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# *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*

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## **Abstract**

*The writings of the twentieth-century protagonists of the law of state responsibility, Anzilotti and Ago, represent two conceptually opposed theories. Both authors have had their predecessors since Grotius and their approaches are likely to remain influential in the future. Taking into account the political and legal context in which Anzilotti and Ago developed their theories, both Anzilotti's bilateral conception of state responsibility and Ago's recognition that the violation of certain fundamental norms creates a legal injury to all states, should be perceived as legitimate. The persistent influence of their theories even beyond the context in which they were developed appears due to the reasons which led international lawyers to lean more towards a positivistic or to a natural law/policy-oriented jurisprudence. In this respect, the work of Hersch Lauterpacht marks an important turning point.*

## **1 Introduction**

It is tempting to describe the international law of state responsibility as developing between the poles of the two great Italian lawyers, Dionisio Anzilotti and Roberto Ago. Anzilotti's *Teoria generale della responsabilità dello Stato nel diritto internazionale* of 1902<sup>1</sup>

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<sup>1</sup> D. Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (1902).

and his article ‘La responsabilité internationale des Etats’ of 1906<sup>2</sup> are considered to be the leading expositions, some even say the scientific establishment, of this branch of international law before the First World War.<sup>3</sup> Ago’s reports to the International Law Commission<sup>4</sup> since the 1960s have perhaps been the major theoretical impulse for the reconception of the international law of state responsibility after the Second World War. Conceptually, Anzilotti’s and Ago’s positions seem to be diametrically opposed: while Anzilotti does not grade violations of international law according to their gravity,<sup>5</sup> Ago differentiates between (lesser) delicts and (more serious) crimes.<sup>6</sup> While Anzilotti only admits violations of obligations between two or more particular states as giving rise to responsibility under international law,<sup>7</sup> Ago also postulates obligations towards the international community of states as a whole.<sup>8</sup> These differences appear to be intimately connected with the respective author’s views concerning the source of the binding nature of international law: while Anzilotti insists on the (collective) sovereign will of the state as the one and only source of international obligation,<sup>9</sup> Ago emphasizes their community interest.<sup>10</sup>

These conceptual differences appear to be grounded in diametrically opposed philosophical and historical perspectives. Anzilotti, the positivist, seems to stand against Ago, who would represent a certain renaissance of natural law. And Anzilotti, the legal defender of sovereign power politics, seems to stand against Ago, the domesticator of sovereignty. From this perspective, both men would appear as the translators of the spirit of their time into the law of state responsibility: Anzilotti embodies the little-checked power politics of the period before the First World War and Ago represents the recognition after the Second World War that there is a real international community of states which possesses some legal mechanisms to enforce the collective will. If viewed from this perspective, the development from Anzilotti to Ago appears to be a story of progress. A closer look, however, will reveal that the issue is not that simple.

## 2 Classical International Law Before Anzilotti

Classical international law does not begin with Anzilotti. His position that the (sovereign) equality of states excluded the invocation by one state of the responsibility

<sup>2</sup> Anzilotti, ‘La responsabilité internationale des États à raison des dommages soufferts par des étrangers’, 13 *RGDIP* (1906) 5–29 and 285–309; see also D. Anzilotti, *Cours de droit international*, vol. 1 (trans. G. Gidel, 1929) 466–534.

<sup>3</sup> See Dupuy, ‘Dionisio Anzilotti and the Law of International Responsibility of States’, 3 *EJIL* (1992) 139–148; Dupuy, ‘Le fait générateur de la responsabilité internationale des États’, 188 *RdC* (1984-V) 9, at 29–33.

<sup>4</sup> See in particular *ILC Yearbook* (1976), vol. II, Part One, at 24–54, with further references.

<sup>5</sup> Anzilotti, *supra* note 1, at 84 *et seq.*

<sup>6</sup> *ILC Yearbook* (1976), vol. II, Part One, at 52–54.

<sup>7</sup> Anzilotti, *supra* note 1, at 88.

<sup>8</sup> *ILC Yearbook* (1976), vol. II, Part One, at 39 and 51.

<sup>9</sup> Anzilotti, *supra* note 1, at 72–74; Anzilotti, *supra* note 2, at 16.

<sup>10</sup> *ILC Yearbook* (1976), vol. II, Part One, at 52.

of another state for violations of the rights of a third state (or the community of states as a whole)<sup>11</sup> has slowly emerged against the Grotian natural law tradition according to which 'kings have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever'.<sup>12</sup> Emer de Vattel, the last of the great natural law authors, marks a turning point. He argued in 1758 that to take reprisals against a nation for the benefit of third party nationals would mean playing the role of the judge between a nation and these strangers and that no sovereign had the right to do so.<sup>13</sup> It was not abstract sovereignty-mindedness which prompted Vattel to draw this conclusion but precedent and policy: in 1662, he tells us, England had applied reprisals against The Netherlands in favour of the Order of Malta. When the States-General protested and insisted that international law only permitted the application of reprisals in order to secure the rights of the state's own subjects, England acquiesced. This rule is right, Vattel says, because the security of a state's own subjects does not depend on the security which is given to the subjects of other powers.<sup>14</sup> In the course of the nineteenth century, Vattel's bilateral conception was adopted by a majority of authors until it received its formal refinement in the writings of Anzilotti.

