

ILA Study Group on Due Diligence in International Law

First Report

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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 First Report.

It is not intended that the Study Group would necessarily examine each and every instance of due diligence in international law for its own intrinsic value, but rather to provide answers to more general questions, including what does the standard of conduct entail? Are the various standards of conduct similar? How is this evidenced? What relevance is the level of technical capability / governance capacity of a State in determining whether due diligence has been met? Is the standard an evolving one? What consequences flow from breach of due diligence for responsibility? To what extent has the application of due diligence in domestic law influenced its application at the international level? More fundamentally, is there any suggestion that there is emerging a common standard of due diligence, and does the existence of due diligence as a standard of behaviour (and of responsibility) across a range of areas of international law say anything more fundamental about the role of the State in regulating private and corporate behaviour in contemporary international law?

This First Report sets out the initial work of the Study Group. It provides 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. It is designed to stimulate further discussion, including among Study Group members meeting at the 2014 ILA Biennial Conference, with a view to the formulation of a Second Report of the Study Group. The Second Report will draw general conclusions about the role of due diligence across international law as a whole, and offer some reflections on areas of future potential development of the concept. Of necessity, the Report does not seek to include every aspect of international law in which due diligence arises – in particular, the report does not include discussion of international trade law, or new areas such as suppression of cyber-attacks.

We gratefully acknowledge the significant contribution to the First Report by members of the Study Group who responded to an initial questionnaire distributed in February 2013. We express particular thanks to several Study Group members who later drafted sections of the report: Eric De Brabandere (international investment law), Aoife O'Donoghue (international humanitarian law), Rachael Lorna Johnstone and Robert McCorquodale (international human rights), Neil Boister (transnational

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

criminal law), and Sandrine Maljean-Dubois, Timo Koivurova, and Sara Seck (international environmental law).

Due Diligence in the History of International Law

‘Due diligence’ emerged as a concept in international law to mediate interstate relations at a time of significant change. Grotius laid the intellectual foundations for the concept in the 17th century,² however it was not until the 19th century that due diligence began to take shape and was applied as both a duty and a constraint upon State behaviour.

With greater movement of citizens across territorial borders, it was accepted that governments were under an obligation to take reasonable steps to protect aliens within their territory.³ As Justice Moore observed in the *SS Lotus Case*⁴, by reference to a decision of the United States Supreme Court in 1887 concerning the counterfeiting of foreign currency,⁵ “[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.”

And with the emergence of strong notions of state sovereignty, it was also recognized that States were required to protect the security of other States in times of peace and war. Hence in the *Alabama Claims Arbitration*,⁶ the tribunal set out an international, due diligence, standard for neutral States in meeting their obligation of neutrality.⁷ Using the agreed standard contained in Article 6 of the 1871 Treaty of Washington,⁸ the question was whether Britain had acted with due diligence so as to fulfil its duties of neutrality. The British government argued 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.”⁹ However the Tribunal agreed with the more exacting standard argued by the United States, that a due diligence standard requires a neutral government to act in exact proportion to the risks to which belligerents may be exposed from any failure to fulfil obligations of neutrality.¹⁰ Due diligence was therefore a flexible concept, the content of which varied depending on the circumstances of the case. Importantly, the Tribunal rejected the British plea that it was constrained by English constitutional law from interfering with private acts, and upheld the supremacy of international law.¹¹ Given that Britain initially refused to submit to arbitration, on the

² Grotius considered that a sovereign could become complicit in crimes of individuals through principles of *patientia* (where a community or its ruler know of a crime committed by a subject but fail to prevent if they can and should) and *receptus* (where a ruler fails to punish or extradite fugitives). See Jan Arno Hessbruegge ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2003-2004) 36 *New York University Journal of International Law and Politics* 265, p. 283.

³ Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ in René Provost (ed), *State Responsibility in International Law* (2002).

⁴ *SS Lotus (France v Turkey)* 1927 PCIJ (Ser. A) No 10.

⁵ *United States v Arjona* (1887) 120 US 479.

⁶ *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 RIAA 125, p. 129.

⁷ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) 221-222.

⁸ Treaty between Great Britain and the United States of America for the Amicable Settlement of all Causes of Difference between the Two Countries, signed 8 May 1871, entered into force 17 June 1871 [1870-1871] 61 BSP 40.

⁹ Case presented on the Part of the Government of Her Britannic Majesty in Papers relating to Foreign Relations of the United States 1872, United States Government Printing Office Washington 1872] part 2 vol 1, p. 412.

¹⁰ *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 RIAA 125, p. 129.

¹¹ *Ibid*, p. 131.

grounds that it was the sole guardian of her own honour,¹² the *Alabama Claims Arbitration* was highly significant in ascribing State responsibility over private acts occurring within its territory, and conditioning that responsibility by reference to an internationally defined due diligence standard.

During the 19th and 20th centuries, due diligence had particular relevance in the context of the protection of aliens. In his 1758 work *The Law of Nations*, Vattel had confirmed the customary international norm that a sovereign, in allowing foreigners the right of entry to his territory, “agrees to protect them as his own subjects and to see that they enjoy, as far as depends on him, perfect security.”¹³ This included both a duty to protect citizens from private criminal acts, and also a duty to prosecute and punish those who caused injury to aliens and their property. By the 19th century, this norm was being tested in relation to the large number of foreigners and extensive foreign property interests within the territorial jurisdiction of emerging nations. Clearly, these emerging nations could not be held responsible for every private act that violated the rights of foreigners within its territories and the question became what standard of protection could be expected.

While complaints concerning the treatment of aliens were initially made on the basis of international comity and the maintenance of friendly relations, States gradually included in their treaties with other countries provisions stipulating for the protection of their nationals and their property.¹⁴ On this basis, States began to use mixed claims commissions and arbitral tribunals to make claims for indemnity for injuries suffered by their nationals. It is these processes, largely conducted as judicial proceedings with decisions made by reference to the rules and principles of international law, that provide much of the early jurisprudence on due diligence.

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.”¹⁵ In that case, which involved injuries to a United States citizen by indigenous peoples in a remote coastal area of Venezuela, the Commission rejected the United States’ claims for indemnity. An examination of similar arbitration claims between the United States and Mexico reveals that while the content of due diligence cannot be precisely defined, a series of objective factors may be taken into account in determining the content of the due diligence obligation in any particular case. These include the degree of effectiveness of the State’s control over certain areas of its territory,¹⁶ the degree of predictability of harm¹⁷ and the importance of the interest to be protected.¹⁸ Moreover, as the Claims Commission in *Janes Claim* makes clear, due diligence also applies to instances of post-hoc denial of justice: “The culprit is liable for having

¹² CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922) vol 2, at p. 120.

¹³ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) reprinted in 3 *Classics of International Law* 145 (1916).

¹⁴ Frederick Sherwood Dunn *The Protection of Nationals* (1932) at p. 55.

¹⁵ John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington 1898-1906, III, 2947) vol III, 3041. Emphasis added.

¹⁶ For example in *Boyd* (UNRIAA IV, 380), the fact that the nearest authorities were stationed 50 miles from an attack against a US citizen was one relevant factor in finding that Mexico did not breach its duty of due diligence to protect (although there was held to be a denial of justice because no effort was made to apprehend for days and orders for arrest were delayed).

¹⁷ For example, in *Chapman* (UNRIAA IV, 632) the fact that the United States citizen had notified the Mexican authorities of a threat he had received was found to be a factor which would increase the predictability of harm.

¹⁸ For example, in *Chapman*, *ibid*, the fact that the United States citizen affected was a consular official may increase the standard of diligence expected.

killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender”.¹⁹

These cases also confirm that the content of due diligence is made by reference to international, rather than domestic, standards. For example in the case of *Neer*, the Arbitral Commission stated that “the propriety of governmental acts should be put to the test of international standards, and...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.”²⁰

However, even if one accepts the proposition that the content of due diligence is determined by international law, this still fails to answer the central research question of the Study Group: namely, to what extent is there a common standard in international law of due diligence? On a broad reading of the International Court’s dictum in *Corfu Channel* – “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”²¹ – it might be thought that the Court was establishing a general obligation of good neighbourliness. But even if that were the case, subsequent developments would suggest otherwise. 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”.²² 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? And is there normative benefit in considering the matter in terms of the former, rather than the latter? Such questions are not considered per se in this report but are left for the second report.

Due Diligence and State Responsibility

The term due diligence is not used in the International Law Commission’s Articles on State Responsibility,²³ as the articles take an agnostic approach to the question

¹⁹ UNRIAA IV, p. 87.

²⁰ UNRIAA IV, p. 60. See also the *Venable* case (UNRIAA IV, 219).

²¹ *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), [1949] ICJ Rep 4, p. 22.

²² 1970 Declaration of Principles of International Law Concerning Friendly Relations (GA Res. 2625 (XXV)), recognised as a rule of customary international law by the International Court in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 168, para. 162.

²³ Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001), 43–59 (noted in GA Res. 56/83, 12 December 2001, UN Doc. A/RES/56/83 (2001)).

of fault, simply requiring, in Article 2, that a wrongful act be attributable to a State and to constitute a breach of an international obligation of that State.

Although the issue of fault attracted significant attention in the development of the Articles on State Responsibility, it is to primary rules of conduct, rather than secondary rules of responsibility, that we must look to determine the applicable standard of behaviour. As the Commentaries explain, the Articles lay down no general standard, whether it involves “some degree of fault, culpability, negligence or want of due diligence”.²⁴ The development of the Articles on State Responsibility have salience to the work of the Study Group as it involved a similar process in drawing common lessons from across different areas of international law.

