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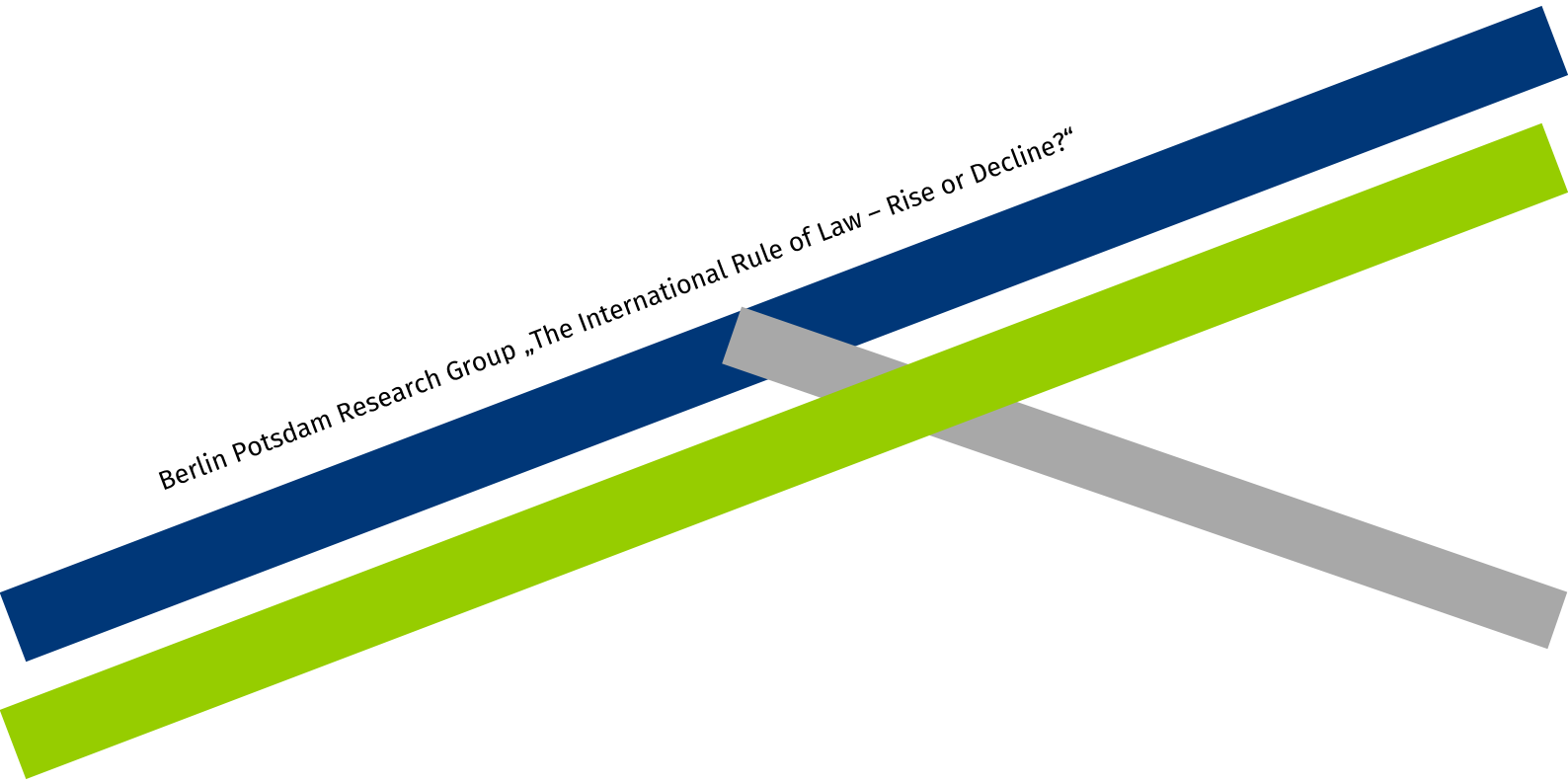
Paolo Palchetti

International Law and National Perspective in a Time of Globalization:

The Persistence of a National Identity in Italian Scholarship of International Law



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International Law and National Perspective in a Time of Globalization: The Persistence of a National Identity in Italian Scholarship of International Law*

*Paolo Palchetti***

Abstract:

The present study aims at identifying the main trends in Italian international legal scholarship from 1990 onwards. After a brief appraisal of the current situation within the Italian community of international law scholars, it will first focus on the methods and fields of interest of the most recent scholarship. Then, an attempt at contextualization will be made, by offering a brief overview of some current trends in international legal scholarship outside Italy and comparing these trends with the recent developments in Italian scholarship. In conclusion, it will be argued that, despite the greater fluidity of national identities, the persistence of common features still appears to characterize the Italian scholarship of international law. A long, deeply rooted and culturally rich tradition of studies in international law, the use of the Italian language, the dimension of the community as well as the presence of lively scientific institutions, are factors that, taken together, appear to favor a phenomenon of reproduction and perpetuation of certain common patterns of thought, thereby preserving the existence of a national perspective.

