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REFLECTIONS ON THE IMPACT OF COMMUNISM ON  
ITALIAN INTERNATIONAL LAW SCHOLARSHIP: 1945-1989

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## **Abstract**

What has been the impact of Communism on the European scholarship of international law in the post-World War II period ? What are lingering differences today in the attitudes of scholars from West and East Europe twenty years after the end of the cold war? This paper, which is part of a series of country studies, is aimed at contributing to a reflection on these questions by focusing on Italy and Italian international law scholarship in the period 1945-1989. The research has covered the responses of Italian scholars to some of the major international crises triggered by Soviet Communism during the Cold War, the influence of Communist theories of international law on Italian doctrine, Communism as an object of study by Italian international law scholars, and the influence of Communism on the active political engagement of Italian scholars. Surprisingly, the conclusion is that such influence has been extremely limited, in spite of the profound impact of Communism on post World-War II Italian political and social life.

## **Keywords**

International Law, Communism, Theories of International Law

Sections 1, 2, 3, 12 and 14 have been written by F. Francioni;\* Sections 4, 5, 6, 7, 8, 9, 10, 11 and 13 by F. Lenzerini.\*\*

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## 1. Communism in Italy: A Brief History

It is not a secret that Communism has influenced large sectors of the Italian society and Italian political culture in the long period that spans from the end of World War II to 1989. For almost half a century, Italy had the largest communist party in the Western world (*Partito Comunista Italiano*, PCI), rooted in the territory of all Italian regions, organized in a capillary manner and responsive to a highly centralized bureaucratic structure dominated by the Secretary General of the party and the Central Committee. It had the largest Italian workers' union, the *Confederazione Generale Italiana del Lavoro* (CGIL), constituted by and representing the interests of a large majority of Communist workers, with a minority of Socialists on the side. Although formally autonomous from the Communist Party, the CGIL was nevertheless closely allied with the Party itself in all matters of economic and social policy and was thus perceived to be acting in a symbiotic relation with the Party.

The rise and the phenomenal development of the Italian Communist Party and the enormous expansion of its electoral basis and of its cultural and political influence in Post World War II Italy are the product of the twenty years of Fascist regime and of the war. The freezing of democratic life during Fascism had pushed many opponents of the regime into exile, confinement (*confino*) or underground. Some of them found refuge in the Soviet Union where they continued to organize the anti-fascist movement in Italy. Palmiro Togliatti was one. He emerged as the charismatic leader of the Italian Communist Party on his return from the Soviet Union in March 1944.

With the crisis of the Fascist regime following the catastrophic consequences of the war, the landing of the Allied forces in Sicily in June 1943 and the deposition of Mussolini by the King on 25 July 1943,<sup>1</sup> the Communist movement under the leadership of Togliatti had a decisive role in the tragic transition from the brutal alliance with Nazi Germany to the rebuilding of the Italian State in the critical period between 1944 and 1948. Togliatti inspired the “*svolta di Salerno*”<sup>2</sup> in spring 1944, which integrated the Communists into the political-military coalition engaged in the fight against Nazi-Fascism and led to the decisive participation of Communist partisans in the active resistance against Nazi-Fascism.

But there is a more subtle reason than simple military contribution to the partisan war, explaining the influence displayed by Communism in Post World War II Italy. The dissolution of the Italian State after the September 1943 armistice; the ignominious fleeing of the King from Rome to the South, already liberated by the Anglo-American forces; the consequent disbandment of the Italian army both abroad and in Italy, amounted to more than a crisis of the Fascist regime. It was the “ground zero” of the Italian state<sup>3</sup>, a tragic institutional collapse of the military, political and administrative structure of the country. It was in this institutional vacuum that the Communists played a decisive role in the transition from the Monarchy – irremediably discredited by its alliance with the Fascist regime and by the desertion of the King – to the Republic, following the 1946 national referendum, and then to the elaboration of the Constitution through the Constituent Assembly in 1947.

For a large portion of Italian society, Communism represented an ideal of radical renewal of a Nation that had been devastated by the war, corrupted by the rhetoric and moral emptiness of the Fascist regime and tainted by the adoption in 1938 of “racial laws”, which had led to the persecution of Italian Jews. It would be wrong to consider this aspiration to renewal as the equivalent of a revolutionary

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<sup>1</sup> For the best historical account of these events see F. W. DEAKIN, *The Brutal Friendship, Mussolini Hitler and the Fall of Italian Fascism*, London, 1962.

<sup>2</sup> The expression refers to the leadership of the Communist party's decision temporarily to set aside the class struggle and the fundamental question whether post-fascist Italy was to remain a Monarchy or transform into a Republic so as to create a common front with the Badoglio Government and the Committee of National liberation (CNL) and cooperate in the common cause to fight Nazi-Fascism and to resist the German occupation of the country.

<sup>3</sup> Some authors have used the expression “*la morte della Patria*” (the death of the Nation).

programme to establish a dictatorship of the proletariat on the model of Stalinist Russia or of events in Prague and East Europe in 1948. In spite of the unavoidable internal conflicts, under the leadership of Togliatti, the Italian Communist Party adopted a pragmatic programme of action in the period immediately following the end of the war. Setting aside orthodox Marxist doctrine and the seductive idea of a prolongation of the partisan war into a true revolution to build a socialist state, Togliatti developed a programme of broad inclusion of Catholics and Socialists in the agenda of national reconstruction. He became the theorist of “diversity in unity”, an expression intended to capture the potential of an Italian way to the building of a modern Socialist state, while accepting the fundamental principles of international Socialism. Togliatti pursued this programme by actively participating in the governments of national unity as Deputy-Prime Minister (1944-1945) and Minister of Justice (1945-1946) and in promoting the active contribution of the Communists to the constituent Assembly and the drafting of the 1947 Constitution. As Minister of Justice, he contributed to national reconciliation by sponsoring the adoption of an amnesty for fascist crimes.

But the onset of the Cold War and Stalin’s take over of Eastern European countries, pushed Italian politics in a different direction. The April 1948 elections marked the emergence of the Christian Democratic Party (*Democrazia Cristiana*) as the dominant player in Italian politics. The marginalisation of Communists in Italy was sealed by the conclusion of the NATO agreement in 1949 and by the launching of the European integration project in 1950. From this point on, the Communists in Italy were in the opposition until the time of the terrorist attack against the democratic institution of the Republic in late 1970s, when the Communist Party, under the leadership of Enrico Berlinguer, contributed to a government of “national solidarity”. Their dissolution as a Communist Party in the 1990s and their later confluence into a modern Democratic Party is contemporary history. At present, Communists still exist in Italy, but as small splinter political parties of varying Marxist inspiration but with no comparable representation and socio-political impact enjoyed by the PCI in Italy in the years from 1945 to 1989.

## **2. The Influence of Communism on the Italian International Law Scholarship**

If we change our perspective from the socio-political landscape of post World War II Italy to the evolution of the Italian legal doctrine in the same period, we realize that the impact of Communism on the method, object and themes of research in the field of international law has been extremely limited. In the following sections, we will try to provide a synthetic overview of this impact by focusing our attention on the several aspects of the relationship between Communism and Italian international law scholarship. These aspects are:

1. the response, or lack of response, of Italian scholars to the major political-legal controversies triggered by the international adventures of Soviet style communism during the Cold War;
2. the influence of Socialist ideas, including Communist theories of international law, on Italian doctrine;
3. Communism as an object of study by Italian international law scholars;
4. the influence of Communism on the engagement of Italian scholars in active political life;
5. Communism in “retrospect” after the Fall of the Berlin Wall.



### **3. Italian Scholars, the Soviet Union and International Politics: 1956-1980**

One of the most reliable ways to gauge the validity of a theory of law is to see how that theory is actually applied in a particular social context. One should expect, therefore, that the complex and often tragic events that marked the long period of the Cold War would have attracted wide-ranging commentary by Italian international law scholars. But, as we have already pointed out, this is not the case. Even a cursory glance at the leading Italian journals and monographs shows a surprising reticence to discuss the role of international law in the aftermath of the major political crises triggered by the Soviet Union, from the military interventions in Hungary (1956), to the Cuban crisis, and the military interventions in Czechoslovakia (1968) and Afghanistan (1979). This contrasts starkly with both the attitude of other European international law scholars, who have dedicated much study to these events<sup>4</sup> and with the attitude that contemporary Italian scholars have with regard to current events in international politics.

What are the reasons for such reticence? Why has the public debate among international lawyers over the controversial political action of the Soviet Union and other Socialist States been so minimal? The most likely explanation for such an approach rests in the combination of a series of factors of intellectual, political, social and cultural nature.

One reason is to be identified in the deeply held conviction of Italian scholars that law is a scientific enterprise and that the academic writing and debate about international law must not be “contaminated” by politically sensitive issues, lest one forsakes the necessary objectivity and impartiality in the analysis of legal phenomena. This attitude had been reinforced throughout the first half of the XIX Century by the legacy of legal positivism, as the preferred legal method of international law scholars in Italy. This method entails a radical separation of legal research from morality, politics and social science and a detached, intense scrutiny of the texts and sources of the law as the product of recognized authority, traditionally embodied in the state. It is a method that reached the apex of formal scientific precision and systematic rigour with the works of Dioniso Anzilotti<sup>5</sup> and the elaboration of the “dualist” conception of the relationship between international law and domestic law. To a large extent, it continued to inform Italian scholarship in the immediate post-World War II period. The introduction in 1947 in the text of the Italian Constitution of a specific provision (Article 10 (1)) incorporating general international law into the Italian legal order provided fertile ground for an intellectual renewal of Italian scholarship of international law and for the reconsideration of the old “dualist” approach to the relationship between international law and domestic law. This renewal did in fact occur with a new generation of scholars reconceptualising international law in terms of customary norms (Morelli), of “spontaneous law” (Ago, Barile), of “general principles” as direct expression of the prevailing forces of the international community (Quadri), and, more recently, of a system capable of being managed and enforced by national judges, rather than by the states in their traditional “diplomatic relations” (Conforti)<sup>6</sup>. This rich renewal of Italian legal scholarship, however, remains well confined within the cultural horizon of that brand of legal positivism, where the state is the exclusive maker and subject of international law and where any prospect of progress and reform to

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<sup>4</sup> See D. MANAI, *Discours juridique Soviétique e intervention en Hongrie et Tchécoslovaquie*, Genève, 1980; T. KOMARNICKI, “L’intervention en droit international moderne”, 60 *Revue Générale de Droit International Public*, 1956, p. 521 ff.; C. ZORGBIBE, “La doctrine soviétique de la ‘souveraineté limitée’”, 74 *Revue Générale de Droit International Public*, 1970, p. 872 ff.

