Realism v. Artificial Theoretical Constructs
Remarks on Anzilotti's Theory of War

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1. Those conversant with Anzilotti's writings know that one of the primary features of his scholarly investigations was his keen realism. His profound knowledge of legal events, and constant alertness to their historical context along with the familiarity with sociology which he acquired in his early research work, all contributed to his acute awareness of the reality of international dealings.

A second major feature of Anzilotti's work was that he sometimes had to make compromises to accommodate jurisprudential concepts; or more specifically, theoretical approaches to international law. In these cases, the need to make international reality fit in with preconceived schemes sometimes led the distinguished lawyer to make artificial legal constructions, resulting in deformations of international reality. However – and here we may discern a third distinguishing trait of Anzilotti's scholarship – he was never content with his own analyses and legal conceptualization; by keeping abreast of the progress of legal literature and constantly rethinking his own theories, he was led to reformulate his views. Consequently, when he felt that they were inadequate to explain the reality of international dealings, he simply revised them, if necessary radically.

To my mind, Anzilotti's view of the legal status of war in the international community is illustrative of these characteristics of his thinking.

2. Since the inception of the international community and until at least 1919, when States started agreeing upon legal restraints on resort to armed violence, war has always constituted a major *punctum dolens* for international lawyers. The reason is self-evident: any legal order is by definition a system designed to ensure stability and in particular to safeguard the life and integrity of community members; it therefore aims at preventing conflicts among those members or, if conflicts break out, to provide legal remedies and enforcement mechanisms. It is well known that before 1919 States were at liberty to

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resort to war either to enforce a legal right or simply to realize their economic or political interests. The goal of war was to annihilate the adversary and, if need be, to annex its territory. How then could this harsh reality be reconciled with the very concept of an international legal order?

It is hence understandable that the first international lawyers started off precisely with the question of war: Vitoria, Alberico Gentili, Grotius, Pufendorf, and others addressed exactly this issue in their major works. Since they were all followers of natural law, they found the answer in this doctrine. They developed the concept of *bellum justum* and defined the classes of permissible and prohibited wars. Thus, war was reconducted into the legal realm and given a legal imprint: it became an authorized means of enforcing law, whenever it was *justum*, i.e. undertaken for the purposes allowed by natural law; it amounted instead to a breach of law, when it was not *justum*.

Once positivism replaced natural law, the problem arose again, with dramatic urgency. Positivists felt that, in order to find an answer to the question of how to reconcile war with the very concept of an international legal order, they had to turn to the legal rules created by States: abstract principles of morality propounded by international lawyers, however authoritative, were no longer regarded as the proper set of parameters.

Anzilotti was one of the few positivists who decided to take the bull by the horns and squarely tackled the issue.

3. It was in 1912 that Anzilotti first dwelt on the issue at great length.[1] After pointing out that war was a means of self-protection designed either to enforce a legal right or to pursue non-legal interests, Anzilotti immediately departed from this commonplace idea by making the following realistic remarks:

> Reprisals and war are not used only for the safeguard of law. Actual reality shows that both categories, and in particular war, are less resorted to for this purpose than for the settlement of conflicts of interests extraneous to the sphere of law. If one surveys the wars of these last years, from the wars for the creation of the Italian kingdom to the French-Prussian war, to the wars in the Balkans, to those in the Far East, to our recent war with Turkey, one immediately realizes that the legal reasons relied upon were mere pretexts. In actual reality these were struggles for establishing a preeminence or a balance, pursued because economic or political interests were to be realized to the detriment of interests conflicting with them. The truth of the matter is therefore that war, that is attack on the integrity of another State, the infringement upon an asset that the international legal order intends to safeguard to the maximum for its subjects, is carried out for reasons totally different from the vindication or the restoration of a legal right that has been breached.[2]

1 See *Corso di diritto internazionale (Appunti ad uso degli studenti)*, (1912-1914) 300-316.

2 Ibid., at 303 (translation mine; other passages from Anzilotti's writings cited in the text are also the author's translations).

In a subsequent paper, of 1915, Anzilotti puts it in even sharper terms:

> Indeed, wars fought on legal grounds constitute exceptions, assuming that such wars do exist: the legal ground is either lacking altogether or is a pretext to cover up other, deeper reasons. Were we to survey all the big wars of the last century and this century, we would probably be unable to find one initiated for the purpose of vindicating a veritable legal right – if we attach to this term the significance of a claim protected by a legal rule.[3]

After stressing this point, Anzilotti states that the real problem for legal literature is to explain how then wars fought for extra-legal reasons can be squared with the existence of a legal order of States: are they outside this legal order? If not, how can they be rendered consistent with it?