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1. Introduction

The present study aims at identifying, and reflecting upon, the main trends in Italian international legal scholarship from 1990 onwards. The reason for taking 1990 as the starting point of this analysis is twofold. First, this particular year represented in many respect an important turning point for both international law and international legal scholarship. The end of the Cold War marked an epochal shift in the international order, causing in turn institutional and normative changes. In international legal scholarship the years around 1990 saw the beginning of an intense, renewed interest in theoretical investigations regarding the role and essence of international law, with the emergence of new methodological perspectives and academic projects. For European scholarship, 1990 is also the year when the first issue of the *European Journal of International Law* was published, raising the prospect of a "European approach" to international law into which, in the long run, national approaches could be integrated.[1]

If there are valid historical and cultural reasons for taking 1990 as the starting point of a study of the main trends of the Italian international legal scholarship, it is fair to recognize that, as regards the present study, there is an additional explanation for this periodization. In 1990 Antonio Cassese published a well-known study investigating the evolution of Italian scholarship from post-World War II onwards.[2] In his study, Cassese provided an extensive overview of the main achievements of Italian international law scholarship during the period under consideration. He also identified two main changes that, in his view, had characterized the study of international law in Italy. They concerned the methods of approaching international legal problems and the fields of interest. According to Cassese, while Italian scholarship was characterized by a rather theoretical approach to international law until the 1960s, a shift in the methodology subsequently took place, with the emphasis moving from theory and logical analysis to a practice-oriented analysis.[3] He also noted that, in its selection of topics and issues, Italian scholarship had progressively moved away from abstract and theoretical problems regarding the foundations of the discipline and towards problems which reflected a greater interest in the living reality of international relations.[4]

The issues that I will address in the present work are largely the same as in Cassese's writing. In particular, after a brief appraisal of the current situation within the Italian community of international law scholars, I will focus mainly on the methods and fields of interest of the most recent scholarship. In doing this, I will use Cassese's conclusions as the starting point for my analysis. The aim will be that of assessing whether, and to what extent, his conclusions are still valid when applied to contemporary Italian scholarship. After this, an attempt at contextualization will be made, by offering a brief overview of some current trends in international legal scholarship outside Italy and comparing these trends with the recent developments in Italian scholarship.

Two preliminary remarks are in order. In Cassese's work, the reader is left with an optimistic appraisal of the evolution of Italian scholarship, his account being that of a scholarship progressively freeing itself of some negative connotations previously associated with it.[5] If the account I offer does not transmit the same optimistic feeling, I hope it will at least not convey the

[1] Admittedly, the editors of the *European Journal* were cautious regarding this aspect. In their inaugural editorial they noted that '[w]hether a genuinely European approach does exist or what contours it may eventually take, remains to be seen': (1990) 1 European Journal of International Law 1, 2.
[2] Antonio Cassese, 'Diritto internazionale' in Luigi Bonanate (ed), *Studi internazionali* (Edizioni della Fondazione Agnelli 1990) 113.
[3] Cassese (n 2) 133-134.
[4] Cassese (n 2) 128-130.
[5] Cassese (n 2) 146-147.

opposite. Most simply, it is not my intention to conduct a comparison in terms of better or worse, evolution or involution.[6] Moreover, unlike Cassese, I will purposefully omit to enter into an examination of the works of different authors and their impact on international legal scholarship. I am aware that, because of this omission, I will offer a somewhat simplified image of Italian scholarship and its trends. The reader is requested to take note of this.

2. The Italian Community of International Lawyers in the Era of Globalization

In an article published in 2013, Francesco Messineo provided a wealth of information illustrating the size and composition of Italian scholarship: the number of scholars of international law employed in Italian universities; Italians sitting as judges in international courts or as members of expert committees; the numbers of Italians who have taught at the Hague Academy, and so on.[7] The data he reported are mostly still valid today. They attest not only the continuing vitality of this scholarship but also an increase in the number of international law scholars working in Italy nowadays compared to 1990.

Without repeating these data, two trends relating to scholarly works and the scholarly environment are worthy of note here, particularly because they appear of relevance in assessing the persistence of a national identity in international legal scholarship – a point to which I will revert in the conclusions of this study. The first trend concerns the use of Italian in scholarly works. If language is one of the first elements of national identity, it should be noted that over the last 25 years Italian scholars have been progressively abandoning the use of Italian in favor of more accessible foreign languages – French, but above all English.[8] The use of English in scholarly works is not a novelty of the last decades. Indeed, the launch of the first Italian international law periodical written entirely in English – the *Italian Yearbook of International Law* – dates back to 1975.[9] Yet, this trend appears to have accelerated significantly over the last two decades. According to the last available *Italian bibliographical index of international law*, published in the 2014 issue of the *Italian Yearbook*, approximately 55% of the books and articles published by Italian scholars during the year 2014 were not written in Italian, the great majority of them being in English.[10] It may be worth noting that, according to the same *Bibliographical index*, ten years earlier the publications in a foreign language were below 40% of the total.[11] The growing use of English as a working language may in part be explained by the fact that Italian scholars increasingly tend to publish their works abroad. According to the *Bibliographical index*, of all the books and articles written by Italian scholars during the year 2014, approximately 45% were published in non-Italian periodicals or by non-Italian publishers. This is hardly surprising if one considers the impressive worldwide growth in the number of international law journals, blogs, edited collections, commentaries, and so on, and the