<sup>5</sup> For an updated revisitation of the influence of D. Anzilotti on international law scholarship, see “The European Tradition in International Law: Dionisio Anzilotti” (contributions by R. AGO, J. M. RUDA, G. GAJA, P.-M. DUPUY, A. CASSESE, A. TANCA), in 3 *European Journal of International Law*, 1992, p. 92 ff.

<sup>6</sup> For an excellent overview of the Italian International Law doctrine in the post-World War II period, see E. CANNIZZARO, “La doctrine italienne et le développement du droit international dans l’après-guerre: entre continuité et discontinuité”, 50 *Annuaire français de droit international*, 2004, p. 1 ff.

accommodate the different attitude of Communist states can only rely on the action and re-action of the states involved. This is also well-documented by the works of two of the most acute observers of the impact of social change in international society, Cassese and Arangio-Ruiz. The first has inscribed his innovative contributions on self-determination, human rights and the use of force within the classical framework of normative positivism.<sup>7</sup> The following lapidary phrase encapsulates the latter's sculpted positive law conception:

“[...] si può essere buoni giuristi quali che siano le premesse idealistiche o materialistiche dalle quali si parte, purché si ammetta l'essenziale: cioè la normatività del diritto, in mancanza della quale non avremmo diritto né idealistico né materialistico”<sup>8</sup>.

Besides the strong and enduring influence of legal positivism, other factors, of a more political and cultural nature, may explain the lack of reactivity of Italian scholars *vis-à-vis* major political events involving the Soviet Union and having a clear relevance for international law. At the political level, the aura of Communism as the main force in the fight against Nazi-Fascism had contributed to confer on it a lasting effect of popular legitimation, which rendered it difficult for the intellectual establishment to take a position of open criticism of international Communism as a form of government, even in the face of clear violations of human rights, the rights of peoples and of international law, as the armed interventions in Hungary and Czechoslovakia had demonstrated. In fact, in the aftermath of World War II many Italians were influenced by a “romantic” vision of Communism, induced in particular by the circumstance that communists were identified with the patriots (*partigiani*) who – during the resistance against Fascism and the German occupation at the end of the Second World War – offered their youth and often their life for the emancipation of the Nation from the bane of Fascism and for the liberation of their country from foreign occupation. This vision was reinforced by the never-abandoned idea that the spontaneous movement of the people that had generated the partisan war was indeed an “unfinished revolution” - a revolution that had to be continued through political action toward a radical renewal of the Italian society and of the State, still considered to be contaminated by the Fascist legacy in its deepest layers of the public administration and bureaucracy.

For this reason – in a context where, with respect to many aspects of the foreign and domestic policy of the Soviet Union and other communist countries, it would have been right and proper to denounce them as illegal, at least under the perspective of “Western” international law – the majority of Italian scholars of international law were more inclined to dodge the issue, as a controversial political question, even if they had no sympathy for Communism.

At the same time, communist sympathizers could hardly endorse Soviet conduct because the actions of the Soviet Union in foreign policy and in the field of human rights could not possibly be reconciled with the Western vision of international law and were indefensible at the political level. This is most probably the reason why – as we will see in the following Sections – some Communist-oriented international law scholars preferred to adopt the strategy of remaining silent, concentrating their attention on situations in which the natural adversary – the United States – could be blamed for blatant violations of international law. This contributed to the fact that, quite paradoxically, it is easier to find traces of anti-Americanism in some of the best post-World War II textbooks of international law than it is criticism of Communism<sup>9</sup>.

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<sup>7</sup> A. CASSESE, *Il diritto internazionale nel mondo contemporaneo* (International Law in Contemporary World), Bologna, 1984; IBID., *Self-determination. A legal Reappraisal*, Cambridge, 1995; IBID. (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986.

<sup>8</sup> According to G. ARANGIO-RUIZ, “one can be a good lawyer independently of the idealistic or materialistic premises from which one starts: as long as the essential point of the law is recognized, that is its normativity, absent which, there is no law, either idealistic or materialistic”; see *Gli enti soggetti dell'ordinamento internazionale* (Subjects of the International Order), Milano, 1951.

<sup>9</sup> For instance, R. QUADRI, *Diritto internazionale pubblico* (Public International Law), Napoli, 1968, *passim*.

Finally, it is at the cultural level that one may find the more subtle causes of the reluctance of the great majority of Italian scholars to openly debate the international law implications of the Communism in world politics. One of the corrupting effects of the Fascist regime had been to push the cultural and scientific establishment, with the exception of the few who went into exile or underground<sup>10</sup>, into the precarious refuge of the arts, science and studies where they could cultivate the illusion of saving culture and their personal conscience. At least for the generation of intellectuals who had experienced the war, this legacy weighed heavily on their attitude toward the harsh ideological and political conflicts of the Cold War. Furthermore, a detached, low profile attitude in the name of scientific autonomy of law, as has already been emphasized, was its consequence.

The following survey documents the variety of the above described attitudes of Italian international law scholarship toward Communism.

#### **4. Hungary 1956**

In November 1956, when the Soviet army invaded Hungary following the popular uprising in Budapest and the denunciation of the *Warsaw Pact* by President Nagy (who also declared the neutrality of Hungary), the most important specialized Italian journal of international law, the *Rivista di Diritto Internazionale* (the “*Rivista*”) devoted in-depth studies to a number of matters – including, *inter alia*, the position of States and individuals in international organizations, the relationship between international and domestic law, the coordination between international bodies, the problems of “relativity” and “objectivity” in international law, the role of treaties in the constitution of international bodies, the effects of war on treaties; it also featured an article by Hans Kelsen on the validity of law. One would look in vain for a single line with respect to the situation in Hungary. Apart from the *Rivista*, occasional reference to the Hungarian uprising and the Soviet repression can be found in writings that belong more to the field of international relations than of international law. This was the case with an article in the *Comunità Internazionale* in 1958 – concerning a political assessment of the different approach to foreign policy by Khrushchev as compared to Stalin – in which an *obiter* may be read where the author defines the facts of Hungary as [*sic*] “the gravest international crime ever committed since Hitler, that is the Soviet intervention in Hungary for the brutal, bloody repression of Hungarian independentism”.<sup>11</sup> However, this assertion is not based on any assessment of the (il)legality of the Soviet intervention in Hungary. It simply represents the political opinion expressed of an author who did not seem concerned to hide his open hostility for the Soviet regime.

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<sup>10</sup> One must recall that only a handful of Italian University professors refused to pronounce the oath of allegiance to the Fascist regime. And only a few continued to be active participants in the University without accepting membership in the Fascist Party. One of them, Piero Calamandrei, who became one of the fathers of the 1947 Constitution, is emblematic of the situation described in the text: while a convinced anti-Fascist he took a very low profile during the most tragic period of the war and the most important book he wrote in that period is *L'inventario della casa di campagna* (The Inventory of the Country House), Montepulciano, 1941, a beautiful, nostalgic account of country life in Tuscany, totally detached from the brutality of the war, of the harsh social conflicts and from the impending tragedy of total collapse of the Nation. Of course, many other intellectuals, but still a minority, made the uncompromising choice to put their art and science at the service of a direct engagement in the fight for their life, liberty and dignity. For them, Concetto Marchesi speak eloquently with his inaugural lecture at the University of Padua under Nazi occupation in Novembre 1943, where he incited students to join the armed struggle against Nazi-Fascists. The speech is reproduced in part in R. BATTAGLIA, *Storia della resistenza italiana* (History of Italian Resistance), Torino, 1964, p. 155 f.

<sup>11</sup> See L. SALVATORELLI, “Dalla ‘guerra fredda’ di Stalin alla ‘coesistenza competitiva’ di Khrushchev” (From Stalin’s ‘Cold War’ to Khrushchev’s ‘Competitive Co-existence’), XIII *Comunità Internazionale*, 1958, 3, p. 7.

## 5. Cuban Missile Crisis, 1962

A similar attitude to that shown for the 1956 Soviet intervention in Hungary can be found with respect to the well-known Cuban missile crisis of October/November 1962, when the world came close to nuclear self-destruction. The compelling legal aspects of the crisis, particularly the issue of the threat of force inherent to the installation of Soviet missiles in Cuba and of the legality of the naval blockade (“quarantine”) by the United States, were not directly addressed in *ad hoc* studies dedicated to the specific political-military context. Instead, we can find some studies and documents in volume XLVI (1963) of the *Rivista*, which address the theoretical aspects of the laws of war and the use of nuclear weapons in war.<sup>12</sup> In the same issue of the *Rivista* we can also find the reproduction of parts III and IV of the text of Pope John XXIII Encyclical *Pacem in Terris*,<sup>13</sup> which included, *inter alia*, a call for disarmament and for a ban on nuclear weapons.

By contrast, there was no dearth of scholarly response from historical-political analysts on the Cuban crisis. For example, an article published on the *Comunità Internazionale* in 1964,<sup>14</sup> connects the relevant facts of the crisis to the broader scenario of international politics and offers the author an opportunity to emphasize the virtue of the American government in opting for a “moderate” reaction to the allegedly aggressive behaviours of the Soviet Union, “[...] without peaks of exasperate arguments” and avoiding “simple anathemas to which the Soviet move and the *evident bad faith* used by the Moscow government in conducting the general negotiations on West Berlin and the German problem would have easily offered”.<sup>15</sup> The author flatly attributes the merit of the management of the Cuban crisis exclusively to the Kennedy administration “in the framework of a general vision of peace”,<sup>16</sup> and highlights that the virtue of the American behaviour was magnified by the fact that, on the Russian side, a “one-way policy” had been developed, *i.e.*, “directed at achieving unilateral advantages and scarcely inclined to accept negotiations on equal basis of giving and receiving”.<sup>17</sup> This is an example of sharp, one-sided criticism of the adventurous policy pursued by Khrushchev – based on “adventures [...] badly conceived and even worse executed”<sup>18</sup> – and, in the rhetorical language of the cold war, of a lesson in well-balanced diplomacy,<sup>19</sup> leading, in the words of Kennedy, to a political victory “...not the world’s victory of a nation or a system, but the world’s victory of mankind”.<sup>20</sup>

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<sup>12</sup> See, in particular, G. GAJA, “Il Trattato di Mosca e l’uso in guerra delle armi nucleari” (The Moscow Treaty and the Use of Nuclear Weapons in Armed Conflicts), p. 397 ff.; A. P. SERENI, “Il concetto di guerra nel diritto internazionale contemporaneo” (The Concept of War in Contemporary International Law), p. 537 ff.

<sup>13</sup> See XLVI *Rivista di Diritto Internazionale*, 1963, p. 317 ff.

