
Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law

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Abstract

The concepts of general customary law and the state are crucial to the structure of the international legal order. They suppose the state is a unified entity, with a single will, which can, in co-ordination with other states, create explicit (treaty) or tacit (customary) international law. Ross adopts a social-psychological causal approach to explain how these supposedly hard positive law concepts are in fact decadent remnants of idealist, natural law provenance. This means lawyers use the language of state will and general custom to express their belief that international legal rules exist. However, this process actually reflects unconsciously, socially induced compulsions. The language of law is one of rationalization. It attaches legal labels to social practices that are of no normative value or significance. However, Ross appears to blink in the face of his own nihilism and recommends that judges, in their decision-making, can best articulate the way any society considers itself to become bound by law.

The argument preferred here is that he should instead have carried his analysis further, to a credible political and cultural sociology of international relations. What this might mean is illustrated with respect to the writing of Raymond Aron and some critical theory reflections on French international law positivism.

With consistent Scandinavian realism, a credible normative perspective on international society disappears altogether. This may be how it should be. However, the argument here concludes with an attempt to introduce a reflective critical dimension to sociological realism not through normative and analytical positivism, but through phenomenological analysis.

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1 Introduction: Developments in Western Theories of Knowledge (Epistemology) and the Doctrine of the Sources of International Law (with particular reference to General Custom)

International lawyers work, as pragmatically as possible, with certain basic concepts such as ‘the state’, ‘the will of the state’, or ‘the consent of the state’, ‘as evidenced in state practice’, etc. There is a tendency of the profession to perceive that these concepts do not have a clear operational meaning, but this doubt is resolved in practice by recourse to commenting on judicial proceedings or on the preparatory work of law-making conferences, *viz.* the work of the International Law Commission or UN conferences convened to consider draft conventions.

Despite these uncertainties, the orthodox view of the international lawyer’s law-finding task is still left with the idea that for obligation to arise under general customary law, the state must appear compelled to accept some kind of obligation outside itself, that is binding upon it. The obligation has to transcend the state, and, as a collectivity, the state acknowledges the obligation, *i.e.* it takes a single and definite decision with respect to it.

The great interest of Scandinavian realists such as Alf Ross and Axel Hägerström is that they afford international lawyers the opportunity for direct contact with a post-metaphysical context of Western philosophy, which is very pertinent to their work. How can one now speak of any subject, whether individual or collective, having an obligation which transcends it? Since David Hume, in the eighteenth century, demolished the moral intuitionism upon which the natural law tradition rested, it has not been clear how any apparently factual, historical process (such as the supposed practice of states) could give rise to a normative or ‘ought’ dimension, to ‘obligation’.¹ For instance in the context of his very short treatment of the ‘law of nations’, Hume himself says of the nature of obligation that when men observe rules, it is because they see that to give free recourse to their appetites makes society impossible. Their obligation of interest rests not there; but by the necessary course of the passions and sentiments, gives rise to a moral obligation of duty, whereby we approve of such actions as tend to the peace of society and disapprove of such as tend to its disturbance. The same advantage and even sometimes necessity exists in the intercourse of states. However, it is not as strong as in the case of individuals since states are that much less dependent on one another. The difference between the national and the international cannot be precisely measured ‘but we must necessarily give a greater indulgence to a prince or minister, who deceives another; than to a private gentleman, who breaks his word of honor’.²

Ross appears, finally, as an international lawyer *and as a legal philosopher*, to bring the needed scepticism to the discipline. He raises, effectively, the question how can an

¹ Johnston, ‘The Scottish Tradition in International Law’, 16 *Canadian Yearbook of International Law* (1979) 3, at 10–11.

² D. Hume, *A Treatise of Human Nature* (D. F. Norton and M. J. Norton (eds), 2001), 3.2.11.

individual, never mind a collective entity, have a sense of obligation which is not simply a socially or historically conditioned response to circumstances, whether immediately (in the sense of contemporaneously) external or historically acquired? With the assistance of Hägerström, it will be possible to see how this scepticism can also be attached to the very notion of the state itself, which is an abstraction, a projection of unity, which does not afford a framework of analysis sufficiently detailed and concrete to allow one to trace the process whereby a collective entity can come to be obliged or otherwise bound. Following through Hägerström, a rigorous sceptical approach should lead even the international lawyer to the greatest doubt as to what such concepts as state and state practice are supposed to refer.

Analytical positivism may appear to sidestep this problem by arguing that 'the idea of Law' supposes, in analytical terms, that the 'relevant' community of somehow already legal subjects somehow posits legal categories which can attribute normative significance to various factual events in international relations. So, certain actions of states are taken to signify recognition of a new state or an acknowledgement that a territory belongs to a particular state. The argument that the events are not usually conclusively accepted until they are adjudicated still applies. This can be considered 'the internal' perspective on legal obligation.

So there is one sense in which analytical legal positivism sees the realist, sceptical problem-posing as false. From an internal perspective law-applying officials consider that they are applying Law, quite simply so.³ However, it is surely obvious that such an approach does not deal adequately with the false consciousness arguments of the Scandinavian realists. Here is where phenomenology might be able to advance matters by providing a more comprehensive framework within which to deepen the analytical approach to the internal perspective. In a post-metaphysical context the question is whether it is possible to develop a theory of obligation which is not based upon rationalization and false consciousness. The post-metaphysical as a concept refers to the absence of God, a supernatural reality or any other equivalent notion that reality exists beyond the concrete particularity of individual human beings. The assumption of Scandinavian realism is that a theory of obligation which refers to such a world or worlds is a rationalization. Analytical positivism appears to sidestep the problem, but only by means of insisting that verbal expressions of validity have to be taken at face value, which does not meet the objection that these expressions have as much social force as attaches to the individual judges expressing them. This force will usually be considerable, but it still remains precisely that, *viz.*, the force of the individual judges, having no normative significance for whoever does not himself internalize them. For the latter, the Ross-style scepticism remains 'a useful tool of resistance'.

For the analytical positivist the crucial distinction is between the external and the internal perspective. He happily supposes that the latter will, in fact, be socially

³ As in H. L. A. Hart, *The Concept of Law* (1961), at 102. 'The judge's ... statement that a rule is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law *in his court*, and constitutes not a prophecy of but a part of the *reason* for his decision ...' (emphasis added).

dominant. So, ultimately he need not be bothered with the former. However, should that not be the case, the place for phenomenology is more evident. The assumption here is that international society does not accord a significant place to a judiciary, although it does have some place and can occupy a number of international lawyers. Even more significantly, the state, even for the mainstream positivist international lawyer, is not a stable entity. Most tensions and insecurities in international relations have to do with this fact: namely, arguments about recognition of territorial title, self-determination of peoples, rights claimed to secession, minority group rights, attempts to suppress 'terrorism', itself a contested concept, and so on. In such a world a way has to be found to bridge the external and the internal perspectives. The state officials have no assured priority over those who contest them. For phenomenology the terms 'external-internal' can be translated into 'object' and 'subject'. Each of us sees ourselves as a subject and 'the others' as 'objects'. We are also 'objectified' by how others see us and also by how those 'in authority' have trained us to see ourselves. We have also to struggle to 'deobjectify' ourselves.

Scandinavian realism is aware, particularly in the work of Hägerström, that the state is an 'objectified' entity. That is to say, those Scandinavian realists who go beyond accepting the classical international law definition of the state realize that it is not enough to reiterate, in analytical terms, the so-called elements of a state, government power, population and territory as static, observable elements. There must be a minimum of political sociology with respect to the collective, territorial-based entities that still dominate international society. One should have an understanding of how concrete, i.e. particular, states have been constructed and also, vitally, include the dimension of the self-awareness and self-understanding of the states. This means abandoning abstractions such as state or statehood for a political sociology of democratic nations — so far at least as the West is concerned — as frameworks of epistemological reference. So, for instance, the United States is a historically situated, territorially based people, not population, with inherited traditions, prejudices, strivings and aspirations, which all contribute to the style and content of its behaviour. The positive dimension of phenomenology, in contrast to Scandinavian realism, is that it does not simply react to such an entity as the United States in terms of reductionist ideology critique of the United States as object, but aims to provide a pathway to deobjectification, through understanding of the self — here a collective self — embedded also in relationship with others. This may open up the possibility, in relations characterized by grave inequality and coercive power, of disentangling the contradicting intentionalities of collective entities in their relations with one another.

