

ILA Study Group on Due Diligence in International Law

Second Report

July 2016

Tim Stephens (Rapporteur) and Duncan French (Chair)

INTRODUCTION

The ILA Study Group on Due Diligence was established to consider the extent to which there is a commonality of understanding between the distinctive areas of international law in which the concept of due diligence is applied.¹ The members of the Study Group are listed in the Annex at the conclusion of this Second Report.

The First Report (2014) set out the initial work of the Study Group. It provided a summary of the history of due diligence in international law, the development of due diligence in the context of State responsibility, and the role of due diligence in several specific areas of international law. The First Report examined in some detail a number of disciplinary areas where due diligence has been deployed to supply content to obligations of conduct, namely international investment law, international human rights, transnational criminal law and international environmental law. The primary purpose of the First Report was to map how due diligence is utilised in those selected fields of international law.

This Second Report is not intended to be a continuation of this mapping exercise. It undertakes a thematic and analytical, rather than sectoral, approach. It is therefore concerned less with *how* due diligence is used in specific fields and more with broader, analytical questions, concerning *what* functions due diligence serves, and *why* it is employed as a standard of conduct in many and varied areas of international law.

The Second Report is divided into three Parts. Part 1 introduces overarching issues and questions, such as the relevance and appeal of due diligence across international law, whether as a result it constitutes a broader principle, and whether it is susceptible to clear and concise definition in these terms. Part 2 turns to operational issues, namely the normative content of due diligence in terms of standards of good governance and administration, and the factors that may influence variability in this standard (such as levels of economic development). Part 3 considers specific areas of contention where some of these normative and operational issues are being played out and are most visible, including in relation to the performance and responsibility of business enterprises and international organisations.

¹ Due Diligence in International Law, Mandate, available at <http://www.ila-hq.org/download.cfm/docid/EB075BB9-E130-4B48-99745A01E9E1E8FB>.

In compiling the Second Report the Rapporteur has had the benefit of significant contributions from several Study Group members, and these are acknowledged in footnotes accompanying those sections of the Second Report that draw from these contributions.²

PART 1 – OVERARCHING ISSUES AND QUESTIONS

A – Why due diligence is (so regularly) employed as a standard of conduct in various areas of international law

At its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, of reasonable care, that seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided by the State or international organisation that either commissioned the relevant act or which omitted to prevent its occurrence. The resort to due diligence as a standard of conduct should be seen against the backdrop of general approaches to accountability in international law.

Due diligence is core to many areas of international law for the primary reason that there is no uniformity in the standard of conduct expected of States or international organisations in discharging their international legal responsibilities that range across a wide arena of obligations and potential harms to other actors. With limited exceptions (for instance in relation to the management of hazardous materials or activities³) international law has not embraced strict or absolute liability. And as international law develops into new, more complex, areas (e.g., in response to cyber-attacks), due diligence is increasingly viewed as an important tool in responding to such challenges.⁴

In international law obligations of conduct are far more common than obligations of result. This means that international law tends to focus primarily on the behaviour of States rather than the outcomes of that behaviour. Due diligence standards preserve for States a significant measure of autonomy and flexibility in discharging their international obligations. Rigid application of international rules, mandating results, or imposing liability in the event of breach in any circumstance cuts against the grain of notions of State sovereignty and domains of non-interference.

The use of due diligence makes the international legal system adaptable to meet particular needs of States within a diverse international community. Akin to the margin of appreciation (*marge d'appréciation*) concept developed in European human rights jurisprudence,⁵ due diligence avoids perfect parity of obligations in favour of a more flexible approach to performance so as to encourage broader

² The Rapporteur also acknowledges the research assistance provided by Mr Jialu Xu, a fourth year LLB student at the Sydney Law School, University of Sydney, Australia.

³ See, for example, the Convention on International Liability for Damage Caused by Space Objects 1972, article II of which provides that 'A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.'

⁴ See further the work of the ILA Study Group on Cybersecurity, Terrorism and International Law, available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1050, and the Tallinn Manual on the International Law Applicable to Cyber Warfare, available at <https://ccdcoe.org/research.html>.

⁵ See Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 906.

participation in treaty and customary regimes. In doing so it is a strategy to avoid oscillation between apology and utopia. As Koskenniemi has observed in relation to 'particularism' within customary international law standards:

It is commonplace to read the most varied kinds of contextual determinants into the ascertainment of [a] State's customary obligations. Classically, this has been so in respect of rules of State responsibility and especially the customary standard of due diligence. More recently, the search for equitableness has affected the law on, for example, natural resources, treatment of individuals, State succession or the status of non-State actors.⁶

Due diligence as an open-ended standard or principle therefore avoids difficulties that can arise in agreement on precise rules (which may be impossible to achieve) and in the enforcement of such rules (which may be controversial if indeed achievable). Again, borrowing from Koskenniemi, due diligence can be seen as a technique of proceduralisation, deferring controversial inquiries as to the content of substantive rules regulating wrongdoing to less controversial questions relating to informed decision-making and process. Rather than posing answers to questions of breach, due diligence instead tends to inquire whether States have taken reasonable and appropriate steps to avoid or mitigate injury to other States.

The effect of due diligence is therefore, in some contexts, to dilute the stringency of State obligations. However, there may be sound reasons for this. Less rigid focus on the equivalence of obligations may encourage broader participation in an international regime, and thus, paradoxically, over time the regime may be strengthened (or, in relation to customary rules, State practice and *opinio juris* might develop the necessary extent and clarity to support its crystallisation). Moreover, and as a related point, the content of due diligence duties themselves are not fixed. They can and do evolve over time. Hence while a broad due diligence obligation may be an initial strategy to promote participation, once involvement increases the strictness of the applicable standard can be enhanced and mature into a more demanding system of legal accountability. An example of this is the obligation to undertake environmental impact assessment which has now been considered by the ICJ on several occasions and progressively strengthened.⁷

There are stark disparities in the capacity of States to fulfil international obligations and, appropriately, States from the Global South may appeal to the apparent forgiving character of due diligence as a benchmark for the performance of obligations. Due diligence introduces flexibility in this respect to serve a broader international community objective to ensure that States with limited economic capacity can participate in the international legal system without being burdened by unreasonable normative demands.

⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), p. 391.

⁷ *Pulp Mills on the River Uruguay, Case Concerning (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 (*Pulp Mills Case*); *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment of 16 December 2015 (cf. the Separate Opinion of Judge Donoghue's in which she observed that due diligence and environmental impact assessment should not be fixed and prescribed, and that there should be 'scope for variation in the way that States of origin conduct the assessment').

However there are a number of contexts in which such exceptionalism has its limits or does not apply at all. For instance in the law applicable to diplomatic missions and diplomatic immunity, special duties of protection apply irrespective of the capacity of the receiving State.⁸ Crawford explains that this 'creates a special standard of care over and above the normal obligation to show due diligence in protecting aliens within the State.'⁹ Another example is in relation to the law of the sea. In *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Seabed Mining Advisory Opinion)*¹⁰ the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) rejected the argument that the stringency of marine environmental protection obligations could be adjusted according to the level of development of a State. It would 'jeopardize uniform application of the highest standards of protection of the marine environment' if 'sponsoring States "of convenience"' became prevalent.¹¹ This decision can be seen as one that balances two competing community objectives in relation to due diligence. On the one hand an objective, enshrined in the notion of common but differentiated responsibility, which takes account of the historical and economic disadvantages faced by developing States, with, on the other hand, the collective community interest in protecting global environmental commons.

Due diligence is imbued with differing content according to the specific area of international law in which it is invoked. This is illustrated in the most recent decision of the ICJ concerning transboundary environmental damage: the joined proceedings in *Costa Rica v Nicaragua; Nicaragua v Costa Rica*.¹² These proceedings concerned two separate claims:

1. By Costa Rica against Nicaragua, for Nicaragua's military occupation of Costa Rican territory and for Nicaragua dredging a channel in the occupied area, as well as a separate claim that Nicaraguan dredging works on the San Juan River was in violation of international law;
2. By Nicaragua against Costa Rica, for Costa Rica carrying out major road construction works in the border area between the two countries on the San Juan River, in violation of international law.

In the first claim, the Court found that Nicaragua had breached Costa Rican territorial sovereignty and awarded reparations on that basis. In relation to the environmental claim, however, after affirming previous ICJ jurisprudence on the need for environmental impact assessments and for consultation with affected States, the ICJ found that Nicaragua did not breach international environmental law obligations by engaging in dredging activities, as it did not give rise to a risk of significant transboundary harm and thus did not activate the need to carry out an environmental impact assessment.

In the second claim, the Court reaffirmed the need for environmental impact assessments where there is a risk of significant transboundary harm. The Court

⁸ Vienna Convention on Diplomatic Relations 1961, Article 22(2).

⁹ James Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012), p. 403.

¹⁰ (2011) 50 ILM 458.

¹¹ *Ibid*, para. 159.

¹² *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment of 16 December 2015.

ruled that Costa Rica had failed in its obligations to engage in a proper environmental impact assessment, as it did not make its assessments prior to construction but rather did so after construction, thus not satisfying the requirements for environmental impact assessments at customary international law. However, the evidence did not ultimately show that the construction of the road caused significant transboundary harm to Nicaragua.

Thus this most recent decision of the ICJ affirmed the following principles:

- That due diligence involves an obligation to carry out an environmental impact assessment if there is a risk of significant transboundary harm (following *Pulp Mills*);
- That where the environmental impact assessment confirms a risk of significant transboundary harm, due diligence requires that the State planning to undertake the activity notify and consult in good faith with the affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk;
- The obligation to carry out an environmental impact assessment requires the assessment to be done *ex ante*, not *post hoc* after construction has already started;
- The procedural obligation to undertake environmental impact assessment is distinct from the substantive obligation (not to cause transboundary harm).

It remains to be seen however, whether due diligence is strengthened or diluted by this apparent move to separate procedural and substantive obligations. As Brunnée notes, 'it appears as if the ICJ distinguishes between the duty to take diligent steps to *prevent* significant transboundary harm, which it then deals with under the rubric of separate procedural obligations, and the duty to take diligent steps not to *cause* harm, which it considers cannot be violated simply by a failure to act diligently'.¹³

B – Whether due diligence embraces/constitutes a broader principle of international law¹⁴

The core content of the due diligence principle was articulated in the *Corfu Channel* case,¹⁵ namely 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. This principle has developed over a lengthy period, is now clearly a part of customary international law, and reflects cornerstone concepts of international law (including State sovereignty, equality, territorial integrity, and non-interference).

The tri-partite core of the due diligence principle is as follows:

- A sovereign State is obligated to ensure;
- That in its jurisdiction (which includes all those spaces where the sovereign exercises formal jurisdiction or effective control¹⁶);

¹³ Jutta Brunnée, 'Procedure and Substance in International Environmental Law: Confused at a Higher Level' (2016) 5 *ESIL Reflections* 6 (June 3, 2016).

¹⁴ This section is based upon a submission to the Rapporteur by Study Group Member Eric De Brabandere.

¹⁵ *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), [1949] ICJ Rep 4.

¹⁶ *Al-Skeini v UK* [2011] ECtHR 55721/07.

- Other States' rights and interests (including those with respect to the protection of their citizens and companies) are not violated.

This broad principle of due diligence can be understood as underlying more specific rules of due diligence. Hence, it can be viewed as a default standard that is triggered in operation if no more specific elaboration of due diligence or stricter standard is in existence.

Subject to specific primary rules, this general principle of due diligence remains applicable and requires active (though not easily identified) measures of due diligence by States in their own territory. Even if the content of due diligence is very general, it is clear that its requirements are defined at the level of international, rather than national, law. Today, of course, many areas of State behaviour are covered by more detailed primary rules of international law. An example is the treatment of aliens, which was once a major arena for the application of due diligence but is less so today because of the application of human rights and investment protection law.

The question was raised in the First Report of the Study Group as to whether it would be desirable to interpret and understand the due diligence standard only within its particular context. As was stated in the First Report:

Normative and institutional fragmentation has revealed significant divergences in the application of due diligence, both in terms of the scope of its application, and also seemingly its content. Nevertheless, the idea that there is a common standard persists. To mention one contemporaneous example; the obligation on States "to refrain from...acquiescing in organized [terrorist] activities within its territory directed towards the commission of such acts [in another State], when the acts referred to in the present paragraph involve a threat or use of force". How should one approach such an obligation? If it is accepted for the moment that the standard required of the host State is that of due diligence, to what extent is this an obligation that flows from the Court's comments in *Corfu Channel*? Or must the application of the due diligence standard be interpreted and understood only within its particular context?

Given the generality of the due diligence principle, as articulated in the *Corfu Channel* case, it may be argued that there is no contradiction between the general standard and more specific expressions of due diligence in sub-branches of international law. The broader obligation of due diligence underlies the more specific instances of due diligence, which will become operational if they apply in a given situation. As there is no norm-conflict between the very general due diligence and these more specific manifestations, it seems also justified to say that no conflict of law rules are needed to resolve these (such as *lex generalis* and *lex specialis* rules).

PART 2 – OPERATIONAL ISSUES

A – Matters affecting whether the standard of due diligence is met¹⁷

¹⁷ This section is based upon a submission to the Rapporteur by Study Group Member Eric De Brabandere.

This section of the Second Report addresses the substantive content of due diligence, that is what can be expected of a State which has assumed a due diligence obligation.

The issues addressed in this section are linked to the issues covered in Part 2.B below ('Whether there are factors that can vary this standard'). The question is also closely linked to the objectivity or subjectivity of the standard of conduct. It is acknowledged that a primary rule may set out one or more elements to assess in determining whether a State has met a due diligence obligation.¹⁸

It is suggested that it is possible to identify a number of elements that may be considered core to due diligence as a standard of conduct. Precisely how the due diligence standard is applied is still subject to considerable discussion and debate (as befits a principle which derives much of its utility because of its general character). Courts and tribunals often provide little in the way of detailed analysis of the standard and whether it has been met in the circumstances.¹⁹ There is an important secondary issue here; due diligence is a positive obligation on States but will tend to be assessed on an *ex post facto* basis to determine compliance and responsibility. For obligations of result, ascertaining (il)legality – though often not without uncertainty – is usually less problematic. But in terms of due diligence, how can States ascertain clearly, and in advance, that they are satisfactorily meeting – and continuing to meet – their obligations of conduct?

'Reasonableness' as the overarching standard

It is difficult to define the standard in absolute terms, as was acknowledged in the *Seabed Mining Advisory Opinion*:

The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time...²⁰

At the same time, the difficulty in defining the standard does not imply that the obligation to act in due diligence has no content. The due diligence standard, from this perspective, bears some resemblance to those rules of international law which leave States discretion in deciding which specific measure can be taken in order to comply with an obligation. States have significant latitude in the choice of means they employ when taking all measures they could reasonably be expected to take. However, discretion in the choice of means can be limited either because (1) the primary norm in itself may explicitly prescribe certain means, such as specific duties to legislate in order to prevent and repress certain conduct, or (2) a specific type of

¹⁸ For example, article 18 of the International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197, requires States parties to adopt domestic legislative measures directed at 'financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity.' Another example is article 7 of the United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209, requiring imposition by parties of a 'comprehensive' domestic supervisory and regulatory regime for banks and non-bank financial institutions.)

¹⁹ See, for example, *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, paras. 189-190.

²⁰ (2011) 50 ILM 458, para. 117.

measure is indispensable to avoid harm. Where regulation is necessary for States to meet an international obligation effectively, custom may develop into an express duty on States to regulate (e.g. in order to regulate potentially harmful activities). As such, due diligence has been described as ‘a flexible reasonableness standard adaptable to particular facts and circumstances, provid[ing] the underlying legal framework. It amounts to “due, or merited, care”’.²¹

Although difficult to define in precise terms, several elements can be derived from case-law and treaty practice to identify core features of due diligence as a concept and principle.

