Annex II

Due Diligence in International Law

by Penelope Ridings

1. Introduction

1. The obligation of 'due diligence' has a long historical pedigree in international law.[1] It developed in the nineteenth century through State practice and arbitral decisions in the context of the law of neutrality and the protection of aliens and their property.[2] International judicial decisions in the twentieth century advanced the concept and gave it more concrete form.[3] Judicial decisions grounded due diligence in the notion that States must prevent the use of their territory for activities that are detrimental to the rights and interests or would harm other States. The International Court of Justice in the *Corfu Channel case* gave expression to this as the obligation of States not to allow their territory to be used for acts contrary to the rights of other States.[4] It has gained even further judicial recognition since the 1980s.[5]

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[1] For an examination of the history of due diligence see Giulio Bartolini, "The Historical Roots of the Due Diligence Standard", in Heike Krieger, Anne Peters, and Leonhard Kreuzer, *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020), pp. 23–41; Samantha Besson, La *due diligence* en droit international (The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye https://brill.com/view/serial/HAPB), vol. 46 (2021) pp. 33–71; Samantha Besson, *Due Diligence in International Law* (Hague Academy Special Editions) (2023) pp. 38–48; Jan Arno Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law", *N.Y.U. J. Int'l. L. & Pol.*, vol. 36 (2003–2004), pp. 265–306; Awalou Ouedraogo, "La neutralité et l'émergence du concept de *due diligence* en droit international: l'affaire de l'Alabama revisitée", *Journal of the History of International Law*, vol. 13(2) (2011), pp. 307–346.

[2] See *Alabama Claims Arbitration (United States of America v. United Kingdom)*, Final Award of 14 September 1872, RIAA Vol. XXIX pp. 125–134 at p. 129, which was governed by the rules set out in Article VI of the 1871 Treaty of Washington, including the 'due diligence' that ought to be exercised by neutral governments; *Frederick Wipperman Arbitration (United States of America v. Venezuela)*, Final Award of 2 September 1890, Moore, History and Digest, vol. 3, pp. 3039–3043 at pp. 3041–3042.

[3] See e.g. *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume Uni)* [*British Property in Spanish Morocco Arbitration (Spain v. United Kingdom)*], Final Award of 1 May 1925, RIAA Vol. II pp. 615–742; *Island of Palmas Arbitration (The Netherlands v. United States of America)*, Final Award of 4 April 1928, RIAA Vol. II pp. 829–871; *William E. Chapman Arbitration (United States of America v. United Mexican States*), Final Award of 24 October 1930, RIAA Vol. IV pp. 632–640; *Trail Smelter Arbitration (United States of America v. Canada)*, Final Award of 11 March 1941, RIAA Vol. III pp. 1905–1982; Dissenting Opinion of Judge Moore, in *S.S. Lotus (France v. Turkey)*, Judgment of 7 September 1927, *P.C.I.J. Reports 1927*, Series A No. 10, pp. 65–94 at p. 88; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, I.C.J. Reports (1949) p. 4 at p. 22.

[4] *Corfu Channel Case* supra n. 3. Interestingly, the English text of the case includes the word "knowingly" whereas the French text omits this and states: "l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats."

[5] See e.g. *United States Diplomatic and Consular Staff in Tehran*, Merits, Judgment, I.C.J. Reports 1980 p. 3, paras. 67–68; *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgments, I.C.J. Reports 1986 p. 14, paras. 157–158, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, paras. 241–242; *The Gabcikovo-Nagymaros Project*, Merits, I.C.J. Reports 1997, p. 7, para. 53; *Pulp Mills on the River Uruguay*, Merits, I.C.J. Reports 2010, p. 14, para. 101; *Certain Activities carried out by Nicaragua in the Border Area*, Merits, I.C.J. Reports 2015, p. 665, para. 104; *Indus Waters Kishenganga* Arbitration, Partial Award of 18 February 2013, PCA 2011-01, paras. 449–450; ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion,

2. At the most general level, due diligence has been understood as a duty or standard of care that should be applied to a State's actions on its territory or activities subject to its jurisdiction or control, which harm the rights and interests of other States. Due diligence is commonly associated with international environmental law, in particular the duty to prevent transboundary environmental harm. According to the International Court of Justice this duty of prevention flows from "the due diligence required of a State in its territory".[6] As is clear from the language of the Court, due diligence is broader than this specific application to the prevention of transboundary environmental harm. For example, it is associated, *inter alia*, with the protection of diplomatic and consular premises and personnel[7] and the failure of a State to prevent harmful acts of non-State actors subject to its jurisdiction or control.[8]