<sup>14</sup> See F. D’AMOJA, “Crisi di Cuba, Trattato nucleare e diplomazia coesistenziale” (Cuba Crisis, Nuclear Treaty and Co-existential Diplomacy), XIX *Comunità Internazionale*, 1964, p. 17 ff.

<sup>15</sup> *Ibid.*, p. 18 (translation from Italian; emphasis added).

<sup>16</sup> *Ibid.*, p. 19 f.

<sup>17</sup> *Ibid.*, p. 21.

<sup>18</sup> *Ibid.*, p. 27.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

## 6. USSR and the Fate of the “Communist Project” in the Mid-1960s

Although the research for this article has not led to the finding of any specific commentary of Italian international lawyers on the dynamic evolution of Soviet Communism in the mid 1960s, a number of academic writings by political scientists take contrasting views on the international relevance of the crisis in the power structure of the communist party in the Soviet Union and its European satellites, and of the emerging tensions between competing communist States, especially Russia and China. On the one hand, these writings emphasize the importance of the internal crisis of the Soviet regime, which culminated in the ousting of Khrushchev the leadership of the Soviet Communist Party (PCUS), and his replacement by Brezhnev, to denounce the failure of the whole communist project.<sup>21</sup> The view advanced in these writings is that the crisis was first of all self-induced by the recognition, in 1956 (at the XX Congress of PCUS), of the crimes perpetrated by Stalin, which had “produced ‘ideological disorder’ and sparked movements of opinion and popular intolerance against the police oppression directed by Moscow<sup>22</sup>. This crisis led to the repression of the Polish workers’ riots in Potsdam, which allowed Wladislaw Gomulka to regain the position of First Secretary of the Communist Party of Poland, and to the tragic events of Hungary in 1956. Academic writings commenting on this crisis generally conclude that in the early 1960s it was still premature to announce the imminent demise of the communist project and warn that behind the emerging tensions between Russia and China there remained the never-abandoned project of “burying capitalism”. One may recall that in his Moscow speech of 15 February 1963 in the presence of Chinese Ambassador Pan Tsu-li, Khrushchev had solemnly proclaimed that “when we will finally bury the capitalism, the last shovel of dust on its grave will be thrown by us and the Chinese, together”<sup>23</sup>.

At the other end of the spectrum we can find commentaries of Italian political scientists and international relations scholars who resist attributing to the Soviet Union exclusive responsibility for the threats to the peace and international security. In an article published in 1967<sup>24</sup> in the *Comunità Internazionale*, the author stresses that, although in the Western world the scarcity of outcomes resulting from the negotiations for disarmament was usually ascribed to the fact that “Moscow has always negotiated in bad faith, with the only purpose of leading to the unilateral disarmament of the United States [...] the simplistic thesis of the communist aiming at disarming the West or at using the smoking curtain of conferences to arm itself [...] and jump at the throat of the West is unacceptable”.<sup>25</sup> According to this author, an objective evaluation of the facts should have led to the conclusion that in many negotiations the Russians had proven much more reasonable than the United States.<sup>26</sup>

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<sup>21</sup> See A. STERPELLONE, “Aspetti attuali del contrasto cino-sovietico” (Present Aspects of the Conflict between China and USSR), XIX *Comunità Internazionale*, 1964, p. 38 ff.; *IBID.*, “La destituzione di Khrushchev e la crisi del sistema intercomunista” (The Destitution of Khrushchev and the Crisis of the Inter-communist System), XIX *Comunità Internazionale*, 1964, p. 527 ff. (part I) and XX *Comunità Internazionale*, 1965, p. 18 ff. (part II).

<sup>22</sup> STERPELLONE, “Aspetti attuali del contrasto cino-sovietico”, *cit.*, p. 39. See also, of the same author, “La destituzione di Khrushchev e la crisi del sistema intercomunista”, part II, *cit.*, p. 24.

<sup>23</sup> STERPELLONE, “Aspetti attuali del contrasto cino-sovietico”, *cit.*, p. 78.

<sup>24</sup> L. DAINELLI, “Evoluzione della strategia e sicurezza internazionale” (Evolution of Strategy and International Security), XXII *Comunità Internazionale*, 1967, p. 281 ff.

<sup>25</sup> *Ibid.*, p. 307 f.

<sup>26</sup> *Ibid.*, p. 308.

## 7. The Invasion of Prague, 1968

The turning point in the attitude of Italian public and academic opinion *vis-à-vis* communism was the invasion of Czechoslovakia by troops of the Warsaw Pact in August 1968 and the bloody suppression of the reform movement that had animated the “Prague spring” and the dream of a ‘communism with a human face’. Although we cannot find any specific commentary on these events in the most important Italian journals of international law of the time, notably the *Rivista* and *Diritto internazionale*, a vast front of disapproval and condemnation emerged from the communist legal academics and scholars from the left. *Democrazia e Diritto* (“Democracy and Law”), a law journal of communist orientation and the official organ of the *Associazione dei Giuristi Democratici* (Association of Democratic Lawyers), published in the 1968 volume a condemnation of the Soviet intervention. It expressed, in the name of the *Associazione*, great emotion and firm disapproval “for the invasion of Czechoslovakia by troops belonging to the Soviet Union and to other countries of the Warsaw Pact”, defining this invasion as “an unjustifiable intromission in the internal affairs of a sovereign State, a serious violation of the right of self-determination of peoples, a worrying injury to the principle of intangibility of national territories and an attempt to solve relations among States through the use of force”.<sup>27</sup> Furthermore, the Bologna section of the Association added that the military intervention in Prague represented “an open and particularly serious violation of the rights of sovereignty and national independence recognized to all States by international law and the U.N. Charter”, noting that it reached an “even greater level of gravity in consideration of the fact that it was aimed to stop a laborious process of democratic evolution of a socialist country by other countries which are inspired by the same principles”.<sup>28</sup> These are bitter words that represent the frustration of Italian communist lawyers and scholars who felt betrayed by the same governments which were supposed to be the major champions of their ideology and of their project of emancipation of the underprivileged peoples of the world. It had also the effect of accelerating the fragmentation of the Italian communist block. A group of influential communist intellectuals (among them L. Pintor, R. Rossanda and L. Castellina) took a very critical, uncompromising position the role of the Communist Party with respect to the invasion of Czechoslovakia and they were expelled from the Communist Party. They founded one of the most sophisticated and intelligent newspapers of the independent left in post-World War II Italy, *Il Manifesto*.

By the same token, the Italian scholars who devoted doctrinal works to the Prague invasion, considered it unlawful under any possible legal perspective. First, the Soviet intervention was plainly considered as absolutely unjustifiable pursuant to the rules of the Warsaw Pact, as no formal or informal act of Czech representative organs had been adopted in order to invoke the state of danger which could justify the activation of the mechanism of mutual military solidarity and defence of the Warsaw Pact. In addition, it was noted that even the mechanism was applied incorrectly as the obligatory prerequisite of consulting *all* members of the Pact had not been respected, Albania and Romania having been excluded from any consultation.<sup>29</sup>

Second, the Soviet intervention was also to be considered unlawful according to the perspective of the so-called “Socialist Internationalism”. This position was corroborated by reference to a contemporary article written by a Soviet scholar, A. I. Botvin, published in the 1968 issue of the journal of the Faculty of Legal Sciences of the University of Leningrad – the *Pravovedenie*. According to this article – entitled *O printsipe nevmesciatelstva v sovremennom mezhdunarodnom prave* (On the Principle of

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<sup>27</sup> See IX *Democrazia e Diritto*, 1968, p. 428.

<sup>28</sup> *Ibid.*, p. 428 f.

<sup>29</sup> See U. CERRONI, “Sui fatti di Cecoslovacchia” (On the Facts of Czechoslovakia), IX *Democrazia e Diritto*, 1968, 293, p. 293 f. It is to be noted that the fact of being excluded from consultation was exactly the reason persuading Albania to withdraw from the Pact.

Non-intervention in Contemporary International Law)<sup>30</sup> – “recognition and respect of territorial sovereignty and political independence as inalienable characters of the State presuppose non-intervention in the State activity relating to its own internal competence [...] [including – as unanimously recognized by the internationalist doctrine of socialist countries –] not only direct, dictatorial intervention (aggression), but also any kind of indirect intervention”. The same article also underlined how “wide international recognition had the initiative of U.S.S.R. to raise at the XX Session of the U.N. General Assembly the problem of inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty”, leading to a Declaration with the same title<sup>31</sup> stating that armed intervention “is synonymous with aggression and, as such, is contrary to the basic principles on which peaceful international cooperation between States should be built”.<sup>32</sup>

Regrettably, Italian scholarship of this period includes some voices in defence of the armed intervention. In particular, the view was expressed that the legal profile alone did not offer “substantial elements of condemnation” of the action carried out by the armies of the Warsaw Pact against Czechoslovakia,<sup>33</sup> as the legal dimension could not be considered disconnected from the predominant political aspects of the dispute. The argument advanced was that the Soviet Union had always clearly perceived the policy of Western powers as constantly aimed at using Germany in an anti-Soviet and anti-socialist role; this made the armed intervention “substantially legitimate” for all socialist countries as a countermeasure against the “danger” posed by the Western policy. In this perspective, the countries of the Warsaw Pact were seen as “a complex of States, the single perceptions of which could even not fully coincide at a given moment”, and the action of the majority of them “to surrogate one of them in the general interests of the whole political social context” was to be considered as fully legitimate, since the national sovereignty of any single member was subordinate to the general interest of the collective socialist body.<sup>34</sup> A negative judgement of the intervention in Czechoslovakia was thus only possible (*rectius*: inevitable) from a political perspective – not for the reason that it would have violated Czech independence or sovereignty, not even under a moral perspective, as it was “an act of force of socialist countries against another socialist country” – but due to the fact that it was the “ultimate symptom” of a situation of the socialist area and of the entire international working movement which was increasingly difficult, being permeated by “extremely serious limits, contradictions, unresolved problems [...], conflicts, separation”. And, in the end, the intervention in Czechoslovakia had offered no solution to this situation “in the sense of contributing to an actual improvement of the quality of the socialist experience”.<sup>35</sup> In sum, the legal lack of legitimacy of the action was downgraded to simple political “negativity”, whose significance was limited to the internal dynamics of the Socialist world. So, from this perspective, the intervention in Prague was not illegal pursuant to international law, but had to be considered wrong in so far as it was unfit to resolve the endogenous problems of Socialist society.<sup>36</sup>

In the same vein, other Italian scholars reacted to the armed intervention in Czechoslovakia by complaining that the real fault of the Warsaw Pact was that of having hindered by the use of force the

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<sup>30</sup> The Italian translation of this article is reproduced in IX *Democrazia e Diritto*, 1968, p. 473 ff.

