Chapter 20

Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations

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I. Introduction

International law may, to the extent it contains mandatory obligations, either order or prohibit a particular behavior of States.¹ The international obligation in question may address the prescriptive, the executive or (then mostly indirectly) the adjudicative function of States. Both orders and prohibitions imply per definitionem some kind of restraint on the freedom of State action. Such limitation of State action or obligation to act may materialize on the international as well as on the domestic level or on both. This means that the State in question either has to undertake a particular action vis-à-vis other States or the community of States or it has to enact a particular legislation or to modify its executive or its adjudicative actions. Regardless of the level where the international obligation materializes itself according to Article 26 of the Vienna Convention on the Law of Treaties² it is the obligation of each individual State to ensure the implementation of its international treaty obligations in good faith. The content of this provision seems to be quite straightforward.

As far as the implementation of international obligations are concerned, the Draft Articles of the International Law Commission on State Responsibility (ILC) in their

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¹ The basis for this contribution is that international obligations are of a legally binding nature and can thus limit the freedom of decisions of States in international relations although not necessarily all provisions of an international treaty impose such limits. This approach deviates, to some extent, from the one of Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005), which places more emphasis on the coincidence of interest, coordination, cooperation and coercion, id. at 10 et seq., and even more fundamentally from the one of Robert Kagan, Of Paradise and Power. American and Europe in the New World Order (2005). But there is no place here to discuss their approaches.

² 1155 U.N.T.S. 331.
first reading\textsuperscript{3} painted a more complex picture of what constitutes a breach of international law. They distinguished between two kinds of international obligations, namely obligation of conduct and obligation of result. The former were defined as obligations that must be implemented through conduct, i.e. means specifically determined by the international obligation itself which is not true for the obligation of result. With “obligation of result” the ILC meant an international obligation that requires the State to ensure the obtainment of a particular situation—a specified result\textsuperscript{4}—and leaves it for that State to achieve such a situation or result by means of its own choice. In other words, the distinction between obligations of conduct and those of result depends on whether the international obligation concerns the performance (or omission) of a particular act or the establishment/maintenance of a particular situation.\textsuperscript{5} This distinction is not reflected in the final version of the ILC Articles on State Responsibility since the ILC intentionally refrained from specifying the content of the primary rules of international law and the obligation thereby created for a particular State.\textsuperscript{6}

As stated explicitly in the commentary to the Articles on State Responsibility, it is not for these rules to determine the scope and content of an international obligation.

\textsuperscript{3} Article 20 read: “There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.” The Sixth Report of the Special Rapporteur on State responsibility, Roberto Ago, had originally recommended the following definition: “A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required.” Article 20, [1977] 2 Y.B. Int’l L. Comm’n pt. 1, at 8.

Article 21 reads in its relevant part: “1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.” The definition of the Special Rapporteur read: “(1) A breach of an international obligation requiring the State to achieve a particular result \textit{in concreto}, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.” \textit{Id.} at 20. See, on this draft and the classification of international obligations as those of result or conduct, Jean Combacau, \textit{Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse}, in \textit{MÉLANGES OFFERTS À PAUL REUTER, LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ} 181 et seq. (D. Bardonnet ed., 1981).

\textsuperscript{4} This result can be defined positively or negatively, for example, not to resort to military force, in violation of Article 2, paragraph 4, of the U.N. Charter.

\textsuperscript{5} It has to be acknowledged that it will be sometimes difficult to distinguish between an obligation of omission and an obligation to maintain a particular situation.

\textsuperscript{6} 37 I.L.M. 440 (1998). Article 12 of the Articles on State Responsibility reads: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”