52–54.

¹⁸⁵ *Ibid.*, at 51.

of international law like recognition, succession, legal personality, and so forth. Having noted the importation of the critique of sources from jurisprudence to international law, the question is naturally: What kind of ripples are generated by the cataclysmic reshaping of the heart of the traditional conceptions of international law?

D Asking for the Impact of Philosophical Realism on International Law

Again, as in the case of the critique of sovereignty, Ross' position on such central issues of international law as the theory of sources derives from his jurisprudence as a call for science. As far as sources are concerned, Ross' vision condemns the traditional theory to banishment in the limbo of medieval myths, as a product of a legal positivism which is itself an unscientific account of law, clearly based on metaphysical ideas about validity as a magical stamp.¹⁸⁶ Since cornerstone concepts like sovereignty and sources have been dented by the irruption of reality in internationalist conceptual construction, what is the overall shape of the science of international law once fully rebuilt along the lines of science? The American Legal Realists had very little to say about international law, as noted in the Introduction to this article, and to some extent, as discussed below, McDougal is the first would-be realist reconstructor in international law. On the Scandinavian side, Professor Lundstedt showed a very ostensible contempt for the Law of Nations, which may be exemplified by one quote among a constellation of other equally exquisite ones: 'The so-called science of the law of nations is an empty nothing.'¹⁸⁷ Through his attempt at the reconstruction of fundamental legal science, Ross offers the hope for a look at the shape of a scientifically reconstructed international law, along the lines of his jurisprudence. A quarter of the *Textbook* is dedicated to the fundamental concepts of traditional international law, and all are reconsidered according to the same standard applied to the ideas of sovereignty and sources. The question of the binding force of international law is rendered moot by the general notion of legal obligation as the rationalization of an individual emotive experience;¹⁸⁸ the notion of sovereignty is disposable, it has no meaning and no use in international law, and can be replaced by more 'functional' concepts, that is, concepts that describe a function supposedly covered by the vague notion of sovereignty;¹⁸⁹ and dualism is the only proper perspective on the relation of international law to domestic law from the standpoint of law as a socio-psychological fact.¹⁹⁰ On these bases, Ross proposes his chart of the system of international law, and moves on to discuss various aspects of its material rules with a more or less favourable outlook. Yet, upon closer look, and apart from his punctual criticisms of the doctrines of expropriation or intervention, reprisals or the justiciability of disputes, the framework of the discipline

¹⁸⁶ *LJ*, at 100 *et seq.*

¹⁸⁷ Lundstedt, *supra* note 43, at 177.

¹⁸⁸ *TB*, at 47 *et seq.*

¹⁸⁹ *Ibid.*, at 39–40.

¹⁹⁰ *Ibid.*, at 62–63.

remains the same, but for a more Hobbesian and pessimistic vision of the social background of the law in international society.¹⁹¹

It would seem that the attack on the pervasive metaphysics of legal science, and international law as an example of it, and the sophisticated reconstructive sketches of the law as a socio-psychological fact would trigger a reconstruction, in the shape of a full-blown revamping, of the whole discipline, until that moment profoundly deluded. In particular, the critique of concepts so fundamental to the traditional understanding of international law, as well as the whole of the study of law, such as rights and duties, would seem to prompt a disfigurement of the discipline as we knew it until then. As the concept of rights is clearly an example of magical thought, in the shape of a 'mystical control over objects',¹⁹² what will happen to them in the reconstruction of international law? The first part of the *Textbook*, which comprises a direct importation into international law of the groundwork carried out by Ross in jurisprudence, ends with a seemingly (in terms of the above exposition) surprising statement according to which a thorough reconsideration of the fundamental concepts of international law along realistic lines leads to a new presentation of the field (formalized in the mentioned chart of disciplinary materials) that 'does not break entirely with tradition but brings some rearrangements'.¹⁹³ We can then find in Ross' *Textbook* an exposition of technical rules of international law relating to such varied subject-matters as jurisdiction over aliens¹⁹⁴ or the right of passage granted to ships across territorial waters,¹⁹⁵ and summary expositions of the law of treaties¹⁹⁶ or the law of responsibility.¹⁹⁷ All is done in a manner which does not bear the more distinctive Rossian stamp that we might expect as a derivative of his self-proclaimed realism. Arguably, after making use of heavy-duty philosophical cleaning material, there is room for some anti-climactic disappointment. In the following paragraphs, I will stretch a good-faith internal vision of Ross' repeated programmatic assertions, and suggest a reconstruction of Ross' reconstructive move that irons out the strange drift from revolutionary rage to Berstein-style reformist talk from within.

E *Hollow Words and Copernicus*

A justification can be attempted for Ross' surprisingly minimalist conclusion to the effect that the importation of philosophical realism into international law actually results in a style of doctrinal presentation shared with less grandiosely self-positioned academics. Sticking to Alf Ross' own perception of the meaning and mission of jurisprudential realism in its reconstructive phase, we need to look closer at the outcome for metaphysical concepts and similarly tainted legal constructions of the

¹⁹¹ *Ibid.*, at 183–184 and 246 (on reprisals and preventive self-defence).

¹⁹² *TRJ*, at 201.

¹⁹³ *TB*, at 78.

¹⁹⁴ *Ibid.*, at 168.

¹⁹⁵ *Ibid.*, at 174.

¹⁹⁶ *Ibid.*, at 202 *et seq.*

¹⁹⁷ *Ibid.*, at 240 *et seq.*

critique of positivism. Again, we have to take a detour through the background jurisprudential work.

Understanding the plastically minimal impact of the realist reconstruction of the concept of law within the arena of doctrinal discussion in international law requires tackling the permanence of supposedly inherently metaphysical ‘tû-tûesque’ constructions and concepts. A first clue appears in the above-quoted passage, according to which the dissolution of antinomies lying at the core of traditional legal thought is the substitution of irrational realities for rationalized fictions.¹⁹⁸ Leafing through Ross’ work, we find such assertions as ‘metaphysical constructions have no consequence per se’;¹⁹⁹ or ‘inherited primitive notions are themselves the result of a process of rationalization’ and ‘the traditional concepts, in themselves unreal, may to a great extent be reinterpreted as real’;²⁰⁰ or, more specifically, that the concept of promise, for instance, inherently magical in nature, can be realistically reconceptualized against the backdrop of interaction with the legal machinery;²⁰¹ that rights and duties, although burdened with a metaphysical baggage, can be used as technical legal means of describing legal reality;²⁰² and finally that a good part of the traditional conception of validity can be ‘appropriated, with metaphysics removed’.²⁰³ More generally, Ross affirms that ‘metaphysical rationalizations have a truth value’,²⁰⁴ which seems to concord with his notion that the examination of the uses of the concept of law as handed down by tradition will tell us what law is all about. The end result is therefore that the reconstruction stops at the level of the underlying reality of the law, in terms of a reappraisal of the nature of ‘realities’ covered by law, so that a monadic ontology can fully replace a dualistic ontology without destroying the whole architecture of legal science in general and international law in particular. This might shed additional light on the seemingly disconcerting affirmation that Ross’ systematic exposition of international law ‘does not break entirely with tradition but brings some rearrangements’,²⁰⁵ despite his fundamental criticism of the positivist grounds on which this tradition is arguably firmly based.

It should be said that Lundstedt, as the alternative Scandinavian voice in a realistic inquiry into international law, advocated (at least at times) the banishment of all metaphysical concepts from the language of law, so that the law would speak, for instance, in terms of ‘advantageous position’ instead of ‘right’.²⁰⁶ All concepts would be made to adequately fit the reality of law as the connection between a conditioning

¹⁹⁸ *TRJ*, at 202.

¹⁹⁹ *Ibid.*, at 199.

²⁰⁰ *Ibid.*, at 203.

²⁰¹ *Ibid.*, at 226.

²⁰² *TB*, at 27.

²⁰³ *LJ*, at 38.

²⁰⁴ *TRJ*, at 238.

²⁰⁵ *TB*, at 78.

²⁰⁶ See Lundstedt, ‘Law and Justice: A Criticism of the Method of Justice’, *supra* note 131, at 469–470.

fact and the fact of sanction through the legal machinery.²⁰⁷ Olivecrona, the faithful disciple of both Hägerström and Lundstedt, considered in the most enlightening way the possibilities of reconciling the difficulty of changing the legal language, as felt by Ross, with the commands of Hägerström's epistemology. Despite the fact that rights and so many other legal concepts were handed down with a metaphysical charge, we should consider, said Olivecrona, that they are now void of their magical meaning (in which in any case, the four Scandinavians are quick to point out in unison, nobody really believes anyway), and find their place in a realistic vision of law as 'hollow words'.²⁰⁸ This means simply that they are used explicitly and self-consciously as meaningless linguistic particles designed to serve as a bypass for the far more complicated legal realities covered by them in reality, as delineated by Alf Ross in the 'tû-tû' example. As Ross said quite meaningfully in the context of the metaphysics of 'tû-tû': '[S]ound reasons based on the technique of formulation may be adduced for continuing to make use of the 'tû-tû' construction'²⁰⁹ and 'the concept of right is a tool for the technique of presentation serving exclusively systematic ends, [although] in itself it means no more than does 'tû-tû'.²¹⁰ Olivecrona's appeal to J. L. Austin's linguistic brand of positivism and the theory of performative speech parallels Ross' later drift into the philosophy of language to explain the nature of legal norms in his *Directives and Norms*. He purported thus at that point to have salvaged the core of realist critique, while arguably brutalizing to a minimal extent Hägerström's dogmas. To follow the unlikely comparison used by Hägerström, Copernicus may well have shown the theologically ideological nature of geocentrism, but the common practice of thinking that the sun still rises and sets does not necessarily make us all still medieval.²¹¹ The anti-climactic feeling arose therefore from the idea that the reappraisal of the underlying referents of legal language should result in a transformation of the linguistic apparatus of law. The turn to language in Olivecrona and Ross foregrounds the inherent tension in the examined brand of realism between the temptation of sociologism and the acknowledgement of the linguistic essence of the object of jurisprudence.

²⁰⁷ Lundstedt was certainly aware of the considerable difficulties implied in the banishment of conceptual cornerstones used in the language and the *Weltanschauung* of an entire profession. His sympathy for the suddenly linguistically dispossessed lawyer led him to envisage a possible terminological stilt: "Ownership" again, as this expression is commonly used, involves an entirely metaphysical idea. The expressions legal rights, duties, obligations, relationships, claims and demands, properly speaking, should not be used, not even as terms or labels. But I think it will be impossible in the common practice of law (be it outside or before the courts of law) to eradicate them. If legal writers use such a term and if they are afraid thereby to be misunderstood they may place the term in question between quotation marks.' (*supra* note 7, at 17.).

²⁰⁸ Olivecrona, 'Legal Language and Reality', in R. Newman, (ed.), *Essays in Jurisprudence in Honor of Roscoe Pound* (1962)169 *et seq.*

²⁰⁹ *Tû-tû*, at 205.

²¹⁰ *Ibid.*, at 213.

²¹¹ "Thus, Hägerström thinks of himself as initiating a Copernican revolution, that is, a new age founded on a solid foundation of knowledge, in which it is for the first time understood that there is but one world, a single harmonious whole, and that this world can be known only by the use of science, expressed in a system of self-consistent judgments.' (Bjarup, *supra* note 171, at 39.).

The foregoing paragraphs have sought to rationalize, in the words of Ross and Olivecrona themselves, the meaning of the disjunction between the ‘radical transformations’ announced in *Towards a Realistic Jurisprudence* and the lack of ‘break with the tradition’ reached in the *Textbook*. Yet, it now remains to be understood exactly how, beyond the nice sleight of hand performed by Olivecrona, the connection between Ross’ critique of the fundamental concepts of law and his appeal to their reconstruction against a scientific account of reality really works, and what the meaning of the whole realist enterprise could mean for international law. Once the tension between legal language and legal reality is purged of its mystical disguise, and repainted in technical-linguistic colours, what do we do with international law as a discipline? Since we can garner from Ross’ explicit or implicit assertions that alternative full-blown anti-positivist theoretical accounts emerging from the inter-war search for the ‘new international law’ would be unacceptable — including the notably intense theoretical efforts performed by authors such as Hans Kelsen, Georges Gurvitch, Santi Romano, Louis Le Fur, Georges Scelle, Charles De Visscher, or Carl Schmitt, to choose but a grossly motley sample — we have to dig a little deeper into the Rossian enterprise to understand why correcting the capital sins of a couple of centuries of internationalist legal thought could result in any satisfactory way in a plastic acceptance of the dominant mode of argument. At the end of the day, we cannot escape from the tempting conclusion that his critique of sovereignty could have been written by James Brierly, his attack on the notions of legal personality by Georges Scelle, and his discussion of recognition by, say, Oppenheim. That is, can we find a more obviously central role for the legal Copernicus in the history of twentieth-century international legal thought, beyond that of offering a somewhat frustrating reconsideration of the psycho-sociology of legal lingo?