The bilateral conception, however, was never unchallenged. A few years before Vattel, Bynkershoek had already expressed doubts as to whether the Dutch claim in the Order of Malta case was justified. If reprisals are permitted on behalf of subjects, he argued in 1744, there seemed to be no reason why they should be denied for the benefit of foreigners, 'for in legal theory it makes no difference whether one is a Troian or a Tyrian'.<sup>15</sup> This statement contains the germ of a non-bilateral conception of state responsibility. In the nineteenth century, such a conception was more fully developed by several influential writers. Heffter<sup>16</sup> and, following him, Bluntschli<sup>17</sup> each postulated a list of particularly serious violations of international law which would affect all nations and whose occurrence would give all nations the right to take measures to redress the wrong and even to punish the wrongdoer. Their lists may be criticized as being incomplete or questionable in several respects, but it is clear that the origin of these lists lies, at least in part, in state practice and not so much in old-fashioned natural law thinking: both Heffter and Bluntschli, for example, consider the attempt by one nation to erect a universal empire to be a violation of international

<sup>11</sup> Anzilotti, *supra* note 1, at 88.

<sup>12</sup> Grotius, *De Jure Belli ac Pacis*, Book II, chapter 20, para. 40.

<sup>13</sup> Vattel, *Le droit des gens ou principes de la loi naturelle*, vol. 1 (1758) para. 348; but see also *ibid*, at vol. 2, para. 70: 'Former et soutenir une prétention injuste, c'est faire tort seulement à celui qui cette prétention intéresse; se moquer en général de la justice, c'est blesser toutes les nations.'

<sup>14</sup> *Ibid*, at vol. 1, para. 348.

<sup>15</sup> Bynkershoek, *De Foro Legatorum Liber Singularis* (1744) chapter XXII, at 554.

<sup>16</sup> A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart* (F.H. Geffcken ed., 1882) 222, para. 104.

<sup>17</sup> J.C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* (1878) 265, para. 471.

law which affects all nations, a clear reference to the Napoleonic wars.<sup>18</sup> In addition, Bluntschli mentions the post-Napoleonic Pentarchy and several collective interventions in favour of persecuted Christians and Jews in order to demonstrate the *erga omnes* responsibility of states for certain grave violations of international law.<sup>19</sup> At the end of the nineteenth century, Hall restated Bluntschli's position in abstract terms: 'When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrongdoing for being accomplished, or to punish the wrongdoer.'<sup>20</sup> The justification Hall gives for this statement is neither an invocation of practice nor of higher law but a structural policy consideration: 'International law being unprovided with the support of an organized authority, the work of police must be done by such members of the community of nations as are able to perform it. It is, however, for them to choose whether they will perform it or not.'<sup>21</sup>

It is against the background of such statements by some of the most influential writers of the nineteenth century that the dominant contrary opinion must be seen. Most writers of that century content themselves with saying that states must redress the injury caused by their violation of a right of another state. Since there is no criminal responsibility of states, say these writers, responsibility can be invoked only by the state whose specific rights have been infringed.<sup>22</sup> This turn against the universalistic position of Heffter, Bluntschli and Hall has been justified by Bulmering in 1889 on policy grounds: 'Should the States wish to extend the right to exercise reprisals to such an extent, a *bellum omnium contra omnes* would arise through reprisals and their frequent application would lead to the application of a world justice. This would produce more mischief than it would prevent, while it has always been viewed as a main function of reprisals to prevent a greater evil, war.'<sup>23</sup> Given the general political situation at the end of the nineteenth century — a group of European powers in a race for colonies and dominance — such a statement was not unreasonable. It should also not be forgotten that, in this situation, the theory was gaining ground according to which the sovereignty of states took precedence over international law and that this sovereignty would exclude any form of legal responsibility against the will of the state.<sup>24</sup>

<sup>18</sup> Heffter, *supra* note 16, at 222, para. 104; Bluntschli, *supra* note 17, at 266, para. 472.

<sup>19</sup> Bluntschli, *supra* note 17, at 266, para. 473.

<sup>20</sup> W.E. Hall, *A Treatise on International Law* (1895) 57.

<sup>21</sup> *Ibid.*, at 58; in a similar vein, see von Holtzendorff, 'Grundrechte und Grundpflichten der Staaten', in F. von Holtzendorff (ed.), *Handbuch des Völkerrechts*, vol. 2 (1887) 70; Geffcken, 'Das Recht der Intervention', in F. von Holtzendorff (ed.), *Handbuch des Völkerrechts*, vol. 4 (1889) 134.

<sup>22</sup> H.W. Halleck, *International Law* (1861) 309, para. 29; F. de Martens, *Traité de droit international* (1883) 562; G.-F. de Martens, *Précis du droit des gens moderne de l'Europe*, vol. 2 (2nd ed., 1864) 198, para. 261; R. Phillimore, *Commentaries upon International Law* (3rd ed., 1885) 30 *et seq.*; Paul Heilborn, *Das System des Völkerrechts* (1896) 352; Lassa Oppenheim, *International Law* (1905) 204, para. 156.

<sup>23</sup> Von Bulmering, 'Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg', in F. von Holtzendorff (ed.), *Handbuch des Völkerrechts*, vol. 4 (1889) 84 *et seq.*

<sup>24</sup> See e.g. Pradier-Fodéré, *Droit international public*, vol. 1 (1885) 329, para. 197.

