

Dionisio Anzilotti and the Law of International Responsibility of States

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At nearly a century's distance in time, Dionisio Anzilotti offers the spectacle, fascinating to any contemporary author, of an international lawyer who put his stamp not only on the theoretical thought of his era but also on legal practice. Rightly regarded as one of the most eminent representatives of positivist voluntarism, it may even be said that he marked the Golden Age of that school, as he was one of its greatest and most outstanding classic authors.

An unflinching indicator of the value of his work is that even today authors frequently define their own conceptions in relation to his theses. Thus, even critical reference to Anzilotti's theories is indispensable to sound legal scholarship, and it is hard to think of anyone among the great jurists of the earlier part of this century, except Hans Kelsen, who enjoy a similar privilege. It would, incidentally, be very tempting to draw a systematic comparison between these two masters; but such an analysis would risk degenerating into simplistic stereotypes, particularly if it were noted that both authors were caught up by positivism, each in a very different way. One would be viewed as the thoroughly Latin intellect, demystified and steeped in 'realism'; in contrast with the other, devotee of the Germanic tradition of the essentialist search for a 'pure' theory of law, as it were, irrespective of the practical conditions of its application.

However, it remains true for Anzilotti that he was concerned to give an account which approximated as closely as possible to the actual practice of States, while illuminating it by strictly defining the central concepts which he employed for technical analysis. The general enterprise of his work was thus concerned with clarifying positive law (understood in his terms as 'the law in force') which he complains is too often confused with 'the ideas and aspirations of doctrine'.¹

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¹ Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers', *RGDIP* (1906) 14.

As President of the Permanent International Court of Justice, Anzilotti had the opportunity both for privileged observation of the conduct of States and for direct influence over the course of international case-law. However, he distrusted incautious transfers into the international legal order of analyses or notions commonly accepted in domestic law. A great theoretician, along with Triepel, of legal dualism, he accordingly rigorously separated the municipal and international legal orders, and was always very concerned to emphasize the specific features of public international law, since its distinguishing facet is that it governs the relationships between legal subjects endowed with equal sovereignty.

The contribution of Anzilotti's work, though relatively slight as regards the sources of international law, (since for him by definition there is none apart from the will of States), is by contrast particularly rich when it comes to the general theory of international responsibility.² More than most of his contemporaries he codified, as it were, the content of these various constitutive elements in order to state the overall theory of classical positivism in relation to international responsibility. The syntax which he more or less formulated was subsequently taken up by the majority of authors, whether in connection with the act giving rise to responsibility, the conditions for attributing the act to the State as a person or, the legal consequences of the act having been committed, and therefore, in particular, the various forms of reparation.

I.

Anzilotti's twofold objective of clarifying the theory of responsibility in international law and making it autonomous first emerged in connection with the act giving rise to responsibility. A great number of authors around the end of the last century, in particular jusnaturalists like Albert de Lapradelle – but also a considerable proportion of those claiming to be positivists – remained attached to the theory of fault, which had been inherited through municipal civil law from Roman law, or at least from the interpretation that the latter was commonly given at the time they were writing.³

2 See esp. Anzilotti, *Corso di diritto internazionale* (3rd ed. 1927), reprinted in *Opere di Dionizio Anzilotti*, Vol. 1 (1964) (hereafter referred to as *Opere*). This work was translated into French by Gilbert Gidel under the title *Cours de droit international* (1929), of which Vol. 1, 466-534, entitled 'Internationally Wrongful Acts', deals with the essential points of the general theory of responsibility. See also *ibid.*, note 1, and, in Italian, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), reprinted in the *Scritti di diritto internazionale pubblico*, Vol. 1 (1956) *lff.*

3 The commonly accepted idea, taken up by Anzilotti himself, was the affirmation that 'the basis of liability in Roman law, so rigidly individualistic, was specifically fault' (G. Gidel, *ibid.*, 497). However, more recent works by Romanists have stressed that if the theory of 'culpa' is indeed Roman, it plays only an incidental part in the provisions on liability and does not constitute the cause of the obligation to make reparation. The advance of the theory of fault is held in fact to be later, and was due essentially to the tradition of natural law, in its various aspects. See esp. M. Villey, 'Esquisse historique sur le mot