2 Ross' Theory of State and Law

Ross begins his attack on the concept of sovereignty by distinguishing between the pragmatic or functional role which concepts should have and the hardened character which certain concepts, such as sovereignty, appear to have acquired. While concepts

should merely refer to a particular problem, hardened concepts amount to a conscious but emotionally charged imagining about the authority and even sacredness of state power.⁴ From the very beginning the psychological realism of Ross exposes irrationality, particularly in the face of authority, with its further implication of coercion. The aim of this psychological approach is to demythologize whatever magic is supposed to be attached to the sovereignty of states. Their rights and duties should not be derivable from conceptual magic but only from the actual rules which international law accords to them.⁵

Scandinavian realism is part of what Ross sees as a necessary struggle for modernity against the mystical tendencies behind Jean Bodin's call for an absolute sovereign within the state, holding authority directly from God, thereby replacing the authority of Pope and Emperor. Bodin's rhetoric represents this sovereignty as if it was a substance which could be transferred, a visible thing. Ross assures us that such a concept of sovereignty is only what he calls an apparent concept (one of appearance or a mirage). It makes no sense to ask by what Law existing Law is valid, i.e. to provide a further or metaphysical grounding for law. Considered psychologically, the concept of law is a rationalization (turning into an idea) of a particular internal compulsion experienced as a feeling, which accompanies positive law. Ross is tracing the pretensions of a somehow supernatural power or force which could give rise to rights and he is bringing these 'down to earth' as merely subjective psychological compulsions. Bodin seems to Ross to have been developed by Hegel, to turn a mystical individual into a mystical collective entity, the state, with which he, Ross, is confronted.⁶

Instead, Ross wishes to argue that the modern concept of sovereignty is not useable either as a criterion to locate a subject of international law or as a source of the law itself. People persist in thinking that the will of the state possesses a capacity to create law. He thinks this illusion can be disposed of by showing its circular character. It is bound up with the idea that international law is a law of treaties. So it is treaties that bind states, but it is also states that create treaties, through their will. For Ross the objection is that the will of the state is a mystical Hegelian concept. In fact Ross tries to argue that treaties can greatly limit in practice the powers which states exercise.⁷ The legal status of a state can only be won from the content of the order to which it is submitted

However, more worrying for Ross is the possible association of a substantive notion of sovereignty with an emotional prejudice that any development of international solidarity will threaten the mystical sovereignty of states. Even a more modified notion of the state as possessing the quality of sovereignty granted to it by international law will mean a tendency to regard certain of its activities as a reserved domain which

⁴ A. Ross, *Lehrbuch des Voelkerrechts*, Kohlhammer (1951, translation of the 1946 2nd Danish edition), at 35.

⁵ *Ibid.*, at 37.

⁶ *Ibid.*, at 38–39.

⁷ *Ibid.*, at 41–43.

cannot be regulated by international law. The emotionally loaded notion of sovereignty is suited to favour the natural egotistical tendencies of the state to oppose international organization and solidarity.

'Natural' or 'by nature' for Ross mean instinctive or blind. A so-called, 'natural', 'binding power', seen realistically, is a social-psychological intermingling of motives which cause conduct, and conduct which further shapes motives — a purely factual, non-normative dimension — also in the Humean sense. Legal duties are based on fear of sanctions. The conduct can appear to the individual to be called for by some request or call, which he cannot understand conceptually, as being the right thing to do, apart from his interest. However, it is easily proven that what is at issue here is a 'motive-mechanism' which operates in a particular way in the individual since earliest childhood and which now operates in an automatic-suggestive way without any connection with the conscious striving or interest of the individual. Hence, the individual comes to believe himself subject to some kind of categorical force of consciousness of duty, whether legal or moral. Instead of recognizing such a foundation for law, and for international law in particular, one continues to believe oneself to be in the presence of some grandiose (elevated), supernatural, spiritual order, as something coming from a divine origin or from an absolute spirit working within man.

This magic comes up against the obvious difficulty, for the modern mind, that the legal order is shaped through human arbitrariness and historical accident. It is a product of definite, historical human acts and is not valid through some inner moral-spiritual rightness. So how can law as a positive order create duties, and not merely causal outcomes in a physical and psychic reality? Will theory, the idea that one binds oneself, that the duty-bound person is in agreement with the force applied, is a mere attempt to wish away the unpleasant element of compulsion. Will theory, as a factual theory, cannot explain validity, because of the 'Is-Ought' dichotomy. So, effectively it resorts to some type of idealist theory of a spiritual power as necessary to explain it. So idealist natural law theory explains all law, including international law, through an idea of justice which reveals itself in the human spirit. An alternative modified positivist, natural law theory tries to explain law by saying its existence has to depend on some prior, unverifiable assumption, such as *pacta sunt servanda*. This has the advantage that it does not make positive law dependent upon correspondence with an ideal of justice, but it does not affect the content of the law and can be made to explain anything, which can, and should, actually be regarded as a social psychological phenomenon.⁸

The difficulty with Ross' interpretation of the role of compulsion in both morality and law is that he honestly recognizes the absence of external compulsion with respect to international law. So, he characterizes it as close to conventional morality, as distinct from personal morality. However, for the majority of practitioners, it is not a matter of personal conscience and not even a purely social morality because it is felt to be and experienced as law. Yet, Ross' explanation for this weakens international law.

⁸ *Ibid.*, at 47–50.

It is that the fundamental principle of international law, *pacta sunt servanda*, is the same as in national law. It is the same men who apply it, simply in different contexts.⁹ This is in line with Ross' epistemology that everything must have a social origin. The ironical outcome is that such an interpretation, made to fit his epistemology, comes to serve the same empty rationalizing purpose as the formalistic natural law principle he has just rejected, precisely because of the role which he later attaches to the judge.

Ross' conventional view of morality is tied to his irrationalist view of conscience and morality. That is to say he objectifies his materials, and explains their behaviour in terms of social causality. Therefore the differing views of states about their rights and their willingness to resort to force to assert their rights can only be overcome through the step-by-step construction of an international power to enforce law (*zur Handhabung des Rechts*). All idealistic talk about an alteration of attitudes, an improvement of morality and an increase in trust in promises, etc — i.e. which do not rest on effective organization — what one might call verbal appeals, are a naïve mistaking of the sociological laws for the construction of a society. There must be either one power standing over the others, or a coordination of powers to uphold peace. The former is dictatorship and the Allied Powers must realize that the defeat of the Germans cannot be followed by allowing 'Sovereignty' to reassert itself, a lawless, self-seeking, arbitrariness. Freedom is only possible within Law and Order.¹⁰

Yet Ross simply reaffirms the basic characteristics of traditional international law. The sovereign equality of states means that conflicts of interests can only be resolved through compromise or war. The character of international law is asocial. It merely provides formal limits to the territorial competence of states, with few norms that serve a function of social coordination. The law says nothing about questions of raw materials, economic policy, population disparities, immigration policy, etc. — which is to admit that the 'feeling' which collective groups have for 'sovereignty' as a substance expresses a reality of anarchy, however objectionable to Ross' epistemology. At the same time, Ross draws a parallel with social conflicts within modern industrial societies. 'We are all part of a great chain of production. Political power is a decisive economic factor.' Just as capital and labour struggle at the national level, so at the international level the absence of an international regulation will be the occasion for innumerable wars.¹¹

Finally, Ross' social-psychological realism does not allow him to say that states are effectively anchored in an international order. National legal systems are experienced or lived as original. The validity of state law is a fact that has its social-psychological roots in national functions or activities. To legitimate states through an international constitution is mere empty, superfluous constructivism.¹²

⁹ *Ibid.*, at 5–54.

