Positivism and Dualism in Dionisio Anzilotti

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1. In legal theory as in other sciences definitions have but a limited value. They rarely represent a concept or a point of view in a way that may be described as accurate. One of the reasons is that they are not self-sufficient and thus contain elements which require further definitions. Another is that the same term is often used in a variety of meanings.

There is nothing fundamentally wrong with the widely accepted definition of Dionisio Anzilotti as a positivist and a dualist. As will be shown, the former definition may also find some support in the language that Anzilotti used when stating his views. However, it provides no more than a general description of Anzilotti's theories with regard to the foundation and sources of international law and to the relations between international law and municipal law. As there are several possible definitions of positivism and dualism, many possible meanings may be attached to the view that an international lawyer is a positivist and a dualist. Furthermore, Anzilotti's basic conceptions of international law no doubt developed in time, so that one would also have to take into account substantial changes.

The definition of an international lawyer as a positivist and a dualist often has a negative implication. Thus, when applied to Anzilotti, this definition seems hard to reconcile with the widely projected image of him as an outstanding figure among scholars and judges of the first half of this century. An inquiry into Anzilotti's basic conceptions may help to overcome this apparent contradiction. Certainly, although a leading figure among positivists and dualists, Anzilotti never carried his views to an extreme. It may also be that an analysis of his theories and their reasons could help towards a reappraisal of some current misgivings about positivism and dualism.[1]

What is intended here is little more than an overview of Anzilotti's writings concerning the foundation of international law, its sources and the relations between

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1 For a weighty defence of the Utilitarians' positivism – which could be applied also to Anzilotti's conception – see Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1957-8) 593.

international law and municipal law. This may be of some use, if only because his works have not been published in English and, apart from his separate and dissenting opinions as a judge of the Permanent Court of International Justice, have never been translated into English. It is worthy of note that while the third edition of his textbook – his *Lectures on International Law* (*Corso di diritto internazionale*) – was published in French, German, Spanish, Japanese and Russian translations, it did not appear in English.[2]

When examining Anzilotti's conceptions it is necessary to consider both his theoretical work and his analysis of specific issues of international law, whether as a scholar or as a judge. Also his less well-known writings on conflict of laws have to be taken into account. First of all, according to a view that Anzilotti often expressed in his earlier writings, to determine the States' legislative competence is essentially a function of public international law, and some of the rules concerning conflict of laws do indeed pertain to this system of law.[3] Moreover, under a dualist approach, the relations between national and foreign municipal laws are to some extent similar to those between international law and municipal laws.

In Anzilotti's theories positivism and dualism are closely related. For the purpose of analysis, positivism should be examined first. It is not only logical to consider the substantive components of international law before examining how it relates to other laws, but this approach also follows the order in which Anzilotti's views developed.

2. Anzilotti's first published work is a philosophical study, dated 1892, reviewing Herbert Spencer's *Justice*.[4] Unlike his later works, in which Anzilotti's prose, although forceful, became clear and concise, this study was written in the difficult and redundant style prevailing in Italian legal literature at the time. It does not refer to international law at all, but deserves mention here because it states Anzilotti's reasons for adopting a positivist concept of law. One of the main points of Anzilotti's criticism concerns the contradiction he found between Spencer's evolutionary approach and his theory that there are some moral rules which are both absolute and necessary. Anzilotti further took

2 An overview in English of Anzilotti's writings is contained in A.P. Sereni, *The Italian Conception of International Law* (1943) 208ff. References to the various translations in other languages of Anzilotti's *Corso di diritto internazionale* (hereafter referred to as *Corso*) – apart from the Russian one which appeared only in 1961 – may be found in Tomaso Perassi's introduction to the posthumous reprint of the *Corso* (1955). This is a reproduction of the third edition (1928), with some minor corrections – which are not listed – and the addition as footnotes of some manuscript notes left by the author. As this volume is far more easily obtainable than the original issue, references to the latter will be made to the pages of the *Corso* as reprinted in 1955. All the quotations from Anzilotti's scholarly works in the text are my translations.

3 This theory was first developed in *Studi critici di diritto internazionale* (1898), reprinted in *Scritti di diritto internazionale privato* (1960) 189.