3. Due diligence may be considered a general principle of law which applies in different areas of international law, generating specific expressions of the due diligence obligation in those areas. Indeed, there is a multiplicity of special international law regimes in which commentators have sought to use due diligence. These include international humanitarian law,[9] international law of the sea,[10] international cybersecurity law,[11] international organisations law where it addresses the responsibility for human rights violations committed abroad by international organisations, including the United Nations and international financial institutions,[12] and international human rights law, where it is associated with the duty of a State to protect people within its jurisdiction from harm[13] and the control of corporations in line with the United Nations Guiding Principles on Business and Human Rights.[14] It is also finding relevance in new areas of international law, such as space law, global health,[15] and the development of artificial intelligence.

2011, p. 41, para. 110; ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024.

6 *Pulp Mills on the River Uruguay (Argentina/Uruguay)* supra n. 5, para. 101.

7 *United States Diplomatic and Consular Staff in Tehran*, supra n. 5, paras. 67–68.

8 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, I.C.J. Reports 2005 p. 168, paras. 246–250, where the Court uses the term 'vigilance'.

9 Antal Berkes, 'The standard of 'Due Diligence' as a result of interchange between the law of armed conflict and general international law', *Journal of Conflict and Security Law*, vol. 23(3) (2018), pp. 433–460; Marco Longobardo, 'The Relevance of the Concept of Due Diligence for International Humanitarian Law' *Wisconsin International Law Journal* 37 (2019) 44–87.

10 See e.g. ITLOS, *Responsibilities and Obligations of States in the Area*, supra n. 5, paras. 110–112; ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2015, para. 129; ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, supra n. 5.

11 Michael. N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., (Cambridge: Cambridge University Press, 2017), Rules 6 and 7; Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, 22 July 2015, UN Doc. A/70/173 (Cybersecurity Report), paras. 13 (c) and 28 (a) and (b).

12 Ellen Campbell et al, "Due diligence obligations of international organisations under international law", *New York University Journal of International Law and Politics*, vol. 50(2) (2018) pp. 541–604; International Law Association, *Accountability of International Organizations*, Berlin Conference (2004); Nigel. D. White, "Due Diligence, the UN and Peacekeeping", in Peters, Krieger and Kreuzer (eds.), *Due Diligence in International Legal Order*, pp. 217–233; Regis Bismuth "The Emerging Human Rights and Environmental Due Diligence Responsibility of Financial Institutions" in William Blair, Chiara Zilioli and Christos Gortsos (eds), *International Monetary and Banking Law post COVID-19* (Oxford University Press, 2023), pp. 330–351.

13 See for example in relation to the protection of women from violence: *Opuz v. Turkey*, European Court of Justice (Application no. 33401/02), Judgment, 9 June 2009.

14 Jonathan Bonnitcha & Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights" *The European Journal of International Law*, Vol. 28(3) (2017) pp. 899–919; John Gerard Ruggie, & John F. Sherman III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Johnathan Bonnitcha and Robert McCorquodale", *European Journal of International Law*, vol. 28 (2017) pp. 921–928.

15 Ahmed Alfatlawi & Azhar Al-Fatlawi, "Conceptual framework of due diligence and notification in light of the rules of international responsibility: COVID 19 as a model" *Al-rafidain of Law*. vol. 24(79) (June 2022) pp. 72–110; Antonio Coco, Talita de Souza Dias, "Prevent, respond,

4. The obligation of due diligence lies at the nexus between the responsibility of States as members of the international community and the sovereign right of States to act within their territory.[16] In the contemporary interconnected world, there is a heightened focus on the extent to which the actions of a State, and the natural and juridical persons subject to its jurisdiction or control, adversely impact on the rights and interests of other States and persons. There is an expectation of a standard of conduct on the part of States that they will act reasonably with regard to the rights and interests of others in the international community. The obligation of due diligence gives expression to this expectation.

5. While due diligence has been addressed in various special regimes of international law, there are common characteristics of due diligence in international law that can be ascertained from the abundant State practice, judicial decisions and doctrinal writings. Although there have been attempts to articulate these common characteristics in the past, including by the International Law Association (ILA),[17] there is room for a systematic approach which examines the full ambit of the obligation of due diligence.