¹⁰ *Ibid.*, at 54–55.

¹¹ *Ibid.*, at 56–58.

¹² *Ibid.*, at 62–63.

3 Ross' Theory of Sources of Law

When Ross comes to his doctrine of sources he continues his anti-metaphysical critique of sources of law which are supposed to be above natural life. How is one to explain sources that are not purely caused by natural forces? The realistic perspective has to find them in socio-psychological facts. Yet to explain such facts Ross resorts to the regular execution of the law before judges. So the task of a doctrine of sources is to analyse the general factors which determine the content of concrete (specific) legal perspectives, which is best done by observing such factors where they are subject to most pressure, which is in court proceedings, directly before the enforcement of their outcome. So the sources of law are the general factors which influence the judge in determining the content of his judgment. So one does not rely only on formulated rules. They merely express interests, goals and ideas of the community. The judge, as a member of the community, is not an automat, but a living member of the community who tries to develop the living tendencies of the same. Custom plays a large role as the judge does not simply follow rules formulated by the 'authorities', but also looks to the regularly followed social order, recognizing the normative power of the factual. Everything which influences and motivates a responsible individual in a concrete situation may be taken into account.¹³ However, the bias is in favour of objectivity and away from the spontaneous and individual. Rather than a matter of individual taste, the judge has to see matters 'with the eyes of the community'.¹⁴

The difficulty with such a doctrine is that there is no regular international judiciary. Since court cases may also be decided by rules given by the parties themselves, nothing about the sources of international law can be drawn from them. Again, it would be circuitous to draw a doctrine of sources from sources themselves. Therefore, the foundation for sources can only be actual practice (*tatsaechliche Praxis*), cases in which, without being more precise, Ross says reference is made to a legal decision.¹⁵ Yet, having said this, Ross proceeds to argue that practice means the rules that have been applied in earlier arbitration or court cases. The sources will not usually be mentioned in the judgments. Article 59 of the World Court Statute excludes a doctrine of precedent in the Common Law sense and Article 38(d) of the same treats court cases as subsidiary sources. Nevertheless, one can read out of the tendency of the Law to lead to bindingness, the compelling necessity that earlier decisions will have a decisive influence on later ones. The notion that court decisions are only a subsidiary source is based on the illusion that court cases do not create law. However, courts and writers rely very largely on court cases to support their arguments. Anything else, says Ross, is 'mere' philosophy. The reluctance to reach this conclusion is explained by the absence until recently of a permanent judicial framework.¹⁶ Ross so openly contradicts himself. There is no regular international judiciary, but its imagined place is central to Ross' view of the sources of international law.

¹³ *Ibid.*, at 77–79.

¹⁴ *Ibid.*, at 80.

¹⁵ *Ibid.*, at 81.

¹⁶ *Ibid.*, at 85.

Within such a narrow framework he says that what the judges will look for is the legal perspective (*die rechtliche Einstellung*). Given that international law rests on autonomy rather than authority, of especial importance is the actual legal perspective (*Einstellung*) of those involved (*Rechts-untergegebenen*). The external conduct is only important as a proof of the existence and seriousness of the perspective according to which the states orient their behaviour. This perspective is to be read out of all states' acts or actions, especially claims and protests and recognition directed to other states. This is especially so for the case that the interests of other states are directly affected. Internal states acts are also relevant, e.g. court or administrative acts. After this very usual iteration of methodology (of evidence of state practice) Ross does insist that objective behaviour is not enough. One must research the subjective, psychological assumptions behind conduct. This will inevitably be difficult and appears to play little role in practice. Yet Ross continues to insist on the distinction between legal bindingness and mere politeness or friendliness. The boundary will be drawn by the tendency of legal material to manifest itself through evidence of a corresponding feeling of boundedness and obligation.

Ross goes through all the usual hoops at this point. Writers such as Kelsen deny the necessity for the subjective inquiry. However, the courts insist on it. Yet, again, the courts rarely engage in an effective search for proof. In certain cases the legal conviction can be so strong that it has become separated from external actions and can constitute basic principles of international law, such as freedom of the seas, equality of states, etc.¹⁷

Nonetheless, Ross ends on the radical note that it makes no sense to iterate a list of sources of international law as a way of analysing the factors which go to make up the subjective element of a legal perspective — all the factors relevant to a motivation, which will have an element of spontaneity in a concrete case. Yet once again everything is thrown away into the hands of the judge who has to have discretion to decide what is in the circumstances to be read as an interpretation of facts or of an instrument such as a treaty.¹⁸ He claims any interpretation is pragmatic and not logical, certainly not objective. An interpretation determines itself in the light of particular goals, ideas and interests. An interpretation is a working together of objective and free factors.¹⁹

4 The Ambitions of Scandinavian Realism

Ross stresses particularly the importance of Axel Hägerström for the development of his approach to legal philosophy generally and to international law.²⁰ It can only appear very promising if a legal philosophy promises to go beyond an abstract, formal

¹⁷ *Ibid.*, at 86–88.

¹⁸ *Ibid.*, at 88–89.

¹⁹ *Ibid.*, at 90.

²⁰ *Ibid.*, at 7.

definition of the state to grasp the communities that make up the principal actors of international society in some sociological or historical sense. Projections of abstract unity of the state as a way of conferring legal authority are obviously sterile. Ross picks up several times on the logical circles of much legal positivism. Yet he leaves us with the traditional definition of the state in international law.

Haegerstrom is rather more penetrating in exposing the speculative and illusory character of 'Will Theories of Law', or of the 'Will of the State'. He argues that surely the 'organized authority of society' can never be so centralized that it is confined to a single person, who makes a decision about the external regulation of society and actualizes it without needing to inform anyone else of it. Any system of law is obeyed spontaneously by part of a majority and the rest reluctantly, but bowing to the objective power of the former part. Within the latter category each individual can be said to will the keeping of the rules only in so far as he personally has no sufficient motives for breaking them. But in no sense can he be said to will their universal maintenance. The so-called 'will of the majority' is meaningless.²¹

This realist critique is carried further to question the very idea of the state as a corporation. There is the beginnings of a political sociology. Hägerström investigates what empirical meaning can be given to the notion that a society governs itself — a key concept for Ross — the self-commanding society. The problem is the supposition that if there is unitary willing, implied in the idea that law is created by the will of the state, then there must be a unitary subject to which this willing applies. This can mean, for Hägerström, nothing more than that a certain system of rules of conduct which relates to a certain group of people comes to be applied by certain specially appointed persons through forces operative within the group itself. The so-called 'sovereign organs' of the state mean only that certain rules for the exercise of supreme power come to be applied by persons or complexes composed of persons appointed for that end, in consequence of forces operative in the society.

Exercise of power reduces itself to the following. In consequence of the force of already existing rules, declarations issued in a certain way by the 'organ' constitute rules. These are put into operation by persons appointed to that end. What does the exercise of such a power mean other than that, as a last resort, the judges apply the declaration in litigation? Yet this, in turn, means only that the law is applied in consequence of the same forces which maintain the system as a whole.²²

Hägerström asks if it is possible to regard law as a system of imperatives and declarations of will issuing from the 'will of the state' in the sense of the will of that power within a certain group of individuals which maintains a system of rules concerning the group? He answers that it is not. All sorts of factors enter as components into the social forces which maintain the impact of rules. Even the power of a constituent assembly depends upon such varied matters as the habit of the people to obey decrees claiming authority, as well as the willingness of the chiefs of the

²¹ A. Hägerström, *Inquiries into the Nature of Law and Morals* (K. Olivecrona (ed.), transl. by C.D. Broad, 1953), at 23–24.