But Anzilotti does not approach the question of the act giving rise to responsibility or the origin of responsibility from the viewpoint, close to legal philosophy, of the foundation of responsibility. On the contrary, it is through the technical conditions for attributing a wrongful act to the State that he comes up with the question of fault, in order to arrive at an objective conception of the internationally wrongful act. In the French version of his Course of International Law, he puts it this way:

Above all, one needs to determine of what the issue really consists. 'Malice and fault', in the proper senses of the words, express human will as a psychological fact, and one cannot therefore speak of them except in relation to the individual. The point is, subsequently, whether an action contrary to international law, in order to be imputable to the State, has to be caused by malice or of fault by individual agents; in other words, whether the latter's malice or fault is a condition laid down by the law in order for particular acts to lead to particular consequences for the State.⁴

Anzilotti saw many barriers to an affirmative answer to this question. Firstly, an act of an individualized agent of the State may be in absolute conformity with its municipal law while being at the same time an infringement of international law. Secondly, any search for fault is 'uncertain and fleeting' due to both its psychological components and the difficulty of correctly interpreting from an external viewpoint the relevant provisions of domestic law.

Returning, therefore, to the conceptions developed by Grotius, who was traditionally understood as an adherent to the idea that there is no responsibility or liability without fault, Anzilotti asserted that:

... in reality, this doctrine may equally be understood in the sense that international liability is born not of an act of an individual but of an act of the State; putting it better, that the act wrongful in the eyes of international law exists not for the mere reason that an offence has been committed, but for the reason that the agents have in this connection engaged in particular conduct.⁵

Anzilotti thus purifies the conception of the act giving rise to liability in order to free it of any subjective connotation or link with domestic legality, by providing it with an objective conception. The act or 'wrongful act' results only from the gap existing

responsable'. *Archives de philosophie du droit*, 22; *La responsabilité* (1977) 45-62; A. Lebigre, *Quelques aspects de la responsabilité pénale en droit romain classique* (1967).

- 4 'Avant tout, il est nécessaire de déterminer en quoi consiste véritablement la question. Le dol et la faute, dans les sens propres du mot, expriment les manières d'être de la volonté comme fait psychologique et on ne peut donc en parler qu'en se rapportant à l'individu. Il s'agit, par suite, de voir si l'attitude contraire au droit international, pour être imputable à l'Etat, doit être l'effet du dol ou de la faute des individus-organes, en d'autres termes, si le dol ou la faute de ceux-ci est une condition que le droit établit pour que des faits déterminés produisent pour l'Etat des conséquences déterminées.' G. Gidel, *supra* note 2, at 498.
- 5 'En réalité, cette doctrine peut également s'entendre simplement en ce sens que la responsabilité internationale ne naît pas d'un fait de l'individu mais d'un fait de l'Etat; pour mieux dire, que le fait

between the actual conduct of the State (by intermediary of its agents) and the substance of the rule of law applicable in the situation considered: 'the internationally wrongful act is an act contrary to objective international law'.⁶ In other words, it is because it is imputed to the State that the individual fault is made an objective breach of law.

Reconciling logic and realism, Anzilotti pushes this conception to its ultimate consequences, thus, by rejecting legal fictions customarily maintained in order to attach to the State the internationally wrongful conduct of its individual agents: that of *culpa in eligendo*, the deputed fault committed by it in choosing its agents, or of *culpa in vigilando*, or negligence committed in supervising their acts.⁷ Notwithstanding, this sort of 'objective' conception of the act giving rise to responsibility should not be confused with so-called objective liability, namely that 'for activities not forbidden by international law' which is founded on a primary obligation to make reparation.⁸