In the second-half of the twentieth century, the development of the ‘due diligence’ standard has been dominated by practice in the field of international environmental law (on which there is extended discussion below). The omission of due diligence from the Articles on State Responsibility in relation to state wrongs generally, led the Commission to take up the concept in other contexts, most notably in the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities²⁵ where the Commentaries explained that the duty to take ‘preventing or minimization activities measures is one of due diligence’,²⁶ and that “[t]he standard of due diligence against which the conduct of the State of origin of [transboundary environmental harm] should be examined is that which is generally considered to be appropriate and proportional to the risk of transboundary harm in the particular instance.”²⁷

Crawford observes:

Despite the uncertainty surrounding their future status, the Draft Articles provide an authoritative statement on the scope of a state’s international legal obligation to prevent a risk of transboundary harm.²⁸

Articles 3 and 7 of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities provide:

3. The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

7. Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Stephens explains that “[t]he obligation to take preventative measures is one of due diligence, not an absolute guarantee against the occurrence of harm.”²⁹ In support, he draws on the commentary to the Draft Articles, which relevantly state:

²⁴ James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002), p. 82.

²⁵ Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001).

²⁶ Ibid, p. 154.

²⁷ Ibid.

²⁸ James Crawford, *Brownlie’s Principles of Public International Law* (8th ed, 2012), pp. 356-7 (citations omitted).

²⁹ Tim Stephens, *International Courts and Environmental Protection* (2009), p. 158.

due diligence is manifested in reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them.³⁰

Further, the Commentary states:

The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State ... [must] exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur.³¹

Stephens continues:

[The commentary] reflects state practice generally, in which there has been great reluctance to accept a stricter standard. Indeed in the *Trail Smelter* case it was accepted that a due diligence standard was to apply having regard to the capacity of Canada, via improving emissions control technologies, to limit transboundary damage.³²

The Commentary also refers to a number of other treaties from which a 'due diligence' obligations can be 'deduced'.³³ The Commentary also refers to a 1986 dispute between Germany and Switzerland, where Switzerland accepted 'due diligence' as the standard.³⁴

Before moving on to individual disciplinary areas, one final comment is worth noting. International treaty law rarely uses the term 'due diligence'. One of the most notable examples, cited below, is the 2011 Council of Europe Convention on Preventing and Combatting Violence against Women. But its use is exceptional. However, as the case law and the International Law Commission commentary discussed below reveals, due diligence is a fundamental feature of many disparate areas of international law.

International Investment Law

The concept of due diligence plays an important role in several aspects of the protection of foreign investors in international investment law. In particular, certain standards of investment protection, notably 'full protection and security' (FPS) include an obligation for the State to act in due diligence, but also in relation to the international minimum standard (IMS) and fair and equitable treatment (FET)

Full Protection and Security, the International Minimum Standard and Fair and Equitable Treatment

³⁰ Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001), p. 154.

³¹ Ibid.

³² Stephens, above n 29, p. 158.

³³ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, articles I, II and VII(2); Vienna Convention for the Protection of the Ozone Layer, article 2; Convention on the Regulation of Antarctic Mineral Resource Activities, article 7(5); Convention on Environmental Impact Assessment in a Transboundary Context, article 2(1); Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

³⁴ Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001), p. 154.

FPS, IMS and FET are generally referred to as *objective* standards of treatment as opposed to *subjective* standards, such as national treatment (NT) or most favoured nation treatment (MFN)³⁵. Objective standards require the State to act in a certain defined way, as required under international law (either custom or treaty law) irrespective of how other investors or investments are treated. When one deals with objective standards, the assessment standard of a breach of those standards requires a comparator – such as the conduct of a diligent State – different from the way in which other investors and investments are treated (as is the case with subjective standards).

The exact relation and interconnectedness between FPS, the IMS and FET remains subject to much debate. Nonetheless it is clear that all three treatment standards have certain commonalities, and thus overlap in certain of their aspects,³⁶ which explains the presence of ‘due diligence’ in all three standards of treatment (although it is in practice much more used in relation to FPS than the IMS and FET).

Due Diligence and Standards of Treatment

Full Protection and Security

Provisions granting protection and security to investments, occasionally also investors, vary in nature. In the current conception of the FPS standard of treatment, however phrased, the host State is in breach of its international if it fails to provide *physical protection* to foreign investments/investors from harm cause by the State itself or by third parties.³⁷ This obligation applies to acts of the State, and of individuals under its jurisdiction.³⁸ The State must exercise due diligence in providing *physical protection* to foreign investments/investors, but this does not entail any form of strict liability for the host State. This understanding of the FPS standard of treatment is shared by many tribunals.³⁹ Certain tribunals have used a similar test, without however referring explicitly to a duty of ‘due diligence’. They

³⁵ See Nicolas Angelet, ‘Fair and Equitable Treatment’, in R. Wolfrüm (ed), *Max Planck Encyclopedia of Public International Law* (2012).

³⁶ See for example the statement of the Tribunal in *Jan de Nul v. Egypt*: ‘The notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap’ (*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 269).

³⁷ See UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, New York and Geneva, 2007, 132, available at http://unctad.org/en/Docs/iteiia20065_en.pdf. See also Jeswald W. Salacuse, *The Law of Investment Treaties* (2010), 132 and 209-210 and George K. Foster, ‘Recovering Protection and Security: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance’, (2012) 45 *Vand. J. Transnat’l L.* 1095.

³⁸ See Christoph Schreuer, ‘Full Protection and Security’, (2010) *Journal of International Dispute Settlement*, 3-10. See also, for example: *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 730.

³⁹ See amongst others: *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, Sep 3, 2001, para. 308, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Oct 12, 2005, para. 164, *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 483; *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 725 ; *Rumeli Telekom A.S and Telsim Mobil Telekomunikasyon Hizmetleri A.S v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award 29 July 2008, para. 668; *Waguih Elie George Siag & Clorinda Vecchi v. the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 447, and the joint decisions *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic*, ARB/03/19, Decision on Liability, 30 July 2010 and *AWG Group Ltd v The Argentine Republic*, ARB/03/19, Decision on Liability, 30 July 2012, para. 161.

have rather referred to a duty of 'vigilance',⁴⁰ which in practice is essentially the same.

Besides the requirement of providing physical protection and security, certain Tribunals have, in particular when the word 'full' precedes 'protection and security', also extended the application of the standard to 'legal protection and security', making this understanding of the standard in fact relatively similar to the FET protection standard.⁴¹ In this context States' obligations are assessed by applying the due diligence standard, in particular in having and making available an adequate legal system.⁴² However, the due diligence standard here only applies to the obligation of States to make available a functioning court system, not to make sure that the decision of these courts is favourable to the foreign investor.⁴³

In both cases – physical and legal protection and security – it is clear that the State holds no strict liability for such harm.⁴⁴ Although not explicitly referring to 'due diligence', the International Court of Justice confirmed this in the *ELSI* case.⁴⁵ In fact, this understanding of the standard dates back to the decision of the Italy-Venezuela Mixed Claims Commission in the *Sambiaggio* case.⁴⁶

How the due diligence standard is applied varies. In general, one could describe it as an obligation for the State to take all measures it could reasonably be expected to take in order to prevent the occurrence of damages to the foreign investor and its investment.⁴⁷ In case-law, what would be required from a 'diligent' State is not explained in detail and is sometimes even absent.⁴⁸ When the due diligence standard is explained, references are made to whether the State has 'reacted reasonably, in accordance with the parameters inherent in a democratic State'⁴⁹, whether the State had 'adopt[ed] all reasonable measures',⁵⁰ the obligation for the

⁴⁰ See for instance that the statement by the Tribunal in *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.05.

⁴¹ See for instance: *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para. 613, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 170, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Award, 20 August 2007, para. 7.4.15; *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 729 and *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 189.

⁴² Foster, above n 37, 1103.

⁴³ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 359-361.

⁴⁴ Jeswald W. Salacuse, *The Law of Investment Treaties* (OUP), 132 and 209-210. See also, amongst others, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 77 and *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 177.

⁴⁵ *Elettronica Sicula S.P.A. (ELSI)*, [1989] ICJ Rep p. 15, para. 108: 'the reference in Article V to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed'.

⁴⁶ Italy-Venezuela Mixed Claims Commission, *Sambiaggio Case*, 10 UNRIAA (1903), 499-525, at p. 524.

⁴⁷ Salacuse, above n 44, p. 217.

⁴⁸ See for example *National Grid plc v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, paras. 189-190.

⁴⁹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 177.

⁵⁰ *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 484.

State to 'take all measures necessary',⁵¹ whether acts lead to a 'manifest lack of due process leading to a breach of international justice',⁵² the requirement for the State to 'undertak[e] all possible measures that could be reasonably expected',⁵³ whether 'acts were unnecessary and abusive',⁵⁴ whether certain conduct 'could reasonably have [been] expected',⁵⁵ or the rather circularly formulated need for States 'to act to prevent actions by third parties that it is required to prevent'.⁵⁶ 'Reasonableness' thus appears to be a recurrent concept in applying the due diligence standard.

Due Diligence and the International Minimum Standard

It is often considered that the 'international minimum standard of treatment' (IMS) encompasses a due diligence obligation of host State. Although there is still much discussion as to whether FPS forms part of the IMS, it is accepted that under the IMS, States must exercise due diligence in the administration of justice.⁵⁷ This however, is very closely connected to the obligation of due diligence as understood in *legal* protection and security, and to the obligations in respect of FET.