4 *La scuola del diritto naturale nella filosofia giuridica contemporanea* (1892), reprinted in *Studi di diritto processuale internazionale e di filosofia del diritto* (1963) 673.

issue with the concept of natural law as developed by Spencer. It may be useful to recall two relevant passages of his critique of natural law:

> Natural conditions of existence give the necessary basis of the concrete form of legal relations; however, this form is directly determined only by the way in which men understand and apply those conditions.[5]

> Were man constantly and exclusively guided by rational necessity, it would be understandable how one could by some logical procedure determine and understand the concrete reality of legal principles and institutions once a starting point has been found. However, law is actually formed and determined by the various elements and relations from which the very structure of the social body results. Since this is not stable and determined by rational needs, but continually develops and changes, through an uninterrupted course of actions and reactions, it is clear that a legal system which is shaped by reason only through logic – such as the system of natural law – must be an empty ghost, that in no way corresponds to the reality in which law lives and accomplishes its functions. Therefore the elements of conscience may and should provide some general premises, some foundations of the legal system, while in order to understand the legal system in its true nature and in its laws one has to study society and deeply comprehend history.[6]

Legal positivism appears to be an aspect of Anzilotti's acceptance of positivist philosophy. In a larger work entitled *Legal Philosophy and Sociology*, also published in 1892, he acknowledged in particular the influence of two Italian legal scholars, Carlo Francesco Gabba, whose lectures he had attended as a student in Pisa,[7] and Icilio Vanni.[8]

A critique similar to that addressed to Spencer was made by Anzilotti in 1906 with regard to the influence of natural law on the study of international law. In a review article of several textbooks,[9] including the first edition of Oppenheim's *International Law*, he noted at the outset that international lawyers were undergoing a phase of transition and were divided between a 'positivist concept of law', which was widely accepted in theory, and several traditional ideas, which were still exercising a strong influence such as the one which supported the existence of some fundamental rights of States. Clearly Anzilotti's suggested method was to adopt a coherent positivist approach:

> Among all legal sciences, the theory of international law has been the last ... to feel the influence of the positivist concept of law, and to take it frankly and fully as the basis of research. Because of the characters which are proper to the subject-matter – especially the absence in the international community of those premises with which the formation of law is

5 Ibid., 680.

6 Ibid., 691.

7 This fact is recalled by Anzilotti in his study *La filosofia del diritto e la sociologia* (1892), reprinted in *Studi, supra* note 3, 495, at 501 note 1.

8 Ibid. Anzilotti referred to I. Vanni, *Prime linee di un programma critico di sociologia* (1888) and *Il problema della Filosofia del Diritto* (1890).

9 'Trattati generali di diritto internazionale pubblico', 1 *RDI* (1906) 33 and 166, reprinted in *Scritti di diritto internazionale pubblico* (1956-7) 1, 243.

> nowadays linked in organized societies -, as well as because of the elements which have influenced the process of historical development, our science has been longer and more profoundly dominated by natural law, and has adopted to a large extent its fundamental concepts and method.[10]

Twenty years on, Anzilotti renewed in his *Lectures*[11] his criticism of those writers who did not adopt, or fully accept, a consistent positivist approach, but were still impregnated with ideas pertaining to natural law:

> All doctrine, almost up to our days, even up to these days, has developed within the framework and on the basis of this conception of legal philosophy, so that a general conviction has emerged to the effect that international law, because of its very character, can only exist by being linked with a system transcending human will. The same doctrines which are apparently more innovative and courageous, such as the Italian school in the second half of the 19th Century, only give a new content to old ways of thought... Doctrine has attempted only in recent years to eliminate this traditional detritus and reconstruct the system of norms that regulate relations among States on the basis of a more rigorous and precise conception. This is founded on the clear distinction between, on the one hand, law that finds its origin in a normative will, and is binding because of the very fact that it is imposed by that will – positive law –, and, on the other hand, that complex of idealistic principles or requirements that are asserted by social conscience on the basis of human nature and the constitution of things in relation to the purposes of society – that is justice, or else natural law.[12]

In his above-quoted criticism of the use generally made by writers of what he labelled as concepts of natural law, Anzilotti referred to the need to draw legal rules from historical and social data relating to the international community. However, this view is reflected only in part in his approach to the foundation of international law and to the related question of the sources of law. True, Anzilotti rejected both the theories based on concepts pertaining to natural law and the neo-Kantian theories, which assumed that there was an *a priori* concept of law: according to Anzilotti, in order to show the existence of international law, it was essential that:

> ... among the rules to which States make their conduct conform in their reciprocal relations, some have come to take on the essential characters of legal rules, i.e. those characters that distinguish legal rules from any other rule of conduct.[13]

However, he accepted solutions which could hardly be derived from historical or social data.

10 Ibid., 246.

11 *Corso, supra* note 2, at 16.

