

Due Diligence

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A. Concept

- 1 Due diligence is an obligation of conduct on the part of a subject of law (→ *Subjects of International Law*). Normally, the criterion applied in assessing whether a subject has met that obligation is that of the responsible citizen or responsible government (→ *Governments*). Failure on a subject's part to comply with the standard—often termed negligence—describes the blameworthiness of the subject as one element of ascribing legal responsibility to it.
- 2 Although in → *international law* the concept of due diligence remains a → *general principle of law*, → *State practice* has developed more precise rules and standards as to what due diligence requires of its subjects in certain areas of international relations. Historically, due diligence had its main impact on the → *responsibility of States for private actors*, which pertained to the preventive measures expected of a State in its sphere of exclusive control when international law was breached by private persons, not by the State as a legal entity.
- 3 Normative development in international law since World War II has been extensive and has influenced how due diligence is understood today (→ *History of International Law, since World War II*). Many fields of international law have seen the emergence of primary obligations that require States to exercise due diligence, that is, to endeavour to reach the result set out in the obligation. A breach of these obligations consists not of failing to achieve the desired result but failing to take the necessary, diligent steps towards that end. Due diligence obligations have developed mostly in the field of international environmental protection but they can be found in other branches of international law as well (→ *Environment, International Protection*; → *Liability for Environmental Damage*). A good example of the trend in → *customary international law* is what is known as the no harm principle/rule, which broadens States' due diligence obligations even towards the environment of the global commons. Customary law has also given rise to procedural obligations that operationalize due diligence in the context of transboundary physical harm.

B. Codification

1. Early Efforts

- 4 Due diligence played a significant role in the first phase of the efforts to codify rules of → *State responsibility*, a period that lasted until 1963. Most crucial here was the work done between the world wars by non-governmental expert bodies and the League of Nations' Committee of Experts for the Progressive Codification of International Law (→ *History of International Law, World War I to World War II*), which prepared the topic for the 1930 Hague Conference for the Codification of International Law ('Hague Codification Conference'). These efforts focused on the areas of international law where relevant State practice existed, in particular State responsibility for the damage caused to → *aliens* by private persons in peacetime and during domestic disturbances. Even though the Hague Codification Conference failed to finalize the codification process, a State could be held responsible if it was manifestly negligent, ie failed to exercise due diligence in trying to prevent, redress or punish the damage to the alien. This approach was applied in the United Nations → *International Law Commission (ILC)* until 1963, but no progress was made with respect to codification (→ *Codification and Progressive Development of International Law*).

2. Project on State Responsibility

5 With the appointment of a new special rapporteur, Roberto Ago, to deal with the issue in 1963, the project of Responsibility of States for International Wrongful Acts ('State Responsibility Project') changed direction significantly: it undertook to define general secondary rules that specified the consequences of breaching a primary rule of international law, ie a rule that prescribed a standard of conduct. This change in focus had a significant impact on the way in which the subjective element of State responsibility was dealt with in that project. As there was controversy over whether international law contained an additional requirement of fault for a State to be deemed to have committed a wrongful act, it was only understandable that the State Responsibility Project, in time, shifted due diligence considerations to the level of primary rules and thus away from the original remit of the project. In order to find common ground for codification in as important an area as State responsibility, it became essential for the State Responsibility Project to restrict its focus to fairly uncontroversial issues. This new orientation took hold only gradually, however, and due diligence came up on several occasions when the State Responsibility Project tried to assign primary norms to various categories. Even in 1999, two years before the UN ILC Draft Articles on Responsibility of States for International Wrongful Acts ('Articles on State Responsibility') were adopted, due diligence was discussed by the ILC under the heading 'Obligations of Conduct and Obligations of Result' (UN ILC, 'State Responsibility' [1999] 59).