²² *Ibid.*, at 36–38.

military to support the authority issuing the decrees. There will be an additional medley of all kinds of heterogeneous factors contributing to the force of a law. They include a popular feeling of justice, class interests, lack of organization among the discontented, etc. Even if each person wishes to conform to the law that does not imply a unitary will in all these individuals with a common end as its unifying focus. The force of a law never depends merely on the fact that a certain section of persons within a group desire it to be observed. It depends on other factors as well, such as tradition, inertia, impotence of opposition. To make a unitary will of this conglomerate of forces is an instance of a universal anthropomorphizing tendency that is fictional.²³

Hägerström concludes that law is an expression of interests. Therefore the question of the intention and the significance of the law is a legitimate one. The mistake is to think in terms of a unitary will with a certain system of values in accordance with which it acts. Instead, in the conflict of interests within a society certain interests become actualized in laws because of a mass of heterogeneous factors. Yet the concept of a unitary will is used as a measuring rod for judging the claims of other original sources of law, e.g. custom, equity, etc. It is attempted to settle such questions by resort to the 'real will' of the 'state authority'.²⁴

The place of the judiciary appears to become large for Hägerström because he does not see how one can prove that the will of a society would continue to desire what was once expressed in the judgment of a law. How can statute law alone express the will of an organized society? 'It is as if one should say that a man exists in virtue of his own voluntary decisions.' However, the judicial decision is also influenced by customary law, the 'spirit of the laws', traditions and social practices, so that the decision itself becomes part of the rules current in the society. That is to say the character of the organizing power in the society is itself shaped by the sort of rules which are operative, making it nonsense to look to the 'will' of an organized society to estimate the validity of other sources of law.²⁵

Hägerström concludes by arguing that underlying the anthropomorphizing tendency is the ancient spectre of natural law. The idea that there must be a supreme rule of law which gives to all legal systems their validity translates into the idea that every group is a corporate entity with a supreme holder of power whose ordinances must be followed. This proposition is supposed to be a 'necessity of thought'. This way of thinking, for Hägerström, belongs to natural law. How can such a supposedly supreme will be the foundation of an unconditional ought, unless it is supposed that its orders ought to be respected, i.e. in some meaning of 'ought' other than that each particular order should be obeyed because it issues from the competent authority? For instance, where is the rule that authorizes a judge in a particular case to apply customary law, or whatever? These applications take place in consequence of general extra-legal factors, such as a feeling of justice or even a mistaken theory that the will of the state commands resort to certain 'sources' of law. The latter language always

²³ *Ibid.*, at 39–41.

²⁴ *Ibid.*, at 41–42.

²⁵ *Ibid.*, at 43–45.

means not that the rule is actually enforced, but only that it ought to be enforced. So the notion of positive law acquires the meaning that certain rules ought to be applied. The natural law element is here disguised because it is thought that one is concerned only with what the will of the state actually wills; though what is really meant is that certain rules ought to be followed.²⁶

Hägerström reaches a firm conclusion that has immense significance for a system of law which might be supposed to be based upon 'the consent or will of states' however loosely expressed. He is saying that there is no factual continuity, coherence, or unity in legal rules other than what is actually stated by judges. Authority is not clearly attributed to individuals in a corporate hierarchy, if one is to look to rules, practices, etc., actually followed. The belief of positivist international lawyers to the contrary that there is an identifiable state, 'complete with will', is a remaining natural law style fantasy, crucial to the aesthetic appeal of positivism. How this fallacy works out in practice at present will be illustrated in the next section but one of this article in the critique that Apostolidis makes of contemporary French international law positivism.

5 From Scandinavian Realism to a Phenomenological Approach to Social Groups

The Scandinavian realist perspectives of Ross and Hägerström provide a basis for breaking away from the sterile pseudo-positivism of the dominant doctrine of the sources of international law in the consent or will of states, however loosely expressed. They argue that rules and principles, not necessarily coherent or systematic in relation to one another, are maintained in existence by a heterogeneous range of social forces. These rules are therefore a product of an unlimited range of factors, including emotions and feelings about justice, real or imagined interest, inertia, impotent refusal of recognition, etc. It is therefore legitimate to try to unravel the whole range of interests and intentions that underlie the rules. It is equally necessary to recognize that the very idea of the existence of these rules supposes a continued application of them, which is as confused and difficult to unravel and explain as the original declaration of the rules. In this sense there is no point in having a theory of the sources of law. It will hide natural law fantasies of unitary harmony. Equally it is unrealistic to expect that any decision-making process will clearly delineate and exclude extra-legal factors from its process.

So why not go as far as Raymond Aron, in his work *Paix et Guerre* and speak of the existence, at the international level, of psycho-social collectivities as a primary fact of international society, instead of falling back upon the traditional international law definition of the state, as Ross does? Every human being is a biological and conscious entity, but he is also a product of heredity transmitted as much as of creative reflexivity.²⁷ So far Aron would agree with Ross. Yet human life is the purpose of cities. It is not solitary and is not accomplished outside national communities. This

²⁶ *Ibid.*, 48–51.

²⁷ R. Aron, *Paix et Guerre* (1962), at 735.

foundation is neither racial nor territorial. The unity is one of culture, of a collection or assembly of beliefs and conduct. Certain nations, after much violence and spilt blood have found some harmony — never perfect — between culture and politics, history and reason. The nation has its language and its law, as a matter of tradition and a distinctive style of existence.²⁸ There is the hereditary dimension, but there is also the dimension of consciously chosen prejudices and reflection upon them.

The bare mention of the word 'nation' will make most Western international law scholars' hair stand on its end.²⁹ However, 'nation' is here understood phenomenologically as an epistemological framework of perception. Ethnicity expresses the differences in human consciousness attributable to divergences of experience in time and place, which are a function of geography and history, and which are usually sharply accentuated by language difference.³⁰ A classic definition of ethnicity is 'a firm aggregate of people, historically established in a given territory, possessing common relatively stable particularities of language and culture, and also recognizing their unity and difference from other similar formations, and expressing this in a self-appointed name-etonym'.³¹ The essential aspect of this definition is the limitation of horizon or vision which ethnicity entails. Ross would call this, correctly, prejudice. This is the reason for its conflictual character which is stressed by Aron. In theory as long as human groups have languages and beliefs which are different, they will have innumerable occasions to misunderstand or 'mis-recognize' one another.³² Conflicts in international relations result, above all, from different hierarchies of values among nations. Aron gives the example, from the writings of Montesquieu, and Tocqueville on France, England and the United States, of a relative constancy of differences of styles of foreign policy in these countries. This is not to say that a psycho-cultural character is the only factor in foreign policy given the importance of calculation of interest in a very instrumentalized field.³³ However, inherited traditions are vital.

For the interest-theory orientation of Scandinavian realists this statement for culture and identity should appear negative. Ross gives full place to inherited and acquired prejudice and emotion. Nonetheless an ambitious argument is presented that such a 'human condition' has to be suffered and lived through. Identity has a central place in the development of a global political discourse. So, Connolly accepts the place of 'interests', 'strategic considerations', geographical factors, etc., in international relations, but argues that these are interpreted in relation to the

²⁸ *Ibid.*, at 736.

²⁹ Aron is adamant that a lot of nonsense is talked about the dangers of nationalism. Neither of the World Wars of the twentieth century can, in his view, be understood as nationalist. The first marked conflicts between societies in different stages of political evolution (a 'war for democracy?'; while the second was ideological, with huge numbers of traitors to the ideology in Germany, France and Russia. Nationalism had no sole responsibility for the conflict and it would be unreasonable to think that some continental or ideological principles would be more pacific, *ibid.*, at 297–300.

³⁰ See further Carty, 'Myths of International Legal Order: Past and Present, 10 *Cambridge Review of International Affairs* (1997) 3, at 13.

³¹ See C. Renfrew, *Archaeology and Language: The Puzzle of Indo-European Origin* (1987), at 216.

³² Aron, *supra* note 27, at 741.