The same principles apply to host state obligations in case of armed conflict, civil strife, revolution or natural disasters.⁵⁸ Then, taking into account the existence of an armed conflict, a State should use 'the police and military forces to protect the interests of the alien to the extent feasible and practicable under the circumstances, both before the event and while it unfolds'.⁵⁹ This understanding is again very closely connected to the obligation of due diligence as understood in *physical* protection and security.

Due Diligence Fair and Equitable Treatment

Due diligence is also referred to when assessing alleged breaches of the fair and equitable treatment standard (FET). Because FET requires at least treatment in accordance with the minimum standard of treatment as understood in general international law,⁶⁰ there is here again a certain overlap between the two standards, notably in relation to due diligence.⁶¹ Also, there is a certain overlap between FET and *legal* protection and security.⁶² References to due diligence in Tribunal

⁵¹ *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, Feb 21, 1997, para. 6.08.

⁵² *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 493.

⁵³ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 85, p. 562, sub (c).

⁵⁴ *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 731.

⁵⁵ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 448.

⁵⁶ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 203.

⁵⁷ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), 246, para. 6.8.

⁵⁸ *Ibid.*, 336, para. 13.4.

⁵⁹ C. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), p. 166.

⁶⁰ Newcombe and Paradell, above n 57, p. 277.

⁶¹ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, Sep 3, 2001, para. 292.

⁶² Ioana Tudor, *The Fair and Equitable Treatment Standard in the International law of Foreign Investment* (2008), p. 157.

discussion of the FET standard are however rather sparse, especially when the latter is not jointly discussed with the FPS standard.⁶³

Due Diligence: An Objective or Subjective Assessment?

A debate exists as to the assessment of due diligence in this context, namely whether it should be subjectively or objectively assessed. Is 'all necessary means' objectively definable or should the specific situation of the State be taken into consideration?

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.'⁶⁴ This is an 'objective' assessment criterion. It has however been rejected by several scholars, and arbitrators, which have instead relied on the 'subjective due diligence standard', taking into consideration the means at the disposal of the State, and the specific circumstances present in the State⁶⁵.

Tribunals have only very sporadically addressed the question, and only in relation to the FPS standard. In *AAPL v. Sri Lanka* (1990), the Tribunal adopted the objective approach.⁶⁶ A more recent case from 2009 suggests that Tribunals should apply a subjective due diligence standard. The sole arbitrator, Jan Paulsson, in *Pantechniki v. Albania* unambiguously adopted the subjective assessment method, distinguishing 'protection and security' from 'denial of justice', the latter requiring an objective due diligence standard, which does not take into account the resources of the State, while the former requires the application of a subjective due diligence standard.⁶⁷

Due Diligence Obligations of Foreign Investors

In respect of the FET standard, and in particular the 'legitimate expectations' of foreign investors, it is generally considered that investors should themselves act with due diligence.⁶⁸ Case law in this respect however is limited. The Tribunal in *Parkerings* noted that the foreign investor has only has 'a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances'.⁶⁹ In the same vein, the Tribunal in *Biwater Gauff* explained that 'the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to

⁶³ See e.g. Joint decisions *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic*, ARB/03/19, Decision on Liability, 30 July 2010 and *AWG Group Ltd v The Argentine Republic*, ARB/03/19, Decision on Liability, 30 July 2012, para. 248 and Separate Opinion of Arbitrator Pedro Nikken, paras. 19-20.

⁶⁴ A.V. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces', 88 RCADI (1955-II) 263, pp. 277-278.

⁶⁵ See for an overview: Newcombe and Paradell, above n 57, p. 310, para. 6.44.

⁶⁶ *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).

⁶⁷ *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 77.

⁶⁸ Tudor, above n 62, p. 216. See generally Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013), pp. 256 ff.

⁶⁹ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 333.

make the investment, *as long as these expectations are reasonable and legitimate* and have been relied upon by the investor to make the investment'.⁷⁰

Application of the principle of due diligence, without however explicitly mentioning the principle as such, was also made to limit the amount of compensation owed by the host State because the investor itself was considered partially responsible for the loss for failure to exercise due diligence.⁷¹

Finally, due diligence obligations of investors have also been noted in relation to the requirement one can find in certain investment treaties that the investment is in accordance with the laws of the host State. As noted by the Tribunal in *Alasdair Ross Anderson et al v. Republic of Costa Rica*:

The Tribunal's interpretation of the words "owned in accordance with the laws" of Costa Rica reflects both sound public policy and sound investment practice. Costa Rica, indeed any country, has a fundamental interest in securing respect for its law. It clearly sought to secure that interest by requiring investments under the BIT to be owned and controlled according to law. At the same time, *prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable.* Based on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken to assure themselves that their deposits with the Villalobos scheme were in accordance with the laws of Costa Rica.⁷²

Due Diligence in International Humanitarian Law

Due diligence plays a considerable, if often covert, role in international humanitarian law (IHL). The engagement of a State's forces against belligerent forces (both State and non-state) as well as the interaction with civilian bodies within the purview of IHL requires a high level of state control of the activities of all actors under (or that ought to be under) their control. The standard of due diligence expected of States during peace, including the legal and material resources to ensure fulfilment of its obligations, may become more difficult to meet during conflict, especially during internal armed conflict. Nonetheless, the due diligence requirements of IHL, and in a residual manner international human rights law, continue to apply.

In the *Akayesu* case the International Criminal Tribunal for Rwanda (ICTR) found that Common Article 3 of the Geneva Conventions (which also form part of customary international law), and Additional Protocol I & II, set the minimum and unconditional standard of duty for States and non-state actors engaged in the use of

⁷⁰ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, award, 24 July 2008, para. 602 (emphasis added). See also *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, para. 75.

⁷¹ *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC, Arbitral Award, 22 September 2005, p. 19.

⁷² *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/, Award, 19 May 2010, para. 58 (emphasis added).

force.⁷³ Within IHL the concept of due diligence most often pertains to targeting, the protection of civilians, the protection of POWs and the prevention and prosecution of grave breaches of IHL.⁷⁴

Within IHL treaty law there are certain specific due diligence obligations. The Hague Convention 1907 imposes liability on States if they fail to exercise due diligence to prevent war crimes.⁷⁵ The four Geneva Conventions under Article 1 require parties to respect and ensure respect for the Convention in all circumstances, an obligation that involves a minimum duty of due diligence.⁷⁶ Additional Protocol I provides that a party to the conflict shall be responsible for all acts committed by persons forming part of its armed forces.⁷⁷ Both the Hague and Geneva Conventions indisputably form part of customary international law.

There are several current issues which are of importance to IHL and due diligence including: the role of private entities/non-state actors undertaking the activities which are normally attributable to States, the establishment of the International Criminal Court (ICC) and the interaction between IHL and international criminal law, as well as the relationship between IHL, human rights and environmental law. The point of most controversy is how remotely the duty of due diligence extends when the actors engaged in the activity are not direct state actors.

The early development of due diligence within IHL is firmly rooted in case law, with these cases tending to focus on the minimum standard for establishing responsibility of States for ensuring the full operation of IHL. Thus the interaction between the law of State responsibility and IHL has been paramount in debates on due diligence. As noted above, the *Alabama Claims Arbitration* defined due diligence as in proportion to the magnitude of the object, dignity and strength of the power which is to exercise it. It also stated that States have an obligation to take all effective measures to ensure that no harm comes to other States in or from their territory.⁷⁸ This was with regard to the law of neutrality, a central aspect of IHL, but importantly also applied due diligence to situations of omission. In the *Armed Activities on the Territory of Congo* the ICJ held that Uganda bore the obligations of an occupying power, including taking 'appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.'⁷⁹

⁷³ *Prosecutor v Jean Paul Akayesu* (International Criminal Tribunal for Rwanda) Judgment of 1 June, 2001. [432-445], 1949 Geneva Conventions, 75 UNTS 287, 1977 Additional Protocol I & II, 1125 UNTS 3

⁷⁴ Due diligence within IHL can, at times, lead to unusual arguments in favour of the use of force. For example, the British claim that due diligence required the shelling of neutral Copenhagen in 1807 to prevent the fleet being used by Napoleon against the UK. Although this is strictly *jus ad bellum*, it impacts upon the application of IHL. A. N. 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 *American Journal of International Law* 586, J Hessbruege, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *New York University Journal of International Law and Politics* 265

⁷⁵ Hague Regulations, Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907, article 3.

⁷⁶ 1949 Geneva Conventions (I-IV) 75 UNTS 287, article 1.

⁷⁷ 1977 Additional Protocol II, 1125 UNTS 3, article 91.

⁷⁸ *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 *RIAA* 125, see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Rep 14, p. 126.

⁷⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, p. 253.