[6] On the idea of progress in international legal discourse, see Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 European Journal of International Law 425.

[7] Francesco Messineo, 'Is There an Italian Conception of International Law?' (2013) 2 Cambridge Journal of International and Comparative Law 879, 891.

[8] For an examination of the same trend in German international law scholarship see, among others, Andreas Zimmermann, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 799, 819-821.

[9] Another Italian international law periodical that publishes prevalently in English is *QIL-Questions of international law*, founded in 2014.

[10] (2014) 24 Italian Yearbook of International Law 543.

[11] (2005) 15 Italian Yearbook of International Law 429. Unfortunately, comparable data are not available for the period 1970-1992 since the *Italian bibliographical index* only included books and articles published in Italy or in Italian periodicals at that time.

force of attraction that this transnational web of editorial projects and fora of discussion inevitably exerts on Italian scholarship.

Despite the increasing use of English in scholarly works, it would be premature to say that Italian scholars have totally abandoned Italian as their working language. In fact, a conspicuous part of the scientific debate continues to take place in Italian. The great majority of articles in Italian international law journals, from the oldest and still most authoritative, the *Rivista di diritto internazionale*, to the younger *Diritti umani e diritto internazionale*, are still written in Italian. Italian scholars, including the youngest ones, continue to publish their monographic works prevalently in Italian. Of all the books and articles by Italian scholars published in Italy or in Italian international law journals during 2014, less than 20% were written in English or another non-Italian language.[12] In a scholarly world dominated by English and where non-English literature is increasingly neglected, the permanence of a scientific debate in Italian is a factor that may contribute to preserving a certain national identity in Italian scholarship.

The second aspect worth mentioning relates to academic mobility. Here again, the current situation combines elements of change with elements of continuity. Thanks also to the process of European integration, an increasing number of Italian scholars now work outside Italy, on a temporary or permanent basis. Moreover, many of the youngest generation of Italian scholars have research experience, or even gain part of their education, outside Italy. At the same time, however, scholars teaching international law in Italian universities are, in fact, exclusively Italian. Access to Italian university positions by non-Italian scholars educated abroad remains an exception. Several reasons may explain this situation, and among them the linguistic barrier certainly plays a significant role. While Italian universities are increasingly introducing graduate and postgraduate courses in English, the great majority of international law courses are still taught in Italian.

3. The Methods of Italian Scholarship: An Evolution within the Perimeter of a Positivistic Conception of International law

In his account of the developments in Italian scholarship between the end of the Second World War and 1990, Cassese mainly emphasized the elements of discontinuity: from a theoretical to a practice-oriented approach, and from abstract and philosophical issues to eminently practical and concrete legal problems. However, albeit in passing and without developing the point, he also identified an important element of continuity. He recognized that, while there had been changes in international legal scholarship, these developments remained "within the framework of the traditional positivistic conception" of international law.[13] In his view, the new trends did not affect the "typical characteristics" of Italian scholarship, which he identified as "logical rigor and correctness of method", the method in question being the positivistic one.[14]

A quarter of a century after Cassese's analysis, the permanence of a strong rule-based conception of international law continues to be the most striking feature characterizing Italian scholarship. If I were to describe the main aspects of this approach to international law, I could not find better words than those used by Joseph Kunz more than 70 years ago to describe what he regarded as the main virtues of the Italian school of international law at that time: 'strictly juridical method of approach; clear distinction between international law and international politics; systematic,

[12] By comparison, of all the books and articles published in Italy by Italian scholars in 1984-1985, less than 5% were not in Italian: (1986-1987) 7 Italian Yearbook of International Law.
[13] Cassese (n 2) 127.
[14] Cassese (n 2) 146.

theoretical treatment'.[15] These three aspects still characterize the approach followed by Italian scholarship nowadays, to a certain extent. To be clear, this is not to deny that there has been an evolution in the methods or that there are differences in approaches between the various authors. The point is that this evolution and these differences have tended to remain within the perimeter of this positivistic conception. As Francesco Messineo felicitously put it, '[f]rom the early 20th century onwards, international legal scholarship in Italy could be described as a battleground between various shades of legal positivism'.[16]

Much has been written in recent times about the plurality of variants of positivism in international legal scholarship and about the different ways in which positivism has developed over the last century.[17] In that respect, to say that Italian scholarship continues to embrace a positivistic conception of international law may not help shed light on the basic features of the method generally employed by that scholarship. In order to better grasp what the main methodological trends are, three points seem particularly important.