6. Such a study would draw on the growing interest in due diligence in international law, particularly in academic writings,[18] and the more frequent recourse to the obligation of due diligence in pleadings before international courts and tribunals.[19] Nevertheless, the legal character, scope and content of the duty of due diligence at international law is not well defined. A topic on due diligence in international law would give concrete guidance to States on the necessary requirements to enable them to meet their due diligence obligations.

7. The sections that follow first address the past work of the Commission on the topic (Section 2). This provides the necessary background for consideration of the scope of the proposed topic and issues to be addressed (Section 3). This is followed by consideration of the criteria for the selection of topics (Section 4), and the possible form of the output of the topic (Section 5). A selected bibliography is also provided.

2. The past work of the Commission related to the proposed topic

8. Due diligence in international law is grounded in the past work of the Commission and a topic on due diligence in international law would add to, and not detract from, that earlier work.[20]

9. In its first session in 1949, the Commission included the topic of State responsibility in its provisional list of topics selected for codification.[21]

10. Following the submission of the Second Report of Special Rapporteur Robert Ago, the Commission decided to split consideration of State responsibility for lawful activities and

cooperate: states' due diligence duties vis-à-vis the Covid-19 pandemic", *Journal of International Humanitarian Legal Studies*, vol.11 (2020), pp. 218–236.

16 See Arbitrator Max Huber, *Case of the Island of Palmas (Netherlands v. USA)*, supra n. 3 at p. 839: "Territorial sovereignty … involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States …".

17 International Law Association, Duncan French (Chair) Tim Stephens (Rapporteur) "ILA Study Group on Due Diligence in International Law: First Report" (International Law Association Reports) 2014; International Law Association, Duncan French (Chair) Tim Stephens (Rapporteur) "ILA Study Group on Due Diligence in International Law: Secord Report" (International Law Association Reports) 2016.

18 Besson, La *due diligence* en droit international, supra n. 1; Besson, *Due Diligence in International Law*, supra n. 1; Krieger, Peters, & Kreuzer, *Due Diligence*, supra n. 1; Joanna Kulesza, *Due Diligence in International Law*, (Leiden: Brill Nijhoff, 2016); Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge: Cambridge University Press, 2022); Societe Francaise pour de Droit International (SFDI)/Sarah Cassella (eds), *Le standard de due diligence et la responsabilité internationale* (Paris: Pedone, 2018).

19 See for example the Written Statements and Oral Statements before the International Tribunal on the Law of the Sea, ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

20 For a description of the work of the International Law Commission on the relationship between due diligence and State responsibility see Kulesza, *Due Diligence*, supra n. 18, pp. 115–220.

21 UN ILC, Yearbook … 1949, Vol. I, pp. 49–50, paras. 27–32.

State responsibility for internationally wrongful acts and to deal first with the latter.[22] In part this was due to the different basis of the "so-called responsibility for risk" which made the simultaneous consideration of the two subjects difficult.[23]

11. In his Fourth Report Special Rapporteur Robert Ago introduced due diligence in his draft article 11 on attribution of the conduct of private parties where he cited at length State practice on the protection of aliens.[24] The concept of negligence on the part of States was further introduced into the draft articles on State Responsibility in his Seventh Report, and in particular through draft article 23,[25] as well as his distinction between obligations of conduct and obligations of result, covered by draft articles 20 and 21.[26] Special Rapporteur James Crawford expressed considerable caution in his Second Report on Robert Ago's classification,[27] and it was abandoned on second reading in the draft articles on State responsibility for internationally wrongful acts.[28] In concluding the articles on State responsibility, the Commission consigned the function of due diligence to the level of primary rules and as a standard which varies from one context to another and in light of the rules giving rise to the primary obligation.[29]

12. The Commission's work on State responsibility for internationally wrongful acts was commenced in advance of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, although they were eventually completed in parallel. The First Special Rapporteur for the topic of international liability for injurious consequences, Robert Quentin-Baxter, grounded the topic in the recognition that there were activities that are in principle useful and legitimate, and should therefore not be prohibited, but which entailed an element of transboundary harm or the risk of such harm.[30] Initially the topic was intended by him to have a wide application to activities undertaken within the territory or jurisdiction of a State which cause injury or harm.[31] However, the Commission decided to limit it to the physical environment.[32]

13. The Commission continued to discuss the single topic of international liability for injurious consequences not prohibited by international law until 1997 when it was split into two parts: prevention of transboundary damage from hazardous activities and international liability in case of loss from transboundary harm arising out of hazardous activities.[33] Due

[22] UN ILC, Yearbook … 1970, Vol. II, p. 178, para. 6.

