



BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND
COMPARATIVE LAW 2 (2022) 473–476

The Italian Review
of International and
Comparative Law

brill.com/iric

Contents

VOLUME 2, NO. 1

ESSAYS

Non-Recognition of Territorial Acquisitions by the Use of Armed Force: The Status of Jerusalem before Italian Courts 1

Massimo Iovane

Sea-Level Rise and State of Necessity: Maintaining Current Baselines and Outer Limits of National Maritime Zones 21

Roberto Virzo

The ECtHR's Decision to Dismiss the First Request Submitted under Article 29 of the Convention on Human Rights and Biomedicine: Putting Its Sleeping Advisory Competence Back in the Attic 48

Gabriele Asta

Italy's Contribution to a More Robust International Architecture for the CBRN Legal Landscape: A Critical Appraisal 68

Federico Casolari

The Italian Constitutional Court and the Use of Comparative Law: An Empirical Analysis 93

Paolo Passaglia

CASE NOTES

Italy and the Enforcement of Foreign Judgments on Third States' Tort Liability for Sponsoring Terrorism: The Conundrum of Jurisdictional Immunity of Foreign States in the Presence of Serious Violations of Human Rights 123

Donato Greco

Violation of Public Policy as a Ground for Non-recognition of Foreign Judgments – The Case of Judgments Preceded by a Mareva-type Freezing Order 140

Pietro Franzina

Stateless Status and Expulsion from Italian Territory: Some Remarks on the Recent Case Law of the Corte di Cassazione 154

Simone Marinai

War and Peace in the Context of the Multilevel Legal Order for the Protection of Fundamental Rights of the Persons Triggered for the Execution of the European Arrest Warrant: Some Remarks on the Decisions No. 216 and 217 of 2021 of the Italian Constitutional Court 163

Filippo Venturi

RECENT DEVELOPMENTS

The Last Presidential (Re)election in Italy: Internal and Exogenous Factors in the Framework of an Unsatisfactory Discipline of Presidential Election 181

Elettra Stradella

International Child Abduction and the 1980 Hague Convention in Practice: The *Biran Case* 191

Ilaria Queirolo

Legal Effects of the Ratification by Italy of the Amendments to the ICC Statute on Aggression 206

Luigi Prospero

REVIEW ESSAYS

The Development of the Italian Doctrine in the Words of Antonio Cassese: Towards a More Pragmatic Approach? 219

Francesca Capone

What's in a Name? International Organizations in Search of an Identity 227

Martina Buscemi

The Fragmentation of Human Rights. Case Studies from a Post-Arab Spring Context 236

Pasquale Annicchino

VOLUME 2, NO. 2

ESSAYS ON JUDICIAL PRECEDENT

- Foreword 243
Fulvio M. Palombino
- The (In)evitability of Precedent 246
Andrea Pin
- Introduction: Judicial Precedent in International and European Law 263
Gian Maria Farnelli, Federico Ferri, Mauro Gatti and Susanna Villani
- Establishing Judicial Precedents Through Advisory Opinions of the European Court of Human Rights 266
Khrystyna Gavrysh
- The Authority of ICJ Advisory Opinions as Precedents: The *Mauritius/Maldives* Case 296
Niccolò Lanzoni
- Tackling *Lacunae* in International Courts and Tribunals' Procedure: The Role of External Precedent 323
Caterina Milo
- Common Features of the Right to Property and International Investments: Evidence from the use of ECtHR Case law in Investment Tribunals' Decisions 347
Roberto Ruoppo
- A Role for Precedent in the Determination of the Standard of Review Applicable by Investment Arbitral Tribunals? A Case Study of ECT-based Energy Disputes Against Spain 370
Niccolò Zugliani
- The Use of Judicial Precedent as a Form of Activism by the Court of Justice: Strengthening the Union's Powers to Protect the Rule of Law 390
Martina Di Gaetano

CASE NOTES

- Medically Assisted Procreation and Same-Sex Couples: The Italian *Corte di Cassazione* Stands its Ground: Note to: *Corte di Cassazione (Sezioni Unite Civili)*, 4 April 2022, No. 10844 415
Francesca Maoli