³³ *Ibid.*, at 291–293.

identities of those that employ and examine them. Transposing his comments onto positive international law, one might say that the lack of attention in legal texts — especially those purporting to demarcate territorial sovereigns — to rhetorical and inter-textual issues signifies a literalist approach to language and an assumption of the rational basis of established identities.³⁴

None of this is to say that cultures are innocent. Aron stresses the rivalry of cultures, the permanent tendency which pushes each to claim that it is superior, where the will to be a nation becomes a collective arrogance.³⁵ Indeed, it is this fundamental mystery about the nature of conflict that has traditionally been the area occupied by metaphysics. This is much clearer in Shweder's work on cultures, which also makes the connection, necessary to this article, between culture and phenomenology. Phenomenology, as a philosophy of the 'Obvious', is a matter of becoming aware of the Self, aware of one's embeddedness, of prejudice, in the sense of the framework within which one prejudges matters. Shweder argues that it is possible to assume that one particular culture will grasp a meaning from a standpoint different from any other but at the same time representing a striving for objective meaning which can, and should, and will have an impact on others. Shweder opposes what he calls Nietzsche's ontological atheism, his reductionist reification of thought as radical subjectivist imagining, without contact with an external, objective world. Instead Shweder believes that existential seizures of meaning represent 'irrepressible acts of imaginative projection across the inherent gap between appearance and reality'.³⁶ That is, one can come out of inherited prejudice.

Cultural psychology for Shweder is premised on human existential uncertainty (the search for meaning) and on an 'intentional' conception of 'constituted worlds'. The principle of intentional (or constituted) worlds asserts that subjects and objects, practitioners and practices, interpenetrate each other's identities and cannot be analysed into independent and dependent variables. A socio-cultural environment is an intentional world, in so far as a community of persons direct their purposes and emotions towards it.³⁷ It is not possible to achieve transcendence and self-transformation except through a dialectical process of moving from one intentional world into the next.³⁸ It is precisely this dialectic which saves us from the stagnant bigotry of nationalism which Ross rightly distrusts.

It has to be accepted that a negative force is at work in identity conflicts among states (read: socio-psychological groups/nation), a force which need never work itself out constructively. Depression and paranoia work sharply in the definition of difference that will equally be accompanied by a struggle for superiority.³⁹ Since Hegel first formulated his phenomenology of the Master-Slave relationship it has been clear that at the root of modern phenomenologies of self-determination there is a vigorous if

³⁴ W. E. Connolly, *Identity and Difference* (1991), at 227.

³⁵ Aron, *supra* note 27, at 297–298.

³⁶ R. Shweder, *Thinking through Cultures* (1991), at 68.

³⁷ *Ibid.*, at 74.

³⁸ *Ibid.*, at 99.

³⁹ *Ibid.*; C. Olivenstein, *L'Homme Parano* (1993), at 103–108.

not violent struggle for self-expression. It is rooted in a logic of identity that is conflictual and anti-social in the sense that it represents a perhaps obsessive struggle against the 'outside threat' of objectification. While it may work towards the goal of inter-subjective *recognition* — which must suppose *frontiers* — the struggle is apparently inherently unstable.

The Hegelian paradigm was popularized for international relations by Alexandre Kojève's lectures on Hegel's *Phenomenology of the Spirit*.⁴⁰ The Hegelian influence on Sartre, and its implications for international relations theory, have been followed up by James Der Derian.⁴¹ Its influence on feminist phenomenologies of struggle is developed by Jessica Benjamin.⁴²

6 Scandinavian Realism, Phenomenology and French International Law Positivism

The crucial issue remains whether phenomenology can provide the normative bridging necessary to give international society a reconciliatory legal dimension that transcends the prejudices of the sovereign nation-states. Ross thinks this can only be achieved, as it were causally, through the superior coercive weight of an inter-state international organization. The question is whether phenomenology can go beyond the faith in the judiciary which Ross and to a lesser degree Hägerström offer and which is in practice what the vast majority of contemporary international lawyers accept.⁴³ However, before approaching this most difficult question, there is a need to strengthen the argument about at least the potential, albeit deconstructive, negative contribution of both tendencies of thought by drawing upon a French critique of dominant contemporary French international law positivism. This will illustrate precisely the failure of legal positivism to accept the need for a political sociology of collective entities in the direction suggested by Aron. Instead positivists continue to reproduce all the mistakes highlighted by Hägerström. Above all, positivists do much the same as naturalists and others in their search for an aesthetic harmony in an abstract unity of states in an international legal order.

French positivism is really a formalist idealism, almost aesthetic in its search for harmonies that absorb and eliminate conflict in international relations. It should be obvious that the so-called wills of states are heterogeneous in relation to one another (not to mention within themselves), even though the international agreement is, by

⁴⁰ A. Kojève, *Introduction à la lecture de Hegel* (1947).

⁴¹ In *On Diplomacy* (1987), at 152–160.

⁴² *The Bonds of Love* (1990), esp. at 51–84.

⁴³ See A. Carty, *The Decay of International Law* (1986), at 26 and fn. 7, where reference is made to the role of the judge as fetish to substitute for the difficulties of the subjective element of custom. Specific mention is made of the Dane, Max Soerensen's role in encouraging concentration on the judiciary, also in Ross' *Lehrbuch des Voelkerrechts* 78. In *The Decay*, Soerensen is quoted as claiming that in the ICJ jurisprudence 'the legal interpretation of facts objectively ascertained, is thus substituted for an inquiry into subjective beliefs'.

definition, a conjunction of wills. Apostolidis develops an argument that is very close to the thinking of Hägerström. The heterogeneity of wills concerns as much the goals pursued by the different states (the agreement as to ends is only apparent, for each party is determined/influenced by factors which are peculiar to it) as well as the background from which each individual state will comes (the will of each state bases itself on concrete internal factors such as the nation, social classes, economic power, all of which sway it towards the agreement). According to Apostolidis, in the face of these social realities, formal logic is the logic of a simplified, abstract world, incapable of expressing the reality of actual social movement.⁴⁴

It is a question of a decadent Cartesianism that ignores even the dialectical couple: complex simple. It breaks up the object of study by a technique of the reduction of the complex to the immediately simple. Thus, for example, the juridical formalism of Kelsen (a dominant background figure in France⁴⁵) interprets the clause *rebus sic stantibus* in the following way. The function of law in general and that of treaties in particular is to stabilize juridical relations among states, in spite of changes of circumstances; if the circumstances do not change it would hardly be necessary to conclude treaties having obligatory force. The clause *rebus sic stantibus* is therefore in opposition with one of the essential aims of the international juridical order. Apostolidis comments in a manner in which Hägerström would have approved. Such positivist logic constructs its concepts in eliminating the concrete content to which they might refer. Everything appears uniquely across (or through) abstract Forms: the treaty, the state, and the international community. The problem with this normativism is that it sees in the state only a juridical order somehow delegated by international law — which is a denaturalization of a historical fact. The state is no longer thought through in its historical existence.⁴⁶

While Apostolidis does not go on to argue directly, as Hägerström, that the aesthetic decadence of French positivism is a hidden form of natural law, he does point out how French natural law doctrine is remarkably similar to positivism. One reinforces a positivism of fact thanks to a formal concept of international society. The right which the society of nations is supposed to have to organize itself politically under a unitary form is founded on a natural law which precedes all national differences. In effect Apostolidis sees here the illusion of a conceptual universe founded on the faculty of an absolute conscience: that is, a conscience which eliminates historical contingencies and real social contradictions. This is once again a mere ideological construction of juridical knowledge. In particular, the place of force, or violence, does not enter into the definition of the concept of law. It is rather regarded as the negative pole of law since the law supposes, in this natural law view, a situation of essentially peaceful

⁴⁴ C. Apostolidis, *Histoire du droit international, Doctrines Juridique et Droit International, Critique de la connaissance* (1991) at 234.