<sup>31</sup> See *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, Resolution 2131 of 21 December 1965, available at <<http://www.un-documents.net/a20r2131.htm>> (last visited on 21 January 2009).

<sup>32</sup> See Preamble, seventh Sentence.

<sup>33</sup> See L. ARATA and S. BOCHICCHIO, “Considerazioni sull’intervento dei paesi del Patto di Varsavia in Cecoslovacchia” (Considerations on the Intervention of the Warsaw Pact Countries in Czechoslovakia), IX *Democrazia e Diritto*, 1968, 486, p. 489.

<sup>34</sup> *Ibid.*, p. 488 f.

<sup>35</sup> *Ibid.*, p. 489.

<sup>36</sup> *Ibid.*, p. 497.

dynamic evolution of international law as a law of the peoples, in as much as the armed intervention had represented a “reassertion of the function of the State, or worse yet of the government, as well as of sovereignty”.<sup>37</sup> As the intervention was justified on the basis of the idea of “limited sovereignty”, in the sense that national sovereignty of any single country of the alliance was subordinated to the general interest of socialism, it paradoxically rehabilitated “a concept which the present tendency of the ‘living constitution’ of the international order presupposes as notably modified”.<sup>38</sup> According to this thesis, “the present basic dynamics of the international community” entailed a shifting of focus “from States (from governments) to peoples, underlining the ever growing importance of the formation of (unwritten) principles as result of the behaviour of peoples, and of their struggles”.<sup>39</sup> Thus, contradicting the main role of the October revolution – which, like the Chinese and Cuban revolutions, was that “of building the bases for socialism in the world and of building a *new* international legal order the *primary source* of which must be the class struggle, inspiring the peoples’ behaviour in their fight against imperialism” – the serious mistake underlying the intervention in Czechoslovakia consisted in removing the “*jus repraesentationis*” of Socialism from peoples (which are the legitimate owners of it) to States, thus invalidating the most important element of the Socialist revolution.<sup>40</sup>

It is clear that by adopting these lines of reasoning the debate among Italian scholars on the Soviet intervention in Czechoslovakia was bound to shift from the legal to the political level, with the consequence of a radical critique from inside the Communist doctrine.

This did not prevent the use of technical legal argument by some international law scholars to support the legality of the Soviet military intervention in Prague. In an article published in 1971, P. Paone defended the legality of the invasion of Prague on the basis of a “socialist” interpretation of the principle of non-intervention in international law.<sup>41</sup> According to this author, the application of the principle of non-intervention in the affairs of another State was precluded in “that sphere of the international community which [...] expunges in general from its framework the forms and institutions of the contractualistic regime”.<sup>42</sup> This would happen “in the sphere of relations among socialist States, as they are holders of economic-social regimes which are antithetical to those of contractualistic nature”, with respect to which Socialism was held to represent a historical progressive alternative. In other words, the principle of non-intervention does not work among those States just because it is rooted and intrinsic in the contractualistic regime. As a consequence, the intervention in Prague was legitimated by the fact that Czechoslovakia was bound “to adopt and to accept any measure designed to prevent a defeat of socialist solidarity, which could entail the disappearance of Socialist States from the scene of international relations”.<sup>43</sup> All the more so, for this author, because Czechoslovakia had recognized that it was part of a community of States “strictly linked by the ideological and practical fact of proletarian internationalism and admit[ted] that this translate[d] into an ‘obligation of loyalty’ of each member of the group concerning the necessary behaviour in order to give realization to socialism”.<sup>44</sup>

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<sup>37</sup> See F. FABRI, “I fatti di Cecoslovacchia dell’agosto 1968 e l’attuale dinamica di base della comunità internazionale” (The Facts of Czechoslovakia of August 1968 and the Present Basic Dynamics of the International Community), in X *Democrazia e Diritto*, 1969, 58, p. 61.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, p. 60 f.

<sup>40</sup> *Ibid.*, p. 61.

<sup>41</sup> See P. PAONE, “Sovranità dello Stato e potere internazionale (a proposito dell’attuale problematica dell’intervento)” (State Sovereignty and International Power (on the Present Issue of Intervention)), XII *Democrazia e Diritto*, 1971, p. 109 ff.

<sup>42</sup> *Ibid.*, p. 155.

<sup>43</sup> *Ibid.*, p. 155 ff.

<sup>44</sup> *Ibid.*, note 50, p. 156.



## **8. Afghanistan, 1979, and Poland, 1980**

With the acceleration of the pace of history that led to the disastrous Soviet adventure in Afghanistan in 1979 and to the surge of the workers movement in Poland (*Solidarność*) in 1980 one would have expected a corresponding growth in legal literature over the role of communism in international law and of its future for international relations. But an examination of Italian international law journals of this period reveals a conspicuous absence of specialized commentaries on the legal significance of these events and of their impact on the development of international law. The only article showing interest on the Soviet invasion of Afghanistan appeared in the *Comunità Internazionale* in 1980. That said, this was written by a scholar of political science and not of international law proper.<sup>45</sup> The author characterized the Soviet move as the onset of a new confrontation between Russia and China<sup>46</sup>, which was supposed to greatly increase the chances of an open conflict between the two countries. This opinion was supported by the observation that after the invasion, the Soviets could be in control of the “thin ‘Vacran strip’ which constitutes the border between China and Afghanistan”.<sup>47</sup> The author attempted to provide an appraisal of the (il)legality of the invasion and ironically notes that the main Soviet argument in support of their intervention was the specific request of assistance addressed to them by the Afghan “president in charge, Hafizzulah Amin, who was killed, in a day not yet specified, together with other components of his family...”.<sup>48</sup> To articulate a judgment of condemnation of the Soviet behaviour, however the author preferred not to take a direct position, but rather to use, *de relata*, the unanimous and severe blame by the whole international community following the decision of USSR to invade Afghanistan.<sup>49</sup>

## **9. Cross-Cutting Issues: Hostile Propaganda, Espionage and Protection of Religious Freedom**

To complete this overview of the variety of Italian scholars’ responses to communist doctrine and practice relevant to international law it may be useful to refer to those few cases in which Italian scholars have addressed the consistency of Communist countries’ policies with certain norms of international law during the period of the Cold War.

In an article published in 1966, concerning the issue of hostile propaganda in international law<sup>50</sup>, the author correctly points out that “propaganda is a powerful weapon in cold war used for influencing the opinion of the population of foreign States and often for inciting it to riots and disorders”.<sup>51</sup> This statement discloses the author’s intention to investigate the relevant behaviour of the main actors involved in the dynamics of the Cold War. Her overall assessment in this regard appears as basically objective and balanced, as it describes examples of propaganda carried out by both the United States and its allies and the Soviet block. However, a more critical attitude emerges toward the approach followed by the Communist countries, especially with respect to the more flexible attitude of the United States in the resolution of disputes arising from possible abuses of propaganda. For instance, in

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<sup>45</sup> See A. STERPELLONE, “Crisi afghana e nuovi equilibri” (Afghan Crisis and New Balance), XXXV *Comunità Internazionale*, 1980, p. 287 ff.

<sup>46</sup> *Ibid.*, p. 290.

<sup>47</sup> *Ibid.*, p. 289. In general terms, the USSR was supposed to need – in order to pursue its political plans – to move toward South Asia (*ibid.*, p. 298); more specifically, it appeared quite clear that the Russians acted especially for the reason that, due to the continuous changes in the government of Afghanistan that had taken place in the last years, they were worried about the fate of their huge investments in the country (*ibid.*, p. 300).

<sup>48</sup> *Ibid.*, p. 299.

<sup>49</sup> *Ibid.*, p. 301 ff.

<sup>50</sup> See G. SGROSSO CATALANO, “La propaganda ostile nel diritto internazionale” (Hostile Propaganda in International Law), XX *Diritto Internazionale*, 1966, p. 17 ff.

<sup>51</sup> *Ibid.*, p. 17.

describing a 1956 case in which the Soviet authorities addressed a note of protest to the governments of United States, Turkey and West Germany for having launched some meteorological balloons with leaflets of hostile content for the USSR, the author affirms that the resulting controversy was settled thanks to a “*move of conciliation*” by the United States – which interrupted the sending of these balloons<sup>52</sup> – seemingly implying that the United States were willing to accommodate the interests of the USSR even on the face of an inherently harmless initiative based on freedom of expression. By contrast, the author emphasizes that when the United States started broadcasting radio programmes beyond the Iron Curtain, Russians reacted by “jamming”, *i.e.*, disturbing the transmission, even though their content was considered to be almost exclusively cultural and educational..<sup>53</sup>

Other cross-cutting issues that have accompanied the whole period of the Cold War are that of espionage and of the legitimacy of national countermeasures. On this subject we can find a specific study dedicated to one of the most serious disputes arisen in the 1960s, the capture of the US vessel ‘Pueblo’ by the North Korean Navy on 23 January 1968.<sup>54</sup> The author examines the legality of capture under the laws of war –considering that the Korean war had been ended by a simple armistice – and under the international law of peacetime and concludes that in spite of the objectionable nature of the violent method of the capture, espionage in the proximity of the coast of a state is to be deemed illegal and can give rise to legitimate countermeasure to protect national security.<sup>55</sup>

On freedom of religion in East Europe, we can note an article published in the *Comunità Internazionale* in 1977.<sup>56</sup> The author describes the strides made on the way toward recognition of religious freedom after the 1975 Helsinki Accords. However, when he refers to cases of clear repression of religious freedom in the communist states, he seems to underplay the gravity of such repression, seeing it as a manifestation of the political tension between the Holy See and the Communist states. But no such reduction is excusable when we think of cases such as Cardinal Mindszenty’s sentence to life imprisonment in 1949 Hungary and of Archbishop Stepinac’s sentence to 16 years of imprisonment in 1949 Tito’s Yugoslavia. The ideological position of the author seems to emerge clearly from the way in which he deals with certain passages of his article. For instance, when quoting some examples of cases in which Communist countries had repressed religious freedom using means that objectively appeared as iniquitous and motivated by political grounds – like in the case of Archbishop Stepinac and of Cardinal Mindszenty – he minimizes the gravity of these acts by labelling them as “very acute moments of friction” with the Holy See.<sup>57</sup> Also, when describing the principle of separation between the State and the church in the author stresses that it had also been applied by some Western States even before the 1917 Russian Revolution. But with respect to Communist countries the author states:

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<sup>52</sup> *Ibid.*, p. 18.

<sup>53</sup> *Ibid.*, p. 19.

<sup>54</sup> F. FRANCONI, “Il caso del ‘Pueblo’ e le norme internazionali sullo spionaggio” (The Case of the ‘Pueblo’ and International Norms on Espionage), XXIII *Diritto Internazionale*, 1969, p. 319 ff.

<sup>55</sup> *Ibid.*, p. 336 f.