Passive Extradition: *The Corte di Cassazione* Rules on the Need to Verify whether, Especially in Time of War, Detention Conditions and Punishments in the Requesting State May Violate Fundamental Human Rights, also Taking into Consideration the Health Status of the Individual: Note to Corte di Cassazione (Sezione VI penale), Criminal proceedings Against A.S., 1 March 2022, No. 10656 428
Pietro Pustorino and Marta Sabino

RECENT DEVELOPMENTS

The Armed Attack Against Ukraine and the Italian Reaction From a *Ius ad Bellum* Perspective 443
Andrea Spagnolo

REVIEW ESSAYS

Poachers, Smugglers, Polluters and Other Environmental Criminals: Remarks on a Recent Publication on the Regulation of Environmental Criminality Under International and EU Law 457
Mariangela La Manna

International Criminal Law: Bone of Contention or Interdisciplinary Cooperation Opportunity? A Review of Judge Aitala's Textbook 466
Mariangela La Manna



BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND
COMPARATIVE LAW 2 (2022) 219–226

The Italian Review
of International and
Comparative Law

brill.com/iric

The Development of the Italian Doctrine in the Words of Antonio Cassese

Towards a More Pragmatic Approach?

Francesca Capone

Dirpolis Institute, Scuola Superiore Sant'Anna, Pisa, Italy

Francesca.capone@santannapisa.it

Abstract

The present review essay discusses Antonio Cassese's book *Il diritto internazionale in Italia*, which was written in the late 1980s and saw the light only in 2021. Each part of this short and very dense volume contains and triggers significant reflections on various topics that are still extremely relevant to this day, and perhaps now more than ever. The starting point of Professor Cassese's inquiry is a straightforward question: how is the work of the Italian international lawyers perceived abroad? More in detail, he wonders if and to what extent it is true that the Italian doctrine, which is characterized by unparalleled scientific rigor and in-depth theoretical disquisitions, pays scant or no attention to practical problems and political, economic, and social implications at large. Professor Cassese's analysis revolves around this initial question but at the same time departs from it in order to offer a wider and extremely accurate overview of its ramifications. In particular, Antonio Cassese helps the reader to better understand the role of international lawyers and the tools at their disposal to contribute to enhancing the society they live and operate in.

Keywords

legal positivism – legal formalism – Italian doctrine – *Rivista di diritto internazionale* – *professionista del cavillo*

Antonio Cassese, *Il diritto internazionale in Italia*, Il Mulino Editore, Bologna, Italy, 2021, 176 pages, ISBN: 9788815288356

1 Too Abstract! Too Formal! How International Lawyers from Italy Are Perceived Abroad

This little gem of a volume was an unpublished manuscript, originally titled *L'evoluzione della scienza giuridica internazionalistica italiana*. The book, authored by Professor Antonio Cassese, was kept in the historical archives of the European Union hosted by the European University Institute, in Florence. Professor Micaela Frulli, who has written the afterword, was the one who made the very wise decision to publish this long essay and share it with the rest of the world. The references included in the text made it possible to date its drafting towards the end of the 1980s. The book in fact describes the international community on the eve of the end of the Cold War, right before the fall of the Berlin Wall and the dissolution of the Soviet Union.

The volume, which is scarcely 130 pages long, consists of a short premise, in which Professor Cassese sets the goal of this work, three chapters and some concluding observations. There is also a foreword by Professor Paolo Benvenuti, which not only provides a clear overview of the volume and its contents, but also offers an account of the many achievements and milestones that have marked Antonio Cassese's career. Introducing Professor Cassese and his work is essential to better grasp the essence of the volume itself and why he has always been very far from the stereotypes that external commentators often associate with Italian legal scholars. As duly noted in the preface, this volume is part of a broader endeavor by Professor Cassese. In fact, after being appointed Full Professor of International Law, first at the University of Pisa in 1972 and shortly after at the University of Florence, Antonio Cassese felt that he was finally free to "choose not only the subjects" of his research, but also "the way to deal with them". Thus, he decided to grapple with legal problems that have a strong human and social dimension, a trajectory that has constantly characterized his work and influenced his overall approach to international law.