4 Realism and the Project of International Law: Ross’ Riddle, Morgenthau’s Despair, Lundstedt’s Hysteria, and the Option of Political Realism

A A Disciplinary Riddle: Political Realism and the Reconstruction Gap

The starting point for an alternative reading of the realist reconstruction of international law (beyond the ‘hollow words’ trick) could be the observation that the story does not end in 1947 or 1950, and an important piece of the puzzle in Ross’ dealings with international law is his work on the United Nations, and the change of tone from his commentary of the Charter to his later monograph on the achievements of the Organization.²¹² The prefatory words of this later work drop a good hint as to its general outlook: Ross aims at tackling questions posed by the UN as a political

²¹² A. Ross, *Constitution of the United Nations: Analysis of Structure and Function*, *supra* note 5; A. Ross, *The United Nations: Peace and Progress* (1966) [hereinafter cited as UNPP].

phenomenon and answering them 'realistically'.²¹³ If the Commentary, almost a contemporary of the *Textbook*, consisted in an analysis of the provisions of the constitutional text and offered what Ross in retrospect terms a 'juridical point of view', this unlikely follow-up volume endorses 'realism in political thinking'.²¹⁴ As alluded to in the very first lines of this discussion, the mention of political realism as a movement or 'school of thought' in international relations theory is usually associated with bad memories for international law. Now, for the reader who has just witnessed Alf Ross enthusiastically rebuild jurisprudence and make the effort along the way of considering international law in a way that no other legal philosopher, and certainly no legal realist, seems to have done before, here comes the intriguing and somewhat scary moment:

This realistic evaluation has especially crystallized, in this book, into the conviction that the widespread belief that peace among nations can be won, as people say, by setting law in the place of might and violence, is an illusion due to lack of understanding of the conditions under which law grows in the national community, and the fundamental difference between the national and the international communities. My analysis of these problems forms the natural conclusion, in political theory, of the study of constitutional law, international law, and the philosophy that has occupied me from the time of my youth.²¹⁵

Two elements of this confession will be highlighted for the remainder of this discussion: Ross' adoption of a shade of political realism as the proper mode of analysis of a reality once submitted to the eye of the (realist) jurist, and Ross' further assertion that this shift in perspective is neither a shift nor a jump, but a 'natural' transition. This will be addressed as the problem of the 'gap' between (international) law and politics or between international law and political science.

In this otherwise insightful book on the UN at the time of decolonization, the reader will find scattered mentions of international law in connection with the work of the International Law Commission²¹⁶ or the International Court of Justice (ICJ), but no in-depth consideration of the general place, or role, or significance of international law as a disciplinary framework for an appraisal of the UN in the world. The 'juridical point of view' has been left in the locker room. International law, for instance, is said to be in transition, in that the transformation of the UN through its membership distribution is replicated in the loss of consensus about the idea of international law and obviously its contents; considering the weak structural position of the ICJ, Ross observes:

All things considered, this is a depressing picture, not least because confidence in the administration of justice seems to have been diminishing as compared with the period before the establishment of the new Court. Part of the explanation, perhaps, is that international law is in a transitional period, in which it has not yet adapted itself to the changed conditions for international relations.²¹⁷

²¹³ *Ibid.*, at vi.

²¹⁴ *Ibid.*, at vi.

²¹⁵ *Ibid.*, at vii.

²¹⁶ *Ibid.*, at 348–349.

²¹⁷ *Ibid.*, at 147.

More generally, Ross observes that the practice of the UN has departed consistently from the provisions of the fundamental text, and concludes:

Jurists usually deplore this antijudicial attitude of the organs of the United Nations as an unfortunate break with the principle, otherwise acknowledged in the Western world, of the rule of law. Even though I am myself a jurist, I am inclined to dissent from this and to think that it is fortunate that political forces should be given the maximum of freedom to shape the development of the United Nations under changing conditions.²¹⁸

Unavoidably, Ross dedicates detailed attention to the question of the collective security system established by the paper rules of the Charter. Ross draws a comparison between collective security and the ‘balance of power system’, reflecting on the fact that the essential difference between them is that ‘[t]he basic tenet of the philosophy of collective security is that peace shall be built on the basis of law’ so that ‘in international relations, too, the rule of law is to be substituted for that of might’.²¹⁹ But a realistic observation of the conditions of international relations must deny the underlying contamination of international society with ideas about the rule of law, since ‘this situation cannot be compared with the peaceful order in a state but rather with the *modus vivendi* that can exist within a team of gangsters or between different teams of gangsters’.²²⁰ The conclusion is that

the failure of the idea of collective security can be attributed to the lack of insight in the nature of international law and to the difference between it and national law. Taking national society as an example, an attempt has been made to replace might by law, without, however, realizing that the law between states (that is, international law) belongs to a category different from that of national law and lacks the latter’s capacity to canalize interests and aspirations. It is appropriate to conclude, therefore, that the problem of the preservation of peace should be settled by states instituting among themselves a legal system of the same nature and strength as the national systems. This is the program on which the movement for the establishment of a world state is based.²²¹

This series of statements, in the framework of the present discussion, suggests a series of questions, all related to the ultimate problem of Ross’ contribution to international law from a realist perspective. Alf Ross has just performed a move before our attentive eyes, which could be considered in different ways. The backdrop is what I have tried to display in the previous pages: a comprehensive scheme for salvaging international law as a branch of legal studies, based on scientist-realist postulates. The move could then intuitively be seen from our contemporary academic landscape, and on the basis of the above scattered quotes from *United Nations: Peace and Progress*, as a disciplinary or professional leap across the boundary of legal science, in the fashion of (but maybe less obviously than) Dean Pound’s leap from Botany to Jurisprudence. In this case, the present discussion could end here, and the possible problem of a place to be given to the above quotations within Ross’ contribution could be relegated to a deeper biographical inquiry into Ross’ academic career. But Ross seems to be quite explicitly

²¹⁸ *Ibid.*, at 52.

²¹⁹ *Ibid.*, at 257.

²²⁰ *Ibid.*, at 260.

²²¹ *Ibid.*, at 262.

saying that his legal realism implies as a conclusion his commitment to political realism, or at least that a lifetime disciplinary commitment to the realist reform of law and legal studies vindicates the adoption of a 'political realist' outlook on international reality, including international law. Because the assertion is that there seems to be but a logical step from the one to the other, the assumption that political realism gives the final answer to the reconstructive side of legal realism as applied to international law might need to be explored. On the one hand, to follow the internal good-faith perspective on Ross, it is worth briefly tracing the place of the *project* of international law within the Rossian *science* of international law to be critiqued and reconstructed. On the other hand, to try and break out a little from Ross' own pre-emptive and all-encompassing framework for understanding the rational and the scientific in life, I suggest helping Ross out of his historical specificity by bringing in other names and other perspectives, so as to shed some alternative light on what should be considered, according to tradition, a disciplinary 'gap' between law and politics, international law and political science, and between the science of international and the project of international law.

B Tracing the Project of International Law in the Maze of Science

A striking element in the above quotes from *United Nations: Peace and Progress*, if compared to the general flavour of the realist project presented in the preceding pages, is that Ross is giving a value judgment about the place of international law in international reality. Ross speaks about the *substance* of international law. The chosen focus of the work on realistic jurisprudence was that of critique and reconstruction of international law as a legal science, not as the project of peace or even as a technique of social organization. Generally, the link between law and social reality is vital to realistic jurisprudence, but since with Ross the 'scientific' approach of *Towards a Realistic Jurisprudence* made them one and the same thing, any idea of 'social engineering' or of possible political dimensions to law implied bringing back the metaphysically normative through the backdoor, or else simply did not mean anything in Ross' disciplinary *Weltanschauung*. This is not the business of legal science, and the criticism (shared with Kelsen) of sociological jurisprudence as 'metaphysics in disguise' had made that patently clear.

Significantly, Ross takes up the question of justice and its place in legal analysis in *On Law and Justice*, only to conclude that there is no scientific basis to start any kind of meaningful exchange about it within the conglomerate of legal sciences newly defined ('It is impossible to have a rational discussion with a man who mobilizes 'justice', because he says nothing that can be argued for or against').²²² The same for 'legal politics' as a legal activity: we are basically waiting for a scientific sociology of law to be promoted for a meaningful discussion.²²³ The question of a possible causal relation between something called law and something called 'the political' or 'the social' is simply off the radar screen. The question seems to be simply incomprehensible in the

²²² LJ, at 276.

²²³ *Ibid.*, at 332.

early Rossian approach. Ross calls his targets ‘metaphysical’ or ‘absurd’, to promote in their place the ‘empirical’, the ‘scientific’ and the ‘logical’; ‘bad’, ‘politically unwise’, ‘reactionary’, ‘dangerous’, or ‘unjust’ are seldom to be spotted on the map. The ‘gap’, alluded to earlier, is thus inherent in Ross’ own approach. With the above quotes, the linguistic repertory of critique has therefore apparently shifted from the lingo of Enlightenment fanaticism to the lexical field of Cold-War political anxiety.

Yet, if one takes a closer look at the *Textbook* or the commentary of the Charter, Ross actually drops here and there normative considerations on the status or possible social contribution of international law.²²⁴ In particular, as already mentioned, Ross alludes to the discrepancy between idealistic constructions as regards the limitations set by law to the use of force in international relations, and the facts of international communal life.²²⁵ Commenting on reprisals, his conclusions were the following:

Viewed from the angle of legal ideals it is at the outset an anomaly to extend a legal sanction to private arbitrary power. But if once this has been found necessary, as in International Law, it is, on the other hand, difficult and a source of fresh anomalies to set legal limits to the exercise of absolute power. An enforcement of justice which is in the hands of the offended party and depends on his physical resources is difficult to distinguish from a quite arbitrary exercise of power without any legal drapery. The anomaly lies in the fact that International Law stands powerless in the face of such exercise of violence as war.²²⁶

When dropping observations on the possible ambitions of international law at the time of the *Textbook*, Ross refers to the limited possibilities for too strict an analogy with the functioning of a national legal system, due to the background social conditions obtaining in inter-state affairs:

the main general International Law gives expression to an unscrupulous individualism, according to which each state can behave as it likes within its formal sphere of competence without considering the consequences for the interests of other states, the social co-ordination of interests being in the main left to be regulated by special treaty arrangements... In reality it is a struggle of all against all. Even peace is no real peace but a war by other than military means.²²⁷

Stepping off this realistic track is pernicious, and so seems actually and very unfortunately to be doing Lauterpacht when speaking irresponsibly of an unlimited justiciability of inter-state disputes. In Ross’ opinion, ‘[w]hat is the good of rigorously asserting the duty of a judicial settlement when it cannot be assumed that this duty will be effectively respected? The result will merely be that law will commit itself by its own powerlessness.’ The observations made by Ross on the role of international law as against, for instance, the ‘unrealistic idealism’ that inspires such ‘extravagant

²²⁴ See e.g. *TB*, at 227 (on the possible role of law in limiting the anarchical conditions of international economic life) or 231 (on the protection of minorities, hampered by notions of domestic jurisdiction or ‘*domaine réservé*’).

²²⁵ See e.g. *CUN*, at 39 (on the veto system in the Security Council and the ensuing ‘static’ character of the Charter) and 21 (on the political pretensions of the smaller states expressed during the negotiations of the text).

²²⁶ *TB*, at 247.

²²⁷ *Ibid.*, at 184.

claims [for] obligatory jurisdiction'²²⁸ are certainly very close to the assertions quoted above from the time of Ross' discussion of the UN. But, on the basis of what has been said above, does Ross' own definition of 'realism' allow a clear connection to be made between, for instance, the assertion that sovereignty is an unscientific concept and the idea that the badly drafted clause relative to the *domaine réservé* in the UN Charter is a political tool serving the interests of the major powers?²²⁹ The *Textbook* evinced simply the parallel tracks of legal science and socio-political pessimism, but (fortunately for the coherence of the perspective adopted here) did not account for their kinship. There is a riddle, as there seems to be a missing link on the methodological level, which Ross however seemed to deny in 1962, while in other ways asserting it in 1947.