Private entities/non-state actors or individuals may violate IHL even if their conduct is not attributed to the State. In these cases, States may incur responsibility if they are not diligent in pursuing and preventing acts contrary to international law by prosecuting and punishing the private perpetrators. The emergence of private military contractors (not characterized as mercenaries) has added to the complexities of understanding due diligence in such circumstances. With regard to non-actors fulfilling state roles during conflict, in *Yeager v Iran* the Iran-United States Claims Tribunal found that the actions of private actors carrying out state functions, in the absence of regular state authorities, could be attributable to the State. Thus, for example, the State is responsible for those acting *levée en masse*.⁸⁰ However this does not mean that States are required to exercise due diligence no matter the connection to the armed group; the degree of attribution to the State will set the requirement for due diligence in motion. Nonetheless, if a State is not a party to armed conflict (in which case IHL would not apply), the Geneva Convention might nevertheless apply if one of its private military corporations violates IHL, and there was a lack of due diligence by the State in regulating its activities.⁸¹

In *Military and Paramilitary Activities in and against Nicaragua* the ICJ applied the 'effective control' test.⁸² The International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case stated that in applying IHL rather than the law of state responsibility, the 'overall control test', ought to apply.⁸³ Following this reasoning, once overall control was established the State would have to act with due diligence. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the ICJ rejected the ICTY's position and returned to 'effective control'.⁸⁴ This disagreement is significant as it determines in what circumstances a State is responsible for the activities of others, thus creating a secondary question as to the standard of behaviour required of the controlling State.

In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, the African Commission on Human Rights stated that '[t]he national armed forces are participants in the civil war and...the Government has failed to intervene to prevent...killing...[e]ven where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations'.⁸⁵ This clearly establishes the principle that in situations of armed conflict a State has duty to take action even in situations where they do not control the armed groups and that this extends to not

⁸⁰ *Kenneth P. Yeager v. The Islamic Republic of Iran, Iran-U.S.* (1987) 17 C.T.R. 92, pp. 101–104, *levée en masse*, is part of both customary international law and treaty law. It enables a states' inhabitants in a situation where the states is, as yet, unoccupied, on the approach of the enemy, to take up arms to resist invasion. These individuals will be combatants if they carry arms openly and respect the laws and customs of war. See Hague Regulations, Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907, article 2; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 75 UNTS 287, 12 August 1949, article 4(A)(6).

⁸¹ N. White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 *Criminal Justice Ethics* 233, A. Faite 'Involvement of private contractors in armed conflict: implications under international humanitarian law' (2004) 4 *Defense Studies* 166.

⁸² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep 14.

⁸³ *Prosecutor v Tadić* ICTY, Appeals Chamber, 1999 (Case no. IT-94-1-A).

⁸⁴ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43.

⁸⁵ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, African Commission on Human and Peoples' Rights, Communication No. 74/92 (1995).

only the protection of civilians but also investigation of criminal acts and violations of IHL.

Thus, IHL's relationship to international criminal law is also significant. The Permanent Court of Arbitration found in the *British Claims in the Spanish Zone of Morocco* that there was a due diligence requirement to prevent and punish the unlawful acts of armed groups.⁸⁶ While in the *Essen Lynching Trial* the Court found that the failure to protect allied prisoners of war from aggressive mobs fell below the required standard and States could be held responsible for such an omission.⁸⁷ Judge Ranjeva, in his separate opinion in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, stated that:

the judgment examined the failure to prevent in terms of due diligence the conduct and acts attributable to one State in particular...[o]n reflection, it might be queried whether such an approach is adequate to cover the whole range of duty relations under 1948 Convention with respect to vigilance in a multilateral setting and, moreover, when dealing with the supreme international crime of genocide.⁸⁸

Here, Judge Ranjeva appears to suggest that when it comes to graves crimes, for example those within the jurisdiction of the ICC, a higher standard than due diligence may be required.⁸⁹

Due Diligence in International Human Rights Law

International human rights law (IHRL) differs from most other fields of international law to the extent that it primarily addresses the internal affairs of States. In other fields, such as international environmental law, the principle of sovereignty leaves the internal affairs of States largely unexamined, and focuses instead on *transboundary* (inter-*nation*-al) injuries of moral or material nature.

The concept of due diligence is relevant in all of the nine core United Nations human rights treaties to varying extents. It is most commonly associated with economic, social and cultural rights for which States Parties must take 'all appropriate measures' to 'achieve progressively' the rights concerned.⁹⁰ However, States also have obligations of due diligence in respect of civil and political rights, for example, the duty to prevent acts of cruel, inhuman or degrading treatment,⁹¹ the duty to investigate disappearances at the hands of non-state actors⁹² and the duty to respect and 'ensure' individuals enjoy their civil and political rights in general and,

⁸⁶ *British claims in the Spanish zone of Morocco* (1925) 2 RIAA 615, s 3-6.

⁸⁷ United Kingdom, Military Court at Essen, *The Essen Lynching case* (1946) 1 WCR 88.

⁸⁸ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, Separate Opinion of Judge 277.

⁸⁹ 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90/37, article 5.

⁹⁰ See, e.g., International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR) article 2(1); Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13 (CEDAW) article, especially (e), (f), (g) and article 5(a) and (b); Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC) articles 2(1) and (2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, 2220 UNTS 3 (MWC) article 7; Convention on the Rights of Persons with Disabilities 2006, 2515 UNTS 3 (CRPD) article 4, especially (1)(b), (e-i) and (2).

⁹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT), article 16.

⁹² International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2715 UNTS (CED), article 3.

in the event of violation, have access to an effective remedy.⁹³ The duty of due diligence in respect of human rights treaty obligations have been addressed, explicitly and implicitly, by the respective monitoring bodies.⁹⁴ Regional bodies have also addressed due diligence obligations of States.⁹⁵ The duties of States to govern corporate conduct is the subject of the UN Guiding Principles on Business and Human Rights 2011.⁹⁶

The framework of duties to respect, protect and fulfil and its connection to due diligence

Within the United Nations human rights treaty system, the tripartite framework of duties to respect, protect and fulfil is often used. Although not every treaty body uses the same terminology, obligations to respect and protect can be found in each of the nine core human rights treaties; and obligations to fulfil in every treaty but for the Convention Against Torture and the Convention on the Protection of All Persons from Enforced Disappearances.

The obligation to respect pertains to States' negative obligations: State actors must refrain from infringing human rights. Responsibility does not pivot on due diligence.⁹⁷ States bear direct responsibility for their own organs and agents, even when they act beyond the scope of their lawful authority according to domestic law (i.e. *ultra vires*).⁹⁸ However, there are some cases where States must take positive steps to protect persons *from their own organs* when the actions of those organs are not *prima facie* unlawful: an example in human rights law is the use of lethal force by

⁹³ International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR), articles 2(1) and (3).

⁹⁴ See, e.g., Human Rights Committee, General Comment No 6 (1982) 'Article 6 (Right to Life)' paras. 4-5; General Comment No. 28 (2000) 'Article 3 (The equality of rights between men and women)' paras. 3-6, 10-12, 16, 20, 22-24, 28 and 31; and General Comment No. 31 (2004) 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' paras. 6-8 and 13-18.

Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990) 'The nature of States parties' obligations (art. 2, para. 1, of the Covenant)' paras. 3-4.

Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (1992) 'Violence against Women' para. 19

Committee Against Torture, General Comment No. 2 (2007) 'Implementation of Article 2 by State Parties' para 18.

See also, Committee on the Elimination of Discrimination Against Women, Views on the following communications: Communication 2/2003 *A.T. v Hungary* (2005); Communication 5/2005 *Goekce v Austria* (2007); Communication 6/2005 *Yildirim v Austria* (2007); Communication 18/2008 *Vertido v Philippines* (2010); Communication 20/2008 *VK v Bulgaria* (2011); Communication 32/2011 *Jallow v Bulgaria* (2011); Communication 17/2008 *Teixeira v Brazil* (2011); Communication 19/2008 *Kell v Canada* (2012); Communication 31/2011 *VPP v Bulgaria* (2012); Communication 28/2010 *RKV v Turkey* (2012).

⁹⁵ E.g., Inter-American Court on Human Rights, *Vélasquez Rodríguez v Honduras*, 29 July 1998, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); European Court of Human Rights, *Osman v UK* [1998] EHRR 101; African Commission on Human Rights; African Commission on Human Rights, Case 245/02: *Zimbabwe Human Rights NGO Forum v Zimbabwe*; European Committee on Social Rights, *European Roma Rights Center v Greece*, Communication no. 15/2003, 8 December 2004.

⁹⁶ 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) (UNGPs 2011).

⁹⁷ 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. 23.

⁹⁸ ILC 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 7.

State organs which must be justifiable and include measures to protect adequately innocent bystanders.⁹⁹

The obligation to protect refers to the State's positive obligations to take preventive measures to reduce or eliminate violations by non-state actors (e.g. within the family, within employment, within contractual relations, and pertaining to corporate conduct). Should a violation occur, the State will not be responsible in every case, but only if it has been deficient in some respect; in any case, the State will never be responsible for the violation itself, but rather for its *failure to act*, the separate delict.¹⁰⁰

In human rights law, the duty to protect contains a number of elements, only some of which are obligations of due diligence. The State must, for example, maintain certain institutions to protect human rights – these are obligations of (immediate) result. States must, for example (a) ensure legal protection of human rights; (b) have preventive apparatus, such as a police force; (c) have investigative machinery; (d) have a forum or for a under which remedies can be sought; and (e) have a system to facilitate reparation for violations.¹⁰¹ These are obligations of result and must be immediately upheld: the State will be in violation if it does not possess these institutions. However, how these institutions *function* is a matter of *due diligence*. ie. these institutions must function *diligently*.¹⁰²

The obligation to fulfil is sometimes separated into duties to *facilitate*, to *provide* and to *promote*.¹⁰³ Many duties to fulfil, especially under the ICESCR, are duties of progressive realisation, meaning that States need not immediately guarantee the rights concerned to all persons immediately but must take steps towards that end.¹⁰⁴ However, even in these cases, some of the institutional measures required of States in light of the obligation to protect also apply *vis á vis* obligations to fulfil and these are immediate obligations of result.¹⁰⁵ It is therefore possible also to view obligations of progressive realisation in terms of immediate obligations of result (institutional) and obligations of due diligence (ongoing effort).¹⁰⁶

According to the Committee on Economic, Social and Cultural Rights, there is a 'minimum core' of each substantive right that all States, irrespective of their degree of development, must ensure immediately. This is not subject to 'progressive realisation.' There are two possible conceptual accounts of this. The minimum core might be an immediate obligation of result for which, as for many other international

⁹⁹ As in European Court of Human Rights, Application no. 30054/96, *Kelly and Others v United Kingdom* (May 4 2001).

