Due Diligence in International Law: Cause for Optimism?

Abstract

Due diligence is not a new concept in international law. It has been used to address State conduct in significant transboundary harm, the law of the sea, protection of aliens and violence in the private sphere in human rights law, especially in the context of violence against women. However, the role of due diligence in international law has been questioned – particularly whether it makes primary obligations weaker and whether its usage adds a clear value. This article examines what the role of due diligence is, its potential, and whether there is a reason to be optimistic about the concept in international law. It argues that the potential value of the concept lies in its malleability and capacity to expand what is required of the State in fulfilling its obligations, yet limitation persists because due diligence relies on international courts and tribunals to crystallise what it entails into a hard legal standard.

Introduction

Due diligence has been termed a familiar stranger.[1] Nonetheless, it has been applied in different areas of international law – for example, in the prevention of transboundary harm, the law of the sea and violence against women. Therefore, it becomes imperative to address what its role and potential contribution are to international law; particularly if there is a reason to be optimistic about due diligence in the assessment of State conduct.

The article begins by discussing why due diligence emerged and its subsequent role in the law of State responsibility. Due diligence's entry is tied to the arising need to attribute responsibility for the sovereign's action or omissions concerning the harm committed by private persons in the age of absolutism. Therefore, the initial impact and relevance of due diligence can be found in the responsibility for harm done to aliens and the State's failure to fulfil its obligations of neutrality. Hence, due diligence has been in play concerning the State's duty to use its apparatus to prevent harm and the State's duty to prevent, investigate, pursue and prosecute perpetrators.

Beyond the context of the protection of aliens, the article shows that due diligence has expanded and developed in international environmental law, the law of the sea, human rights and violence against women. In this expansion, due diligence has also been used as a standard of conduct that States must meet when fulfilling their obligations. There is also consensus that as "a qualifier of behaviour",[2] due diligence is a tool for promoting better State response or conduct. As such, this contribution understands due diligence as an element of primary obligation. Furthermore, this

[1] Anne Peters and others, 'Due Diligence in the International Legal Order - Dissecting the Leitmotif of Current Accountability Debates' in Heike Krieger *et al* (eds), *Due Diligence in the International Legal Order* (OUP 2020) 1.
[2] Ibid., 2.

article contends in the final section that due diligence's continuous relevance is in its potential to scrutinise State conduct in changing circumstances where existing standards are no longer sufficient. However, such relevance may be limited where there are gaps in State accountability in some thematic areas and those gaps are not filled because there is no crystallised hard legal standard of due diligence developed by international courts/tribunals in such areas.

1. Early Impact of Due Diligence

Due diligence comes from the Latin word diligentia, which can be translated as care or circumspection.[3] It stems from domestic legal traditions linking back to Roman civil law.[4] However, both common and civil law systems recognise the duties of diligent conduct.[5] Under the traditions, a person can be liable for accidental harm caused to others if the injury is occasioned by the person's failure to meet the standard required of a 'diligens paterfamilias.' That is, the standard required of a prudent head of a household.[6] Burdick explains that these Roman law underpinnings indicate a connection between culpability and due diligence.[7] Accordingly,

> Culpa [fault] and diligentia are…inseparably associated, since culpa is the lack of due diligence, and the degree of diligentia or care required in any given case regulates inversely the degree of culpa or negligence that will subject one to liability in case of loss.[8]

The above implies that, in its domestic origins, due diligence was instrumental in attributing the responsibility of an actor concerning harm caused by them. This due diligence functionality of establishing responsibility influenced the writings of Grotius on State responsibility.[9] Elements of due diligence in Roman traditions were then invoked to address questions surrounding States' responsibility for private actions in the protection of aliens in international law.[10] These are the issues bordering on when States bear responsibility for the actions of individuals. Indeed, as Blanco notes, due diligence was introduced between the pre-modern idea that the nation is responsible for the acts of its members and doctrines, acknowledging no responsibility for private injuries to aliens.[11]

Thus, in addressing the uncertainties between States and harm caused by their private citizens, Grotius laid the foundation for the concept of responsibility due to lack of due diligence.[12] It was

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[3] Ibid.
[4] Pierre Dupuy, 'Due Diligence in the International Law of Liability' in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (OECD, 1977) 369.
[5] Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (CUP 2021) 78.
[6] Ibid; See also Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civil Tradition* (1996) 1009; Robert Warden Lee, *An Introduction to Roman-Dutch law* (4th edn, 1946) 324.
[7] William Livesey Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (Lawbook Exchange 2004) 415
[8] Ibid.
[9] See Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (Springer Nature 2019) 386.
[10] See Jan Arno Hessbruegge, 'The historical development of the doctrines of attribution and due diligence in international law' (2003) 36 NYUJ Int'l. L. & Pol. 266.
[11] Blanco (n 9), 376.
[12] See Hessbruegge (n 10) 283; See also Joanna Kulesza, *Due Diligence in International Law* (Brill Nijhoff 2016) 1-3.

discussed in State ruler accountability for his subjects in the age of absolutism, where the sovereign wields all governmental power.[13] So he posited that the sovereign could become complicit in the crimes of private individuals through the principles of *patientia* and *receptus*.[14] Under patientia, a community or its ruler is responsible for a crime committed by the subject where they had knowledge of the crime but failed to prevent it.[15] This same duty extends to situations where the sovereign's subjects commit a crime against foreign sovereigns or subjects. Similarly, a ruler under receptus is responsible for not extraditing or prosecuting offenders who are using the ruler's realm as a refuge from justice.[16] There is a duty on the sovereign 'to punish the offenders as guilty, in case they could be found, or surrender them.'[17] He also explained that 'a man who is privy to a Fault and does not hinder it, when in a Capacity and under an Obligation of so doing, may properly be said to be the Author of it.'[18] In essence, Grotius underpinned that the sovereign is under a duty to take appropriate steps in response to the injurious acts of private individuals. In the knowledge of harm or risk of harm, an absence of action implies that the sovereign incurs responsibility.

Wolff echoed the Grotian concept of responsibility and due diligence. However, unlike Grotius, he differentiated the State from its ruler.[19] This differentiation might have been influenced by the fact that the age of absolutism was wearing off, and all governmental authority no longer resides with the sovereign. Wolff explained that the State is under a duty not to allow any of its subjects to harm foreign nationals or foreign states.[20] Where an injury occurs, the ruler is required to compel the offender to repair the loss suffered; and if it is a criminal act, the offender is punished.[21] Though the nation and ruler are different entities, Wolff noted that an act is imputed to the ruler and, by implication, the nation where the ruler approves private individuals' harmful acts.

Drawing from Wolff, Vattel explained that a nation would be guilty of its members' crime if its conduct allows its citizens to plunder and maltreat foreigners – especially where there is a failure to organise the manners and maxims of government appropriately.[22] Vattel's arguments show that States are under an obligation to protect foreigners within their territory from any potential harm. The State must ensure that actions within its territory do not become harmful to other States. Vattel also noted that if one State counterfeits another State's currency it harms the latter, and this

[13] Kulesza (n 12), 3.
[14] Hugo Grotius, *On the Law of War and Peace* (Stephen Neff translation, Cambridge University Press 2012) 292; Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid. 284
[18] Hugo Grotius, *The Rights of War and Peace Book II* (From the edition by Jean Barbeyrac, Liberty Fund, Indianapolis 2005) 1056.
[19] Christian Wolff, 'Jus gentium methodo scientifica pertractactum' (1749) in James Brown Scott (ed), *Classics of International Law* (Joseph Drake translation, Clarendon Press 1934) 536.
[20] Ibid; Hessbruegge (n 10) 288.
[21] Ibid.
[22] Emer de Vattel, *The Law of Nations* (6th edn by Joseph Chitty, 1844) 163.