12 Ibid.

13 *Il diritto internazionale nei giudizi interni* (1905), reprinted in *Scritti di diritto internazionale pubblico, supra* note 9, 1, 281, at 318.

3. In his volume on State responsibility, which was published in 1902,[14] Anzilotti devoted a lengthy analysis to the prevailing theories on the foundation of international law and came to the following conclusion:

> Rules of international law may derive only from the will of several States: 'ex omnium aut multorum gentium voluntate'. Only the will of several States, by becoming a collective or common will, may acquire the character of a will which is higher than that of individual States and is capable of imposing on their conduct some positive rules, that are not lacking in the essential character of law.[15]

This conclusion, as Anzilotti acknowledged, accepted the views that had been expounded by Karl Binding in his work *Die Gründung des Norddeutschen Bundes*, and later developed by Georg Jellinek in his *System des subjektiven öffentlichen Rechts* and by Heinrich Triepel in his volume *Völkerrecht und Landesrecht*.[16] Following the latter author, he also considered that in international law the common will resulted from normative agreements (Ver*einbarungen*) and that customary rules were established by tacit agreements.[17]

Accepting also Triepel's view that a 'legal explanation of the binding character of law is impossible',[18] Anzilotti wrote in 1902 that:

> The ultimate foundation of law is not and cannot be a legal concept. This applies to any part of the law, because necessarily, when one steps back from one to the other source of the binding character of a rule, one reaches a point in which law ceases and one must nevertheless assert its binding character, unless one intends the whole legal system to be destroyed... The binding character of law is rather a moral concept than a legal principle. This is the more so with regard to international relations, in which the less complete evolution gives greater uncertainty to the boundaries between morals and law. I think that nobody would doubt that the ultimate reason why States comply with the rules set by their common will is not a legal reason, but an ethical idea.[19]

In the 1923 edition of his *Lectures*[20] Anzilotti adopted, with regard to the foundation of international law, a new theory, that of Hans Kelsen.[21] Although it was expressed in different language, it may be taken as a development of Anzilotti's previously held views. When considering the rules of international law, Anzilotti noted that:

14 *Teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), reprinted in *Scritti di diritto internazionale pubblico, supra* note 9, 1, 1.

15 Ibid., 34.

16 Ibid., 38.

17 H. Triepel, *Völkerrecht und Landesrecht* (1899) 95ff.

18 Ibid., 82.

19 *Scritti di diritto internazionale pubblico, supra* note 9, 1, 57. The inconsistency between this view and the concept of the binding character of the collective will of States was stressed by M. Giuliano, *La comunità internazionale e il diritto* (1950) 82-83.

20 *Corso di diritto internazionale* (1923).

21 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920).

> A special category of these norms – certainly the most important one – is formed by those which come into being through agreements among States... Their binding force rests on the principle that States are under an obligation to respect agreements between themselves: *pacta sunt servanda*. This principle, because those norms are based upon it, cannot be further demonstrated from the point of view of the same norms. It has to be accepted as the first and undemonstrable hypothesis to which all order of human knowledge is related. There may be a demonstration from some other points of view – ethical, political, etc. – but this is clearly irrelevant for legal science, which goes no further than the said hypothesis.[22]

The principle *pacta sunt servanda* is viewed by Anzilotti as the 'necessary source of the binding force' of all norms of international law, including customary rules.[23] Thus the idea that customs are but tacit agreements among States was not revised by Anzilotti.

As is well known, Article 38 of the Statute of the Permanent Court of International Justice gave some support to the view that international custom is the result of the consent of States, by defining it 'as evidence of a general practice accepted as law'. In the *Lotus* judgment, which was taken by the vote of a strict majority which included Judge Anzilotti, the Court went a further step in the direction of considering international custom as a tacit agreement by stating that:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[24]

This famous passage no doubt reflects to a large extent Judge Anzilotti's views.

The theories put forward in 1923 were expressed by Anzilotti with the same or similar words in the 1928 edition of the *Lectures*: customs were still defined as tacit agreements, which were based on practice and *opinio juris*.[25] The suggestion of a slight amendment that Anzilotti intended to include in a later edition was contained in the following manuscript note he left among the pages of a copy of his textbook:

> The theory of customary law is the point on which I have most to take into account the new ways of thinking. In substance, I keep believing that my concept is right, but I have to use a broader concept of custom – and perhaps use a different term – in order to accommodate what is true in the so-called necessary and constitutional law of international society.[26]

22 *Corso di diritto internazionale* (1923) 26f.
23 Ibid., 27. The definition of customs as tacit agreements is also outlined at 42.
24 *PCIJ Publications*, Series A, No. 10, 18.
25 *Corso, supra* note 2, at 66f. and 72f.
26 Ibid., 72 note 10.