⁴⁵ See, for instance, the doctoral dissertations: J. Combacau, *Le pouvoir de sanction de l'O.N.U. Étude théorique de la coercition non militaire* (1974); and C. Leben, *Les sanctions privatives de droits ou de qualité dans les organisations internationales spécialisées* (1979).

⁴⁶ *Ibid.*, at 325–328.

social relations.⁴⁷ In the same abstract way, sovereignty is considered as an obstacle to the realization of international law. Yet this state is conceived itself as a juridical category beyond question, while hiding under a single word the profound differences that exist among states. All reference to such content is eliminated.⁴⁸

The same idealist formalism exists in supposedly sociological approaches to international law. There is always what Apostolidis calls the unificatory tendency, the supposedly incontestable supremacy of the universal over the particular, in the guise of a perpetual return of the multiple to unity.⁴⁹ For instance, Scelle poses the individual human action as having social value in so far as it is in conformity with social solidarity. The primacy of the general interest over particular interests imposes a necessary hierarchy of juridical orders in the sense that 'the international' conditions always 'the national' in modifying it or in abrogating it *ipso facto*.⁵⁰ In this way an internationalist, collaborationist, logic requires that one consider, for example, the competence of the League of Nations as unlimited, that even the United Nations Charter appears as a constitution of a quasi-universal international society. This 'objectivist' logic rediscovers its conclusions wherever there is its point of departure. Given the hypothesis, the contrary is inconceivable.⁵¹

Apostolidis sees all of these currents — positivist, naturalist and sociological — as identical in their effect in creating at present in the French Faculties of Law a formalist *rhetoric* for the state-dominated model of international relations — a cult of a technical logic, a conservative ideology, repetitions of juridical texts, distinctions between texts and commentaries — a whole series of intellectual operations which take place without any critical dimension. Positivists preach and call for abandonment of doctrinal debate in favour of the increasing technical character of legal materials. They create dichotomies, as did Kelsen before them, calling for lawyers to separate the normative value from the explicative character of law.⁵²

The final outcome of this critique is a call for a phenomenological approach. Apostolidis concludes, appropriately, with a critique of contemporary positivist definitions of the state. One has to break out of a uni-dimensional thought to a pluri-dimensional one which distinguishes itself by its capacity 'to think its object', seizing at the same time the social and ideological conditions in which it thinks. Thereby pluri-dimensional thinking makes of a given society an object of its reflection. Critical thought becomes ahistorical conscience and goes beyond an anodine critique of ideology to a sociology of knowledge.⁵³ So one has to transform a passive definition of the state as a so-called sovereignty of fact, a state power, into a living force, the antagonistic social forces that act within it. Instead of supposedly breaking up the elements of the state into so-called constitutive elements, in a pseudo-scientific

⁴⁷ *Ibid.*, at 413, 428.

⁴⁸ *Ibid.*, at 432–433.

⁴⁹ *Ibid.*, at 202.

⁵⁰ *Ibid.*, at 213–215.

⁵¹ *Ibid.*, at 216.

⁵² *Ibid.*, at 478–488.

⁵³ *Ibid.*, at 495.

positivist way (governing power, population, territory), one should recognize that a Population is a people, in movement, heterogeneous, contradictory, dynamic,⁵⁴ *most of all, not graspable by a supposedly sovereign positivist observer.*

7 Can Phenomenology Overcome the Value-Nihilism of Scandinavian Realism?

A *The Scandinavian Realists*

A crucial problem with the Scandinavian realist interpretation of international 'legal' experience has to be how to bridge the chasm between or among different individuals or national socio-psychological collectivities. The extent of this difficulty has its explanation in the causal, empirical approach to values, which sees values as reactive prejudices, conditioned by social and psychological background. To state this condition as 'objective' or 'objectified' fact is not to provide any way of overcoming it. Ross offers the fetish of the judiciary as the way out of this perfectly cogently constructed impasse. This is in open contradiction with himself, since he accepts that the judiciary is not significant in international conflicts. Hägerström provides a brilliantly penetrating framework for resisting the anthropomorphizing of the state as a unitary entity, but did not see it as his task to enter into the details of international society. This part of the paper takes on a new track in so far as it tries to treat in depth, at a philosophical level, the epistemologies of both Scandinavian Realism and Phenomenology to see if the latter does provide a way out of the impasse.

Both Ross and Hägerström, as Scandinavian realists, have, in common with phenomenology, the distrust of the *a priori* pseudo idealism of contemporary international law positivism, so clearly presented in France. They will have no *a priori* objection to the possibility that the dissipation of power so familiar to Hägerström extends beyond traditional national state boundaries and extends to an ultimately untraceable intersecting of social forces at the planetary level. In this case Aron's removal of the formal juridical framework of the state in favour of psycho-social collectivities may be treated as merely a heuristic device with which to begin to analyse what will, in the present argument, come to be regarded as the psycho-social phenomena of international relations.

Ross and Hägerström are correct to engage in an empirical, causal ideology critique of concepts such as sovereignty and state will. This is a concern with the epistemological issue of the origin and foundation of beliefs. Hägerström stresses the importance, within an exclusively natural and social context (excluding the supernatural and its Kantian equivalents, in terms of an 'apotheosis of man'), of observing the impressions of objects upon one's consciousness. His analysis is a psychological description of the origin of ideas in relation to social facts. This provides a 'realist' framework for a search for obligation. An action as an object must have

⁵⁴ *Ibid.*, at 401, 434–435.

some sensible or natural element to cause the corresponding element of the effect to be represented by the idea or concept. There must be an intelligible and necessary interaction between the object as cause and its effect on consciousness as idea. According to the principle of similarity, the effect must be like the cause. It follows that the element of ought must be present in the action to cause the meaning and truth of the corresponding idea. Yet for Hägerström every attempt to draw out of a situation the conclusion that it is in the highest degree of *value* to undertake the action fails because no supreme value can be discovered if we are standing indifferently before ourselves and our actions. Hägerström accepts Hume's and Kant's view that when nature is observed by experience, ought has no meaning.⁵⁵ This is where Scandinavian realism leaves Ross and he appears to jump into the fetish of the judge as 'the eyes of the community'.

Importantly, Hägerström rejects the Kantian avenue that it is human reason which introduces the meaning of ought, on the ground that this implies introducing a super-sensible world alongside the sensible world. Man's mind is part of nature and subject to its causal structure. This leaves Hume's position that morality is more properly felt than judged. The meaning of ought can only be found in relation to subjective attitudes in terms of feelings. This leads to an inquiry into the origin of the false idea of the truth of normative ideas. This is to enter into an inquiry of the origin of normative ideas in relation to social upbringing, for Hägerström especially the religious element based on centuries of social upbringing. Reality has an inherent logical structure of necessitating causes and their effects. Within this causal structure, there is no room for any normative properties in terms of ought.⁵⁶

These views are so clearly reflected by Ross that it is difficult to see why he does not take 'the final step' and say that the international judiciary simply cannot find in state practice any obligatory or 'ought' element. This is not because there is no subjective element to whatever psycho-social collectivities one cares to observe, but rather that the subjective element has no *significance*. A clash of subjective attitudes cannot be resolved — unless, of course, the two parties say they will accept whatever the judges wish.

While it is proposed to go on to a phenomenological approach to international relations, it is not the author's intention to diminish the rigour of this aspect of Scandinavian realism. So, one will pursue Hägerström's objections to the idea that actions *have to be determined by reference to normative beliefs*. He claims that in the idea of an action as valuable there is no consciousness of objectivity present. For Kant the normative judgment interests us because it is true for us in virtue of having sprung from our will as intelligence and so from our proper self. For Hägerström normative belief only has meaning because it interests us by means of feelings which require a commitment of the will. However, this human will is not conceived in Kantian terms as practical reason but rather in Humean terms as having appropriate feelings. For

⁵⁵ Bjarup, 'Reality and Ought: Hägerström's Inaugural Lecture Re-examined', 40 *Scandinavian Studies in Law* (2000) 11, at 57–58.