[23] *Ibid.*, Vol. II, p. 178, para 6 and p. 306, para. 66.

[24] UN ILC, Yearbook … 1972, Vol. II, pp. 95–126, paras. 61–146. See also International Responsibility, Second Report of Special Rapporteur Francisco V. Garcia Amador, UN ILC, Yearbook … 1957, Vol. II, pp. 121–130.

[25] UN ILC, Yearbook … 1978, Vol. II (Part One), pp. 32–37, paras. 1–19.

[26] UN ILC, Yearbook … 1977, Vol. II (Part One), pp. 4–20, paras. 1–46. See Paul-Marie Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", *European Journal of International Law*, vol. 10 (1999), pp. 371–385 for a critique of Ago's approach to obligations of conduct and obligations of result.

[27] UN ILC, Yearbook … 1999, Vol. II (Part One), pp. 27–29, paras. 80–92.

[28] James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) pp. 226–232.

[29] UN ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook … 2001 Vol. II, Part 2, General Commentary, pp. 31–32, paras. 1–4. For a spirited response of Special Rapporteur Mr. James Crawford to suggestions that due diligence be addressed within the draft articles on state responsibility, see UN ILC, Yearbook … 1999 Vol. I, pp. 181–183; paras. 51–71.

[30] Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook … 1981, Vol. II, (Part One), pp. 122–123; paras. 78–93; Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook … 1983, Vol. II, (Part One), p. 201–202, para. 2.

[31] Fourth report by Quentin-Baxter, supra n. 30, p. 202, footnote 8.

[32] First report on prevention of transboundary damage from hazardous activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook … 1998, Vol. II (Part One), p. 193, para. 71.

[33] UNGA Resolution, Report of the International Law Commission on the work of its forty-ninth session A/RES/52/156, 26 January 1998.

diligence was discussed in the context of prevention,[34] and characterised as a central component of the duty to prevent transboundary harm.[35] Indeed, the articles on prevention of transboundary harm treat the duty of prevention in the same breath as the duty of due diligence.[36] While the articles give some content to the duty of due diligence in the context of transboundary harm from ultrahazardous activities in the environmental field,[37] they are limited in their application.

14. The relationship between due diligence and State responsibility has occupied the Commission for decades. Quentin-Baxter had initially raised the duty of care or due diligence as a central factor that operated as a function of the obligation of prevention.[38] He later abandoned the phrase 'duty of care' as having "too many overtones to justify its retention in the vocabulary of the present topic". Part of his justification for doing so was because the phrase, even when applied to 'acts not prohibited by international law', suggested a standard which, if disregarded, would entail the responsibility of a State for wrongful acts, which was not within the scope of the topic.[39] He reaffirmed the Commission's decision that "the topic lay within the field of 'primary' rules, i.e. rules that are governed by and do not compete with the established system of State responsibility for wrongful acts or omissions".[40] Nevertheless, a duty of care subsequently appeared in the reports of the second and third Special Rapporteurs on the topic.[41] The conundrum of the place of due diligence within the system of State responsibility has pervaded consideration of the duty of due diligence since then.[42]

15. The duty of due diligence has also featured in other outputs of the Commission's work, including non-navigational uses of watercourses.[43] Draft article 7 of the law of the non-navigational uses of international watercourses placed due diligence as a central element in the use of international watercourses so as not to cause significant harm to other States in

[34] For a review of the previous work on the Commission on the topic, see First report on prevention of transboundary damage from hazardous activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook … 1998, Vol. II (Part One) pp. 186–193, paras. 32–70.

[35] Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook … 1999 Vol II (Part One) pp. 116–121, paras. 18–49.

[36] Articles on Prevention of Transboundary Harm from Hazardous Activities, General Commentary, UN ILC Yearbook … 2001, Vol. II (Part Two) p. 148, para. 2. Nevertheless Crawford has explained that there is a difference between them: an obligation of due diligence would be breached by failure to take action, whether the prohibited event in fact took place, while in the case of the obligation of prevention, there must be a failure to take steps as well as the occurrence of the event: Crawford, *State Responsibility*, supra n. 28, pp. 231–232.