In his view, once this question is raised, one is faced with the following dilemma: either one manages to demonstrate that the international legal order itself authorizes international subjects to breach legal rights of other subjects for the pursuit of non-legal interests, or one has to admit that war is squarely outside international law. The first alternative is for him 'manifestly inadmissible': 'it would be as if the State said to its citizens: "do not kill, steal or forge documents, etc. unless you have an interest in doing so"'.[4] Hence, only the second alternative remains valid. It will be shown that it is this second alternative that Anzilotti embraces and endeavours to theoretically justify.

4. Before I briefly mention how Anzilotti sought to work out a legal construct of war, it is necessary to recall the general approach to international law he advocated in that period. For, it is this theoretical approach that constitutes the basic assumption and the point of departure of Anzilotti's legal view of war.

Between 1905 and 1920 Anzilotti adhered to a theory of international law enunciated by some leading German lawyers (Binding, Jellinek and Triepel)[5] and which he later refined and elaborated.[6] According to this theory, international law is *jus super partes* resulting from the 'collective will' of States. This 'will', in turn, results from the merger of several distinct wills which have the same content and become objectivized in legal rules binding on the different authors of the 'collective will'. The 'collective will' takes the shape of international agreements, that can be either tacit or non-written (customary law) or written (treaties). The reason why the 'collective will' becomes binding on

3 'Il concetto moderno dello Stato e il diritto internazionale', in D. Anzilotti, *Scritti di diritto internazionale pubblico* (1956) 618.

4 Ibid., at 621.

5 K. Binding, *Die Gründung des Norddeutschen Bundes* (1889) 69ff.; G. Jellinek, *System der subjektiven öffentlichen Rechte* (1892) 194ff. and 299ff.; H. Triepel, *Völkerrecht und Landesrecht* (1899) 50ff.

6 See in particular *Teoria generale della responsabilità dello Stato nel diritto internazionale* (1902), *Scritti in diritto internazionale pubblico*, *supra* note 3, at 38-61; *Corso*, *supra* note 1 at 45-56; *Il concetto moderno dello Stato*, *supra* note 3, at 627-629.

States was seen in the fact that States themselves attributed to their 'collective will' the power to issue binding obligations.

A crucial point in this theory is that the making of agreements is a *pre-legal activity*, that is an activity which is not itself regulated by law. The reason why the normative process is pre-legal is that 'if an agreement were to draw its binding force from a rule of law, this rule of law should in its turn be founded on a previous agreement, since only the collective will can set legally binding rules for States; in its turn, this agreement should be based on another prior agreement, and so on; the process would thus end up in a clear vicious circle'.[7]

One of the consequences of this view of the creation of international legal rules as a pre-legal activity, is that States can be looked upon from two different angles: 1) as 'creators of the legal order' when they make agreements; from this viewpoint they are totally free from any restraint or limitation, their 'collective will' being able to set any legal rules they please; 2) as 'holders of rights and obligations', when legal rules are addressed to them; and in this case they are restrained by these rules.

5. This theory of international law enabled Anzilotti to easily explain why war, as a means of pursuing non-legal interests, *lies outside the province of law*.

Indeed, when resorted to for extra-legal reasons, war is a way of creating new law. The peace treaty, by providing for the annexation of the vanquished State, or its dismemberment, or control of the State apparatus by the victor State, or in any case by setting a new regulation of the relationship between the two States, lays down new rules governing the status of the vanquished State and its relations with the victor. If then war is a normative process, a process designed to lead to a law-setting agreement, this means that *war exists before and outside law*. Consequently, States waging this kind of war act outside the realm of law, and their will is not restrained by any rules (except for those governing the conduct of hostilities, *jus in bello*, and the relations with neutral States).[8]

World War I prompted Anzilotti to write prolifically about the legal aspects of war; a topic that clearly tormented him intellectually. During the period from 1914 to 1918, the Italian international lawyer reached radical conclusions regarding the relationship between war and the international legal order. In one article he contended that since war is a pre-legal fact, i.e. it exists outside the province of law, it is immaterial whether or

7 *Corso, supra* note 1, at 49. See also *Teoria generale della responsabilità dello Stato, supra* note 6, at 55-56 and Triepel, *supra* note 5, at 81.

