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Federico Casolari,
L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea,
Giuffrè, Milano, 2008

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Federico Casolari, **L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea**, Giuffrè, Milano (2008)[*]

Reviewed by

Giuseppe Martinico

The book I am going to review represents a valuable attempt to consider in a unitary way a very diversified phenomenon: the incorporation of international law in the EU legal order.

Actually the work limits itself to the analysis of the situation in the first pillar, leaving the other two aside, and this choice can be explained in several ways: the book was written before the entry into force of the Lisbon Treaty (which formally abandoned the three pillars structure) and, secondly, the less active role of the European Court of Justice (ECJ) in the second and third pillars (due to the different competences the Court had in the previous regime); nevertheless this does not mean that the author neglected the developments in the other two pillars (especially after *Pupino* [1]and *Segi*[2]), as they are also recalled in the work.

As for the structure of the volume, it is composed of five big chapters and a final section including the conclusions by the author.

The book aims at providing an overview of the adaptation mechanisms through which the EU legal order incorporates the international law. The work starts by analyzing the subject and presenting the methodology of the research, which is conducted on the basis of the ECJ's and the Court of First Instance/General Court (CFI)'s case law, due to the scarcity of formal provisions existing in this field.

It covers all the relevant judgments in this field passed by the European courts between 1956 and 1970, with a view to investigate the techniques used by the judges in ascertaining the existence of international public law rules in the EU system and, in a second moment, the "openness" of the European legal order towards international law.

The first chapter aims at presenting the theoretical premises of the research and the notion of international law considered relevant in the book (distinguishing between binding and non-binding international law), the (poor) legal framework provided by the Treaties and the issue of the legal personality of the EU, which was recently resolved by the Reform treaty.

In these pages Casolari presents his main theoretical assumptions: the importance of judges in creating the connections between the EC and the international legal orders, and the peculiarity of the EC law compared with the classic international law. In the second chapter, the author moves on

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[*] Book review written in 2009.

[1] C-105/03, Pupino ECR, 2005, I-5285.

[2] C-355/04 P, Segi and others / Council ECR, 2007, I-1657.

to study the judges' endeavors in verifying the existence of rules of customary international law and of international law of the treaties, recalling the relevant ECJ's case law about the notion of "international treaty", and studying how some pillars of the Vienna Convention on the law of Treaties are applied by the supranational judges.

In the third chapter, Casolari deals with the issue of the incorporation of the international binding law into the European legal order, providing an exhaustive analysis of the relevant case law in the field of the relationship between international and European laws, and studying different hypotheses of conflict between Community and international laws (customary international law or law of the treaties). In the fourth chapter, Casolari explores the issue of the ranking of international law incorporated in the European system, analyzing the usability of the former for evaluating the legitimacy of the European institutions' conduct, and the principle of consistent interpretation.

In the fifth chapter, Casolari investigates the subject of the incorporation and rank of international non-binding law in the European legal order, carrying out the analysis through the substitution theory, according to which the EC institutions may be bound by international obligations previously taken by the member States and able to influence the competences of the organization; indeed, this doctrine is a confirmation of the strong connection between the ECJ's case law dealing with EC competences and that dealing with international law.

When analyzing these issues, Casolari also studies the lack of coherence in the ECJ's case law regarding the ascertainment of the international obligations previously taken by the states, focusing his attention on three cases: the relationship between EC law and the GATT/WTO obligations, that between EU law and the European Court of Human Rights (ECHR) norms, and that between EU law and the UN system's law.

In the last part of the chapter, Casolari deals with some recent rulings such as *Kadi*[3], which present itself as groundbreaking for several reasons: *Kadi* makes clear the existence of a "hard core" in the EU legal order- and the author points out the similarity between the ECJ approach in this case with that followed by the national Constitutional Courts with regard to conflicts between domestic and external laws-.

On the basis of such an analysis, the author offers, in the last chapter, some conclusions on the scope of the EU adaptation mechanism and on the impact of international law on the relationship between the different levels of the so-called multilevel constitutionalism. As Casolari acknowledges, the ECJ case law in this field is showing the dynamic nature of the integration process and, in order to better represent this idea, Casolari compares the Opinion delivered by

[3] Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council, 2008,p.I-6351.

Advocate General Lagrange the *Fédération charbonnière de Belgique* case[4] with that of Advocate General Maduro in the *Kadi* case[5]: while in the first case Lagrange found the sources of EC law in the national level rather than in the international one, in the second the limits from international obligations are strongly present as a guide for the interpretation and application of the Treaties (p. 436). Casolari connects the judicial developments in this field to the increased importance acquired by the EU as an international actor; today, as the ECJ pointed out many times in its jurisprudence, the international obligations are an "objective element" for the actions of the subjects of the European legal system.