### 3 Anzilotti's Theory and Its Significance

It was in this situation that Anzilotti developed his general theory of state responsibility. His theory mainly consists of a reduction and an abstraction. For our purposes, the most important reduction consists in the exclusion of sanctions and of mere interests from the field of state responsibility. According to Anzilotti, the violation of a rule of international law gives rise to a claim of reparation as the primary content of state responsibility, which is sharply distinguished from the right to take reprisals or from permissible grounds of intervention.<sup>25</sup> In addition, only the violation by a state of a true subjective right of another state can give rise to state responsibility and not the mere violation of general or more specific interests.<sup>26</sup> And, finally, only acts by states can give rise to responsibility under international law, not acts by individual persons.<sup>27</sup> This conceptual framework has several important implications:

- 1 Anzilotti introduced clear conceptual distinctions which had analogies in various domestic legal systems. He thereby enhanced the status of international law, in the eyes of his contemporaries, as a true (positive) law. In particular, he liberated the law of state responsibility from the question of enforcement.
- 2 Anzilotti connected the law of state responsibility plausibly with what was generally seen as the ultimate source of international obligation, the sovereignty of the state. If states are only bound to what they have (explicitly or implicitly) consented to, it seems logical that they should only respond in so far as they have accorded specific rights to other states.
- 3 By insisting on a strict concept of subjective right as against mere interests, Anzilotti disconnected seemingly insoluble general political issues and controversies from the realm of hard law.
- 4 Excluding the human person from the international law of state responsibility also served Anzilotti to depoliticize this branch of the law and to reduce it to a set of clearly distinguishable bilateral legal relationships.

Anzilotti's reconception of the law of state responsibility should not be interpreted negatively. It is not the product of a man who was blinded by sovereignty and who had completely lost sight of international community interests and gradations of injury. Indeed, in a footnote, Ago himself draws attention to the fact that Anzilotti accepted the individual or collective imposition of international community interests by way of intervention.<sup>28</sup> In addition, Anzilotti's exposition of the law of state responsibility is full of references to the 'international community' and to the legitimately rising demands of the individual person.<sup>29</sup> And it should finally not be forgotten that Anzilotti wrote at a time when the use of force between states was not yet prohibited and in which community interests could lawfully be pursued by powerful states without having to invoke a specific right. In such a situation it was eminently reasonable to make a

<sup>25</sup> Anzilotti, *supra* note 1, at 96; Anzilotti, *supra* note 2, at 13.

<sup>26</sup> Anzilotti, *supra* note 1, at 89 *et seq.*

<sup>27</sup> Anzilotti, *supra* note 2, at 6 *et seq.*

<sup>28</sup> *ILC Yearbook* (1976), vol. II, Part One, at 42, n. 219.

<sup>29</sup> Anzilotti, *supra* note 2, at 16–20.

distinction between specific rights which had to be invoked by the competent states and under prescribed conditions and procedures on the one hand, and general interests which could be pursued in a more diffuse political process and on more politically tainted legal bases on the other.<sup>30</sup> Such a distinction ultimately served, and was perhaps designed to serve, the interests of individuals by isolating the problems they raised from general ‘political’ issues.

Perhaps intentionally, Anzilotti’s conceptual reduction of the law of state responsibility has contributed to its factual limitation to the issue of injuries to aliens. The title of Anzilotti’s famous 1906 article in the *Revue Générale* is indeed striking: while the main title ‘La responsabilité internationale des États’ suggests a general theory of state responsibility, the subtitle, ‘a raison des dommages soufferts par des étrangers’, covers a more limited field, at least to today’s readers’ eyes. However, given his general theory, as he understood it, there may not have been a discrepancy. And, indeed, the most important practical issue of state responsibility at the time was the responsibility for injuries to aliens.<sup>31</sup> It was in this field that a multitude of arbitral decisions was being rendered. This meant that the postulated legal nature of this area was supported by practical evidence while other areas remained more diffuse. It is Anzilotti’s enduring achievement to have provided a theoretical framework for the law of state responsibility which reconciled the contemporaneous emphasis on sovereignty and the need to establish a clear system for this area of the law. In addition, his theory satisfied contemporary continental European standards of positive, formal and systematic law. This achievement was, *inter alia*, consciously bought at the price of excluding diffuse or collective interests from the law of state responsibility.<sup>32</sup> For a short while, international law stood self-confidently beside its domestic sisters.

## 4 Developments Between the First and Second World Wars

The First World War rocked the newly found self-confidence of international law, not least in the area of state responsibility. In 1916, Elihu Root, speaking as President of the American Society of International Law, remarked while referring, *inter alia*, to the violation of Belgian neutrality by Germany: ‘Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it.’ And he demanded: ‘International law violated with impunity must soon cease to exist and every state has a direct interest in preventing those violations which if permitted to continue would destroy the law.’<sup>33</sup> Although Root’s remarks were mostly *de lege ferenda*, he also demanded that ‘there must be a change in

<sup>30</sup> Anzilotti, *supra* note 1, at 84, 86 and 88 *et seq.*

<sup>31</sup> See e.g. E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1916) 177–180, 349–354 and 419.

<sup>32</sup> See also Schoen, ‘Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen’, 10 *Ergänzungsheft 2 zur Zeitschrift für Völkerrecht* (1917) at 135–136.

<sup>33</sup> Root, ‘The Outlook for International Law’, 10 *AJIL* (1916) 1, at 7 *et seq.*; see also Peaslee, ‘The Sanction of International Law’, 10 *AJIL* (1916) 328, at 333.

theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation’.