Each part of the book contains and triggers significant reflections on various topics that are still extremely relevant to this day, and perhaps now more than ever. The starting point of Professor Cassese's inquiry is a straightforward question: how is the work of the Italian international lawyers perceived abroad? More in detail, he wonders if and to what extent it is true that the Italian doctrine, which is characterized by unparalleled scientific rigor and in-depth theoretical disquisitions, pays scant or no attention to practical problems and political, economic, and social implications at large.

Professor Cassese's analysis revolves around this initial question but at the same time departs from it in order to offer a wider and extremely accurate

overview of its ramifications, as we will try to better explain in the following paragraphs.

2 The Many Facets of Italian Positivism

One of the first aspects that Professor Cassese investigates in his volume is the dialectic tension within the Italian legal scholarship between legal realism, as an openly positivistic view of the law, and legal formalism. The former legal doctrine became extremely popular in Italy at the end of the 19th and in the first part of the 20th century and found in Dionisio Anzilotti its best and most appreciated advocate (p. 30). The latter developed in Italy during the rise of the fascist movement and saw Tomaso Perassi as its undisputed leader and most prominent proponent. Cassese reflects on the convergence of interest towards certain topics, on the different methodologies adopted, and on the conclusions reached. For example, while the developments of Anzilotti's thoughts ultimately drew him towards the acceptance of Hans Kelsen's theory of the *Grundnorm* and towards a clear-cut separation between international law and municipal laws, his approach to specific issues was never formalistic. Perassi, on the other hand, since the beginning of his career embraced his autonomous re-elaboration of some of Kelsen's ideas, leaning towards a distinctively dogmatic orientation. In particular, Perassi's legal dogmatism focused on the hierarchical construction of the juridical order, on top of which he placed first the *pacta sunt servanda* rule, and later a group of fundamental norms, whose legality remains a postulate.

The inquiry by Professor Cassese is much more than a historical overview of how the different legal theories interacted and diverged, it is rather a conceptual analysis of how each of them engaged with other disciplines and with the broader legal and societal context. In particular, Antonio Cassese reflects on the very marginal role played by the Italian international lawyers, spearheaded by Perassi, during the fascist era (p. 41) and comments on the danger that derives from the ever-expanding gap between a *tecnico del diritto* (someone who conceives the use of law as nothing more than a technical exercise) and a citizen. In Cassese's view, it is exactly this gap that allowed Perassi, notably inspired by Mazzini's ideology, to work for the fascist regime and its Ministry of Foreign Affairs as a legal consultant, or better as a *professionista del cavillo*, as he was labelled by the Minister himself (p. 49).

3 The Evolution of the Italian International Legal Scholarship in the Aftermath of the Second World War

Chapter 2 of Cassese's volume focuses on the way the Italian international legal doctrine reacted to the dreadful events of the Second World War, and to the many challenges that followed the end of the hostilities. In the course of the chapter, Professor Cassese offers an interesting overview of the finest and brightest minds of that time. Although it is certainly fascinating to read about *i grandi capiscuola* (the leaders of the different schools), namely Tomaso Perassi, Gaetano Morelli, Roberto Ago and Rolando Quadri (pp. 63–78), the most commendable effort that the author makes is singling out the main aspects that characterize the Italian approach to the study of our discipline. First, Antonio Cassese reports a major, and significant, shift regarding the goals that the Italian doctrine aims to achieve. Of course, the theoretical questions still play a prominent role, but the most relevant ones have a practical turn and appear to be: what is the foundation of international law's binding character, and why does the international community need its own legal order?

Second, the openness of the Italian international legal scholarship towards a more pragmatic approach is still quite limited. Once the *Rivista di diritto internazionale* (to these days the most prominent international legal journal published in Italy) resumed its activities in 1953, after a long hiatus induced by the war, the journal set some new goals. In particular, the editorial board, at the time led by Gaetano Morelli, affirmed that the *Rivista* was going to expand the section on notes and comments with the purpose of accommodating more contributions on recent events and the activities carried out by international organizations. As Cassese notes, this pledge, and the proclaimed intention to place more emphasis on the connection between theory and practice, was not met and in the 1950s and 1960s the *Rivista* remained mainly concerned with abstract inquiries (p. 57).