8 *Corso, supra* note 1, at 312-314; *Il concetto moderno dello Stato, supra* note 3, at 628-630. See also *Corso di diritto internazionale*, III, Part I (1915) 183-187; 'Rassegna critica di dottrina, legislazione e giurisprudenza – Questioni di diritto internazionale relative alla presente guerra, esaminate e discusse nelle principali riviste giuridiche della Germania' (1915 and 1918), in *Scritti di diritto internazionale pubblico*, Vol. II (1957) 518-522; 'La nostra guerra con l'Impero Austro-Ungarico e il Trattato della Triplice Alleanza' (1915), ibid., at 433-437.

not a State has undertaken a legal obligation not to go to war. If a State then engages in war in breach of that obligation, the only implication is that it no longer intends to act as a legal subject, that is as an *addressee* of the obligation at issue, but changes its role to that of a *creator of new law*. For Anzilotti the fact that war was made by a State in breach of previously undertaken legal obligations did not have, from a legal viewpoint, any relevance.[9]

In this way, not only was war totally expunged from the realm of law, but even any possible legal obligation directed to restraining the unfettered freedom of States to resort to war was so downgraded as to become utterly meaningless. The resulting legal picture of the international community was Hobbesian to the hilt.

6. The artificiality of Anzilotti's legal construct need not be stressed, nor the inadequacy of one of its premises, that is the double role of States, as law-creators acting outside any legal restraint, in a total vacuum, and as law-appliers, bound by the rules set by themselves. Admittedly, it is correct to say that States can act both as law-makers and law-appliers; similarly, it is true that, at the time when Anzilotti wrote, international law did not restrain the liberty of States from enacting any legal rule: *jus cogens* had not yet appeared. What however is unacceptable is Anzilotti's view of States as *dramatis personae* that can enter the stage of international law or leave it at their will. Practical experience shows that legal systems tend to govern not only most of the action of their subjects, but also, and more specially, the process by which rules are set, are judicially reviewed and, if need be, enforced. This is borne out by legal logic and by the general principle of law – advocated precisely by positivists – whereby whatever is not prohibited, is allowed by the legal order (hence, if war was not prohibited, it was authorized by international law). Anzilotti's theory proves inadequate precisely because it fails to see that States get involved in the legal process at any stage, both when they create new rules and when they

9 See in particular 'La nostra guerra con l'impero Austro-Ungarico' *supra* note 8, at 436-437 ('The legal irrelevance of the reason for making war ... logically includes the case where a State has previously undertaken not to make war. Such an obligation, validly undertaken, implies solely that the State cannot avail itself of that coercive means [i.e. war], if it intends to act as a legal subject. This, however, does not detract anything from the fact that a State, as always, instead of wishing to act *qua* subject of the legal order, may intend to pursue the objective of changing the legal order in keeping with its own interests [...]. Hence, war, even when made in breach of a previously undertaken obligation, is nevertheless fully correct (*regolare*) from the point of view of international law and does produce all the legal effects of war. However, while the fact that war is made by a State in breach of previously undertaken obligations has no relevance whatsoever from the legal viewpoint, it has instead great importance from the viewpoint of a moral appraisal of war. From an ethical viewpoint [...] the question of whether or not a State has assumed a prior legal obligation not to make war, is by no means immaterial'.)
In another writing ('Rassegna critica di dottrina' *supra* note 8, at 522) Anzilotti took an even more extreme view. He wrote that 'the justification of war lies only in the ethical value of the concept that the State seeks to realize. To try to constrain war within the narrow limits of a positive legal system is not very scientific. Indeed, it is so unscientific as to believe that the will of one man conditions that terrible process for the realization of divine will in history, which is the struggle among peoples'.

apply them. Instead, Anzilotti makes States enter or exit from the legal system by a sleight of hand.

In addition, by theorizing that States had an unfettered freedom to 'change their hats' as they pleased, that is to move at their whim from the world of legal subjects to that of law-makers, Anzilotti contributed to stultifying the few existing treaty obligations designed to restrain States from going to war. Indeed, according to his theory a breach of such an obligation became 'lawful' behaviour if the State at issue contended or even implied that it was not intending to act as a legal subject but as a law-creator.

Another major flaw of Anzilotti's theory is that, by splitting the role of States into two abstract and unrealistic categories, he failed to underscore a basic weakness of old international law, namely the fact that by authorizing war for any purpose, it afforded a very precarious legal protection to the rights and indeed to the very existence of members of the international community.

7. As I pointed out above, Anzilotti never rested content with his own legal constructs and changed his views accordingly.