This legal construct has aroused a number of criticisms, particularly in its application to certain types of offence such as those provoked by omission; one may in particular think of the wrongful act constituted by the lack of diligence of the State, a contemporary example being the abstention by the authorities of the Islamic Republic of Iran in the initial stages of the taking hostage of American diplomats in Tehran.⁹ It is submitted that another criticism that can be made is that this objective conception does not give a faithful account of all situations in which primary obligations make the legality of the conduct they cover depend on its conformity with certain motives or certain purposes, as can be found particularly, for example, with regard to conditions for nationalization of foreign private assets, the definition of aggression, or the various specific applications of the principle of non-discrimination.¹⁰

Nonetheless, for decisive reasons which shall be returned to later, Anzilotti's doctrine on this point rapidly secured the support of his contemporaries. We can subsequently find analyses thoroughly concordant with his, particularly in the general

illicite au regard du droit international, n'existe pas pour la simple raison qu'un délit a été commis, mais pour la raison que les organes ont tenu, à tel égard, une certaine conduite.' G. Gidel, *ibid.*, at 503.

6 *Supra* note 1, at 14.

7 *Ibid.*, at 287; G. Gidel, *supra* note 2, at 501.

8 On this distinction, see esp. P.-M. Dupuy, 'Le fait générateur de la responsabilité internationale des Etats', *RdC* (1984-V) 61ff. and 188, and P.-M. Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?', *Michigan Journal of International Law* (1989) 105-126.

9 See the judgment of the International Court of Justice in the case relating to the diplomatic and consular staff of the United States in Tehran, ICJ Reports (1980) 3, at paras. 32 and 67ff; on responsibility for omission of due diligence see R. Pisillo Mazzeschi, '*Due Diligence*' e responsabilità internazionale degli stati (1989) 418; P.-M. Dupuy, 'Due Diligence in the International Law of State Responsibility', in *Legal Aspects of Transfrontier Pollution* (1977) 369-379.

10 P.-M. Dupuy, 'Le fait générateur de la responsabilité internationale des Etats', *supra* note 8, at 33ff.; P.-M. Dupuy, 'Faute de l'Etat et fait international illicite', *Droits* (1987) 5, 51ff.

courses given at The Hague Academy of International Law by various important authors in the 1930s.¹¹

One might add that in fifty years the conception of the internationally wrongful act adopted by the International Law Commission on the basis of Professor Roberto Ago's remarkable reports, does not depart from Anzilotti's theories, but on the contrary completes their consecration;¹² even if one may note that the current special rapporteur, Professor Gaetano Arangio Ruiz, tends to favour partial reintroduction of fault, particularly in assessing the consequences of the implementation of the responsibility of States.¹³

II.

The contribution Anzilotti made to analysing the conditions for attributing a wrongful act to a State occupies a fundamental place in his work on State responsibility. For it is in this connection that he manages to systematically isolate international law as an autonomous entity in relation to municipal law, the latter constituting for him (as case-law was subsequently frequently to repeat) 'a mere fact'. More generally still, acts by an individual agent are one thing and the international obligations of the State on whose account he is acting are another. In the international legal order the State's responsibility will be involved, only when individual conduct breaches an international norm prescribing particular conduct to the State:

... international law regards acts injuring or offending foreign States committed by individuals as individual acts not attributable to the State; but it combines with these acts particular international obligations, and corresponding duties; a liability of the State for a wrongful act, accordingly, arises not in consequence of the individual's action, but only from the failure to meet the obligations that international law combines therewith.¹⁴