### A *Karl Strupp*

It is perhaps unsurprising that it was a German author who defended Anzilotti’s approach. In his monograph of 1920, *Das völkerrechtliche Delikt*, Karl Strupp conceded that it was theoretically possible to conceive the violation of any treaty as a violation of the basic norm of *pacta sunt servanda* which in turn would imply ‘a violation of all members of the community of states’.<sup>34</sup> He even estimated that such a conception of international law could be desirable ‘from the point of view of world justice, international solidarity and international morals’.<sup>35</sup> He did, however, insist that international law had not yet taken account of such ideas. During the First World War, he reminded his readers, domestic and international pressure to make the United States or Switzerland protest or intervene against Germany’s violations of the laws of war and neutrality had not been successful.<sup>36</sup> Therefore, Strupp reasoned, positive international law still provided only the immediately injured state with a right to invoke the responsibility of the injuring state.<sup>37</sup> Strupp’s contribution shows that positivism had become defensive: Strupp does not draw conclusions from abstract notions of sovereignty or the state; he even recognizes community interests as legal interests; but he does not accept that what may have been desirable had become law already, and he could point to the most recent practice to reinforce his conclusion.<sup>38</sup>

### B *Treaties and Projects*

Strupp’s reluctance to reconceive the general law of state responsibility was shared by almost all other authors who wrote in the decade after the First World War.<sup>39</sup> The reason for this was not, however, that the notions of ‘crime of state’ or ‘responsibility towards all states’ were quickly forgotten after the catastrophe. On the contrary, the years after the First World War saw many initiatives which tried to draw conclusions from the experience and to define particularly serious violations of international law which would give rise to special sanctions and responsibility *erga omnes*. These initiatives, however, all have in common that they were treaty-based or treaty-oriented: the most important example is, of course, the Versailles Treaty with its annex, the Treaty Establishing the League of Nations. While the Versailles Treaty

<sup>34</sup> K. Strupp, *Das völkerrechtliche Delikt* (1920) 9–11.

<sup>35</sup> *Ibid.*, at 14.

<sup>36</sup> *Ibid.*, at 15–16.

<sup>37</sup> *Ibid.*, at 16; see also K. Strupp, *Die völkerrechtliche Haftung des Staates* (1927) 8.

<sup>38</sup> The coming to power of the Nazi regime which led to his emigration did not cause Strupp to change his position: see Strupp, ‘Les règles générales du droit de la paix’, 47 *RdC* (1934-I) 263, at 557–567.

<sup>39</sup> De Visscher, *La responsabilité des États*, vol. 2 (1924) 116–119; L. Oppenheim, *International Law*, vol. 1 (3rd ed., 1920) 249–250, para. 156; F. von Liszt, *Das Völkerrecht* (M. Fleischmann ed., 1925) 280 and 287; but see W.E. Hall, *A Treatise on International Law* (A.P. Higgins ed., 8th ed., 1924) 65 *et seq.*

postulated that Germany had committed a crime by starting and conducting the war and that German leaders should be tried for crimes against the law of nations, the League of Nations was the first international institution which provided for collective sanctions in case a state resorts to war against its stipulations. The Geneva Protocol of 1924 on the Pacific Settlement of International Disputes, which never entered into force, declared the resort to war to be a ‘crime’ against which all nations were called to act.<sup>40</sup> In addition to the development of the concept of ‘crime of state’, initiatives were undertaken to establish the international criminal responsibility of individuals. Names such as Pella<sup>41</sup> and Donnedieu de Vabres<sup>42</sup> represent initiatives from academia which led to serious studies in broader circles on how to establish an international criminal jurisdiction.<sup>43</sup>

### *C New Theories and Codification*

One is tempted to ask why the First World War and its aftermath did not lead academics to take up the theories of Heffter, Bluntschli, Hall and others and to use these theories for reinterpreting the law of state responsibility in the light of new developments. The reason is probably more than simple inertia or a continued belief in sovereignty in the strong sense. Indeed, the 1920s saw a number of new general theories which emphasized the ‘objective’ or ‘community’ character of international law and which reduced the central focus on sovereignty. It is perhaps sufficient only to mention the names of Kelsen and Verdross.<sup>44</sup> It is more plausible to assume that practically all international lawyers at the time felt that such a paradigm change would require the positive creation of a new international law and that a mere reinterpretation would not suffice.<sup>45</sup> The 1920s were, after all, the time in which the movement to codify international law reached a new height. The ambiguity which progressive international lawyers must have felt was expressed by Clyde Eagleton in his 1928 monograph on *The Responsibility of States in International Law*. On the one hand, Eagleton cites Hall for the proposition that ‘there can be no doubt that joint action for the support of international rights and for the enforcement of international duties is quite legal, even on the part of states not themselves directly injured’; on the other hand he requires that the ‘mode of collective interference’ should be undertaken ‘through an established agency ... if proper impartiality is to be secured’.<sup>46</sup> In addition, practically all international lawyers and states during the interwar period felt that the classical object of the law of state responsibility, the issue of injuries to aliens, was of a qualitatively different kind than the issue of the paradigmatic

<sup>40</sup> League of Nations, Records of the Fifth Assembly (1924), Plenary Meetings, 498; 19 *AJIL* (1924) 9.

<sup>41</sup> Pella, ‘La repression des crimes contre la personnalité de l’État’, 53 *RdC* (1930-III) 677, at 816–828.

<sup>42</sup> H. Donnedieu de Vabres, *Les principes modernes du droit pénal international* (1928) 418–431.

<sup>43</sup> See also R. Lais, *Die Rechtsfolgen völkerrechtlicher Delikte* (1932) 138–148.

<sup>44</sup> Verdross, ‘Règles générales du droit international de la paix’, 30 *RdC* (1929-V) 275, at 275–349.

<sup>45</sup> See e.g. Wehberg, ‘La guerre hors la loi’, 24 *RdC* (1928-IV) 151, at 282; Kraus, ‘La morale internationale’, 16 *RdC* (1927-I) 389, at 527.