counterfeiting incurs responsibility.[23] He reiterated the Grotian principle that requires the State to effect reparation of damage caused by a subject and punish the offender or carry out the offender's extradition. Where there is a refusal to punish or extradite, the relevant State will incur responsibility as an accomplice in the harm.[24]

The influence of Wolff and Vattel concerning due diligence and State responsibility for harmful conduct towards foreign States is apparent in the 1872 *Alabama Claims Arbitration.*[25] Great Britain (GB) had allowed the construction and escape of vessels planned to be used by the Confederacy against the United States. The arbitral tribunal examined GB's obligation of neutrality in the United States civil war. GB argued that due diligence should be exercised per their affairs and efforts prescribed by national laws instead of international law.[26] The tribunal rejected Great Britain's definition as narrow. Instead, it adopted the more demanding definition from the US. The tribunal explained that due diligence is informed or determined by international law, and it requires efforts that are in exact proportion to the risks or threats that parties may be exposed to from a failure to fulfil the obligations of neutrality. GB incurred responsibility here as the measures used in pursuit of the escaped vessels '…were so imperfect as to lead to no result…'[27] As such, the tribunal clarified that due diligence requires a show of vigilance and adopting necessary means to prevent harm to another State.[28] Therefore, the State is responsible for the actions of individuals if it did not exercise due diligence in performing its duties.[29]

Hall noted that to avoid responsibility, the State must demonstrate that its failure to prevent the commission of harmful acts or an omission to do certain acts has been within the reasonable limits of error.[30] That is, the State must show that the injurious acts could not have been prevented by the acts proportioned to the apparent nature of the circumstances.[31] As was said in *Alabama,* the government's amount of care and its response must be proportional to the state of affairs existing at the time.[32] Furthermore, since administrative officials, naval and military commanders are under the State's control, injurious actions done by them are actions of the State until the State renounces such actions.[33] Where these officials harm a foreign State or its nationals, the State must punish the

[23] Ibid. 47.
[24] Ibid. 162-3.
[25] Award rendered on 14 September 1872, Reports of International Arbitral Awards 2012, Volume XXIX, p. 125-134.
[26] Ibid.
[27] Ibid., 130
[28] Ibid., 129 – 132.
[29] Kulesza (n 12), 21.
[30] William Edward Hall, *A Treatise on International Law* (first published 1884, 3rd edn, Clarendon Press, 1890) 213-17.
[31] Ibid.
[32] Ibid. 216.
[33] Ibid. 213-214.

officials and provide necessary reparations.[34] By implication, the State's conduct must not condone or encourage public officials' injurious actions toward a foreign state or its nationals.

In connection with the above, the influence of Hall is visible in the Mixed Claims Commission Italy - Venezuela constituted under the Protocols of 13 February and 7 May 1903, specifically in *Sambiaggio.*[35] Hall explained that when a government cannot control the harmful acts of private persons within its territory because of insurrection, it cannot be responsible for injuries suffered by aliens.[36] Where the State has lost much control in the case of internal insurrection, it will be difficult for it to take appropriate steps to protect aliens and their interests. In *Sambiaggio,* the tribunal examined Venezuela's protection obligations concerning Sambiaggio and other Italians resident in Venezuela.[37] Referencing Hall, the tribunal explained that it could not hold Venezuela responsible for the harm inflicted by private actors since the State has lost control of its territory.[38] Here, due to the insurrectional war, the State could not exercise due diligence in the use of its apparatus to prevent harm. However, the Amador Report[39] suggests that the State's responsibility may change if it is manifestly negligent in adopting measures to prevent or suppress an insurrection. The State will be responsible for injuries caused to an alien by measures taken by its armed forces or other authorities if they harm private persons.[40] Here, it means the State may still be responsible even in the face of internal insurrection.

Nonetheless, as Pisillo-Mazzeschi,[41] Baldwin,[42] and Barnidge[43] argue, the broader implication is that due diligence has been in play concerning the State's duty to use its apparatus for preventing private harm, particularly in the protection of aliens. It is also in play in the State's duty to prevent, investigate, pursue, and apprehend perpetrators.[44] This role of due diligence became apparent in the litigations between the United States and Mexico. For example, in *Janes*,[45] a claim was made by the United States for the murder of Everett Janes, an American citizen working in Mexico.[46] The Mexican authorities delayed action and even failed to take appropriate steps to apprehend the perpetrator. The Claims Commission held that there was an evident lack of diligence on the part

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[34] Ibid.
[35] (Italy v. Venezuela) (1903) 10 R.I.A.A. 499, Reports of International Arbitral Awards 2006, Volume X pp. 499-525
[36] Hall (n 30), 219.
[37] Sambiaggio (n 35) 500 - 501.
[38] Ibid. 515-21; See also *Santa Clara Estates Case (Supplementary Claim),* (1903) UNRIAA IX 2006, 455, where similar conclusions were reached.
[39] F. V. Garcia Amador, 'International responsibility, Second Report'. Document A/CN.4/106, 15 February 1957, 120.
[40] Ibid.
[41] Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German Y.B. Int'l L. 9.
[42] Simeon E. Baldwin, 'Protection of Aliens by the United States' (1914) 13 Mich. L. Rev. 17.
[43] Robert P. Barnidge, Jr. *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (T.M.C. Asser Press 2007).
[44] Ibid; Pisillo-Mazzeschi (n 41), 29.
[45] *Janes (U.S.A.) v. United Mexican States* (1925) UNRIAA IV 2006, 82-98.
[46] Ibid., 83.

of Mexican authorities to apprehend and punish the perpetrator.[47] Like Alabama, the Commission explained that the failure to take timely and efficient action towards the perpetrator's apprehension indicates a lack of due diligence, and, as such, Mexico will incur responsibility for the harm.[48] The responsibility of States for not exercising due diligence in the prevention of harm caused by their private citizens to aliens was subsequently confirmed in similar cases.[49] This role of due diligence in attributing responsibility has also been acknowledged in ILC Special Rapporteur Garcia Amador's second report on international responsibility.[50] The Report reiterated the articulations above, noting that a State is responsible for an injury to a foreigner from its failure to exercise due diligence to prevent the injury.[51]

Therefore, due diligence emerged and had its initial impact on States' responsibility for private actors, particularly in the prevention of harm against aliens.[52] As an offshoot of this initial impact, there has been an emergence of due diligence requiring States to endeavour to reach the result set out in an obligation.[53] Also, it has expanded to other areas of international law – not just in the sense of State responsibility for harm committed by individuals, but also in the case of responsibility for harm committed by the State.[54] However, due diligence in its expansion has also developed as a tool for prescribing the standard of conduct required to discharge international State obligations. As we will see below, due diligence is a useful and flexible tool in, for instance, the prevention of transboundary environmental harm or protection of women from domestic violence.