⁵⁶ *Ibid.*

anything to be better or worse, the knowing person must assume a certain attitude of feeling in relation to what is given. If the person lacks the appropriate attitude of feeling and volition ‘then the obligation vanishes’.⁵⁷ This has an extremely important consequence for

the search for the ‘ought’ in whatever context, also in the lawyer’s search for the subjective element of custom. Hägerström’s position is, in terms of moral absolutism, a moral nihilism. Any search for external authority is authoritarian and also illusory, which means that anyone who ‘finds’ such standards will be authoritarian. However, for Hägerström his argument also means that once the agent realizes that no objective answer is available, it is impossible to be mistaken. The result of this will produce a state of mind characterized by security rather than anxiety.⁵⁸

This is in contrast to the view of moral language as an instrument of social pressure and also the fanatical view that one’s own moral view is absolutely authoritative. However, it is not a philosophy of liberalism. It rejects the Kantian individualism of a good will as a reality that is good in itself. This is, as already argued, a super-sensual or supernatural view.⁵⁹

For Hägerström’s world view none of this is very dangerous. Human beings exist in society and they are more likely to be able to do so peacefully if they realize that their preferences have no objective force *and that any compulsion to regulate their relations in terms of what they believe to be objectively required* will be pre-modern mystical nonsense, whether of the religious or secular form, that is likely to be accompanied by anxiety and violence. Hence there is **categorically** no place for searches after the subjective element of customary law or of the will of the state or states, as the case may be, depending upon whether the inquiry is international or national. Ross should put together the bits and pieces of his ‘legal philosophy’ and realize that what he has said is that whatever a judge may be sometimes allowed to do, he is not ‘making Law’, since there are, as he says himself, ‘no sources of the Law’.

B Phenomenology Husserl and Ricoeur

A phenomenological search for the ‘ought’, bindingness and obligation in practice can only be presented in bare outline at this stage. Its distinctiveness from Ross and Hägerström is that while it is as subjectivist as Scandinavian realism, it has a confidence in the possibility of an intelligible access by the subject to its own inherited prejudices and acquired practices of behaviour. This access could lead to overcoming the apparent inevitability of blind conflict of prejudices. The post- rather than anti-metaphysical dimension of this search is to accept that there is no dimension of ‘oughtness’ outside the parties themselves, in the sense of an outside ‘force of oughtness’ which they regard as compelling. Nor is it enough to rest with the so-called internal perspective of analytical positivism. The latter would mean reference to an *a*

⁵⁷ *Ibid.*, at 60.

⁵⁸ *Ibid.*, at 63.

⁵⁹ *Ibid.*, at 66 and 68.

priori criterion of legality concordance with which makes practice significant, e.g., a specific rule in a specific area of law supposed to be already accepted — the aesthetic illusion of positivism already described by Hägerström and Apostolodis. For the Scandinavian realists this is simply to accept stated prejudices at their face value. Phenomenology has to start, here also, from the critique that the Scandinavian realists will make.

Equally radically, the acceptance of the arguments of the Scandinavians so far and their development by Aron and Apostolodis means that there must be no search for a 'unitary state will' but rather at least heuristic acceptance of Aron's framework of a psycho-social collectivity as the context in which to pursue the key dimension of phenomenology — intentionality, where the objectified subject becomes a subject aware of itself.⁶⁰ The state might be regarded as an institutional framework for numerous subordinate institutions within which individuals, including international law officials, work with others — and against others — to achieve certain aims *with more or less conscious coherence or integrity*.

The argument from phenomenology is that a sense of obligation can arise from a consciousness of a sense of identity with oneself and a memory of or present experience of relationship with others. The unity of the self is of a personality or someone with a gradually acquired and eventually consistent pattern of acted-upon intentions. Obligation arises from an awareness of the need for unity through consistency, and through comprehension of a similar need in the other. As Edmund Husserl explains, the starting point has to be the supposition of an *I* from which the conscious experience originates. The *I* does not simply turn towards what is already passively given, but, instead, it is already embedded in its own and others' experience. This embeddedness is what Ross would call inherited prejudice. However, Husserl thinks this experience can be reappropriated through critical self-awareness. '[B]y connecting in the way of relational determining, it [the self] constitutes relations of objects, states of affairs, property relations . . . likewise relations of values, practical relations, activities, means for goals'.⁶¹ The *I* is not an empty ideal polar point. 'With the original decision the *I* becomes originally the one who has thus decided. The *I* has its history and on the basis of its history it creates an *I* which persists for it habitually as the same *I*'.⁶²

How is the *I* related to the *Other*? This is for the international lawyer, faced with clashing and self-contradictory collective social entities, the rub of the matter. The *I*, in its self-instituting activity '... executes co-belief, co-valuing etc in an institution which follows by its "assent", i.e., by accommodating itself fittingly to the *other's* motivation and the *other's* conviction'. Such convictions are not simply born forth from the *I* itself, but follow from another, are guided by another. The *I* thinks and values not of itself but lives with the *Other*, '... *putting itself in the other's place and living*

⁶⁰ This is the working hypothesis which underlies the joint work of myself and Richard Smith, *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office, 1932–1945* (2000), esp. at 25 and fns 37 and 38.

⁶¹ *Phenomenological Psychology* (transl. by J. Scanlon, 1977), at 160.

⁶² *Ibid.*, at 161.

with him'.⁶³ This rather optimistic picture needs strengthening. Husserl considers that the *I* itself is compelled, by a sense of obligation to itself, to retain its individual style, its total character, throughout the fluctuations of its own actions.⁶⁴ At the same time, the *I* may direct its interests towards the *personal*, i.e., towards how persons behave as persons, how they define themselves and others, how they form friendships, marriages, unions, etc., above all, how they form mental meanings in a useful way, trophies, treatises, works of art. The *person* is the theme, but especially in its surrounding world.⁶⁵ It is this entire realm of personal subjectivity that is the exclusive theme in all socio-cultural investigation.⁶⁶

Interdisciplinary perspectives are essential. One way is for the literary imagination to realize the possibility of passing beyond the world actually experienced at any one time to an all-inclusive survey of the experiential world as such. This means we 'disclose' the experiential world 'by expanding actual experience and entering into recollection, expectation and possible experience'.⁶⁷ This requires the *I* to follow the *Other*, to reproduce his insight, in 'a field of associative-apperceptive transfer from the sphere of seeing to what is anticipated without being seen, made on the basis of an analogy with what was previously seen, but not supported by any seeing verification'.⁶⁸ Husserl's 'Eidetics' is the all-inclusive science of ideally possible forms of personality.

A further means to overcome unthinking or rationalized inherited tradition is history, taken as 'an all-inclusive personal science' signifying the *other* as seen by myself through empathy, i.e., in the subjective mode. The *other* is posited by me 'as himself having his body as the center of his surrounding world and having such and such thoughts, valuations, aspirations'. Husserl himself insists that even the imaginative world of possible personality can only be part of one historical world. By this he means an affirmation of human solidarity which makes for *one* experiential world. 'The first thing is this: *I*, the one experiencing, and *we*, the ones experiencing, live and are forever experiencing in the unity of a personal life (whether we reflect on it or not)'. So the conclusion is a dramatic declaration of faith that the historian extends his thematic interest 'to a unitary horizon of experience which unites in the unity of one humanity all personalities and communities, a unity to which he himself belongs'.⁶⁹

It is proposed to take up, however briefly, three aspects of Husserl's arguments which appear to need elaborating — just how one person takes another into account, how community results from this and the relation between intentionality and a general theory of the will in the context of a theory of personality. Inter-subjectivity is the kernel point for Husserl, replacing Descartes' search for a final foundation point,

⁶³ *Ibid.*, at 162–163 (emphasis in the original).

⁶⁴ *Ibid.*, at 164.

⁶⁵ *Ibid.*, at 168.