When we mention 'political realism' in a discussion around themes concerning international affairs, the term refers to a set of postulates about the nature of social relations among states, expressed in a variety of ways and personified in the academic setting by a 'school' of thought in political science, again with a variety of ramifications. The core of political realism, beyond the (fairly easy) question of whether it constitutes a normative or descriptive framework and despite its varied and at times conflicting expressions, is deemed to provide, from Thucydides to Kenneth Waltz and beyond, a mental picture of the functioning of international society as it 'really' is. One moderately interesting question would be here: Has Alf Ross turned into Henry Kissinger before our slightly incredulous eyes? The answer could simply be then that Alf Ross has been a closeted Henry Kissinger all along, maybe in the same way as we could at least argue that Kelsen had a life-time commitment to (social) democracy openly expressed in a parallel track to that of the development of the Pure Theory. But a question of greater transcendence would be rather: since (1) Ross seems to have been a (realistic) pessimist all along, and (2) pessimism about international law is not warranted, or rather meaningful, in his own brand of legal realism, how do we stretch legal realism *à la* Ross to support his claim that legal realism and political realism are of the same kin? Again, to further (ab)use the comparison, this would be like saying that there is a deep connection between a (social) democratic worldview and the Pure Theory. The relevance of the question, I submit, is of greater transcendence, because the possible kinship of Alf Ross with Kissinger dating back to before 1947 has in any case not prevented him from offering his own solution, or a beginning thereof, to existential dilemmas faced by the congregation of *internationalistes* in the inter-war period and ever since. His later conclusions, based as they are on a career-long reliance on the methodologically imperialistic postulates of 'modern science', point in an apparently threatening way to the general irrelevance of international law as an autonomous discipline and, moreover, give the unneeded support of 'science' to more contemporary claims about political science generally constituting the better future for international law. Since I have suggested that, from the 1947 perspective, the link between the reformed science of international law and

²²⁸ *Ibid.*, at 282.

²²⁹ Ross, "The Proviso concerning "Domestic Jurisdiction" in Article 2(7) of the Charter of the United Nations", 2(5) *Oesterreicher Zeitschrift für öffentliches Recht* (1950) 569.

the substance and social ambitions of international law was quite incomprehensible, it is here that I will suggest abandoning Alf Ross for a moment to seek help from his fellow realist travellers.

C Morgenthau: Legal Realism and the Quest for the Political

Let us start with the most obvious. To those acquainted with the disciplinary history of political science in international affairs, the Ross of 1962 will have sounded strangely familiar, bordering on the banal. The surprising twist suggested by Ross is reminiscent of the founding moment of the modern academic discipline of International Relations, with Hans J. Morgenthau's publication of *Politics among Nations*.²³⁰ The reader familiar with the canon of 'IR theory' will have already perceived in Ross' statement the echoes of past and gloomy times for international law, and will perhaps have associated the substance and mood of his categorical 'conclusion' with leading figures of political realism. Maybe the already mentioned E. H. Carr, maybe Arnold Wolfers, maybe Kenneth Waltz, but certainly and before anybody else Hans J. Morgenthau, considered both the founder of the modern discipline of International Relations and the founding partner of its Realist branch.²³¹ It so happens that Morgenthau is remembered as the unavoidable reference, which he rightly is in political science, but he should also be remembered, from the point of view of the compulsive idealists that international lawyers were made out to be by traditional realism,²³² as the chief traitor to the cause. Morgenthau was actually a very sophisticated international legal theorist himself up to World War II, advocating moreover a realistic turn in the discipline.²³³ Between 1941 and 1946, Morgenthau left the field, so to speak, to adopt a 'political realist' outlook on international affairs, in the same way that Ross presented his later work on the United Nations. Thus displayed in the most grossly contrived fashion, the ghost of Morgenthau here conjured up against the backdrop of Ross' puzzling assertions, brings with him the obvious question: Is realism in international law nothing but the natural way out of it? Because Morgenthau and Ross have in common the consistent call for realism, and because Ross finally advocates 'political realism' as opposed to the 'juridical point of view', whereas

²³⁰ H. J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (1948).

²³¹ See the canonical piece by Professor Stanley Hoffmann, 'An American Social Science: International Relations', in S. Hoffmann, *Janus and Minerva: Essays in the Theory and Practice of International Politics* (1987), at 6 *et seq.*

²³² See a nice expression of this labelling, but from the annoyed perspective of the international lawyer, in Hersch Lauterpacht's 'Professor Carr on International Morality', in E. Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht, supra* note 98, Vol. II, at 67–68.

²³³ Four international legal pieces by Morgenthau stand out: *La notion du politique et la théorie des différends internationaux* (1933); *La réalité des normes et en particulier des normes du droit international: Fondements d'une théorie des normes* (1934); 'Positivism mal compris et théorie réaliste du Droit international', in *Colección de estudios, históricos, jurídicos, pedagógicos y literarios: Treinta y dos monografías de historia de España, historia de América, historia y crítica literarias, derecho y pedagogía, escritas por autores españoles y extranjeros, y ofrecidas a D. Rafael Altamira y Crevea con motivo de su jubilación de catedrático y del cumplimiento de sus 70 años de edad* (1936); Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 260. .

Morgenthau actually reinvents in many ways modern political realism, could Morgenthau explain how legal realism ends up leading us by the hand into political realism in a way that Ross himself could not?

Hans Morgenthau's career could be summarily described as a continual struggle to improve the science of international law from its then current state in the 1930s, advocating an improvement of international law from its dominating legal positivist outlook towards an embrace of realism, ending up eventually in disillusionment and the call for political realism in the study of international affairs. The thrust of the argument was an incorporation by the language of international law of its real subject-matter, international politics, from Carl Schmitt's delineation of the realm of the political,²³⁴ through a temporary Kelsenian improved brand of positivism, to end up eventually in what one could see as a full-blown Schmittian vision of the world.²³⁵ The striking aspects of this path will be summarized by a few quotes. In his early work, we find programmatic calls like the following:

*[L]e réalisme juridique satisfait au principe fondamental du positivisme philosophique exigeant que la science ne s'occupe que des choses réelles vérifiables par l'observation. . . . En comblant le fossé qui sépare la science du Droit international de son objet, le réalisme juridique met un terme à ce stade de chancellement indécis entre la compréhension désintéressée de la réalité et la tentative d'engendrer une réalité imaginaire ne correspondant qu'à une représentation idéale, et fait du Droit international l'objet d'une véritable science.*²³⁶

So far, Morgenthau might seem to be speaking Danish. But we do not need to look at it

²³⁴ Schmitt's canonical text is *The Concept of the Political* (Transl. by George Schwab, 1996). Schmitt's *Concept of the Political* is mentioned here because, according to the now notorious piece of academic gossip, Morgenthau claimed that the crucial changes between the first (1927) and second (1932) editions of that text — namely the famous definition of the 'political' as the ultimate threshold in the scale of conflictual intensity (above which the constitutive dividing line between friend and public enemy is drawn, and so forth) — were actually 'borrowed' from Hans J. Morgenthau himself, and especially from his *La notion du politique* cited above. In that work, Morgenthau spends some time criticizing Schmitt for his (earlier) more simplistic notion of the political, and proposed a 'quantitative' intensity-model of the political, as opposed to a 'qualitative' domain-model of the political for the purposes of embracing the question of political disputes from the perspective of international dispute resolution (*supra* note 233, at 44 *et seq.*). On the question of Schmitt's plagiarism of Morgenthau, see in particular W. E. Scheuermann, *Carl Schmitt: The End of Law* (1999), at 226 *et seq.*

²³⁵ Professor Koskeniemi has recently offered a powerful and complex critical account of the place that should be granted to Hans Morgenthau's intellectual path in the development of twentieth-century (US-based) international legal scholarship. See M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, (2001) Ch. VI ('Out of Europe: Carl Schmitt, Hans Morgenthau and the Turn to "International Relations"'), esp. at 413–465. A more focused interpretation of the Schmittian shadow on Morgenthau's meanderings, from international law to international relations, can be found in a shorter version of the above, as 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 17.

²³⁶ 'Legal realism satisfies the fundamental principle of philosophical positivism which demands that science deal only with real things which can be verified by observation. In bridging the divide which separates the science of International Law from its object, legal realism brings this stage of indecisive wavering, between disinterested understanding of reality and the attempt to construct an imaginary reality corresponding only to an ideal representation, to a close and makes International Law the object of a real science.' Morgenthau, 'Positivisme mal compris...', *supra* note 233, at 17–18.

much closer to spot a distinctive tendency in the focus of his own legal realism: ‘*le Droit international ne peut pas être compris par un procédé négligeant l’ambiance sociale, à savoir politique qui détermine le contenu des normes, qui influe sur leur validité et dont dépendent le fait et la manière de leur réalisation.*’²³⁷ At the scholarly turning point in his trans-disciplinary career, Morgenthau’s tone has turned from programmatic to truly alarmed, and he goes on to warn the community of international lawyers: ‘... the science of international law is now confronted with the alternative of maintaining the traditional pattern of assumptions, concepts and devices in spite of the teachings of history, or of revising this pattern and trying to reconcile the science of international law and its subject-matter, that is, the rules of international law as they are actually applied.’²³⁸ The conclusion of the drama is but a few years ahead, and in his most famous work we find in turn such famous statements as:

In the international field, it is the subjects of the law themselves that not only legislate for themselves but are also the supreme authority for interpreting and giving concrete meaning to their own legislative enactments. They will naturally interpret and apply the provisions of international law in the light of their particular and divergent conceptions of the national interest. They will naturally marshal them to the support of their particular international policies and will thus destroy whatever restraining power, applicable to all, these rules of international law, despite their vagueness and ambiguity, might have possessed.²³⁹

In short, Morgenthau advocated during his legal career an improvement of the science of international law, so that it would be capable of grasping the ‘political’ in the international field:

*La doctrine dominante manifeste une aversion constante contre la position même du problème du ‘politique’ sur le plan international; et en effet, que deviennent les solutions apparentes, si logiques et harmonieuses mais si imaginaires, auxquelles aboutit la doctrine reçue du Droit international, si avec la notion du ‘politique’ la menace permanente contre la validité et l’efficacité du Droit international entre dans le cadre des considérations théoriques! La théorie réaliste, toutefois, trouve précisément ici le champ préféré de ses investigations.*²⁴⁰

The turning point is formalized in his famous article calling on international law to adopt a functionalist perspective, or else fall into the historical dustbin of idealism.²⁴¹ The perspective for judging international law is, unsurprisingly, that of science, along the lines of ‘positivist philosophy’, and the call is for a reshaping of the language of international law to adapt to its object, to align itself to the reality of international law

²³⁷ ‘International Law cannot be understood by an approach which ignores the social context, that is, the political context, which determines the content of norms, which bears on their validity and upon which both their implementation and the means of their implementation depend.’ *Ibid.*, at 20.

²³⁸ *Ibid.*, at 261.

²³⁹ *Ibid.*, at 270.

²⁴⁰ ‘Mainstream scholarship betrays a permanent dislike of the mere question of “the political” at the international level. And what indeed becomes of the apparent solutions, as imaginary as they are logical and harmonious, which are produced by the accepted doctrine of International Law, if together with the notion of “the political” the constant threat against the validity and effectiveness of International Law enters the theoretical picture! Nevertheless, realist theory is interested in precisely this area for its analysis.’ *Ibid.*, at 20.

²⁴¹ Morgenthau, ‘Positivism, Functionalism’, *supra* note 233.

instead of sticking to an idealistically overly broad embrace reaching out way beyond the '*réalité des normes*'. Not only is the question of the reality of norms — that is, the psycho-physical existence of the Kelsenian 'ought'²⁴² — a theme familiar from what we have seen of Ross' approach, but Morgenthau himself cites the early works of Alf Ross as posing the right question in terms of the reality of 'validity' for the overall legal sciences.²⁴³ But the end result is the *explicit* failure of international law, even from its better Kelsenian construction, to take the necessary step called for by Morgenthau, and its seemingly inescapable absorption in the realm of the political, where little can be said about it except that it is the function of the social, political and moral organization of the world. This, which without too much of a stretch of the imagination could be reconstructed as an expression of the Schmittian *nomos*,²⁴⁴ can in any case be seen as the almost complete loss of any relevance of international law as a normative factor. A long research into the reality of validity or normativity of international law for a reshaping of the scientific language of international law ends up in the abandonment of the question altogether. The question is: Was Ross' enterprise, as far as international law is concerned, preempted by Morgenthau, and is the missing link between legal realism and political realism in Ross, provided by Morgenthau's progressive realization of the failure by international law to embrace the political, that is, its object, its reality? Can something be learned from Morgenthau's theoretical defection for a better understanding of Ross' puzzling twist?

On Morgenthau's side, a sketchy approximation to the evolving framework from legal realism to political realism is that the purpose of legal realism was to highlight the reality of norms, starting from a Kelsenian perspective, which ended up showing the necessary foundation of international law on morals,²⁴⁵ and the equally necessary nature of morals as the product of the political forces at work in international relations, based on a pessimistic philosophy of human behaviour.²⁴⁶ The end result is that international law is a product more than a factor of international politics, and that the normative framework of traditional international law is to be considered an unwarranted exportation into international affairs of a conception of the rule of law as a sheer creation of liberal ideology.²⁴⁷ From there, international law cannot meaningfully exist as the object of scientific observation but must be seen within a larger perspective that does away once and for all with the temptations of idealism on

²⁴² Morgenthau, *La réalité des normes*, *supra* note 233, at 62–63.