2. Lessons from Environmental Law and the Law of the Sea

Due diligence has significantly developed in the area of transboundary environmental harm and the law of the sea.[55] Particularly, the concept has been instrumental in the obligation to prevent significant transboundary harm. In the 1949 *Corfu Channel* case,[56] the International Court of Justice (ICJ) explained that a State has an obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States. This enunciation is a general obligation that has been given a broader interpretation in the context of significant transboundary harm and the setting of minimum standards in international environmental law. Hence, *Corfu Channel* constitutes a precedent in

[47] Ibid., 82-86.
[48] Ibid., 90; In the *Sewell case*, for example, the arbitral commission confirmed Mexico's responsibility for lack of diligence in the pursuit and apprehension of culprits. (*William E. Chapman (U.S.A.) v. United Mexican States* (1930) UNRIAA IV 2006, 632.
[49] See *Thomas H. Youmans (U.S.A.) v. United Mexican States* (1926) UNRIAA 2006, 110-117; *Neer (U.S.A.) v. United Mexican States*, (1926) UNRIAA IV 2006, 60-66; *Chase (U.S.A.) v. United Mexican States* (1928) UNRIAA IV 2006, 337.
[50] Garcia Amador, (n 39), 106, 122-23; See also Ian Brownlie, *Principles of Public International Law* (OUP 6th edn, 2003) 438.
[51] Ibid.
[52] Timo Koivurova, 'Due Diligence' (2013) Max Planck Encyclopaedia of Public International Law 1, 9.
[53] Ibid.
[54] As we will see in international environmental law, a State can become responsible for not exercising due diligence in the prevention of transboundary harm to other States.
[55] Kulesza (n 12), 11.
[56] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep. 4.

favour of due diligence in environmental law, and there is a subsequent manifestation of this precedent.[57] The International Law Commission's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries* (ILC Prevention Articles)[58] provides that there is a duty on the State of origin to take all appropriate measures to prevent significant transboundary harm or to minimise its risk to other States.[59] In addition, the Commentaries explain that this is an obligation of prevention requiring the exercise of due diligence from States.[60] In terms of what this requirement means, the Commentaries explicated that it is the State's conduct concerning its obligation that is relevant under due diligence.[61]

Thus, due diligence requires the State to exert its best possible efforts to minimise the risk of transboundary harm.[62] Certainly, this effort will depend on the circumstances of the potential harm, and the State is to keep itself updated on the technological changes and scientific developments in the area.[63] In *Pulp Mills on the River Uruguay,*[64] Argentina instituted proceedings against Uruguay in respect of their construction of two pulp mills on the River Uruguay with reference to its transboundary effects on the quality of the waters of the River Uruguay.[65] *Pulp Mills* is significant because it covers the themes highlighted by the ILC in the Prevention Articles – due diligence, environmental impact assessment (EIA), notification, consultation and cooperation.[66] Also, until *Pulp Mills*, no international court has held that there is a specific duty on States to carry out an EIA in cases of significant transboundary risk.[67] The ICJ further affirmed that fulfilling the obligation to prevent environmental harm requires the exercise of due diligence. That is, it 'entails not only the adoption of appropriate rules and measures but also a certain level of vigilance…'[68] This vigilance implies that where a party is planning works that may affect the river and indeed occasion transboundary harm, as in this case, it must undertake an EIA on the potential effects of the works in the light of perceived risks.[69]

The other implication from *Pulp Mills* is that being vigilant and, consequently, the undertaking of EIA is evidence of the exercise of due diligence on the part of the State.[70] Boyle similarly argued

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[57] Pisillo-Mazzeschi (n 41), 39.
[58] Text adopted by the International Law Commission at its fifty-third session in 2001 and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).
[59] Article 3, Ibid. 154.
[60] Commentary 7, ibid.
[61] Ibid; Kulesza (n 12), 11.
[62] Commentary 10, ibid.
[63] Commentary 11, ibid.
[64] *Argentina v. Uruguay*, Judgment, I.C.J. Reports 2010, p. 14.
[65] Ibid, para. 1, p. 25.
[66] Alan Boyle, 'Pulp Mills Case: A Commentary' < https://www.biicl.org/files/5167_pulp_mills_case.pdf> accessed 09 October 2020, 1.
[67] Ibid. 2; See also Cymie R. Payne, 'Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law' (2010) 14(9) Am. Soc. Int'l L. Insights
[68] *Pulp Mills* (n 64), para. 197, p. 79.
[69] Para. 205, p.83, ibid.
[70] Ibid.

that EIA is a necessary element of due diligence in preventing and controlling transboundary harm.[71] Therefore, the State's duty to be vigilant, which has roots in *Alabama,*[72] and the duty to undertake an EIA represent the specific type of conduct expected of a State regarding its obligations in transboundary harm. For example, these include requirements to notify, inform, consult, cooperate, conduct risk assessments, monitor, warn, publicly explain, or take reasonable precautions.[73] These action points represent due practical steps the State should take to prevent transboundary harm before commencing environmental works. Pisillo-Mazzeschi[74] and Fitzmaurice[75] pointed out that what is required of the State is to make every effort to reach the specified result in an obligation. In this case, the result is the prevention of transboundary harm, and the relevant State must make every effort to undertake EIA at the start of an environmental project.[76]

In the 2015 *Border Area and Road Case,*[77] the ICJ provided links between due diligence, EIA and the duty to consult and negotiate. In the case, Costa Rica alleged that Nicaragua invaded and occupied their territory, conducting dredging works in the San Juan River in violation of its obligations.[78] Affirming its position in *Pulp Mills* concerning due diligence*,* the ICJ explained that

> if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.[79]

Thus, due diligence triggers the need to carry out an EIA and to notify and consult the potentially affected State where the EIA confirms there is a risk of significant harm.[80] Hence, the above quote from the court's judgment offers sequential steps that start with an EIA. That is, an EIA, then a risk of transboundary harm confirmed and then, notification and consultation. These steps represent a set standard that is indicative of the exercise of due diligence in preventing significant

[71] Alan Boyle, 'Developments in International Law of EIA and their Relation to the Espoo Convention' (2012) 20(3) Review of European Community & International Environmental Law 227.
[72] *Alabama Claims Arbitration* (n 25).
[73] Anne Peters and others (n 1), 12.
[74] Pisillo-Mazzeschi (n 41), 41.
[75] Malgosia Fitzmaurice, 'Legitimacy of International Environmental Law. The Sovereign States overwhelmed by Obligations: Responsibility to React to Problems beyond National Jurisdiction?' (2017) 77(2) Heidelberg Journal of International law 339.
[76] See Rumiana Yotova, 'The Principles of Due Diligence and Prevention in International Environmental Law' (2016) 75 Cambridge LJ 445.
[77] Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*) and Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v. Costa Rica*), Judgment, I.C.J. Reports 2015, p. 665.
[78] Ibid, para. 1.
[79] Ibid, para. 104, 45.
[80] *Pulp Mills* (n 64), para. 104.

transboundary harm.[81] They also inform State conduct[82] – as attention is on State behaviour, precisely what they should do or what they are actively doing to fulfil their prevention obligations in environmental law. As such, for States to meet their obligations, they will have to establish various domestic and transboundary procedures to prevent significant transboundary damage.[83]

However, the ICJ in the *Border Area and Road* case was unclear about the method and criteria that should be used to assess the degree of risk of transboundary harm that would be sufficient to trigger a State's obligation to carry out an EIA.[84] This has practical implications for the exercise of due diligence in the context of transboundary harm. If there is no threshold of risk that triggers the duty to conduct an EIA, then there is a lack of clarity in determining whether a State has exercised due diligence in preventing transboundary harm. There should be a threshold for assessing the risk, and that threshold should not be decided by the States involved, but rather, by international law. Perhaps, as Desierto argues, the ICJ should have drawn on the Prevention Articles, which tie in the concept of significant risk of transboundary harm to the 'physical consequences' of activities, taking into consideration current 'developments in scientific knowledge' in the assessment of risks.[85] Activity may involve a risk of significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it.[86] As such, the risks should be assessed objectively, based on an appreciation of the possible harms resulting from an activity that a properly informed observer ought to have.[87] While objective assessments might be a way out of ascertaining what threshold of risk triggers the need for an EIA, there is a likelihood that the States involved in the activity may disagree. The disagreement may be because objective assessments might still need some level of specificity of requirements or pointers that can guide States on when an EIA should be carried out. Consequently, this might be a signal that due diligence needs to be further fleshed out by, for example, international courts/tribunals to fill gaps and strengthen the continuous crystallisation of a legal standard in transboundary harm.