A voluntarist conception was adopted by Anzilotti also with regard to those rules of international law which, in a few lines that were added in the 1928 edition, he considered as not being norms of treaty or customary law:

> Also the logical premises and the necessary logical consequences of those norms are part of international law, because the will to observe a norm or an ensemble of norms implies the will to observe all those norms without which the former ones would make no sense or which are logically included in them.[27]

Anzilotti called these norms 'constructive rules'. In another manuscript note which was left in his copy of the textbook he hinted at a different approach:

> Constructive rules and general principles of law are close concepts. On this basis I believe that one may reshape the theory of sources in order to take into account what is right in the opinion that views general principles of international law as a source of that law.[28]

Whether one considers the first version of Anzilotti's views on the foundation of international law – Triepel's conception of collective agreements, with ethics as the ultimate foundation of the binding character of legal rules – or the later normative approach based on the *Grundnorm* that treaties have to be respected, there is sparse evidence to indicate that Anzilotti's theories on the foundation of international law (and the consequences he drew with regard to sources) were the result of empirical research on the way in which rules operate in international society. In the more recent version, as has been shown, the very possibility of a demonstration on the basis of a historical or social analysis is flatly denied. Moreover, the idea that customs are to be regarded as tacit agreements essentially appears to be the result of an attempt to develop a theory that is logically consistent with the accepted premises, rather than of an analysis of how customs operate in international society. As it was expressed by Roberto Ago, the collective will 'is no longer the will of individual States, nor is it the will of an entity which may have a will, as there is no entity superior to States'.[29] Thus, more modern theoretical constructions replaced older concepts and the positivist approach which Anzilotti had outlined in his earlier works was adopted only to a limited extent.[30]

27 Ibid., 67.

28 Ibid., 67 note 5. A reference to the general principles of international law was made by Anzilotti (at 107) when examining Article 38(c) of the Statute of the Permanent Court of International Justice. According to Anzilotti this provision refers both to principles 'which have been tacitly adopted in the international legal system' and to principles which 'exclusively belong to the municipal legal systems': the latter 'do not exist in international law' and, when the Court applies them, a special norm is created for the case in hand.

29 R. Ago, *Scienza giuridica e diritto internazionale* (1950) 28. The quotation in the text is a translation.

30 This criticism was expressed by Ziccardi, 'Note sull'opera scientifica di Dionisio Anzilotti', 3 *Comunicazioni e Studi* (1950) 7, at 20. Some further remarks on Anzilotti's conception of the foundation of international law were added by the same author in 'Caratteri del positivismo dell'Anzilotti', 36 *RDI* (1953) 22.

Similar remarks could be made on Anzilotti's view that national rules on conflict of laws are part of a system in which higher rules, pertaining to international law, regulate matters which are by their nature of an international character:

> Thus, national statutes relating to private international law are an actual part of an international legal system which is still incomplete and imperfect. It is therefore necessary to consider and study those rules in relation to the system that they contribute to shape and from which they draw their *raison d'être* – their value. In other words, this means that, next to the municipal system of private law, there is an international system of private law which – notwithstanding all its imperfections and gaps – asserts itself with its own characters and needs, which correspond to the characters and needs of the factual substratum from which it arises.[31]

Although Anzilotti's theoretical writings on conflict of laws contain several references to the need to follow a positivist approach, this finds little correspondence in the construction of a system of conflict of laws which pertains to international law, and in relation to which national rules are to be interpreted.[32]

4. Notwithstanding the inconsistency between Anzilotti's declared approach and his theoretical constructions, the definition of Anzilotti as a legal positivist, within the meaning he had given to the concept, does not appear to be totally misplaced. One has to consider, to this effect, the way in which specific problems of international law have been studied and resolved. One could then apply to Anzilotti himself a remark similar to the one he addressed to English and North American scholars of international law, when he noted that they 'often gave wide attention to the determination and illustration of the rules positively accepted in the relations among States even when their theoretical conception was based on the idea of natural law'.[33] Similarly, one could note that, although Anzilotti viewed customary rules as the product of tacit agreements, his assertion of the existence of customary rules is based on an analysis of State practice which does not fully correspond to an attempt to find the actual 'will' of States.[34]

In the 1928 edition of his *Lectures* Anzilotti made the following comment on the way in which customary rules may be said to have been accepted by all the members of the international community:

> Common international law exclusively consists of customary law: there does not exist at present any treaty to which all the members of the international community are parties. It is

31 *Scritti di diritto internazionale privato*, *supra* note 3, at 229.