⁶⁶ *Ibid.*, at 169.

⁶⁷ *Ibid.*, at 171.

⁶⁸ *Ibid.*, at 163.

⁶⁹ *Ibid.*, at 175–177.

such as divine veracity.⁷⁰ In other words, the lawyers' search for a final, 'nodal' point of validity is replaced by the search for the point where mutual comprehension of intentionalities can be reached. Intentionality refers to the intending of a sense and not to some sort of contact with an absolute external world. At the same time, the life of the Cogito is not an anarchistic outburst but is guided by permanences of signification.⁷¹ In other words, contrary to the 'anti-essentialists' who believe that all would-be substances are purely social constructions, it is maintained that the ego does constitute the substratum of its permanent properties. The crucial point is that the ego gives itself coherence by its manner of 'retaining' and of 'maintaining its position-takings'. This includes 'my world around me', including my experience of 'the other', a radical triumph of interiority over exteriority.⁷² The ego has to imagine itself in order to break away from itself as brute fact. Yet this imaginative self-distancing is anything but a self-construction. It bridges the disparity between positing of the self and the positing of 'the other' in a subjectivity in general. There is a capacity to bring the presence of 'the other' back to the presence of the self, because of the power of consciousness to go beyond the latter into its implicit horizons.⁷³

Against blind and conflictual prejudice (Ross), the paradox, which Ricoeur highlights in his commentary on Husserl, is the following. It is clear that 'the other' is derivative in relation to my consciousness, but if I were to withdraw from the content of my experience what it owes to commerce with others, there would remain no content worthy of being called mine.⁷⁴ I experience myself as a member of this totality of things outside me and in me.⁷⁵ There is a contradiction. While 'the other' is, idealistically, a modification of the ego, realistically it never ceases to exclude itself from the ego. In the first case 'the other' is a projection. Yet the constitution of an objective nature would require the experience of the ego to enter into a composition with 'the other' on the basis of reciprocity. The fact remains that however 'real' communities may be, they are never absolute. It is the ego alone which is, in the final analysis, real.⁷⁶ The question is how any person can overcome this chasm whether as advocate, academic commentator or so-called judge or adjudicator. There is no escape to a foundational reference point, into an illusion of validity, by an operation of an over-viewing. For Husserl it is always a matter of looking from the side, never from above.⁷⁷

This is the crucial breaking point for Scandinavian realism for which everything is reducible to subjective emotion acquired through upbringing and rationalized as tradition and brute prejudice. In contrast, in phenomenology the *I* may see itself as a psyche in a world with other psyches. Each man appears to every other in an

⁷⁰ P. Ricoeur, *Husserl, An Analysis of His Phenomenology* (transl. by E. G. Ballard, 1967), at 84.

⁷¹ *Ibid.*, at 94.

⁷² *Ibid.*, at 106–107.

⁷³ *Ibid.*, at 108–113.

⁷⁴ *Ibid.*, at 120.

⁷⁵ *Ibid.*, at 123.

⁷⁶ *Ibid.*, at 130–131.

⁷⁷ *Ibid.*, at 133.

intra-psychic manner, that is to say in systems of intentionality. It is the self-objectification of the monad as psyche that makes the self aware of ‘the self as among other selves’. This happens not in cognition but in *praxis*, in action. Husserl abandons the impersonal subject of Descartes, Kant and neo-Kantianism, orienting towards the most particularized subject and towards the inter-subjective network. This inter-monadic relation includes a structure resistant to our arbitrary actions. It is starting from the ‘own’ self that the alien is understood, but this contact is a matter of suffering and doing whereby the ego or man becomes a person in community.⁷⁸ The outcome is an objective order in the sense of an inter-subjective order.

Finally, Scandinavian realism appears, with Ross and Hägerström to absorb the will in the emotions, the psyche in the body. This is a reaction to classical psychology that constructed man like a house: below were the elemental functions; above was an extra level, the will. Need, desire and habit were transposed from animal psychology as needed. Therefore it was possible to omit the fact that the will is already incorporated in a complete understanding of the involuntary. In phenomenology, in the human order, the emotions only take on sense in relation to a will which they solicit, while the will takes on these senses even if only by its resignation.⁷⁹ Phenomenology restores the unitary movement of the voluntary and the involuntary. It is then clear that the Scandinavian dichotomy between will and emotion, with the latter swamping the former, and with such swamping, the possibility of intentionality, is false. As Ricoeur says: ‘Even if I go to the very end of this reflexive movement, I discover myself as the possibility of myself which continuously precedes and reiterates itself in the anguish of what might be. But probing the root of that reflective involvement of myself I discover an unreflective involvement implicit in my projects themselves.’⁸⁰ The critique of methodological dualism restores to us the lived through union of pre-reflective willing and the owned body. Certain aspects of this dualism can be explained by the temporal structure of our being in the world, as Merleau-Ponty expresses it, in the sense that a tendency to persistence and fixation is inscribed in every living present. Every new project breaks into a world already there, a world of sedimented projects. Necessity is lived through not simply as affecting but as wounding. To be transparent, without the opacity of the unconscious, would be comparable to the perfectly voluntary movement in which the body is effaced.⁸¹ That is, it would be unrealistic.

8 Conclusion

The anti-theoretical ‘practical’ international lawyer will sneer: What use is all of this phenomenology to the everyday legal questions he thinks he has to consider? The

⁷⁸ *Ibid.*, at 137–141.

⁷⁹ *Ibid.*, at 215–216.

⁸⁰ *Ibid.*, at 224.

⁸¹ *Ibid.*, at 225–227.

answer to this question insists upon the partnership between Scandinavian realism and phenomenology which has been constructed here. A legal question is usually a variant of the theme: whether the sovereignty of the state is limited by some international rule, willed explicitly or implicitly by itself alone or in conjunction with others or by some supposed international community as a whole, which has expressed its will either expressly or implicitly. The judge is set in search of valid rules, following these criteria. Sovereign space is either limited or extended accordingly.

Scandinavian realism, in the argument presented here, has effectively swept away this whole formalistic apparatus as illusory. The next stage of the argument has been to look at international society through the eyes of international relations scholars, particularly of a cultural, socio-psychological inclination, to see where there would be a place for phenomenological intentionality. After this the opportunity was taken to test a social realist perspective of international society against the sterility of will-theory based French positivist formalism in international law. Finally the real challenge that phenomenology tries to meet, in the last, philosophical part of this paper, is not legal positivism, which is a self-hypnotic nonsense, but the hard emotivism of Scandinavian realism. The latter appears to leave no place for rationality or the search for meaning in international society. Maybe it offers a vague hope that habit and tradition will lead to some involuntary form of communal reasonableness, based on the type of ethnic homogeneity and political stability or inertia which appears to prevail in Scandinavia.

The search for a way out of the inert body of unconscious prejudice is the real challenge for the 'phenomenological international lawyer'. Whether it is the 'war against terrorism', the new war of the twenty-first century; the wrangling over minorities; secessionist movements; quarrels over environmental concerns and commercial necessities; monetary stability and speculative dealings in currencies; immigration flows, asylum seeking, and freedom of movement; the legitimacy of weapons used in national security and defence; the extent of the immunity of state officials in the face of actions which appear gravely offensive; the limits of would-be humanitarian and security assistance — the list is endless and it consists of issues of unlimited controversy. The actors who pose these problems are numberless, even if usually socio-psychological collectivities. The variety of prejudices and rigidity of the structures in which the questions appear are equally difficult to count exhaustively.

The lawyer comes back to recognition and consent about the usual issues, which remain unresolved. It is 'all about how to get there — about process'. Phenomenology can accept the Scandinavian realist deconstruction of the pseudo-transcendentalist search for an *opinio juris sive necessitatis*. There is no 'ought' beyond the self. Yet there is an 'ought' within the self, which can, through an inter-subjective dialectic, reach beyond the closure of itself-as-object to the self as subject-in relation.