The role of international tribunals in crystallising what due diligence entails is also apparent in the law of the sea. For example, the International Tribunal for the Law of the Sea (ITLOS) in the *Seabed*

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[81] See, for example, Payne arguing that carrying out EIA is now a requirement for the State under international law. Cymie Payne, 'Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law' (2010) 1 European Journal of Risk Regulation 317.
[82] Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 ICLQ 1044.
[83] ILA Study Group on Due Diligence in International Law, First Report, 7 March 2014, 28.
[84] See *Border Area and Road* case (n 77), paras. 104 – 105; See also Diane Desierto, 'Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)' (*EJIL: Talk*!, 26 February 2016) <https://www.ejiltalk.org/evidence-but-not-empiricism-environmental-impact-assessments-at-the-international-court-of-justice-in-certain-activities-carried-out-by-nicaragua-in-the-border-area-costa-rica-v-nicaragua-and-con/> accessed 4 June 2021.
[85] Prevention Articles (n 58), paras 15 and 16.
[86] ibid.
[87] ibid para 14.

Mining Advisory Opinion[88] had the opportunity to interpret the obligation to ensure compliance and liability for damage provided in article 139 of the United Nations Convention on the Law of the Sea (UNCLOS). Referring to the ILC Commentary in the Prevention Articles[89] and the ICJ's findings in *Pulp Mills,* ITLOS explained that the obligation to ensure requires the exercise of due diligence, which is not an obligation to achieve, in every case, the result.[90] As such, it is an obligation to deploy adequate means, exercise the best possible efforts, do the utmost, and use a certain level of vigilance to obtain the result.[91]

The obligation to exercise due diligence adds another layer in the sense that State conduct should be attentive to the reality of the extant issue at stake, as we have seen in *Alabama*. Also, the standard of conduct required from the State may change or evolve as measures considered sufficiently diligent at a particular time may become less diligent in the light of new knowledge or riskier circumstances.[92] For environmental law, the general level of knowledge or information will continuously shift because of new insights and information.[93] Hence, the sequence of action required from the State will evolve or shift so that it is relative or proportional to the existing issues. However, factors that may change the level of conduct required from the State do not include its capacity to implement and enforce environmental measures. That is, ITLOS does not consider the development level of a State to be a factor in whether it has exercised due diligence in its conduct.[94] The basis of this is to adopt and push for the highest standards in environmental protection – which means the required action from the State is not only to avoid potential responsibility but to do the utmost in protecting a common heritage of humanity.[95] Indeed, ITLOS itself warned that differentiated lower standards might result in the emergence of the equivalent of States "of convenience" – where legal spaces are created for some developed States to perform at a lower

[88] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011, ITLOS Reports 2011, p. 10.
[89] See Article 3, *Prevention Articles* (n 58).
[90] Para. 110, ibid. It is not one that 'dictates the prefect achievement of result.' See Donald Anton, 'The Principle of Residual Liability in the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: The Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17)' (2012) 7 McGill Int'l J Sust. Dev L & Pol'y 241.
[91] Ibid.
[92] Para. 117, ibid.
[93] Duncan French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor - The Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 Int'l J Marine & Coastal L 525.
[94] *Seabed Mining Advisory Opinion* (n 88), para. 158-159.
[95] Tim Poisel, 'Deep Seabed Mining: Implications of Seabed Disputes Chamber's Advisory Opinion' (2012) 19 Austl Int'l LJ 226; See also French (n 93), 559.

standard in respect of their environmental obligations.[96] Also, the uniform application of the highest standards of protection of the marine environment will be jeopardised.[97]

Similarly, a further application of the standard requirements of due diligence from the *Seabed Advisory Opinion* can be seen in *The Sub-regional Fisheries Commission* (*SRFC) Advisory Opinion* submitted to ITLOS.[98] Here, ITLOS was requested to provide an advisory opinion on the flag State's obligations in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States.[99] Reiterating *Pulp Mills*, ITLOS clarified that the obligations of the flag States concerning IUU fishing require due diligence in their discharge.[100] It further explained that these obligations do not involve the achievement of compliance in IUU fishing by vessels flying the State flag in every situation.[101] Instead, what is required is for the flag state to take all necessary measures and actions to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.[102] These requirements to take all necessary measures will enable authorities to fight illegal fishing more efficiently.[103]

The flag State of a fishing boat, therefore, has an obligation of conduct.[104] Due diligence obligations can well be categorised as obligations of conduct – those primary obligations that require States to endeavour to reach the result set out in the obligation.[105] Obligations of conduct focus on the behaviour of States. So, due diligence can be used as a legal standard of conduct – in the sense of acting with due diligence – but only by reference to a pre-existing rule of international law. If a State has acted with the required diligence under a particular rule, it can be said that the State has not violated the rule.[106] For example, for a State party to fall below the due diligence standard, it must engage in conduct at variance with its control obligations in IUU fishing.[107] Importantly, ITLOS elucidated the specific conduct required of the State to satisfy the standard of due diligence in IUU fishing. For example, a flag State should adopt sanctions of sufficient gravity to deter and

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[96] See *Seabed Mining Advisory Opinion* (n 88), 159; David Freestone, 'Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area"' (2011) 105 American Journal of International Law 755.
[97] Ibid.
[98] ITLOS Case No 21, Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4.
[99] Para. 85, ibid.
[100] See also para. 125-132, ibid.
[101] Para. 129, ibid.
[102] Ibid.
[103] Victor Ventura, 'Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence' (2015) 12 Braz J Int'l L 50.
[104] David Freestone, 'International Tribunal for the Law of the Sea, Case 21' (2016) 1 Asia Pac J Ocean L & Pol'y 131.
[105] Koivurova (n 52), 2.
[106] McDonald (n 82), 1044.
[107] Gunther Handl, 'Flag State Responsibility for Illegal, Unreported and Unregulated Fishing in Foreign EEZs' (2014) 44 Envtl Pol'y & L. 163.

disincentivise violations and deprive offenders of IUU fishing benefits.[108] This elucidation indicates that, as far as the IUU obligations require due diligence, a particular standard of care is expected of the flag state.[109] An identical conclusion was also reached in the *South China Sea Arbitration*[110] – where it was explained that since China had not taken any steps to enforce rules against fishers engaged in poaching endangered species in the sea, it was not exercising any form of due diligence.[111] Thus, from the context of IUU fishing and even poaching of endangered species, we can identify that due diligence performs an important task because it applies to new situations where no specific or limited regulation exists.[112] Also, the international court or tribunal faced with a question of due diligence has the flexibility to assess its specific content and, consequently, what conduct is required of the State in a particular context.[113] However, while the exercise of due diligence by States will contribute to a reduction in illegal, unreported and unregulated fishing, the current due diligence requirements alone will not directly revive already heavily depleted fisheries.[114] For example, more needs to be done to combat artisanal fishing that over-extracts marine resources by fishing beyond the maximum sustainable yield for a region.[115] So, through the articulations of ITLOS, the current standards of due diligence may also be redefined and updated to deal with the gap left by unsustainable artisanal fishing practices.[116]

3. Violence Against Women: Due Diligence and the Public/Private Divide

The application of due diligence to determine whether States are meeting their international human rights law obligations was first introduced by the Inter-American Court of Human Rights (IACrt.HR) in the *Velasquez Rodriguez case*.[117] In this case, Velasquez, a university student in Honduras, was violently detained without a warrant and tortured by members of the Honduran Armed forces. In the judgment, the court explained that an illegal private act that violates human rights could lead to the State's responsibility for harm where there is a lack of due diligence to prevent the violation or in responding to it.[118] This decision is reminiscent of the application of due