[37] Articles on Prevention of Transboundary Harm from Hazardous Activities, General Commentary, UN ILC Yearbook … 2001, Vol. II (Part Two), Commentary to Article 3, pp. 154–155, paras. 7–18.

[38] Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC Yearbook … 1981, Vol. II (Part One), pp. 119–123, paras. 68–72 and 90.

[39] Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook … 1982, Vol. II (Part One), pp. 55–57, paras. 19–23.

[40] Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur, UN ILC, Yearbook … 1983, p. 203, para. 7.

[41] See Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur, UN ILC Yearbook … 1986, Vol. II (Part One), p. 149, para. 18; Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur, UN ILC, Yearbook … 1999 Vol. II (Part One), p. 119, para. 32.

[42] See for example UN ILC, Yearbook … 1999 Vol. I, pp. 181–183; paras. 51–71 and the discussion between Special Rapporteur Mr. James Crawford and Mr. Hafner and Mr. Simma on due diligence.

[43] See Fourth report on the law of the non navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur, UN ILC, Yearbook … 1988, Vol. II (Part One), pp. 237–243.

whose territory part of an international watercourse is situated.[44] In the draft articles on the protection of persons in the event of disasters, article 9 addresses the reduction of disasters and was inspired by principles of international environmental law, including due diligence.[45] The draft guidelines on the protection of the atmosphere include an obligation on States to protect the atmosphere by exercising due diligence.[46] Most recently the Commission addressed due diligence in the draft principles on the protection of the environment in relation to armed conflict, principle 10 of which addresses corporate due diligence when business enterprises act in an area affected by an armed conflict.[47]

16. This review makes it clear that the duty of due diligence has featured in the past work of the Commission. However, the Commission has never comprehensively addressed the duty as a stand-alone duty with wider application than environmental harm. The Commission's consideration of the contours of the duty have not always been consistent. This has made identification of the scope and core contents of the duty difficult. It also sits somewhat uneasily between primary obligations and secondary obligations of responsibility. The proposed topic would complement the past work of the Commission and address matters not covered to date by the Commission.

3. Scope of the proposed topic and issues to be addressed

17. The topic would seek to clarify the legal character, scope and content of the due diligence obligation. Due diligence is often referred to as a 'duty' or an 'obligation' where the content of the duty is ascertained from the content of the primary obligation which it qualifies and the rights and interests of other States which are to be protected.[48] It is referred to as a standard of conduct by which to assess the conduct of a State in meeting its primary obligations.[49] It may also be considered a general principle of law which finds expression in different areas of international law.[50] The term 'due diligence' may take on different meanings depending on the context in which it is used.[51] In order to more clearly delineate the topic, the core of the due diligence obligation will be that enunciated by the International Court of Justice in the *Corfu Channel case* that a State should not allow its territory to be used for acts contrary to the rights and interests of other States protected by international law.[52]

18. The objective of the topic would be to identify the legal character, scope and content of a due diligence obligation in international law through discerning common elements of the due diligence obligation that can be applied both generally in international law and to special

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[44] UN ILC, Yearbook … 1994, Vol. II (Part Two), pp. 103–104, paras. 3–9 of the commentary to draft article 7.

[45] Draft articles on the protection of persons in the event of disasters, with commentaries 2016, UN Doc A/71/10, commentary to draft article 9, para. 4. See also draft article 16 which establishes the obligation for the affected State to take the measures that would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance.

[46] Draft guidelines on the protection of the atmosphere, with commentaries 2021, UN Doc A/76/10, draft guideline 3.

[47] Draft principles on the protection of the environment in relation to armed conflict, with commentaries 2022, UN Doc A/77/10, draft principle 10.

[48] Besson, *Due Diligence*, supra n. 1, p. 65.

[49] Riccardo Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States", *German Yearbook of International Law*, vol. 35 (1992), pp. 9–51 at p. 42; International Law Association Study Group on Due Diligence in International Law, 'Second Report', supra n. 18; Caroline Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard, and Due Diligence*, (Oxford: Oxford University Press, 2021), pp. 99–129.

[50] International Law Association Study Group on Due Diligence in International Law, 'Second Report,' supra n. 18, p. 6.

[51] See for example the use of 'due diligence' by the International Court of Justice in the *Bosnian Genocide case*, as a standard to define the scope of the duty to prevent genocide: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Merits) Judgment, I.C.J. Reports 2007, p. 43 at para. 430.