6 Yet, by the time the ILC adopted the Articles on State Responsibility, in 2001, all primary norm classifications had been eliminated. The Commentary to Art. 2 Articles on State Responsibility described the situation in rather strong terms:

Whether responsibility is 'objective' or 'subjective' in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. (at 70)

7 The State Responsibility Project took a clear stance on what constitutes an internationally wrongful act: an act or omission that is attributable to the State and constitutes a breach of the international obligations of that State. On the one hand, the Articles on State Responsibility do not prejudice the question whether an additional element of fault or lack of diligence is required before the primary norm in question can be considered breached; on the other hand, they fail to cover explicitly situations to which due diligence traditionally applied, ie violation of international law by private persons. While Chapter II of the Articles on State Responsibility, 'Attribution of Conduct to a State', makes it clear that private conduct cannot be attributed to a State, the Commentary to Chapter II of the Articles on State Responsibility clarifies that in some cases this is nevertheless possible

But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. (at 81)

8 In its final stages, the State Responsibility Project no longer maintained the distinction between obligations of conduct and obligations of result, but this choice was motivated by the exigencies of codification, not any flaw in the classification as such (UN ILC, 'State Responsibility' [1999] 62–63). Due diligence obligations can well be categorized as obligations of conduct, ie those primary obligations that require States to endeavour to reach the result set out in the obligation.

3. Other Codification Efforts by the International Law Commission

9 Even though due diligence was excluded from the codification efforts of the State Responsibility Project, it served as an important concept in the work of the ILC in two projects that started at the end of the 1970s: International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law ('Liability Project'; → *Liability for Lawful Acts*) and the Law of the Non-Navigational Uses of International Watercourses ('Non-Navigational Uses Project'; → *International Watercourses, Environmental Protection*). Both projects dealt with situations of transboundary physical harm, and showed where due diligence would have its main influence in the coming years—international environmental protection. As this body of law must reconcile the interests of economic development and environmental protection, its substantive norms are many times expressed as due diligence obligations. Most of the material treaty and customary law norms of international environmental law are due diligence obligations.

10 The Liability Project was instrumental in fleshing out the contemporary meaning of due diligence, as it codified and in some parts progressively developed due diligence as it applies in situations of risk of transboundary harm from

hazardous activities. From its very inception, however, the Liability Project set off in different directions, whereupon the ILC decided at length, in 1997, to divide it into two parts, one dealing with preventive rules, the other with liability rules.

- 11 The original focus of the Liability Project—direct State liability for lawful activities—posed fundamental problems from the outset and the Liability Project eventually found itself in a paradoxical situation: while its focus was liability, its first outcome was the UN ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities ('Preventive Draft Articles'; → *Hazardous Substances, Transboundary Impacts*; → *Hazardous Waste, Transboundary Impacts*); these were adopted by the ILC in 2001 with a recommendation that the UN General Assembly consider them as a basis for a treaty. One salient factor here was the growing scholarly consensus that responsibility in the context of transboundary harm is well handled by the customary rules of State responsibility and that therefore no special general rules of State liability exist: for instance, the customary law principle of no harm was breached when both significant damage occurred and due diligence was breached, with the consequences then determined by State responsibility rules. As the liability rules working group of the Liability Project noted: 'It was understood that failure to perform duties of prevention addressed to the State in terms of the earlier draft articles on prevention entails State responsibility' (UN ILC, 'International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law' [2002] para. 443).
- 12 The Commentary to the Preamble of the Preventive Draft Articles notes from the outset that the instrument has a firm legal basis, ie Principle 2 Rio Declaration on Environment and Development (→ *Stockholm Declaration [1972]* and *Rio Declaration [1992]*), which the → *International Court of Justice (ICJ)* considered to have entered the body of international law in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ('Nuclear Weapons Advisory Opinion'). Principle 2 Rio Declaration—also Principle 21 Stockholm Declaration—reads:

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 national jurisdiction.

- 13 This no harm principle has been included in an extensive number of multilateral → *treaties* and → *declaration[s]*. There has been a long debate on whether the principle has entered the body of international law and whether it is based on the causing of damage alone or requires additional proof of lack of diligence, but a consensus has taken shape on these issues.
- 14 First, as noted by the Commentary to the Preventive Draft Articles (at 378), the ICJ has confirmed the no harm principle as *lex lata* in two recent cases:

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. (*Nuclear Weapons Advisory Opinion* para. 29).