<sup>46</sup> C. Eagleton, *The Responsibility of States in International Law* (1928) 226.



international crime, aggressive war.<sup>47</sup> This is confirmed by the fact that the effort to codify the law of state responsibility at the 1930 Hague Conference practically only dealt with injuries to aliens and did not reach the issue of different grades of violations of international law and responsibility beyond the immediately injured state.<sup>48</sup>

### D *The Debate on State Responsibility in the 1930s*

It was only in the early 1930s, when the hope for successful international institution-building and codification had dimmed, that the still-dominant opinion<sup>49</sup> was challenged by some authors who asked the question whether positive international law already permitted qualitative distinctions to be made between different kinds of violations of international law and to enlarge the concept of the injured state beyond that of the immediately injured state.

#### 1 *Hersch Lauterpacht*

The most important of these authors was certainly Hersch Lauterpacht. In his 1927 book, *Private Law Sources and Analogies in International Law*, Lauterpacht had already made a strong attack on what he perceived to be the continental legal positivism with its personification of the state and its rigid formalism.<sup>50</sup> In his 1937 Hague Lectures,<sup>51</sup> he took issue with a central premise of the dominant theory, according to which states, because they are sovereign, cannot be punished. Therefore, reparation for individual wrongs is the sole consequence of violations of international law. Lauterpacht challenged this position from the points of view of logic, justice and practice: it would be logical, he argued, to deny *any* form of responsibility of states on the basis that they are sovereign, but it was completely arbitrary to say that a community (organized in the form of a state), because it has chosen the attributes of sovereignty and dignity, is protected from certain consequences of its violations of the law.<sup>52</sup> It is repugnant to justice, he argued, to abolish criminal law and an important part of tort law by limiting the responsibility to making reparation. This permitted individuals who are organized in the form of a state to acquire a degree of immunity with respect to criminal acts which they do not possess when acting as individuals.<sup>53</sup>

<sup>47</sup> See e.g. Briery, 'Règles générales du droit de la paix', 58 *RdC* (1936-IV) 5, at 177.

<sup>48</sup> A. Roth, *Das völkerrechtliche Delikt vor und in den Verhandlungen auf der Haager Kodifikationskonferenz 1930* (1932) 167 *et seq.*

<sup>49</sup> Salvioli, 'Les règles générales de la paix', 46 *RdC* (1933-IV) 5, at 97–130; Strupp, 'Les règles générales du droit de la paix', 47 *RdC* (1934-I) 263, at 557–567; Kaufmann, 'Règles générales du droit de la paix', 54 *RdC* (1935-IV) 313, at 466–471; Scelle, 'Fonction exécutive en droit international', 55 *RdC* (1936-I) 91, at 193; Basdevant, 'Règles générales du droit de la paix', 58 *RdC* (1936-IV) 475, at 659–665; Stefan Arató, *Die völkerrechtliche Haftung* (1937) 55; and François, 'Règles générales du droit de la paix', 66 *RdC* (1938-IV) 5, at 284–286.

<sup>50</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 51 *et seq.* and 71 *et seq.*

<sup>51</sup> Lauterpacht, 'Règles générales du droit de la paix', 62 *Recueil des Cours* (1937-IV) 99, at 99–422.

<sup>52</sup> *Ibid.*, at 350.

<sup>53</sup> *Ibid.*, at 350 *et seq.*

And, finally, in practice, he argued, treaties and arbitral decisions had already established the concept of a state crime and punishment of the state. The Treaty of the League of Nations and the Kellogg Pact, according to Lauterpacht, clearly established that states are subject to punishment, and certain arbitral decisions whose terms of reference had not been restrictive had recognized and awarded punitive damages.<sup>54</sup>

Each of Lauterpacht's main arguments is open to criticism, but his approach represents a most important alternative to the then prevailing opinion. It may be true that, once the bindingness of international law is admitted, it does not follow logically from the concept of sovereignty that responsibility should be limited to reparation of specific individual injuries. But it is certainly not arbitrary if the international legal system limits the consequences of a wrong and the available sanctions in order to preserve an equilibrium, or peace, among its subjects. It may be repugnant to justice if a legal system permits individuals to escape criminal conviction but this injustice need not necessarily be remedied by establishing a collective criminal responsibility. It would appear to be closer to Lauterpacht's preferred domestic analogies if the international criminal responsibility were limited to individuals while the additional collective responsibility would be limited to the classical form of reparation. And, finally, while it may be possible to interpret the League of Nations Treaty, the Kellogg Pact and certain arbitral decisions as having punitive functions, a classical positivist would respond that it is on the basis of the state's sovereign free will that such treaties and arbitration agreements have been concluded and that this did not necessarily affect general international law.

