Review essays

The development of international law through the lens of the Italian doctrine

Massimo Iovane

Department of Law, Federico II University of Naples, Naples, Italy

massimo.iovane@unina.it

Abstract

This review essay analyses a very interesting collection of essays providing a fresh examination of international law schools operating in Italy from the early medieval period to current times. The Essay will show that the book adopts a completely new presentation of this subject, offering thus an unbiased assessment of the doctrinal debate developed in between the two World Wars.

Keywords

history of international law in Italy – dimension (local and/or international) of Italian scholarship – formalistic and realistic approaches to international law – subjects of international law – international law in times of peace and war

Giulio Bartolini (eds.), *A History of International Law in Italy*, Oxford University Press, Oxford, UK, 2020, 512 pages, ISBN: 9780198842934

This book is a collection of essays providing a fresh examination of international law schools operating in Italy from the early medieval period to current times. It is a completely new presentation of this fascinating subject by mostly young scholars, offering thus an unbiased assessment of a doctrinal debate which had mainly developed in between the two World Wars. In an original way, the contributions are divided into two parts: the first one illustrates “scholarly networks and their complex influences”, whereas the second one is “devoted to an analysis of key historical and political events” to combine “ideas and State practice”. There are, however, some common threads running throughout these two parts which invite for different and more concrete descriptive criteria. These criteria are based on five sets of opposing concepts.

1. *As of the first set, it concerns the local or international dimension of Italian scholarship.* Are Italian international lawyers just providing solutions for domestic cases or are they part of a wider scientific dialogue with their foreign colleagues? These problems have been particularly tackled by the volume's editor in his introductory remarks. He clarifies that assessing international law in the Italian context does not mean taking a parochial defence of the national legal pride of an academic community. The relationship between national and universal levels being in fact highly interdependent, their mutual consideration is important to identify common problems and their legal solution according to established standards of conduct. I agree with Giulio Bartolini that Italian scholarship has not been looking for an international law the Italian way. Quite on the contrary, it has always offered systematic descriptions of international law as a legal order valid for all countries and situations; as well as of specific problems of general interest such as the subjects or the sources of international law.

Throughout centuries of scholarly debate, Italian international lawyers have been constantly engaged in the search for a foundational element which could explain the legal nature of international law. As we shall see later in more detail, most of them had in mind a sort of unifying or universal idea which could explain reasons and effectiveness of the international legal order. Evidently, there could be no room for localistic intentions in such a methodological and comprehensive approach. Indeed, Italian authors show a close and continuing interest for foreign doctrine, the opposite being not always true. They partly endorse, but partly also reject theoretical proposals coming from abroad while trying to find their own way, especially drawing from the great heritage of the Italian public law school.

This seems clearly to emerge from the chapters dealing with the interpretation and application of international law to specific internationally relevant events involving Italy. Edoardo Greppi speaks, for example, of an “Italian school of international law” concerning scholars of the Risorgimento who gathered around Pasquale Stanislao Mancini and his principle of nationality. Their teaching was instrumental to justify the creation of the new Kingdom of Italy. However, Greppi highlights that, once this result was achieved, these scholars distanced themselves very soon from their *maître* looking for a more rigorous scientific methodology. To that end they seemed to address especially to the Austro-German positivistic theories, confirming the vocation of Italian jurists to engage in an international academic discussion beyond the limits of a provincial milieu.

It is also worth mentioning, in this regard, the essay by Mirko Sossai about the role of Catholicism in the evolution of international law in Italy. He denies the existence of a Catholic doctrine of international law in the Italian school. In other words, Italian international lawyers were not culturally dominated by just one doctrine but reach out to different cultural inspirations.

2. *The second set of arguments, and one of the most challenging one*, is the never-ending antagonism between *natural* and *positive law*. Natural law is generally considered by most Italian internationalists as being the lowest degeneration of legal studies, running against the modern principle of legal certainty. It is particularly blamed for supporting the existence of an ideal society contrary to a sound scientific method based on the observation of the facts. Moreover, it advocates the existence of principles valid in all epochs and places ignoring that, in fact, legal rules and institutions change continuously in time and space. Positive law would be the only remedy to those shortcomings, as it presents law as a set of written rules, adopted by competent institutional organs, and grouped in a logically and hierarchical way. The opposition between these two conceptions is particularly discussed in the book in relation to war, human rights, and humanitarian law. Thus, the quarrel becomes one of both method and substance.