32 Ibid., 240-241.

33 *Corso*, *supra* note 2, at 25.

34 Ziccardi, 'Note sull'opera scientifica di Dionisio Anzilotti', *supra* note 30, at 25 remarked that 'custom, although it is defined by the author as a tacit agreement of wills, is in practice determined in its factual elements in a way that does not appear to rule out altogether the hypothesis of norms which have arisen through custom on the basis of the legal conviction of States, even if a conclusive expression of wills has not taken place'. This quotation is also a translation.

> in substance the result of a long historical evolution, first accomplished in Europe – hence the idea, which was once widespread, that international law was to be regarded as a law of European peoples – and then gradually extended to other continents, whether there were formed States of European civilisation, as in America, or whether States of a different civilisation accepted its results, following contacts with European States, as in East Asia. At first there were some common convictions that little by little prevailed, with the force of binding rules, on all the States among which relations existed: they are rules so connected with the characters and needs of those relations that the fact of entertaining relations appeared to be inseparable from the observance of those rules; similarly, the entry of a new member in the international community was linked with the acceptance of the same rules, as general and common principles, historically given, in the said community. To determine which are these rules is one of the most essential and difficult tasks of the science of international law. To attempt to determine them approximately, through general language, would be dangerous, worse than useless.[35]

It is clear that something short of verifying the acceptance of a customary rule by all the States is required here in order to establish the existence of a norm applying to the whole community. The attitude of many States is not even taken specifically into account, because it is assumed that they agree to all the rules prevailing in the international community, nor is any attempt made to ascertain a valid consent on the part of those States whose practice is known. It is noteworthy that in another passage of the same textbook, while still defining customs as 'tacit agreements', Anzilotti considered them as 'spontaneous, almost unconscious expressions of certain needs of common life'.[36]

This approach is only partly reflected in Anzilotti's general remarks on the way in which the existence of customary rules has to be established. These appear to conform to a more consistent voluntarist conception:

> The facts from which a tacit agreement results have to be State acts in the field of international relations, which show their will to be bound to behave reciprocally in a certain way. They must be State acts, that is acts which may be legally attributed to States, according to the rules that will be described later. They must be in the field of international relations, because the agreement in question is possible only there. Internal acts, which have their *raison d'être* in the State's legal system, such as statutes, judgments and acts of administrative authorities, are not as such facts which show the will of concluding an international agreement: this also when they affect foreign States and are substantially uniform in various countries... However, in conjunction with other adequate facts, even statutes, judgments, and so on may strengthen the evidence of the existence of a tacit international agreement.[37]

Anzilotti further insisted on the fact that, for a customary rule to arise, States should intend to bind themselves towards other States in an unambiguous manner.[38]

35 *Corso, supra* note 2, at 85.
36 Ibid., 73.
37 Ibid., 73-74. Some italics have been suppressed in this quotation.
38 Ibid., 74.

This appears to assert that in ascertaining a customary rule no weight should be given to international arbitral awards and to judgments of the Permanent Court of International Justice, as they do not build up State conduct. However, the inference would not be correct, because Anzilotti added that:

> While diplomatic correspondence allows one to ascertain the attitude taken in relation to a certain dispute by the States which are involved in it and to draw some aspects of their legal convictions, the legal rule which is applied in the solution of the dispute is rarely stated, because this solution is too often the result of a settlement or a compromise. Arbitral awards are more useful to this end, in the same way as one finds in the judgments of national courts an expression of what is the law in force according to the court.[39]

Arbitral awards may be clearer as to the law, but no explanation is offered here as to why awards are relevant towards establishing the tacit will of States. The fact that an agreement between the States involved in the dispute is at the root of the binding character of the award does not appear to justify an identification of the arbitrator's views with the States' *opinio juris*, particularly so with regard to further disputes, possibly with other States.