- 15 Even though the wording used by the ICJ to express the principle—replacing the term 'damage' with 'respect'—differs from that ordinarily found, there is an emerging consensus that the ICJ has confirmed that the principle is now part of the corpus of general international law. In addition, there is a clear consensus that although the no harm principle does not state so explicitly, a State can only breach the principle if it fails to act with due diligence. This is the reason why some scholars refer to this principle as the principle of due diligence. Hence, a consensus is building that breach by a State of its due diligence obligations, and the consequent significant damage caused to the environment of other States or of areas beyond national jurisdiction, engages the origin State's legal responsibility.
- 16 Second, even though the no harm principle is a general one, there is a growing consensus on its basic elements in the field of transboundary physical harm. The majority opinion seems to be that the principle is an international minimum standard providing a test whereby a State's conduct is compared to what a 'reasonable' or 'good' government would do in a specific situation of transboundary harm. Since the principle is an international minimum standard, the requirements that it sets out are context specific, requiring different measures in different circumstances. Notwithstanding, some basic criteria have emerged that make it possible to determine whether a State has acted diligently or not. These are now well codified in the Preventive Draft Articles, although in some aspects the articles seem to go beyond *lex lata*.
- 17 According to the Commentary to the Preventive Draft Articles, the standard of due diligence against which the origin State's conduct should be judged is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. The Commentary to the Preventive Draft Articles cites activities that may be considered ultra-hazardous: in such cases the State of origin is required to exercise 'a much higher standard

of care in designing policies and a much higher degree of vigour ... to enforce them' (at 394). In other words, extra precautions need to be taken with respect to ultra-hazardous activities, but if a State implements such precautions, it has discharged its due diligence obligation. In this respect, due diligence has always been problematic: in the absence of a liability regime governing ultra-hazardous activities, damage caused by such activities is mostly not covered by due diligence. The recently adopted UN ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities ('Loss Allocation Draft Principles') attempt to remedy this shortcoming by guaranteeing to victims of physical damage some form of → *compensation* in cases where due diligence has been observed (at 120).

- 18 The Commentary to the Preventive Draft Articles states that where the risk is serious or irreversible, due diligence could involve, *inter alia*, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage. This is well articulated in principle 15 of the Rio Declaration. (at 394–95)

It can be seen from the language used in the Commentary to the Preventive Draft Articles that the role played by the → *precautionary approach/principle* in assessing due diligence obligations is still evolving. Some scholars maintain that in the field of climate policy, for example, due diligence would require far-reaching measures from States because of the precautionary principle, but as yet these views are more *de lege ferenda* (→ *Climate, International Protection*).

- 19 Due diligence does not require similar measures from all States, as lack of economic and technological capacity may mitigate the attendant obligations for → *developing countries* (see also → *Common but Differentiated Responsibilities*). However, as the Commentary to the Preventive Draft Articles is quick to point out, there are limits to this, especially if there are international agreements in force for the developing States. Another crucial issue is the criterion of degree of control, which is not fully elaborated in the Preventive Draft Articles. It seems established that due diligence obligations are at their strictest when an activity is within a State's area of territorial → *sovereignty* or sovereign rights, and particularly when it is within a State's actual physical control. The ICJ stated already in 1949 in the → *Corfu Channel Case*, that all States are obligated 'not to allow knowingly [their] territory to be used for acts contrary to the rights of other States' ([1949] ICJ Rep 4 at 22). Only in exceptional cases, for example, would a developed State which is domicile to a company operating in a developing country be held responsible for failing to exercise due diligence, for the State of origin is clearly in a better position to control the activity. The same applies to mitigation of a State's due diligence obligations with regard to vessels flying its flag: a State cannot fully exercise due diligence in supervising such vessels when they are sailing outside its territorial waters (→ *Flag of Ships*; → *Territorial Sea*). A State bears a heightened diligence obligation for its own transboundary polluting activities as opposed to the polluting activities of private companies in its territory; naturally it has a due diligence obligation to control and regulate all private activities in its territory (→ *Air Pollution, Transboundary Aspects*).
- 20 The Commentary to the Preventive Draft Articles also rightly points out the dynamic character of due diligence:
- What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments. (at 394)