¹⁰⁰ Roberto Ago, 'Second Report on State Responsibility: The Origins of International Responsibility' [1970] 2 *Yearbook of the International Law Commission*, UN Doc A/CN.4/SER.A/1970/Add.1, 177, 188, para. 35; James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) *American Journal of International Law* 874, pp. 878-9.

¹⁰¹ 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, Vol. 333 (2009) Chapter III.

¹⁰² See, e.g., *Kelly and Others v United Kingdom*, above n 99, para. 96.

¹⁰³ To facilitate means to create the circumstances to enable individuals to secure their own human rights; to provide requires the State to provide directly, for example, in cases where individuals cannot secure their own rights or where State provision is more efficient, e.g. in health-care; to promote is to support research and education on HRs and to train those whose work bears upon the right in question.

¹⁰⁴ ICESCR, article 2(1); see also Pisillo-Mazzeschi, above n 101, Chapter V.

¹⁰⁵ E.g., to ensure legal protection of human rights; to have a forum or for a under which remedies can be sought; and to have a system to facilitate reparation for violations.

¹⁰⁶ Pisillo-Mazzeschi, above n 101, 442; See also *European Roma Rights Center v Greece*, above n 95.

legal obligations, a *prima facie* violation is subject to the defence of impossibility.¹⁰⁷ Alternatively, even in respect of the minimum core, it is sufficient for the State to show it has taken all possible measures: it does not 'guarantee' the result; it does not have an obligation to *succeed*. According to this latter view, the duty to fulfil the minimum core of each substantive right is still an obligation of progressive realisation.¹⁰⁸ A closer examination of the provisions on impossibility in the Vienna Convention on the Law of Treaties indicate that it applies only to *supervening* impossibility;¹⁰⁹ States are presumed not to enter into obligations that are impossible for them to meet at the moment of ratification. Human rights law differs in this respect as there is no desire either to water down human rights treaties to such banality that all States can immediately realise them, nor to discourage States from ratifying treaties that contain provisions that they cannot hope immediately to satisfy (even of the minimum core). With this in mind, the understanding of the minimum core as an obligation of progressive realisation may be the more fitting one.

Due diligence obligations are usually considered obligations of conduct, to distinguish them from the obligations to guarantee certain outcomes (obligations of result) but this character is problematic for obligations of progressive realisation to fulfil human rights. The measures that are taken must be undertaken with some *result* in mind and the results will be key to the determination of a violation.¹¹⁰ Human rights obligations contain: (a) strict obligations of conduct (not subject to due diligence), including all negative obligations (to respect human rights) and procedural obligations (e.g. to submit reports); (b) immediate obligations of result, usually of an institutional nature or to have certain laws in place (not subject to due diligence) (c) obligations of conduct subject to due diligence (e.g. that institutions function *diligently*); and (d) obligations of progressive realisation, i.e. duties to aim to achieve, *over time*, certain results which might be conceivable as due diligence obligations.¹¹¹

In many cases, States have a considerable degree of discretion regarding *which* measures they will take to protect individuals from non-state actors and to fulfil human rights, but there is a clear preference for 'legislative measures' (e.g. ICESCR, article 2(1)).¹¹²

The 2011 Council of Europe Convention on Preventing and Combatting Violence against Women¹¹³ is novel in this regard, highlighting the dichotomous nature of the obligations on States parties:

Article 5 – State obligations and due diligence

¹⁰⁷ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (VCLT), article 61.

¹⁰⁸ This is the view of Pisillo-Mazzeschi, above n 101, Chapter V(5).

¹⁰⁹ VCLT, article 61.

¹¹⁰ Abjörn Eide wrote in 2001: 'The basic provisions (CESCR, Articles 2 and 11) were drafted more in the form of obligations of result rather than obligations of conduct.' It should be born in mind, however, that Eide's essay was published in 2001, hence presumably based on an interpretation of obligations of conduct and result as defined in the first reading of the ILC Articles (according to which obligations of conduct allowed almost no discretion). Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause og Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2001) 25.

¹¹¹ See Pisillo-Mazzeschi 2009, above n 101, p. 297 on categories b-d *vis a vis* positive duties of States.

¹¹² See also, Committee on Economic, Social and Cultural Rights, General Comment No. 9 (1998) 'The domestic application of the Covenant', para 3.

¹¹³ CETS No. 210 (2011).

1 Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.

2 Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors.

As noted above, this is a novel provision in actually using the term due diligence, but it is also a controversial proposition in doing so. By so clearly demarcating between two situations which are not always so divisible – and essentially lowering the standard expected of States as regards violence performed by non-state actors, highlights sharply the difficulties international law of human rights when seeking to protect human rights in an ever-complex array of factual situations.

Due diligence in human rights law as a variable standard

In human rights law, the language of progressive realisation and all appropriate measures indicates that even if the same ultimate *results* are expected from each State, the timescale for reaching them will vary according to capacity. The key here is *capacity*, not State *will* or *policy* (and in this respect, it should be distinguished from the ‘margin of appreciation’ under the European Convention on Human Rights).

This may mean that developing States are permitted to exercise *less diligence*. An alternative reading is that what differs are the *results* they can reasonably be expected to achieve at a given point in time, taking into account their different starting points and available resources. On this view, what differs is not the degree of care the State organs should exercise but rather the outcomes that can be expected from them. This would seem to be an area in need of further clarity, and it is an issue on which the Second Report will return.

The connection between wrongfulness and harm in human rights law

The necessity for ‘harm’ to trigger state responsibility depends on the primary rules.¹¹⁴ In respect of due diligence obligations, there can be harm in the absence of a wrongful act of the State (i.e. the State has exercised due diligence but some harm has nonetheless occurred). There can also be a wrongful act in the absence of harm, e.g. a State has not exercised due diligence and left individuals at the *risk* of harm, even if no harm has actually occurred.¹¹⁵

Corporate due diligence to respect human rights

International human rights law applies binding legal obligations directly on States alone. Despite a number of attempts, and some statements by the human rights

¹¹⁴ James Crawford, *The International Law Commission's Articles on State Responsibility* (2002), p. 12.

¹¹⁵ Tangentially in support of this position, one can consider the communications on domestic violence brought before the Committee for the Elimination of Discrimination Against Women (CEDAW Committee): *A.T., Goekce, Yildirim, V.K. and Yallow*, above n 95. In these cases, the CEDAW Committee has not concerned itself with seeking a causal link between the institutions’ failure to act diligently and the resulting injury. The complainant (or her representative) was not required to demonstrate that had the State acted diligently, the violence would have been prevented: it has been enough to show simply that the State did *not* act diligently for the State to be found in violation.

treaty bodies, to apply these obligations on 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.

In 2011 the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs),¹¹⁶ which had been developed by Professor John Ruggie as Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SSRG). These create a framework of three “pillars”, being a state duty to protect human rights, a corporate responsibility to respect human rights, and access to a remedy. Importantly, the SSRG clarified that corporations (called “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 Framework and Guiding Principles.

The concept of due diligence is used throughout this second pillar,¹¹⁷ with Guiding Principle 15 being one of the foundational principles, providing 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.

Guiding Principles 17 to 21, which discuss the practical steps that business enterprises should take to discharge this responsibility, appear under the heading, “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 performance.

This concept of due diligence is defined by the UN 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

¹¹⁶ SSRG, *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).

¹¹⁷ This summary is based on R. McCorquodale, ‘International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights’ in L. Blecher, N. Kaymar Stafford and G. Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (2014, forthcoming).

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.¹¹⁸

This appears to be an integration of the international human rights legal obligation of due diligence in relation to the actions of non-state actors,¹¹⁹ and the general voluntary business practice of due diligence.¹²⁰ In relation to the general business practice, the SRSG notes the following:

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.¹²¹

Thus the Framework cleverly (though potentially misleadingly) aims to use a terminology that is familiar to both human rights law and business management practices.

This confusion is carried through into the Guiding Principles. 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 term, being about the subjective means of conduct. In contrast, the general foundational statement in General 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 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 Framework and Guiding Principles.

The other aspect of the term due diligence that can cause confusion is how it can be applied to different situations. General 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.

¹¹⁸ UN Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), at p. 4.

¹¹⁹ See *Velasquez Rodríguez v. Honduras*, (1989 28 ILM 294).

¹²⁰ See, e.g., Jeffery S. Perry & Thomas J. Herd, *Mergers and Acquisitions: Reducing M&A Risk through Improved Due Diligence*, (2012) 32 *Strategy & Leadership* 12, p. 12.

¹²¹ SRSG Report to UN Human Rights Council UN Doc. A/HRC/11/13 (Apr. 22, 2009).

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;
- (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.

General Principle 17(a) continues the distinction drawn in General 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. General Principle 13 is as follows:

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.

Thus, a clear distinction is made between the responsibility on 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)).