By reading the contributions on the point, it struck me to realise that contrary to the mainstream positivistic critical attitude, natural law is not at all invoked as a sort of universal morality, or as a set of principles valid *sub specie aeternitatis*. It is rather used as a convenient technique for jurists and judges when issuing legal opinions or decisions *imperio rationis*, i.e., filling normative gaps by means of a constructive and inventive legal argument. Elements such as the quality of the reasoning, the reputation of the drafter, and the reference to pertinent historical precedents are fused to confer authority and persuasiveness to those opinions and decisions. In other words, it was more a matter

of addressing new problems on a case-by-case basis, than proposing an ideal model of legal order.

This framework fits very well into the overall scenario depicted by Claudia Storti in her beautiful chapter about the medieval origins of modern international law. She describes a situation of *legal pluralism* taking hold in the Italian area, namely a world of different forms of government trying to free themselves from the so-called universal powers. Italy was, perhaps, the first place in Europe where old and new public law subjects such as communes, monarchies, lordships, the Empire, and the Church, competed and maintained mutual relations. The field was wide-open for Italian jurists, glossators, and commentators to adapt Roman law and dispersed principles of Western civilisation “to their times and their spaces”. Accordingly, they began to draft their *consilia* about *jus ad bellum* and the law of war by exploiting traditional sources of natural law such as *jus gentium* and the customs observed by Christianity. Natural law principles would often incorporate also statutory law from the new-born public subjects. These principles were conveniently reused to propose viable solutions to contemporary legal problems.

Natural law continued to stimulate the creativity of Italian legal advisers even in the following period stretching from 1600 to 1859. This evolution is illustrated by Walter Rech in his brilliant essay. Once again, natural law becomes a synonym for historical sensibility and legal expertise by jurists looking for authoritative solutions to the recent *jus inter potestates*. In 17th and 18th centuries, natural law was invoked, for example, in relation to the principle of self-defence as being embedded in the legal conscience of humanity. The author also mentions the development of the law of the sea through the opinions of Paolo Sarpi. Interestingly, he also notes that natural law was often balanced in practice with more realistic approaches, which left the door open for mutual exchanges between positivism and natural law. Indeed, elements of natural law persist in dominant contemporary positivism, even within its fundamental norms; on the other hand, natural law requires a form of effectiveness that only positive law may provide. By the mid-19th century some positive rules drawn from the old natural law debate were already established in interstate practice as customary law: the concepts of sovereignty and non-intervention, the State as a subject of international law, the express will of governments as the source of legitimacy of international rules.

The controversy between Italian positivist and natural lawyers erupted in the early decades of the 20th centuries, reaching its peak in the immediate post-Second World War. This doctrinal confrontation has been thoroughly described by Giulio Bartolini and Antonello Tancredi, respectively.

The transition from natural law to positivism did not come about abruptly. At the beginning of the 20th century, most authors seemed still to adhere to a mix natural and positivist conception of international law. Strict descriptions of interstate practice coexisted with “idealistic visions of international law, where meta-legal notions such as justice, conscience, or reason acted as background theories and influenced some solutions” (Pasquale Fiore, Luigi Olivi, Giacomo Grasso, Giovanni Lomonaco). According to Martti Koskenniemi, as quoted in the text, Fiore’s manual sought “a pragmatic reconciliation of history and reason”, which was exactly the aim of jurists and judges operating from Middle-ages to the 18th century.

Other authors adhered to a more practice-oriented method, while dismissing any theoretical elaboration. Bartolini distinguishes between “empirical (or inductive)”, “common will”, and “deductive” variants of positivism, the latter inductively verified through an extensive examination of practice. Again, abandoning any express reference to natural law did not stop the search for some other meta-legal basis to explain the binding force of positive international law. The author offers a detailed exposition on the common will theory proposed by Dionisio Anzilotti, the most prominent internationalist of his time. However, Anzilotti did not rule out the existence of some ethical value as the ultimate reason why States comply with international obligations. This seems germane to the *minimum moral content* conception by Herbert Hart. Anzilotti later embraced the normative theory and placed the postulate *pacta sunt servanda* at the top of the international legal order, the very idea of “postulate” being incompatible with a genuine positive approach.

Although evoking the idea of eternal and unchangeable rules, the concept of natural law did instead undergo a gradual evolution. Truly, natural law lost all its appeal as the ultimate non-positivist foundation of international and constitutional law. However, its driving ethical force still permeates the positivist process of law-creating and law-enforcing. On the one hand, it became an inspiring source for incorporating emerging new human rights categories through the ordinary law-making process; on the other, it plays the crucial role of suggesting to judges value-oriented *corrections* during the application of positive norms and judicial precedents.