[108] SRFC Advisory Opinion (n 98), para. 138 – 139.
[109] Eva Romée van der Marel, 'ITLOS issues its Advisory Opinion on IUU Fishing' (2015), The JCLOS Blog at <https://site.uit.no/nclos/2015/04/21/itlos-issues-its-advisory-opinion-on-iuu-fishing/> Accessed on 20 September 2020.
[110] South China Sea Arbitration, The Republic of the Philippines and The People's Republic of China, PCA Case No. 2013-19, Permanent Court of Arbitration, 12 July 2016.
[111] See para. 1203, ibid. For further analysis of this case, see Bernard Oxman, 'The South China Sea Arbitration Award' (2017) 24 U Miami Int'l & Comp L Rev 235.
[112] Koivurova (n 52), para. 44.
[113] See Valentin Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47(4) Ocean Development & International Law 337.
[114] Anastasia Telesetsky, 'The Global North, the Global South, and the Challenges of Ensuring Due Diligence for Sustainable Fishing Governance' (2017) 26 Transnat'l L & Contemp Probs 436.
[115] ibid.
[116] See for example, Helmut Tuerk, 'The Contribution of the International Tribunal for the Law of the Sea to International Law' (2007) 26(2) Penn State International Law Review 289.
[117] Case of Velásquez-Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
[118] Para. 172, ibid.

diligence in the context of private harm against aliens described earlier above.[119] Thus, what is again clear here in *Velasquez* is that if the State's apparatus acts in a manner that allows for violations to go unpunished and reasonable efforts are not taken to restore the victim's full enjoyment of rights, the State has failed to act with due diligence.[120] As Shelton and Gould pointed out, a State's diligence is not legally deficient because of the act that causes harm. Instead, it is because of what was lacking in the authorities' conduct.[121] Indeed, the language in *Velasquez* provided the foundation for the subsequent application of due diligence in violence against women (VAW).

Consequently, States could be held responsible for failing to effectively prevent and address VAW – particularly at the hands of persons in the private sphere.[122] Although in *Velasquez,* the decision still concerned victims' violations in the public sphere and through the State machinery, the introduction and appropriation of due diligence in VAW made visible acts of violence against women within the private sphere.[123] The introduction of due diligence in VAW necessitated a redefinition in the standard of conduct required of States towards more protection for women, especially in the case of intimate partner violence.[124] The use of due diligence to respond to the problem of the public/private divide indicates that there is potential for it to be used as a tool to address State behaviour that has previously ignored human rights abuses in the private sphere.

With General Recommendation No. 19, the *UN Committee on the Elimination of Discrimination Against Women* adopted due diligence as a tool to assess a State's obligations in VAW.[125] Similarly, article 4 of the *Declaration on the Elimination of Violence against Women* (DEVAW)[126] requires the State to exercise due diligence to prevent, investigate and punish acts of VAW, whether those acts are perpetrated by the State or by private persons.[127] Furthermore, article 7(b) of the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*[128] has similar provisions requiring the State to apply due diligence concerning their obligations

[119] See nn 42-52 above.
[120] Para. 176, *Velasquez* (n 117).
[121] Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford Handbooks, 2013), 562.
[122] Paulina García-Del Moral and Megan Alexandra Dersnah, 'A feminist challenge to the gendered politics of the public/private divide: on due diligence, domestic violence, and citizenship' (2014) 18(6) Citizenship Studies 661.
[123] Ibid., 665.
[124] See, for example, Leyla-Denisa Obreja, 'Human Rights Law and Intimate Partner Violence: Towards an Intersectional Development of Due Diligence Obligations' (2019) 37(1) Nordic Journal of Human Rights 63.
[125] Paragraph 9, UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 11th Session, 1992.
[126] UN General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993.
[127] Ibid.
[128] Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 1994.

in combatting VAW.[129] In addition, the *Coomaraswamy Report on VAW*[130] made some articulations about the application of due diligence. According to the report, the test is whether a State takes its duties seriously. This seriousness or inaction will be evaluated through the actions of State agencies and private actors on a case-by-case basis.[131] Referencing the General Recommendation 19, DEVAW and *Velasquez*, the report showed that inaction in fulfilling State duties has implications – which is, if a State does not respond to the attendant crimes in VAW, it is as guilty as the perpetrators.[132]

Furthermore, noting gaps in the enforcement of protective obligations, the *Ertürk Report on VAW*[133] moved further by using due diligence to redraw the protection levels of conduct for States' enforcement. According to the report, the response of due diligence to VAW should be at different levels of intervention, namely, individual women, the community level, the State and the transnational level.[134] The Report uses due diligence to holistically capture these different levels of causes and consequences of VAW. At the level of individual women, State efforts must target women's empowerment. This target action would involve education, skills training and access to productive resources to improve women's self-awareness and self-reliance.[135] State efforts should also be geared towards victims of VAW, and those at risk of VAW should have access to support systems that suit their needs.[136] At the community and family level, human rights discourses should be complemented with an approach based on 'cultural negotiation.'[137] Cultural negotiation means discouraging culture-based norms that give validity to gender-based violence in private spheres.[138] Overall, the report seeks to expand the application of due diligence to push new minimum levels of conduct in addressing VAW at all levels of manifestation – including the public and private spheres.

Indeed, the CEDAW Committee has taken advantage of due diligence's capability to respond to State conduct in the private sphere. In *A. T. v. Hungary,*[139] the victim had been subjected to severe domestic violence and serious threats by her partner.[140] She argued that Hungarian authorities had failed to provide adequate protection for her and her two children.[141] Hungary had no legal

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[129] Ibid.
[130] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, E/CN.4/1996/53, 5 February 1996.
[131] Ibid.
[132] Para. 120, ibid.
[133] E/CN.4/2006/61, 20 January 2006.
[134] Ibid.
[135] Paras. 78-81, ibid.
[136] Ibid.
[137] Ibid. paras. 85-88.
[138] Ibid. paras 85.
[139] Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005).
[140] Para. 2.1, ibid.
[141] Ibid.

mechanism for obtaining protection or restraining orders, and the criminal proceedings against her husband had been dragging on for years while he remained free.[142] The CEDAW Committee determined that Hungary had indeed failed in its protection obligations.[143] It explained that the State's failure to act in this case represents the general landscape in Hungary, and there is an entrenched traditional stereotype regarding the role of women.[144] In their decision, they recommended that Hungary acts with due diligence by expeditiously introducing a specialised law prohibiting domestic violence against women, which would also provide for protection and exclusion orders.[145] Thus, due diligence was used as a tool by the CEDAW Committee to delineate that States like Hungary adopt specialised mechanisms that address harm in the private sphere within the context of VAW.[146]

Furthermore, the corresponding application of due diligence in the Inter-American system has also provided a means to re-envision human rights law to better respond to violations with gender-specific causes and consequences.[147] In *Maria da Penha Maia Fernandes v. Brazil,*[148] the victim alleged that the Brazilian government condoned the violence perpetrated by her husband against her. Brazil also failed to punish her husband, and he had remained free.[149] The Commission found that the violence perpetrated by the Husband was part of a pattern of negligence and lack of effective action by the State in prosecuting perpetrators. It noted that the discriminatory judicial ineffectiveness fosters a climate that encourages domestic violence – since the public sees that the State will not take effective action to punish violence.[150] Citing the *Convention of Belém do Pará,* the Commission described Brazil's conduct and climate of impunity as a systematic failure on the part of a State to meet the due diligence standard to ensure that women are protected from violence and gender-based discrimination.[151] Thus, due diligence provides a juridical bridge from the traditional State-centric and public sphere-focused human rights law to the role the State may have in the relationship between individuals.[152]

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142 Para. 3.1-3.2, ibid.
143 Para. 9.2-9.3, ibid.
144 Para. 9.4, ibid.
145 Para. 11(e), ibid.
146 See also *Goekce v. Austria,* Communication No.: 2/2003, Views of the Committee on the Elimination of Discrimination against Women; *Yildirim v. Austria,* Communication No. 6/2005; *Kell v. Canada*, Communication No. 19/2008; *V. K v. Bulgaria*, Communication No. 20/2008; *Isatou Jallow v. Bulgaria,* Communication No. 32/2011.
147 Elizabeth A. H. Abi-Mershed 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System' in Carin Benninger-Budel (ed.), *Due diligence and its application to protect women from violence* (Martinus Nijhoff Publishers 2008) 127.
148 Maria da Penha Maia Fernandes v. Brazil, Case 12.05 1, Inter-Am. C.H.R., Report No. 54/0 1, OEA/Ser.L/V/II.111, doc. 20, rev. 16 (2000).
149 Paras. 1-20, ibid.
150 Para. 56, ibid.
151 Ibid. See also para. 20.
152 Abi-Mershed (n 147), 128.