It is precisely at this point, however, that Lauterpacht's position transcends the traditional point of view. By invoking the criteria of 'domestic analogy', 'justice' and 'innovative practice', Lauterpacht relegates the will of the state to a lesser place in international law. He thereby opens the door for a creative development of international law, including by means of interpretation. From a positivist point of view this may appear as a return to natural law thinking. Indeed, in his monograph of 1927 Lauterpacht had already conceded that he saw himself as part of a movement towards a renaissance of natural law. He added, however: 'Needless to say, it is not the old law of nature, it is rather the modern "natural law with changing contents", "the sense of right", "the social solidarity", or the "engineering" law in terms of promoting the ends of the international society.'<sup>55</sup> Lauterpacht was not the first proponent of such a neo-natural law approach. His specific importance seems to lie in the fact that he challenged the prevailing continental European thinking both about international law in general and about the law of state responsibility in particular. He did not confine himself, as many authors from the common law world did, to describing and interpreting the rich arbitral practice with respect to injuries to aliens, but he equally did not believe in the abstract formality and the systematic thinking of his state-centred continental European counterparts. He challenged the prevailing continental European thinking on both theoretical and practical grounds, the

<sup>54</sup> *Ibid.*, at 353 *et seq.*

<sup>55</sup> Lauterpacht, *supra* note 50, at 58, n. 7.

combining element being the inherent qualities of a common law and/or customary law approach. Such an approach is characterized not so much by a greater reliance on precedents as such, but by a stronger reliance on the capacity of judges, arbitrators and authors to make the law perform its basic function, that is, to ensure peace and the enjoyment of rights, including individual rights.

## 2 Roberto Ago

Lauterpacht's resubstantiation of our aspect of the law of state responsibility did not receive a full response before the Second World War. Lauterpacht did, however, receive an interesting partial response. In 1939, Roberto Ago himself gave his first Hague Lecture on 'Le délit international'.<sup>56</sup> In these lectures, Ago addressed the question of whether international delicts could be classified 'according to the legal value which is attributed to the tort by the law, or better, according to the quality which the effect that is produced by this attribution of the legal value can take' ('differentiation . . . d'après le caractère de la valeur juridique attribué au tort par le droit, ou mieux, d'après le caractère que l'effet produit par cette attribution de valeur juridique peut revêtir').<sup>57</sup> Proceeding from this formulation of the question, Ago developed a theory which could enable classical positivists to accept the concepts of crimes and sanctions in the law of state responsibility: in a first step, Ago criticizes Anzilotti for assuming that the concept of crime would violate the nature of international law because this concept would presuppose an organized community which was non-existent in international law. For Ago, the characteristic legal feature of a crime was not the infliction of a punishment by an organized community, but only the repressive character of a (counter-)measure. Legal history, after all, showed that the application of criminal sanctions by private individuals could often be found at the early stages of legal development.<sup>58</sup> In a second step, Ago criticizes Kelsen for the radically opposite view according to which the normal consequence of an international delict is a sanction. With this approach Kelsen had tried to turn Anzilotti's theory, according to which the only consequence of a violation of international law is a duty to make reparation, on its head.<sup>59</sup> According to Ago, Kelsen's view does not conform with the practice of states and rests only on abstract preconceptions.<sup>60</sup> Having then established the theoretical possibility of distinguishing international delicts according to whether they give rise only to a duty to make reparation, or to sanctions, or to both, Ago proceeded to verify whether this distinction had already been accepted in international law. His result was meagre: perhaps, he said, the consequences of certain war crimes can only be sanctions, and perhaps a certain

<sup>56</sup> Ago, 'Le délit international', 68 *RdC* (1939-II) 419, at 419–554.

<sup>57</sup> *Ibid.*, at 524.

<sup>58</sup> *Ibid.*, at 524–526.

<sup>59</sup> Kelsen, 'Unrecht und Unrechtsfolge im Völkerrecht', 12 *Zeitschrift für öffentliches Recht* (1932) 545 *et seq.*; see also L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938) 25 *et seq.*

<sup>60</sup> Ago, *supra* note 56, at 526–527.

category of delicts of lesser importance exist which cannot be reacted to by way of reprisals.<sup>61</sup>

It is possible to interpret Ago's 1939 Hague Lecture to be of only minor importance. Indeed, in a footnote to his 1976 report to the ILC, Ago himself modestly noted that in 1939 he had been 'thinking mainly of the impossibility of making the right to resort to sanctions contingent upon a prior attempt to obtain reparation in cases where it is materially unthinkable — in the case of war, for example, that the state committing the breach would agree to make reparation'.<sup>62</sup> One can also, however, view Ago's early theory both as a most important concession by an adherent of the classical school to Lauterpacht and as the conceptual framework for his later categories of 'crimes' and of their possible special legal consequences. Ago's early theory is indeed an important concession to Lauterpacht in the sense that he no longer insists on a central premise of Anzilotti's theory, that is, the view that the sovereignty and equality of states excludes non-reciprocal and non-reintegrative legal relationships between states. Ago accepts that the idea of a crime — in the sense that a state can be subjected to repressive measures — is not alien to international law. He does not, however, go as far as to ask whether his concept also has a bearing on who would be entitled to react to the crime-committing state. And he hardly addresses the substantive issues of war-prevention and human rights which had driven Lauterpacht to reconceive the rules of state responsibility.

Thus, if we take Ago and Lauterpacht as the main contenders, we see form somewhat approach substance. Whether the remaining gulf between them could be bridged would ultimately depend on what 'practice' meant. If interpreted liberally and sense-oriented, as Lauterpacht would have preferred, much room for the reinterpretation of general international law could be discovered. If it was interpreted more restrictively and state-oriented, as Ago would have preferred, general international law needed more and different practice to transcend the traditional bilateral model of state responsibility. The outbreak of the Second World War overtook the scientific debate.

## 5 Developments after the Second World War

One should have expected that the Second World War provided a major impulse for the development of the law of state responsibility from the classical bilateral and unidimensional model to a more 'progressive' multilateral and multidimensional model in which different degrees of wrong would lead to different regimes of responsibility. After all, the experience of the aggression by Nazi Germany and its genocide and other systematic human rights violations of unprecedented dimensions provided the best possible illustration for the need to move towards more effective and collective mechanisms for certain particularly serious violations of international law.