A major factor that probably led him to rethink his conception of war was the adoption of the Covenant of the League of Nations in 1919, and the consequent enacting of restrictions on resort to war. It now became unrealistic and logically difficult to explain away the Covenant's provisions on war by simply stating that they were not in reality binding and therefore a member State of the League could disregard them at will. Furthermore, in the aftermath of World War I, the overall political, intellectual and moral climate had radically changed and was markedly different from that prevailing from 1914 to 1918 when Anzilotti had written most of his papers on war. In short, Anzilotti's view of war turned out to be less and less tenable, and contrasted sharply with new trends emerging in the international community.

Anzilotti's dissatisfaction with his own views on war combined conveniently with his adherence to a new theory of law, which offered an adequate theoretical framework for revising his previous construct.

Under the influence of the new jurisprudential concepts advanced by the Austrians Kelsen and Verdross[10] and as a result of the specific criticisms of the theory of

10 The new theory was gradually developed, mainly in the following writings by H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (1911) 11ff., 162ff.; *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920) 8-14, 89; 'Les rapports de système entre le droit interne et le droit international public', 14 *Hague Recueil* (1926-IV) 263ff.; 'Die Idee des Naturrechts', 7 *Zeit. für öffentliches Recht* (1928) 221ff.
As for A. Verdross, see in particular 'Zur Konstruktion des Völkerrechts', 8 *Zeit. für öffentliches Recht* (1914) 329ff., especially at 340-359; 'Grundlagen und Grundlegungen des Völkerrechts', 29 *Zeit. für öffentliches Recht* (1921) 65ff., especially at 83-91; 'Völkerrecht und einheitliches Rechtssystem', 12 *Zeit. für Völkerrecht* (1923) 414-419; *Die Verfassung der Völkerrechtsgemeinschaft* (1926) 3ff., 21ff., 32; 'Le fondement du droit international', 16 *Hague Recueil* (1927-I) 275ff.

'collective will' put forward by the Italian Perassi and the new theoretical approach that he consequently advocated, [11] in 1923 Anzilotti espoused the new theory whereby at the top of any legal system there is a fundamental rule (*Grundnorm*) regulating the norm-setting process. In the international community this norm is *pacta sunt servanda*. It follows that the creation of agreements, be they written or unwritten, is regulated by law: when entering into agreements, States exercise a legal power granted by international law.

One of the consequences of embracing this theory is that Anzilotti was now no longer able to regard war as a 'pre-legal fact'. He thus propounded the view that war was one of the lawful manifestations of self-help: whenever it was not prohibited by such rules as those of the Covenant of the League of Nations, it was a 'lawful fact'. States were entitled to go to war both for the enforcement of legal rights and simply to realize an economic or political interest.[12] The artificial dichotomy between States as legal subjects and as law-makers was thus jettisoned.

It followed from this new approach to war that treaty restrictions on the right to make war were no longer regarded as practically meaningless, but as truly binding legal obligations, the effect of which was to place mandatory bans on resort to war, or to allow it subject only to certain procedural conditions.

8. Thus Anzilotti ended up, in 1923, by opting for the first of the two alternatives he had advanced in 1915; that is the alternative he had initially rejected as being logically inadmissible: international law itself authorized States – subject to such limitations as those laid down in the Covenant – to go so far as to annihilate other subjects or at any rate to totally disregard their sovereign rights.

This was no doubt a conclusion based both on realism and a correct perception of the international legal system. This conclusion enabled Anzilotti to overcome the previous cleavage between the realization that wars are normally fought for extra-legal purposes, and the rigid and artificial exclusion of States from the realm of law when they fight wars.

Once again, the great scholar showed that he was able to rethink old concepts in the light of new realities. By maximizing intellectual tools provided by other jurists, he formulated a legal construct that was more sound and better attuned to international relations, than the ideas reflected in his previous scholarship.

11 Perassi, 'Teoria dommatica delle fonti di norme giuridiche in diritto internazionale' (1917), in T. Perassi, *Scritti giuridici* (1958) 256ff. See also T. Perassi, *Lezioni di diritto internazionale* (1922) 10-13, 22-27.
On the theory of 'collective will' see also the important critical remarks by G. Sperduti, *La fonte suprema dell'ordinamento internazionale* (1946) 13ff., 140ff., and by R. Ago, *Scienza giuridica e diritto internazionale* (1950) 26-28.

12 *Corso di diritto internazionale* (2nd ed., 1923) 40ff. See also the 4th edition (1955) 43-48.

13 *Corso di diritto internazionale* (4th ed., 1955) 414-418, 420-421.