²⁴³ *Ibid.*, at 8.

²⁴⁴ For a very enlightening analysis of the Schmittian idea of *nomos* in international law, and its roots in Schmitt's legal and political thought, see the introductory essay by P. Haggemacher, 'L'itinéraire internationaliste de Carl Schmitt', in C. Schmitt, *Le nomos de la Terre dans le droit des gens du jus publicum europaeum*, (traduit par Lilyane Deroche-Gurcel; révisé, présenté et annoté par Peter Haggemacher, 2001) 1 *et seq.*

²⁴⁵ Morgenthau, *La réalité des normes*, *supra* note 233, at 82–83.

²⁴⁶ The desire of man for (potentially unlimited) power, that is, the 'desire to dominate', is the key to the understanding of international politics, because it is the key to the understanding of all social relations. See e.g. Morgenthau, *supra* note 230, at 17–18.

²⁴⁷ H. J. Morgenthau, *Scientific Man v Power Politics* (1947), at 108 *et seq.*, esp. 112–3.

the one side, but also and paradoxically the temptations of ‘scientism’ on the other.²⁴⁸ Retrospectively, then, legal realism seems to be the springboard towards the realm of the political, through the perception of the moral ideology at work at the very heart of traditional international law. This, I submit, might be helpful in understanding what is at stake here: if Morgenthau had said that legal realism vindicated the final trans-disciplinary leap, we would find in this summary sketch something akin to a coherent explanation as to what legal realism and political realism have in common and why they share the same label. Ross’ framework, although similar, bears obviously distinctive traits that call for an approximation to the path from the *Textbook* and *Towards a Realistic Jurisprudence* on to the assertion that pessimism is warranted as to the substantive project of international law. The puzzling similarities and significant differences between Ross and Morgenthau help dramatize the position of Ross as a contributor to international law, because Ross’ evolution seems more difficult to reconstruct than Morgenthau’s; but Morgenthau has turned the spotlight onto the importance of what is actually cast out of the realm of science when adopting realism as a seeing-eye dog for a disabled international law. Before turning back to Alf Ross, I would also like to bring a fellow Scandinavian voice into the conversation to further highlight the puzzling fact that Ross’ statements could have been less puzzling from a Realistic perspective.

D *Lundstedt: Legal Science vs the Ideology of International Law*

I have repeatedly alluded to Lundstedt, not only as sharing (along with Olivecrona) the general bases of Ross’ legal realism (especially Hägerström’s epistemological gospel), but also as having some very personal things to say about international law. A renewed basic reference to the titles of Lundstedt’s works will drive my point closer to home: a lengthy pamphlet already mentioned calls the law of nations a ‘peril’,²⁴⁹ a book drawing parallels between the calamities of domestic and internationalist legal thought evokes the presence of ‘superstition’ in schemes for world peace,²⁵⁰ and finally a shorter and polemical article draws attention to the amount of responsibility that legal science could claim in the fate of nations.²⁵¹ When Lundstedt approached international law, the conclusions of the Swede did not leave much room for the kind of perplexity I am suggesting about Ross’ theoretical endpoint: the science of the law of nations is termed by Lundstedt an ‘empty nothing’, because along realistic lines, it has no object. To set Lundstedt in perspective, the problem as he sees it is that domestic law is polluted by metaphysics in the form of a background ideology expressed in terms of

²⁴⁸ This is the main gist of Morgenthau’s *Scientific Man v Power Politics*. A longer investigation into the meaning of science for Morgenthau would be necessary, but for our purposes we should only note that Morgenthau is the centre of what later on came to be known as the debate between realism and the more truly scientific ‘neo-realism’. See e.g. I. Neumann and O. Waever, *The Future of International Relations* (1997), at 17–18; Ashley, ‘The Poverty of Neorealism’, in R. Keohane (ed.), *Neorealism and its Critics* (1986), at 261–263.

²⁴⁹ A. V. Lundstedt, *The Law of Nations: A Peril to Nations* (1937).

²⁵⁰ Lundstedt, *supra* note 43.

²⁵¹ Lundstedt, *supra* note 1.

an implicit belief in 'material law' and a 'common sense of justice', generally assumed to be above the functioning of the apparatus of the legal system (the 'legal machinery'), whereas common sense as to the normativity of law is in reality the product of the application of sanctions by the court system (which is all fairly close to Ross' own account in *Towards a Realistic Jurisprudence*). From there, when we approach international law, if we look closely, all we will come across is that very 'ideology', a heap of fancy words and linguistic constructions without a real external referent, a general and overwhelming absence of any system of organized sanctions able to give an underlying substance to those very words. This seems just slightly more radical than Ross' own views, but Lundstedt does not stop there, and the paths of polemical jousting with the 'so-called science of the law of nations' converge precisely in the gap between science and politics. This ideological construct called international law is dangerous for its usurpation of the title of legal science: by the very fact that it adopts the guise of law, it fosters what are only political claims (based on interest, convenience, preference, force, etc.) presented as 'legal', giving them a fantastic out-of-this-world legitimacy that can very plainly account for war, domination, destruction and everything that is wrong with international relations. International law serves evil by pretending to be law. And the question of the 'responsibility' of legal science in the fate of the peoples of the earth, as Lundstedt presents it, is highlighted by Scandinavian Legal Realism in that the general defence of science has helped disclose the generally evil cover-up performed by international law. If we lay a Rossian grid on Lundstedt's conclusions, we observe how the reconstruction of international law ends in its critique, in the very Kantian way also adopted by Kelsen: defining the limit of knowledge from the legal perspective has simply cast out international law from the legal realm, so that the point of view of science as critique implies for the sake of science the destruction of a pseudo-scientific discourse which is really non-scientific and politically tainted propaganda. International law is a belief, not a fact.

In the always more savoury style of Professor Lundstedt, we can in a few typical punch-in-the-face styled sentences see how the gap between the perspective of science and international social reality, between legal science and the politics of international law, is bridged by Legal Realism:

*[L]a science du droit des gens est incapable de prouver que ce qu'elle comprend par 'droit international public' est autre chose que l'ordre qui règne parmi les animaux de proie . . . Ce malheureux droit des gens est, en vérité, un fléau de l'humanité. C'est en élevant les intérêts nationaux au rang de droits, et en transformant l'idée de vengeance et de revanche en idées juridiques sublimes, qu'il crée le nationalisme et le chauvinisme. Ces faux concepts de droit sont des forces particulièrement aptes à enflammer et à exciter l'égoïsme et la haine des peuples.*²⁵²

Metaphysics is, like for Ross' more explicitly logical positivist reading, a set of empty

²⁵² "The science of the law of nations is incapable of proving that what it understands by "public international law" is anything more than the "order" which governs animals of prey . . . This unfortunate law of nations is in fact a scourge on humanity. By raising national interests to the level of rights and by transforming the idea of vengeance and revenge into sublime legal notions, it creates nationalism and chauvinism. *These false legal concepts are forces particularly well suited to enflaming and fuelling egoism and the hatred of peoples.* *Ibid.*, at 29 (emphasis in the original).

words; but their permanence has an impact that goes beyond that of a technical use as ‘hollow words’. They are actually everything but ‘hollow’: they are phantasmagoric golems turning against their delusional masters, ideas having an independent impact in the chain of causation through their influence on the evil schemes of politicians. The unscientificity of international law is therefore paradoxically what gives it its ‘reality’, an illegitimate existence that clouds perception and therefore negatively influences foreign policy: ‘*Qu’on veuille donc enfin comprendre que de pareilles stupidités ont les conséquences les plus dangereuses pour le commerce des peuples.*’²⁵³ So that eventually we might understand how the science of international law and a project informing or informed by international law are necessarily linked. The turn to politics for Lundstedt is the automatic consequence of legal realism, because legal realism shows that international law is not only an illusion (‘the “Law of Nations” is only a myth and does not exist’;²⁵⁴ ‘although these legal authorities think they are dealing with international law, they are, as a matter of fact, only dealing with split straws’;²⁵⁵ ‘this so-called law is based only on illusions and is thus devoid of all reality’,²⁵⁶ etc.), but also a *dangerous* illusion since it is obviously value-ridden and biased under the solemn guise of legal objectivity: ‘As far as international affairs are concerned, the world still holds might supreme. This is the simple truth that is *concealed* by the misrepresentation of international law and legal relations as between nations. They do not exist. The law is here *always on the side of the strong.*’²⁵⁷ In contradistinction with Alf Ross, Lundstedt does not stop at the fact that ‘sovereignty’ is the product of metaphysical thinking — which might occasionally hamper the progress of international law and organization²⁵⁸ — he highlights beyond the obvious illusive nature of such a thing the role (essentially ‘*néfaste*’) played by the concept among the rest of international legal chimeras. Here are the clearest policy conclusions reached by thorough legal-realist convictions and methodology: ‘*Ce droit imaginaire est le principal obstacle à la division du travail entre les peuples, et à l’épanouissement d’une économie mondiale susceptible de remplacer, par une prospérité, au moins relative, la misère économique, génératrice d’un prolétariat de chômeurs qui augmente sans cesse.*’²⁵⁹ Lundstedt is attacking international law for contributing to the very opposite of what law is supposed, or is pretending, to do. And this is crucial for the possibility of considering from the realm of science the very idea of a project within, underlying or even constituting international law — metaphysics is not only meaningless, it is deceptive and treacherous because it steals the ideology of justice from domestic law

²⁵³ ‘Can we finally realize that such stupidity has highly dangerous *consequences* for the intercourse among peoples?’ *Ibid.*, at 30 (emphasis added).

²⁵⁴ Lundstedt, *supra* note 43, at 161.

²⁵⁵ *Ibid.*, at 169.

²⁵⁶ *Ibid.*, at 177.

²⁵⁷ *Ibid.*, at 165 (emphasis added).

²⁵⁸ See *TB*, at 45; *CUN*, at 129.

²⁵⁹ ‘This imaginary law is the main obstacle to a division of labour between peoples, and the blossoming of a world economy capable of replacing economic misery, which has produced an endlessly growing unemployed proletariat, with at least relative prosperity.’ Lundstedt, *supra* note 1, at 32.

without the machinery (judges, police, etc.) which actually counterbalances that very ideology at the level of the 'law in action' in the domestic setting.²⁶⁰ International law is purposive, it is ideological to the bone, and, in case the point was not clear enough, Lundstedt leaves the most disturbing expression of his apocalyptic hysteria for the very end: '*Les conceptions juridiques actuellement en vigueur n'ont-elles pas encore fait assez de dégâts ? Si la race blanche continue à construire, pour sa vie de nations civilisées, un monde de conceptions chimériques, et si elle ne se résout pas enfin à regarder en face la réalité sociale de ce monde, elle préparera sa propre destruction et l'avènement d'autres races qui se substitueront à elle.*'²⁶¹ Hence for our purpose the very significant title of Lundstedt's piece: legal science has a responsibility in the fate of nations, and tackling metaphysics in international law is dealing with the political destiny of mankind.²⁶² Since international law fuels war, poverty and worldwide despair, Lundstedt, like Morgenthau, sees the future of world order and peace in political action. On account of the above indictments, it is clear that law is essentially — although to a slightly lesser degree for Lundstedt than for Morgenthau — the product and not the generator of a political community (in this case the international community). For Morgenthau, ultimate (utopian) stable peace and order would come with the construction of a world state;²⁶³ for Lundstedt, the key is the construction of a 'world social spirit'.²⁶⁴

²⁶⁰ This is a central theme in Lundstedt, that links his condemnation of international law and his general attack on domestic jurisprudence. See Lundstedt, *supra* note 43, at 189 *et seq.*

²⁶¹ 'Haven't current legal concepts done enough damage? If the white race continues to build a world of chimeras for the good of its own civilized nations, and if it does not decide to look finally at the social reality of the world, it will pave the way for its own destruction and the advent of other races which will replace it.' Lundstedt, *supra* note 1, at 32.