Reasonableness

‘Reasonableness’ is a golden thread in determining which measures States should take to act in a duly diligent manner.²² Indeed, one might describe a due diligence obligation as an obligation for the State to take *all measures it could reasonably be expected to take*.²³ Even in the instance of preventing a gross violation of international law from occurring, such as the commission of genocide, the standard articulated by the ICJ in order to incur international responsibility was that a State ‘manifestly failed to take all measures’ that were ‘within its power’ to take.²⁴

In the history of international law, due diligence in the context of the protection of aliens was expressed as the need for States to take all measures it could ‘reasonably’ be expected to take.²⁵ For example, in the *Wipperman* case it was stated that no State is responsible for acts of individuals ‘as long as *reasonable diligence* is used in attempting to prevent the occurrence or recurrence of such wrongs.’²⁶ In the *Neer* case, often quoted as representing the international minimum standard, the Claims Commission described the international minimum standard in these terms:

the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every *reasonable* and impartial man would readily recognize its insufficiency.²⁷

²¹ RP Barnidge Jr, ‘The Due Diligence Principle Under International Law’ (2006) 8 *International Community Law Review* 118 citing C Corino, ‘Environmental Due Diligence’ (2000) 9 *European Environmental Law Review* 120, 120.

²² See also Ian Brownlie, *Principles of Public International Law* (7th ed, 2008), p. 526 and Helge E. Zeidler, ‘The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harm Caused by Private Actors’ (2005) 3 *Stockholm International Arbitration Review* (2005), 1.

²³ Jeswald W. Salacuse, *The Law of Investment Treaties* (2010), p. 217.

²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 Feb 2007, ICJ Reports 2007 para 430. (emphasis added) (*Genocide case*)

²⁵ See also International Law Association, Study Group on Due Diligence in International Law, First Report (7 March 2014) <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045> pp. 2 ff.

²⁶ John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol III, p. 3041 (emphasis added).

²⁷ General Claims Commission (Mexico and United States), *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Decision of 15 October 1926, IV UNRIAA, pp. 60-66, at pp. 61-62 (emphasis added).

Reasonableness has echoes in subsequent practice, well beyond the treatment of aliens and diplomatic protection. In relation to the UN Guiding Principles on Business and Human Rights,²⁸ developed by John Ruggie as Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, similar references to ‘reasonableness’ can be found. In this context the concept of due diligence, applicable to transnational corporations, is defined as:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, *a reasonable and prudent [person or enterprise]* under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that *a reasonable and prudent enterprise* needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.²⁹

Similar references are found in corporate due diligence obligations in transnational criminal law,³⁰ and in relation to the progressive realisation of human rights.³¹ The Draft Articles on Prevention of Transboundary Harm from Hazardous Activities also contain references to ‘reasonableness’.³²

Yet, the term ‘reasonable’ is, as the due diligence standard itself, difficult to determine *in abstracto*, and leaves States much discretion in the choice of means. Reasonableness implies an evaluation of the measure taken by reference to what could be *expected* from a State. And this is problematic to define, since what could be *expected* from a State cannot be ascertained in general terms. The assessment of the reasonableness of the measures taken depends also, *inter alia* on the question whether ‘what is reasonable’ is assessed through a standard which takes into account the level of development of a State.

Good government

The expectation of ‘good government’ as an element of duly diligent behaviour finds some support in the writings of publicists and in international case law. The parameter here is closely linked to the general standard of ‘reasonableness’ and the potential variability of the due diligence standard according to the State’s level of development.

²⁸ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Human Rights Council, UN Doc. A/HRC/17/31 (March 21, 2011).

²⁹ UN Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), at p. 4 (emphasis added).

³⁰ See First Report, above n 25, p. 22.

³¹ Influenced by the South African Constitutional Court’s jurisprudence on progressive rights realisation, the new OP-ICESCR contains language referring to ‘reasonableness’ in article 8, para. 4 of the OP-ICESCR. See also Evelyne Schmid, ‘Thickening the Rule of Law in Transition: The Constitutional Entrenchment of Economic and Social Rights in South Africa’ in Edda Kristjánsdóttir, André Nollkaemper and Cedric Ryngaert (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (2012), p. 73.

³² International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN GAOR 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), Commentary to article 3, para. 10.

In his 1955 Hague Academy lecture, Freeman noted that the standard of due diligence requires 'nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.'³³ Some investment tribunals have posited the need for States to act 'in accordance with the parameters inherent in a *democratic State*',³⁴ in order to delimit what could reasonably be expected from a State. In *AAPL v. Sri Lanka*, the Tribunal noted

A number of other contemporary international law authorities noticed the "sliding scale", from the old "subjective" criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an "objective" standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.³⁵

Such an approach also is implicit in the *Seabed Mining Advisory Opinion*.³⁶

International minimum standard and national treatment

Notwithstanding the ascendance of the international minimum standard, a matter sometimes referred to in mistreatment of alien cases in assessing whether a due diligence standard is met, and whether the acts taken by the State are 'reasonable,' is how a State has treated its own nationals. Treatment of a foreign national may be considered unreasonable if it is of a lesser quality and degree than that normally provided to nationals.³⁷

In the *Alabama Claims Arbitration*,³⁸ the British government argued, unsuccessfully, for a (restrictive) national standard, contending that a lack of due diligence meant 'a failure to use...such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation.'³⁹ Max Huber in *British Property in Spanish Morocco case*⁴⁰ observed that:

Vigilance, which from the point of view of international law the State is required to guarantee, can be characterized by applying by analogy the Roman law term of *diligentia quam in suis*. This rule, consistent with the overriding principle of the independence of States in their internal affairs, in fact offers States, for their nationals, the degree of security which they can

³³ A.V. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces', 88 RCADI (1955-II) 263, pp. 277-278.

³⁴ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 177 (emphasis added).

³⁵ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 77 (internal references omitted).

³⁶ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, para. 158.

³⁷ Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors' (2005) 3 *Stockholm International Arbitration Review* 1, p. 16.

³⁸ *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 RIAA 125, p. 129.

³⁹ Case presented on the Part of the Government of Her Britannic Majesty in Papers relating to Foreign Relations of the United States 1872, part 2 vol 1, p. 412.

⁴⁰ *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) (British Property in Spanish Morocco)*, Decision of 1 May 1925, II UNRIAA, pp. 615-742.

reasonably expect. As long as the vigilance exercised clearly falls below this level *compared to nationals of a foreign State*, the latter is entitled to consider this to be an injury to its interests which should enjoy the protection of international law.⁴¹

This element implies that at least some account is taken of the capacities of the relevant State and its relative level of development.

Control over territory and non-State actors

International humanitarian law contains specific due diligence obligations within both treaty and customary international law, and in some situations it requires, for the standard to be applied, that the State should have control over its territory.⁴² Also connected to the issue of control, which goes to the reasonableness of State action (or inaction) in some circumstances, is the degree of influence a State has over non-State actors.

In the *Nicaragua* case the ICJ applied the 'effective control' test for determining whether the United States was responsible for the actions of a paramilitary force.⁴³ In *Prevention and Punishment of the Crime of Genocide (Bosnian Genocide case)* the ICJ reaffirmed the 'effective control' test.⁴⁴ In contrast, the ICTY in *Tadić* contended that the less demanding 'overall control test' ought to apply both in determining whether a conflict was international in character, and whether the actions of the Bosnian Serbs could give rise to the international responsibility of the Former Republic of Yugoslavia.⁴⁵ Given that the application each test turns on the level or degree of control exercised then due diligence is relevant to both. In the *Bosnian Genocide case* the ICJ explained the operation of the due diligence principle in relation to the obligation to prevent genocide:

In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.

⁴¹ Ibid, p. 644 – original in French – translation by Eric De Brabandare.

⁴² Geneva Conventions I-IV 1949, 75 UNTS 287, articles 1 & 3; *Prosecutor v Akayesu* (Appeal) ICTR-96-4 (1 June 2001); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Prosecutor v Tadić* (Appeal) ICTY-94-1 (15 July 1999); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Case Concerning the (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43; Yeager v. *The Islamic Republic of Iran*, Iran-US Claims Tribunal (1987) 17 CTR 92, pp. 101–104; Nigel White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 *Criminal Justice Ethics* 233.

⁴³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Rep 14, p. 126

⁴⁴ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment), [2007] ICJ Rep 43 (*Bosnian Genocide case*).

⁴⁵ *Prosecutor v Tadić*, International Criminal Tribunal for the Former Yugoslavia (ICTY), Appeals Chamber, 1999 (Case no. IT-94-1-A).

The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.⁴⁶

Degree of risk

As noted in the *Seabed Mining Advisory Opinion*, '[due diligence obligations] may also change in relation to the risks involved in the activity.'⁴⁷ This is also reflected in the ILC's Draft Articles on the Prevention on Transboundary Harm. The Commentary to Article 3 of the Prevention Articles explains that due diligence standard should be 'appropriate and proportional to the degree of risk of the transboundary harm'.⁴⁸ The UN Guiding Principles on Business and Human Rights also accepts that due diligence requirements increase in situations in which the risks of harm are known to be particularly significant.⁴⁹

Knowledge of an activity or potential risk

States can usually only be expected to act in accordance with a due diligence obligation to prevent harm if the State has knowledge of the situation which requires action.⁵⁰ However, in some circumstances a State may be under a specific obligation to use best efforts to gain knowledge of activity within its territory or jurisdiction.

The State has a due diligence obligation to monitor certain kinds of activities taking place on its territory or under its jurisdiction. As observed in the *Corfu Channel* case, 'the fact of...exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events.'⁵¹ It may allow the State which is the victim of an international wrong 'a more liberal recourse to inferences of fact and circumstantial evidence.'⁵² In

⁴⁶ *Bosnian Genocide* case, [2007] ICJ Rep 43, para. 403.

⁴⁷ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, para. 117.

⁴⁸ International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN GAOR 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to article 3, para. 11.

⁴⁹ *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Human Rights Council, UN Doc. A/HRC/17/31 (Mar. 21, 2011). Principle 17(b) explicitly states that due diligence 'will vary in complexity with ... the risk of severe human rights impacts'. See also Principle 7, requiring States to pay particular attention to the human rights-related risks of businesses operating in conflict-affected areas, and Principle 3 (assessing the adequacy of laws in light of evolving circumstances) and Principle 21 (formal reporting where business operations or contexts pose risks of severe human rights impacts).

⁵⁰ Helge E. Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors', 3 *Stockholm International Arbitration Review* (2005) 1, p. 14.

⁵¹ *Corfu Channel* case [1949] ICJ Rep 1, p. 18.

⁵² *Ibid.*

that case, the Court concluded that the laying of the minefield in the channel ‘could not have been accomplished without the knowledge of the Albanian Government.’⁵³ Albania was held responsible because it either knew or should have known about the activity.

Bad faith/absence of any measure

A State cannot be considered to have acted diligently when the State has acted in bad faith or has knowingly refused to take any measures whatsoever. This was the case, for example, in *Wena v. Egypt*⁵⁴, in which the Tribunal found that the failure by the State to take any action against those responsible for the forceful seizure of Wena’s property constituted a breach of the full protection and security standard.⁵⁵ This idea is very much in conformity with due diligence as understood in international environmental law, to the extent that a State has to act diligently in the event of foreseeable harm.⁵⁶

2B – What factors, if any, may vary a due diligence standard⁵⁷

It is useful to consider due diligence standards in light of both objective and subjective criteria. An objective standard of due diligence means that all States are held to the same standard, irrespective of their individual characteristics. Subjective standards of due diligence allow for varying expectations of States, taking into account considerations such as the level of development of a State, the degree of control a State has *de facto* over its territory if subject to alien occupation or territorial control by guerrilla forces, or other characteristics that put a State in a unique position at a given time.⁵⁸

Subjective Variation in Due Diligence Obligations

The level of a State’s economic development can have a bearing on the operation of due diligence obligations in some circumstances. For instance, the World Trade Organisation allows States to self-identify as ‘developing countries’ but reserves the designation of ‘least developed countries’ to those accepted by the United Nations Development and Policy Analysis Division.⁵⁹ The World Bank relies on its own World Development Indicators to distinguish low, lower-middle, upper-middle, and high income countries.⁶⁰

In international environmental law, the language and concept of “common but

⁵³ Ibid, 22.

⁵⁴ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 84,

⁵⁵ Ibid, paras. 82, 84 and 94.

⁵⁶ First Report, above n 25, p. 26.

⁵⁷ This section is based upon a submission to the Rapporteur by Study Group Member Rachael Lorna Johnstone.

⁵⁸ Eric de Brabandere, ‘Host States’ Due Diligence Obligations in International Investment Law’ (2015) 42(2) *Syracuse Journal of International Law and Commerce* 319, pp. 354-355.

⁵⁹ World Trade Organisation, ‘Who are the Developing Countries in the WTO?’

<http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 11 February 2015; UN Development Policy and Analysis Division, ‘Who are the Least Developed Countries (LDCs)?’

<http://www.un.org/en/development/desa/policy/cdp/ldc_info.shtml> accessed 11 February 2015.

⁶⁰ The group of high income countries is also divided between OECD and non-OECD members: The World Bank, ‘Country and Lending Groups’ <<http://data.worldbank.org/about/country-and-lending-groups>> accessed 11 February 2015.

differentiated responsibilities” emerged from the Rio Conference on Environment and Development in 1992 and the treaties it produced.⁶¹ Three factors justify such an approach in environmental law. The first is the need to balance environmental protection with economic development of all States on an equitable basis. Measures of environmental protection should be designed and implemented in such a way as to support rather than inhibit States in achieving human development objectives. The second factor is the historical responsibility of developed States for environmental damage since the industrial revolution and their continuing, vastly disproportionate, consumption of the Earth’s resources and contributions to the biggest environmental threat of the Anthropocene: climate change. The third factor is the greater financial and technological capacity of more developed States to shoulder the costs of transition towards more environmentally sustainable use of resources. Reflecting these considerations, the Rio Declaration provides:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.⁶²

Elsewhere, the Rio Declaration requires States to apply the precautionary approach ‘according to their capabilities.’⁶³ The precautionary approach was analysed by the Seabed Disputes Chamber in the *Deep Seabed Mining Advisory Opinion*. On the one hand, the Chamber held that the general provisions of the UN Convention on the Law of the Sea (UNCLOS), especially Part XI, should be objectively defined (i.e. the standard of the good government) as the relevant Part does not explicitly provide for a variable standard.⁶⁴ On the other hand, the Seabed Disputes Chamber held that it was possible that specific Regulations established by the International Seabed Authority under the authority of Part XI, could allow for variable degrees of diligence according to a State’s capabilities.⁶⁵ However, the Chamber was unwilling to read “capabilities” as a reference only to the level of economic development of a State, but rather considered ‘capabilities’ in light of all the circumstances, including the resources, knowledge and technological capability available in fact in each case.⁶⁶ The Chamber no doubt had in mind the scientific expertise of the private contractors that the State in question sponsors.

⁶¹ Rio Declaration on Environment and Development (1992) 31 ILM 876, principle 7; Convention on Biological Diversity 1992 (CBD), 1760 UNTS 79, article 6; United Nations Framework Convention on Climate Change 1992 (UNFCCC), 1771 UNTS 107, article 3(1); United Nations Convention to Combat Desertification 1994 (UNCCD), 1954 UNTS 3, article 6 (this latter does not use the terms “common but differentiated responsibilities” but the concept is implicit).

⁶² Rio Declaration, *ibid*, principle 7.

⁶³ Rio Declaration, *ibid*, principle 15.