Similarly, in *Jessica Lenahan Gonzales et al. v. United States*,[153] the claimants argued that the US violated their rights by failing to exercise due diligence to protect Jessica Lenahan and her daughters from harm perpetrated by her ex-husband even though Ms Lenahan held a restraining order against him.[154] They alleged that the police failed to adequately respond to Jessica Lenahan's repeated calls that her husband had taken their minor daughters in violation of the restraining order.[155] The Inter-American Commission observed that due diligence is used to interpret the content of State obligations toward the problem of violence against women.[156] Due diligence provides a way of understanding what a State's human rights obligations mean in practice when it comes to violence perpetrated against women, including domestic violence.[157] Citing *Maria Da Penha Maia Fernandes v. Brazil*,[158] the Commission explained that the State has to act with the due diligence necessary to investigate and sanction human rights violations in domestic violence cases.[159] Restraining orders are critically part of the due diligence conduct of States in cases of domestic violence. They are often the only remedy available to women victims and children to protect them from imminent intimate partner harm. They are only useful, however, if they are diligently enforced.[160] The Commission concluded that the US failed to act with due diligence to protect Jessica Lenahan and her daughters from domestic violence.[161]

Thus, notably from the above, the public-private dichotomy obscures the violence experienced in private life.[162] Due diligence challenges this public-private divide by articulating the relationship between State responsibility and violations by private residents. Those focusing on addressing gender violence have shown interest in developing due diligence in this area for this reason.[163] Applying due diligence to VAW has helped to bring violations of rights in the private sphere under scrutiny.[164] Hence, the potential of due diligence lies in the renewed interpretation or expansion of existing levels of conduct and full implementation of obligations of prevention, protection and compensation – so that it responds more effectively to the specificities of violence against women at all levels.[165]

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[153] Inter-American Commission on Human Rights, Merits, Report No. 80/11, Case 12.626.
[154] See paras. 1-58, ibid.
[155] Ibid.
[156] Para., 123, ibid.
[157] Para., 125, ibid.
[158] *Maria da Penha Maia Fernandes* (n 148).
[159] Para. 131, *Jessica Lenahan* (n 153).
[160] Para. 163, ibid.
[161] Para. 199, ibid. For similar cases see – *Claudia Ivette Gonzalez and Others* (Mexico), IACHR, Report No. 54/01, Case 12.051 paras. 160-255; *Case of González et al. ("Cotton Field") v. Mexico.* Preliminary Objection, Merits, Reparations and Costs, Judgment of November 16, 2009, Series C No. 205.
[162] Debra J. Liebowtiz and Julie Goldscheid, 'Due Diligence and Gender Violence: Parsing Its Power and Its Perils' (2015) 48(2) Cornell International Law Journal 306.
[163] Ibid. 307.
[164] Yakın Ertürk, 'The Due Diligence Standard: What Does It Entail for Women's Rights?' in Carin Benninger-Budel (ed.), *Due diligence and its application to protect women from violence* (Martinus Nijhoff Publishers 2008) 33.
[165] Ibid.

The European Court of Human Rights in *Opuz v. Turkey*[166] amplified the need for States to exercise due diligence by using it to pierce the private sphere in the context of VAW, especially where the situation poses a danger to the potential victim. In the case, the court examined whether Turkey displayed due diligence or acted in preventing the killing of the applicant's mother.[167] Turkey argued that criminal proceedings were commenced against the perpetrator but were discontinued after the applicant withdrew their complaints.[168] The Turkish authorities also claimed that further interference by them would amount to a breach of privacy rights.[169] Interestingly, the court rejected this argument, stating that the authorities should have considered the circumstances of the situation. For instance, the ex-husband had regularly issued death threats against the applicant and her mother.[170] In such indicative instances, due diligence requires authorities to take further measures that would have a real prospect of altering a negative outcome or mitigating the harm suffered.[171] In the court's opinion, branding the issue as a "private matter" or "family matter" is incompatible with the discharge of the State's positive obligations.[172] Also, such uninformed branding cannot remove the applicant and her mother from danger. The court noted that there was no uniform practice amongst the Contracting States in terms of continuing with proceedings when the complainant in a domestic violence case withdraws the complaint.

Nonetheless, there is an acknowledgement of the duty on the part of the authorities to strike a balance in enforcing the victim's privacy rights.[173] Thus, given the circumstances of the situation, Turkish authorities should have exercised due diligence by pursuing criminal proceedings against the ex-husband as a matter of public interest.[174] More importantly, the court elaborated on the nature of State obligations concerning violence in the family, particularly acknowledging the problems created by the invisibility of the crime and highlighting the seriousness with which States must respond.[175] Furthermore, like the *Lenahan* decision and the *Maria da Penha Maia Fernandes* case, this articulation in *Opuz* contributes to building due diligence content, particularly extending what is the minimum a State is required to do in the context of the private sphere in VAW.[176]

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[166] ECHR Application no. 33401/02, 9 June 2009.
[167] Para. 137, ibid.
[168] Paras. 140-145, ibid.
[169] Ibid.
[170] Ibid.
[171] Para. 136, ibid.
[172] Para. 144, ibid.
[173] Para. 138, ibid.
[174] Para. 145, ibid.
[175] Mandy Burton, 'The Human Rights of Victims of Domestic Violence: Opuz v Turkey' (2010) 22 Child & Fam L. Q. 131.
[176] See Caroline Bettinger-Lopez, 'Introduction: Jessica Lenahan (Gonzales) v. United States of America: Implementation, Litigation, and Mobilization Strategies' (2012) 21(2) Journal of Gender Social Policy and Law 228.

However, due diligence, in the context of VAW, is not a silver bullet. While it has helped to deconstruct the public/private divide, VAW persists.[177] As much as attention has been brought to the public/private divide, more needs to be done for due diligence to be more impactful in addressing VAW in practice. This includes continuous activism, grassroots efforts and advocacy, all of which historically used due diligence to challenge the public/private divide. Advocacy groups could use documents like the United Nations Development Fund for Women (UNIFEM) Ten Point National Accountability Checklist on ending VAW.[178] It was written for policy-makers, parliamentarians and advocates seeking to promote due diligence in the establishment and track State action and policies in response to VAW.[179] A more recent example is the Due Diligence Project's (DDP) Due Diligence Framework.[180] The DDP is a research-based advocacy group that aims to enhance understanding of a State's due diligence obligations to prevent, protect, prosecute, punish and provide redress for VAW. Also, it aims to develop a due diligence framework with a set of guidelines for compliance.[181] Its work could be taken up at the UN Special Rapporteur level, where more attention could be drawn to expanding due diligence to address gaps in accountability.