In the same 1928 edition of his *Lectures*, Anzilotti also expressed another, slightly different, view about the ascertainment of customary rules. Without making any further reference to his theory of customs as tacit agreements, he stressed the need both for a constant conduct and for *opinio juris* and added that:

> As we have seen, while international custom may only result from State acts in the field of international relations – we include in this category also the decisions of arbitral tribunals – , some very relevant and sometimes decisive indications of its existence may be taken, as we have noted, from some acts which are internal by their nature: (a) statutes which ensure a certain conduct of a State towards other States and that are not determined by a special interest of the former; this is because as a rule no State does for the benefit of others, without its own advantage, more than what it believes it is under an obligation to do; (b) judgments which constantly apply certain principles aiming at the safeguard of certain needs at the international level, and which may therefore be understood as part of the implementation of international norms within municipal law, for the very purpose of making it possible or easier for the State to comply with its international obligations; (c) acts of administrative authorities which are taken for similar reasons; etc.[40]

While some of these remarks, especially those relating to decisions of international tribunals, do not completely tally with Anzilotti's theoretical premises, they are an interesting contribution to the study of the method to be used in ascertaining international customary rules. Several elements to the same end may be drawn from the way in which Anzilotti addressed specific issues both in his textbook and in his monograph, articles and notes.

39 Ibid., 75.
40 Ibid., 99-100.

This may already be said, to a certain extent, of his first study of public international law, which appeared in 1894. After briefly referring to judgments of several States, Anzilotti criticized a decision of the Court of Cassation of Rome for having adopted the restrictive theory of jurisdictional immunity of foreign States:

> ... I do not wish to say that Italian courts should not rightly proceed in a free and independent way, when they believe that truth and justice are on their side. However, this emancipation from opinions which are universally held takes a very different value and meaning with regard to questions of international law... It is a question of modifying a principle of customary international law and this – needless to say – does not depend on the attitude or the opinions of the courts of an individual State... I do not deny that also with reference to international law there may be a useful work of innovation on the part of some courts when this is but the beginning of a transformation which is generally taking place and which impatiently awaits recognition and protection by law: what I say is that in international matters innovations and changes should be evaluated under some special and stricter standards because of the more serious dangers which they involve if they are not universally accepted.[41]

Seventeen years later Anzilotti further elaborated his views on the immunity of foreign States.[42] This work deserves special mention here because it gives an important insight into Anzilotti's method of ascertaining international customary rules. In his more recent study on jurisdictional immunity he took a new approach on the value of precedents of national courts:

> First of all, it is clear that in no way may case-law adequately build up an international custom. Judgments, being acts which are essentially internal and self-sufficient, and not made reciprocally, cannot give life to the collective will of the States. Even when judgments are concurring, they are always separate and autonomous expressions, which are thus inadequate for blending into a new element which may englobe and replace them.[43]

Anzilotti noted that national case-law was not uniform on the issue of jurisdictional immunity and that Belgian and Italian courts had adopted a restrictive theory. This could point to the inexistence of an international custom or, alternatively, be taken as an infringement of a rule of customary international law:

> ... the manner in which governments behave towards each other when a State is summoned before the courts of another State, gives a much firmer basis to our enquiry than an examination of judgments that are guided by considerations and principles which are more or less extraneous to the true problem.[44]

41 'Competenza di Tribunali italiani in confronti di Stati esteri', 46 *Giurisprudenza Italiana* (1894), reprinted in *Studi di diritto processuale internazionale e di filosofia del diritto*, *supra* note 4, 7, at 15.

42 'L'esenzione degli Stati stranieri dalla giurisdizione', 5 *RDI* (1910) 477, reprinted in *Scritti di diritto internazionale pubblico*, *supra* note 9, 2, 119.

43 Ibid., 147.

44 Ibid., 149-150.

Anzilotti found that government practice gave support to the existence of a rule of international law concerning State immunity, with the only exception – apart from waiver – of cases concerning immovable property located in the State where the foreign State had been summoned to court.[45]

One may consider that the decisions of national courts are highly relevant when, as in the case in point, the hypothetical international rule concerns conduct of States which is enacted by these courts. However, there is certainly some truth in Anzilotti's remark that the existence of uniform case-law is not decisive, and that one must also take into account the States' conduct in their international relations: whether there are any claims or protests designed to ensure that the rule is complied with. This remark does not necessarily rest on the theory that one should look for the States' will, although, as was recently pointed out with reference to Anzilotti's method,[46] the acceptance of this theory implies a tendency to emphasize the importance, within State practice, of the conduct of those State organs which are competent in dealing with international relations.

This is not the place to make a full analysis of Anzilotti's method in ascertaining international customs. This would be particularly difficult with regard to those rules which are only briefly demonstrated, as is the case with various passages in his textbook and with the few references to rules of general international law which are contained in his individual opinions.[47] However, it may be said that, whenever an opportunity for a fuller argument arose, Anzilotti elaborated his theories with a critical attention to international practice which finds little correspondence in the works of his contemporaries, particularly in the earlier part of this century.