²⁶² I allow myself here to disregard in this context the racist (under)tone of Lundstedt's warning, in the same way we envisage the possibility of discussing Carl Schmitt's legal contribution while leaving aside his antisemitism and problematic relationship with the National-Socialist establishment. To repeat, the importance of Lundstedt's text lies for this discussion in the link he draws between radical legal realism and an attack on international law as sheer ideology, in a way that contrasts with Alf Ross' own position. This might be a good place to mention that Carl Schmitt seems to have appreciated Lundstedt's *Superstition or Rationality*, from what is said in the review excerpts that appear at the beginning of *The Law of Nations: A Peril to Nations*, *supra* note 249, at 1. Yet, to moderate the labelling effect of truncated (and brutal) excerpts — especially against the backdrop of my disregard for the explanatory elements of personal and professional psychology, sociology, and politics — we can refer to the more nuanced shape that Lundstedt's criticism takes up in *The Law of Nations: A Peril to Nations*. There, Lundstedt, for instance, follows the same underlying line of attack on international legal ideology by indicting the 'stupid dogmas of international law' (and the European democracies' reliance on them) for their contribution to the destruction of German Social-Democracy and the rise of dictatorship in the inter-war period. (*ibid.*, at 25 *et seq.*) Symptomatic of Lundstedt's take on what international law and international legal scholarship are all about, the text drifts openly into political considerations on, for instance, the notion of a collective responsibility of the German people for World War I. This is all accompanied by his characteristic prophetic tone (Lundstedt is very keen, as a politician and Member of the *Riksdag*, to assert the repetitive nature of his warnings). Hence, for instance, the transcript of his own speech in the Swedish Legislature on the question of sanctions at the time of the invasion of Ethiopia (*ibid.*, at 33 *et seq.*).

²⁶³ Morgenthau, *supra* note 230, at 391 *et seq.*

²⁶⁴ Lundstedt, *supra* note 43, at 232 *et seq.*

E McDougal vs Ross, Morgenthau and Lundstedt: Idealism Beyond Realism

I submit that Morgenthau and Lundstedt might have shed some light already on Ross' situation at the brink of the precipice between the *Textbook* and *United Nations*, and that the problem at stake — which hopefully will appear as having more existential significance than merely that of deciphering the academic career of Alf Ross — becomes clearer when Alf Ross' original contribution is set against alternative voices. Before we return to Ross for another try at saving the coherence of his scientific vision, a last character must be brought in to add a final element to the plot: thus enters Myres S. McDougal. The puzzling jump from legal realism to political realism might be better approached if we take a look at Myres McDougal's critique of Morgenthau's vision of the law/politics divide. The gist of McDougal's attack on Morgenthau (criticized jointly with fellow political realist George Kennan), simply stated, is twofold: Morgenthau has not understood the nature of international law, and he has not understood the nature of politics either.²⁶⁵ Something has happened between the call for a complexly realistic notion of law, pushed forward by Morgenthau (and Ross), and the vision defended within a 'political realist' framework. McDougal disparages the 'fashion to minimize both the role that law presently plays in the world power process and the role that, with more effective organization, it could be made to play in maintaining the values of a free, peaceful, and abundant world society'.²⁶⁶

McDougal is himself engaged in a project of critique and reconstruction, and the critical dimension of the enterprise is equally aimed at the destruction of legal positivism and political realism. The way out is to reconstruct legal science on the basis of a reconstruction of the notion of law, just as Ross and Morgenthau thought, but with the idea of moving beyond the stagnating and paradoxical stage of reconstruction as mere critique. McDougal is, and presents himself as, heir to American Legal Realism, and proposes a way towards reconstruction on the basis of the Realists' critical findings in the 1930s.²⁶⁷ It is unnecessary to lay out here in detail the shape of what ended up being known as the 'policy-oriented' or 'process-based'

²⁶⁵ McDougal, 'Law and Power', 46 *AJIL* (1952) 102.

²⁶⁶ *Ibid.*, at 102.

²⁶⁷ See e.g. McDougal and Lasswell, 'Legal Education and Public Policy: Professional Training in the Public Interest', 52 *Yale Law Journal* (1943) 203; McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community', 56 *Yale Law Journal* (1947) 1345–1355. See also Tipson, 'The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity', 14 *Virginia Journal of International Law* (1974), at 542 *et seq.*; Falk, 'McDougal and Feliciano on Law and Minimum World Public Order', reprinted in R. Falk, *Legal Order in a Violent World* (1968) 80. Lissitzyn, 'Book Review: Studies in World Public Order, by Myres McDougal *et al.*', 63 *Columbia Law Review* (1963) 387; B. Rosenthal, *Etude de l'oeuvre de Myres McDougal en matière de droit international public* (1970) 66.

approach,²⁶⁸ or simply the 'New Haven school'.²⁶⁹ The key is that McDougal accepts the basic realist understandings of the workings of the law and the inadequacies of classical legal thought in the United States, largely parallel to the usual criticisms levelled at international legal positivism in the inter-war period. But the way towards reconstruction is built upon the reconceptualization of law, termed by McDougal as the building of a new 'framework of inquiry'²⁷⁰ and by others as a 'shift in paradigm'.²⁷¹ Following up on the critique of political realism, McDougal proposes that the move forward from legal realism as critique is the adoption of policy science to rebuild a science of international law, along very explicitly teleological lines.²⁷² McDougal answers the calls of Morgenthau (in his embrace of politics as the living environment of international law), but by adopting a realistic vision of international law based partly on the methods of 'policy science', and thus denying that the reality of international law might be found in the 'reality of norms' sought for by Morgenthau and Ross. Legal realism is in McDougal's view clearly destructive, and the reconstruction must come from without, not within.²⁷³ The starting point is, however, the notion that everyone up to that moment had misunderstood the nature of law, which gives to the struggle by Morgenthau and Ross to understand the 'reality' of norms partly meaningless and hopeless undertones, since the reality of law is deemed

According to Professor Richard Falk, we can understand the thrust of McDougal's jurisprudence as an effort 'to go beyond criticism to develop a method that promises to make the insights of legal realism operational in a systematic way' (Falk, Book review of *Studies in World Public Order*, by Myres S. McDougal and Associates, 10 *American Journal of Comparative Law* (1961) 297, at 267 (emphasis in the original).

²⁶⁸ For a good presentation of the position of a process/policy-based approach in international law as an alternative to traditional rule/norm-based approaches see R. Higgins, *Problems and Process: International Law and How We Use It*, (1994), at 1–12.

²⁶⁹ Suzuki, 'The New Haven School of International Law: An Invitation to Policy-Oriented Jurisprudence', 1 *Yale Studies in World Public Order* (1974) 1–48. A good account of the place to be given to the New Haven School in the historical panorama of US jurisprudence is given by Duxbury, *supra* note 9, at 161–203. The central references within the extremely prolific literature produced by McDougal and his closest disciples are: M. S. McDougal and H. D. Lasswell, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (1991), Myres S. McDougal and associates, *Studies in World Public Order* (1960), M. S. McDougal, H. D. Lasswell and I. A. Vlastic, *Law and Public Order in Space* (1963), M. S. McDougal and W. T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Seas* (1967), M. S. McDougal and W. M. Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community* (1981).

²⁷⁰ McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry', 4 *Journal of Conflict Resolution* (1960) 337 *et seq.*

²⁷¹ See R. Falk, *Revitalizing International Law* (1989) 9. A good picture of Richard Falk's nuanced appraisal of the McDougalian revolution is given in his 'McDougal and Feliciano on Law and Minimum World Public Order', *supra* note 267, at 80 *et seq.*

²⁷² McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community', *supra* note 267, 1345 *et seq.*; McDougal, 'The Relation of Law to Social Process: Trends in Theories about Law', 37 *University of Pittsburgh Law Review* (1976) 465.

²⁷³ See e.g. McDougal, 'Fuller v The American Legal Realists: An Intervention', 50 *Yale Law Journal* (1941) 827 *et seq.* According to Duxbury, 'the policy-oriented approach to jurisprudence may be said to constitute a fundamental step onwards from legal realism' (*supra* note 9, at 200). But see the more complex appreciation of the New Haven project's relationship to legal realism suggested by Duxbury in the following pages, and particularly his claim that McDougal might not have really (contrary to what he might have thought) participated in the pragmatist legacy.

by McDougal much broader than that accepted by the framework that led Ross (that is, his adherence to the concept of law ‘handed down by tradition’) to see the only reality of law in the judge’s decision.

Briefly presented, a realistic approach to international law takes thus the shape of a reconstruction of law as process, on the basis of the realist insight that the key to be described and understood is the process of legal decision; but the legal process is expanded to cover a much broader area, in line with the realistic description of validity as a matter of degree and law as an influential part of widespread decision-making mechanisms in international affairs above and across state boundaries. More importantly still, McDougal feels compelled, on the basis of a realistic outlook on world politics, to advance the notion that ideals and moral goals are not mere abstractions but guiding forces that have to be reckoned with in any realistic theory of the international legal process, which is then not isolated from the rest of the international reality, and whose ‘validity’ is thus reappraised as the retrospective correspondence of the policy/process with social goals. McDougal embraces politics on the basis of a broader legal viewpoint, responding to Morgenthau’s turn to the embrace of international law by politics, and turning back-to-front the law/morals connection found in Morgenthau with what has been called a ‘*totalitarisme à rebours*’.²⁷⁴ A very significant signal comes from McDougal when he chooses as an epigram to his general course at the Hague Academy a quote from a famous article on international law by one of the allegedly closeted metaphysicians, Roscoe Pound, target of both Alf Ross and his semi-fellow American counterparts.²⁷⁵ We do not need to drown any deeper in the New Haven project (and especially its very problematic methodological tricks and sometimes blatant ideological biases, highlighted by most unsympathetic critics) for the purposes of the present discussion. What do Lundstedt, Morgenthau and McDougal say about the gap between the science of international law and the project of international law, between international law and international politics, between legal realism and political realism, between themselves and Alf Ross? What help do we get from these scattered quotes in assessing the contribution made by Alf Ross to international law?

F Realism, the Ambiguous Nature of International Law, and John Austin

A first observation stemming from the description just attempted of the contrast between Ross and alternative Realist voices is that since realism in its critical mode

²⁷⁴ Rosenthal, *supra* note 267, at 41. This is not the place to expand on the criticisms addressed to McDougal and his disciples, but we need to mention that the centrality of McDougal in US international legal scholarship of the immediate post-war brought with it a flurry of hostile responses on both the ideological and the methodological fronts. Graphic examples could be here e.g. Meyrowitz, ‘Droit international et “policy science”: Sur une thèse française consacrée à la doctrine de McDougal’, 97 *Journal de droit international et de législation comparée* (1970), at 902–906 or Fitzmaurice, ‘Vae Victis or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It?’, 65 *AJIL* (1971) 358.

²⁷⁵ McDougal, ‘International Law, Power and Policy: A Contemporary Conception’, 132 *RdC* (1953) 137.

means sorting out the facts, it automatically means drawing a line between facts and ideas, and taking a stand on the relationship between science as facts, and ideology (or metaphysics, or superstition) as the disguising of ideas as facts.²⁷⁶ This means also adhering to (pre)conceptions about the nature of 'facts'. If we take a look back at symptomatic conversations between legal theorists across the century, we could see that Ross labels positivism, natural law, the free law movement, Gurvitch, Kelsen and the Americans as generally unrealistic; the American Legal Realists attack sociological jurisprudence as well as dominant conceptualism as unrealistic; sociological jurisprudence and the free law movement criticize the American Legal Realists as lacking realism; McDougal criticizes Morgenthau for his lack of realism; and eventually the pragmatist wave coming after McDougal in the United States attacks or dismisses him for his lack of realism, amongst many other things. The call for Realism is before anything else a critical move in terms of discrediting the adversary, and in Ross this is patently clear. The fact that everybody and anybody, coming from any type of perspective uses the banner of realism to attack the adversary, leads to the notion that realism as such is, to hijack Olivecrona's idea here, a 'hollow word', to be filled, depending on the adopted framework, with an underlying adherence to functionalism, Deweyan pragmatism, empiricism or something else. Importantly enough, the reaction of sociological jurisprudence and friendly supporters in the American Legal Realist controversy of the 1930s was to discredit the 'neo-realists' as being unrealistic precisely because they dismissed the 'ought' aspect of the law, or the Poundian 'ideal' element that is responsible for the specificity of the legal phenomenon. McDougal's call for a teleological approach to law, where the 'legal' is determined partly by the orientation towards a moral goal postulated to be 'human dignity', is designed as a way to propose a theory of international law on the basis of the findings of the Realists about the nature of the legal process. As such, then, the call for realism can mean anything, since it means precisely and mainly 'sorting out the facts' before 'getting back to the facts': it is slightly different from Ross to Morgenthau and from Ross to the North Americans, and it is widely different from, say, Ross to Pound, who actually reflected on the 'call for a realist jurisprudence'.²⁷⁷ In the words of the great Georges Scelle, '[i]l n'en est pas qui n'aient à coeur d'être avant tout réalistes et il n'y a aucune originalité à vouloir l'être. Il se trouve seulement que ce qui constitue pour les uns une réalité n'est pour les autres que fiction ou construction idéologique.'²⁷⁸ That does not mean that a quest for the substance of 'realism' is meaningless; it precisely means

²⁷⁶ Obviously, but nonetheless worthy of explicit mention, 'ideology' is here used in a very loose non-technical (non-Marxist, for instance) sense, and refers mainly to the flip side of science as defined by the (rhetorical) attributes of neutrality, objectivity and political independence. This is the pejorative and essentially negative meaning attached to the word 'ideological' by both the Scandinavians and Kelsen (see e.g. Kelsen, *Introduction to the Problems of Legal Theory*, *supra* note 127, at 25, and also 'Droit et Etat du point de vue d'une théorie pure', *supra* note 127, at 22).