This distinction is also seen in the use of the term leverage to describe how a business enterprise should respond to actions by third parties. For example, General 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." Therefore, two different standards of due diligence are operating in the application of General Principle 13 to a business enterprise: a strict standard of avoiding its own impacts; and a leveraged standard for seeking to prevent others' impacts.

The former is consistent with the human rights legal obligations on States, which is objective and for which compliance can be determined, and the latter is more consistent with the responsibilities on business practices, which are more voluntary and based on the business enterprise's own risks. However, the lack of clearer legal obligations on business enterprises in the Framework and Guiding Principles in relation to the violation of human rights makes it very difficult to access or enforce any remedies against them.

Due diligence and the obligation to provide effective remedies

Redress for human rights violations is another aspect of due diligence.¹²² The provision of the necessary institutional mechanisms to provide access to remedies for human rights violations is an obligation of result and is neither subject to due diligence nor progressive realisation. However, these institutions must operate *diligently* (e.g. the police, prosecutors and Court staff must work to an adequate standard). Failure to do so constitutes a wrongful act on the part of the State. The State does not guarantee a remedy or full satisfaction for every violation, however. It will not have acted wrongfully if, through no fault of its organs, there is insufficient evidence to amount a successful prosecution or make an award of damages.

In human rights law, punishment of wrongdoers is an essential element of reparation for serious violations (whether they be State actors or not) and, once their wrongdoing has been established through an appropriate process, their punishment is not conditioned on due diligence. If found responsible, those who violate human rights should be appropriately punished and State pardoning of those convicted is a wrongful act.¹²³

Due Diligence in Transnational Criminal Law

Driven by a need to be more effective, the programmatic development of treaty crimes to suppress harmful threats such as drug trafficking and human trafficking emanating from non-state actors has in the last decades expanded its focus. It has move beyond criminalization, into the adoption of increasingly broad measures dealing with the prevention of crime. Customer Due Diligence (CDD) is an important part of this movement of transnational criminal law into crime prevention.

By joining crime control treaties, States undertake to place obligations on some non-criminal non-state actors, such as businesses working in the financial sector, to do 'due diligence' in regard to other potentially criminal non-state actors whose activities those non-criminal actors are at risk of facilitating. In this regard transnational criminal law is concerned particularly with the behaviour of third parties – private individuals within state authority – rather than other States; unless those States parties violate their commitments to institute such regimes (increasingly sophisticated implementation monitoring is applied in this regard¹²⁴).

A Brief Survey of the Evolution of CDD Provisions in Transnational Criminal Law

It was understood at an early stage that record-keeping of transactions in potentially illicitly derived property can assist in the detection and prosecution of offenders. Article 10(a) of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹²⁵ prefigured CDD obligations because it imposed an obligation on States parties to ensure antique dealers maintained a register of artefacts bought and sold in the antique trade.

¹²² E.g., ICCPR article 2(3); International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 UNTS 195, article 6; CAT, article 4.

¹²³ See, e.g., Human Rights Committee General Comment No. 31, above n 94, especially para. 18; *Kelly and Others v UK*, above n 99, paras 105 and 154; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, above n 95, para. 147; *Vélasquez Rodríguez v Honduras*, above n 95, paras. 172-181. See also Pisillo-Mazzeschi, above n 97, 28-30; and Pisillo-Mazzeschi, above n 101, 350-351 (discussing the Chile Truth Commission).

¹²⁴ See William Gilmore, 'Money Laundering' in Neil Boister and Robert Currie (eds), *The Routledge Handbook of Transnational Criminal Law* (2014).

¹²⁵ 823 UNTS 231.

Most of the different modalities for CDD, including ‘know your customer’ and ‘suspicious transaction’ reporting provisions were developed within the anti-money laundering regime. A report of the Committee of Ministers of the Council of Europe noted in 1980 that ‘the banking system can play a highly effective preventive role’ in suppression of transnational crime. Principle II of the Basel Principles on Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering, noted that ‘banks should make reasonable efforts to determine the true identity of all customers requesting the institution’s services’.¹²⁶ The very influential 1990 FATF Forty Recommendations have taken this approach, and expanded on the basic principle of binding an ever-increasing number of players in the financial sector to take steps to engage in CDD.¹²⁷ These recommendations enlarge considerably on:

- the scope of persons both legal and natural that are subject to the CDD obligation to include not only banks but all participants in all forms of financial activity;
- the evidential basis for reporting from suspicious transactions to actions of a wide variety of kinds including those over a certain amount (usually USD\$15000), with increased reliance on a governing principle of risk as the determining criterion of when to report;
- the actions which must be taken in response to include not only reporting but further investigation and analysis of the true nature of who is involved in the transaction and what they are engaged in.

Article 18 of the 1999 International Convention for the Suppression of the Financing of Terrorism,¹²⁸ signalled a more direct cooperation obligation in the suppression of specific terrorism offences by requiring 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.’ It required parties to consider adopting regulations prohibiting anonymous bank accounts and customer identification including taking steps to verify the legal existence and the structure of the legal persons such as companies, obligations to report unusual transactions and patterns of transactions, and to keep records for five years.

The formal legal obligations broadened in scope to other crimes through Article 7 of the 2000 UN Convention against Transnational Organized Crime,¹²⁹ which, in the cause of the suppression of all forms of serious crime by organized criminal groups, requires the imposition by parties of a ‘comprehensive’ domestic supervisory and regulatory regime for banks and non-bank financial institutions. It elaborates upon the familiar concepts of customer identification, record keeping and suspicious transaction reporting, and ‘calls upon states to use as a guideline the relevant

¹²⁶ See also the Wolfsberg AML Principles on Private Banking, Principles 1-7.

¹²⁷ See, for example, Chapter D which is directed at Preventive Measures and in particular Recommendation 10 of the 2012 FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

¹²⁸ 2178 UNTS 197.

¹²⁹ 2225 UNTS 209.

initiatives of regional, interregional and multilateral organizations against money-laundering', which means the FATF and FATF Style Regional Bodies (FSRBS).

At a regional level, the Council of Europe has led the way with Article 13 of the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism,¹³⁰ reiterating the obligation on parties to 'institute a comprehensive domestic regulatory and supervisory or monitoring regime to prevent money laundering' and referring directly to the FATF, while setting out the now standard array of identification, reporting and supportive measures.

Negotiation of the United Nations Convention against Corruption¹³¹ culminated in a fleshed-out obligation to maintain a domestic supervisory regime. Article 14 broadens the scope of preventative provisions, to include 'informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence'. Article 9 sets out a series of obligations that States are obliged to impose on those engaged in the public procurement process and include such familiar devices as registers of declarations of interest. Article 12 sets out analogous codes for transparency in the private sector.

Finally, in terms of Article 7(1) of the 2013 Protocol to Eliminate the Illicit Trade in Tobacco Products,¹³² each State party promises to require that all persons engaged in the supply chain engage in CDD in regard to sale of tobacco products, monitor sales to ensure they are commensurate with demand in the particular market for which they are intended, and to report suspicions. Article 7(2) provides for specific examples of due diligence obligations including finding out whether the person with whom the company is dealing is licensed, its identity, place of business, intended market for the tobacco products and so forth. Here we see the shift of the concept of CDD out of the financial sector entirely into a supply chain for a licit commodity – tobacco – to prevent diversion into the illicit (untaxed) trade.

What emerges is, in essence, the development through international law of a principle of transnational crime prevention by proxy through private individuals based on an obligation for those individuals to undertake a due diligence risk evaluation in regard to their facilitation of transnational criminal activity. Identifiable trends in the development and use of this principle include:

- a steady expansion in scope in regard to who bears this obligation and what they are expected to do;
- the use of hard treaty law outlines and soft law details in combination to achieve this;
- little concern for the negative impact on human rights of those who are made partners in crime prevention and on those whose privacy is invaded because they may be potential criminals.

Due Diligence in International Environmental Law

¹³⁰ CETS No 198, 16 May 2005.

¹³¹ 2349 UNTS 41.

¹³² See Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Draft Protocol to Eliminate Trade in Tobacco Products*, FCTC COP/5/6, 11 May 2012.

The concept of due diligence is a key component of the obligation to prevent harm in international environmental law.

In the case of environmental damage to a neighbouring State, the actual cause is often a private company. The early *Trail Smelter* case provides an example. A private company in Canada, close to the border with the United States, polluted the environment the latter, resulting in the award given by a Tribunal established for resolving the dispute between the two States. The Tribunal famously stated that "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"¹³³.

The subjective component of the principle of prevention of environmental damage, which was at the heart of the *Trail Smelter* case, was developed by the ICJ in its 1949 *Corfu Channel* case, referring generally to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".¹³⁴ This principle evolved in time to cover broader responsibility for States over environmental damage:

- States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹³⁵
- According to Article 1 of the 2001 International Law Commission's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*,¹³⁶ the obligation to prevent harm applies to "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."¹³⁷ Article 2(d) provides that the holder of this obligation is the State of origin, defined 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."

¹³³ *Trail Smelter*, RIAA, III, p. 1965, http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf. Even if the *Trail Smelter* case confirmed the no significant harm principle in relations between states, it left open whether states need to act diligently to ensure that no significant pollution ensues from the activity of its own or a private enterprise in its territory to other states. This is so because the two states had already settled the issue of Canadian legal responsibility over the pollution effects via a compromise, making it possible to argue that the state of origin carries legal responsibility even if it has acted diligently and harm nevertheless ensues.

¹³⁴ *Corfu Channel case*, (United Kingdom of Great Britain and Northern Ireland v. Albania) [1949] ICJ Rep 22.