5. Anzilotti's approach to the relations between international law and municipal law is similar to the one taken in his discussion of positive law as opposed to natural law. His main concern appears to be that of clearing international law from the undue influence of concepts prevailing in municipal law. In his major study on the subject (*Il diritto internazionale nei giudizi interni*), which was published in 1905, he traced a distinction between international law and municipal law on the following lines:

> First of all, they are enacted by different wills: international law stems from the collective will of several States, while rules of municipal law are always the expression of the will of a State, or better of the will belonging to a State, if one does not wish to prejudge the well-known controversy on the binding nature of custom, which many jurists consider as law which is not State law, while nobody doubts that it belongs to municipal law.

45 Ibid., 167ff.

46 Ferrari Bravo, 'Méthodes de recherche de la coutume internationale dans la pratique des Etats', 192 *RdC* (1985-III) 233, at 260.

47 See Ruda, 'The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice', in this *Journal*, p. 100.

> Secondly, the relations which are respectively governed are different: norms of international law govern relations between coordinated and autonomous entities, which are linked within a community lacking a legal organization, and thus these norms are completely independent from the existence of any power over these entities, while norms of municipal law govern relations within a society which is legally organized and therefore they implicitly contain an idea of supremacy and subordination – an *imperium* of the collective entity over the members of society.[48]

These two distinctive factors – which according to Anzilotti are strictly related[49] – put international law and municipal law on different levels: the respective norms have a different foundation and different legal addressees. National courts, which are set in the municipal system, only resolve disputes between subjects of municipal law on the basis of rules which are also part of municipal law:

> ... if norms of international law only regulate relations among States, and give rights and duties only to States, it is impossible that disputes governed by international law ever come as such before national judicial authorities. One could therefore state that on principle these authorities never take a decision which is immediately based on a rule of international law.[50]

This conclusion, which closely follows a passage written by Triepel,[51] leads *inter alia* to the idea that States cannot implement treaties merely by enacting a statute that would make them applicable in the municipal legal system, as this 'would be tantamount to ordering what is impossible'.[52] When a State enacts legislation which refers to a treaty:

> ... in fact it adopts by this reference the rules which are required by the treaty and the content of which is already determined by the same treaty, as the treaty may in no way regulate some relations which are completely different from those between the States concerned.[53]

A similar approach was taken with regard to private international law, given the fact that, according to Anzilotti, the conflict rules essentially belong to international law, while the command given by a State to its organs in order to apply a certain law – whether or not in compliance with a norm of international law – pertains to municipal law and is applied as such by national courts.[54] There is no similar distinction between the legal addressees of different municipal laws; however, Anzilotti stressed that there could not properly be any conflict of laws, since the various municipal laws are separate: 'a conflict exists between two or more distinct legal systems, not within any one of them'.[55]

48 Scritti di diritto internazionale pubblico, supra note 9, 1, 281, at 319-320.
49 Ibid., 320.
50 Ibid., 323.
51 H. Triepel, *Völkerrecht und Landesrecht* (1899) 438-439.
52 *Scritti di diritto internazionale pubblico, supra* note 9, 1, 377 note 67.
53 Ibid., 380.
54 Ibid., 406.
55 Ibid., 443 note 9.

It is noteworthy that in his 1906 study Anzilotti did not rule out at all that national courts could apply international law as such. Quite the contrary:

> ... norms of international law do not have any intrinsic or necessary inadequacy for being observed and applied by national courts. Courts are State organs and everybody knows that implementation – taking the word in its wide meaning – of international law may only take place through these organs. The State is certainly no fiction, but is nevertheless an abstraction, as it is a collective body represented as a unity – it is a collective will which is shaped and expressed by one or several individual wills, an activity that requires and sets forth a sum of individual activities. Thus, the State expresses its will and acts through those to which these functions pertain and which we call its organs. So also rights and duties that international law gives to a State may be exerted and respectively accomplished only through its organs.[56]

More generally, State organs are considered as 'bound by rules of international law' and as being 'directly in contact with international law'.[57] This shows how in his major work on the relations between international law and municipal law Anzilotti accepted the dualist theory only to a certain extent, because under a strictly dualist approach there appears to be an inconsistency between the idea that national courts are rooted in the municipal system and do not deal with relations between States and the assertion that the same courts apply international law directly.[58]

