



PRESENTAZIONE DEL VOLUME

Informazioni generali

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Informazioni sul volume

Il principio fondamentale dell'ordinamento internazionale che postula la supremazia del diritto internazionale sul diritto interno sancisce l'impossibilità di invocare quest'ultimo per giustificare la violazione di obblighi internazionali. Opinioni dottrinarie, esempi di prassi e decisioni giudiziarie, tuttavia, ammettono la possibilità di richiamare i principi costituzionali fondamentali come causa di esclusione dell'illecito internazionale.

Questa monografia esamina le possibili strade argomentative che possono percorrersi per giustificare tale affermazione, a partire dall'ipotesi che si formi una specifica norma consuetudinaria secondo cui i principi supremi della costituzione nazionale siano invocabili come causa di esclusione dell'illecito internazionale. Una seconda via da considerare si apre quando si provi a inquadrare i valori supremi protetti dalle Costituzioni nazionali nell'ambito degli interessi essenziali dello Stato in virtù dell'esimente della necessità, codificata all'art. 25 del Progetto di articoli sulla responsabilità degli Stati. Da ultimo occorre analizzare l'approccio adottato quando si sposta la questione dal piano del conflitto tra ordinamenti (internazionale e interni) a quello del conflitto tra principi e valori che, pur tutelati dalle costituzioni nazionali, sono riconosciuti e protetti anche nell'ordinamento internazionale.

Lo studio così condotto consente di concludere che, allo stadio attuale di evoluzione dell'ordinamento internazionale, gli Stati che oppongono la tutela dei principi fondamentali delle proprie Costituzioni all'attuazione di obblighi internazionali non possono pretendere di restare esenti da responsabilità internazionale, anche se la prassi in questione non resta priva di effetti sul piano dell'ordinamento internazionale.

Abstract in inglese

The supremacy of international law over domestic law constitutes one of the greatest and fundamental principles of the international legal order. Its main and most important corollary is that States cannot invoke the provisions of their domestic law, including constitutional law, to justify the breach of an international obligation, irrespective of its source. This principle, which has customary nature, has been codified in Article 27 of the Vienna Convention on the Law of Treaties and Articles 3 and 32 of the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts.

However, the recent practice of States reveals an increasing tendency to invoke the need to abide with the fundamental or supreme principles of national constitutions as a justification for the failure to perform an international obligation. In particular, more and more often domestic courts, especially supreme and constitutional courts, have argued that an international norm or an international judgment could not be implemented in the domestic legal order as this would have entailed a violation of some fundamental principle enshrined in the national constitution. In so doing, they oppose their fundamental constitutional principles as “counter-limits” which prevent the entrance within the domestic legal system of norms which are incompatible with them.

The present book aims at assessing this practice from the standpoint of the international legal order. In theory, on the basis of the principle of supremacy, the invocation of fundamental constitutional principles does not deprive an act of its wrongful character under international law. Accordingly, such a conduct entails the commission of an internationally wrongful act and the international responsibility of the State concerned. However, it may be argued that international law nowadays recognises the legitimacy of such a conduct and stipulates that, when grounded on the need to conform to some constitutional principles of a fundamental importance, the breach of an international obligation would not entail the international responsibility of the State concerned. The book presents three different argumentative strategies which, in theory, can be advocated in order to justify such an assumption.

Chapter I deals with the hypothesis that the abovementioned practice of State has given rise to a new international customary norm, which would constitute an exception to the principle of supremacy of international law. According to such a hypothetical custom, the breach of an international obligation would be justified if committed on the basis of the need to conform with a constitutional principle of fundamental importance. The Chapter examines the method for the identification of customary international law and the relevance that, in this regard, is to be attributed to decisions of domestic courts. Having examined the relevant State practice and the reactions to the latter, the analysis shows that, although the practice in this sense is increasing, it is still insufficient in order to justify the formation and identification of a new customary norm which would prevent the wrongfulness of such a conduct.

Chapter II proposes to qualify the fundamental or supreme principles of national constitutions as “essential interests” of the State, within the meaning of the circumstance precluding wrongfulness codified in Article 25 of the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, notably the state of necessity. It will be argued that, on the basis of such norm, a State would be entitled to demonstrate that the breach of an international obligation constituted the only mean to prevent an irreparable harm to one of its fundamental constitutional principles. The Chapter examines the conditions established under Article 25 to invoke the state of necessity, and the (scarce) State practice and international case-law in this regard. It concludes that, due to the absence of relevant State practice, this hypothesis, although theoretically sound, appears to be practically unfeasible.

Chapter III concerns the different approach consisting in transposing the conflict between international law and fundamental constitutional principles to the international plane. It observes that the fundamental principles of domestic constitutions may happen to coincide, from a substantial point of view, with international norms or with values and interests protected by the international legal order. Accordingly, the conflict between those constitutional principles and international norms might be examined as a conflict between international norms. Such conflicts might be solved through the balancing technique. The Chapter examines the relevant State practice through the lenses of such approach and tries to assess whether it can be considered acceptable by international courts. The analysis shows that international tribunals are still reluctant to admit that a breach of an international

obligations might be justified when aimed at protecting fundamental constitutional principles, even when they coincide with values and interests protected under international law.

The book concludes that, at the current stage of development of international law, States cannot claim not to commit an international wrongful act when they oppose their fundamental constitutional principles against their international obligations. It appears, in particular, that it is not possible to identify any exception to the principle of the supremacy of international law over domestic law. Accordingly, States cannot invoke domestic law in order to justify the breach of their international legal obligations. However, the States' practice which has been examined is not entirely deprived of relevance. When States invoke fundamental constitutional principles which coincide with values and interests protected by the same international legal order, their practice is capable of pushing towards a development of international law towards a system which is more compatible with the protection of those values and interests such as, in particular, the protection of the individual's fundamental rights.