First, a rule-oriented approach dominates the international legal discourse in Italian scholarship: its focus is on the determination, interpretation and application of international rules. Within this strictly legal analysis, formal sources continue to play a key role, in that they permit a distinction between law and non-law. In assessing the operation of these formal sources, Italian scholars, while still attached to the positivistic method with its focus on legal norms, have generally abandoned certain features usually associated with positivism as a legal theory,[18] such as the idea that only States can be regarded as subjects of international law and that international law is no more than the expression of the will of States. In line with the canons of "modern" or "enlightened" positivism, the trend is rather towards a "liberalization" of the traditional sources doctrine,[19] with greater importance being attached to treaty interpretation and the role of the interpreter, to the variety of elements that can count as practice for the purposes of determining customary rules, or to the legal effects attached to soft law.

The second point relates to the role granted to the empirical observation of the reality of international relations – in brief, to international practice – in the analysis of international law problems. With regard to this issue, it can be said that practice-oriented positivism has nowadays become the ordinary, if not the only, method.[20] Here, perhaps, one may even wonder whether the importance placed upon international practice in international legal analysis has not come at the

[15] Joseph Kunz, 'Book reviews' (1940) 34 American Journal of International Law 562. It may be worth stressing that the term 'theoretical' employed by Kunz does not refer to any interdisciplinary or philosophically inspired approach to the discipline; the allusion seems rather to the importance attached by Italian scholarship to a conception of international law as a coherent legal system, whose rules may be logically deduced without necessarily engaging with practice.
[16] Messineo (n 7) 891.
[17] Regarding this consideration, see, among many, Jean D'Aspremont and Jörg Kammerhofer, 'Preface' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International legal positivism in a post-modern world* (Cambridge University Press 2014) ix, xi; Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' in Steven R Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (Hein&Co. 2006) 23, 25.
[18] On the difference between positivism as a method and positivism as a legal theory, see Norberto Bobbio, *Il positivismo giuridico. Lezioni di filosofia del diritto* (Giappichelli 1997).
[19] On this issue, see Christian J Tams and Antonios Tzanakopoulos, 'Use of Force' in d'Aspremont and Kammerhofer (n 17) 498, 508; see also Simma and Paulus (n 17) 30.
[20] Regarding a similar trend in French scholarship, see Emmanuelle Jouannet, 'Regards sur un siècle de doctrine française du droit international' (2000) 46 Annuaire français de droit international 1, 31, who uses the expression "positivisme pragmatique" to define this approach.

expense of a systemic vision of international law, once a hallmark of Italian scholarship.[21] There is indeed a tendency in some recent Italian scholarship to focus increasingly on very specific problems or cases, and to limit the task of legal analysis to that of giving an answer to such problems in the light of a survey of existing practice, without attempting to offer a more general and systematic account. In short, rigorous and systematic conceptualization appears to be losing ground in favor of accurate commentaries on practice and the case law of international courts and tribunals. This is not a tendency that is exclusive to Italian scholarship. As recently noted by one author, this attitude appears to reflect a broader 'European "fetishism" with practice'.[22] With regard to Italian scholarship, however, such a shift in approach would represent a radical change and a movement from one end of the spectrum to the other: from abstract systematization to excessive practicality.

The last point concerns the role of scholarship in critically appraising the rules and fostering their development. Cassese addressed this question only passingly in his work of 1990. While the distinction between *lex lata* and *lex ferenda* – between the law in force and mere aspirations and proposals – remains one of the pillars of the positivistic legal analysis practiced by Italian scholarship, the idea that legal analysis also involves criticizing existing law and promoting the development of new law now appears to be widely accepted. Such an approach, which Cassese later labeled as critical positivism,[23] is quite common in Italian scholarship. It is criticism within the law, in the sense that it is conducted through the traditional tools of legal argumentation, leaving political, ethical, or other non-legal considerations in the background. This critical approach reveals that the positivism practiced by Italian scholarship has largely abandoned the traditional claims of the objectivity and neutrality of the law. While certainty in law continues to be regarded as an important value,[24] the search for certainty coexists with the recognition that a certain degree of indeterminacy is inevitable. In the same way, international law is far from being regarded as a system of neutral rules, and legal scholars do not shy away from discussing, and even criticizing, the political choices that lead States and other international actors to adopt or maintain certain rules. However, neither of these elements – a greater awareness of the indeterminacy of the law and increasing attention towards the extra-legal context of the law – has led Italian scholarship to reconsider the basic postulates of the positivistic method. The approach to international legal problems continues to be characterized by a sharp distinction between the statement of the existing law and criticism of such law or proposals for innovations, as well as by a clear distinction between strictly legal considerations and political or ethical ones. Nowhere has this been more clearly illustrated than in the scholarly debate sparked by the judgment of the Italian *Corte di Cassazione* in the *Ferrini* case[25]. Contrary to the views expressed by many non-Italian commentators, a large portion of Italian scholarship has defended the solution adopted in *Ferrini*, claiming that recent developments in international law justify the recognition of an exception to