[52] *Corfu Channel Case*, supra n. 3.

regimes of international law. The topic would map the normative contours of the due diligence obligation through an analysis of State practice, judicial decisions and doctrine on due diligence as applied in different fields of international law with the objective of identifying the core characteristics of due diligence that are not dependent on the primary obligation to which due diligence is attached. This will enable a deductive approach to be adopted which deduces from these individual elements those that are common characteristics of due diligence. Although some commentators have disputed that there exists a general regime of due diligence,[53] others have illustrated the promise of such a regime.[54]

(a) Title of the proposed topic

19. The title of the proposed topic is 'Due Diligence in International Law'. The use of 'due diligence' as a general term, rather than any of its elements, is deliberate. It allows the topic to be concentrated on the common aspects of due diligence and does not prejudice the identification of any specific meaning of due diligence. It should be noted, however, that the topic would address due diligence, whether as an obligation, a duty or a principle. However, it would not directly address questions of State responsibility. The reference to 'international law' signals that the topic addresses due diligence in the context of general international law.

(b) Scope of the proposed topic

20. This section considers the elements of the scope of the topic: the legal character of due diligence, the scope, and the content of the due diligence obligation. It also seeks to confine the scope of the topic by excluding certain elements that are peripheral to the main objective of the topic.

i. Legal character of due diligence

21. There is a lack of clarity over the legal character or foundation of due diligence as a general principle of law or a customary international law obligation and therefore its relationship to the sources of law under Article 38(1)(a) to (c) of the Statute of the International Court of Justice. It is sometimes referred to as a 'principle of international law' in the sense of a general standard of behaviour applicable across international law.[55] On the other hand, its status as a principle has been questioned.[56] An understanding of the legal character of the duty of due diligence may assist in considering how it may be applied in both general and specific fields of international law. Similarly, in the orthodoxy of the articles on State responsibility, due diligence is an element of primary rules. It nevertheless has a necessary connection to secondary rules of responsibility arising from the consequences of breach of the obligation. Understanding due diligence within the orthodox framework of State responsibility, as well as within the dichotomy of obligations of conduct and obligations of result,[57] can assist in a better appreciation of its character.

ii. Scope and content of due diligence

22. The topic would seek to identify common elements of due diligence gleaned from a survey of State practice, judicial decisions and doctrine related to the obligation of due

[53] See Riccardo Pisillo Mazzeschi, "Le chemin étrange de la due diligence: d'un concept mystérieux à un concept surévalué", in SFDI (ed.), *Le standard de* due diligence *et la responsabilité internationale: Journée d'études franco-italienne du Mans*, (Paris: Pedone, 2018) pp. 323–338.

[54] ILA, Study Group on Due Diligence in International Law, First and Second Reports, supra n. 18; Robert Barnidge, "The Due Diligence Principle under International Law", *International Community Law Review*, vol 8 (2006), pp. 81; Awalou Ouedraogo, "La due diligence en droit international: de la règle de la neutralité au principe general", *Revue Général de Droit*, vol. 42 (2012), p. 641; Besson, La *due diligence* en droit international, supra n.1; Ollino, *Due Diligence Obligations*, supra n. 18.

[55] Kulesza, *Due Diligence*, supra n. 18, pp. 272–6; Barnidge, "The Due Diligence Principle", supra n. 54; Ouedraogo, « La due diligence en droit international » (2012), supra n. 54.

[56] See Neil McDonald, "The Role of Due Diligence in International Law" *International & Comparative Law Quarterly* 68(4) (2019), who bases this in part on the non-legal policy considerations that may condition a State's conduct; Heike Krieger & Anne Peters, 'Due Diligence and Structural Change in the International Legal Order', in Krieger, Peters, Kreuzer, *Due Diligence*, supra n. 1, pp. 371-6.

[57] See Ollino, *Due Diligence Obligations*, supra n. 18, pp. 64–130.

diligence in specific areas of international law. It would examine a range of issues associated with the due diligence obligation, including the following:

- whether there are conditions under which due diligence arises that are specific to the due diligence standard, and not dependent on a particular obligation;
- the relevance of the circumstances or capabilities of the State concerned and the degree of their control over the sources of harm;
- the extent and nature of the variability of the standard of conduct that is required by the duty of due diligence; and the degree of care or vigilance, or the absence of negligence, that is required;
- whether there is a minimum level of risk of harm and the gravity of the harm before the obligation of due diligence is activated; and questions over the relevant knowledge requirement and foreseeability of the risk of harm; and
- the reasonableness of the standard of conduct with regard to a State's activities and the activities of non-state actors subject to their jurisdiction or control, including consideration of the duty of due diligence as an objective standard.