While this is not an explicit reference to the → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)*, there seems to be a link to that judgment, for in it the ICJ emphasized the dynamic nature of all international environmental law. The development of international environmental law—hard as well as soft—needs to be taken into account in evaluating the level of due diligence required.

- 21 Importantly, developments in customary law have made it possible for the Preventive Draft Articles to specify the procedural obligations of due diligence. Two sets of norms can be distinguished: first, those that require States to establish specific institutional capacity to be able to fulfil the requirements of due diligence and, second, obligations to co-operate in cases of specific transboundary harm situations, failure to comply with which may result in that State being deemed not to have acted diligently (→ *Transboundary Co-operation between Local or Regional Authorities*; see also → *Co-operation, International Law of*; → *Regional Co-operation*). Drawing on these developments in customary law, the Preventive Draft Articles conclude, first of all, that States 'concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles'. According to the Commentary, Art. 5 Preventive Draft Articles has been included to emphasize the continuing character of the obligations. States are obligated to establish prior authorization procedures domestically for proposed

hazardous activities and any major changes to them; they are also obligated to base the authorization decision on an → *environmental impact assessment*, which includes an assessment of transboundary harm.

22 Depending on the outcome of the risk assessment, the origin State is obligated to notify the potentially affected State and provide it with all the necessary information; if it fails to do so, there are procedures to be followed in case of disagreement between the concerned States. Consultations on preventive measures are to be conducted with the aim of an equitable balancing of interests, the various criteria for which are enumerated in Art. 12 Preventive Draft Articles. The concerned States are also obligated to exchange information on preventive duties where already operative activities are concerned. Here the Commentary to the Preventive Draft Articles emphasizes the continuing nature of due diligence obligations: 'The duty of prevention based on the concept of due diligence is not a one-time effort but requires continuous effort' (at 420).

23 The no harm principle applies to all significant transboundary harm and thus, in principle, to transboundary watercourses (→ *International Watercourses*). Hence, in the UN ILC Draft Articles on the Law of the Non-Navigational Uses of International Watercourses ('Watercourse Draft Articles')—later developed into the Convention on the Law of the Non-Navigational Uses of International Watercourses ('Watercourses Convention')—Art. 7 mentions due diligence as one of the main guiding principles:

1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.
2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:
 - a) The extent to which such use is equitable and reasonable taking into account the factors listed in article 6;
 - b) The question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

24 The Commentary to Art. 7 Watercourse Draft Articles in fact outlines the general contours of due diligence:

The obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilising an international watercourse significant harm would not occur. It is an obligation of conduct, not an obligation of result. What the obligation entails is that a watercourse State whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it. Therefore, '[t]he State may be responsible ... for not enacting necessary legislation, for not enforcing its laws ..., or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it'. (at 103)

25 Yet, as negotiations began and continued on the basis of the Watercourse Draft Articles in the UN's Sixth Committee (→ *United Nations, Sixth Committee*), it became apparent that references to the concept of due diligence would have to be removed in order for the Watercourses Convention to be concluded. The final text of the Watercourses Convention no longer contains the term 'due diligence' in its Art. 7 (1). It now reads: 'Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States'. Even though due diligence was removed from Art. 7 (1) Watercourses Convention, the wording used in this paragraph suggests that the obligation itself is still a due diligence obligation. The changes to Art. 7 (2) Watercourses Convention were more substantial, however,

Where significant harm nevertheless is caused to another watercourse State, the State whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

26 The Watercourse Draft Articles provide that the principle of due diligence overrides equitable balancing of interests if there is a threat that significant transboundary harm will occur (see also → *Equity in International Law*). As noted by many scholars, it has no longer been clear since the conclusion of the Watercourses Convention whether the due diligence principle enjoys any priority when a significant transboundary harm takes place or is merely one of the considerations that go into equitable and reasonable balancing. The same wordings are now being used by the ILC's Shared Natural Resources Project, which deals with the confined transboundary ground-waters that were excluded from the Non-Navigational Uses Project (UN ILC, 'Shared Natural Resources' [2006] 183–87; see also → *Groundwater Protection*).