This part of Anzilotti's theory is no longer present in the 1923 edition of his *Lectures*, which appears to be inspired by a stricter concept of the separation between international law and municipal laws, although it is somewhat tempered by the observation that there is substantial agreement on the existence of rules within the various municipal systems that tend 'to ensure the compliance with some obligations under international law'.[59] The essential core of Anzilotti's definitive theory on the relations between international law and municipal laws may be summarized by the two following passages of the 1923 edition of his *Lectures* – passages which were reproduced unchanged in the 1928 edition:

> The basic norm, according to which States should behave as they have agreed to do with other States, represents the criterion that determines which norms are part of the international legal

56 Ibid., 424.

57 Ibid., 430. According to Anzilotti, State organs could apply international law only within their competence; in the presence of a municipal statute which is in conflict with a norm of international law municipal courts are not regarded as competent to apply this norm (ibid., 449-450). This is so because the judicial function is viewed as subordinate to the legislative function (454).

58 This criticism was voiced by Strupp, 'Les règles générales du droit de la paix', 47 *RdC* (1934-I) 259, at 396 and by Ziccardi, 'Note sull'opera scientifica di Dionisio Anzilotti', *supra* note 30, at 22-23, who also maintained that Anzilotti could have reached the conclusion that national courts may apply unincorporated international law when resolving preliminary questions also on the basis of the 'non-legal character of international norms when they are used in preliminary questions'.

59 *Corso di diritto internazionale* (1923) 36 and *Corso, supra* note 2, at 60.

> system and that formally distinguishes them from norms pertaining to the various municipal laws, although even the latter may in many ways concern the relations between States.[60] From the principle that each norm is a legal norm only within the system of which it is part, one may draw the clear separation of international law and municipal law as far as the binding character of the respective norms: international norms only apply in the relations between subjects of international law, while municipal norms do so within the State system to which they belong.[61]

In the 1925 edition – the last one – of his *Lectures on Private International Law*,[62] Anzilotti, while abandoning his theory that conflict of laws is essentially a part of public international law, outlined more strictly his view that rules of municipal law only exist as legal rules within their respective system. He wrote:

> From the principle that a norm is legal only if and in so far as it belongs to a specific legal system, it follows that the foreign norm is as such a mere fact, which is lacking in that practical value of which ... the legal character of a norm consists.[63]

This language is very similar to the one adopted the following year by the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*, when considering the relations between international law and municipal law:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[64]

This famous passage no doubt closely reflected Anzilotti's views. Anzilotti never said, in as many words, that he had written it: this would have been contrary to the principle of secrecy of deliberations in the Court and also would not have been in keeping with Anzilotti's style. However, it is not devoid of significance, under the circumstances, that Anzilotti quoted this passage approvingly *in extenso* in his individual opinion attached to the Court's advisory opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.[65]

6. The foregoing analysis of Anzilotti's thoughts on some basic issues of international law can hardly lead to a conclusion. However, one or two additional remarks may not be out of place.

It would be difficult to describe Anzilotti's views on the issues here discussed as particularly original. It has to be said that he was not looking for a development of new theories, but kept reconsidering his own position on the basis of contributions by other

60 *Corso di diritto internazionale* (1923) 30 and *Corso, supra* note 2, at 53.
61 *Corso di diritto internazionale* (1923) 32 and *Corso, supra* note 2, at 56.
62 *Corso di diritto internazionale privato* (1925). This textbook is incomplete. Regrettably, it has not been included in the posthumous collection of Anzilotti's works.
63 Ibid., 57. Some italics have been omitted.
64 *PCIJ Publications*, Series A, No. 7, 19.
65 *PCIJ Publications*, Series A/B, No. 65, 63.

writers, especially German and Austrian. He did not try to defend his views to the end, nor was he ready to accept all the implications of the new theories that he found in principle convincing. One cannot but admire also in his scholarly work the marks of an exceptional honesty and openness of mind. They are fully confirmed by a perusal of the manuscript notes which he had made for his own personal use in view of a further edition of his *Lectures*.[66] These notes often express doubts about his own points of view and suggest that further reflection is needed.

While the later developments of Anzilotti's thoughts drew him towards the acceptance of Hans Kelsen's theory of the basic norm and towards a clear-cut separation between international law and municipal laws, his approach to specific issues was never formalistic. He showed a sound understanding of practice and endeavoured to reach reasonable solutions. His arguments were stated clearly and expressed with vigour. It may well be that the real greatness of Anzilotti's scholarly work rests more in his discussion of specific principles or norms than in his general theories. If this is so, the present study may find a justification in providing the background for some further analysis.

66 As was recalled above, note 2, these manuscript notes have been included as footnotes in the 1955 reprint of the third edition (1928) of the textbook.