⁶⁴ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, para. 158; but see UN Convention on the Law of the Sea 1982 (UNCLOS), 1833 UNTS 397, Part XII, article 194 which requires States to take measures to prevent pollution of the marine environment ‘in accordance with their capabilities’.

⁶⁵ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, paras. 160-161.

⁶⁶ *Ibid*, para. 162.

The Chamber's reasoning indicates its view that whether or not the degree of diligence required varies between developed and developing States pivots on the applicable primary rules. Developing States will only be subject to a reduced standard if provided for in the treaty, binding secondary norms established under the treaty, or in customary law in the relevant, narrow context. Part XI of the UNCLOS contains no such provision. Alternatively, it may be that the common heritage character of the deep seabed and its superjacent high seas preclude the application of common but differentiated responsibilities. The same (common) resources should be treated with the same degree of care by all States.

Within international human rights law, in respect of *some* human rights, there are variable expectations on States according to their economic circumstances. States should take 'all appropriate means' to achieve progressively certain rights, in particular, but not exclusively, economic, social and cultural rights.⁶⁷ Developing States are also permitted to restrict certain economic, social and cultural rights to nationals and exercise a lower standard of diligence in respect of non-nationals.⁶⁸ There may also be a *limited* scope for States at any level of development to reduce human rights protection in times of economic crisis.⁶⁹

International humanitarian law contains specific due diligence obligations both within treaty and customary international law. Nonetheless the extent of control that parties have over territory, whether effective or overall control, as well as the role of non-State parties, including private military contractors and international organisations, results in varying standards of due diligence being applied depending on the circumstances.⁷⁰

Different views are held regarding international investment law as to whether developing States may exercise less diligence than more developed States.⁷¹ One view is that due diligence in this context may be a variable standard for some aspects, such as in the application of the 'full protection and security' (FPS) standard of treatment in relation to acts of third parties, also considered part of the international minimum standard of treatment. However, a common, objective standard of diligence for other aspects applies, such as the State's due diligence obligation in the case of harm caused by acts of third parties, to apprehend and punish those responsible for the acts. This is also part of the FPS standard, an obligation with parallels to the customary norm on the prohibition of a denial of justice, which is considered part of the international minimum standard of

⁶⁷ International Covenant on Economic, Social and Cultural Rights 1966 (ICECSR), 993 UNTS 3, article 2(1); Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), 1249 UNTS 13, article 2. See also International Law Association, Study Group on Due Diligence in International Law, First Report (7 March 2014) <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045> accessed 15 April 2014, p. 16.

⁶⁸ International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, article 2(3).

⁶⁹ Rachael Lorna Johnstone and Aðalheiður Ámundadóttir, 'Human Rights in Crisis: Securing the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Economic Downturns' (2013) 1 *International Journal of Human Rights and Constitutional Studies* 6, pp. 10-20.

⁷⁰ Geneva Conventions I-IV, 1949, 75 UNTS 287, articles 1 & 3; *Prosecutor v Akayesu* (Appeal) ICTR-96-4 (1 June 2001); *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14; *Prosecutor v Tadić* (Appeal) ICTY-94-1 (15 July 1999); *Bosnian Genocide case* [2007] ICJ Rep 43; *Yeager v. The Islamic Republic of Iran*, Iran-US Claims Tribunal (1987) 17 CTR 92, 101-104; Nigel White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 *Criminal Justice Ethics* 233.

⁷¹ See De Brabandere, above n 58, pp. 353-358.

treatment.⁷² The scant attention given by arbitral tribunals to this question however leaves much ambiguity as to the objectivity of the applicable due diligence standard.

As States develop economically and their capacity increases, so too are the requirements of diligence heightened. Furthermore, States do not all develop at the same rate. This has proven controversial in the context of international climate law. Some of the obligations under the Kyoto Protocol were obligations of result (e.g. emissions limits) but the Protocol contained also obligations of due diligence.⁷³ Fast-developing (and high carbon-emitting) China and India maintained that they should be treated as developing countries subject to lower expectations while many Annex B countries rejected what they saw as unfair latitude. This tension was an impediment to effective negotiations under the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol, hampered the setting of targets for the period 2013-2020. The issue of differentiation has been at the heart of negotiations for emission cuts in the post 2020 period. It was resolved to a large extent in the Paris Agreement,⁷⁴ which significantly reduces the differentiation between developed and developing countries in recognition of the need for urgent, global, concerted action to address rapidly unfolding climate crisis.

Another aspect of the common but differentiated responsibility concept is the enhanced duties of developed States. This was a position promoted by developing countries at the Rio Conference but has remained controversial.⁷⁵ It is implicit in Principle 7 of the Rio Declaration but also appears in the UNFCCC according to which developed countries “should take the lead” and the performance of developing countries is made conditional on financial support and technology transfer from developed countries.⁷⁶ The UN Convention to Combat Desertification establishes special obligations of developed country parties, including provision of financial support.⁷⁷ The Convention on Biological Diversity has quite detailed provisions on financial assistance according to which developing States’ performance is made contingent on transfer of financial resources and technology from developed States parties.⁷⁸ The duty to transfer technology and scientific knowledge to developing countries is also found in UNCLOS in the context of exploitation of the deep seabed.⁷⁹

Under human rights law, States’ obligations are primarily to persons within their territory or jurisdiction but the 1966 International Covenant on Economic, Social and Cultural Rights is not jurisdictionally limited.

⁷² Due Diligence in International Law, First Report, above n 67, p. 10. See *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), para. 77 (for the claims that the due diligence standard applies subjectively and objectively, see *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) para. 77 (for the claim that an objective standard generally applies)).

⁷³ Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (Kyoto Protocol), 2303 UNTS 162, article 2.

⁷⁴ 2015 Paris Agreement, available at <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>

⁷⁵ See International Law Association, Report of the Committee on Legal Principles Relating to Climate Change, in the Report of the Seventy-Fifth Conference (The Sofia Conference, August 2012), pp. 442, 445.

⁷⁶ UNFCCC, above n 61, articles 3(1) and 4(7).

⁷⁷ UNCCD, above n 61, article 6.

⁷⁸ CBD, above n 61, article 20; see also article 16 on transfer of technology.

⁷⁹ UNCLOS, above n 36, article 144.

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁸⁰

This could be read to mean that developed States parties should exert best efforts to secure the Covenant rights to all people in all other States parties as well as their own.⁸¹ At the very least, they should exercise due diligence to ensure that activities under their control, including through international organisations in which they play a leading role, do not detract from economic, social and cultural rights abroad.⁸²

Subjective factors aside from economic development can also enhance the degree of diligence required of States. In the *Bosnian Genocide* case, the Court held that the geographical proximity and “political, military and financial links” between the organs of Serbia and the génocidaires in Bosnia meant that Serbia’s duties to take measures to prevent the genocide could be distinguished from those of all other States parties to the Genocide Convention.⁸³ An enhanced degree of diligence can also result from a Court order (as in the case of the two Provisional Orders in the *Bosnian Genocide* case proceedings⁸⁴) or a Chapter VII Security Council resolution directed at a particular State.

Where a State does not have effective control over the entirety of its territory, the degree of diligence expected may also be mitigated accordingly. International law presumes, whether accurately or not, that a State has control over its territory and holds that ‘responsibility is the corollary of sovereignty.’⁸⁵ (The proceedings in the European Court of Human Rights against Ukraine in relation to the shooting down of MH17 is arguably an example of this). However, in reality, situations such as alien occupation or control by a guerrilla force, mean that States cannot provide the same protections to, *inter alia*, their own nationals, aliens, investors or even the environment of neighbouring States under such conditions.

It is not clear, however, that this is truly a question of requiring less *diligence* or instead is a matter of *force majeure* as a (temporary) circumstance precluding

⁸⁰ ICESCR, above n 67, article 2(1)

⁸¹ See Committee on Economic, Social and Cultural Rights, General Comment No. 3 ‘The Nature of States Parties’ Obligations (art. 2, para. 1, of the Covenant)’ (1990) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Vol. I, May 27 2008, HRI/GEN/1/Rev.9 (Vol I) paras. 13-14.

⁸² Committee on Economic, Social and Cultural Rights, General Comment No. 2, ‘International Technical Assistance Measures (Art. 22 of the Covenant)’ (1990), in Compilation of General Comments and General Recommendations Vol I, *ibid.* More ambitiously, see Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) 34 *Human Rights Quarterly* 1084-1169.

⁸³ *Bosnian Genocide* case, [2007] ICJ Rep 43, paras. 430 and 434.

⁸⁴ *Ibid.*, para 435; *Application of the Convention on the Prevention and Punishment of Genocide, Case Concerning the (Bosnia and Herzegovina v Yugoslavia)* (Order for Provisional Measures) [1993] ICJ Rep 3; and *Application of the Convention on the Prevention and Punishment of Genocide, Case Concerning the (Bosnia and Herzegovina v Yugoslavia)* (Order for Provisional Measures) [1993] ICJ Rep 325.

⁸⁵ *Island of Palmas case (Netherlands v United States of America)* 1928, Permanent Court of Arbitration, Arbitrator: Huber, 2 RIAA 829, p. 839.

wrongfulness.⁸⁶ However conceptualized, such circumstances would have no effect on States' duties to uphold norms of *ius cogens*, for instance duties to prevent acts of genocide or torture committed within their territories. On the other hand, occupying States also have due diligence obligations within the territories that they occupy and the extent of their obligations will vary according to the degree of control they exercise.⁸⁷ International organisations, particularly those administering territories or engaged in long-term peacekeeping operations will also hold similar due diligence obligations with regard to *ius cogens* and other human rights and international human rights norms.⁸⁸

Corporate human rights due diligence, as expressed in the UN General Principles, also provides for variable standards of diligence taking into account both the size of the corporation as well as criteria relating to the nature of the company's operations and the risk to human rights.⁸⁹

Objective Due Diligence Obligations

There are some obligations of due diligence for which the same standard is required of all States and no account is taken of the economic resources of a State, its degree of control over its territory or other special characteristics. Here we can consider, *inter alia*, the provisions of the minimum core of economic, social and cultural rights;⁹⁰ certain aspects of the international minimum standards in international investment law;⁹¹ the prevention of terrorism,⁹² international humanitarian law,⁹³ and certain obligations to protect the environment of areas beyond national jurisdiction.⁹⁴ As discussed above, the *Deep Seabed Mining Opinion* concluded that developing States are not to be held to a lower standard in their governance of contractors engaged in deep seabed exploration and exploitation and that they should apply best environmental practices, although it allowed more latitude in respect of the

⁸⁶ Articles on Responsibility of States for Internationally Wrongful Acts 2001 in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, UN Doc A/56/10 (2001), article 23.

⁸⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, p. 253; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras. 102-113.

⁸⁸ Boris Kondoch 'Human Rights Law and UN peace operations in post-conflict situations' in Nigel White and Dirk Klaasen (eds.), *The UN, Human Rights and Post Conflict Situations* (2005) 149; 27-33, Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011) pp. 320-393; Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2010).

⁸⁹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31 (March 21, 2011) (UNGP 2011), general principle 17(b). See also First Report, above n 25, p. 21.

⁹⁰ First Report, *ibid*, pp. 16-17; CESCR General Comment No 3, above n 81, para. 10.

⁹¹ First Report, *ibid*, pp. 6-7; As explained above, the State's due diligence obligation to apprehend and punish those responsible for acts of violence committed towards aliens, whether one considers this as part of the FPS standard or the international minimum standard of treatment, does not allow taking into consideration the means or economic development of the State. See, for example, *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010) para. 422 ff; and *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) paras. 356 ff.

⁹² UN Security Council Resolution 1373 (28 September 2001); UN Security Council Resolution 1540 (28 April 2004).

⁹³ Rome Statute of the International Criminal Court 1998, 2187 UNTS 3, article 5; *Prosecutor v Akayesu* (Appeal) ICTR-96-4 (1 June 2001), paras. 432-445; Geneva Conventions 1949, above n 70; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, 1125 UNTS 609.

⁹⁴ *Seabed Mining Advisory Opinion* (2011) 50 ILM 458, para. 158.

application of the precautionary approach.⁹⁵

ITLOS followed the Seabed Dispute Chamber's interpretation of due diligence in its 2015 advisory opinion on illegal, unreported and unregulated fishing (IUU fishing).⁹⁶ In this advisory opinion, ITLOS did not contemplate the possibility of common but differentiated responsibilities in respect of flag States' obligations 'to ensure' that vessels flying their flag were not engaged in IUU fishing in light of their obligations to preserve and protect the marine environment under Part XII of UNCLOS.⁹⁷ This would seem to support the interpretation that if the primary rule does not explicitly concede a lesser expectation of diligence from developing States, an objective, international standard is to be preferred. Whereas article 194 of UNCLOS requires states to take measures to prevent pollution of the marine environment 'in accordance with their capabilities', UNCLOS does not explicitly differentiate States' duties in relation to prevention of IUU fishing.

The Tribunal in the *South China Sea* arbitration between the Philippines and China agreed with the ITLOS *SRFC Advisory Opinion*, and noted that 'anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.'⁹⁸ The Tribunal observed that '[i]n many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine.'⁹⁹ This is because, the Tribunal said, unlawful fishing will often take place covertly, far from any official presence, and in such circumstances it will be 'far from obvious what the flag State could realistically have done to prevent it.'¹⁰⁰ This was not the situation with this case, however, as Chinese fishing vessels were escorted into the Philippines EEZ by Chinese government vessels.

Due diligence also emerged in the *South China Sea* arbitration in the context of the obligations to protect the marine environment. In interpreting Articles 192 and 194 of UNCLOS, the Tribunal referred approvingly to the *Pulp Mills* case and the *Deep Seabed Mining Opinion*, and noted that the obligation to protect the marine environment entails a duty of due diligence. The evidence disclosed that China's activities, including the poaching of endangered species in the South China Sea which was tolerated and encouraged by the Chinese government, clearly fell foul of the due diligence obligations under Articles 192 and 194.¹⁰¹

Another area in which common but differentiated responsibilities appear to be excluded is in the facilitation of remedies. Commonalities can be seen across international investment law, procedural environmental law, international human rights law, international humanitarian law, and international institutional law, in this

⁹⁵ Ibid, paras. 158-159 and 161.

⁹⁶ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, International Tribunal for the Law of the Sea Case No. 21 (Advisory Opinion) (2 April 2015), paras. 125-129.

⁹⁷ Ibid, paras. 130-140.

⁹⁸ *In the Matter of the South China Sea Arbitration* (Philippines v China), Arbitral Award, 12 July 2016, [744].

⁹⁹ Ibid, [754].

¹⁰⁰ Ibid.

¹⁰¹ Ibid, [964].

regard.¹⁰² The maintenance of competent investigatory bodies, such as police services, criminal courts and tribunals to resolve private law disputes is an obligation of result and hence not a matter of due diligence at all.¹⁰³ Similarly, the provision of reparation and the punishment of those who have been found guilty under criminal law of human rights violations is a strict obligation and not subject to due diligence.¹⁰⁴ However, the quality of any investigation depends on the subjective competence and efforts of individuals working in the institutions. That the investigation be *effective* is a duty of due diligence: the State's organs must exercise their responsibilities *diligently*.¹⁰⁵ A failure to convict a perpetrator according to the rigorous standards of criminal law despite the exercise of best efforts will not constitute a violation of a State's international responsibilities. Nevertheless, there does not seem to be the same scope for reduced *effort* on the part of developing States (or States otherwise constrained by circumstances) in the provision of investigation and remedies.

Significantly, where subjective factors affect the degree of diligence required of States, this is nevertheless still a standard of international law and does not relate to the standard of care States exercise in their own domestic affairs.¹⁰⁶

Variability between Primary Obligations of Objective Due Diligence?