[21] On this, see Kunz (n 15).
[22] Anne Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 24 European Journal of International Law 533, 544.
[23] Antonio Cassese, *Five Masters of International Law* (Hart 2011) 258; the notion of critical positivism is given a different meaning by Corten: Olivier Corten, *Le discours du droit international. Pour un positivisme critique* (Pedone 2009).
[24] For the importance attached to certainty in law in Italian legal culture see John Henry Merryman, 'The Italian Style I: Doctrine' (1965-1966) 18 Stanford Law Review 39, 61.
[25] Corte di Cassazione (Sezioni Unite), judgment No 5044 of 6 Nov. 2003, registered 11 Mar. 2004, (2004) 87 Rivista diritto internazionale 539.

State immunity in cases of breaches of peremptory rules of international law.[26] Irrespective of their well-foundedness, it is remarkable that even the more progressive views have all been advanced from within a positivist analytic framework. True, they may appear to rely on a rather innovative approach to the sources of law, particularly in the importance they attach to a *jus cogens*-based hierarchical method of conflict-setting in order to determine the applicable law. However, this flexible approach to the sources doctrine can hardly be regarded as a departure from the positivistic framework; it rather appears to be in line with the trends that characterize "modern positivism"[27].

4. The Field of Interest: Between Generalism and Specialization

As it has been said, in his analysis of the transformation of Italian scholarship during the second half of the twentieth century, Cassese identified a clear element of discontinuity in the importance attached by later Italian scholarship to concrete problems arising from examination of the living reality of international relations. It can be said from the outset that this trend has persisted and even grown over the last decades. The amount of attention devoted since 1990 to the role of the United Nations, and in particular to the collective security system of the Security Council, as well as the proliferation of studies on international criminal law, including the functioning of international criminal tribunals, are just two of the many examples that can be cited.[28] More broadly, it can be said that the topics and issues addressed by Italian scholarship have not differed substantially from those addressed in the most representative international law journals of other States over the last 25 years. However, there is one notable exception: current Italian scholarship shows little interest in theoretical problems related to the methods and the function of international law. This is an aspect to which I shall return later, when comparing the main trends in Italian scholarship with those prevailing outside Italy[29].

It is frequently observed that, since 1990, the process of progressive diversification of international law regimes and, with it, the progressive specialization of international legal scholarship, have intensified.[30] Italian scholarship has not been immune to this trend. This specialization is partly demonstrated by the share of publications devoted to specialized areas of international law in comparison to those devoted to general issues regarding the fundamentals of international law, such as sources and subjects, dispute settlement, as well as international responsibility. According to the *Italian bibliographical index of international law*,[31] approximately 25% of all articles and books published by Italian scholars in 2014 were in the area of international human rights law. Other publications in specialized fields such as international economic law, environmental law, international criminal law, the law of the sea and cultural heritage accounted for approximately 40% of all publications. Only a restricted share of publications, amounting to no more than 20%,

[26] One of most authoritative and influential authors among those who have supported the legal solution adopted by Italian courts is Benedetto Conforti, e.g.: Benedetto Conforti, *Diritto internazionale* (Editoriale Scientifica 2006) 230.
[27] See Tams and Tzanakopoulos (n 19) 508.
[28] For a rapid overview see Enzo Cannizzaro, 'La doctrine italienne et le développement du droit international dans l'après-Guerre: entre continuité et discontinuité' (2004) 50 Annuaire français de droit international 1, 20-22.
[29] ibid 5.
[30] Yannick Radi, 'In Defence of "Generalism" in International Legal Scholarship and Practice' (2014) 27 Leiden Journal of International Law 303.
[31] (2014) 24 Italian Yearbook of International Law 543-576.

were devoted to general problems of international law such as subjects, sources, immunities, responsibility, dispute settlement, and the relationship between international and domestic law.

Another significant aspect is the proliferation of graduate and postgraduate courses in specialized areas of international law. According to a survey conducted in 2016 by the Italian Society of International Law and European Union Law,[32] alongside courses on international institutional law and international economic law, already mentioned in Cassese's contribution,[33] Italian universities offer courses on a great variety of subjects, including international criminal law, international humanitarian law, international human rights law, international labor law, the law of sustainable development, international migration law, international dispute settlement, and international environmental law.