<sup>56</sup> See F. BIGAZZI, “Il problema della libertà religiosa visto dai paesi dell’Europa orientale. Da Helsinki a Belgrado” (The Problem of Religious Freedom Seen under the Perspective of East-European Countries. From Helsinki to Belgrade), XXXII *Comunità Internazionale*, 1977, p. 309 ff. (Part I) and 478 ff. (Part II).

<sup>57</sup> *Ibid.*, p. 310.

“[in these countries], instead, some limitations are provided deriving from the secular conception of the Socialist State [...], having the purpose of ‘reducing religious beliefs to the level of individual conscience’. According to Lenin, in fact, the State is bound to grant freedom of religion to all [...], but on the condition that ‘public order is not endangered’. This limit, which may be considered as primary, is accompanied by others referring to national safety, social order, public morals, rights of other citizens, health of citizens, freedom and secularity of education and the other major interests of the society and the State”.<sup>58</sup>

Further, when describing the domestic provisions of communist countries concerning religious freedom, the author emphasizes concepts such as “equality of all citizens irrespective of their religious belief” (with respect to Poland)<sup>59</sup> or “full equality” between religious institutions and State organs (referring to Hungary).<sup>60</sup> This apparent favour for Socialist countries, however, does not prevent the author from denouncing the shortcomings of these countries in the practical management of religious freedom, e.g., the frictions between State and religious institutions in the Democratic Republic of Germany<sup>61</sup> and in Czechoslovakia<sup>62</sup>, the general tendency of communist legislation to “not include adequate guarantees in terms of effective implementation of [civil and, in particular, religious] rights”<sup>63</sup>, or the fact that “we are still far, in the countries of Eastern Europe, from the amalgamation of the whole nation – of believers and non-believers – and from the ideal realization of the socialist State”<sup>64</sup>).

## **10. Communist Legal Thought as an Object of Study by Italian International Law Scholars**

During the cold war, Socialist conceptions of international law, and Socialist legal and social thought in general, attracted the interests of legal scholars and were the object of study in several Western countries. One may recall the collected essays edited by H. Baade in the United States on *The Soviet Impact on International Law*,<sup>65</sup> the systematic study of Soviet law by W. E. Butler,<sup>66</sup> and the comprehensive work by D. Manai in France.<sup>67</sup> No comparable manifestation of interest can be found in Italian international law scholarship. The only available pertinent monographic works are not of international lawyers, but of comparative law scholars interested in the material content of socialist law, especially of the Soviet Union,<sup>68</sup> as well as of legal theorists among whom we can single out U. Cerroni with his monograph, *Il pensiero giuridico sovietico*.<sup>69</sup>

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<sup>58</sup> *Ibid.*, p. 479.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 481.

<sup>61</sup> *Ibid.*, p. 482.

<sup>62</sup> *Ibid.*, p. 484.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, p. 494.

<sup>65</sup> H. BAADÉ (ed.), “The Soviet Impact on International Law: a Symposium”, 29 *Law and Contemporary Problems*, 1964, p. 843, reprinted as a separate monograph published in Dobbs Ferry in 1965.

<sup>66</sup> See W.E. BUTLER, *Soviet Law*, 2<sup>nd</sup> Ed., Stoneham, 1988.

<sup>67</sup> See D. MANAI, *Discours juridique Soviétique et intervention en Hongrie et en Tchécoslovaquie*, cit.

<sup>68</sup> Si veda G. CRESPI REGHIZZI, *L'impresa nel diritto sovietico* (The Enterprise in Soviet Law), Milano, 1969.

<sup>69</sup> See U. CERRONI, *Il pensiero giuridico sovietico* (The Soviet Legal Thought), Roma, 1969; see also, of the same author, *Teorie sovietiche del diritto* (Soviet Theories of Law), Milano, 1964, and *Teoria della crisi sociale in Marx. Una reinterpretazione* (Theory of Social Crisis in Marx: A Re-interpretation), Bari, 1971.

However, two interesting theoretical studies saw the light, respectively in 1976 and 1978, investigating the Socialist conception of international law. In the first<sup>70</sup>, the author notes that, “the problem of a ‘Socialist conception of international law’ arises in all its extension when the ruling party of a Socialist state [...] is *forced* to entertain multifaceted relations with governments which, as revolutionary movement, it is bound to fight”.<sup>71</sup> The very idea of international law – as traditionally conceived, *i.e.*, as an order based on the equilibrium of sovereign forces – would be in principle at odds with the Marxist philosophy of Socialism, just because “the State [...] is destined to disappear with the realization of the communist society”.<sup>72</sup> Thus, “Socialist international law” would be based on a fiction produced by the paradoxical reality according to which communist governments were forced to entertain relations with governments with which they were in absolute opposition. This reality – as the author explains – is reflected in a treatise published in 1923 by one of the most renowned Russian scholars of the post-revolution period, E. Korovin, under the indicative title *International Law of the Period of Transition*. The transitory character of international law was meant to permit the establishment of relations among States based on a different social and economic order. These relations were supposed to be limited to technical and economic cooperation, without being in any way extended to cultural and political collaboration. This temporary accommodation was only destined to last until the communist revolution had finally achieved a total success world-wide.<sup>73</sup> In the following decades, however, the intellectual debate concerning Socialist international law evolved toward different conceptions, although the idea that international law in force was to be defined based on the social and political aims pursued by Communism continued to pervade the academic debate.<sup>74</sup> After Stalin’s death in 1953, growing attention was devoted to the development of international relations with capitalist and developing countries. Among the principles theorized in this period, that of “peaceful co-existence” was a major one.<sup>75</sup> This principle – according to Bigazzi – was undermined when the Soviet forces invaded Hungary in 1956 and Czechoslovakia in 1968. The principle of peaceful co-existence was thus considered as trumped by the principle of “proletarian internationalism”. One needs only to recall the warning that the leaders of the communist parties of the Warsaw Pact addressed to Czechoslovakia on 16 July 1968, according to which “[w]e do not have the intention to interfere with problems which are internal to your party and your State [...] but each of our parties is responsible not only *vis-à-vis* its working class and its people, but also *vis-à-vis* the international working class and the world’s communist movement and cannot thus avoid to pursue the resulting obligations”.<sup>76</sup> In line with the argument developed by Arata and Bochicchio<sup>77</sup>, the military interventions in Hungary and Czechoslovakia were justified by the need to pursue the agenda of proletarian internationalism, and because “formal respect of the principle of self-determination of nations would ensure freedom of self-determination not in favour of the peoples, but of their enemies pushing for the loss of Czech independence”.<sup>78</sup> This is, according to the author, the essence of “socialist international law”, co-existing with, and when necessary setting aside, “general international law”.<sup>79</sup> This Socialist international law is also seen as the embryo of a system of principles informed

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<sup>70</sup> See F. BIGAZZI, “Concezione socialista del diritto internazionale” (Socialist Conception of International Law), XXXI *Comunità Internazionale*, 1976, p. 321 ff.

<sup>71</sup> *Ibid.*, p. 329 (emphasis added).

<sup>72</sup> *Ibid.*, p. 321.

<sup>73</sup> *Ibid.*, p. 329.

<sup>74</sup> *Ibid.*, p. 329 ff.

<sup>75</sup> *Ibid.*, p. 334 f.

<sup>76</sup> *Ibid.*, p. 336.

<sup>77</sup> See Section 7.

<sup>78</sup> See BIGAZZI, “Concezione socialista del diritto internazionale”, *cit.*, p. 337.

<sup>79</sup> *Ibid.*, p. 339.

by the peculiar economic structure of Socialist countries.<sup>80</sup> These principles – which at first were “proper of the internal structure of USSR ...have then extended to all countries that [...] have acquired the particular institutional characters of a socialist State”<sup>81</sup> and were to be characterised as “local customs”, the applicability of which would not be limited to those States which participated in their formation only, but would also extend to all other countries which in the future “will assume the required characters” of a Socialist state.<sup>82</sup>

A less ideological overtone characterised the second article, published in 1978, by Bigazzi.<sup>83</sup> Here the author takes into account the more recent tendencies of Eastern scholars and practice on the definition of the constitutive elements of socialist international law, and offers a general assessment of the evolution of the conception of the principle of democratic peace, including, peaceful co-existence based on free self-determination of peoples, and recognition of war of aggression as an international crime. He notes that, however, among the corollaries of this principle there are not only the defence of peace and the prohibition of any action of “traditional” colonialism (conceived as violent action aimed at depriving peoples of their right to self-determination, freedom and independence), but also the right to fight neo-colonialism,<sup>84</sup> taking into account the fundamental importance of consolidating unity, cohesion, friendship and brotherhood among socialist States in order to reinforce the world’s socialist system,<sup>85</sup> as well as to defend peace and security of nations against the aggression of imperialist and reactionary forces.<sup>86</sup> In close agreement with Russian scholars, the author maintained that the aim of the principle of socialist internationalism was “to promote voluntary cooperation and unity of States in the fight against imperialism and for the construction of the new society” and that such aim was in line with the purposes of contemporary international law.<sup>87</sup>

In the same year – 1978 – another article was published also concerning the Socialist conception of international law, with special attention to the concept of “general principles of law”.<sup>88</sup> In his long essay the author criticizes the view of Socialist legal scholarship according to which the sources of international law would be based exclusively on the principle of consent, with the consequence that customary international law – and, *a fortiori*, general principles of law – may only exist in the form of

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<sup>80</sup> *Ibid.*, p. 343.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> See F. BIGAZZI, “Sviluppi nella concezione socialista del diritto internazionale” (Developments in the Socialist Conception of International Law), XXXIII *Comunità Internazionale*, 1978, p. 71 ff.

<sup>84</sup> *Ibid.*, p. 80.

<sup>85</sup> It may be of interest to note that the different treatment reserved for socialist States as opposed to the ones with a different socio-economic system was expressly provided for by the new Soviet Constitution of 1977. In fact, while article 29, in defining the rules regulating the relations with non-communist States, recalled the principles of the 1975 Helsinki Final Act of the CSCE (Conference on Security and Co-operation in Europe) – *i.e.*, sovereign integrity of States, inviolability of national borders, non-intromission in internal affairs of other States, peaceful settlement of disputes, bans on the use of force, respect for human rights and fundamental freedoms, reciprocal equality of peoples – article 30 affirmed that the USSR retained its priority as the country with the mission to spread socialism. This provision would thus offer a constitutional basis to the legality of actions like those in Hungary in 1956 and in Czechoslovakia in 1968. See, on the 1977 Constitution, F. D. RICCIOLI, “Le disposizioni relative al diritto internazionale nella Costituzione sovietica del 1977” (The Provisions relating to International Law in the Soviet Constitution of 1977), LXIV *Rivista di diritto internazionale*, 1981, 301, p. 304 f.; it is noteworthy that this author stresses that – due to the greater relevance recognized to international law and policy by the new Constitution in comparison to the previous ones – its entry into force (taking place on 12 December 1977) implied a “reinforcement of international law *tout court*” (see p. 317). The 1975 Helsinki Final Act is available at <<http://www.hri.org/docs/Helsinki75.html>> (last visited on 18 June 2009).