<sup>61</sup> *Ibid.*, at 530; see also J. Personnaz, *La réparation du préjudice en droit international public* (1939) 302.

<sup>62</sup> *ILC Yearbook* (1976), vol. II, Part One, at 43, n. 230.

## A The Theoretical Contributions

In his 1976 report to the ILC, Ago wrote that ‘during the period following the Second World War, the interest of scientific circles in the problem under discussion grew in both intensity and scope’.<sup>63</sup> This statement, however, is misleading. It is true that the United Nations Charter provided for a new and comprehensive system of sanctions against aggression; it is true that individuals were punished in Nuremberg for international crimes; and it is true that serious attempts were made to codify particularly grave violations of international law and to establish international criminal responsibility. These developments, however, did not immediately affect the thinking of the great majority of authors on the law of state responsibility. Indeed, Lauterpacht included new sections 156a and 156b in his 1947 (sixth) edition of *Oppenheim’s International Law* in which he asserted that states and individuals may be subjected by international law to penal damages and criminal responsibility.<sup>64</sup> As we have seen, however, Lauterpacht in essence had already adopted this position in his Hague Lectures of 1937.<sup>65</sup> It is also true that in 1946 Levin formulated what was to become the official Soviet position, that is, the need to distinguish between international delicts (*narusheniya*) and international crimes (*prestupleniya*). Apart from these two authors, however, Ago could point to hardly any others who, until the early 1960s, asserted that the general rules of state responsibility had evolved away from the classical bilateral and unidimensional model. Indeed, Ago acknowledges this by saying, perhaps ironically, that ‘the legal literature of the 1950s shows a special interest in what we might call the classical aspects of the theory of state responsibility’.<sup>66</sup>

In fact, the authors of the 1950s were not unaware of the possibilities of developing international law. There are, of course, those, like Accioly, who continued to expound the law of state responsibility without any reference to possible multilateral or multidimensional forms of responsibility.<sup>67</sup> Others, like Philip Jessup, acknowledge ‘that the traditional legal foundations of unilateralism remain largely unshaken’ and advocate the introduction of criminal law type regimes in international law *de lege ferenda*.<sup>68</sup> Georg Schwarzenberger advocated a pragmatic approach with respect to the question of which state had a legal interest to invoke responsibility or to enforce international law but, characteristically, he only mentions the violation of the freedom of the high seas as an example where the ‘maritime powers take a wide view of their own legal interest in any such breach’.<sup>69</sup> Paul Guggenheim and Bin Cheng, finally, both criticize Lauterpacht and expose the reasons why most authors of the 1950s did not follow either Lauterpacht or Levin: Paul Guggenheim requires a

<sup>63</sup> *Ibid.*, at 45, para. 135.

<sup>64</sup> In the fifth edition of 1937, Lauterpacht had continued to use Oppenheim’s classical bilateral conception.

<sup>65</sup> Interestingly, Ago does not mention Lauterpacht’s Hague Lectures of 1937 in his 1976 report to the ILC.

<sup>66</sup> *ILC Yearbook* (1976), vol. II, Part One, at 46, para. 138.

<sup>67</sup> Accioly, ‘Principes généraux de la responsabilité internationale d’après la doctrine et la jurisprudence’, 96 *RdC* (1959-I) 353, at 413–419.

<sup>68</sup> P. Jessup, *A Modern Law of Nations* (1950) 10 *et seq.*

<sup>69</sup> G. Schwarzenberger, *International Law*, vol. 1 (1957) 587.

centralized, and thus an explicitly agreed-upon, mechanism in order to integrate third states into the enforcement of international law.<sup>70</sup> Bin Cheng asserts that Lauterpacht's change of position in the sixth edition of *Oppenheim's International Law* was based on a *petitio principii* and was in contradiction to the author's previous interpretation of certain arbitral awards which could be (mis-)read as accepting that restitution could have punitive functions.<sup>71</sup> Guggenheim and Bin Cheng have in common that they, implicitly or explicitly, reject an approach to international law which gives more room to a Lauterpacht-type creative interpretation. Like the great majority of authors at the time, they preferred to wait until the political process had led to sufficient legal sources or practice in order to draw conclusions.<sup>72</sup>

### **B *The García-Amador Proposal to the ILC***

It should not be forgotten, however, that the 1950s saw the first, and failed, attempt by the ILC to codify the law of state responsibility. In his report, Special Rapporteur García-Amador addressed the issue of whether international law knew only the traditional 'civil' responsibility of states which could lead merely to reparation, or whether it by then also encompassed forms of 'criminal' responsibility. García-Amador indeed alleged that 'the present state of international law does not allow doubts whatsoever', and that 'particularly since the Second World War, the idea of international criminal responsibility has become so well identified and so widely acknowledged that it must be admitted as one of the consequences of the breach or non-observance of certain international obligations'.<sup>73</sup> He derives this conclusion, however, mainly from two questionable arguments. First, he takes sides in the classical dispute over whether the duty to make reparation can also encompass punitive functions.<sup>74</sup> This issue had been inconclusively debated with reference to a number of arbitral awards which were rendered between the second half of the nineteenth century and the Second World War, the majority of authors having rejected the notion that a punitive function played a significant role.<sup>75</sup> Secondly, he refers to the Nuremberg crimes.<sup>76</sup> These international crimes, however, concern the punishability of individuals and do not necessarily suggest a change in the general rules of responsibility between states. Indeed, ultimately García-Amador refrained from taking a clear position on the 'really crucial question', that is, whether punitive damages can be imposed on the state as such, and he limited himself to including the international criminal responsibility of individuals in his proposed framework.<sup>77</sup> Despite his circumspection, the Commission did not accept García-Amador's

<sup>70</sup> P. Guggenheim, *Lehrbuch des Völkerrecht*, vol. II (1951) 597.