¹³⁵ Article 2 of the *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (1992). See also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, [1996] ICJ Rep 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] ICJ Rep 7, para. 53.

¹³⁶ International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN GAOR 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) p.3 66.

¹³⁷ It is sometimes claimed that the due diligence obligation does or should apply to situations of transnational harm where both the activity and physical damage occur within one country, yet an international dimension is introduced by the transfer of hazardous technology from a state of origin. See Xue Hanqin, *Transboundary Damage in International Law* (2003) pp. 9-10; Shinya Murase, 'Perspectives from International Economic Law on Transnational Environmental Issues' (1995) 253 *Recueil des Cours* 287 at 396-399.

Under the no-harm principle, States are prohibited from causing significant pollution damage to the environment of another State or to the environment of areas beyond national jurisdiction (objective). However, this principle of no-harm is breached only when the origin State has not acted diligently with regard to its own activities, over state-owned enterprises, or private activities. What then is required of States towards the activities in its jurisdiction and control? The following principles appear to be broadly accepted.

The material content of due diligence

In order to demonstrate that it has acted diligently, the State of origin is expected to prevent foreseeable significant damage, or at least minimize the risk of such harm.¹³⁸ This is clear from the *Pulp Mills case*: ‘The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory’.¹³⁹ On the other hand, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, in its *Seabed Mining Advisory Opinion*, emphasised that precaution is, in effect, part of due diligence.¹⁴⁰ Traditionally, due diligence has required States to take preventive action in relation to foreseeable harm, that is, when they possess scientific evidence that significant transboundary damage is likely. After the Advisory Opinion, it may be that States are expected to act already when there is insufficient evidence but where the consequences may be severe and irreversible. This would be in keeping with Article 10(c) of the Prevention Articles, which suggests that the precautionary approach is relevant to an evaluation of the risk of the significance of harm to the environment and the availability of means to prevent or minimize it. Some authors consider that the precautionary principle calls for the burden of proof to be reversed. In practice, as of today, however, no international judicial decision has ever inferred from the precautionary principle or approach such consequences for the rules governing the burden of proof. Thus, following the ITLOS Advisory Opinion, the precautionary attitude forms part of the due diligence obligation; consequently, the principle of prevention comes with positive obligations for States: the proof is thus reduced, not as regards the burden of proof, but what has to be demonstrated by the plaintiff. Proof must be made not of the existence of a risk, but that the State has not put in place the legislative and regulatory framework which would have enabled it to become aware of the risk, to measure its probability and gravity, and to take measures aimed at preventing the harm.

Due diligence is a standard that varies according to context, as the *Seabed Mining Advisory Opinion* confirmed. As the Chamber stated, due diligence ‘may not easily be described in precise terms’ because it is ‘variable’. It may change ‘over time’ and

¹³⁸ *Prevention Articles*, article 3. According to the Commentaries to Article 3, due diligence is “manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in a timely fashion to address them. Thus States are under an obligation to take *unilateral* measures to prevent significant transboundary harm, or at any event to minimize the risk thereof...”. Commentary to article 3 at para. 10, p. 393.

¹³⁹ *Pulp Mills on the River Uruguay* (Argentina v Uruguay), [2010] ICJ Rep 14, para. 101.

¹⁴⁰ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Case No 17, 1 February 2011). The Chamber noted that “it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations” and: “[t]he due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor”, including in “situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks” (para. 131).

‘in relation to the risks involved in the activity’¹⁴¹. Even if the subjective requirements may change in relation to the risks involved in the activity, it seems clear that a State is not in breach of due diligence if it has taken all the precautions but damage happens in any case. Some very inherently risky activities (such as operating nuclear power plants) may cause significant transboundary damage, but escape legal responsibility if due diligence has been observed. This is why States have concluded treaties over such activities, and ascribed strict liability to make sure that innocent victims receive at least some kind of compensation.¹⁴²

The due diligence standard also varies in many contexts on the basis of common but differentiated responsibilities. It is well-established that developing States may not be able to control the activities in their territory in a similar manner to developed States, and that this will effect the evaluation of whether they have breached their due diligence obligation.¹⁴³ On the other hand, while the *Seabed Mining Advisory Opinion* observes that precautionary measures must be applied by States ‘according to their capabilities’,¹⁴⁴ it is noteworthy that the Chamber did not agree with the Republic of Nauru’s position that a contractual approach rather than a regulatory approach would be sufficient for developing country States to meet their due diligence obligations with regard to contractors engaging in mining of the international deep seabed.¹⁴⁵ Moreover, the ITLOS Chamber noted that while rules ‘setting out direct obligations of the sponsoring State *could* provide for different treatment for developed and developing sponsoring States’,¹⁴⁶ it would ‘jeopardize uniform application of the highest standards of protection of the marine environment’ if ‘sponsoring States “of convenience” became prevalent.’¹⁴⁷ Thus ‘[e]quality of treatment between developing and developed States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls.’¹⁴⁸

¹⁴¹ Para. 117. See in relation a similar wording from the ECHR in arrêt *Tatar v. Roumanie*, 27 January 2009, application n° 67021/01, para. 88. See also Commentaries to article 3 of the *Prevention Articles*, stating that the standard of due diligence against which the conduct of a State of origin should be measured is that which is “generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance.” Furthermore, “ultra-hazardous activities require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of operation, its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered...” Commentary to Article 3, *Prevention Articles*, at para.11, p.394.

¹⁴² See also treaties addressing civil liability for oil pollution at sea, for example.

¹⁴³ Commentary to Article 3, *Prevention Articles*, at para.12 and para.13, p.394, referring to Principle 11 of the *Rio Declaration*. However, the economic level of a state cannot be used to dispense the state entirely from its obligations. “It is however understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of government is different from States which are not so well-placed. Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.” Commentary to Article 3, *Prevention Articles*, at para.17, p.395.

¹⁴⁴ *Seabed Mining Advisory Opinion*, para. 161.

¹⁴⁵ *Seabed Mining Advisory Opinion*, para. 223: “a sponsoring State could not be considered as complying with its obligations only by entering into a contractual arrangement, such as a sponsoring agreement, with the contractor.” Compare with *Statement by the Republic of Nauru regarding the questions submitted to the Seabed Disputes Chamber for an advisory opinion on the responsibilities and obligations of States sponsoring entities with respect to activities in the international seabed area*, Permanent Mission of the Republic of Nauru to the United Nations NV10/76, para.26, August 5, 2010.

¹⁴⁶ *Seabed Mining Advisory Opinion*, para. 160 (emphasis added)

¹⁴⁷ *Seabed Mining Advisory Opinion*, para. 159.

¹⁴⁸ *Seabed Mining Advisory Opinion*, para. 159.

The procedural content of due diligence

In order for States to meet their due diligence obligations, they will have to establish various domestic and transboundary procedures to prevent significant transboundary damage as follows:

- Require impact assessments and permit procedures for all activities that may reasonably be thought of as raising the risk of environmental damage. The aim is to minimise risk of significant transboundary damage ensuing to the environment of other States or of areas beyond national jurisdiction.¹⁴⁹ In the *Pulp Mills* case, the ICJ signalled that it is a matter for individual States to determine what type of EIA and permit procedures they establish, as long as it is appropriate and conducted with due diligence prior to implementation of the project.¹⁵⁰
- The origin State needs also to notify and consult with the potentially affected State, in order to make sure that transboundary environmental impact assessments are conducted appropriately, and that the potentially affected State has been able to comment on the possible transboundary consequences.¹⁵¹
- The State of origin may consult the public likely to be affected in another State. According to Article 13 of the *Prevention Articles*, all States concerned shall provide the 'public likely to be affected' with the relevant information relating to [the] activity, the risk involved, and the harm which might result and ascertain their views.¹⁵² The Commentary to Article 13 suggests that this obligation applies regardless of whether the public is the State's own public, or the public of another State.¹⁵³ In the *Pulp Mills* case, the Court was far more ambiguous as to

¹⁴⁹ *Prevention Articles*, articles 5, 6 and 7, pp. 398-406. According to Article 5, States "shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms." Where the activities are conducted by private enterprises, the obligation of the state is "limited to establishing the appropriate regulatory framework and applying it." Commentary to Article 5, *Prevention Articles*, para. 3, p. 399. According to article 6, the State "shall require its prior authorization" for any activity. Article 7 provides that any decision to authorize an activity must be based upon an "assessment of possible transboundary harm caused by that activity, including any environmental impact assessment". The State is not required to conduct the assessment itself, which would usually be done by the operators observing guidelines laid out by the state, with the State of origin designating an authority to evaluate the assessment: Commentary to article 7, para. 5, p. 404.

¹⁵⁰ *Pulp Mills*, para. 205. "It is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment."

¹⁵¹ *Prevention Articles*, articles 8-10, pp. 406-418. According to Article 8, the State of origin is to provide the state likely to be affected with "timely notification of the risk" and transmit to it all available technical and other relevant information. The State of origin must then wait before making the decision to authorize the activity pending receipt of a response within six months. Article 9 provides that concerned states are to enter into consultations at the request of either of them, and seek solutions based upon an "equitable balance of interests" and factors listed in Article 10. These include: the importance of the activity for the State of origin in relation to the potential harm to the likely affected State and the degree to which either State is prepared to contribute to the costs of prevention. Also according to Article 10, the standards of prevention that the affected state applies to the same or comparable activities as well as standards of regional and international practice are relevant.

¹⁵² *Prevention Articles*, article 13, p.422.