4. Conclusions on Codification

27 All in all, it is worthy of note that due diligence was initially one of the central concerns in the attempts to codify the rules of State responsibility. When the ILC undertook to codify general rules of State responsibility, due diligence considerations gradually disappeared altogether from the State Responsibility Project but played an important role in the specialized ILC projects dealing with transboundary physical harm. The reason for this change was clear: the ILC needed to find those aspects of State responsibility on which broad agreement existed, and concepts of due diligence or fault were not among these. In other words, this change was caused by the exigencies of codification, and the State Responsibility Project did not challenge the impact of due diligence as part of the content of various primary rules.

28 Although it eventually endorsed due diligence as one of its central principles, the Non-Navigational Uses Project faced opposition from many upstream States, and the ultimate Watercourses Convention no longer referred to due diligence. This is perhaps more in line with the present state of the law relating to transboundary watercourses as *lex specialis*, which relies more on equitable principles than due diligence. It has been submitted by the ILC that the Preventive Draft Articles should be developed into a Convention, which might result in some changes to the Preventive Draft Articles themselves. Even with their present standing, the Preventive Draft Articles have been useful in trying to pin down the modern scope and specific requirements of due diligence in cases of risk of significant transboundary physical harm.

C. Due Diligence in Practice: Examples

1. Primary Norms

29 In addition to the no harm principle discussed above, international environmental law contains many primary treaty norms that do not expect achievement of a certain result but only require of States their best efforts to conserve the environment. A good example of such a norm is Art. 194 (2) United Nations Convention on the Law of the Sea of 1982 (1833 UNTS 397):

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment (see also → *Law of the Sea*).

30 This article requires States to act with due diligence when permitting and monitoring activities under their jurisdiction or control in order to prevent or minimize damage by pollution to the marine environment of other States (→ *Marine Environment, International Protection*). A State does not breach the article merely by causing damage; a potentially affected State has to show a lack of diligent efforts on the part of the origin State.

31 As is evident from the material rules related to international environmental law, due diligence does not apply solely to private activities, for a State's own transboundary polluting activities are subject to the due diligence rule. Nevertheless, due diligence clearly figures prominently where illegal conduct by non-State entities is concerned, that is, acts that cannot be attributed to a State. This is well exemplified by the cases taken up below (see paras 34–41), which show the relevance of due diligence especially in diplomatic law and the laws of war in examining what a State's legal responsibility for illegal private conduct is (see also → *Diplomacy*; → *Humanitarian Law, International*). In most of these instances, it is not the State that has breached the international law norm in question but a private entity or individual, whose act cannot be attributed to the State. Yet, the State has breached its own due diligence obligations of prevention and punishment with regard to the private activity. A similar logic applies in the interpretation of international → *human rights* and humanitarian law treaties (→ *Interpretation in International Law*).

32 Common Art. 1 → *Geneva Conventions I–IV (1949)*—and the almost identical provision in Art. 1 → *Geneva Conventions Additional Protocol I (1977)*—reads: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. With the commitment to 'ensure respect', the parties may in some cases be responsible for the actions of private parties, whose actions cannot be attributed to the State. More specifically, a

State's failure to take diligent efforts to prevent and punish private entities or individuals for breaches of humanitarian law treaties triggers a legal responsibility on its part for those breaches.