Even where an objective standard of due diligence applies (i.e. all States are treated the same), the degree of diligence required of States varies according to the primary rule in question. In other words, there is not one single standard of diligence that applies to all primary norms (although as discussed elsewhere in this report, there may be a single *baseline* standard of due diligence that underlies all positive obligations that applies in the absence of more specific (and demanding) requirements).

For example, what is considered to be reasonable in exercising diligence to prevent genocide (a violation of a norm of *ius cogens*) will obviously be more demanding than that which is expected for the prevention of harm to property or financial

¹⁰² See eg, First Report, above n 25, p. 10 (international investment); p. 14 (international humanitarian law); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, articles 13-14 (human rights law); International Law Association, Committee on the Accountability of International Organisations, Final Report (2004) <<http://www.ila-hq.org/en/committees/index.cfm/cid/9>> Part Four (on remedies against International Organisations).

¹⁰³ Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9, p. 46; Riccardo Pisillo-Mazzeschi, *Responsabilité de l'état pour violations des obligations positives relatives aux droits de l'homme*, Collected Courses of the Hague Academy of International Law 2008 (2009), Volume 333 p. 335; First Report, above n 25, p. 23; De Brabandere, above n 58, pp. 342-343.

¹⁰⁴ Pisillo-Mazzeschi 1992, *ibid.*, pp. 28-30; Pisillo-Mazzeschi 2008, *ibid.*, p. 351; First Report, *ibid.*, p. 22.

¹⁰⁵ European Court of Human Rights, Application no. 30054/96, *Kelly and Others v United Kingdom* (May 4 2001) para. 96; see also De Brabandere, above n 58, pp. 342-345.

¹⁰⁶ First Report, above n 25, p. 4; ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, commentary to article 3, para. 9 (citing the *Alabama Arbitration (United States of America v United Kingdom)*); Pisillo-Mazzeschi 1992, above n 103, pp. 41-42 (adding that: 'the same conclusions hold with regard to environmental conservation'); Pisillo-Mazzeschi R, "*Due Diligence*" e *Responsabilità Internazionale degli Stati*, Series: Quaderni di <Studi Sensi> Raccolti da Paulo Nardi no. 67 (1989), p. 398-399; Timo Koivurova, 'Due Diligence', in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International Law* (2012), online edition, para. 16.

interests.¹⁰⁷ In this case, the degree of diligence varies according to the importance of the interest requiring protection.¹⁰⁸

In international environmental law, a higher standard of care is required when inherently hazardous activities are undertaken; here, the degree of diligence varies in light of the level of risk.¹⁰⁹ Advances in scientific understanding and technological capabilities can also increase the degree of care required *over time*. The extent of risk or advances in scientific knowledge that allow us to *perceive* more accurately the extent of risk (either higher or lower) will also influence the degree of diligence required.¹¹⁰ This can also be seen in the relationship between the principles of precaution and prevention. States should take a precautionary approach to ‘threats of serious or irreversible damage.’¹¹¹ They must take ‘cost-effective measures’ in light of those threats and ‘must not disregard those risks’.¹¹²

However, if science shows that the risk of damage is not merely theoretical but a causal link can be proven, the principle of prevention takes over: where there is a likelihood of significant harm, a State that permits an operation to proceed is acting wrongfully.¹¹³ Thus as scientific understanding advances over time there are two distinct shifts in the due diligence standard: first of all, the damage decreases in severity from ‘serious or irreversible’ (precautionary approach) to (merely) ‘significant’ (principle of prevention). Secondly, while States should only give due regard to uncertain risks and are encouraged to take ‘cost-effective measures’ to reduce the risk (the precautionary approach), where there is a known risk or likelihood of negative transboundary impact, a State must exercise a much higher degree of diligence to prevent the damage (the principle of prevention). Physical changes beyond a State’s control, such as an earthquake, a flood or volcano, may also render an activity more hazardous and hence increase the degree of diligence required of a State (if it is aware – or should have been – of the possibility of such hazards occurring).¹¹⁴ Furthermore, technological advances can enhance States’ capacities to reduce negative impacts or render them cheaper (i.e. ‘cost-effective’). This is reflected in the standards of ‘best available technology’ and ‘best environmental practices’, where the ‘best’ is likely to evolve over time.¹¹⁵ International organisations are also subject to similar requirements when undertaking territorial administration.¹¹⁶

Since the degree of diligence pivots on the primary rules, changes to the primary rules will also affect the standard of care expected. This can take place over decades under customary international law or it can take place through the entry into force of a treaty or even a Security Council Resolution.¹¹⁷ For example, accession to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit

¹⁰⁷ *Bosnian Genocide case* [2007] ICJ Rep 43.

¹⁰⁸ Pisillo-Mazzeschi 1992, above n 103, p. 44.

¹⁰⁹ *Seabed Mining Opinion* (2011) 50 ILM 458, para. 117.

¹¹⁰ *Ibid*, para 117; Pisillo-Mazzeschi 1992, above n 103, p. 44; First Report, above n 25, p. 29; ILC Draft Articles on Prevention of Transboundary Harm, commentary to article 3, para 11.

¹¹¹ Rio Declaration, above n 61, principle 15.

¹¹² *Seabed Mining Advisory Opinion* (2011) 50 ILM 458, para 131.

¹¹³ *Pulp Mills* [2010] ICJ Rep 14, para. 101.

¹¹⁴ ILC Draft Articles on Prevention of Transboundary Harm, ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, commentary to article 1, para 15.

¹¹⁵ *Seabed Mining Advisory Opinion* (2011) 50 ILM 458, para. 117; Pisillo-Mazzeschi 1992, above n 103, p. 44.

¹¹⁶ Committee on the Accountability of International Organisations, Final Report (2004), above n 102; Wilde, above n 88.

¹¹⁷ Compare, for example, the gradual increase in the requirements of due diligence in environmental law from *Trail Smelter Arbitration (United States v Canada)* 1941, 3 RIAA 1905 to *Pulp Mills* [2010] ICJ Rep 14.

Import, Export and Transfer of Ownership of Cultural Property¹¹⁸ or the 1966 International Covenant of Economic, Social and Cultural Rights would increase the degree of diligence expected of States in the protection of culturally significant antiques and of human rights respectively well above the standards of customary international law. Security Council Resolutions 1373 and 1540 (on the prevention of terrorist financing and the prevention of the transfer of weapons of mass destruction to terrorists) also had the immediate effect of increasing the degree of diligence required of UN Member States.¹¹⁹

Due diligence duties can increase (and, at least in theory, also decrease) through changes in customary international law, although this is likely to occur over a longer period of time.

Differentiated Responsibilities Viewed as Differentiated Results

Common but differentiated responsibilities under the UNFCCC and the Kyoto Protocol include different *results* expected of States at different stages of development.¹²⁰ Obligations of result are not normally conceived of as due diligence obligations but are obligations which the State must achieve by means of its own choosing. For such obligations a defence of ‘best efforts’ – either subjectively or objectively defined – is unavailable.

It is possible to view differentiated responsibilities in a number of areas of international law not as variable standards of due diligence but rather as differentiated results. For this, it is necessary to consider what is intended by the term ‘diligence’. If diligence only means ‘effort’ then the different results expected of States at different levels of economic development may not be an indication of a lower standard of diligence at all.

The different timescales in the fulfilment of socio-economic rights can also be viewed as differentiated results rather than a lesser degree of diligence. With fewer resources the same effort will produce lesser outcomes. If a State is indeed applying ‘all appropriate means’ it can hardly be said that they are exercising less diligence, less effort than any other State. ‘Realisation’ may be an obligation of result but the duty to take steps – indeed all appropriate steps – is immediate.¹²¹ While the content and nature of those steps will differ depending on the resources and needs of each State, each State must exercise equal diligence in selecting and implementing the most appropriate measures.

Conclusions

Just as the degree of diligence required varies between different areas of international law and is given content by the primary rule, so the scope for a subjective standard of due diligence also pivots on the primary rule. In other words, in some cases, the primary rules permit a lesser standard of conduct for developing States or States otherwise possessing limited capacities while in others the same

¹¹⁸ 823 UNTS 231.

¹¹⁹ UN Security Council Resolutions 1373 and 1540, above n 92, (immediately increasing the degree of diligence required to prevent terrorists operating within States’ jurisdictions).

¹²⁰ UNFCCC, article 4(2); see also Report of the Committee on Legal Principles Relating to Climate Change, above n 75, p. 435.

¹²¹ Committee on Economic, Social and Cultural Rights, General Comment No 3, above n 81, para. 2.

degree of care is required of all States. Under treaty law, such a variable standard can be identified in the treaty provisions; but in the absence of any such provision, an argument can be made that the presumption is for an objective standard of due diligence.¹²²

It is more difficult to evaluate whether standards of due diligence are subjective or objective with regard to duties under customary international law. This reflects the perennial problem of identifying with sufficient clarity the precise contents of customary international law in any area and is not peculiar to the evaluation of due diligence. At a high level of abstraction, the same principle applies, that is to say that the primary (customary) rule will determine whether an objective or subjective standard applies. Recent research in international investment law indicates that the presumption in that area of law is for a subjective standard but there remains some older case-law, which is indicative of an objective approach.¹²³ Soft-law instruments in international environmental law which often stimulate the crystallisation of customary international law in this field also seem to prefer the subjective standard.¹²⁴ However, this apparent presumption in favour of a subjective standard of due diligence cannot be straight-forwardly extrapolated to customary norms in other areas of international law.

2C. What of unavoidable loss and damage?¹²⁵

Being quintessentially an obligation of conduct rather than result, it is quite possible that a State will act with all due care and diligence and yet this will nonetheless result in some level of loss or damage being caused to another State.

In fashioning a due diligence standard applicable to a specific issue area (such as transboundary harm) it is important that regard is had both to the *level of effort* required of States to meet the requisite duty and also to the *degree of harm* that would be occasioned even if the State fulfills this standard. That is to say that there is a balancing process in which both the onerousness of the due diligence obligation and the effects of the activity or omission upon a victim State are considered.

This was an issue of concern for the ILC during the more than 50 years that it was engaged in the codification of the law of State Responsibility.¹²⁶ In the 1970s, more than 20 years after beginning its work on State responsibility, the ILC decided to start work on a second parallel track on State liability for the injurious consequences of

¹²² *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, para. 158; see also *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, International Tribunal for the Law of the Sea Case No. 21 (Advisory Opinion) (2 April 2015).

¹²³ De Brabandere, above n 58 (citing, *inter alia*, *British Property in Spanish Morocco* UNRIAA Vol 2, p. 661; Ian Brownlie, *Principles of Public International Law* (7th ed., 2008) and Pisillo-Mazzeschi, above n 103 (in support of the subjective standard) and General Claims Commission (Mexico and United States), *H G Venable (USA) v United Mexican States*, Decision of 8 July 1927, IV UNRIAA, pp. 219-261 (in support of an objective standard)).

¹²⁴ Rio Declaration, above n 61.; ILC Draft Articles on Prevention of Transboundary Harm, commentary to article 3, para. 13.

¹²⁵ This section is based upon a submission to the Rapporteur by Study Group Members Sara L Seck and Evelyne Schmid.

¹²⁶ This section is drawn from: Sara L Seck, *Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities* (PhD Thesis, Osgoode Hall Law School, York University, 2008) [unpublished].

acts not prohibited by international law.¹²⁷ While initially conceived as an alternate conceptual basis necessary for the imposition of liability on States for 'lawful' activities causing environmental harm (absolute or strict liability) this approach was critiqued by Ian Brownlie among others as 'fundamentally misconceived' for confusing primary and secondary rules.¹²⁸ In 1996, draft Articles and Commentary dealing with prevention, co-operation, and strict liability for damage were proposed by the ILC, but the strict liability articles were said to be too controversial as a 'progressive development' of international law.¹²⁹ Ultimately, the ILC divided this work plan into what became 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (the 'Prevention Articles'),¹³⁰ and the 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities ('Loss Allocation Principles').¹³¹

The Prevention Articles provide 'an authoritative statement on the scope of a State's international legal obligation to prevent a risk of transboundary harm'¹³² and provide in Article 3 that a State of origin 'shall take all appropriate measures to prevent significant transboundary harm or at any rate to minimize the risk thereof'.¹³³ According to the Commentaries, this obligation is one of 'due diligence' that requires the State to 'exert its best possible efforts to minimize the risk'.¹³⁴ The standard of due diligence is that which is 'generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance'.¹³⁵ While the 'operator of an activity is expected to bear the costs of prevention,' the State of origin is to put in place 'administrative, financial and monitoring mechanisms'.¹³⁶ To this end, the State of origin is to require its prior authorization for activities, and must play an active role in regulating them.¹³⁷

According to Article 15, natural or juridical persons at 'risk of significant transboundary harm' are to be provided access to justice in the courts of the State of origin, unless the States agree on alternate means of redress through, for example, a bilateral agreement.¹³⁸ Neither access to justice in State of origin courts, nor the alternate agreement on redress are said to be conditional upon the State of origin

¹²⁷ See AE Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?" (1990) 39 *International and Comparative Law Quarterly* 1; and Günther Handl, "Liability as an Obligation Established by a Primary Rule of International Law" (1985) 16 *Netherlands Yearbook of International Law* 49.

¹²⁸ Ian Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford: Clarendon Press, 1983) at 50.

¹²⁹ PW Birnie & AE Boyle, *International Law and the Environment*, 2d ed (Oxford: Oxford University Press, 2002) at 105. See "Report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law" (UN Doc A/51/10, Annex 1) in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (New York: UN 1998) (UN Doc A/CN.4/SER.A/1996/Add.1).

¹³⁰ ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, pp. 366-436.

¹³¹ ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, UN GAOR 61st Sess, Supp No 10, UN Doc A/61/10 (2006), pp. 101-182.

¹³² First Report, above n 25, p. 5, citing James Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012) pp. 356-7.

¹³³ ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, above n 32, article 3. A "State of origin" is defined in article 2(d) as "the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are planned or carried out."

¹³⁴ *Ibid*, Commentary to article 3, pp. 391-396.

¹³⁵ *Ibid*, Commentary to article 3 at para. 11.

¹³⁶ *Ibid*, Commentary to article 3 at para. 15.

¹³⁷ *Ibid*, articles 6 and 7.

¹³⁸ *Ibid*, article 15 and Commentaries.

failing to meet its due diligence obligation in Article 3; indeed, it could be said that the provision of access to remedy in Article 15 may itself be part of the due diligence obligation to prevent or minimize the risk of harm, at least to the extent that access to courts could be used to seek injunctive measures designed to prevent harm.

The ILC's 1996 Draft Liability Articles would have imposed strict liability on a source State for significant transboundary harm that it could not prevent by exercising due diligence.¹³⁹ When the ILC resumed work on liability for environmental harm in 2002, it moved away from strict liability of States to a focus on 'loss allocation among different actors involved in the operation of hazardous activities.'¹⁴⁰ The rationale for this move was an assessment that State practice did not reflect strict liability for transboundary harm arising from activities that are within the lawful sovereign rights of States to pursue within their domestic jurisdiction.¹⁴¹ Instead, the aim of the Loss Allocation Principles is for States to apply national laws to private actors so as to provide compensation. Drafted as a non-binding declaration of principles, the Loss Allocation Principles indicate that they are without prejudice to rules relating to State responsibility and any claim that might arise in the event of a breach of an obligation of prevention.¹⁴²

The assumption under the Loss Allocation Principles is that the due diligence and other duties under the Prevention Articles have been fulfilled, so the focus is specifically upon damage that has occurred despite the exercise of due diligence.¹⁴³ This is conceptualized as liability for risk, rather than State responsibility¹⁴⁴ and is focused upon providing compensation to victims. Victim is defined in Principle 2(f) as 'any natural or legal person or State that suffers damage.' The underlying motivation for this conceptualization is the need to create mechanisms for addressing losses that would remain uncompensated if we were to leave them to the traditional analysis of State responsibility for which legal consequences are only available where there is an internationally wrongful act attributable to a State.