Third, Professor Cassese highlights that, although many legal questions connected with the conduct of the war and its aftermath have been discussed and dissected by the Italian scholarship (in particular through the contributions of Pietro Ziccardi, Giuseppe Sperduti, Francesco Capotorti and Alessandro Migliazza), other burning issues have not caught the attention of the Italian lawyers. According to Cassese, amongst the many relevant and groundbreaking topics that the Italian doctrine ignores are the use of nuclear weapons and the attacks against Hiroshima and Nagasaki, the Nuremberg and Tokyo trials, and the polarization of the world during the Cold War. These, in the words of Professor Cassese, are perceived as “not entirely legal problems” (p. 59), but rather as topics that deserve to be analyzed from a political perspective.

The fourth aspect that Cassese discusses is the lack of historical memory that affects the Italian doctrine. As he stresses, there is almost an obsession towards the work of individual scholars, but it is not possible to identify any comprehensive attempt to assess the developments and the contributions of the Italian academic community in the field of international law (p. 60). This absence represents a clear limitation to the enhancement of a choral and functional approach to the discipline, one that is less concerned with individual achievements and more focused on the role that international law can (and should) play in the dynamics across the various actors that interact on the supranational plane.

The fifth aspect that this chapter discusses is the traditional representation of public and private international law as two sides of the same coin. Professor Cassese, with his unparalleled ability to be always one step ahead, criticizes this approach, stressing how the two disciplines adopt *different* methodologies, investigate *different* ambits, and ultimately appeal to scholars with *different* backgrounds (p. 62).

The sixth and final topic that he tackles in this part of the volume is the leadership role of the exceedingly big names mentioned above. Professor Cassese does not question their undisputed ability to attract young scholars and teach them, but he rather reflects on what the creation of an academic system that operates in this sectarian way means for those who do not belong to any of the leading schools, a problem still widely felt at the present time.

4 New Trends and Old Paths

In Chapter 4, Professor Cassese describes the many changes that took place from the 1960s onwards. In his analysis, he once again refers to what happened around the world and how these major events have resonated at the domestic level, and in particular across the Italian international legal scholarship. Antonio Cassese identifies four groundbreaking events, namely the end of colonialism, the consolidation of three distinct groups of States (Western countries, Eastern countries and developing countries), the slow ending of the Cold War, and the beginning of the United Nations' decline as an international organization truly capable of dealing with the ever-increasing threats to peace and security (p. 95). These four major events are responsible for, or in any case deeply connected to, several trends that can be witnessed in various regions of the world, like the sporadic resort to the use of force by States and the proliferation of different kinds of non-State actors, insurgents as well as terrorist organizations. These new challenges at the global level trigger some significant

changes also at the domestic level. Within our field of analysis, we can group said changes by focusing on a number of key aspects.

Amongst the most relevant editorial achievements, Professor Cassese highlights the launch of two new academic journals, namely the *Rivista di diritto internazionale privato e processuale* in 1965, and the Italian Yearbook of International Law in 1975, as well as the addition to the *Rivista di diritto internazionale* of a new section named *Panorama* and focusing on timely issues and problems. The *Rivista di diritto internazionale privato e processuale* finally provides a much needed and authoritative forum for those international lawyers who are concerned with the private international law domain. Thus allowing, at least from an editorial perspective, the separation between the public and the private international legal spheres that Professor Cassese has always encouraged despite the Italian long lasting tradition of keeping them united (p. 113). The foundation of the Italian Yearbook of International Law by Benedetto Conforti, Francesco Capotorti, and Luigi Ferrari Bravo also represents an important step, this time towards the outside world. The rationale of the Yearbook is in fact to build a bridge between Italian scholars and their counterparts abroad, allowing them to finally engage in a more consistent way through the publication of a yearly journal that presents, in English, the best of the Italian academic literature and the milestones of the Italian case law.

Each of these achievements bears testament to the lively status of the Italian academic community and to the emergence of new doctrinal trends. In particular, Professor Cassese notes how Italian scholars are increasingly concerned with two types of research. The first one focuses on “traditional” topics, such as the international responsibility of States, the relationship between international law and domestic law, and the law of armed conflict, discussed in light of current events rather than analyzed from a purely abstract perspective. The second one deals with new topics, which reflect the changes taking place at the political and societal levels, like environmental harm, terrorism, and wars of national liberation. A further change that Antonio Cassese duly reports has to do with the collective dimension of the research undertaken by the Italian scholars (pp. 104–106). More in detail, he stresses that, from the 1970s, the Italian academic community has started to recognize, and to some extent even to encourage, collective efforts concerning, for example, the study of the Italian diplomatic practice, the bilateral agreements between Italy and other States, and the Italian case law relevant to international law.

