The Legal Character of Due Diligence: Standards, Obligations or Both?

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Abstract

The concept of due diligence and its associated legal principles and obligations are of increasing significance in the global arena. Yet its definition, parameters and potential reach are often not clearly identified or understood. Notably, there can be a tendency, including by academics, courts and tribunals, to conflate due diligence standards with corresponding obligations, partly attributable to unclear and fluid definitional contours.

Attaining increased clarity between what is merely influential and what is formally binding is important since different legal consequences can ensue in the event of their breach. Whereas no formal consequences will accompany non-compliance with a non-legally binding standard, the breach of a primary rule or obligation can trigger international responsibility as articulated in the International Law Commission (ILC) Articles on State Responsibility 2001.

Specifically, the article examines whether due diligence constitutes a non-binding interpretative standard for other obligations and/or creates its own binding obligations; the contexts in which standards and obligations tend to exist; and the associated normative parameters of these findings. These issues are examined in legal contexts where due diligence is most developed – diplomatic law, the protection of aliens, international environmental law, law of the sea and international human rights law – although its findings are of wider significance. An overarching aim is to develop a generically applicable framework of global relevance on this important but largely under-researched issue. As such, it is expected to have significant impact potential.

Keywords: due diligence, standard, obligation, diplomatic law, protection of aliens, international environmental law, law of the sea, international human rights law.

1 Introduction

The concept of due diligence, together with the legal principles and obligations associated with it, is of increasing significance in the global arena, with its role in law and policy development expected to increase. This includes the response to

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diverse current and emerging crises and disaster events, ranging from protecting civilian populations against human rights abuses and from terrorist attacks, to protecting the environment, to preventing – or at least mitigating the potential effects of – 'man-made' and 'natural' disasters. Yet the definition, parameters and potential reach of due diligence are often unclear or not well understood. Indeed, there can be political interest in keeping the definitional and substantive contours of due diligence blurred in terms of how it is applied, interpreted and developed.[1] This is illustrated by ongoing controversies regarding the legality and ethics of the continuing supply of armaments by the United States, the United Kingdom and some other countries to Saudi Arabia that are being used to target, inter alia, rebel forces in Yemen, resulting in high civilian casualties and aggravating what has been described as the world's biggest humanitarian catastrophe.[2] Nonetheless, greater clarity is needed, notably in differentiating non-binding standards from binding obligations since different legal consequences ensue, particularly in the event of their breach. Whereas no formal consequences will accompany non-compliance with a non-legally binding standard, the breach of a primary rule or obligation can trigger international responsibility.[3]

Accordingly, the current primary research objective is to better clarify the legal character and parameters of due diligence. Specifically, the article examines: (1) whether due diligence merely constitutes a non-binding standard that informs the interpretation of other binding obligations; and/or (2) whether binding obligations of due diligence exist; (3) in what circumstances due diligence standards and/or legal obligations exist; and (4) what the parameters of those obligations are. Since these increasingly important issues have remained relatively under-researched to date, an overarching aim of this article is to develop a generically applicable analytical framework that may better facilitate the examination of the legal nature and effect of due diligence across legal regimes.

In terms of approach, the analysis here draws mainly from six areas of international law, namely general international law, diplomatic law, the protection of aliens, international environmental law, the law of the sea and international human rights law, where the concept and related principles of due diligence are the most developed. Examination of the selected legal regimes is framed largely around those legal sources that create legal obligations that may be breached: treaties, customary international law and sometimes general principles.[4] In order to gauge the consistency of interpretative approaches, jurisprudence drawn from a broad range of regional and international courts, tribunals and mechanisms is considered.

1 Barnidge 2006, p. 121.
2 Human Rights Watch 2018.
3 See further International Law Commission (ILC) (2001) Responsibility of States for Internationally Wrongful Acts, *ILC Ybk*, vol II (Part Two) (ASR).
4 Statute of the International Court of Justice 1945, UNTC 993 (adopted and entered into force 24 October 1945), Art. 38 (1a-1c).

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With respect to the structure, Section 2 introduces and explains the key concepts of 'standards' and 'obligations', 'substantive' and 'procedural', which form important analytical benchmarks for the ensuing analysis. Section 3 considers the concept of due diligence, outlining some of the challenges associated with identifying its parameters as an evolving concept. The focus of Section 4 turns to discussing the circumstances in which due diligence may take the form of non-binding standards, and with what effect. A similar exercise is then repeated in Section 5 in relation to binding obligations, comparing and contrasting the approaches of diverse legal regimes. The article concludes in Section 6 by drawing together the key findings in order to discern the extent to which courts, tribunals, mechanisms and scholarship are (in)consistent in their understanding of, and definitional approaches to, due diligence standards and obligations and the implications of this.