- 11 See esp. Bourquin, 'Règles générales du droit de la paix', 35 *RdC* (1931-I) esp. 218ff; Strupp, 'Les règles générales du droit de la paix', 47 *RdC* (1934-I) esp. 561; Basdevant, 'Règles générales du droit de la paix', 58 *RdC* (1936-IV) esp. 668.
- 12 See the text of all articles in the first part of the Draft Codification of the Law of International Liability of States in ILC Yearbook (1980) Vol. 2, second part, 29ff., and in particular article 1: 'Every internationally wrongful act of a State engages its international liability'.
- 13 See Arangio Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance, contribution to Mélanges Michel Virally', *Le droit international au service de la paix, de la justice et du développement* (1991) 25-44; see also G. Arangio Ruiz's second report to the International Law Commission, UN.4/426/Add., 22 June 1989, 3ff.
- 14 'Le droit international considère les actes lésant ou offensant des Etats étrangers commis par des individus comme des faits individuels non imputables à l'Etat; mais, à ces faits, il rattache des obligations internationales déterminées et des droits correspondants; une responsabilité de l'Etat pour fait illicite ne naît pas par suite de l'action de l'individu, mais seulement de l'inaccomplissement des obligations que le droit international y rattache.' *Supra* note 2, at 491.

We thus meet with a purified, simplified conception of attribution, which

... from the viewpoint of international law is nothing other than the consequence of the relationship of causality that exists between an act contrary to the law of nations and the activity of the State that is the author of that act.¹⁵

This sort of simplification clearly cannot have the effect of abolishing all relationships between municipal law and international law. But these relationships are more perceptible the more they are clarified. Thus, it is indeed the legal organization of the State itself that provides the conditions for associating an individual or agency with the State as a legal person. By being an agent of the State, an individual acting on its account is identified with it. But two clarifications are necessary.

On the one hand, imputation to the State of acts of individuals can come about only pursuant to rules of international law, which as we have seen remain indifferent to the subjective conduct of the author of the act as such, and call for a distinction between the individual's conduct and the international obligation on the State for whom he is acting. On the other hand, and there is no contradiction here, international law does not interfere with the circumstances of the State's internal organization, and is unable to establish whether the individual author of the act was or was not acting on behalf of the public authority concerned. In particular, international law remains indifferent to the distribution of competences among the various agents of the State, just as no credit can go to the notion that the State would exercise powers in the domestic order by delegation from international law. A consistent dualist, Anzilotti categorically rejected, in clear contrast with the ideas of Georges Scelle,¹⁶ any idea of involvement of international law in the sphere of domestic law, noting instead that nothing is more repugnant to States than the idea of exercising powers 'granted' by international law.¹⁷

Thus the attribution of the internationally wrongful act does not bind together the municipal and international legal orders, since one (the domestic order) determines whether the immediate author of the act under consideration is an agent, while the other (the international order) attributes to the act its quality of wrongfulness. But each of these two orders nonetheless retains its autonomy *vis-à-vis* the other, even if the wrongfulness of the act becomes invocable internationally by attribution to the State.

The durability of Anzilotti's ideas is certainly beyond doubt. One need not necessarily adhere to the dualist view of international law to note the reciprocal position of the two legal orders in the context of the law on imputation of the wrongful act. This can

15 '[l'imputation,] au point de vue du droit international, n'est pas autre chose que la conséquence du rapport de causalité qui existe entre un fait contraire au droit des gens et l'activité de l'Etat dont ce fait émane.' *Supra* note 1, at 291.

16 On Georges Scelle's ideas see the series of articles that appeared in the 1 *EJIL* (1990) No. 1/2, entitled 'The European Tradition in International Law: Georges Scelle'; on the idea of delegation, see esp. A. Cassese, 'Remarks on Scelle's Theory of 'Role Splitting'', *ibid.*, 210-229.

17 See his *Corso di diritto internazionale* (3rd ed., 1927), in *Opere*, *supra* note 2, at 52ff.

be found faithfully in Articles 5 to 15 of the first part of the ILC draft on the Law of International Liability of States,¹⁸ and it may be said that the classic rules for imputing the wrongful act to the State as a person still remain thoroughly permeated by Anzilotti's conception.

III.

The third major contribution by Dionisio Anzilotti to the general theory of international responsibility appears in the consideration he gives to its consequences, which for him lie essentially in the various aspects of reparation.