¹⁵³ *Prevention Articles*, Commentary to article 13, pp. 422-425. While this obligation can be fulfilled through the offices of the other state, the suggestion is that direct communication with the public of the other state may be undertaken where feasible. Commentary to article 13 at para.7. The Commentaries suggest that this obligation may exist under human rights law. Commentary to Article 13 at para.10. Furthermore, article 15 provides that access to justice in state courts shall be provided in accordance with the principle of non-discrimination. Thus, unless the concerned states have agreed otherwise "for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm", a state "shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other

whether the public of the potentially affected State needs to be consulted, signaling that this is not currently part of the due diligence obligation of States.¹⁵⁴

- Nothing prevents States from agreeing more specifically what type of measures due diligence requires of them. They may even set very specific emission standards, which naturally make it clearer to know what each State expects of the other in terms of due diligence.
- There is also an obligation to monitor the implementation of the activity as long as it continues and so long as monitoring is required. All States concerned have an obligation to continue to exchange information with other concerned States and the State of origin during this time.¹⁵⁵

Due Diligence in the International Law of the Sea

In the law of the sea, due diligence is of special relevance to the obligations upon States to protect the marine environment. In its *Seabed Mining Advisory Opinion*,¹⁵⁶ the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea found that parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) must exercise due diligence to ensure that contractors engaged in seabed mining activities in the Area comply with their obligations to protect the marine environment.

In the 2012 *Seabed Mining Advisory Opinion*, the Seabed Disputes Chamber of examined the nature of an obligation imposed on States ‘to ensure’ that contractors engaged in seabed mining activities in the Area comply with their obligations to protect the marine environment.¹⁵⁷ The Chamber noted that an obligation ‘to ensure’ is not an obligation to achieve, in each and every case, the prescribed result. Rather it is an obligation of due diligence, ‘an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.’¹⁵⁸ As in other areas of international law, the Chamber noted that due diligence as used in the law of the sea could not be easily described in precise terms, but it did provide useful guidance on a number of elements of the concept.

First, the Chamber affirmed that due diligence is an elastic and flexible concept, with the content of the obligation depending on the particular circumstances of the case. With particular relevance to the law of the sea, the content of the obligation may change in relation to the risks involved in the activity, with a high standard expected for riskier activities such as exploitation, than for prospecting.¹⁵⁹ The content of the obligation may also change in line with scientific and technological advances.¹⁶⁰ Thus what is sufficiently diligent in a certain context may become insufficient over time. In this regard, in the law of the sea due diligence may tend to have an ever

appropriate redress.” article 15, p. 427. See also International Law Association, “Final Report of the Transnational Enforcement of Environmental Law Committee” in *Report of the 72nd Conference held in Toronto 4-8 June, 2006* (2006) p. 655. There is an argument to be made that access to justice for victims of environmental harm is part of a due diligence obligation.

¹⁵⁴ *Pulp Mills*, paras. 215-219.

¹⁵⁵ *Prevention Articles*, article 12, p. 420. See also *Seabed Mining Advisory Opinion* paras. 142-144; *Pulp Mills* para. 205.

¹⁵⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Case No 17, 1 February 2011).

¹⁵⁷ UNCLOS, article 139(1)

¹⁵⁸ *Seabed Mining Advisory Opinion*, para. 110.

¹⁵⁹ *Seabed Mining Advisory Opinion*, para. 117.

¹⁶⁰ *Seabed Mining Advisory Opinion*, para. 117.

more technical character, capable of measurement in terms of technical and scientific standards of behaviour that are commonly accepted by States.¹⁶¹

Second, various 'direct duties' may be relevant factors in meeting a due diligence obligation. In relation to seabed mining, one such direct duty is the duty to comply with the precautionary principle articulated in Principle 15 of the Rio Declaration. The Chamber noted that in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks, a sponsoring State would not meet its obligations of due diligence if it disregarded those risks.¹⁶² Other direct duties include the obligation to act in accordance with best environmental practices and complete an environmental impact assessment of activities.

Finally, the Chamber considered the issue of differing levels of capacity among States. In its request for an advisory opinion, Nauru had noted that as a developing country it was dependent on the private sector to participate in deep seabed mining. It expressed concern that exposure to liability or costs arising from its sponsorship of private actors could far exceed its national financial resources and thus preclude its participation in the activities.

The Chamber concluded that the general provisions relating to the responsibilities and liability of the sponsoring State apply equally to all States, whether developed or developing.¹⁶³ In making this finding, it was cognisant of the fact that imposing equal standards on developed and developing sponsoring States assists in preventing commercial enterprises from choosing sponsorship of developing countries as a means of avoiding regulation and control.¹⁶⁴ However, the Chamber recognized that various direct duties such as the precautionary principle allow for differential application with Principle 15 of the Rio Declaration allowing for States to implement the principle "according to their capabilities".¹⁶⁵ Article 194(1) of UNCLOS similarly concedes that the requirement of States to take all measures necessary to prevent and control marine pollution, is subject to the State using the best practicable means at their disposal and in accordance with their capabilities.

Due diligence is also of relevance to a range of other obligations in the law of the sea, including those which require States to have 'due regard' to the interests of others, such as the obligation upon coastal States in exercising rights and performing duties concerning their exclusive economic zone to have 'due regard' to the rights and duties of other States.¹⁶⁶

The extent of the due diligence required by States under such provisions may receive articulation when ITLOS delivers an advisory opinion in Case No 21 currently before it. On 27 March 2013, the Sub-Regional Fisheries Commission requested an advisory opinion from ITLOS in relation to the rights and obligations of flag States and coastal States with respect to illegal, unreported and unregulated (IUU) fishing which poses an on-going challenge to many States. Considering

¹⁶¹ Ricardo Pisillo-Mazzechi, "The Due Diligence Rule and the Nature of the International Responsibility of States" in *State Responsibility in International Law* (Rene Provost, ed) (2002) at p. 133.

¹⁶² *Seabed Mining Advisory Opinion*, para. 131.

¹⁶³ *Seabed Mining Advisory Opinion*, para. 158.

¹⁶⁴ *Seabed Mining Advisory Opinion*, para. 159.

¹⁶⁵ *Seabed Mining Advisory Opinion*, para. 161.

¹⁶⁶ UNCLOS, article 56(2).

provisions of UNCLOS, which require parties to have ‘due regard’ to the rights of the coastal State within an EEZ¹⁶⁷ and cooperate with respect to the high seas,¹⁶⁸ and also provisions of the 1995 Fish Stocks Agreement which impose obligations on flag States “to ensure’ that vessels flying its flag no not undermine the effectiveness of conservation and management measures on the high seas,¹⁶⁹ ITLOS could consider whether these provisions impose a ‘due diligence’ requirement to prevent IUU fishing on flag States. If so, State responsibility could be invoked when a flag State has failed to take appropriate measures with respect to the oversight and management of its vessel registry.

Initial Conclusions and Moving Forward

This First Report of the Study Group has sought to consider some of the diverse circumstances in which due diligence is applied; investment law, human rights, and law of the sea, inter alia. As this Report has shown, international environmental law in particular has contributed significantly to our understanding of the concept of due diligence, but it remains unclear how far that contribution is limited to the particular parameters of environmental matters, or whether it can be viewed more broadly. There is a risk in concluding of over-simplifying the complexity of the debate, but three issues seem especially relevant.

First, the level of governmental capability and capacity though generally accepted as a valid factor in determining due diligence – certainly by the International Law Commission – was queried by the Seabed Disputes Chamber in relation to the responsibilities of States sponsoring entities conducting activities in the Area. As noted in the section of human rights, issues of capability and capacity often arise in relation particularly as regards the fulfilment of economic and social rights, though without clarity as to its affect and scope.

Secondly, how far can due diligence vary in the light of the risk presented? Risk here is defined broadly, and relates not just to environmental risks. As noted in the *Alabama Claims Arbitration*, the conduct expected of States is “in exact proportion to the risks”. But how is “exact proportion” determined? This question is not simply whether it is a matter of objective versus subjective interpretation, but more fundamentally, as a matter of applying law to complex facts, is due diligence a crude standard when more precise measures are, or should be, available? As the discussion on investment law indicated, are not open standards of conduct prone to significant variation in arbitral interpretation? Thus, rather than reflecting on the value of due diligence as a standard of conduct imposed on States for effectively regulating the acts of others, might it be appropriate to question its overall utility?

Thirdly, and returning to the Study Group’s central research question, can due diligence be viewed as a common standard applicable across a broad range of obligations in international law, or must each be viewed separately. Or phrased alternatively, quite how should one interpret the dicta of the International Court in *Corfu Channel*; expansively or more narrowly? This is both a retrospective analytical, and a prospective normative, question. It is retrospective and analytical

¹⁶⁷ UNCLOS, article 58(3).

¹⁶⁸ See UNCLOS, articles 116, 117 and 118

¹⁶⁹ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 88, articles 18-19.

as we consider areas of international law already extant, and seek to place them within a broader legal framework. Prospectively and normatively, how far in an ever-complex global order as new problems of regulation confront the international community, should we begin to order and regulate such matters – if indeed due diligence is, in fact, the appropriate standard – as merely instances of a broader, common, obligation? In short, due diligence is not simply a standard of conduct, itself becomes a primary norm – which must surely be what the Court itself was intimating?

The Second Report will return to these – and other questions – and seek, as far as is meaningful, to present a coherent sense, of where due diligence may be heading within the current parameters of international law.

Annex

List of Study Group Members

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