23. The topic would not be limited geographically but would have a wide application in light of the context of the primary obligations with which due diligence is associated. The geographical scope to which due diligence applies would include areas beyond national jurisdiction where the rights and interests of the international community are engaged.

iii. Confining the scope of the topic

24. Given the multiplicity of the regimes in which due diligence obligations are found, it is necessary to clearly delineate the scope of the topic.

25. The topic would address due diligence obligations of *States*. It would not extend to due diligence that may be required of international organisations in the conduct of their internal processes,[58] nor to due diligence that may be required of multinational corporations, business operators, private investors or other non-State actors.[59] The applicability of due diligence to international organisations differs from that applying to States, due to the variety of their legal and institutional structures and their degree of control and institutional autonomy.[60] In some contexts, due diligence can be seen as a process whereby non-State actors, such as corporations, identify, assess, and manage risks related to their investment or activities.[61] In light of these differences and the challenge of identifying commonalities in the application of due diligence to different actors, due diligence as applied to international organisations and non-state actors is not within the proposed scope of the topic.

26. The topic would not encompass the application or operationalisation of due diligence in particular circumstances as this would depend to a large extent on the content of the primary obligation to which due diligence is attached. Similarly, the topic would not undertake a micro-level analysis of the different individual primary obligations to which due diligence is associated as the focus would be on due diligence and not on primary obligations.

27. The proceduralisation of the due diligence obligation has become particularly pervasive in international environmental law and is also found in international human rights law.[62] Due diligence is seen as entailing certain procedural obligations, such as notification, information sharing, consultation, cooperation, assessment and monitoring. However, the nature and scope of these procedural obligations depend on the relevant primary obligations.

[58] See International Law Association, *Accountability of International Organizations*, Berlin Conference (2004); United Nations, Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces, 2013, UN Doc. A/67/775–S/2013/110.

[59] For example, the United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc. A/HRC/17/31.

[60] Besson, *Due Diligence*, supra n. 1, pp. 81–85.

[61] Ollino, *Due Diligence Obligations*, supra n. 18, pp. 58–61.

[62] See Ollino, *Due Diligence Obligations*, supra n. 18, pp. 232–265.

Thus, in identifying common elements of due diligence it will be a challenge to identify generally applicable procedural obligations in a way that clarifies and gives substance to the due diligence obligation in general international law. For this reason, the topic will not seek to identify any particular procedural obligations that are associated with due diligence in the special regimes of international law, as distinct from procedural obligations that possess a customary international law character and are applicable as common elements of the due diligence obligation.

28. The proposed topic would not directly address issues of State responsibility. However, as due diligence is associated with primary rules, the topic should assist in clarifying the relationship between primary and secondary rules and between obligations of conduct and obligations of result. It may also need to cover some aspects of circumstances precluding wrongfulness which are relevant to due diligence, such as *force majeure*, distress or necessity, where the contributory conduct of a State may arise.[63] In general, however, the topic would not encompass the relationship of due diligence with the question of attribution of conduct and responsibility, the question of causation and allocation of responsibility and the question of reparations in case of negligent conduct by States. These are specific to the regime of State responsibility and any discussion of them in the context of a study of due diligence in international law would overlap with past work of the International Law Commission. It would also blur the distinction between primary and secondary rules that the Commission has sought to maintain in the past.

4. ILC's criteria for the selection of topics

29. The proposed topic would meet the Commission's criteria for the selection of topics. It would fit within the schema for the International Law Commission's long-term programme of work, and in particular Section IX on the law of international relations/responsibility.[64] This is in keeping with the earlier treatment by the Commission of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. As indicated in section 2, the topic would flow from and complement the work the Commission on the 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts* and the 2001 *Articles on the Prevention of Transboundary Harm from Hazardous Activities*.

30. Any new topic should meet the Commission's criteria for the selection of topics. These are that the topic should: (a) reflect the needs of States in respect of the progressive development of international law and its codification; (b) be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for progressive development and codification. The Commission also agreed not to restrict itself to traditional topics but to also consider those that reflect new developments in international law and pressing concerns of the international community.