<sup>86</sup> BIGAZZI, “Sviluppi nella concezione socialista del diritto internazionale”, *cit.*, p. 83.

<sup>87</sup> *Ibid.*, p. 71.

<sup>88</sup> See A. SINAGRA, “I principi generali di diritto nelle concezioni socialiste del diritto internazionale” (General Principles of Law in Socialist Conceptions of International Law), XV *Comunicazioni e Studi*, 1978, p. 417 ff.

tacit agreement (*tacita conventio*), i.e. when *all* the countries of the world agree on its content and binding nature.<sup>89</sup> This would further imply that – being all international norms the result of tacit agreements – the principle of the autonomy of states would be recognized without conditions, with the consequence that *any* rule of international law could be modified each time that a subsequent agreement is concluded in this respect.<sup>90</sup> On this point the author – relying on Quadri<sup>91</sup> – emphasizes that “the original autonomy of States cannot be conceived and recognized without limits”, being it constrained by the need of ensuring consistence with the basic principles safeguarding those supreme values shaping the concept of *international public order*, including, *inter alia*, repression of genocide, abolition of slavery, trade in children and territorial inviolability of states.<sup>92</sup> With specific respect to general principles of law, the author notes that the socialist doctrine excludes the existence of this category as an autonomous source of international law distinct from treaty or customary law, explaining that according to the Socialist thought they can only be conceived as resulting from “the scheme of legal production of agreements or custom”.<sup>93</sup> The author then confutes that the most important general principles of international law theorized by Socialist scholars on the basis of this line of reasoning – including the principles of non-aggression, pacific settlement of international disputes, self-determination of peoples and pacific co-existence among states – really exist as rules of contemporary international law, as they are not accepted by states as absolutely binding and inderogable in all situations.<sup>94</sup> The next point examined by the author relates to the specific Socialist principles of international law that are considered as existing in the relations among the states governed by the regime of popular democracy, particularly the principle of proletarian internationalism, which would constitute the basis of a distinct Socialist international law. In this respect, after denouncing the presence of a certain degree of contradiction in the construction of this principle – as it would inherently challenge the effectiveness of certain principles recognized by Socialist scholars, particularly State sovereignty<sup>95</sup> – the author notes that the consequence resulting from this construction would be that in the relations among Socialist States the norms of general international law could not be applied when they would contradict the “particular *principles* which are proper of the community of socialist States, particularly proletarian internationalism”.<sup>96</sup> However, the author concludes that, although certain peculiarities are actually existing in the Socialist conceptions of international law, they do not amount to *new* principles of international law exclusive to the community of Socialist States, but simply to different ways of interpreting and applying existing rules of general international law.<sup>97</sup> As a consequence, it would not be possible to maintain that a specific Socialist international law – distinct from general international law – actually exists, except in the limited form of a regional sub-system of local customs, as in Latin America.<sup>98</sup>

In retrospect, the question of “socialist internationalism” is of some interest also in relation to the recurrent argument used by the West that the Communist countries’ perseverance on promoting a Socialist conception of international law was actually the main cause of the paralysis of international institutions, primarily, the International Court of Justice. The ideological reticence of the Soviet Union toward the World Court is well-known (at least until the renowned article written by Mikhail Gorbaciov, entitled *Reality and Safeguards for a Secure World*, was published on the *Pravda* on 17

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<sup>89</sup> *Ibid.*, p. 422 ff.

<sup>90</sup> *Ibid.*, p. 435 f.

<sup>91</sup> See QUADRI, *Diritto internazionale pubblico, cit.*, p. 110.

<sup>92</sup> See SINAGRA, “I principi generali di diritto nelle concezioni socialiste del diritto internazionale”, *cit.*, p. 435 f.

<sup>93</sup> *Ibid.*, p. 439 ff.

<sup>94</sup> *Ibid.*, p. 443 ff.

<sup>95</sup> *Ibid.*, p. 457 ff..

<sup>96</sup> *Ibid.*, p. 463 f.

<sup>97</sup> *Ibid.*, p. 465 f.

<sup>98</sup> *Ibid.*, p. 466 ff.

September 1987).<sup>99</sup> However, Italian scholars have correctly noted that this argument was often misused by Western countries as a pretext to cover their own position. In particular, in 1991, L. Ferrari Bravo stressed that, “the complete change of the position of the countries of Eastern Europe, suddenly moved toward a position of great zeal for the international jurisdiction, has put several Western countries in crisis, as they well liked to cover themselves behind the *niet* of Moscow and are now forced to disclose their reservations and ambiguities or to revise their positions”.<sup>100</sup> The same author also emphasized the merit of communist countries – in conjunction with developing ones – in favouring important developments of international law during the period of the Cold War, like the evolution of the concept of international crimes and the fight against colonialism and *apartheid*.<sup>101</sup>

## **11. The Influence of Socialist Thought on Italian Legal Doctrine**

If the practice of Communist regimes has had a tenuous impact on the Italian scholarship of international law, the same cannot be said with respect to the elaboration at a theoretical level of principles and general categories derived from Marxist thought, as well as with respect to the development of legal arguments directly inspired by Socialist beliefs. Several important authors have come under the spell of Marxist doctrine.

For example, in his dense essay on “Diritto internazionale dell’economia e costituzione economica internazionale” (International Economic Law and International Economic Constitution),<sup>102</sup> P. Picone skilfully combines legal realism with an approach open to the categories of Marxist analysis. His characterization of the distinguishing feature of the international community borrows the language of the “modes of capitalist production” and “international division of labour”, and goes beyond the purely normative dimension of the international community to identify the social and economic forces that determine the material structure of the international community and its influence on the creation and renewal of international legal norms.

Nevertheless, a more open and insistent reliance on Marxist doctrine in the approach to international law can be found in the work of A. Bernardini. In particular, in a dense essay published in 1970 he offered a singular construction of the reason why the peoples struggling for national liberation are to be considered as subjects of international law, through the adaptation of socialist doctrines of international law to the radical modification of the international community as a consequence of decolonisation and access to independence for former colonial peoples.<sup>103</sup> According to such a construction, the idea of “people’s sovereignty” has developed thanks to the “progressive affirmation of socialist states, in which [...] an inter-penetration exists between the State-apparatus and the State-community”; this makes the national people – organized as a State – the effective holder of sovereignty, capable of self-determining “just because it re-takes the conditions of its own existence and development”. This development was necessarily destined to influence the other States as well as international law, leading the peoples struggling for national liberation to be recognized as subjects of international law and the armed fight against colonial power to be considered as the lawful exercise of the right to self-determination of peoples. In this general framework, the author asserts that State sovereignty, in those contexts in which it coincides with people’s sovereignty (*i.e.*, socialist State), is

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<sup>99</sup> The article was then reproduced as a document of both the U.N. General Assembly and Security Council; see, respectively, doc. A/42/574 and doc. S/19413.

<sup>100</sup> See L. FERRARI BRAVO, “Prospettive del diritto internazionale alla fine del secolo XX” (Perspectives of International Law at the End of the Twentieth Century), LXXIV *Rivista di Diritto Internazionale*, 1991, 525, p. 530.

<sup>101</sup> *Ibid.*, p. 528.

<sup>102</sup> See P. PICONE and G. SACERDOTI, *Diritto internazionale dell’economia* (International Law of Economy), Milano, 1982.

<sup>103</sup> See A. BERNARDINI, “I popoli in lotta per la liberazione nazionale quali nuovi soggetti di diritto internazionale” (The Peoples Struggling for National Liberation as New Subjects of International Law), XI *Democrazia e Diritto*, 1970, p. 497 ff.

the object of a peculiar form of protection in the relations among the States of the same kind. The main value is the “internationalist relationship among peoples”, which are structured according to the power of proletarianism, and not the relation among the government apparatus. Therefore – as a matter of international law – the protection of sovereignty in a socialist state is especially finalized to the preservation of the real conditions of people’s sovereignty.

The above approach was confirmed by Bernardini in his 1973 monograph on *La questione tedesca nel diritto internazionale* (The German Question in International Law),<sup>104</sup> which provides an in-depth critique of the traditional positive law approach adopted by Italian scholars on the question of the “subjects” of international law. This monograph expanded the thoughts developed by this author in an article published in 1970, in which he revisited the management of the situation of the “two Germanies” in the aftermath of World War II.<sup>105</sup> What emerges from this article is that, according to the author, the very “macroscopic fact of the creation of the Federal Republic of Germany” represented *ipso facto* a breach of the post-War agreements among the allied powers – in consideration of “the concrete character that this State has assumed, the social forces of which it is expression, the ambiguous relationship with the past that it has instituted” – a breach which translated into “extremely serious violations of international law”.<sup>106</sup>

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<sup>104</sup> This monograph was published in Padova in 1973 under the auspices of the Italian Society for the International Organization (*Società Italiana per l’Organizzazione Internazionale*, SIOI).

<sup>105</sup> See A. BERNARDINI, “Gli avvenimenti del 1945 e la debellatio della Germania” (The Facts of 1945 and the Defeat of Germany), XI *Democrazia e Diritto*, 1970, p. 267 ff.

<sup>106</sup> *Ibid.*, p. 293 ff. According to the author, these violations resulted from “the activities and omissions of the three Western States [*i.e.*, France, the United Kingdom and the United States], which allowed the definitive division [...] of the German nation and the adoption of certain characteristics by the State supported by them”. In addition, as there were no doubts that both the Democratic Republic of Germany and the Federal Republic of Germany were “States” in the proper sense of the word – with identical and exclusive competences over their respective territories – “the pretension to represent the entire German people advanced by [the Federal Republic of Germany], on the basis of a fake thesis of continuity with the German *Reich* and however of concepts of ‘democratic legitimacy’ that are pseudo-scientific hypotheses in contemporary international law [...] is in itself illicit and, in the forms in which it has been manifested and in the consequences to which it has led [...], with all discriminations created to the prejudice of a Sovereign State and of its citizens”, violated “several international provisions that impose respect of sovereignty and non-intervention” also in the relations between States which do not recognize each other. According to Bernardini, these international breaches had the form of real instances of aggression, although indirect and unarmed; in this respect, the author denounces the hypocrisy of the Western legal doctrine in considering the Federal Republic of Germany as perfectly legitimate State and the Democratic Republic of Germany as – depending on the circumstances – an occupied territory, a puppet State or a *de facto* government, while no reasonable evidence existed that it was influenced by the U.S.S.R. more than the Federal Republic of Germany was under the control of Western powers. Furthermore, the fact that West Berlin was considered part of the Federal Republic of Germany represented another breach of international law, as it had been subtracted from the Democratic Republic of Germany, which was to be considered the legitimate successor of the occupying power (the U.S.S.R.). West Berlin was thus to be considered as a territory under the illicit occupation of the Western courtiers – *rectius*: under an effective *contra legem* power – as no *effective* annexation of it to West Germany had ever taken place.