Principle 3 of the Loss Allocation Principles provides that the dual purposes are to 'ensure prompt and adequate compensation to victims of transboundary damage' and 'to preserve and protect the environment in the event of transboundary damage, especially with regard to mitigation of damage to the environment and its restoration and reinstatement.'¹⁴⁵ Principle 4 outlines in five headings the nature of State measures necessary to ensure prompt and adequate compensation, including the imposition of strict liability upon the operator of the hazardous activity, although liability may be limited by, for example, compliance with a compulsory measure of a public authority.¹⁴⁶ Principle 4 also emphasises avenues to prevent and address loss that would otherwise remain unremediated – either because its extent surpasses the

¹³⁹ AE Boyle, "Globalising Environmental Liability: The Interplay of National and International Law" (2005) 17 *Journal of Environmental Law* 3, pp. 4-5. See Article 21, *Report of the Working Group on International Liability etc, Report of the ILC (1996)*, UNGAOR A/51/10, Annex 1, at 320.

¹⁴⁰ Boyle, *ibid*, p 6.

¹⁴¹ *Ibid*.

¹⁴² ILC Draft Principles on the Allocation of Loss, above n 131, General Commentary, paras. 6, 11, and the Preamble.

¹⁴³ *Ibid*, Commentary to principle 1, para. 6.

¹⁴⁴ *Ibid*, Commentary to principle 1, at para. 5.

¹⁴⁵ *Ibid*, principle 3.

¹⁴⁶ *Ibid*, Principle 4(2) and Commentary to principle 4, para. 27. This could be imposed upon another person or entity if appropriate.

capacities of the actor(s) responsible for the damage or because liability and/or attribution cannot be established. The Principle provides that the operator or other entity should be required to 'establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.'¹⁴⁷ Moreover, in appropriate cases, the establishment of national-level industry-wide funds should be required.¹⁴⁸ Finally, should insufficient adequate compensation be available despite implementation of the earlier recommended measures, the Loss Allocation Principles explicitly state that the 'State of origin should also ensure that additional financial resources are made available.'¹⁴⁹ However, according to the Commentaries, a 'central theme' of the Loss Allocation Principles is that each State has the freedom to choose 'one option or the other in accordance with its particular circumstances and conditions' and these are to be treated as best practice guidelines for States.¹⁵⁰

The issue of uncompensated loss has also arisen under the UNCLOS deep seabed mining regime.¹⁵¹ In the *Seabed Mining Advisory Opinion*, the Seabed Disputes Chamber of ITLOS considered the liabilities of States sponsoring deep seabed mining operations, including in situations where States fulfilled their due diligence obligations. The Chamber concluded that there was a distribution of "responsibilities" for deep seabed mining activities 'between the contractor, the Authority and the sponsoring State,'¹⁵² with the main liability for wrongful acts committed by the contractor or the Authority resting with the contractor or Authority rather than the sponsoring State. Existing in parallel is the liability of the sponsoring State, which would arise from its own failure to carry out its own responsibilities, provided that a causal link could be established between the sponsoring State's failure and the existence of damage caused by the contractor.¹⁵³ As described by the Chamber, a 'gap in liability' might arise despite the sponsoring State taking 'all necessary and appropriate measures', when a sponsored contractor causes damage but is unable to pay its liability in full.¹⁵⁴ In addition, a gap may occur 'if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage.'¹⁵⁵ The Chamber concluded, however, that there was no room for residual State liability under the regime established by UNCLOS Article 139 and related instruments.¹⁵⁶ To address these situations, the Chamber recommended that the ISA consider

¹⁴⁷ Ibid, Principle 4(3).

¹⁴⁸ Ibid, Principle 4(4).

¹⁴⁹ Ibid, Principle 4(5).

¹⁵⁰ Ibid, Commentary to Principle 4, para. 39.

¹⁵¹ The following analysis is drawn in part from: Anna Dolidze and Sara L Seck, "ITLOS Case No. 17 and the Evolving Principles for Corporate Responsibility under International Law" in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, edited by Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert, (Brill Publishers, 2015, in press) at 235-259. See further UNCLOS, article 156.

¹⁵² *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, [200]

¹⁵³ Ibid, [166]-[184]. Under customary international law, state liability would arise even though no material damage resulted from the failure of the state to meet its international obligations.

¹⁵⁴ Ibid, [203]. Note, however, that the use of terms such as "liability" and "responsibility" is inconsistent and potentially leads to confusion. See on this point the suggested distinction between responsibility and liability in Anna Dolidze and Sara L Seck, "ITLOS Case No. 17 and the Evolving Principles for Corporate Responsibility under International Law" in *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place*, edited by Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert, (Brill Publishers, 2015, in press) at 235-259.

¹⁵⁵ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, [203].

¹⁵⁶ Ibid, [204], [184], [166]. UNCLOS Article 139 states explicitly that while "damage caused by the failure of a State Party ... to carry out its responsibilities ... shall entail liability," a "State Party shall not however be liable for damage caused by any failure to comply ... by a person who it has sponsored... if the State Party has taken all necessary and appropriate measures to secure effective compliance...". This is bolstered by Annex III, Article 4, paragraph 4.

establishing a trust fund.¹⁵⁷ The Chamber indicated, however, that UNCLOS specifically refers to the development of further rules on responsibility and liability, either within the deep sea mining regime (including through new ISA rules) or customary international law.¹⁵⁸

Interestingly, the Chamber did not specifically consider the consequences in a situation where harm to the international deep seabed might arise despite no wrongdoing on the part of the contractor (as opposed to the sponsoring State). The UNCLOS deep seabed mining regime specifically contemplates that a contractor must engage in wrongful conduct in order to be liable; yet by contrast, the ILC's Loss Allocation Principles contemplate that the 'operator or, where appropriate, other person or entity' should be liable even without proof of fault, with the responsibility to implement measures to ensure prompt and adequate compensation placed upon the State of origin.¹⁵⁹ The Chamber's omission may be explained if attention is given to the standard clauses for exploration contracts recommended by the ISA, as it would appear that coverage for harm in the case of non-wrongful conduct may be captured by contractual requirements for contractors to hold insurance coverage.¹⁶⁰ The Chamber's silence about the issue is especially noteworthy, considering that IUCN explicitly touched upon the issue of fault in the conduct of the contractor and pointed to the ILC's Loss Allocation Principles as applicable international law.¹⁶¹

PART 3 – PARTICULAR ISSUES OF CONTENTION

The Second Report now considers two specific areas in which due diligence has been in contention: (i) due diligence duties arising from business activities and (ii) due diligence obligations as regards international organisations. Together, they provide a number of important insights into the development of due diligence in international law in fast-moving areas of normative evolution.

A. Due Diligence and Business Activities¹⁶²

International law relating to due diligence in the business context has received much attention since 2011, as a result of developments in international human rights law. And as discussed in the First Report of the Study Group, another area of international law where businesses (as foreign investors) may be required to exercise due diligence is in international investment law. Nevertheless, this part will

¹⁵⁷ Ibid, [205]. While the ILC Loss Allocation Principles would have provided residual state liability here, the Chamber did not refer to them here. See also Donald K. Anton *et al.*, *Advisory Opinion on Responsibility and Liability for International Seabed Mining, (ITLOS Case. No. 17): International Environmental Law in the Seabed Disputes Chamber*, (Austl. Nat'l Univ., ANU Coll. of Law, Research Paper No. 11-06, 2011), available at <http://ssrn.com/abstract=1793216> at 64.

¹⁵⁸ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, [211].

¹⁵⁹ ILC Draft Principles on the Allocation of Loss, above n 131, Principle 4.

¹⁶⁰ International Seabed Authority, *Standard Clauses for Exploration Contract*, §§ 16, 16.5, <http://www.isa.org.jm/files/documents/EN/Regs/Code-Annex4.pdf>.

¹⁶¹ *Seabed Mining Advisory Opinion*, (2011) 50 ILM 458, *Written Statement of International Union for Conservation of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal, and Coral Reefs Specialist Group*, [81]-[85] (Aug. 19 2010), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf.

¹⁶² This section is based upon a submission to the Rapporteur by Study Group Members Robert McCorquodale, Mary Footer, Sara Seck and Lise Smit.

focus on non-binding due diligence obligations on businesses broadly under the remit of corporate social responsibility.

International human rights law applies binding legal obligations directly on States alone. Despite a number of attempts, and some statements by the human rights treaty bodies, to apply these obligations to non-State actors, the international human rights framework (outside international criminal law and international humanitarian law) has not yet developed this aspect. However, there are some developments in the area of the obligations of corporations that indicate a way forward, and these include considerations of due diligence.¹⁶³

In 2011 the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs),¹⁶⁴ which had been developed by Professor John Ruggie as Special Representative to the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). These create a framework of three pillars, being a State duty to protect human rights, a corporate responsibility to respect human rights, and the need for access to a remedy. Importantly, the SRSG clarified that corporations ('business enterprises') can abuse all types of human rights – economic, social, cultural, civil, political, and collective – and that all business enterprises, no matter their size, nature, or location, should be subject to the Guiding Principles.

The concept of due diligence is used throughout the second pillar. Guiding Principle 15, being one of the foundational principles, provides the following:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) a policy commitment to meet their responsibility to respect human rights;
- (b) a *human rights due diligence process* to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

This responsibility placed upon business enterprises to respect human rights is not a legal obligation, unlike the obligation of States. There may be a great deal of pressure from inside and outside a business enterprise, including from its own

¹⁶³ See Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' in Lara Blecher, Nancy Kaymar Stafford and Gretchen Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (2014), pp. 51-78, from which some of this section is drawn. Negotiations are currently taking place at UN level regarding a possible binding treaty to regulate corporate human rights impacts. If any such treaty is adopted and based on the terminology of the UNGPs, human rights due diligence will presumably form part of the treaty provisions. See Robert McCorquodale and Lise Smit 'Human Rights Due Diligence: A Responsibility, A Defence or A Mirage?' in S. Deva and D. Bilchitz (eds), *A Treaty on Business and Human Rights? Exploring its Contours* (forthcoming, 2016)

¹⁶⁴ SRSG, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Human Rights Council, UN Doc. A/HRC/17/31 (March 21, 2011) ('Guiding Principles')

sector, to comply with this responsibility, but it is not legally binding under international law.¹⁶⁵

Guiding Principles 17 to 21, which discuss the practical steps that business enterprises should take to discharge this responsibility, appear under the heading of 'Human rights due diligence.' These steps include having a human rights policy; assessing human rights impacts of business activities; integrating those values and findings into corporate cultures and management systems; and tracking as well as reporting on the effectiveness of the actions taken.

This concept of due diligence is defined as follows:

Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.¹⁶⁶

The use of the term 'due diligence' in the Guiding Principles appears to be an integration of the international human rights legal obligation of due diligence in relation to the actions of non-State actors,¹⁶⁷ and the general voluntary business practice of due diligence, such as in mergers and acquisitions.¹⁶⁸ In relation to the general business practice, the SRSR has stated:

Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships, can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk.¹⁶⁹

Thus, the Guiding Principles cleverly (though potentially misleadingly) aim to use a terminology that is familiar to both human rights law and business management practices. When the Guiding Principles refer to processes to 'identify, prevent, mitigate and account for . . . adverse human rights impacts' (as in Guiding Principle 15(b) above), the term due diligence is used in the business-practice sense of the

¹⁶⁵ See Robert McCorquodale, 'Pluralism, Global Law and Human Rights', (2013) 2 *Global Constitutionalism* 287.

¹⁶⁶ UN Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), at p. 4.

¹⁶⁷ See *Velasquez Rodriguez v. Honduras*, (1989) 28 ILM 294.

¹⁶⁸ See, e.g., Jeffrey Perry and Thomas Herd, 'Mergers and Acquisitions: Reducing M&A Risk through Improved Due Diligence' (2012) 32 *Strategy & Leadership* 12, p. 12.

¹⁶⁹ SRSR Report to UN Human Rights Council, UN Doc. A/HRC/11/13 (Apr. 22, 2009).

term, being about the management process.¹⁷⁰ In contrast, the general foundational statement in Guiding Principle 11 is as follows:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

This approach in Guiding Principle 11 uses the term due diligence as a standard of conduct and so is used in the human rights law sense of the term. Thus there is some confusion in the application of the term due diligence in the Guiding Principles.

The context for the operation of due diligence in the corporation's responsibility to respect human rights is explained in Guiding Principle 13:

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

A clear distinction is made in Guiding Principle 13 between the responsibility of a business enterprise to *avoid* causing or contributing to its own human rights impacts (13 (a)) and the responsibility to *seek* to prevent or mitigate impacts by third parties (13 (b)). Therefore, two different standards of due diligence are operating in the application of Guiding Principle 13 to a business enterprise: a stricter standard of avoiding its own impacts; and a leveraged standard for seeking to prevent others' impacts. This is discussed further below.

The Guiding Principles provide some guidance on what corporate human rights due diligence entails. Guiding Principle 17 provides the following:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

¹⁷⁰ See further in Jonathan Bonnitcha and Robert McCorquodale, 'Is the Concept of 'Due Diligence' in the Guiding Principles Coherent?' (January 29, 2013). Available <<http://ssrn.com/abstract=2208588> or <http://dx.doi.org/10.2139/ssrn.2208588>>

- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Thus appropriate due diligence should consist of four components:

- Assessing actual and potential human rights impacts;
- Integrating and acting upon the findings;
- Tracking responses; and
- Communicating how impacts are addressed.¹⁷¹

Guiding Principle 17(a) also continues the distinction drawn in Guiding Principle 13 between human rights due diligence for adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, and human rights due diligence for adverse human rights impacts of third parties.

It is of note that the Guiding Principles make clear, correctly, that corporate human rights due diligence is an obligation which exists independently of States' human rights obligations, and over and above compliance with national laws.¹⁷² Therefore, in assessing its impact, a business enterprise should take into account all internationally recognised human rights obligations, such as those contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.¹⁷³ For practical reasons, certain rights may be prioritised for due diligence purposes, in accordance with the severity of the risks,¹⁷⁴ and provided all human rights impacts are periodically reviewed.¹⁷⁵

The scale and complexity of the due diligence required will depend on various factors, such as the 'size, sector, operational context, ownership and structure'¹⁷⁶ of the business entity, as well as the nature of the business and the risk of severe human rights impacts.¹⁷⁷ Potential adverse human rights impacts should be prevented or mitigated, whereas actual adverse impacts, which have already taken place, should be remedied.¹⁷⁸

As mentioned above, a lesser standard of control is required in relation to the actions of third parties with which the business enterprise has business relationships. The commentary to Guiding Principle 17 provides:

¹⁷¹ Guiding Principles, above n 164, Guiding Principle 17.

¹⁷² Ibid, Guiding Principle 11.

¹⁷³ Ibid, Guiding Principle 12.

¹⁷⁴ Ibid, Guiding Principle 24.

¹⁷⁵ Ibid, Commentary on Guiding Principle 12.

¹⁷⁶ Ibid, Guiding Principle 14.

¹⁷⁷ Ibid, Guiding Principle 17(b).

¹⁷⁸ Ibid, Commentary on Guiding Principle 17.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all.