2 Distinguishing Standards from Obligations

In order to examine the legal nature and associated parameters of due diligence, it is first necessary to define the terms 'standard', 'obligation', 'substantive' and 'procedural', which will be used throughout this article for analytical purposes. Since these terms are not always used consistently in the literature and in case law, the identification of associated binding and non-binding norms, and related consequences of any breach, is more difficult to discern.

2.1 Standards

The term 'standard' is used here to denote a widely accepted benchmark that can be used for interpreting the parameters of binding obligations (including for the purpose of determining whether or not a breach has occurred) but that does not of itself create legal obligations. Instruments articulating standards can take a many different forms such as guidelines, codes of practice, performance standards, global framework agreements between relevant actors and resolutions. They are generally intended to encourage state and non-state actors to abide by substantive legal norms, aimed at improved practice, which are not formally binding on them. In seeking to determine common legal qualities of standards, a number of instruments are considered here, drawn from business and human rights, as well as international investment, contexts where due diligence standards have arisen.

The first notable characteristic is that despite the common inclusion of widely accepted legal principles, normally binding only on states, the inclusion of such principles does not per se make any instrument articulating those standards

binding. For example, the UN Guiding Principles (2011)[5] aim to "enhanc[e] standards and practices" in the context of business and human rights without "creating new international law obligations…".[6] Similarly, the Organisation for Economic Co-operation and Development (OECD) Guidelines (2011)[7] uses the language of "recommendations" and "non-binding principles and standards" to explain their purpose and legal status.[8] The same is true of the Montreux Document (2008),[9] which makes it clear that it is not intended to act as a legally binding instrument.[10] Indeed, in clearly distinguishing between binding obligations on states and non-binding standards on Private Security Companies (PSC), an express primary purpose of the related International Code of Conduct (2010)[11]

> is to set forth a commonly-agreed set of principles for PSCs and to establish a foundation *to translate those principles into related standards* as well as governance and oversight mechanisms.[12]

Another indicator is that legal principles forming the basis of standards tend to be phrased in more general rather than detailed terms. For example, the Guiding Principles on Business and Human Rights specify that "… in situations of armed conflict enterprises should respect the standards of international humanitarian law…",[13] without going into the complexities and significant details of this body

5 United Nations (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04. Geneva, New York, pp. 32-33, para. 30. This standard has been interpreted as meaning "an ongoing management process that *a reasonable and prudent enterprise* needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights". UN Human Rights Office of the High Commissioner (2012) *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. 4. (Emphasis added).

6 Ibid., p. 1.

7 OECD (2011) *Guidelines for Multinational Enterprises* (adopted on 50th Anniversary OECD 25 May 2011), Foreword, p. 3. http://www.oecd.org/daf/inv/mne/48004323.pdf. Accessed 8 March 2018. On due diligence standards, also see the parallel OECD, "*Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*".

8 Ibid., p. 3.

9 Swiss Confederation and International Committee of the Red Cross/Red Crescent (2009) The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations, of Private Military and Security Companies During Armed Conflict. https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf. Accessed 14 March 2018. In relation to the protection of human rights, it specifies that "States are expected to exercise due diligence, that is, to do what can reasonably be expected to prevent or minimize harm", p. 34.

10 Ibid., p. 9, para. 3.

11 International Code of Conduct for Private Security Service Providers' Association (2010) International Code of Conduct for Private Security Service Providers. http://www.icoca.ch/en/the_icoc. Accessed 14 March 2018. The Code expects signatories to it to "exercise due diligence to ensure compliance with the law and with the principles contained in this Code", p. 7, para. 21.

12 Ibid., Preamble, 3, para. 5.

13 *UN Guiding Principles*, above n 5, p. 14; similarly, see p. 19.