In this connection, Anzilotti analyses the notion of damage in international law not so much regarding the methods of reparation but with regard to the grounds for recovery, (in particular States were responsible for whether moral damage or whether reparation for material damage should include interest). Here too, he puts things straight, distinguishing moral damage or legal harm, to which he pays special attention, from purely material damage, with both forms of harm being involved in the implementation of liability.

At the very beginning of his article in the *Revue générale du droit international public* in 1906, Anzilotti states that:

The breach of the international legal order committed by a State subject to that order thus gives rise to a duty of reparation, in general consisting of the restoration of the disrupted legal order.

He thus puts the stress on the non-material component of the damage, designated above with the term 'legal harm'. A little further on, he gives the following clarification:

The damage is implicitly contained in the anti-legal nature of the act. The breach of the rule is in fact always an injury to the interest it protects, and in consequence also to the subjective right of the person to whom the interest belongs; all the more so since in international relations the damage is in principle more a moral one (ignoring the value and dignity of the State as person of the law of nations) than a material damage (economic or property damage in the true sense of the word).¹⁹

18 See text in ILC Yearbook (1979) Vol. 2, (part 2) 91-93, and for a particularly qualified commentary, L. Condorelli, 'L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances', 189 *RdC* (1984-VI).

19 'Le dommage se trouve compris implicitement dans le caractère anti-juridique de l'acte. La violation de la règle est effectivement toujours un dérangement de l'intérêt qu'elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l'intérêt appartient; il en est d'autant plus ainsi que, dans les rapports internationaux, le dommage est en principe plutôt un dommage moral (méconnaissance de la valeur et de la dignité de l'Etat en tant que personne du droit des gens), qu'un dommage matériel (dommage économique ou patrimonial au vrai sens du mot).' *Supra* note 1, at 13.

This last assertion is somewhat disputable, not only because property damage caused by breach of an international obligation may in fact be considerable, and is in practice very frequent, but also because material damage always implies a legal harm. This duality is brought out more clearly by Anzilotti's masterly analyses.

He stresses first that the object of the liability is defined in a legal perspective before being material; and secondly that the damage more frequently overlaps with a breach of law than in municipal law. The institution of liability thus has a normative dimension, as much as a reparatory one, as its primary aim is to sanction the breach of law. Accordingly, it appears as an instrument intended to safeguard international legality; its very existence ensures a determining function for the application of norms within the international legal order, especially since there is no centralized institution competent to monitor respect for that law (this is still the case today, except in the sphere of application of the system of collective security, which was at Anzilotti's time only adumbrated imperfectly by the League of Nations).

We have sought to explain elsewhere,²⁰ that theoretical perspectives opened up by Anzilotti allowed a better understanding of the true object of the implementation of liability. It is not confined solely to reparation of the material damage on a basis of *restitutio in integrum*. More broadly, it aims at restoration of the situation, both legal and material, that existed, before commission of the act giving rise to it, between the two States involved in the liability relationship.

It is accordingly apparent that restoration, so understood, includes on the one hand restoration of the legal order anterior to the act, in order to guarantee the integrity of the law, and on the other reparation for damage suffered, in order to safeguard the victim's interests.

This twofold perspective is particularly important in order to understand the present developments in the law of States responsibility. As regards the responsibility for crimes of State as sketched out on the basis of Article 19 of the first part of the draft codification, in case of breach of imperative rules of international law, the ILC puts stress on the importance of liability as a means for verifying respect for legality by the international community.²¹ This view also plays an important part in Professor Gaetano Arangio Ruiz's reports to the International Law Commission on the second part of the draft

20 See P.-M. Dupuy, 'Le fait générateur de la responsabilité internationale des Etats', *supra* note 8, at 91-97; see also P.-M. Dupuy's report to the 1990 colloquium of the Société française pour le droit international, 'Responsabilité et Légalité', in *La responsabilité dans le système international* (1991) 263-299, or, P.-M. Dupuy, 'The Law of International Liability. Evolution or Revolution', *supra* note 8.