While a certain degree of specialization is inevitable nowadays, given the expansion of international law and the complexities of many special regimes, this phenomenon does not seem to have brought about a change in the conception of international law as a unitary system. On the contrary, a unitary understanding of international law still largely prevails, also in specialized literature. International human rights law provides a formidable example in this respect. This is an area of international law that has attracted the attention of a large portion of Italian scholarship for a long time.[34] Yet, Italian scholarship has generally refrained from embracing a view of human rights law as an autonomous, self-contained branch of general international law, with its own sources of law or set of secondary rules on responsibility.[35] Such a "generalist" approach to the study of specialized areas of international law still represents the rule in Italian scholarship. Also in the context of education, despite the proliferation of specialized courses, teaching of the fundamentals of public international law maintains a central role, public international law being a compulsory course in university curricula in the field of law and political science. Moreover, a body of publications on different aspects of the discipline is generally regarded as an indispensable requirement for recruitment to an academic position in this field.

In short, despite the growing trend towards specialization, to a large extent Italian scholarship continues to embrace a generalist approach to the study and teaching of international law. By contrast, the tradition that international law scholars should be equally well-versed in public international law, private international law and European Union law, which still prevailed at the time of Cassese's writing,[36] has been progressively abandoned. The younger generation of Italian scholars tends to specialize in only one of these three subjects. Such trend towards the recognition of an autonomous disciplinary identity is particularly evident regarding European Union law, as shown, for instance, by the flourishing of specialized journals in this area over the last two decades.[37] This process of progressive separation is destined to be enhanced by recent changes in the Italian university system, which, departing drastically from the traditional unity between international and European Union law scholarship, have the effect of establishing a rigid disciplinary boundary between these two areas.

[32] On file with the author.
[33] Cassese (n 2) 115.
[34] A perusal of the *Italian bibliographical Index* confirms that already in the last three decades of the nineteenth century a high share of articles and books published by Italian scholars were in the area of international human rights law.
[35] On this issue, see Pasquale De Sena, 'La dottrina internazionalistica italiana e la tutela internazionale dei diritti dell'uomo (1945-2005)' (2012) 3 Diritti umani e diritto internazionale 513, 534f.
[36] Cassese (n 2) 135.
[37] The reference is particularly to the following periodicals: *Il diritto dell'Unione europea*, *Studi sull'integrazione europea* and, most recently, *European Papers*.

5. Comparing Trends: Italian Scholarship and the Outside World

Is there anything that distinguishes the methods and fields of interest of Italian scholarship from those of international legal scholarship outside Italy?

It is clear from the outset that, while trying to identify some basic characteristics of current Italian international law scholarship is already a challenging task, the risk of engaging in commonplace generalizations is even greater when attempting a comparison, and all the more so when the other term of comparison is as generic as non-Italian international legal scholarship. Having said this, it seems useful to locate the analysis of Italian scholarship carried out so far within the main trends in international legal scholarship. In particular, two of these trends should, in my opinion, be singled out, since it is with respect to them that the comparison with Italian scholarship may reveal significant differences. The first relates to the flourishing of different methods with which to address the problems of international law, which may be contrasted to the strictly juridical, rule-based, positivistic approach that continues to dominate in Italian scholarship. The other is represented by the turn towards critical self-reflection on the discipline, to which one could oppose the limited attention devoted by Italian scholarship to theoretical reflection on the methods and techniques of international law. I will address these two strictly related aspects in turn.

As regards the question of methods, nowadays the discipline of international law appears to be increasingly characterized by methodological pluralism. International law is studied in many different ways. A recent publication of the *American Society of International Law* identified 8 different approaches: positivism, policy-oriented jurisprudence (or the New Haven approach), new international legal process, law and economics, the critical approach, the international law and international relations approach, feminist approach, and third world approach.[38] Except for positivism, all the other methods depart from a rule-based, normative conception of international law, instead placing emphasis either on the process by which authoritative decisions are taken, or on critical analysis of the political choices behind rules and processes. While this methodological pluralism has transformed the landscape of international legal scholarship, its impact has not been the same everywhere. As the editors of the abovementioned publication remarked, most of the new methodological approaches have a 'distinctly American origin';[39] by contrast, positivism 'remains the lingua franca of most international lawyers, especially in continental Europe'.[40]

This allusion to a European versus Anglo-Saxon divide provides an important clue to understanding (at least in part) the coexistence of different perspectives on international law and its methods. This is not the place to assess the main aspects of this divide or to examine its historical and cultural reasons. What is worth stressing here is that most of the analyses regarding this divide tend to agree in identifying the different legal traditions as the reasons for the limited influence of the new methodological approaches in certain national scholarships. In particular, this would explain why such approaches have had little impact on continental European scholarship, where a strictly juridical, rule-based approach still largely dominates the international legal discourse.[41]