The level of control over the third party will depend on the amount of ‘leverage’ which the business entity has over the relevant third party. For example, Guiding Principle 19(b)(ii) provides that appropriate action by a business enterprise will depend on the ‘extent of [the business enterprise’s] leverage in addressing the adverse impact.’ Leverage is defined as ‘the ability to effect change in the wrongful practices of an entity that causes a harm,’¹⁷⁹ and leverage is ‘considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.’¹⁸⁰ This applies even where the business entity has *not* contributed to a harm, in what has been described as ‘*leverage-based* negative responsibility’.¹⁸¹ Appropriate action will be determined by such factors as ‘how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.’¹⁸²

In international human rights law the State’s obligations in relation to the actions of third parties are often expressed in terms of due diligence. For example, in *Velazquez Rodriguez v Honduras*, the Inter-American Court of Human Rights found that a State may be held liable for human rights violations caused by a third party where the State has failed to exercise due diligence to prevent the violation or to respond as required.¹⁸³ The Guiding Principles, similarly, refer to the corporate obligation to exercise due diligence to ‘seek to prevent or mitigate’ adverse impacts caused by third parties. States and business enterprises therefore have similar due diligence obligations with respect to third parties’ actions.

However, according to Guiding Principle 17, business enterprises also have due diligence obligations in relation to their own conduct. In contrast, where a human rights abuse is a direct result of a State’s own conduct, due diligence would not ordinarily be the applicable standard. Instead, national and international human rights law provide States with other forms of tests or ‘justifications’ where their own conduct has adverse human rights impacts, such as necessity, proportionality, and legislation of general application aimed at a legitimate purpose. These mechanisms of justification are not available to business enterprises, which are private entities without any legal or territorial jurisdiction.¹⁸⁴

In certain contexts, corporate due diligence is required by domestic (including EU) legislation.¹⁸⁵ In some cases, proving due diligence affords a defence against liability¹⁸⁶ or provides for a reduction in sentence.¹⁸⁷ In other cases due diligence may

¹⁷⁹ Ibid, Commentary on Guiding Principle 19.

¹⁸⁰ Ibid, Commentary on General Principle 19.

¹⁸¹ Stepan Wood, ‘The Case for Leverage-Based Corporate Human Rights Responsibility’ (2012) 22 *Business Ethics Quarterly* 63, p. 65.

¹⁸² Guiding Principles, above n 164, Commentary on Guiding Principle 19.

¹⁸³ *Velazquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 172.

¹⁸⁴ Yousuf Aftab, ‘The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies,’ 60 *Rocky Mt. Min. L. Inst.* 19-1 (2014) at 19-10.

¹⁸⁵ Olga Martin-Ortega ‘Human rights due diligence for corporations: From voluntary standards to hard law at last?’ (2013) 31 *Netherlands Quarterly of Human Rights* 44, p. 52.

¹⁸⁶ See for example section 90 (1) of the UK Financial Services and Markets Act 2000, section 11(b)(3)(A) of the US Securities Act 1933, and section 7(2) of the UK Bribery Act of 2010 read with UK Ministry of Justice,

be essential to enforcement measures in pursuit of a broader set of socio-economic policy goals, such as climate change mitigation, as under the EU Timber Regulation.¹⁸⁸ In the latter case, due diligence is used to address the effects of illegal logging, which brings about risks linked to environmental and societal changes, e.g. deforestation that contributes to desertification and soil erosion, or local forest-dependent communities whose livelihoods are threatened.¹⁸⁹

Similarly, the Guiding Principles' due diligence requirements which regulate corporate human rights impacts are increasingly finding their way into statutory instruments, even if not always phrased in human rights language. Examples include §1502 of the US Dodd-Frank Act,¹⁹⁰ the US Department of State's reporting requirements for US firms in Burma,¹⁹¹ as well as the EU Directive on the disclosure of non-financial information by certain large companies.¹⁹² The Council of Europe has adopted Recommendations which include that member states apply measures which 'encourage or, where appropriate, require' mandatory human rights due diligence of companies domiciled or conducting substantial activities within their jurisdiction.¹⁹³

Beyond statutory requirements, the corporate responsibility to respect human rights is increasingly embedded in international standards that are promoted by States and industry associations to business enterprises operating internationally, particularly in the extractive industries context.¹⁹⁴ For example, the responsibility to respect is embedded in the 2011 revisions to the OECD Guidelines for Multinational Enterprises (OECD Guidelines),¹⁹⁵ as well as in the revised Sustainability

Guidance on the Bribery Act 2010, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf pp. 20-31.

¹⁸⁷ See for example §8B2.1. of the United States Sentencing Commission '2011 Federal Sentencing Guidelines Manual', available at <http://www.ussc.gov/guidelines-manual/2011/2011-8b21>, accessed 26 February 2015, where it is stated: 'The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.'

¹⁸⁸ See for example EU Parliament and Council Regulation (EU) No 995/2010 of 20 October 2010, laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295/23 (Timber Regulation), recital 3.

¹⁸⁹ For specific provisions concerning the establishment of a system of due diligence for the responsible sourcing by business operators of timber and timber products, which have not been illegal harvested, see the Timber Regulation, *ibid*, recitals 15-17, 20, 25 and 29 together with articles 4-6, 8, 13 and 20.

¹⁹⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) 12 USC 5301 (US), s 1502.

¹⁹¹ United States Department of State 'Responsible Investment Reporting Requirements' (2012), <http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>. See also United States Department of State 'Responsible Investment Reporting Requirements Frequently Asked Questions' (23 September 2013), <http://www.humanrights.gov/2013/09/23/responsible-investment-reporting-requirements-frequently-asked-questions>.

¹⁹² European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

¹⁹³ Recommendation III. 20 of Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to members States on human rights and business, adopted on 2 March 2016.

¹⁹⁴ See for example International Council on Mining & Metals (ICMM), 'Business and Human Rights,' ICMM online: <http://www.icmm.com/page/84154/our-work/projects/articles/business-and-human-rights>.

¹⁹⁵ OECD Guidelines on Multinational Enterprises, adopted in 1976, revised in 2000 and 2011, now retitled as the 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment'; they form part of, and are annexed to, the 'Declaration on International Investment and Multinational Enterprises', adopted on 25 May 2011 by the OECD Members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. Available at <http://oecd.org/daf/inv/mne/48004323.pdf> (last accessed 24 February 2014) (hereinafter OECD Guidelines).

Performance Standards of the International Finance Corporation (IFC),¹⁹⁶ both of which are briefly analysed below. These standards could also inform the standard of care for the purpose of establishing domestic law tort liability, and thus become legally binding within domestic legal systems.¹⁹⁷ The standards, and thus the corporate responsibility to respect human rights through due diligence, may also become legally binding through incorporation in financing or investment contracts.

Business due diligence is often conducted voluntarily to avoid certain risks. The incentive to conduct due diligence may be the avoidance of legal liability, both civil and criminal, such as for corruption or money-laundering, the costs of remedying environmental contamination, a reduction in creditworthiness, or other forms of operational, reputational or financial damage.¹⁹⁸ In cases where there are no fixed legal requirements, the scope of the due diligence is determined by the business enterprise. It has to ask itself whether its due diligence is sufficiently comprehensive to protect it against the risks it seeks to avoid. Resources and time will be decisive factors, and will be weighed up against the likelihood and severity of the risks. However, the commentary to Guiding Principle 17 explains that business enterprises conducting appropriate human rights due diligence 'should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.'

There is one other difference between business and human rights due diligence. Business due diligence is most often a once-off investigation aimed at providing a business enterprise with necessary information, for example before a merger or acquisition is negotiated, or before a large transaction or financing of a project takes place. Human rights due diligence, however must be ongoing. The Commentary to Guiding Principle 18 states:

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

This approach is similar to a State's human rights due diligence as action to protect human rights is not a once-only protection.

OECD Guidelines for Multinational Enterprises¹⁹⁹

¹⁹⁶ International Finance Corporation (IFC)'s Policy on Environmental and Social Sustainability (Washington, International Finance Corporation, 2012), available at http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES

¹⁹⁷ See for example *Choc v Hudbay Minerals Inc* (2013), 116 O.R. (3d) 674, (Ont Sup Ct).

¹⁹⁸ For more detail on the manifestation of these risks see www.business-humanrights.org accessed 13 May 2015.

¹⁹⁹ This section and the following one draws on Mary E Footer, 'Human Rights Due Diligence and the Responsible Supply of Minerals from Conflict-Affected Areas: Towards a Normative Framework?' in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Human Rights Obligations of Corporations* (2015), pp. 179-228.

The OECD Guidelines state that business enterprises should conduct ‘risk-based due diligence’ by, for example, ‘incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts’.²⁰⁰ While they should ‘avoid causing or contributing to [such] adverse impacts ... through their own activities’ they should also ‘seek to prevent or mitigate an adverse impact where they have not contributed’ to it but where that impact is nevertheless ‘directly linked to their operations, products or services.’²⁰¹ The latter is an oblique reference to the responsibility of business enterprises for impacts arising in all their business relations, including supply chains,²⁰² an issue which is explored below. Due diligence, for the purposes of the OECD Guidelines is defined as “the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management system.

A new chapter on human rights was inserted in the OECD Guidelines in response to the developments in the Guiding Principles. This sets out a business enterprise’s duty to respect human rights, which is aimed at limiting adverse human rights impacts, and includes human rights due diligence.²⁰³

[Business enterprises should] within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations ... [ensure that they] carry out human rights due diligence appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.²⁰⁴

The Commentary recommends that business enterprises implement a process of human rights due diligence, which may fall within their broader enterprise risk management system, which should include assessing ‘the actual and potential human rights impacts’ of the business activity, integrating and acting upon the findings, tracking responses and communicating how such human rights impacts are addressed.²⁰⁵ In this regard, due diligence should be an ‘on-going exercise, recognising that human rights risks may change over time as the enterprise’s operations and operating context evolve.’²⁰⁶

There is also a business responsibility that runs with a transnational supply chain to ‘seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.’²⁰⁷ This includes ‘complex situations where an enterprise has not contributed to an adverse human rights impact’, including ‘relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or

²⁰⁰ OECD Guidelines, above n 195, General Policies, Chapter II, Section A, p. 20, para. 10.

²⁰¹ Ibid, paras. 11 and 12.

²⁰² Ibid, para. 13, which urges enterprises to ‘encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*’.

²⁰³ OECD Guidelines, above n 195, Chapter IV, pp. 31-34.

²⁰⁴ Ibid, p. 31, para.5.

²⁰⁵ Ibid, Commentary on Human Rights to Chapter IV, p. 34, para. 45.

²⁰⁶ Ibid.

²⁰⁷ Ibid, Chapter IV, p, 31, para. 3.

services.²⁰⁸ One of the factors to take into account in determining ‘the appropriate action in such situations’ is “the enterprise’s leverage over the entity concerned”,²⁰⁹ which resonates with the UNGPs.²¹⁰

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

Due diligence, as part of responsible supply chain management, has also received specific attention where it concerns the sourcing of minerals from conflict-affected and high risk areas. In 2010 the OECD developed a collaborative, government-backed, non-binding instrument called the Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas (OECD Due Diligence Guidance).²¹¹ Built on a multi-stakeholder initiative for the responsible supply chain of minerals from conflict-affected areas, it initially involved OECD Members and eleven member States of the International Conference on the Great Lakes Region ICGLR. It was later supported by Brazil, Malaysia and South Africa, as well as industry and civil society organisations.

In its 2012 revision the OECD Due Diligence Guidance,²¹² benefitted substantially from John Ruggie’s work on due diligence in the supply chain²¹³ and the UNGPs more generally. It further builds on, and is consistent with, the principles and standards contained in the OECD Guidelines. Significant too is the fact that OECD Due Diligence Guidance contains a detailed Supplement on Tin, Tantalum and Tungsten, which updates the original Supplement,²¹⁴ and a new Supplement on Gold was added in 2012 (hence 3TG).

The OECD Due Diligence Guidance provides a framework for detailed due diligence as a basis for responsible global supply chain management of tin, tantalum, tungsten, their ores and mineral derivatives, and gold. Its main emphasis is on conducting due diligence throughout the 3TG supply chain, involving all the processes from extraction through to transport, handling, trading, processing, smelting, refining and alloying, manufacturing, or the selling of products that contain minerals from conflict-affected and high risk areas.²¹⁵

²⁰⁸ Ibid, supra, Commentary on Human Rights to Chapter IV, p. 33, para. 43.

²⁰⁹ Ibid.

²¹⁰ Guiding Principles, above n 164, Guiding Principle 19(b)(ii), discussed above.

²¹¹ The original OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2010, was approved by the OECD Investment Committee, the OECD Development Assistance Committee (DAC) and was endorsed by the 11-Member strong International Conference on the Great Lakes Region (ICGLR) in the Lusaka Declaration, 15 December 2010.

²¹² The revised (second edition) of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereinafter OECD Due Diligence Guidance), was approved through the OECD Recommendation on the Due Diligence Guidance, adopted by the Council at Ministerial level on 25 May 2011 and subsequently amended on 17 July 2012 to include a reference to the Supplement on Gold (hereinafter ‘Gold Supplement’), pp. 61-118. The 3‘T’s Supplement was retained as a supplement to the second edition of the OECD Due Diligence Guidance at 631-60 (hereinafter ‘3‘T’s Supplement’). The second edition of the OECD Due Diligence Guidance was adhered to by Argentina, Brazil, Latvia, Lithuania, Morocco, Peru, Romania, South Africa and the eleven member countries of the ICGLR. Details are available at <<http://oecd.org/daf/inv/mne/GuidanceEdition2.pdf>>

²¹³ See, for example: the SRSG’s Discussion Paper, ‘“The Corporate Responsibility to Respect Human Rights in Supply Chains’, 10th OECD Roundtable on Corporate Responsibility, 30 June 2010; available at <<http://oecd.org/dataoecd/17/50/45535896.pdf>>

²¹⁴ The first ‘Supplement on Tin, Tantalum and Tungsten’ was issued as a Supplement to the original 2010 version of the OECD Due Diligence Guidance, supra, p. 19 ff.

²¹⁵ OECD Due Diligence Guidance, above n 212, p. 14.

The concept of risk-based due diligence in OECD terms is understood as ‘the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions.’ This is very much in line with UNGP’s Guiding Principle 17, urging business enterprises to engage in an active and reactive process to ensure that ‘they respect human rights and do not contribute to conflict.’²¹⁶

In theory, the OECD Guidelines and the OECD Due Diligence Guidance remain non-binding.²¹⁷ However, they have potential to contribute to the emergence of hard law norms in the area of business responsibility, including as part of a regulatory “smart mix”.

IFC’s Performance Standards on Environmental and Social Sustainability

The most recent 2012 edition of the IFC’s Policy on Environmental and Social Sustainability has also been influenced by the UNGPs. It refers specifically to ‘the responsibility of business to respect human rights independently of the State duties to respect, protect, and fulfil human rights’.²¹⁸ This means the need to ‘avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to.’²¹⁹ The IFC’s Policy is further elaborated throughout eight specific Performance Standards on Environmental and Social Sustainability.

Performance Standard 1 (PS1) on the Assessment and Management of Environmental and Social Risks and Impacts, reiterates the IFC’s Policy Statement.²²⁰ It makes clear that there are human rights dimensions to many of the types of projects that the IFC finances. Due diligence is seen as a means for the client to address relevant human rights issues in its project,²²¹ which should be sufficient to ‘identify risks and impacts at a point in the future when the physical elements, assets, and facilities are reasonably understood.’²²² There is, however, a specific footnote to the text, which acts as a reminder that ‘ [I]n limited high risk circumstances, it may be appropriate for the client to complement its environmental

²¹⁶ Ibid, p. 13.