²⁷⁷ Pound, 'The Call for a Realist Jurisprudence', 44 *Harvard Law Review* (1931) 697.

²⁷⁸ 'At heart, everybody wishes to be realist above all else, and there is no originality in wishing to be so. It is just that what constitutes *reality* for some is for others a *fiction* or an ideological construct.' G. Scelle, *Précis de droit des gens: Principes et systématique*, Première partie (1932) ix.

that the critical nature of the call for realism and its destructive drive should lead us to understand the Realists in the broader political, sociological, psychological and/or disciplinary context. For our purposes, the chosen viewpoint is the contribution of a Realist to international law, with the many meanings that this conveys.

This leads us back to the development of international law as we know it today and the question of the link between Legal Realism and Political Realism, and more particularly the possibility that legal realism might lead the inquirer naturally into the frighteningly apologetic realm of ever-colliding billiard balls, to use Arnold Wolfers' image. Ross naturally does not say that his realism is the only brand of realism, since it goes without saying that, once realism is understood as the strict adherence to ontological realism, there is only one realism, because that brand of realism says precisely that there is only one kind of reality. The gap between law and politics, legal science and political science (Morgenthau)/policy science (McDougal)/peace activism (Lundstedt?) is bridged — from McDougal's perspective of a value-added constructive legal realism — by the position taken by legal realism as regards the role of ideas/ideology in the substance of the international legal world. With Ross, the gap is obvious and puzzling because the notion that ideas could have a 'function' is deprived of pertinence by a philosophical framework that rids non-factual concepts of any relevance, if not ultimately labelling them as 'hollow words'. Ideas do not have an independent role, which is another way of saying that they are not facts, which is what the other three people here seem to be saying in one way or the other when turning away from science and into politics. Science in those three served to legitimate the turn to politics; with Ross, the perspective of *Towards a Realistic Jurisprudence* and the *Textbook* did not seem to be able to tell us anything about the perspective of *United Nations: Peace and Progress*, but that later framework does not seem to be able to grasp the perspective of 1947 either. Ross legitimates his shift by asserting the gap, and that might be something we can garner from the obsession about bridging it that I just cast on the three other legal realists.

McDougal seems to be the only realist who managed to actually construct anything while claiming the heritage of legal realism, which might prompt us again to point to the essential differences between American Legal Realism and Scandinavian Legal Realism, in particular the impossibility of reconciling teleological thinking with Vienna-Circle-style logical positivism, while deriving it from the Deweyan pragmatism invoked by McDougal. But the three people examined above are made to provide what would be a short cut between the *Textbook* and *United Nations: Peace and Progress*, in that they do in their own peculiar ways give some meaning to the idea of abandoning the 'juridical point of view'. Their relevance lies therefore precisely in the fact that Alf Ross does not say anything of the kind. The confrontation serves to strengthen the idiosyncratic position of Alf Ross and shows that: (1) the Realist reconstruction of international law at the time of the *Textbook* is complete as a reconstruction of international law in the strict terms of legal science; (2) there is indeed a hiatus between the *Textbook* and *United Nations*, that is coherent from the 1947 perspective; and (3) the incoherence between 1947 and 1962 is not a contradiction, but a lack of continuity in perspective. This is conceivable, for instance,

through the fact that Morgenthau did not reject the conceptually legal nature of international law, but dismissed excessively confident accounts of its relevance in international politics.

And this is where our meandering investigation bumps back into Ross' writing. The crux of the problem can be recast in a more familiar mould, once we focus on the continuity of core assumptions between political and legal perspectives, beyond the disciplinary/methodological fracture displayed by Morgenthau and Ross. The question becomes: If we see Morgenthau as not relinquishing the legal nature of international law across the disciplinary divide (whatever his own peculiar conception of law), are we sure that Ross' perception of international law as law (apparently a key basis for any switch of opinion on its role) is as firmly seated? I would like to end by suggesting how *On Law and Justice* might actually do justice to Ross' eventual pessimism about international law as law. We need therefore to move back into the Rossian world and make sense of it from within, after problematizing it from without.

The absence of a bridge over the gap was vindicated by the idea that the gap at the time of the *Textbook* and *Towards a Realistic Jurisprudence* was crucial to the understanding of what realism meant at that point. Whether international law as a discipline is relevant or not is not a question overlooked by realistic jurisprudence, it is simply rejected. Realistic jurisprudence deals with legal language as a scientific language, so that its only purpose is to show that international law as a scientific language is possible. Ross' conclusion to a discussion lasting no more than a few paragraphs is that international law can be talked about from the perspective of law, whatever we might otherwise think of the kinship between domestic law and international law.²⁷⁹ Moreover, Ross distinguishes the question of the historical situation of international law, that is, the overall shape currently assumed by international law, from the concept of international law, the latter being the focus of investigation.²⁸⁰ In my terms, science and project can be and should be distinguished. At the time of *On Law and Justice*, the focus has changed, because 'norms' are the key to be explained here: the law is described as a binary phenomenon, composed of both factual experiences in reality and abstract norms, the norms of valid law being the ones that are operative in the judge's mind at the time of adjudicating. The norms are conceptualized in a very Kelsenian fashion as frames for the interpretation of facts, along the lines of the by now famous chess analogy.²⁸¹ Ross then bumps into the objection he has levelled against the Americans (is the law what happens in the moment of adjudication or does it exist before that?), and answers by a new sleight of hand, saying mainly that yes, the construction is circular, but there is by necessity no starting-point in the legal system and, after all, validity is ascribed to the system in its entirety.²⁸² At the end of the day, the disarticulation of the law as a complex phenomenon (involving norms as directives on the one side, and the problem of the

²⁷⁹ *TB*, at 51.

²⁸⁰ *Ibid.*, 54.

²⁸¹ *LJ*, at 11 *et seq.*

²⁸² *Ibid.*, 36.

law in action, as psycho-physical counterpart to the ‘abstract norms’ on the other side), and the subsequent disarticulation of the legal sciences into three different genres of inquiry (with three types of object, or three different perspectives on reality) ends up defining domestic law as the model of the legal system, and international law as a ‘primitive’ type of law, lacking what is really the core of law: sanctions.²⁸³

The outlook of his *Towards a Realistic Jurisprudence* prompted Ross to say that the question of whether international law is law was a moot question, merely a question of classification without real importance. But he also said that international law was clearly different from domestic law, and should normally be pigeonholed, among the possible classifications of normative phenomena, as ‘conventional morality’, although international law is clearly not morals, because there are authoritatively laid down rules; eventually ‘it would not be right to characterize International Law as ‘conventional morality’ because it is undoubtedly ‘felt to be valid as law’.²⁸⁴ In any case, Ross says, this has no bearing on the ‘concept of international law’, it merely refers to the current historical state of international law.²⁸⁵ This slightly confusing stance, although perfectly in tune with the line of *Towards a Realistic Jurisprudence*, gets corrected within the framework of the later perspective, by a shift of focus. The result is, after much discussion of the ways in which legal phenomena and norms should be understood, that law is actually what courts do, or rather what they will probably do (to be distinguished in Ross’ opinion from the American Legal Realist predictive theory of law),²⁸⁶ and in international law, it just happens that courts do very little and with no sanction. In terms of the conceptual approach to law (as opposed to its factual reality), the question of sanctions has, just like in the slow development of Kelsen’s own approach, come to be central, and international law is again downgraded, because it becomes key that ‘the law consists of rules concerning the exercise of force’.²⁸⁷ The validity problem is solved essentially in terms of a reconceptualization of the norm as a Kelsenian frame of interpretation, but with the replacement of the ontologically separate Kelsenian plane of validity-generation with the facts of court-activity, so that legal science is essentially descriptive of what courts will (probably) do. *On Law and Justice* definitely pushes legal science in the descriptive direction, by advancing a ‘probabilistic’ theory of validity that even prevents the lawyer from meaningfully saying that a court decision is wrong (that would only mean: there is a high probability that the courts in the future will not follow that decision).²⁸⁸ From there, it would not really be surprising that Ross no longer sees a real point in addressing international law from a ‘juridical point of view’ when observing the United Nations.

The conclusion would be, not that the *Textbook* was actually a mistake and an exercise in futile legal dogmatics and petty quibbling with international lawyers, but

²⁸³ *Ibid.*, 60.

²⁸⁴ TB, 54–5.

²⁸⁵ *Ibid.*, 54.

²⁸⁶ LJ, 45.

²⁸⁷ *Ibid.*, 59.

²⁸⁸ *Ibid.*, 50.

again that it was an exercise in scientific clarification of the language of international law. The language of law in general is left almost untouched by Alf Ross, despite heavy deconstruction of its meaning, and the language of international law could both remain the same, and be largely irrelevant. The key transition happened from the moment when in the *Textbook* Ross distinguished the 'concept of international law' from the present state of development of international law (characterized by weak institutionalization and poor enforcement), to the moment when in *On Law and Justice* norms were pushed to the foreground as rules about the application of monopolized public force. The *Textbook's* distinction simply made the *Textbook* coherent and meaningful in the framework of legal realism. That law can be the object of legal science depends on what one means by 'law', and 'science'; the late developments in Ross' framework have shifted the understanding of both of them. It makes no sense to submit international law to science. Ross has not turned into Kissinger, although he might have been a closeted Kissinger all his life. Ross is simply saying: it makes no sense to talk about international law the way we talk about law. That is what Lundstedt might help us understand, because he is saying something different: not that it makes little sense to use the same method, but that there is precisely no scientific object, and that this absence is constitutive of the existence of international law as a phenomenon. International law is a lie. Ross has not abandoned the idea that there is a strong connection between law and international law. The key to the riddle, if we look for it in the substance of Ross' evolving framework, lies therefore in the astonishingly central, and scandalously banal, question of whether international law is really law. That is, to make sense of Ross' dealings with international law, we would need to step back and think whether Ross ever made up his mind on the ambiguous legal nature of international law. If we look at Ross' last jurisprudential contribution, only a few lines are dedicated to international law within the framework of his general theory of norms as directives:

International Law governs the society of states. There exist institutional procedures both for the establishment of general norms and for the judicial decision of disputes. On our definition of law, therefore, international law is indeed law. But it has like the laws of associations, no institutional provisions for the exacting of sanctions by physical force. In the society of states there is, under present conditions, no monopoly of force; sanctions are therefore non-violent... In modern times there have been attempts, albeit unsuccessful, to organize disapproval, boycott and even the use of military force through the law of world organization. If it should eventually be the case that there evolved an effective disarmament of individual states and the concentration of the instruments of force as the monopoly of a supranational agency, international law would no longer exist. For under these conditions a world state would have been created, and the laws which govern the relations of formerly sovereign states would constitute *municipal law*, the law of the world state.²⁸⁹

Again, Ross wants to say that international law is law, which methodologically would justify his earlier *Textbook*, but his distinction of types of law according to the criterion of sanctions — municipal law being the model, as opposed to the 'law of associations'

²⁸⁹ DN, at 95.

and international law — allows him (explicitly) to say nothing more about it, and (implicitly) to leave us wondering whether the reconstruction of international law is not simply and precisely the assertion of the ‘gap’ and a disciplinary expression of the ambiguous nature of international legal phenomena.