There are two additional aspects that Professor Cassese stresses and discusses in order to enlighten the reader on the many changes that have taken place from the 1960s onwards. The first aspect is the affirmation of a modern version of Italian positivism. This reading of the positivist doctrine, which

according to Cassese was developed by authors such as Gaetano Arangio-Ruiz and his own mentor, Giuseppe Sperduti (pp. 117–118), marks an openness towards the external world as well as other disciplines. Said openness is far from representing only a theoretical exercise, as it influences, in a very tangible way, the work of the newest generation of international scholars. More in detail, the younger international lawyers from Italy are finally drawn to topics that have a practical connotation, prefer the adoption of specific interpretative approaches (and above all the teleological one), and take into due account the practical implementation of international norms into the municipal framework. Professor Benedetto Conforti, for whom Antonio Cassese clearly has a profound admiration, represents the epitome of the “new” Italian legal scholar. In particular, Cassese highlights the importance of Conforti’s original focus on the interaction between the international legal framework and the domestic one. As he points out, this perspective permeates Conforti’s work from the beginning and results in writings, starting from his well-known manual, that target both students and practitioners.

The last aspect upon which Professor Cassese invites us to reflect is the growing presence of Italian scholars in the media. International lawyers from Italy can steer and inform the public opinion and they finally start doing so by contributing to the Italian newspapers with careful analyses and detailed accounts of what is happening inside and outside the national borders (pp. 128–130). This is obviously not an academic endeavor, nor even an effort that contributes to building someone’s reputation as a rigorous scholar, but it is something that, as citizens who are also experts on a rather complex subject, we must do to educate our society.

5 Concluding Remarks

In the observations that conclude the volume, Professor Antonio Cassese goes back to his research question and explains that the progress made in the last timeframe covered by his analysis are undeniably remarkable. In the last part of his inquiry, he seems less concerned with how the rest of the world sees the contribution of the Italian international legal scholarship and more with the role that said scholarship, and its proponents, can play on the public scene, in Italy and abroad. The evolution of the Italian doctrine has emerged on many levels. On the one hand, the method and its theoretical foundations remain unaltered and solid, and on the other hand, the abstract character of the legal problems tackled by the Italian authors has been swept away by the recognition of new needs and potentialities. While many took a long time to process

all these changes, Professor Antonio Cassese immediately embraced them; it is not without reason that he has often been described as a man ahead of his time.

As Paolo Benvenuti notes in his foreword, Antonio Cassese never hid – on the contrary, he proudly showed off – his love for a multitude of academic subjects other than international law. He was passionate about philosophy, history, and literature, and although he decided to pursue a Law Degree and devoted his life to the study of law, he remained well aware of the importance of never closing the door to other disciplines. At the same time, he consistently and methodically focused on legal problems that also have a practical dimension, or better that have a strong human connotation. For these reasons, Professor Cassese's very enjoyable overview of the evolution of the Italian doctrine is much more than a pleasant walk down memory lane. It is an opportunity to reflect on what the Italian international lawyers have achieved and how they can do more to uphold the values and principles upon which the idea of an international community, made of equal and peace-loving countries, has been built.

I am not among the extremely fortunate colleagues who had Professor Antonio Cassese as their mentor, but I have always admired his work and his approach to our discipline. From what I learnt about him over the years and what the reading of this volume ultimately confirmed, I am pretty sure that he would have expressed very strong feelings and opinions about the horrific events that we are witnessing as I write this review essay. I am also sure of the fact that he would have appreciated, and generously made time to participate in, the many conferences, seminars, and events that our community is organizing to inform and raise awareness on the legal implications of Russia's unjustifiable attacks against Ukraine's integrity and sovereignty. Professor Cassese, as his life and career teach us, would have taken a stand and used his role and his credibility to advocate for the achievement of peace, justice, and respect for the rights of those most affected by the conflict. After all, there is no doubt that Antonio Cassese could have never been depicted as a mere *professionista del cavillo*, he was so much more than that.