²¹⁷ The OECD Guidelines remain voluntary for companies but the actual ‘Declaration on International Investment and Multinational Enterprises’, of which they form part, is a decision of the OECD Council, which is binding upon OECD Members under Article 5(a) of the OECD’s founding instrument, the Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, entry into force 30 September 1961, 888 UNTS 179. It means that OECD Members are obliged to implement this decision and to take such measures as are necessary for its implementation under the OECD Guidelines, such as the establishment of National Contact Points (NCPs). In practice, however, this has not always happened; see further Jernej Letnar Černič, ‘The 2011 Update of the OECD Guidelines for Multinational Enterprises’, (February 10, 2012) 16(4), *ASIL insights*, under ‘Analysis and Conclusion’, noting also the weaknesses in the actual NCP process, which OECD Members are bound to implement.

²¹⁸ International Finance Corporation’s Policy on Environmental and Social Sustainability (2012), available at <http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES>, para, 12.

²¹⁹ Ibid.

²²⁰ IFC Performance Standard 1 on Environmental and Social Sustainability (PS1), January 1, 2012, p. 1, para. 3, available at:

<http://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES>

²²¹ Ibid.

²²² PS1, *ibid*, p. 3, para. 7.

and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.’ In other words, human rights due diligence is seen as exceptional action rather than a mainstream activity in the IFC review process.²²³

Significantly, the borrower’s (or client’s) compliance with the IFC Performance Standards on Environmental and Social Sustainability, including whether human rights due diligence has been conducted under PS1, may be challenged before the IFC/Multilateral Guarantee Agency (MIGA) Compliance Advisor Ombudsman (CAO).²²⁴ The CAO is a grievance mechanism that investigates complaints from project-affected communities under IFC financing or MIGA investor insurance-guarantee schemes.

The Equator Principles

The IFC Performance Standards on Environmental and Social Sustainability have influenced the formulation of the Equator Principles (EP), on which they are drawn and to which they refer. The EP ‘is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making’.²²⁵ Although a set of voluntary guidelines, as of 2014 some 80 financial institutions (so-called ‘Equator Principles Financial Institutions’ or EPFIs) from 34 States had officially adopted the EP, accounting for 70% of international project finance indebtedness in emerging markets.²²⁶ The latest and third revision to the original EP dates from 2013 and is known as EPIII.²²⁷

Unlike the IFC Performance Standards and PS1, the EPIII specifically recognises the role of the EPFIs, as financiers, to ‘promote socially responsible development, including fulfilling our responsibility to respect human rights by undertaking due diligence’. There is specific reference to the UNGPs in a footnote.²²⁸ Principle 2 on Environmental and Social Assessment in EPIII closely resembles IFC PS1, which considers ‘limited high risk circumstances’ as warranting ‘specific human rights due diligence’ to complement the so-called Assessment Documentation.²²⁹ Furthermore, human rights due diligence is listed as one potential environmental and social issue to be addressed in the ‘Environmental and Social Assessment Documentation’, which appears in Exhibit II to the EPIII.²³⁰

However, the EP, although now in their twelfth year of existence, remain opaque in their execution. To date, they have been monitored by a single NGO, known as

²²³ Ibid, fn. 12 to para. 7.

²²⁴ For more information about the IFC/MIGA Complaint Advisor Ombudsman (CAO) and its caseload, see <http://www.cao-ombudsman.org/>.

²²⁵ Information about the Equator Principles is available at <<http://www.equator-principles.com/index.php/about-ep/about-ep>>.

²²⁶ Ibid.

²²⁷ The third edition of the Equator Principles or EP III is available at <<http://www.equator-principles.com/index.php/ep3>>.

²²⁸ Preamble to EPIII, *ibid*, p. 2.

²²⁹ Principle 2, EPIII, *ibid*, pp. 5-6.

²³⁰ See para. (l) in the Exhibit II to EPIII, *id*, p. 20,

BankTrack,²³¹ but there is no remedial mechanism for those affected by an EPFI's non-compliance with the EP.

Conclusions

The adoption of the UN Guiding Principles on Business and Human Rights has brought about a significant shift in the international consensus on the duty of business enterprises to undertake due diligence for its human rights and environmental impacts. This has flowed into other international regulation, such as in the OECD Guidelines, IFC Performance Standards and the Equator Principles, all of which now include human rights due diligence requirements, although of varying levels of compliance monitoring. There have also been clarification of the due diligence requirements of contractors, as business enterprises, in relation to their activities on the deep seabed.

Increasingly, domestic jurisdictions are incorporating human rights due diligence standards into regulatory provisions such as reporting requirements. The role of legal advisers, who are often responsible for undertaking other types of corporate due diligence, is being explored by law societies and bar associations, with guidance being issued on how to advise corporate clients on their human rights impacts.²³² Business entities, civil society and academics are exploring questions around corporate human rights due diligence, ranging from what it entails in practice to how to apply it as a legal standard.²³³ Industry bodies are issuing sector-specific guidance, and local experts are publishing country-specific risk analyses²³⁴. Many businesses have started to report on their human rights due diligence, in varying detail, and many more are expected to do so in terms of the growing number of regulatory requirements.²³⁵ There is also the possibility of an international treaty on this area.²³⁶

It is anticipated that clearer legal standards will be developed by courts and tribunals, both domestically and internationally, as well as through corporate practice. Human rights due diligence requirements on business are likely to be increasingly a matter of legal regulation.

B. Due diligence, State conduct and international organisations²³⁷

The rise of multilateralism in the 20th Century has led to an ever increasing range of rights and responsibilities for international organisations and this has, in turn, resulted in the establishment of both positive and negative due diligence

²³¹ For details of BankTrack, see http://www.banktrack.org/show/pages/equator_principles.

²³² See, for example, Law Society of England and Wales, Business and Human Rights Advisory Group Recommendations, <http://international.lawsociety.org.uk/files/BHRAGfinalRecommendations.pdf> (last viewed 13 May 2015).

²³³ See, for example, <http://www.biicl.org/duediligence>.

²³⁴ See, for example, International Council of Mining and Metals, Integrating Human Rights Due Diligence into Corporate Risk Management Processes, <http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes> (last viewed 13 May 2015).

²³⁵ See, for example, Nestle, Talking the Human Rights Walk, http://www.nestle.com/asset-library/Documents/Library/Documents/Corporate_Social_Responsibility/Nestle-HRIA-White-Paper.PDF (last viewed 13 May 2015).

²³⁶ Human Rights Council Resolution, A/HRC/26/L.22/Rev 1 of 25 June 2014.

²³⁷ This section is based upon a submission to the Rapporteur by Study Group Members by Aoife O'Donoghue and Katja Samuel.

obligations.²³⁸ Within the range of their own competences, the imposition of conditionality by the World Bank Group or the International Monetary Fund, the activities of UN Security Council, the administration of territory by the UN or the actions of the European Union the range of international human rights, humanitarian, investment, environmental and other legal obligations that now extend to international organisations is substantive. Whilst international organisations employ due diligence obligations in their dealings with States, for example requiring States to engage with due diligence in administrative functions or within domestic legal reform, they have been less consistent in the application of due diligence to their own activities.²³⁹ That said, the role and scope of due diligence is of increasing importance and reach within institutional contexts. This is in part attributable to growing expectations that international organisations, as with States, will be accountable and responsible for their acts and omissions constituting wrongful acts under international law. This is reflected in the International Law Commission's work to develop the 'Draft Articles on the Responsibility of International Organizations 2011' (DARIO)²⁴⁰ which, in contrast to the parallel Draft Articles on the Responsibility of States 2001, is generally regarded as progressively developing rather than codifying international law.²⁴¹

Sources and Potential Parameters of Due Diligence Obligations

A starting point to determining the existence of due diligence obligations for international organisations is that like States they possess international legal personality under international law.²⁴² In contrast to sovereign States though, the nature and scope of their accompanying rights and duties will be more limited since they do not possess the same degree of powers and functions, reflected too in the principle of speciality.²⁴³ The ILA's 2004 Report on Accountability of International Organisations makes clear links to due diligence and utilises both constituent documents and general international law as sources of accountability.²⁴⁴ While due diligence and accountability are not synonymous both are intertwined in governance. The ILA Report on the Accountability of International Organisations makes specific reference to decisions regarding the use of force, peacekeeping or enforcement operations, the imposition of coercive measures, structural adjustment programmes

²³⁸ Draft articles on the responsibility of international organizations 2011, http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf, albeit it does not contain any direct references to due diligence. ILC Study Group on Due Diligence in International Law, available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

²³⁹ See eg United Nations Convention against Corruption (UNCAC), 2000 UN Convention against Transnational Organized Crime 1999, International Convention for the Suppression of the Financing of Terrorism, 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005.

²⁴⁰ ILC, Draft articles on the responsibility of international organizations, with commentaries 2011, Adopted by the ILC at its sixty-third session, A/66/10 (2011) (DARIO with commentaries).

²⁴¹ DARIO with commentaries (n 237) 2-3 para 5.

²⁴² It is for this reason too that the ICJ has held that international organisations can be responsible for their acts and omissions in international law. See eg *Reparations Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174, and *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Reports 151, 167-68.

²⁴³ See eg *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep para 76.

²⁴⁴ ILC Committee on the Accountability of International Organisations, Final Report (2004), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9>, 15, *Fresh Marine Company SA v. Commission of the European Communities*, Judgment of the Court of First Instance (24 October 2000), Case T-178/98, paras 61 and 82.

and development projects during the temporary administration of territory in the context of international human rights and humanitarian law obligations. While the ILA Report does not utilise due diligence in all strands of accountability it does state that a lack of standing mechanisms for private claimants against international organisations leave the sole route State jurisdiction, making accountability of international organisations conspicuously lacking.

One overarching challenge for identifying specific obligations of due diligence for international organisations is that they do not fit neatly into more traditional sources in Article 38(1) Statute of the International Court of Justice 1945.²⁴⁵ This is important since 'the nature of the due diligence obligation is a matter to be resolved by the underlying primary rules, not the secondary rules of State [or institutional] responsibility'.²⁴⁶ It is of the essence, therefore, that primary rules establishing obligations under international law²⁴⁷ are identified before there can be any suggestion that these have been breached, including for the purposes of establishing the existence of a wrongful act (or omission) as understood under Article 1 DARIO which would trigger secondary responsibility.

There would appear to be four potential sources of due diligence obligations for an international organisation. The first is obligations arising under an international treaty with accompanying due diligence obligations. This is likely to be the most limited origin of institutional due diligence obligations since international organisations are not generally parties to international treaties with accompanying due diligence obligations, particularly in the sphere of international human rights and environmental law. Even where there are treaty obligations, normally the constituent treaty, controversies and uncertainties remain as to whether, how and to what extent the organisation itself is bound by its own outputs, such as human rights,²⁴⁸ even though a significant element of its activities and outputs is the development of such norms.

There are circumstances though where an international organisation is expected to respect, and so far as is possible abide by, treaty standards even though it is not a party to the relevant instruments. This is true of territorial administration which is probably the most significant situation of direct governance by an international organisation in which it comes closest to acting as a *de facto* State.²⁴⁹ Consequently, it is likely to possess more extensive due diligence obligations akin to those of a State, such as those accompanying the protection of basic human rights as a minimum. That said, the identification of primary obligations will not always be clear and, to some extent, will depend upon the legal basis of a specific international territorial administration situation. Often this emerges from Security Council Resolutions but may also derive from peace agreements amongst interested parties.²⁵⁰ If the legal basis is a peace agreement, a key challenge here is that it will

²⁴⁵ See further eg P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413 including at 416; ND White, *The Law of International Organisations* (2nd edn Juris Publishing, Manchester 2005) 159-60.

²⁴⁶ Barnidge (n21)86.

²⁴⁷ See Articles 2(b) and 4 DARIO.

²⁴⁸ See eg J. Paust, 'The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity' (2010) 51 Harvard Int'l L. J. online 301, 318-19.

²⁴⁹ Paust (n 245) 328-9 in relation to the UN Mission in Kosovo and the UN Temporary Administration of East Timor where 'fully fledged governance structures' were developed.

²⁵⁰ Eg General Framework Agreement for Peace in Bosnia and Herzegovina November 21, 1995 UN Doc A/50/79C.

often be vague as to the obligations it imposes on international organisations and will rarely mention standards or positive legal obligations on which to adjudge whether international organisations act or fail to act on the basis of due diligence. As such, where and when the duties of States and international organisations may be different or identical and, thus, overlap, is unclear. In contrast, where the legal basis is a Security Council resolution, the obligations will generally be easier to discern, including the expectation that the interim authorities will abide by international obligations notably basic human rights standards – particularly those of *jus cogens*²⁵¹ - though the exact accompanying parameters of this may not be entirely clear either.²⁵² Furthermore, the context of territorial administration offers some examples of due diligence obligations being embedded within an international organisation's own activities, such as the UN's Third Party Claims Process in Kosovo, the Kosovo Ombudsman, the Kosovo Human Rights Advisory Panel that investigates potential violations of human rights by UNMIK, and the ICCPR Human Rights Committee Reports on Kosovo though this latter example has been filtered through Serbia's State obligations. Peacekeeping (considered below) is another example. Certainly, it is evident that to a large extent international organisations are left to determine for themselves their own applicable legal frameworks in such contexts, subject to their other existing international legal obligations.

Another potential source is due diligence obligations accompanying obligations sourced in general customary international law. Once again, there is lingering disagreement regarding the exact parameters of its application to an institutional context.²⁵³ For example, whether only norms with *jus cogens* status apply here or customary norms more generally; and whether they apply to only some organs of an international organisation, but not to others notably in relation to the Security Council when exercising its Chapter VII powers to maintain international peace and security.²⁵⁴ Certainly, there is a strong argument to be made that international organisations are bound by those international obligations, such as human rights ones, existing under customary international law to the extent that they are relevant to their conduct and functions.²⁵⁵ Therefore, for example, in the context of territorial administration where an international organisation is directly engaged in the governance of territory, there is a strong argument to be made that it should consider itself bound more extensively by customary international law obligations compared with its more routine activities. As a minimum, international organisations as legal actors are bound by those *erga omnes* obligations on the international community accompanying norms of *jus cogens*²⁵⁶ in all of their activities.

²⁵¹ See eg B. Kondoch 'Human Rights Law and UN peace operations in post-conflict situations' in ND White and D Klaasen, *The UN, Human Rights and Post-conflict Situations* Manchester University, 2005) 27-33.

²⁵² See eg UNTAET, Reg. No. 1999/1 On the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, 27 Nov. 1999 which refers to an extensive list of international human rights instruments.

²⁵³ For a detailed discussion of the issues in the context of the UN see eg C Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19 JCSL 451.

²⁵⁴ Eg E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart, 2004) 186.

²⁵⁵ A Tzanakopoulos, 'Strengthening Security Council Accountability for Sanctions: The Role of International Responsibility' (2014) 19 JCSL 409, 417. Though he was writing specifically about the UN Security Council, the principle is considered to be of more general application.

²⁵⁶ See further eg ND White, 'Due diligence obligations of conduct: developing a responsibility regime for PMSCs' (2012) 31 Criminal Justice Ethics 233, 257-8; ILA Committee on the Accountability of International Organisations (n 241) 18; Tzanakopoulos (n 252) 417.

A third source is general international law which has a number of very established principles ('general principles of law') which have been consistently applied and developed since they were referred to in early arbitration cases.²⁵⁷ More specifically, these are the principles of protection, prevention, investigation, punishment and ensuring redress as also exist for States. The key difference between their application to international organisations compared with to States is that in practice what is required to meet the reasonableness standard of conduct by the latter is generally likely to be less due to the more limited powers and functions, and therefore control over a situation including jurisdictionally, that an international organisation possesses compared with a State.²⁵⁸ Significantly too, due diligence obligations sourced in general international law exist independently of other international obligations, though they will often inform those due diligence obligations sourced in more conventional sources. Therefore, their existence is not dependent on the identification of primary rules binding on an international organisation sourced in treaty or customary international law which, as just noted above, can be accompanied by much uncertainty and controversy. It is further suggested that due diligence obligations sourced in general international law have further, currently not fully realized, potential to form the basis of a wrongful act triggering secondary rules of international responsibility. This has the potential to bridge some current impunity gaps where the identification of primary rules existing under a treaty or customary international law is not possible.