As it turns out, the shift to politics highlights the overall compulsively apolitical character of Ross’ brand of legal realism, which leads him to say that international law is some kind of hybrid system, not really legal, and closer to morals, essentially devoid of the essential character of law: sanction by the state. In other words, Ross, as the possible adept of a grand scheme of reconstruction in international law, has led international law, after half a century of struggle to free the discipline from the tight grip of legal positivism, back into the arms of John Austin, who essentially triggered the century-long disciplinary war by labelling international law ‘not properly so called’, being in truth nothing more than ‘positive morality’.²⁹⁰ And unlike Morgenthau’s call for legal realism, Ross’ adherence to philosophical realism prevents him from saying anything else about morals, a quintessentially unscientific object, beyond the relationship between legal doctrines and facts. So the paradoxical meaning of the jump to a realistic vision of international politics might be only that we actually *need* to step out of science to talk about international law. Perhaps after all these long detours, this might be yet another unsurprising conclusion, since Ross mentioned John Austin as one of the initiators of jurisprudential realism.²⁹¹ So Ross helps us see that any kind of reconstructive move in international law, that is, any type of theoretical development beyond the plastic surface inherited from the positivist tradition (the foundations of which the realist critique has served to clarify and un-metaphysicize) is necessarily idealistic in its own mirror definition given to it by realism, thus echoing what E. H. Carr said of the relationship between realism and idealism in general: ‘Immature thought is predominantly purposive and utopian. Thought which rejects purpose altogether is the thought of old age. Mature thought combines purpose with observation and analysis. Utopian and reality are thus the two facets of political science. Sound political thought and sound political life will be found only where both have their place.’²⁹² Ross’ step out of the realm of science into the realm of politics seems to serve to highlight that in many ways, the realism infused by science, if not followed by a relinquishment of that very scientific outlook, is at the service of the (disciplinary) *status quo*.²⁹³ Ross would certainly not have denied the gist of the observation, since it is a restatement of the very steps of the realistic enterprise. But we should certainly ask whether the adoption of the framework itself is a political

²⁹⁰ J. Austin, *The Province of Jurisprudence Determined* (W. E. Rumble ed., 1995) 112 and 124.

²⁹¹ *LJ*, at ix.

²⁹² Carr, *supra* note 2, at 10.

²⁹³ In the words of E. H. Carr, ‘[s]uch an attitude, though advocated in the name of “objective” thought, may no doubt be carried to a point where it results in the sterilization of thought and the negation of action’ (*ibid.*). On the question of the perverse effects of empiricism on positivism’s servility to ‘science’ and the fetishism of ‘facts’, the *locus classicus* might be the devastating critique of Vienna Circle positivism provided by Max Horkheimer in ‘The Latest Attack on Metaphysics’, reprinted in M. Horkheimer, *Critical Theory: Selected Essays* (1992) 132.

stance, and the fetishism of science, especially in its meta-theoretical version, is as political as the project of international law itself in the eyes of Morgenthau. This is perhaps the most valuable question suggested by a reading of Ross' realism in light of Morgenthau's treason, Lundstedt's hysteria and McDougal's withering new gospel for the salvation of international law. The still lingering questioning and puzzlement will help to slide into some conclusive remarks.

5 Conclusion: on Dualisms and the Existential Drama of the International Lawyer

'The reconstruction of the history of theories proceeds like a dialogue in which one asks a question, seeks to comprehend whether this question is meaningful to the other, listens and reformulates the answer of the other, and in light of the answer rearticulates one's original position.'²⁹⁴ The struggle to dig out the deeper coherence of Alf Ross' project for international law, and its tormented links with his vision for legal studies in general might be in itself the first element of answer to such instinctive concluding questions as: What does Alf Ross tell us? What is the place of Alf Ross in the theoretical history of twentieth-century European international law? Why would it be important to read or reread Ross at all? The dialogue across time and space with Alf Ross might for starters simply tell us something about the nature, function and place of such a dialogue within the discipline of international law, especially as we come out of this laborious debate with the Dane still unable to decide for ourselves if we really have understood him, or he has understood our (or at least my) obsessive questioning. The intertwined questions here would be: Did I ask the right questions? How do I know if those were the right questions? What is it that we would be looking for when questioning somebody like Alf Ross? I would like to conclude this contribution by suggesting that these questions are meaningful in many ways for the long-condemned, though never really dead, discipline of international law.

From our contemporary perspective, an evaluation of Ross' contribution might start with an overall appreciation of Scandinavian Realism's trademark reliance on science, its promotion of something called science based on a vague model supposedly followed by natural sciences, or what some have chosen to depict as the Scandinavians' 'religion of science'.²⁹⁵ This could take the form of a radical critique (that is, 'to the roots') of scientism, as another example of the inherent excesses implied in all 'isms';²⁹⁶ or else we could engage in a more specific undermining of the assumed god-eye epistemological position of science in its opposition to something called

²⁹⁴ S. Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (1986), at x.

²⁹⁵ Bjarup, *supra* note 171, at 39. Bjarup's harshest criticisms of Hägerström and his closest 'henchmen' (Lundstedt and Olivecrona) deal with the belief, infused by Hägerström's messianic stance, according to which his is the only theoretical construction that does not rest on convictions of any kind (hence the accusation addressed to Hägerström of being a 'philosophical imperialist in analytical disguise', *ibid.*, at 40).

²⁹⁶ See e.g. T. Sorell, *Scientism: Philosophy and the Infatuation with Science* (1991) (especially Ch. 1 on Scientism and 'Scientific Empiricism'). And see also Horkheimer, *supra* note 293.

‘politics’ or ideology, recapturing the project of science as a value-laden political enterprise of its own;²⁹⁷ or we could conjure up Kelsen himself to highlight the fact that the project of a scientific discipline of law is always guided by a broader vision of the place of law in society, and a conscious or unconscious notion of what is at stake in maintaining law away from values;²⁹⁸ or, more simply, we could confront the idea of a detached science of law with the charge that the language of legal institutions is necessarily a reflection and a product of the mindset and priorities of successive generations of legal élites.²⁹⁹ But again, this would seem appropriate in dealing with a contemporary colleague suddenly gone astray. The intuitive reaction, when stepping back and considering the work carried out by Ross between 40 and 70 years ago, is that of puzzlement, incomprehension, maybe annoyance at best, disinterest at worst. When dialoguing with the ghost of Alf Ross, we cannot but ask him questions that are always, to a greater or lesser extent, rooted in our time.³⁰⁰ The *Zeitgeist* would dictate questions like: What can Alf Ross tell a government legal adviser who handles drafts of international labour conventions, or a UNICEF field officer who negotiates guidelines for the recruitment of minors in combat units, or an expert on the WTO appellate body who would like to strike a balance between the survival of sea turtles and the well-being of universal free trade? The immediate feeling that we need to reframe the question in the light of Ross’ imagined expression, is arguably the key moment. Summoning the writings of past scholars always involves a good deal of distortion by extraction, but the fact is that the texts remain, something is happening in the exchange when we shout our questions back at Alf Ross. As we have witnessed, the dialogue is difficult, and the elements of doctrinal innovation found here and there in Ross’ contribution — which we could naturally be inclined to focus on — seem to be but the symptoms, never the core, of Ross’ message. Something must have happened between Ross and us for the feeling to seem obvious that a general theoretical account of the international legal system, based on a thoroughly scientific notion of law, is unneeded, or ludicrous, or impossible, or bizarre. What seems generally to be a truism, but appears in all its complexity in such a debate around/about/with Ross, is the notion that the process of looking at the past of the discipline tells us a lot about the

²⁹⁷ See generally Ashley, *supra* note 248.

²⁹⁸ See in particular Kelsen’s polemical exchanges with conservative figures of German constitutional law in the inter-war period. His passionate attack on Carl Schmitt, in H. Kelsen, *Wer soll der Hüter der Verfassung sein?* (1931) (I consulted the Spanish translation, as *¿Quién debe ser el defensor de la Constitución?*, (traducción y notas por R. J. Brie; estudio preliminar de G. Gasio), (1995)). See also Kelsen’s debunking of Rudolf Smend’s theory of the state in H. Kelsen, *Der Staat als Integration: eine prinzipielle Auseinandersetzung* (1930) (translated into Spanish as *El Estado como integración: Una controversia de principio* (traducción y estudio preliminar de J. A. García Amado), (1997)). Carl Schmitt’s endless chastising of Kelsen can be found in C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934) (translated as *Sobre los tres modos de pensar la ciencia jurídica* (estudio preliminar, traducción y notas de M. Herrero) (1996)); and especially C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (transl. G. Schwab, 1986).

²⁹⁹ See e.g. the place reserved for ‘juridical figures’ by Michael Hardt and Antonio Negri in the very first pages of *Empire* (2000), at 3–21.

³⁰⁰ A good starting point on this issue can be found in Rorty, ‘The Historiography of Philosophy: Four Genres’, in R. Rorty, J. B. Schneewind, and Q. Skinner (eds), *Philosophy in History* (1984), at 49–75.

shape, identity, structure and dilemmas of the field today. A richer picture could be sketched with the help of an account of the sociological/professional/human dimension of the field, through the examination of the place Ross occupies in the genealogical tree of professionally/sociologically/psychologically situated international lawyers.³⁰¹ What is at stake here, however, is the lesson that one can at least arguably draw from a confrontation with theoretical texts toward which one feels a varied mix of sympathy, incredulity and amusement, but which still form part in many complicated ways of the inherited architectural landscape in international legal scholarship.

Ross' project of systematic coherence under the banner of science is only one part of the picture, and as we start to lose sight of that very coherence in the later steps of the enterprise, we perhaps start to feel more at home. The other part of the picture might be a broader view of the multi-dimensional eclecticism that grows in Ross' jurisprudence, and the later disjunction between the scientific project of law and the candid confrontation with raw politics. In retrospective, we find in Ross disciplinary diversification (legal science, legal politics, legal sociology), the infusion of legal studies with shades of interdisciplinarity (a little bit of sociology, a little bit of psychology, a little bit of philosophy of language), and eventually a disciplinary division of labour through a Kantian critique of scientific knowledge (law/language vs politics/action). The feel of the synchronized broader picture could be that of post-war US-style pragmatism in international law; that is, a brand of international law that does not obsess with theoretical foundations, yet assumes the rejection of legal positivism and policy-science, or any other imperialistic method, for the sake of practical case-by-case adaptation to the needs of the world out there.³⁰² But the discussion of both Ross-the-legal-realist and Ross-the-political-realist should offer some evidence to the effect that Ross is not, either consciously or in a plausible reconstructed way, a European counterpart to US pragmatism, in the very same way that he was not an exact counterpart to the Legal Realists of the New World. The main

³⁰¹ For the US part of the disciplinary genealogical tree, see in particular recent pieces by Professor David W. Kennedy: 'When Renewal Repeats: Thinking against the Box', 32 *New York University Journal of International Law and Policy*, (2000) 335; 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9, esp. at 17–37; or 'The International Style in Postwar Law and Policy', 1994 *Utah Law Review* (1994) 7.

³⁰² See also Martti Koskenniemi's account of the roots of the 'instrumentalist' drive in US-based international law in the post-war period, *supra* note 235, at 474 *et seq.* A leading figure like Oscar Schachter gives a good approximation to the ambiguously eclectic pragmatic mode: 'It [i.e. international law] is in essence a system based on a set of rules and obligations. They must in some degree be binding, that is, the rules must be accepted as a means of independent control that effectively limits the conduct of the entities subject to the law. To that degree, law must be independent from politics. . . [but i]t is more than a given body of rules and obligations. It involves purposive activities undertaken by governments, directed to a series of social ends. These activities are conditioned and limited by constraints on the voluntary choices of the government — constraints related to factors of power, resources, ideology, felt needs. Nor can we overlook the less tangible realm of ideas and ideals that both reflect and influence the demands of people and the conducts of governments. No account of the role of law can be adequate without considering the impact of ideals of peace and security, national identity, self-determination and social justice.' (O. Schachter, *International Law in Theory and Practice* (1991), at 2–3.).

concerns decipherable in his work point too obviously in another direction. But clearly, the question is still: What lies in the time gap between the Dane and us, or how do we bridge it?

The confrontation of Alf Ross with the roots of mainstream American instrumentalist international law serves somehow to highlight the important fact that the Dane embodies in his trajectory the struggle with the fundamental problems grounding the discipline, to which the pragmatic/instrumentalist stance gives a particular type of answer, predetermined by the previous McDougalian attempt at a definitive solution. As a consequence of that, Ross also highlights, through his dealings with international law on the basis of a reappraisal of the concept of law as 'handed down by tradition', that our understanding of international law is grounded in history, a history of theoretical struggle. Moreover, his self-presentation as a philosopher astride two worlds, condemning European continental legal tradition and seeking a dialogue with the North Americans, puts on the table the important question of the heterogeneous nature of the historical roots of North-Western international law. That is, there exists cultural dialogue and dissension between the old and the new worlds within the centre of international legal production and domination in the twentieth century. Approaching Alf Ross serves not only to highlight his idiosyncratic position, but serves as a reminder, both from within the substance of Ross' jurisprudence and from Alf Ross' general enterprise, that intense (and fragmented) theoretical efforts and struggles permeate the story of international law. Moreover, the uneasy manoeuvring witnessed in Ross to find a way to get a hold of international law serves to sketch, exemplify, highlight the pervasive feeling of crisis and doom that lies at the heart of the field, punctuated by the recurrent return of the living dead in the person of John Austin. Because Alf Ross is not really an 'international lawyer', the deployment of a theoretical apparatus threatening enough to force us to follow him until he reaches his mixed conclusions about international law, is important for the brutality of his message concerning the many-sided, many-layered, many-shaped presence of dualisms at the heart of the discipline, as well as for the meaning of efforts still witnessed today to deny them, or solve them, once and for all.