The issues of subjectivity, statehood and recognition also represented the legal background on which another author addressed in 1970 the German question within the particular context of the possible admission of the Democratic Republic of Germany to the World Health Organization (WHO).<sup>107</sup> In this article, the author notes, in particular, that the argument maintained by Western powers – according to which the admission of East Germany to the WHO would not be possible as this State was not recognized as such by members of the Organization – was absolutely incorrect, since Statehood (*rectius*: international legal personality) as a condition for the admission to an international organization was to be based on the principle of effectiveness, while recognition had no weight in this respect.<sup>108</sup> Apart from the question of its possible admission to the WHO, in a separate article the same author – quoting Fitzmaurice<sup>109</sup> – notes that the Democratic Republic of Germany

“was constituted in the far 1949 and now we may only note the fact of its existence [and effectiveness] [...] It is a factual question. It is possible to think that such a government is ‘unworthy’ to represent its State. But it is not possible to maintain that it does not represent it in fact, simply because it is not worthy of it. [...] The Declaration of the Three Powers of 1950 [...] which considers the government of Federal Republic of Germany as the only German government freely and lawfully constituted, represents nothing but a political, ideological position”.<sup>110</sup>

Also, according to Lattanzi, the “absurd episodes [of States trying to ignore the existence of the Democratic Republic of Germany] besides concretizing a breach of the international norm imposing the obligation of recognizing the internal personality of sovereign States and therefore the acts enacted by them, would also produce a violation of the international norm on sovereign equality of all States”.<sup>111</sup>

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<sup>107</sup> See F. LATTANZI, “La Repubblica Democratica Tedesca e l’Organizzazione Mondiale della Sanità” (The Democratic Republic of Germany and the World Health Organization), XI *Democrazia e Diritto*, 1970, p. 525 ff.

<sup>108</sup> *Ibid.*, p. 525 ff. The author also refutes another argument that at the relevant time was used in order to deny the opportunity of allowing the Democratic Republic of Germany to be admitted to the WHO, *i.e.*, that it would create an obstacle in reaching “a ‘*modus vivendi*’ between the two Germanies”. In doing this, she notes how implausible is that the common participation of two States to an international organization pursuing highly pacific and humanitarian purposes may have negative effects for the solution of their reciprocal problems. On the contrary – the author notes – the cooperation between the two countries which would be instituted in the event that East Germany would become member of the WHO could only give rise to a positive contribution in the settlement of the said problems (*ibid.*, p. 531 ff.). It is interesting to further note how the author emphasizes that, under a factual perspective, it was opportune not only that East Germany would become member of the Organization, but also that it was accorded all rights granted to all other States, so that “humanity may progress profiting of the cooperation of all peoples” and that WHO was allowed to profit from the experience “of highly advanced countries in the sanitary field in light of the purpose pursued by such Organization”. This conclusion is based on the examination of the health system existing at the time in the Democratic Republic of Germany, which, according to the author, actually respected the principles informing WHO. In this respect, Professor Lattanzi stresses that in the Democratic Republic of Germany “the right of any citizen to protection of his health, of his working capacity, as well as the right to social security are granted. A system of social insurance [is in force which] grants all citizens [...] qualified medical and social assistance in the event of illness, invalidity and old age”. The author also emphasizes that other fundamental principles of the WHO, including that of preventive protection of health, were also excellently implemented in the Democratic Republic of Germany, where the sector of medical research and experimentation was very advanced as well. See *ibid.*, p. 533 ff. The Democratic Republic of Germany eventually became a full member of the WHO in 1973.

<sup>109</sup> See G. FITZMAURICE, “Chinese Representation in the United Nations”, 6 *Yearbook of World Affairs*, 1952, 36, p. 51.

<sup>110</sup> See F. LATTANZI, “Il riconoscimento della Repubblica Democratica Tedesca” (The Recognition of Democratic Republic of Germany), XII *Democrazia e Diritto*, 1971, 197, p. 205.

<sup>111</sup> *Ibid.*, p. 211. The author notes in particular that the argument pursued by the Federal Republic of Germany – according to which recognition of the Democratic Republic of Germany by other States would represent an unjustified interference in its own internal affairs – was to be considered as totally unfounded. On the contrary, it was precisely the behaviour of West Germany which gave rise to an unlawful intervention in other States’ affairs, particularly when it broke (or threatened to break) off its diplomatic relations with other States for the reason that they had started relations with East Germany; see *ibid.*, p. 218.

A radical and all-encompassing embrace of a Socialist approach to international law can be found in Pasquale Paone. In his 1973 monograph on the *Concetto di comunità internazionale e mutamento delle condizioni storiche* (Concept of International Community and Change of Historical Conditions)<sup>112</sup> he engages in a critical analysis of the traditional Italian positivist approach to international law, which he considers historically functional in the maintenance of the capitalistic mode of production and division of labour. His call for a new critical approach that would look beyond the normative super-structure of legal positivism to grasp the socio-economic substratum of the international community is reinforced by his professed faith in the potential for radical renewal inherent to the presence and political action of Socialist states in the international society.

This faith was bound soon to be belied by the socialist states themselves and their transition to market economy and liberal democracy.

Other Italian authors have expressed a pro-Communist position in a much less blatant and less ideological way. For instance, such a position was articulated in a subtle and elegant way in an article published in 1984 dealing with the issue of international law and defensive policies.<sup>113</sup> In this essay, the author offered a critical review of the (then) recent negotiations for disarmament between the two superpowers, explaining why the United States constantly tried to promote solutions that were objectively disproportionate in its own favour, being thus unacceptable to the Soviet Union. In particular, the author refers to the negotiations concerning the so-called strategic weapons, explaining that the United States promoted the inclusion in the definition of such weapons of only those missiles *located in the respective territories of each of the two superpowers* which had the potential capacity to reach the territory of the other. For the United States “this kind of weapons represents the totality of those capable to reach their territory. For the Soviet Union, given the geographical situation, this solution is not protective in the same way as it may be reached also by missiles [...] placed in the territory of the U.S. allies, which are located close to its borders”.<sup>114</sup> Also, with respect to British and French nuclear weapons, the position of the United States to exclude them from the negotiations (on the basis of their bilateral nature) could not be satisfactory for the Soviet Union, “because British and French missiles (the power of which is rapidly increasing) have as their own objective the U.S.S.R. territory”.<sup>115</sup> Finally, the proposal of the United States to dismantle the SS 20 from the Soviet territory in exchange for the promise not to install the new Pershing and Cruise missiles in the European territory was not accepted by the U.S.S.R. since, “in exchange of the promise to not install future missiles, the destruction of a system already realized for its majority was requested”. The author finally notes that the negotiations eventually failed in 1983 due to the NATO decision to deploy Cruise and Pershing missiles in Europe despite the fact that the question was still being discussed between the parties.<sup>116</sup>

Besides the limited cases noted above of open embrace of the Communist positions or of Marxist philosophy in the evaluation of key events of the history of Europe during the Cold War, there is no denying that Socialist thought has had an indirect influence on the work of many Italian authors in the period of decolonisation and especially in the area of international economic law. This is apparent in works on the role of equity in the re-distribution of benefits arising from the exploitation of natural resources,<sup>117</sup> on the impact of the political demands for a “new international economic order” on the

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<sup>112</sup> This monograph was published in Milano in 1973.

<sup>113</sup> See A. GIARDINA, “Diritto internazionale e politiche di difesa” *International Law and Defence Policies*, XXIV *Democrazia e Diritto*, 1984, Issue 3, p. 49 ff.

<sup>114</sup> *Ibid.*, p. 53.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, p. 54.

<sup>117</sup> See F. FRANCONI, “Compensation for Nationalisation of Foreign Property: the Borderland between Law and Equity”, 24 *International and Comparative Law Quarterly*, 1975, p. 255 ff.

legal regime of nationalisations,<sup>118</sup> as well as in the context of the debate over the regulatory or market freedom approach in the exploitation of natural resources in areas beyond national jurisdiction, such as the international seabed<sup>119</sup> and Antarctica.<sup>120</sup> The same can be said with respect to certain academic works revisiting the international regulation of the use of force in the context of self-determination,<sup>121</sup> of military intervention and of the need to provide assistance to movements of national liberations in their struggle for independence.<sup>122</sup>

Indirect influence by Socialist thought on the work of Italian international law scholars is detectable also in a number of academic works which take a critical position of Western politics, especially of the United States. The occasion, of course, was offered by the Viet Nam war. In an article published in 1969,<sup>123</sup> Bernardini denounces “the disconcerting deficiency of the legal arguments brought by one of the parties of the Vietnamese conflict to support its positions and the aggression perpetrated”.<sup>124</sup> Then – after providing a comprehensive assessment of the relevant historical facts and the different legal arguments raised by scholars – Bernardini concludes that the intervention of the United States in Viet Nam was indisputably to be considered – with no possible excuse – “as an international illicit act [...], as an active intervention in the internal affairs of an independent and sovereign State”, reaching the threshold of “an ‘armed aggression’ (crime against peace) [...] and illegal use of force by the United States of America”.<sup>125</sup> In a later article dealing with the same subject, Bernardini also laments that in the 1950s, after the end of the French occupation, this was replaced by the creeping occupation of the United States, taking the form of aid to the puppet government of Saigon with the purpose of bringing “Viet Nam to unity in the framework of a colonial relationship”. This behaviour by the United States – Bernardini continues – “may be undoubtedly considered as the most serious form of intervention in the internal affairs of an independent State, aimed at least a breaking its territorial integrity and mutilating its independence [...] an aggression with substantial occupation of part of the territory of a sovereign State”.<sup>126</sup> The author also took the opportunity to reiterate that the U.S. military intervention was to be considered as a “monstrous” action aimed at dominating a people and “destroying it materially or at least obliterating its civilization and all social structures, ‘bringing it back to the stone age’”.<sup>127</sup> For this reason, the “most various figures of war crimes and crimes against humanity [including genocide] may be [...] found in relation to the activity systematically developed by the United States and its accomplices in Viet Nam”.<sup>128</sup>

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<sup>118</sup> See G. TESAURO, *Nazionalizzazioni e diritto internazionale (Nationalisations and International Law)*, Napoli, 1976.