- 33 A similar trend is discernible in human rights law, as most of the human rights treaties contain provisions setting out the States Parties' general obligations in guaranteeing human rights to all individuals under their jurisdiction. For instance, according to Art. 2 (1) → *International Covenant on Civil and Political Rights (1966)* ('ICCPR'):

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Even though the obligation is primarily targeted at State machinery, it requires a State to ensure that all individuals within its jurisdiction can enjoy the ICCPR's rights, which indicates—in light of the doctrine of due diligence—that States are also obliged to protect individual human rights from interference by → *non-State actors*. Hence, a violation of a human right by a non-State entity may also trigger a State's legal responsibility where it has failed to act with due diligence in preventing and punishing the non-State actor.

2. Special Cases

- 34 The first clear application of a principle of due diligence was the → *Alabama Arbitration* of 1872 between the United States and the United Kingdom over the alleged failure of the UK to fulfil its duty of neutrality during the → *American Civil War (1861–65)* (→ *Neutrality, Concept and General Rules*). The Confederate States of America had commissioned a number of → *warships*, including the *Alabama*, from private companies operating in the UK, a neutral State; the warships eventually caused damage to US shipping. Essentially, the question was whether the UK had acted with due diligence when it was possible for a private company to construct the *Alabama* and arm it partly within the territorial waters of the UK. The standard was defined in Art. 6 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] [1870–71] 61 BSP 40) by which the US claims were submitted to → *arbitration*. The parties interpreted the requirements of due diligence in contrasting ways. The UK adopted a restrictive interpretation of the principle whereby a lack of due diligence meant,

a failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation. (*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 I, 412)

In essence, hence, due diligence was defined from the domestic perspective: if a country's system worked as defined in its legislation, then due diligence was not breached.

- 35 The US put forward the position that it was not a question of how the domestic system works in ordinary circumstances; rather, the neutral State had to exercise active diligence, that is, diligence commensurate with the emergency or with the magnitude of the failure of due diligence. In its 1872 award, the arbitral tribunal accepted the view of the US, stating that diligence has to be exercised in exact proportion to the risks and that a government could not justify its failure to exercise due diligence by pleading insufficiency of the legal means of action which it possessed.
- 36 The concepts of due diligence and negligence have figured in many ICJ cases, mainly in judges' dissenting or separate opinions. The two main ICJ judgments where due diligence or negligence has played a clear role in deciding the case are the → *United States Diplomatic and Consular Staff in Tehran Case (United States of America v Iran)* and the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* ('*Nicaragua Case*').
- 37 In the first phase of the attack on the US embassy by Iranian revolutionary militants in November 1979, the ICJ had to assess what the obligations of the Iranian government were, as these private acts could not be attributed to the government. This contrasted with the second phase, when the Iranian authorities approved the acts by private individuals and the acts could thus be attributed to the government—as is now codified in Art. 11 Articles on State Responsibility. The ICJ held that

The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to

prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means. (*US Diplomatic and Consular Staff in Tehran Case* para. 63)

38 The ICJ thus determined that due to their negligence—or lack of diligence—the Iranian authorities had failed to protect the US embassy from an attack by private persons, and this manifest negligence triggered responsibility on the part of the Iranian government. However, in *Gould Marketing Inc v Ministry of National Defense of Iran*, the Chamber of the → *Iran-United States Claims Tribunal* determined that by December 1978 ‘classic *force majeure* conditions’ existed in Iran’s major cities (at 153). These conditions were defined by the Chamber as ‘social and economic forces beyond the power of the state to control through the exercise of due diligence’.

39 One of the questions before the ICJ in the *Nicaragua Case* was whether the Nicaraguan authorities were assisting the armed opposition in El Salvador. The ICJ held that this had not been proven, but had to consider whether Nicaragua had breached its due diligence obligations, as it had not been able to prevent the arms traffic taking place through its territory to El Salvador (→ *Arms, Traffic in*). The ICJ stated:

[I]t would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic: its determination to put a stop to it would be likely to fail.... Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it. (*Nicaragua Case* para 157)

40 The ICJ thus contextualized the assessment of the level of diligence required of a territorial sovereign with regard to private illegal activities taking place in its territory. As the US, with its vast resources, had all the motivation to put a stop to armed opposition activities in El Salvador—and thus also to stop arms trafficking to El Salvador via Nicaragua—yet failed in these efforts, it seemed indeed unreasonable to expect more from the territorial sovereign. Also figuring prominently in the ICJ’s assessment that Nicaragua had not failed to act diligently was the traditional criterion of due diligence whereby developing States with their less developed economy and human and material resources cannot be expected to uphold the same degree of diligence as their developed counterparts.