3. *The third point is directly connected to the previous one.* It concerns the dialectic between *formalistic* and *realistic approaches* to international law. Formalism may concern only positivist narratives on the concept of law, as it presupposes written norms, abstract categories, and a strict logical analysis of the problems. On the contrary, realism relies on factual sources, such as custom and principles, shifts the focus of legal analysis from norms to effective

practice, exalts the process of interpretation and adaptation of law to individual cases. The ethical and cultural sensibility of the interpreter may well influence the ultimate outcome of this process.

As Rech rightly points out that elements of realism were already present in the dispute opposing the Papacy to the Republic of Venice on the regime of the Adriatic Sea. They concerned claims of vital space, expansion via the right of war, and continuous and effective jurisdictional control.

It is not by chance that realistic doctrines became so popular in Italy at the end of 19th and the first part of the 20th century. Lacking international law independent institutions to adopt norms and effectively enforce them in case of violation, many scholars turned to sociologically inspired perspectives. In this context, Bartolini describes the institutional theory by Santi Romano which became influential among constitutional and international lawyers alike. It conceived the international legal order "as a natural phenomenon linked to the institutional existence of States and other subjects acting at the international level, being capable of generating rules intended to facilitate their relationships and coordination". Elements of Romano's thought penetrated in later works by some important authors, such as Roberto Ago, Giuseppe Barile, and above all Mario Giuliano. Their original ideas on the nature of international law and the international community have been masterly illustrated by Tancredi. It is a pity that we cannot dwell extensively on these doctrines, especially on Giuliano's historical insight on the origins of international law. The author also gives a precise account of the more recent realistic perspective by Rolando Quadri, active in Naples up until the 1970s. According to Quadri "*ubi societas ibi auctoritas*: in every society there is a power superior to its members (individually considered), which posits and guarantees the rules [...]" At the international level, the element of authority must be identified in States operating in the *uti universi* mode, as active elements in the management of general interests, and not *uti singuli*, as isolated entities pursuing individual ends [...]" In the same period, other prestigious scholars elaborated dogmatic theories of international law, mainly based on Kelsen's normativism. The opposition between these two antagonistic approaches has contributed significantly to render the academic environment of that time particularly lively. The scanty Marxist international lawyers, whose ideas have been skilfully described by Lorenzo Gradoni, also come under the realist school of thought.

4. *States and other subjects of international law is the fourth dichotomy.* It is tightly connected to another problematic dilemma of Italian doctrine, namely the choice between monism and dualism.

It emerges clearly from its medieval origins that international law was considered at the beginning as *jus inter potestates*, sovereign entities refusing any formal or substantial authority by the Emperor and the Papacy. However, different opinions were later introduced trying to enlarge the “social basis” of international law. They promoted the international personality of nations, individuals, and peoples beside States and other independent subjects. We may mention the concept of nation elaborated by Mancini as “an aggregate of human beings sharing certain common characteristics [...] such as territory, race, language, history, customs, laws, and religion”. You can find here and there traces of a universalistic version of international law as the legal order of mankind, where individuals and not States should be considered as the ultimate holders of international rights and duties. This perspective has been rigorously dismantled by Gaetano Arangio-Ruiz, a staunch dualist who reorganised in an innovative way the theory of international law subjects.

5. *International law on peace and war is the fifth and last dichotomy I would like to mention.* History of international is mostly the account on different positions concerning *jus ad bellum* and the rules governing the conduct of hostilities between States and other independent bodies. This comes out very clearly from the articles by Storti and Rech concerning the role of jurists and legal advisers up to the 18th century. They should be credited as developing a sort of *opinio juris* for future creation of customary rules on the matter. However, the legality of war and the limits to engage in armed conflicts have been discussed in all epochs and all different doctrines. It was considered the central problem by those looking for the foundational principle of the international legal order. Questions concerning *bellum justum* are addressed, for example, in the chapter on the unification of Italy, the doctrine of the Catholic Church on international relations, the position of Italian authors towards the two World Wars.

Unfortunately, it is not possible to illustrate all chapters and contributions. They are full of extremely fascinating nuances and critical considerations and really deserve an accurate study by all those interested in the historical development of international law. I hope I was able to express all my enthusiasm for the book and wish to congratulate with the editor, Giulio Bartolini, and all the contributors.