<sup>119</sup> See B. CONFORTI, “Notes on the Unilateral Exploitation of the Deep Seabed”, IV *Italian Yearbook of International Law*, 1978-1979, p. 3 ff.; T. TREVES, “Seabed Mining and the Law of the Sea Convention”, *Ibid.*, p. 22 ff.

<sup>120</sup> See F. FRANCONI, “Resource Sharing in Antarctica: for Whose Benefit?”, 1 *European Journal of International Law*, 1990, p. 258 ff.

<sup>121</sup> See CASSESE, *Self-determination. A legal Reappraisal*, cit.

<sup>122</sup> See N. RONZITTI, *Le guerre di liberazione nazionale e il diritto internazionale (Wars of National Liberation and International Law)*, Pisa, 1974.

<sup>123</sup> See A. BERNARDINI, “Il Vietnam nel diritto internazionale attuale” (Viet Nam in Present International Law), X *Democrazia e Diritto*, 1969, p. 443 ff.

<sup>124</sup> *Ibid.*, p. 444.

<sup>125</sup> *Ibid.*, p. 485.

<sup>126</sup> See A. BERNARDINI, “L’aggressione contro il Viet-Nam e il minamento dei porti vietnamiti: considerazioni giuridiche” (Aggression against Viet Nam and Mining of Vietnamese Harbours), XIII *Democrazia e Diritto*, 1973, 101, p. 104 ff. See also, to a not dissimilar extent, A. GIARDINA, “La violazione degli accordi di Parigi sul Viet-Nam” (Breach of Paris Agreements on Viet-Nam), XXIX *Comunità Internazionale*, 1974, p. 624 ff., particularly p. 627 ff.; in this article, Giardina offers a comprehensive assessment on how the United States had breached the Paris agreements on Viet-Nam, although it is to be emphasized that he uses an objective and balanced approach, also illustrating the profiles of responsibility of the government of Viet-Nam itself.

<sup>127</sup> See BERNARDINI, “L’aggressione contro il Viet-Nam e il minamento dei porti vietnamiti”, cit., p. 113.

<sup>128</sup> *Ibid.*, p. 115.

Bernardini remains consistent in his approach. In the foreword of his 2005 book “La Jugoslavia assassinata” (*Yugoslavia Murdered*) – published as a collection of all his writings on Yugoslavia – he affirms that the book concerns “the barbaric interventions and aggressions of the West”.<sup>129</sup> He admits the “militant” nature of his writings and the “impossible neutrality” on the face of events that require a legal approach oriented toward the victims of aggression<sup>130</sup>. In his view, the disguised purpose of the “aggression” by the West was to favour “the imperialist penetration in the Balkans and towards Russia”.<sup>131</sup> The dismemberment of Yugoslavia would have been opened by the strategic interests of Germany and the United States.<sup>132</sup> The author does not refrain from criticising the practice of the United Nations and the writings of scholars on the issue of self-determination of peoples, “too often ideologically conditioned, both, by prevailing ideologies”, as well as by the ambiguous position, also of international Organisations, on the issue of external interventions (see Vietnamese intervention in Cambodia, Soviet intervention in Afghanistan).<sup>133</sup> In his defence of Yugoslavia, no one knows what import the author accords to ethnic cleansing, mass killings and genocide practiced in the attempt to grab territory.

## 12. Communism and Political Militancy of Italian International Law Scholars

Many Italian scholars of international law have covered institutional positions – including the position of legal adviser of the Ministry of foreign affairs<sup>134</sup> and that of elected member of the Constitutional Court<sup>135</sup> – for which, undoubtedly, the political orientation of the person had decisive importance. Very few international lawyers, however, may be identified who have undertaken an active political career and have held electoral offices. The only international scholar who, to the best of our knowledge, has been elected in the lists of the Communist Party, but as an independent of the left, is Mario Giuliano, who was a member of the House of Representatives in the VIII Legislature starting in 1979.

Another influential scholar who actively participated in political life and had an important role in advancing the process of European integration – without technically being an international law scholar – is Altiero Spinelli, who was elected as an independent of the left in the lists of the Communist Party in 1976 and 1979. He was also an active member of the European Parliament in the years 1976-1984.

Two other international lawyers can be mentioned, but for their dialectic position against Communism and for their active militancy in the Christian Democratic Party. They are Giacinto Bosco, member of the House of Representatives and of the Senate in the years between 1948 and 1972, and Minister in several Cabinets; and Giuseppe Vedovato, also a member of the Christian Democratic Party, elected to the House of Representatives in the years 1953-1968 and to the Senate in 1972.

As we can see, very few international law scholars have engaged in active political life and only one of them has done so in the files and ranks of the Communist Party.

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<sup>129</sup> See A. BERNARDINI, *La Jugoslavia assassinata*, Napoli, 2005, p. V.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, p. VIII.

<sup>132</sup> *Ibid.*, p. XI.

<sup>133</sup> *Ibid.*, p. XXVI.

<sup>134</sup> Until recently this position had been reserved to professors of international law; Luigi Ferrari Bravo and Umberto Leanza have been the last ones. Although many international law scholars continue to work as legal advisors. Counsel and representatives in ad hoc negotiations and contentious cases.

<sup>135</sup> Today, the Constitutional Court includes two professors of international law: Giuseppe Tesauo, formerly professor at the University of Naples and judge at the European Court of Justice, and Maria Rita Saule, a professor from the University of Rome, La Sapienza.

### 13. Communism in “Retrospective” after the Fall of the Berlin Wall

After the fall of the Berlin wall in 1989, the inheritance left by Italian scholars of international law concerning the vast political and social transformation undergone by world at that time was limited to a very few specific academic works and some *obiter dicta* included in doctrinal works dealing with different issues.

In this respect, in addition to the article by Luigi Ferrari Bravo,<sup>136</sup> as well as the book by Bernardini briefly examined in Section 11,<sup>137</sup> we can refer to a brief essay published in the 1990 volume of the *Comunità Internazionale*.<sup>138</sup> The position of the author – G. Ziccardi Capaldo – with respect to the end of Communism in Europe is celebratory of the “grand and un-hoped happenings taking place in the Eastern countries starting from the last months of 1989”.<sup>139</sup> She denounces the factual circumstance that the end of “the structural dominion of the Great Powers” that had “overcome national sovereignties and remedied to the structural anarchy of the international community allowing [...] the maintenance of international public order” had fed the fear that “re-emersion of national sovereignties would lead the international society to fall down into anarchy”.<sup>140</sup> However, she expresses “cautious optimism” because since the end of the Second World War, States had proven able to reach “convergences and aggregations for the defence of some fundamental values (condemnation of colonialism, foreign occupation, *apartheid*, terrorism, pollution, etc.) and had started processes for their collective management”.<sup>141</sup> In addition, according to this author, the United Nations themselves, overcoming the limits of the Charter, had been able in practice to develop “a function of collective legitimation consisting in approving or condemning behaviours and situations, and in conferring [...] to the collective action carried out by individual States the seal of objectivity and impartiality which is [otherwise] lacking”.<sup>142</sup> As for the danger – perceived by the public opinion – that the sudden loss of control, previously assured by the balanced co-existence of the two superpowers. could lead to the development of “legalized sanctuaries of authoritarian and indecent States, like Ceausescu’s in Romania or Noriega’s in Panama”,<sup>143</sup> their suppression could be guaranteed by the possibility unilateral action by States which are “legitimized to intervene on behalf of the Community”. Without hesitation, she optimistically concludes that “the principle of democratic legality” has finally become “a value shared by the international Community”.<sup>144</sup>

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<sup>136</sup> See FERRARI BRAVO, “Prospettive del diritto internazionale alla fine del secolo XX”, *cit.*

<sup>137</sup> See BERNARDINI, *La Jugoslavia assassinata*, *cit.*

<sup>138</sup> See G. ZICCARDI CAPALDO, “Da Yalta ad un nuovo ordine politico internazionale” (From Yalta to a New International Political Order), XLV *Comunità Internazionale*, 1990, p. 210 ff.

<sup>139</sup> *Ibid.*, p. 210.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, p. 210 f.

<sup>142</sup> *Ibid.*, p. 211.

<sup>143</sup> *Ibid.*, p. 211 f.

<sup>144</sup> *Ibid.*, p. 212. However, the translation of this optimistic view (which – as it is well known – was in large part contradicted by subsequent practice) into reality would have needed, according to the author, an “institutional structurization of the international Community, at least a sufficient integration of it with the United Nations and the other organizations”. See *ibid.* p. 213.

Finally, in an article published in 1997 in *Comunicazioni e Studi*, the author, while reflecting on the transformation and development of the international community in the last two centuries, takes the opportunity for declaring that “the autocratic hegemony of U.S.S.R. vis à vis East-European countries, characterized by the affirmation of the doctrine of limited sovereignty, produced damaging consequences for the international relations of those countries”.<sup>145</sup>

#### 14. Conclusion

In any national society, the memory of the past serves the eminent political purpose of separating good from evil. In Italy, for a long time, the relationship between scholars and communism has been influenced by the need to identify Communism with the fight against and the victory over the supreme evil of the entire national history: Fascism, Nazi occupation, the war and the persecution of political opponents and of the “diverse”. In this context, Communism has been the axis and the most uncompromising component of “anti-fascism” and has served the cathartic purpose of permitting large strata of the Italian society and of intellectuals to position themselves on the side of the “good”, *scilicet* of the victims of Nazi- Fascism and of the war. This is a perspective that sets us apart from our neighbours and friends from the East, for whom it is clear where the “evil” stands: it is sufficient to visit the Museum of Terror in Budapest. At the same time, it is a distorted perspective, because it ignores the absence of political consensus and of “shared memory”, and more important, it underplays the persistent view in large strata of the Italian society of communism as the main form of “evil”, with its history of terror, brutality and totalitarian oppression. This radical duality of the Italian attitude toward Communism, explains the high degree of aloofness of established Italian international law scholarship with regard to the crimes committed by Soviet Communism. It is a singular feature of this scholarship, as it emerges from the above survey, that some of the most critical voices of Communist practice came from communist authors. This is understandable. After all, unlike Fascism and Nazism, which specialised in persecuting the “other”, Soviet Communism developed a special skill in persecuting and killing its own people, simply to perpetuate an instrument of political dominion based on terror. This is probably the most important obstacle to a detached assessment of the legacy of Communism in Post-World War II Europe.

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<sup>145</sup> See A. M. DEL VECCHIO, “Riflessioni su trasformazioni e sviluppi nella comunità internazionali” (Reflections on Transformations and Developments in the context of the International Community), XXI *Comunicazioni e Studi*, 1997, 341, p. 355.

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