41 In → *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (*‘Pulp Mills Case’*), a dispute between Uruguay and Argentina over the potential and actual environmental harm caused by the construction and operation of pulp mills located close to their mutual border river, the ICJ in 2010 made some interesting statements over the requirements of due diligence in general international law, even if it resolved the dispute mainly by applying the 1975 Statute of the River Uruguay (Argentina–Uruguay) (1295 UNTS 331). The Court, first of all, made it clear that the principle of prevention is a customary rule, and as such has its origins in the due diligence that is required of a State in its territory. For this reason, the ICJ argued, a State is obligated to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.

42 The ICJ, importantly, elaborated on the procedural requirements under general international law in cases of breach of the no harm principle. It stated that due diligence cannot be considered to have been exercised, if the party planning the works liable to affect the quality of the border river did not undertake an environmental impact assessment (‘EIA’) on the potential effects of such undertakings and did confirm that general international law requires the origin State to undertake an EIA in cases where there is a risk of the proposed industrial activity having a significant adverse transboundary impact. Yet, the ICJ was careful in navigating between views that argue on the one hand that there already exists a fairly specific scope and content for transboundary EIAs based, eg on the 1991 Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context), and on the other that it is enough that some sort of transboundary EIA is done. According to the ICJ, the starting-point is that general international law does not specify any clear scope and content for an EIA. Yet, it did also state:

[I]t 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. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken. (*Pulp Mills Case* para. 205)

After a careful examination, the ICJ came to the conclusion that Uruguay had acted with the requisite degree of due diligence in conducting its transboundary EIA over the harmful effects of permitting the construction of the Botnia pulp mill, even if it also found Uruguay to have violated procedural obligations of the 1975 Statute of the River Uruguay.

- 43 In the cases reviewed above, the main issue was the responsibility of a government for private actors violating international law in its area of exclusive control when the private acts cannot be directly attributed to the State. As noted above, the early efforts to codify State responsibility—before the 1963 turn-around by the ILC—focused exactly on such situations. The cases show the continued relevance of due diligence—or negligence—in evaluating a State's performance in cases where international law is breached by private persons or third parties in its area of physical control.

D. Evaluation

- 44 The development of general juridical concepts such as due diligence is a slow process. The *Alabama Arbitration Award* of 1872 is still quoted as a relevant precedent in the two most recent ILC codification efforts, where the due diligence standard or concept has been given additional content. Since general juridical notions potentially apply to a wide variety of human activities, their scope and content has to remain fairly abstract and context-dependent. Due diligence, together with other general juridical notions, performs an important task in the international legal system in that it is applicable to new situations, where no specific regulation exists. Its basic content will in all likelihood remain much the same as long as the principle of territorial sovereignty remains one of the corner stones of the international community.
- 45 The Preventive Draft Articles have been significant in codifying and progressively developing due diligence in the field of transboundary pollution. As shown by the two ILC projects, due diligence has developed mostly in the field of transboundary physical harm, but there are also other branches of international law, eg diplomatic law, protection of → *aliens*, and human rights, that contain similar primary norms, norms requiring States to take diligent steps to achieve a certain result.
- 46 Due diligence obligations play an important role in the field that was excluded from the State Responsibility Project for codification reasons, and that formed the classical focus of due diligence: responsibility of a State for violations of international law by private persons under its exclusive jurisdiction and control. The cases reviewed above show the continued importance of due diligence in determining legal responsibility in these situations, which are of increasing importance given that the globalizing world is shifting societal power to non-State actors. However, States, too, are increasingly obligated through a variety of international instruments to take diligent action in many ways, for example, to suppress → *terrorism* in their territories.