21 On the general issues of international crimes of States see in general J. Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of State, A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, European University Institute, Series A. (1989). On contemporary developments with the law of responsibility see P.-M. Dupuy, 'The International Law of State Responsibility: Revolution or Evolution', *supra* note 8.

codification, devoted specifically to the content and implementation of liability.²² It can thus be seen that Anzilotti's analyses, far from having lost their pertinence, are meeting with renewed interest in current studies.

In conclusion, one can with hindsight readily understand Anzilotti's success and decisive influence as both a scholar and a practitioner. The general clarification of the theory of liability, although it simplified reality made it possible to guarantee the unity of the theory, as well as the efficacy of its application, by both States and international judges.

As long as fault, poorly freed from its origins in natural law, was kept as the basis for responsibility, a distinction was drawn, often in a confused manner, between actions giving rise to penal sanctions, and those that entailed only the duty of reparation. With the positivist school, on the contrary, implementation of responsibility is reduced without exception to reparation for the damage caused (although some break faith with Anzilotti's teaching, by tending to almost forget that in many cases where a breach is material it is at the same time legal, and that in every case it constitutes an attack on the law). As Professor Roberto Ago was later to explain in his report to the International Law Commission, for the majority view which supports the unity of the theory of responsibility (i.e. which makes no distinction between international, civil²³ and criminal responsibility), neither the form of reparation called 'satisfaction', nor even, in certain cases, the vestige of a punitive, penal aspect through the imposition of 'penal damages' on the State responsible, undermine the monolithic nature of the theory. Supporters of this view see nothing in these practices other than special modes of reparation, adapted to the specific nature of certain types of indemnifiable damage.²⁴ Up until the very recent past, the unity of the theory of responsibility was not only supported by the vast majority of legal scholars, but corresponded, and continues to do so, with international practice. It is only with the appearance of prospects for creating a responsibility for State crimes in public international law, bound up with breach of an imperative norm of general international law, that the dissociation of the penal and the purely reparatory elements in classical responsibility is being increasingly clearly envisaged; though it is not yet possible to say that this change has penetrated the sphere of positive law.²⁵

Essentially, however, even today, this unitary conception of responsibility reflects the prevailing agreement among States as to the role played by responsibility law in an international society of juxtapositioning powers. But despite the objective nature of the wrongful act in classical theory, that theory fundamentally remains a protector of

22 See esp. Arangio Ruiz's second report to the ILC, UN Doc. A/CN.4/425 and Add.1, *supra* note 13.

23 I.e. reduced to the sole function of reparation for damage caused.

24 Ago, 'L'origine de la responsabilité internationale', second report, ILC Yearbook (1970) II, second part, 194ff.

25 See P.-M. Dupuy, 'The International Law of State Responsibility: Revolution or Evolution', *supra* note 8, at 109ff.; J. Weiler, A. Cassese, M. Spinedi (eds.), *supra* note 21, at 170ff., and in particular see the contributions by A. Cassese, G. Gaja and G. Abi-Saab.

sovereignties, because it is voluntarist: the State need make reparation only for the consequences of acts that clash with obligations in the creation or application of which it has participated, or at least to which it has consented.

Finally, Anzilotti's theory has one final but decisive advantage: it is practical. The simplification of the concept of wrongful act, the purification of the imputation link (reduced to a causal relationship) the unification of the object and the purpose of the responsibility, all have the effect of setting up reparatory machinery that is reliable and capable of empirical adjustment. They supply the judge and the arbitrator with a reference framework and a panoply of effective operational concepts that in no way rule out their adjustment to the circumstances of the case. The entirely formal structure of the act giving rise to responsibility, of attribution and of reparation, has the further effect of greatly facilitating the furnishing of proof, both of the legal or illegal nature of the act and of its attribution to the State, in particular through the possible incorporation of the operation of certain presumptions.

Giving an account of the legal reality while simplifying it in order to render its practice smoother – in other words, building a useful theory – is that not, at least as far as historical circumstances permit, the secret of authors whose names will last? In any case, it certainly was Dionisio Anzilotti's.