[38] See Ratner and Slaughter (n 17); for a more recent reappraisal of the different theoretical approaches to international law see Andrea Bianchi, *International Law Theories* (Oxford University Press 2017).
[39] Ratner and Slaughter (n 17) 8.
[40] ibid 5.
[41] See, in particular, Jean-Pierre Cot, 'Tableau de la pensée juridique américaine' (2006) 110 Revue générale de droit international public 537; Emmanuelle Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 Maine Law Review 292; Guglielmo Verdirame, '"The Divided West": International Lawyers in Europe and America' (2007) 18 European Journal of International Law 553; on

If considered from this perspective, the position of Italian scholarship can hardly be regarded as being an isolated example. Its approach does not substantially differ from the 'positivisme pragmatique'[42] of French scholarship or from the 'auf der Grundlage juristischer Methodik und einer fundierten Analyse der Staatenpraxis'-based approach[43] of the German one. In this respect, the least that can be said is that the methods employed by Italian scholarship are informed by a legal tradition that continues to thrive and largely prevail in many European States, if not beyond.[44]

Seen from a different perspective, the current debate on methods also reveals the increasing importance attached by contemporary international legal scholarship to theoretical reflection on international law. This trend has long been recognized. Appraising a century of scholarship in the *American Journal of International Law (AJIL)*, and focusing in particular on the period from 1990 to 2006, David Bederman noted that 'the most surprising intellectual turn of the *AJIL*'s past decade has been the self-conscious renewal of interest in the methods and techniques of international legal scholarship itself'.[45] This intellectual turn has not characterized American scholarship alone. An intense interest in methodological and theoretical problems has characterized the *European Journal of International Law* since its first issue. Since 2012, the *Leiden Journal of International Law*, a leading European periodical, has distributed its articles into sections of "International Legal Theory" and "International Law and Practice". Many more such examples could be cited.

By contrast, Italian international law scholarship has been rather impermeable to this turn towards critical self-reflection on the discipline. Little can be found in terms of methodological debate or focused discussions on the new intellectual trends. There is, in fact, a clear reluctance to abandon the terrain of technical legal analysis to engage in theoretical discussion on the methods and techniques of international law.[46]

It may well be that this situation is not exclusive to Italian scholarship. Indeed, it has been observed that a shift away from theoretical problems also characterizes current French scholarship.[47] In this respect, it could be argued that the predominance of a positivistic, rule-based conception of international law may lead to the perception that the focus of international legal research should remain on concrete applications of the law, while theoretical research lies outside the scope of the discipline. However, even by the standards of European continental scholarship,

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the presence of a critical tradition in the francophone scholarship, see however Olivier Corten, 'Existe-t-il une approche critique francophone du droit international? Réflexions à partir de l'ouvrage Theories critiques du droit international' (2013) 48 Revue belge de droit international 257.

[42] For this expression, see Jouannet (n 20) 31;. see also Cot (n 41) 540 ('Nous sommes tous devenues des enfants de Basdevant').

[43] See Zimmermann (n 8) 805; see also Georg Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 657, 674 ('Die besondere Stärke der in Deutschland geprägten Völkerrechtswissenschaftler [...] scheint mir seit langem in der relativ unparteiischen, gleichzeitig systematischen und pragmatischen rechtsdogmatischen Analyse zu liegen'); and Felix Lange, 'Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany's International Legal Scholarship (1920-1980)' (2017) 28 European Journal of International Law 535, 557, who, however, notes that, 'even though German legal scholarship still comes with its particular [practice-oriented] approach, German international legal research has somewhat changed in the past 20 years'.

[44] See, in this respect, the observations of Jouannet (n 20) 55: 'ce qui fait la réalité de notre doctrine française plonge ses racines dans une culture juridique beaucoup plus large et qui englobe toutes les traditions européennes non anglo-saxonnes, ainsi que toutes celles qui ont subi cette influence et qui en portent encore indéniablement l'empreinte'.

[45] David Bederman, 'Appraising a century of scholarship in the American Journal of International Law' (2006) 100 American Journal of International Law 20, 48.

[46] See Paolo Picone, 'Recensioni' (2009) *92* Rivista di diritto internazionale 905, who criticized 'the reluctance of Italian doctrine to address topics which do not strictly pertain (or are not perceived to pertain) to positive law'.

[47] See Jouannet (n 41) 307-309.

the situation within Italian international law scholarship seems particularly striking. A perusal of the *Italian bibliographical index of international law* appears to confirm this impression, as it reveals a dearth of publications devoted to theoretical investigations regarding the role and essence of international law over the last decades.

The reasons for this state of affairs are a matter for speculation. The trend towards specialization may partly explain it: with the expansion of the domains of international law, international lawyers appear to have focused progressively more on the analysis of positive law and practical problems, while largely abandoning theoretical reflection. The rigidity of the disciplinary boundaries in the Italian university system may also have played a role. While the new methodological approaches to international law developed over the last decades are frequently the result of academic projects characterized by a high degree of interdisciplinarity, in Italy disciplinary boundaries continue to have significant weight, with a consequent lack of communication between different disciplinary communities. This phenomenon affects not only the relationship between legal and non-legal disciplines but also, to a certain extent, the relationship between different fields of the legal discipline. In this regard I would just point out that in Italy the debate about Global Administrative Law has remained confined almost exclusively among scholars with a background in administrative law, while international law scholars have generally neglected the issue. It is also significant that, despite the proliferation of university courses in the field of international law, the very few existing courses on the theory of international law are taught by philosophers.