Select Bibliography

JB Moore *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (US Government Printing Office Washington 1898) vol 1 495–682.

JB Moore *A Digest of International Law* (US Government Printing Office Washington 1906) vol 7 1059–67.

P-M Dupuy *La responsabilité internationale des états pour les dommages d'origine technologique et industrielle* (Pedone Paris 1976).

P-M Dupuy 'Due Diligence in the International Law of Liability', in OECD (ed), *Legal Aspects of Transfrontier Pollution* (OECD Paris 1977) 369–79.

G Handl 'State Liability for Accidental Transnational Environmental Damage by Private Persons' (1980) 74 AJIL 525–65.

R Pisillo Mazzeschi *Due Diligence e responsabilità internazionale degli Stati* (Giuffrè editore Milano 1989).

R Pisillo Mazzeschi 'Forms of International Responsibility for Environmental Harm', in F Francioni and T Scovazzi (eds) *International Responsibility for Environmental Harm* (Graham & Trotman London 1991).

R Pisillo Mazzeschi 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 GYIL 9–51.

R Lefeber *Transboundary Environmental Interference and the Origin of State Liability* (Kluwer The Hague 1996).

P-M Dupuy 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 EJIL 371–85.

R Wolfrum and C Langenfeld *Environmental Protection by Means of International Liability Law* (Erich Schmidt Berlin 1999).

A Tanzi and M Arcari *The United Nations Convention on the Law of International Watercourses* (Kluwer London 2001).

JH Knox 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96 AJIL 291–319.

T Koivurova 'What is the Principle of Due Diligence', in J Petman and M Koskenniemi (eds) *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Nijhoff Leiden 2003) 341–49.

AR Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Oxford 2004).

RP Barnidge 'States' Due Diligence Obligations with regard to International Non-State Terrorist Organisations Post-11 September 2001: The Heavy Burden that States Must Bear' (2005) 16 ISIA 103–25.

R Verheyen *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Nijhoff Leiden 2005).

RP Barnidge 'The Due Diligence Principle under International Law' (2006) 8 ICLR 81–121.

RM Bratspies and RA Miller (eds) *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press Cambridge 2006).

JFL Contreras *La noción de debida diligencia en derecho internacional público* (Universidad de Alicante Barcelona 2007).

VP Tzevelekos 'In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses That Are Not Attributable to It?' (2010) 35 BrookJIntlL 155–231.

Select Documents

Alabama Arbitration Case (United States of America v United Kingdom) (14 September 1872) *Papers relating to Foreign Relations of the United States 1872* (United States Government Printing Office Washington 1873) part 2 vol IV.

Convention on Environmental Impact Assessment in a Transboundary Context (done 25 February 1991, entered into force 10 September 1997) (1991) 30 ILM 802 (Espoo Convention).

Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, not yet entered into force) (1997) 36 ILM 700.

Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7.

Gould Marketing Inc v Ministry of National Defense of Iran (1983) 3 Iran-US CTR 147.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.

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

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) (20 April 2010) ICJ Doc 2010 General List No 135.

UN Conference on Environment and Development, 'Rio Declaration on Environment and Development' (14 June 1992) UN Doc A/CONF. 151/26/Rev.1 vol I, 3.

UN Conference on the Human Environment, 'Stockholm Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev.1, 3.

UN ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' (2001) GAOR 56th Session Supp 10, 370.

UN ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) GAOR 56th Session Supp 10, 43.

UN ILC, 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto' (1994) GAOR 49th Session Supp 10, 195.

UN ILC, 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (with Commentaries)' (2006) GAOR 61st Session Supp 10, 106.

UN ILC, 'International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law' (2002) GAOR 57th Session Supp 10, 220.

UN ILC, 'Shared Natural Resources' (2006) GAOR 61st Session Supp 10, 183.

UN ILC, 'State Responsibility' (1999) GAOR 54th Session Supp 10, 48.

United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) [1980] ICJ Rep 3.