Among the many reflections inspired by this volume, I would like to dwell on those regarding the role of judges in the context of legal pluralism.

Casolari starts from a very good intuition: the European judges have a crucial role in adapting and reshaping (sometimes) the principles of international law; they are definitely the "gatekeepers"[6] of the EC legal order. As the author points out in the conclusion (p.433), the ECJ remedied the gaps existing in the discipline governing international law in the treaties thanks to its interpretive mission codified in Art. 220 ECT. Developing this intuition, I think, we can find a coherence in the ECJ case law regarding the relationship between international and EC law, since Art. 220 ECT represents the starting norm for reading the alternative conceptions of the international law's use by the Court. The connecting thread in its jurisprudence may thus be seen in its constant attempt to ensure the independence of Community law from other international or national systems' law.

Whatever happens, the ECJ cannot renounce its interpretive monopoly and this explains cases like *Mox Plant*[7] and *Kadi*, inspired by a strong euro-centrism; in few words, sometimes the engine of those pronouncements was the competition with other interpreters (and this explains why many commentators read the *Kadi* case as a new *Solange*[8] case[9]).

Linking its case law to the "political" aim to maintain its interpretive independence, we can make a further comment regarding another premise assumed by the author, that of the peculiarity of EC

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4 8/55, Fédération charbonnière de Belgique / ECSC High Authority ECR.1955,291. About the sources of Community law Advocate Lagrange said that "nothing forbids to look for them, when it is necessary, in the international law but, normally and very often, we will rather find them in the domestic law of the member States " (our translation of the Italian version reported at p. 436).

5 "The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments", Opinion of Advocate General Maduro to the *Kadi* case, *ibid*.

6 On this image see F. Snyder, "The gatekeepers: the European courts and WTO law". *Common market law review*, 40 pp. 313-367.

7 C-459/03 European Commission v Ireland [2006] ECR I-4635

8 *BVerfGE* 37, S. 271 ff

9 B. Kunoy, A. Dawes, "Plate tectonics in Luxembourg: The ménage à trois between EC law, international law and the European Convention on Human Rights following the UN sanctions cases", in *Common Market Law Review*, 46, 2009, 73-104

law: it is worth recalling that some scholars[10] believe that the emancipation of the EC law operated by the ECJ is due (also) to "political reasons", i.e. not to be bound by the normal rules governing the interpretation and application of international law. This way the Court would be more free in playing its role, and in this respect we could read the case law on the emancipation of the EC law as a manner to create a non-interference zone which allowed it to impose its doctrine on the member states; as Itzcovich said, among the classic interpretive methods of international law, "*there was, as a direct consequence of the principle according to which limitations of sovereignty should not be presumed, that the treaties should be interpreted strictly*"[11]. In this respect, the emancipation of Community law allowed for the abandonment of such a criterion and permitted a more aggressive approach based on the idea of "*favor communitatis*".

Nevertheless, this idea of the autonomy and peculiarity of EC law seems to be now at stake due to the evolution of more developed international regimes: looking at such regimes (for example, the ECHR, the WTO), we can appreciate the incoming Europeanization of international law and, on the other hand, the progressive influence on the EC law system of other international regimes (see the phenomenon of the "unionisation and conventionisation of fundamental rights"[12)].

As written at the beginning of the volume, this work deals with different phenomena (the role of judges as "gatekeepers", the issue of the effects of the international treaties concluded by the EU within the European borders, the issue of the contrast between international law and EC law), and a consequence of this variety is a not-always-easy reading, but this little weakness of the book is a direct consequence of the very detailed analysis contained in its pages; that is why I do recommend its purchase.

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[10] For a similar perspective see. O.Spiermann, "The other side of the story: an unpopular essay on the making of the European Community legal order", European Journal of International Law, 1999 10(4):763-789.

[11] "*To presume limitations of sovereignty, i.e., to create new obligations upon the states by means of legal interpretation, would have meant a multiplication of potential breaches to conventional international law. In order to avoid international conflicts, the early legal doctrine, from Grotius and Vattel since the Lotus decision of the Permanent Court of International Justice, recommended to interpret international law in a strict way, so that mutual rights and duties of the states were to be clearly defined; sometimes, that doctrine used to remind the general private law principle of the favor debitoris*", G. Itzcovich,
"The Interpretation of Community Law by the European Court of Justice" , *German Law Journal*, 2009, 533-560, 544.

[12] J.Callewaert, "'Unionisation' and 'conventionisation' of fundamental rights in Europe: the interplay between union and convention law and its impact on the domestic legal systems of the member states", in J. Wouters-A. Nollkaemper- E. de Wet (eds.), *The Europeanisation of International Law. The Status of International Law in the EU and its Member States*, 2008, T.M.C. Asser Press, 2008,109-135.