There is little doubt that it is in the interest of Italian scholarship to engage more in comparisons with the new intellectual trends and theoretical approaches to international law. Three decades of critical thinking about international law have already profoundly modified the landscape of international legal scholarship. This comparison, which obviously does not mean the passive appropriation of certain fashionable stands, should contribute to generating greater self-awareness within Italian scholarship regarding its own methods and approaches. It should also represent an opportunity to explore the possibilities of adapting the existing methods of legal analysis to the new realities of international relations. The risk otherwise is that Italian international legal scholarship will progressively confine itself to the legal analysis of technical issues, losing sight of its role in contemplating the bigger picture and in conceptualizing new phenomena.

6. Concluding Remarks

National schools of international law have rarely been the object of such intense interest as in the last two decades. An impressive number of studies have been published, aiming to take stock of the development of international legal scholarship in different national contexts or to compare the approaches to international law in different national scholarships.[48] These studies have contributed to shedding light on an aspect that has long been neglected, if not entirely denied:[49] the role of the national context in shaping a particular conception of international law.

[48] A non-exhaustive list includes the following: As regards German scholarship, see the symposium on '"*Typisch Deutsch…*": Is There a German Approach to International Law?' (2007) 50 German Yearbook of International Law 15-455 and the forum on 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' (2007) 67 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 583-824; on French scholarship, see Jouannet (n 20) 1; on American scholarship see Bederman (n 45) 20; and Mark Weston Janis, *America and the Law of Nations 1776-1939* (Oxford University Press 2010).

[49] For the observation that, until recently, '[l]a notion de conception national du droit international était considérée avec méfiance', see Cot (n 41) 592.

It is somewhat ironical that this celebration of national scholarship has come at a time when, despite the more recent signs of rising nationalism, the prevailing trend has been towards a progressive erosion of the importance of the national context as an element of cultural identity. Indeed, one may legitimately ask whether it still makes sense in an era of European integration and globalization to refer to an Italian (or a French, German, or American) school of international law as something endowed with certain identifying features that distinguish it from other communities of international lawyers.[50] One may even be tempted to believe that the recent flourishing of writings on national scholarships is in itself a sign of their vanishing role: having become a relic of the past, they can now be the object of historical analysis.

Yet, despite the greater fluidity of national identities and the declining importance of the national perspective in the study of international law, it is too early to say that the epoch of national scholarships has come to an end. National legal traditions, including in the field of international law, still matter, even if their weight varies from one national context to another as a consequence of a plurality of factors.[51]

As regards Italian scholarship of international law, the persistence of common features appears to be linked to a number of factors. A long, deeply rooted and culturally rich tradition of studies in international law is one of the principal explanations. This intellectual inheritance continues to exert a significant influence, thereby contributing to shaping a common perspective. The use of the Italian language is another element. While Italian scholarship, almost inadvertently and without any serious discussion about its implications, now prevailingly uses English as its working language, a relevant part of the scientific debate continues to take place in Italian, a fact that inevitably tends to restrict the community of reference. The dimension of this community, with more than 250 scholars employed in Italian universities, and the presence of lively scientific institutions, such as the Italian Society of International Law and European Union Law, contribute to the permanence of an effective internal debate. All these elements, taken together, appear to favor a phenomenon of reproduction and perpetuation of certain common patterns of thought, thereby preserving the existence of a national perspective.

Luigi Condorelli once described the Italian school of international law as a fortress whose conceptual wall was erected by Dionisio Anzilotti at the beginning of the XX century.[52] While perhaps under the siege of globalization, it seems safe to say that, for better or for worse, the fortress has not yet capitulated.

[50] See, for instance, Andrea Gattini, 'Post 1945 German International Law and State Responsibility' (2007) 50 German Yearbook of International Law 407, 412 ('In the present state of globalization of the (anyway narrow) epistemic community of international lawyers, it is simply impossible to detect any national specificity anymore'). But, *contra*, see Anthea Roberts, *Is International Law International?* (Oxford University Press 2017).

[51] For the view that 'neither the Europe under construction (the European Union), nor common ways of thinking, nor shared values can preclude, for the time being, the continuation of different cultural and linguistic contexts at the national level in which particular visions of international law are rooted', see Jouannet (n 41) 294.

[52] L Condorelli, 'Scholie sur l'idiome scellien des manuels francophones de droit international public' (1990) 1 European Journal of International Law 233 ('la citadelle fortifiée de l'académie italienne [...] protégée par la formidable muraille conceptuelle que Dionisio Anzilotti avait érigée').

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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