31. The Commission's criteria for the selection of topics are fulfilled in this instance. The topic is important to States which must decide how to navigate an increasingly complex world where the range of international actors is expanding, threats are increasing, including those associated with technological advances, and there is heightened concern over the harmful effects of governmental and private actions in an interconnected world. Due diligence is increasingly being seen as a tool to address situations in which care and oversight is required in order to prevent conduct which amounts to State responsibility.

32. The topic is also sufficiently advanced in terms of State practice to permit codification and progressive development. There is a growing body of judicial decisions, State practice and scholarly writings to advance the codification and progressive development of due diligence in international law. Due diligence has featured in the advisory opinion of the

[63] Art. 23(2)(a), Art. 24(2)(a) and Art. 25(2)(b), ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, UN ILC, Yearbook … 2001, Vol. II (Part 2), pp. 76–84; Ollino, *Due Diligence Obligations*, supra n. 18, pp. 218–225.

[64] International Law Commission, *Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996*, UN ILC, Yearbook … 1996, Vol II (Part Two), Annex II, pp. 133–136.

International Tribunal on the Law of the Sea on climate change,[65] and the advisory opinion on climate change sought from International Court of Justice can be expected to further assist in clarifying the scope of the duty.

33. An ILC topic on due diligence would also complement the work of the ILA which undertook a study into due diligence in international law and considered the extent to which there was a commonality of understanding between the distinctive areas of international law in which due diligence is applied.[66] This study, however, centred on due diligence as a standard of conduct and did not address due diligence as an obligation within the *Corfu Channel* paradigm. Neither did it address the legal character of due diligence and its relationship to secondary rules of responsibility. The *Institut de Droit International* is currently examining the "Harm Prevention Rules Applicable to the Global Commons" and intends to elucidate the parameters and application of the obligation to protect the environment of areas beyond national jurisdiction.[67] As a part of this it will elaborate on what the attendant standard of due diligence requires of States with respect to compliance with this obligation.[68] However the proposed topic on due diligence would be broader in geographical scope than the work undertaken by the *Institut* and would be more systematic than the work of the ILA.

34. The topic of due diligence is both concrete and feasible for progressive development and codification. A systematic examination of its content, based on State practice and subsidiary means for the determination of rules of international law, can serve to elucidate the contours of the obligation. The role of due diligence is acknowledged in judicial decisions and in the practice of States and can be a tool to address contemporary issues involving the harmful effects of activities of States and non-State actors subject to their jurisdiction or control and the consequent impact on the rights and interests of other States. It would also reflect new developments in international law and pressing concerns of the international community.

35. The study of due diligence would benefit from independent analysis and consideration by international legal experts. Through its methodological approach, the International Law Commission can give greater precision and form to the due diligence obligation through the elaboration of a legal framework of due diligence that can be used by States to minimise the harmful effects of their actions and of those subject to their jurisdiction or control. In this way it would assist States in providing them guidance to enable them to fulfil their obligations and to assist in addressing potentially harmful situations before they arise.

36. Finally, it is important that the Commission be fully engaged with the contemporary needs of the international community. International law must keep pace with the changing reality and with the increasing complexity of today's world. The International Law Commission has a role to play in the codification and progressive development of due diligence in international law. Given its composition and collegial working methods, and its close relationship with States through the General Assembly, the Commission would be able to make a useful contribution to international law on due diligence.

5. Possible form of output

37. The primary purpose of the topic is the codification of the practice relating to the obligation of due diligence in international law. Given its practical orientation, the preferred form is that of draft principles which can be used to assist States in their implementation of the due diligence requirement. A set of principles on due diligence in international law would bring together the fundamental normative content of the due diligence obligation which is sufficiently general and broadly supported so that it can serve as a guide to States for its practical application. Other alternative forms could be considered in light of progress on the topic, such as draft conclusions. Draft articles would be consistent with the 2001 Articles on

[65] ITLOS, *Request Submitted to the Tribunal by the Commission of Small Islands Staes on Climate Change and International Law*, Advisory Opinion, 21 May 2024.

[66] International Law Association, Study Group on Due Diligence in International Law, supra n. 18.

[67] *Institut de Droit International*, 3rd Commission, Harm Prevention Rules Applicable to the Global Commons, Editions, A. Pedone, 2023, p. 104.

[68] *Ibid*., p. 105.

State Responsibility and the 2001 Articles on Transboundary Harm and complement the past work of the Commission on interconnected legal issues. However draft principles are the preferred form of the output of the topic due to its practical orientation and the intent to formulate propositions at an appropriate level of generality to guide States.

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