The final source of institutional due diligence obligations are the 'rules of the Organization'.²⁵⁹ These are broadly defined by DARIO to incorporate not only more conventional Article 38(1) ICJ sources, notably constituent instruments as treaties, but also 'decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization'. Importantly, all of these institutional outputs have the potential to create international obligations for the purposes of attribution of conduct under Article 4 DARIO, 'whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization'.²⁶⁰ That said, as the Commentary to DARIO recognises, not all of these instruments will create international obligations.²⁶¹ Significantly too, over time, such rules may become part of customary international institutional law²⁶² affording them increased weight within that particular international organisation.

An example of such institutional rules are the key documents issued by the UN Secretary-General governing peacekeeping missions where UN troops are deployed on the ground. It is likely that the Bulletin issued by the UN Secretary-General in 1999²⁶³ and the Capstone Document issued in 2008²⁶⁴ - which states that '[a]ll

²⁵⁷ Such as the *Alabama Claims of the United States of America against Great Britain*, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, United Nations, Reports of International Arbitral Awards, Vol XXIX p130.

²⁵⁸ Eg to prevent the commission of gross human rights violations.

²⁵⁹ Article 2(b) DARIO.

²⁶⁰ DARIO Commentary p11 para 16.

²⁶¹ DARIO Commentary to Article 10 para 7.

²⁶² See eg White (n 242) 85.

²⁶³ 'Observance by United Nations forces of international humanitarian law', UN Secretary-General's Bulletin ST/SGB/1999/13 (6 August 1999) reprinted in ILM, 1999, 1656 - which outlined 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'.

United Nations entities have a responsibility to *ensure* that human rights are *promoted* and *protected* by and within their field operations²⁶⁵ - now constitute rules of the UN, probably customary institutional ones. Together with internal legal advice issued by the UN Office of Legal Affairs stating that it considered the UN institutionally to be bound by human rights – presumably those reflected within peace support operations guidelines and standards - ‘as a general matter’,²⁶⁶ such language as ‘ensuring’, ‘promoting’ and ‘protecting’ all point to due diligence obligations. Certainly, when one considers the UN’s consistent policy of reiterating the importance and applicability of international human rights and humanitarian law to the peacekeeping context, including to its own deployed UN troops, and the gravity associated with the protection of civilian populations including from sexual violence by UN peacekeeping troops, it would be difficult to argue that no accompanying institutional sense of obligation exists to abide by these standards.

Indeed, such institutional rules will often exist alongside and/or reflect other sources of due diligence obligations. For example, Common Article 3 of the Geneva Conventions 1949 and other elements of international humanitarian law are certainly part of customary international law and so too create due diligence requirements for international organisations. The ICRC argues that ‘[g]iven that multinational forces are more often than not deployed in conflict zones it becomes essential to determine when a situation is an armed conflict in which IHL will constitute an additional legal framework governing a specific operation’ and so too, due diligence.²⁶⁷ In the *Akayesu* case the Tribunal found that Common Article 3 of Geneva Conventions (forming part of customary international law) and Additional Protocols I and II 1977 set the minimum and unconditional standard of duty for States and non-State actors engaged in the use of force.²⁶⁸ *Yeager v Iran* established that private actors carrying out State functions, in the absence of regular State authorities, could be attributable to the state and arguably, by extension to an international organisation.²⁶⁹ Private entities/non-State actors or individuals may violate international humanitarian law derived due diligence obligations even if their conduct is not attributed to the State which also arguably extends to international organisations even if this is the shared duality of State/institutional governance. In such instances, an international organisation may incur responsibility if it is not diligent in pursuing and preventing acts contrary to international humanitarian law by prosecuting and punishing private perpetrators. Yet, this does not mean that the international organisation is inevitably required to exercise due diligence no matter the connection to the armed group; the

²⁶⁴ ‘United Nations Peacekeeping Operations, Principles and Guidelines’ (Dept of Peacekeeping Operations/Dept of Field Support 2008) (Capstone Document), <http://www.un.org/Depts/dpko/dpko/Conduct/un-in.pdf> accessed 15 April 2016.

²⁶⁵ Capstone Document (n 261) 27.

²⁶⁶ S Sheeran and C Bevilacqua, ‘The UN Security Council and International Human Rights Obligations: Towards a Theory of Constraints and Derogation’ in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013) 386 – cited by Michaelsen (n 250) 455.

²⁶⁷ ICRC Report on Contemporary Challenges to International Humanitarian Law, 31IC/11/15.1.2, 31, available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> accessed 15 April 2016.

²⁶⁸ *Prosecutor v Jean Paul Akayesu* Judgment of 1 June 2001, paras 432-45; Geneva Conventions 1949, 75 UNTS 287; Additional Protocol I and II 1977, 1125 UNTS 3. Due diligence within international humanitarian law can lead to unusual arguments in favour of the use of force. Eg the British claimed in 1807 that due diligence required the shelling of neutral Copenhagen to prevent the fleet following to Napoleon. AN Ryan, ‘The Causes of the British Attack upon Copenhagen in 1807’ (1953) 68 *The English Historical Review* 37; Q Wright, ‘Responsibility for Losses in Shanghai’ (1932) 26 *AJIL* 586.

²⁶⁹ *Yeager v. The Islamic Republic of Iran*, Iran-U.S. (1987) 17 CTR 92, 101–4.

degree of attribution and impact of the overall or effective control test will be pertinent here.²⁷⁰

In addition, the 2013 UN Human Rights Policy on Due Diligence includes specific steps to be taken before providing support to non-UN forces.²⁷¹ This policy requires the UN's support to be 'consistent with the purposes and principles as set out in the Charter of the United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law' while also asking that both the Security Council and General Assembly utilise the guidelines when either mandate action.²⁷² The policy regards due diligence as risk assessment, transparency and effective implementation with more detailed requirements under each category. Nonetheless, such institutional approaches remain *ad hoc*²⁷³ and have yet to make a significant impact in practice. In contrast with the 1999 Bulletin and Capstone Document 2008, though this 2013 policy is considered to now form part of the UN's rules, it is not yet considered to form part of UN customary international institutional law, including as to the most recent addition to due diligence related documents.

Due diligence can play a role in the context of other legal regimes and institutional settings too. For example, the roles of both the International Monetary Fund (IMF) and the World Bank Group can have significant impact upon governance within States. In particular, the 'right to development' is critical in understanding the methods by which these organisations go about achieving their aims.²⁷⁴ Both the IMF and World Bank Group deploy due diligence in their agreements with States and the conditionality they impose. The character of these "letters of intent" or memorandums of understanding that both the IMF and World Bank Group set with States means review of the obligations created therein is difficult. Usually these

²⁷⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits), Judgment (1986) I.C.J. Reports 14, 126; *Prosecutor v Tadić*, ICTY, Appeals Chamber, 1999 (Case no. IT-94-1-A); *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment [2007] ICJ Reports 43.

²⁷¹ 'Human rights due diligence policy on United Nations support to non-United Nations security forces', Annex to Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, A/67/775-S/2013/110 dated 5 March 2013.

²⁷² 'Human rights due diligence policy' (n 268); HP Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2014) *Journal of Conflict and Security Law Advance Access*, doi:10.1093/jcsl/kru011; 'Due diligence guidelines for the responsible supply chain of minerals from red flag locations to mitigate the risk of providing direct or indirect support for conflict in the eastern part of the Democratic Republic of the Congo', available at http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf, Security Council Resolution 1596 (2005), accessed 1 June 2016. This has been extended to Peacekeepers in the Congo in an Environmental Context, Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations UNEP, available at http://www.un.org/en/events/environmentconflictday/pdf/UNEP_greening_blue_helmets_ES.pdf accessed 1 June 2016.

²⁷³ 'Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations', UN General Assembly, UN Doc. A/60/980 (2006); the UN Independent Audit Advisory Committee, UN General Assembly, UN Doc A/RES/60/248 (2006); 'Strengthening Accountability', at <http://www.un.org/en/strengtheningtheun/accountability.shtml> accessed 1 June 2016.

²⁷⁴ 'Declaration on the Right to Development', UN Doc A/RES/41/128 (1986); UNDP, *Human Development Report 2005: UNDP, International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (OUP, 2005) 126; Bi-lateral aid, while not within the remit of this article, also is often tied to economic obligations such as privatisation or the opening up to investment. C Tan *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States Law, Development and Globalization* (Routledge, 2011) 102-10.

“letters of intent” require States to take due diligence into their practice albeit this is rarely replicated within organisations.²⁷⁵

Under its Articles of Agreement, the IMF must establish adequate safeguards to ensure that loans are repaid and this is a duty the IMF owes to its own members, but this has largely been interpreted as outward facing.²⁷⁶ Within the IMF the most obvious use of due diligence is the instigation of a safeguards assessment. The aim of these is to guarantee the repayment of loans by ensuring a client State's central bank's governance is at the necessary standard. These safeguards require external audit mechanisms, legal structures and autonomy, financial reporting, internal audit mechanisms and a system of internal controls.²⁷⁷ These due diligence procedures extend into processes to ensure that policies on Longer Term Programme Engagement ensure a State maintains its economic reforms.²⁷⁸ All contemporary agreements with States contain due diligence provisions that also form part of the reviews of States' implementation. The creation of the Independent Evaluation Office in 2001 to appraise the IMF introduced a form of due diligence internal review.²⁷⁹

The World Bank's constituent organisations take a pro-active approach to due diligence, but as with the IMF this is largely State focused. For instance, as part of its due diligence process the International Financial Corporation in facilitating investment examines the 'environmental and social risks and opportunities' in a company's process of investing including corruption and fraud but also human rights impact assessments.²⁸⁰ The World Bank Group also requires environmental impact assessments and have a due diligence checklist for aspects such as public-private partnerships.²⁸¹ As with the IMF, the World Bank constituent organisations are also bound by its Articles of Agreement to adequately safeguard its resources and have taken this as paramount in the conditionality they extend.

CONCLUSIONS

Due diligence has a significant pedigree in international law, recognising the long-standing desirability that States adhere to certain behavioural standards, or to seek to achieve certain outcomes, but without prescribing either the precise result or timeframe by which this is to occur. It is thus unsurprising that due diligence has not only remained an influential standard of conduct in international law, but that its

²⁷⁵ ME Salomon, *Global responsibility for Human Rights* (OUP, 2007), Chapter 5; P Alston, 'The International Monetary Fund and the Right to Food' (1987) 30 HLJ 473; M. Lucas, 'The International Monetary Fund's Conditionality and the International Covenant on Economic Social and Cultural Rights' (1992) 25 RBDI 104.

²⁷⁶ Articles of Agreement of the International Monetary Fund, Article 1 (v), 5. 3(a).

²⁷⁷ Details available from the IMF at <http://www.imf.org/external/np/exr/facts/pdf/safe.pdf>, accessed 1 June 2016.

²⁷⁸ *Review of Ex Post Assessments and Issues Relating to the Policy on Longer-Term Program Engagement*, (March 2006), available at <https://www.imf.org/external/np/pp/eng/2006/032006R.pdf> accessed 1 June 2016.

²⁷⁹ Independent Evaluation Office terms of reference, available at <http://www.ieoimf.org/ieo/pages/TermsOfReference.aspx> accessed 1 June 2016. These have included reviews of loans to Sub-Saharan Africa, Fiscal Adjustment Programmes and Conditionality Completed Reports, available at <http://www.ieo-imf.org/ieo/pages/Completed.aspx> accessed 1 June 2016.

²⁸⁰ See eg the International Finance Corporation, 'IFC Project Cycle', available at http://www.gcgf.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/what+we+do/due+diligence accessed 1 June 2016; UN Global Compact, 'Guide to Human Rights Impact Assessment and Management', available at http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/About+the+Guide+to+HRIAM/ accessed 1 June 2016.

²⁸¹ PPIRC, 'Due Diligence Checklist for Legal and Institutional Enabling Environment for PPP', available at <http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/due-diligence-checklist> accessed 1 June 2016.

influence and appeal has spread beyond the confines of the mistreatment of aliens and transboundary harm. Certainly, what was previously perhaps implicit in the judgments of international courts and tribunals when addressing State wrongs is now increasingly being made explicit, particularly through the work of the International Tribunal for the Law of the Sea, though not by it alone. The 2015 *ITLOS Advisory Opinion on IUU fishing* is a very good example of the way in which ITLOS can utilise due diligence to give substance and meaning to obligations and commitments, which until this point had remained somewhat indeterminate or unclear. Equally, new global challenges – presenting new areas of transnational and global regulation – are (at least in the absence of specific primary rules) often finding in the standard of due diligence a useful yardstick by which to hold all States (to varying degrees) to a minimum standard of conduct.

Thus, this Second Report has sought to identify why due diligence is employed, the normative core of its content and the factors that might influence the variability in its operation. As the Second Report has shown, although being able to take into account the level of a State's economic development is an oft-expressed example of the flexibility inherent within due diligence (a flexibility which due diligence does, but will not always, incorporate) there is a wider range of factors at play, including but not limited to the overall reasonableness of State conduct, the degree (and knowledge) of the risk, an expectation of good government (of some form), control over territory, and the existence (or absence) of bona fides acts. Nor is due diligence static, but what it requires of States – of *all* States – may become more demanding overtime.

To the extent that due diligence is not one, but many standards of conduct, all premised on the same one idea – that States are expected to strive to achieve certain common goals and, in the spirit of good neighbourliness, to prevent problems especially of transboundary and global harm (be it environmental, economic, military (including non-State terrorism), kinetic, or other) – due diligence is an evolving principle of international law. To refer to it merely as a standard of conduct is not inaccurate, but nor does it capture its central place in the operation of a wide array of international obligations and global governance, more generally. As the Second Report finds, there is no norm-conflict between the very general standard of due diligence perhaps best encapsulated in *Corfu Channel* and more specific manifestations.

The Study Group has found due diligence to be an expansive, sectorally-specific yet overarching concept of increasingly relevance in international law. Its application in the related, yet distinct, field of business operations and human rights (and the overlap between the two) thus highlights both its importance, but also the concomitant risk of conceptual confusion. The Study Group has now concluded its work, but it would recommend to the Executive Committee that if the International Law Association considers further work on due diligence were deemed appropriate, it may wish to establish an international committee, with the mandate to undertake further study and to propose a resolution identifying the material factors and underlying principles helpful in the identification and operation of due diligence as a standard of conduct in international law.

Annex

Study Group Members

Name	Position	Branch
Professor Duncan French	Chair	British
Professor Tim Stephens	Rapporteur	Australian
Ms Zarizana Abdul Aziz	Member	American
Professor Neil Boister	Member	New Zealand
Associate Professor Eric de Brabandere	Member	Belgian
Professor Mary Footer	Member	British
Professor Robin Geiss	Member	German
Professor Rachael Lorna Johnstone	Member	Headquarters
Professor Timo Koivurova	Member	Finnish
Dr Sandrine Maljean-Dubois	Member	French
Professor Robert McCorquodale	Member	British
Professor Lorna McGregor	Member	British
Associate Professor Yumi Nishimura	Member	Japan
Dr Aoife O'Donoghue	Member	British
Dr Katja Samuel	Member	British
Dr Evelyne Schmid	Member	Swiss
Professor Karen Scott	Member	New Zealand
Dr Sara Seck	Member	Canadian
Professor Mirko Sossai	Member	Italian
Professor Hennie Strydom	Member	South African
Associate Professor Blake C Y Wang	Member	Chinese (Taiwan)