4. Implications of using Due Diligence as a tool for expanding the scope of obligations

Over the years, due diligence's conceptualisation, functionality, and contemporary relevance have increased in international law. Due diligence provides a way of understanding what State obligations mean in application, for example, when it comes to responding to the problem of violence against women.[182] Sarkin has called due diligence an oversight tool,[183] and Ertürk explained that it is a framework for action in respect of obligations.[184] Mullally has also argued that due diligence can be potentially expanded to the context of asylum adjudications – where its introduction would require much greater scrutiny of States' legislative and policy frameworks on domestic violence asylum claims.[185] The reasonableness of relocation alternatives would also be

[177] See for example, UN Women, 'Facts and figures: Ending violence against women' (*UN Women*, March 2021) <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes> accessed 8 June 2021.
[178] See UN Women, 'Ending Violence against Women and Girls: UNIFEM Strategy and Information Kit' (*UN Women*, 2010) <https://www.unwomen.org/en/digital-library/publications/2010/1/ending-violence-against-women-and-girls-unifem-strategy-and-information-kit> accessed 8 June 2021.
[179] Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40(1) Human Rights Quarterly 17.
[180] Zarizana Abdul Aziz and Janine Moussa, 'Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women' (*Due Diligence Project*, 2016) <http://duediligenceproject.org/resources/> accessed 8 June 2021.
[181] ibid 5.
[182] Rosa M Celorio, 'The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting' (2011) 65 U Miami L. Rev. 854.
[183] Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40(1) Human Rights Quarterly 17.
[184] Ertürk (n 164), 27, 37.
[185] Siobhán Mullally, 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?' (2011) 60(2) International and Comparative Law Quarterly 483.

open to greater questioning to assess whether State obligations are being fulfilled.[186] Also, Davitti argued that due diligence is a tool capable of reconceptualising protection standards in investment discourses where the interests of all actors, especially the most vulnerable, can be better reflected and protected.[187] It would seem that Mullally and Davitti see the re-envisioning potential in due diligence.

Due diligence's contemporary relevance is in its potential to redefine the existing standard of conduct required of States in the fulfilment of their obligations. It is receptive to changes so that new levels of conduct are set or shaped in the light of evolving circumstances. Therefore, due diligence should be seen as a rallying point for the required action that States must carry out.[188] It has the potential to lay out what new conduct the States should be exhibiting, particularly in the face of a change in circumstances. It can also function as a yardstick against which States' efforts towards their obligations may be measured.[189] So, instead of providing answers to questions of breach of obligations, due diligence tends to inquire whether States have taken reasonable and appropriate efforts to avoid or mitigate injury to other States.[190]

However, what happens when acting with due diligence no longer signifies only acting reasonably, but transforms into meeting more stringent and concrete legal standards? Garnering from the above discussions, the crystallisation of due diligence into concrete legal standards is already at play in international law. This is because of the usage of due diligence as a tool by international courts and tribunals (as shown above). For example, regarding obligations to prevent significant transboundary harm, acting with due diligence now legally requires an EIA and the duty to notify and consult the relevant States. Similarly in the context of VAW, the introduction of due diligence through women's advocacy within the echelons of the UN has redefined the standards so that States become attentive to abuses in the private sphere.[191] International courts like the Inter-American Court of Human Rights have contributed to the crystallisation of due diligence into a legal standard in VAW. The consequence is that the international legal order has a more attentive or relevant legal standard within a thematic area. Importantly, the involvement of State parties in international litigation (as shown in the previous sections) before the courts increases the strictness of the applicable standard "into a more demanding system of legal accountability. An example of this is the obligation to undertake environmental impact assessment (EIA) which has now been

[186] Ibid.
[187] Daria Davitti, 'On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence' (2012) 12(3) Human Rights Law Review 443.
[188] Sarkin (n 179), 4.
[189] See Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' in Carin Benninger-Budel (ed.), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff 2008), 47.
[190] International Law Association (ILA) Study Group on Due Diligence in International Law, Second Report, July 2016, 3.
[191] See García-Del Moral and Dersnah (n 122).

considered by the ICJ on several occasions and progressively strengthened".[192] This article sees due diligence as a standard which may form part of secondary rules and it can also form part of primary rules. For example, article 7(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) provides that States "apply due diligence to prevent, investigate and impose penalties for violence against women."[193] Also, as shown above, due diligence can be used to determine whether the State in question is internationally responsible for its omissions concerning a non-state actor's conduct that is contrary to international law.[194]

The transformation of due diligence from what is reasonable to concrete legal standards in the thematic areas discussed above also shows some limitation regarding the concept and cause for pessimism. Due diligence itself alone cannot respond to gaps in the implementation of State obligations unless its contents and what it entails are crystallised or concretised into a legal requirement by international courts and tribunals or treaty provisions – otherwise, it does not then become a hard legal standard.

However, this is not to say that there is no reason to be optimistic about due diligence – given its reliance on courts and tribunals to be crystallised. Indeed, the concept is not static. The contents of due diligence themselves are not fixed, even if they have been crystallised into a hard legal requirement. Also, due diligence is referred to in the Commentaries to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) as a standard of a primary obligation that varies from one context to another for reasons which essentially relate to surrounding circumstances, the object and purpose of the treaty provision or other rule giving rise to the primary obligation.[195] This classification of due diligence is not surprising as international practice and most international legal scholarship acknowledge that due diligence is an element of primary rules and not a general principle of responsibility.[196] However, in the Commentaries to ARSIWA, due diligence is mentioned as a way of measuring the breach of an obligation by States. Due diligence has the capability to form part of primary rules. It can also operate as part of secondary rules.[197]

As such, the flexibility of the concept and the standard of reasonableness it entails can be used as a basis for advocacy – even at a soft law status – regarding what is required of a State concerning its obligations in international law, in the sense that what the relevant State is doing is unreasonable

[192] ILA (n 190).
[193] Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994
[194] See also Richard Mackenzie-Gray Scott, 'Due diligence as a secondary rule of general international law' (2021) 34 Leiden Journal of International Law 359.
[195] Article 2, Commentary.
[196] Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press 2022) 62.
[197] See for example, Scott (n 194).

– even if the current hard legal standard allows it. It can be used by NGOs and civil society organisations as a basis to pressure States and push the boundaries of an extant standard to be more attentive to current circumstances.[198] One method of doing this is that NGOs can submit *amicus curiae* briefs that articulate due diligence and what it entails before international courts, regional human rights courts and, for example, the UN Human Rights Committee. Due diligence can also be used in reports of UN Special Rapporteurs to challenge and point out gaps in current standards.

There is scepticism about using due diligence. One could argue, like Hathaway and Foster, that since due diligence is concerned with State responsibility, it is conceptually unfit or will be at odds with a regime designed to protect individuals from harm.[199] This argument is limited because it conceptualises due diligence only within the paradigm of State responsibility. Indeed, conceptualising due diligence this way is understandable given the concept's origins. However, limited conceptualisation will lead to conclusions only associated with State responsibility. It blinds the potential of due diligence to prescribe standards of conduct to be met by States to fulfil their obligations.

Kamminga argued that since due diligence conduct is one of means and not results, it presents a potentially dangerous weakness.[200] He explained that, as an obligation of conduct, due diligence could be used as a defensive standard – where the State could defend their position that even though the result was not achieved, it still acted with due diligence.[201] He then pointed out that there is a risk due diligence undermines positive obligations existing within treaties.[202]

However, due diligence does not undermine positive obligations. The relationship between due diligence and positive obligations makes due diligence in international law a positive development. The concept seeks to push States to carry out their positive obligations as it is used to describe prudent steps to be taken by States to avoid a range of bad outcomes in the discharge of their positive obligations.[203] Positive obligations require the State to carry out certain acts and the standard of due diligence allows a wide margin of flexibility as to the substance of conduct required to carry out those acts.

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[198] See, for example, Special Rapporteur on Violence against Women, its Causes and Consequences, The Due Diligence Standard as a Tool for the Elimination of Violence against Women, UN Doc. E/CN.4/2006/61 (20 January 2006) (by Yakin Ertürk).
[199] James Hathaway and Michelle Foster, 'Failure of State Protection' in *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 314.
[200] Menno T. Kamminga, 'Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse' (2011) Maastricht Faculty of Law, Working Paper No. 2011/07 1.
[201] Ibid. 5.
[202] Ibid. 6.
[203] McDonald (n 82), 1049.