Since Kelsen, lawyers have looked for professional identity in a middle-ground between that which is sociological description (of what works) and that which is moral speculation (of what would be good). This is not because lawyers would have dismissed sociology or ethics as unworthy enterprises but because neither one or the other is able to answer the question that lawyers are called upon to answer; namely the question about (valid) law.³⁰³

Taken in isolation, Alf Ross seems, at least at some point in time, both in agreement with, and personally impervious to, Professor Koskenniemi's statement. Thus Ross' meandering path, as it uncovers a chain of dualisms, paradoxes, dilemmas and contradictions, might serve in retrospect to lay bare the problematic essence of international law and its impact on the existential drama of the international lawyer. More contemporary discussions around the general bipolarity of the both underlying

³⁰³ Koskenniemi, *supra* note 235, at 494.

and overarching structure of international legal argument,³⁰⁴ giving rise to a disclosure of the international lawyer's dilemmas in its relationship to more explicit expressions of political power,³⁰⁵ find in Ross a predecessor for their diagnosis (though not their possible attitude toward the disease). The endless repetition of the too familiar dyads science/politics, objectivity/subjectivism, law/morals, facts/values and the like, as well as the equally familiar tension between language and 'reality', or even the ambiguous stance of international law between law and morals, all these images left in the fabric of legal imagination seem to project themselves onto the professional existence of the international lawyer in terms of a familiar dilemma between relevance and autonomy.³⁰⁶ Just as the apologetic side of international legal discourse was destined to describe the whims of the sovereign without ever being able to guide them (the 'utopian' dimension of international law as an autonomous discourse), the existential need for 'relevance' is for the international lawyer a temptation to speak to power, speak of power, speak power.

Alf Ross — in his initially scandalously marginal positioning in the spectrum described above, and then in his careless abandonment of international law — reminds us that the inherited structures of international legal discourse are indeed necessarily unstable; but he also invites us — by his now perceived blunt confrontation of international law as an outsider to the field's debating etiquette — to remember that those structures did not fall from the sky yesterday and, moreover, that they were at some point in time intensely discussed and at the same time silently shaped. Furthermore, his presentation of a stark bifurcation between, on the one hand, the risk of diluting the autonomy of international law as a platform by transforming it into a science and, on the other hand, the temptation to deny the international lawyer any existence by denying him any relevance, reminds us that something is at stake in any project for international law which does not face the dilemma. The confrontation between Alf Ross' style and the likes of Morgenthau and Lundstedt should speak in a shrill voice to the situation of international lawyers of today; the fact that the tragic tone of their pleas and accusations did not find any response might suggest that, from their perspective, we have all slipped into forgetfulness, carelessness, shallowness and eventually oblivion. Pop international lawyers of today might be unaware of the cloud of scorn that hovers over them, as the spirits of Ross, Morgenthau and Lundstedt gasp at their oblivious and naive activities

³⁰⁴ The classics are M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), and D. Kennedy, *International Legal Structures* (1987). See also the early and important Kennedy, 'Theses about International Law Discourse', 23 *German Yearbook of International Law* (1980) 353. See also 'The Sources of International Law', 2 *American University Journal of International Law and Policy* (1987) 1, 'Sources of International Law', 19 *Thesaurus Acroasium* (1992) 141, at 172 *et seq.*, 'When Renewal Repeats: Thinking against the Box', *supra* note 301, at 362–397; Koskenniemi, 'The Limits of International Law: Are There Such?', 28 *Thesaurus Acroasium* (1999) 27.

³⁰⁵ See for instance, Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4 *et seq.*

³⁰⁶ This might be a cruder form of what Professor Koskenniemi qualifies as the 'move from structure to history', which I here want to translate into a link between the complicated genealogies of the linguistic/conceptual universe of international law and the existential position of the international lawyer in its various historical expressions, see Koskenniemi, *supra* note 235, at 5 *et seq.*

as either managerial problem-solvers (in denial *vis-à-vis* the violence of values and fantasies carried over by language through a backgrounded history), or mere puppets to the dead hand of the past (in denial *vis-à-vis* the weight of the metaphysics of legal positivism),³⁰⁷ or paralyzed victims of the inescapable dialectics of discourse and fact, or finally (since these seem to be the options) full-fledged ideologues wielding the noble flag of international law (here the moans of Lundstedt, Morgenthau, Ross, and even Kelsen, might be interrupted by the jeering of McDougal). The quest for, and defence of, the elusive international law is not fashionable, or is not interesting, or is not relevant; theory is resurrected not to account for the nature of the ‘reality of international law’,³⁰⁸ because that is no longer problematic, but to theorize the uses of the toolbox.³⁰⁹ These beginnings of puzzling impressions are a good enough reason to read Ross, for the clarity of a project on the edge of the dilemmas that ground the whole discipline since John Austin was imported as its built-in nightmare. We find in

³⁰⁷ In thinking against the built-in slavish role reserved for international lawyers by too commonly accepted images of international law, we might as always turn with great profit to the incisive and penetrating observations of Professor Luigi Condorelli: ‘*Je pense que dans une situation de crise profonde, de flottements et de tâtonnements, comme celle que nous vivons actuellement, la doctrine a plus qu’un devoir de critique: je parlerais d’un véritable devoir de résistance face au pouvoir des Etats. A mon sens, le juriste doit s’abstenir de courir derrière la pratique des Etats jusqu’à perdre son souffle (voire son âme. . .) et doit dénier à cette pratique, même si elle est majoritaire, la capacité de modifier le droit préexistant. . . En résistant de telle façon (par exemple, en persistant à qualifier d’illicite un comportement d’Etat qui contredirait un principe d’importance essentielle, et ceci même si les autres Etats le justifient) le juriste peut donner sa contribution — certes minimale, mais qu’importe? — à un dénouement satisfaisant de la crise et à la formation d’un nouvel ordre qui soit à caractère progressif, et non pas régressif.*’ I think that, in a situation of deep crisis, of fluctuations and uncertainty, such as the one we are currently experiencing, scholars have more than just a duty to criticize — I would speak of a real duty to resist the power of states. In my view, the jurist should not run along behind state practice until his lungs collapse (sometimes together with his soul. . .) and should deny this practice, no matter how common it is, the power of modifying existing law. By resisting in this way (for example, by continuing to denounce a state’s actions which contradict a principle of crucial importance, and to do this even if other states countenance the action) the jurist can make a contribution — a minimal one, to be sure, but so what? — to the successful resolution of the crisis and the formation of a progressive rather than regressive new order.’ (Condorelli, ‘A propos de l’attaque américaine contre l’Irak du 26 juin 1993: Lettre d’un professeur désespéré aux lecteurs du *JEDJ*’, 5 *EJIL* (1994) 134, at 143–144.).

³⁰⁸ Jessup, ‘The Reality of International Law’, 18 *Foreign Affairs* (January 1940) 244 *et seq.*

³⁰⁹ On the available risk of negating or evading the responsibility of the international lawyer (as any producer of political discourse, we might add), I will not resist the temptation of using again some thought-provoking words by Professor Condorelli: ‘*. . . voilà le problème mis à nu dans toute sa gravité, voilà que nous sommes placés en face de nos responsabilités de juristes. Aucune possibilité de nous esquiver par une galipette comme celle qui amène certains d’entre nous à se réfugier dans la planète lointaine de fumeuses théories générales: comme par hasard, celles-ci reviennent à la mode, au point d’encombrer excessivement, du moins à mon goût, les pages même de ce Journal (au vu de la situation générale, je ne résiste pas à la tentation de rappeler que dans le grand salon du Titanic on dansait également alors que le navire était en train de couler).*’ ‘Here the problem is revealed in all its seriousness; here we must confront our responsibilities as jurists. There is no possibility of dodging the issue by somersaulting into the far-off land of hazy general theories, in the way that some of us have chosen to do. As if by chance, these theories are coming back into fashion, to the extent that they are, at least for my taste, taking up too much room on the pages of this very journal (given the general situation, I cannot resist recalling that on the *Titanic* they carried on dancing in the ballroom as the ship went down).’ (Condorelli, *supra* note 307, at 141.).

Ross' anchoring of international law in a realistic jurisprudence all the scattered elements of the dramatic plot of international law as a coherent discipline and project.

Alf Ross as legal philosopher does not bear the pressure of existential annihilation when realism takes him by the hand from jurisprudence to legal theory to international law to political pessimism. My point has been precisely that his observations from above and beyond are what makes the dialogue enriching through the veils of history. Significantly, Ross believed that 'juridical imagination can never rise to the wealth of reality'.³¹⁰ The breaches opened in the fabric of the realist critique and reconstruction of international law by the confrontation of variously inspired shades of pessimistic realism are telling us that international law in its ambiguous and never resolved status is also about creating reality. Ross paradoxically teaches us that, whether we embrace or deny the ontological and existential dualism at the heart of international law, international law is an open arena for idealist critique and reconstruction. As crises follow crises and international law rehearses the alternative spectacle of a martyred scapegoat or a hopeless delusion; as distress continues to accumulate around the planet and doubts continue to grow as to the feasibility of a project of global order, peace and progress; as the managerial style of international legal problem-solving thrives on the lost memory or the arrogant dismissal of a century of raging theoretical and doctrinal innovative endeavours; as finally the loss of appeal of radical theoretical confrontation further conceals the existential dilemmas tackled by our past masters, the shadow of E. H. Carr on Alf Ross and his fellow Realists reminds us that the time is ripe again, as it has always been, for idealism. The encounter with the intriguing mind of Alf Ross tells us then that all depends on our ability to sharpen our legal imagination by a constant dialogue with the past from where our words have travelled, before entering, in the most self-aware and cautious way, the metaphysical arena of international justice. The choice is therefore not between fantasy and reality, but between fantasy and resignation. And so let us end with a last quote to offset Ross' pessimistic conclusion on our chances in wrestling with the weight of an oppressive inherited language:

Certes l'invention juridique est pauvre de moyens; elle doit user de la langue vulgaire et le droit international voit encore ses choix restreints par la nécessité de choisir des vocables qui appellent des correspondances faciles dans la plupart des langues vernaculaires, et c'est peut-être ce qui explique que le latin y ait encore plus d'audience qu'ailleurs. Puis c'est à partir de ces moyens médiocres mais intelligibles dès le départ que l'invention peut procéder à un travail plus souvent lent que prompt, et insinuant que violent, en déformant le sens des mots par petites pesées, pour rendre leur sens mieux adapté à des fins particulières, et souvent plus efficace au regard de l'unification de la société internationale. Quelle ingéniosité, quelle ténacité prudente lorsqu'il s'agit de donner un législateur et un gouvernement à une société qui en ressent le besoin profond en raison même des progrès techniques, mais qui ne veut pas, qui ne peut pas le reconnaître, engagée qu'elle est encore dans la virulence du phénomène national? Ce n'est certainement pas sans hésitation que le juriste accepte des constatations qui semblent diminuer non seulement l'éclat, mais encore, la sincérité du travail juridique: être sensible

³¹⁰ CUN, at 9.

*aux pressions sociales, profiter des chances d'un langage admis, glisser sous les mots une réalité plus substantielle qu'à l'origine, ne pas vouloir faire porter à une notion plus de logique ni plus de clarté que les temps révolus ne le permettent: même si c'était cela l'invention du droit, elle resterait grande par l'idéal qui l'anime et par l'importance de l'enjeu.*³¹¹

³¹¹ 'Certainly legal invention is low in resources; it has to use common language and international law is once again seeing its choices restricted by the need to use terms which permit easy integration in most vernacular languages, and this probably explains why Latin still has a wider appeal here than elsewhere. So, with these mediocre but understandable tools to hand from the start, invention can proceed in an enterprise that is often slow rather than swift, subtle rather than violent, and gradually twists the meaning of words in order to render this meaning more suitable to particular ends, and often more effective with regard to uniting international society. What ingenuity, what prudent stubbornness when it is a matter of providing a legislator and a government for a society which desires them burningly because of technical progress, but which will not and cannot admit it, given its involvement in the virulence of the nation-state phenomenon? It is hesitatingly that the jurist accepts findings which seem to reduce not only the impact but also the sincerity of legal work: remaining sensitive to social pressures, exploiting the possibilities of an accepted language, giving words a more substantial meaning than they originally had, not wishing to bring any more logic or clarity to bear than in times past — even if this were the essence of the invention of law, it would still retain its status through the ideal which motivates it and the importance of the issue.' Reuter, 'Quelques réflexions sur le vocabulaire du droit international', in P. Reuter, *Le développement de l'ordre juridique international: Ecrits de droit international* (1995) 22.