<sup>71</sup> Bin Cheng, *General Principles of Law* (1953) 235–240.

<sup>72</sup> See also I. Brownlie, *International Law and the Use of Force by States* (1963) 150–154.

<sup>73</sup> *ILC Yearbook* (1956), vol. II, at 183, para. 50.

<sup>74</sup> *Ibid.*, at 182–183, paras 49 *et seq.*, and 211–212, paras 201–207.

<sup>75</sup> See e.g. Personnaz, *supra* note 61, at 303–329.

<sup>76</sup> *ILC Yearbook* (1956), vol. II, at 183, para. 51, and 212 *et seq.*, paras 208–209.

<sup>77</sup> *Ibid.*, at 212–213, paras 205–209.

approach of including ‘criminal’ aspects in the codification effort.<sup>78</sup> Thereafter, he limited his subsequent draft to the question of state responsibility for injuries to aliens.

### C The New Approach After Decolonization

The rest of the story is better known. It is told in more detail by Marina Spinedi.<sup>79</sup> In the early 1960s, the ILC decided to embark on a new attempt to codify the law of state responsibility. The mandate for the new Special Rapporteur, Roberto Ago, was the result of a compromise between the traditional Western approach of viewing the law of state responsibility as primarily one of responsibility for injuries to aliens, and the demand by representatives from the socialist and some Third World states to codify the rules of responsibility for the violation of the most important rules of international law, in particular those relating to peace and security.<sup>80</sup> The compromise, as it was proposed by Ago himself, consisted in a mandate to codify the general rules, that is, the secondary rules of state responsibility. This compromise enabled a distinction to be drawn between more or less serious violations and to codify important aspects of the law of responsibility for injuries to aliens without giving this field a predominant place. However, it took until the early 1970s for the ILC actually to start work on the project. By that time, the concept of *jus cogens* had been recognized by Articles 53 and 64 of the Vienna Convention on the Law of Treaties, and the International Court of Justice had decided the *South West Africa* and the *Barcelona Traction* cases.<sup>81</sup> These cases had revealed the practical importance of distinctions in the law of state responsibility between more or less serious violations and between obligations *inter partes* and obligations *inter omnes*.<sup>82</sup> Against this background, it seemed to be a less drastic step to introduce the concept of ‘crime of state’, as Ago did in 1976 in his famous proposal for Article 19 of his Draft Articles.

## 6 Conclusion

What conclusions can be drawn from this historical *tour d’horizon*? At first sight, one is tempted to say that the great majority of international lawyers for too long have remained under the spell of Anzilotti’s formal pre-First World War conception of the law of state responsibility which emphasized sovereign equality over community interests. This reading of history would see Lauterpacht as the shining exception who was finally validated by state practice after decolonization forced the Eurocentric mainstream of international lawyers to recognize the new quality of international

<sup>78</sup> *ILC Yearbook* (1957), vol. II, at 105.

<sup>79</sup> Spinedi, ‘International Crimes of State — The Legislative History’, in J.H.H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (1989) 12 *et seq.*

<sup>80</sup> *Ibid.*, at 13.

<sup>81</sup> *Barcelona Traction*, Judgment, ICJ Reports (1970) 3; *South West Africa* cases, Second Phase, Judgment, ICJ Reports (1966) 4; *South West Africa* cases, Preliminary Objections, ICJ Reports (1962) 319.

<sup>82</sup> See e.g. B. Boellecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1974) 51–90; Schindler, ‘Le principe de non-intervention dans le guerres civiles’, 55 *Annuaire de l’institut de Droit International* (1973) 545, at 560–561.

law. It is also possible, however, to provide a less simplistic interpretation. Such an interpretation would proceed from the experience of the interwar period. At the beginning of this period, international lawyers hoped that the new ideas of multilateral responsibility and gradations of violations would be integrated into international law by regular procedures, and by unquestionable sources, that is, by way of treaty. It was only when the hopes for such a development had dissipated in the 1930s that individual attempts were made to recognize these ideas by way of reinterpreting existing law. The experience of the post-colonial approach by Ago, however, shows that the reluctance of the mainstream international lawyers was not without foundation. It is one thing to recognize the principles of gradations of injury and multilateral responsibility, it is another to translate these principles into applicable norms and regimes.<sup>83</sup> Without pressure on the part of states, such as by the Soviet bloc and the Third World countries after decolonization, and without controversies such as the *South West Africa* cases, international lawyers can hardly be expected to radically reinterpret the existing law. Today, when the international community has become somewhat less antagonistic than during the time of the Cold War, it appears more legitimate again for international lawyers to wait for states to agree on how differentiated the regime of state responsibility should be. In this perspective, the latest developments in the law of state responsibility, the Draft Articles which have been adopted by the ILC on the basis of James Crawford's reports,<sup>84</sup> appear to fit into a long-term perspective.<sup>85</sup>

<sup>83</sup> E. Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo* (1980) 327; I. Brownlie, *Systems of the Law of Nations. State Responsibility*, Part I (1983) 33; Weil, 'Le droit international en quête de son identité', 237 *Recueil des Cours* (1992-VI) 282 *et seq.*

<sup>84</sup> Report of the International Law Commission on the Work of Its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (UN Doc. A/56/10), chapter IV.E.1.

<sup>85</sup> But see Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999) 425.