For example, in environmental law, due diligence indicates conduct or behaviour a State must follow to effectively protect other states from transboundary harm through legislative and administrative action.[204] It is thus demanding in the sense that States go beyond legislation by adopting useful measures to meet their positive obligations in international environmental law.[205] These measures should not be mere formalities preordained to be ineffective.[206] Due diligence does not subtract from positive obligations. Instead, it gives additional value to the interpretation of positive obligations. It is an oversight mechanism that assists in scrutinising the will and processes used in fulfilling positive obligations.[207] It allows deficiencies in State conduct to be detected and corrected.[208] It provides a platform for determining what it means to fulfil an obligation and analysing the duty-bearer's actions or omissions.[209]

Due diligence does not only describe steps to be taken to fulfil a positive obligation; it has the potential to redefine standards of conduct in the face of changing circumstances, albeit reliant on international courts/tribunals to make it a hard legal standard. This potential could be useful in demanding a more significant response from the States as things evolve or new problematic trends come to light. As we saw in *Alabama*, Great Britain wanted a narrow interpretation of due diligence.[210] The tribunal rejected this argument and gave a broader and more demanding standard that must match or be in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.[211] The standard is not static – as the conduct required of the State would correspond with the new circumstances of a fluid situation. For example, as in *Alabama,* the circumstances changed after the ships escaped from British territory. The tribunal noted that the subsequent measures taken to pursue the escaped ships were so inadequate in the situation that they could not lead to any result.[212] The Treaty of Washington (1871), on which the *Alabama* litigation is based, indicated how the States are required to use due diligence at every stage. Firstly, to prevent the fitting and equipping of any vessel intended to carry on war against another State. Secondly, to use like diligence to prevent the departure of any vessel intended for war.[213] So, depending on whether the vessels are in a

[204] See Patricia Birnie et al., *International Law and the Environment* (3rd edn, OUP 2009).
[205] Andrew Byrnes, 'Article 2' in Marsha A. Freeman et al. (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 69.
[206] *Velasquez* (n 117), para. 177.
[207] See for example, *Pulp Mills* (n 64), para. 197.
[208] Sarkin (n 179), 17.
[209] The Special Rapporteur on violence against women, its causes and consequences, 'Summary Paper: The Due Diligence Standard for Violence against Women, available online at <http://www2.ohchr.org/english/issues/women/rapporteur/docs/SummaryPaperDueDiligence.doc > Accessed 14 March 2017.
[210] *Alabama Claims Arbitration* (n 25).
[211] Ibid.
[212] Ibid.
[213] Ibid; See also Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 Int'l & Comp. LQ. 16.

construction stage or finished stage where prevention of departure is then required, or the escape stage, where another specific action is needed, the type of conduct required changes.

Similarly, in international environmental law, we see some of the potential of due diligence to change expectations of required conduct in light of circumstances. In transboundary harm, the required degree of care is also proportional to the degree of hazardousness of the activity involved. The degree of harm itself should be foreseeable, and the State must know or should have known that the activity has the risk of causing significant transboundary harm.[214] Furthermore, depending on the activity, carrying out an EIA before an environmental activity is not mandatory. However, if the activity carries some potential risk of transboundary harm by default, the conduct required will change.[215] The ILC Draft Articles explained that activities involving a risk of causing significant transboundary harm usually have some general identifiable characteristics.[216] So, where the activity bears some of these identifiable potential risks, the standard will then require an EIA from the State and, subsequently, the duty to notify and consult with the State that may be potentially affected will follow.[217] It is entirely plausible that the process is sequential in the sense that notification and consultation come after the outcome of an EIA process.[218] Therefore, depending on the preliminary nature of the environmental activity, the standard of conduct required of the State may include carrying out an EIA and/or notification and consultation. In *Seabed Mining Advisory Opinion,* it was explained that due diligence might change over time as measures considered sufficiently diligent at a specific moment may change in light of new scientific or technological knowledge.[219] For instance, prospecting for minerals is generally less risky than the exploitation of minerals. Thus, the standard of due diligence in prospecting minerals would be less onerous, and in the case of exploitation of minerals, the standard might shift towards requiring more demanding conduct from the relevant State.[220]

Conclusion: Optimism?

Due diligence emerged as an element within State responsibility culminating in its early relevance in harm committed by private persons, particularly in the context of alien protection. The

[214] International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities), 5th May 1999, Pemmaraju Sreenivasa Rao, Special Rapporteur, A/CN.4/501.
[215] See *Pulp Mills* (n 64), *Border Area* (n 77), *ILC Prevention Articles* (n 58).
[216] For these characteristics, see Commentary 9, Article 7.
[217] See (n 194); Kulesza (n 12).
[218] Jutta Brunnée, 'Reflection Procedure and Substance in International Environmental Law Confused at a Higher Level?' < https://esil-sedi.eu/post_name-123/> Accessed 01/10/2020.
[219] *Seabed Mining Advisory Opinion* (n 88), para. 117; See also Commentary to Article 3, *ILC Prevention Articles* (n 58). Similar to *Alabama,* the Commentary said that the standard of due diligence against which the conduct of the State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm. For example, activities which may be considered ultrahazardous require a much higher standard of care and a much higher degree of vigour on the part of the State.
[220] Tim Poisel, 'Deep Seabed Mining: Implications of Seabed Disputes Chamber's Advisory Opinion' (2012) 19 Austl Int'l LJ. 29.

application of due diligence then expanded and developed in other areas like significant transboundary harm in environmental law, the law of the sea and violence against women. In these applications, due diligence reinforces a standard of conduct that States must meet or display in the fulfilment of their positive obligations. Notably, we see in the VAW context that the due diligence standard has been reinterpreted to pierce the private sphere and increase State responses at all levels where VAW could thrive or manifest. It has also been argued that the application of due diligence can be expanded to issues like domestic violence claims in asylum adjudication in order to provide adequate protection standards to, for example, women seeking asylum from a culture of violence in the origin State.

There is a good reason for optimism as due diligence's flexibility provides a tool for advocacy and the possibility of redefining existing standards of conduct when they are no longer attentive to extant problems. The value and, indeed, the continued relevancy of due diligence lies in the potential that it can be extended or stretched to meet new and evolving situations or contexts. It provides a platform to design what is due in State conduct. It can also be used to analyse extant requirements to increase State accountability and redraw required responses in a changing situation. This potential in due diligence can change what is required of States so that such requirements can match changes in circumstances and set new minimum conduct, respectively. Global issues are innately dynamic as new challenges arise, and formerly existing requirements may be insufficient. So, due diligence can present a malleable standard to set new or additional requirements for States in the face of growing challenges. Thus, due diligence adds more to the advocacy arsenal. Notwithstanding the potential that due diligence holds, for due diligence to redefine an existing standard of conduct required to fulfil an obligation, it has to be crystallised by international courts or tribunals. Such reliance means it may take some time for a redefined due diligence standard in soft law and probably at the advocacy level to transform into a concrete legal standard.

In addition, there could be concerns about the consistency of standards where there is a constant evolution of due diligence requirements to meet new circumstances or close gaps through judicial recognition. For example, where due diligence forms part of the provisions of a treaty (as in the Convention of Belém do Pará), it is possible that what due diligence entails in the prevention of violence against women later changes to close new gaps. In this case, the implication is that State parties have signed up to a treaty where the standard of their obligations are not consistent or are now different, probably stricter than what they may have understood it to be at the point of ratification. States might be wary of changing standards and could argue that there is a level of uncertainty about what exercising due diligence constitutes or what is expected of them. There was an indication of this in the *Alabama Claims Arbitration* – where the US and GB gave different interpretations of the definition and requirements of due diligence as provided for in article (vi) of

the Treaty of Washington (1871). So, there is always the possibility that the malleability of due diligence and its evolution through judicial recognition may place uncertain standards on State parties. Consequently, the concept of due diligence occupies the border across optimism, advocacy and possibility of increasing the attentiveness of legal standards to new circumstances and wishful legal thinking for solutions to new problems in international law.