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of law.[14] Therefore, as White notes, "in discussing the positive obligations of different states, and later organizations and PMSCs, there is a fair degree of leeway in how due diligence should be implemented".[15]

A closely related key feature is that since standards are voluntary, they are not legally enforceable.[16] That said, there is an expectation that the primary intended target audience for these standards – normally non-state actors not bound by treaty or customary international law obligations – will nevertheless abide by them.[17] Importantly too, standards should not be "… interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law".[18] National and international law/regulations will always prevail over standards in the event of any conflict of norms arising.[19]

The articulation of standards within specific contexts can also be instrumental to the development of associated 'hard' and 'soft' norms and correspondingly influential in terms of informing related practice. The UN Guiding Principles are commonly cited as an authoritative articulation of key standards applicable to non-state actors and, in turn, have acted as a catalyst for the development of other standard setting documents. The OECD Guidelines have been adopted by 42 OECD member states together with other non-OECD states that have chosen to adhere to them. Although technically voluntary in nature, in practice the Guidelines form an important framework in which international cooperation on international investment and trade involving multinational enterprises occurs, not least since they form "the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting".[20] Similarly, the Montreux Document has influenced not only the policies and practices of PSCs[21] but also other significant non-state actors that have signed up to it, including the European Union, Organization for Security and Cooperation in Europe and North Atlantic Treaty Organization.[22] It also formed the basis of attempts to agree a binding treaty instrument, although this is unlikely to be agreed any time soon. Consequently, the Montreux Document and its accompanying Code of Conduct remain the primary, standard setting instruments for PSC regulation globally who, as non-state actors, are informed but not directly bound by Geneva law (i.e. international humanitarian law).

14 Similarly, see *International Code of Conduct*, above n 11, Preamble, 3 para. 3, illustrated by Section F "Specific Principles Regarding the Conduct of Personnel".
15 White 2012, p. 243.
16 E.g., *OECD Guidelines*, above n 7, p. 17, para. 1.
17 E.g., *UN Guiding Principles*, above n 5, p. 13, para. 11; p. 14, para. 12; p. 19, para. 17, which use the term "standard" several times when referring to legal principles it wishes non-state actors not formally bound by them still to adhere to them.
18 *Montreux Document*, above n 9, Preface, p. 9, para. 4.
19 *OECD Guidelines*, above n 7, p. 17, para. 2.
20 *OECD Guidelines*, above n 7, Foreword, p. 3. Regarding the significance of such voluntary standards in practice, see Liberti 2012, p. 36.
21 *Montreux Document*, above n 9, Preface, p. 9, para. 8.
22 *Montreux Document* signatory details, above n 21.

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2.2 Obligations

The next matter to determine is the character of legal obligations, which can be substantive or procedural in nature. As Talmon has observed, in relation to the persisting substantive-procedural, as well as primary-secondary, definitional dichotomy surrounding obligations, making clear distinctions between these terms can be helpful for "better understand[ing] the function and operation of legal rules",[23] which is the approach here. The terms "obligation" and "rule" are used here interchangeably[24] to denote a formally binding, enforceable obligation, reflecting current practices including those by courts and tribunals. Since a principal current objective is to identify the nature of due diligence obligations, the ensuing analysis is conducted through the prism of legal sources.[25]

The position becomes more complex when one tries to distinguish between 'primary' and 'secondary' obligations. A classical distinction is that primary rules arise from substantive law and secondary rules concern procedural law.[26] With respect to the difference between these two types of law and their resultant obligations, it has been suggested that

> a basic distinction exists in international law between substantive principles, standards and rules, on the one hand, and the principles, standards and rules related to remedies, procedures, and enforcement, on the other.[27]

Put differently, substantive law is generally concerned with the first element regarding such issues as the lawfulness of a particular situation or act/omission, whereas procedural law principally governs more functional aspects, notably interpreting (although this can form part of substantive law too), implementing or enforcing substantive law.[28]

Indicators of substantive law include obligations "… *to protect, prevent, preserve, provide, cease, refrain from, ensure, or abstain*…",[29] most of which will be examined in this article. Certainly, this is the sense in which the International Court of Justice (ICJ) appears to have employed the term "substantive" within its jurisprudence.[30] In contrast, the parameters it has attributed to "procedural" have been less clear.[31] This is attributable to the fact that not only do some procedural law obligations possess substantive qualities,[32] but some obligations "… may straddle the divide and, depending on the circumstances, may be seen as either

23 Talmon 2012, pp. 983-984.
24 See, e.g., Art. 2(b), Chapter III, ASR, above n 3, Art. 4(b).
25 Crawford 2002, p. 219.
26 David 2010, p. 28.
27 Cowles 1952, pp. 78-79. See too Cassese 2005, p. 244 on how to distinguish between primary and secondary rules of international law.
28 Talmon 2012, p. 986.
29 Ibid., p. 982. Emphasis added.
30 See, e.g., ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, pp. 140-42, paras. 92-97, which considered obligations of protection to be substantive but rules governing state immunity to be procedural.
31 Ibid., p. 140, para. 93.
32 Talmon 2012, pp. 982-983.

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substantive or procedural in nature…".[33] Such obligations tend to be couched in terms like "… *co-operate, inform, or negotiate*",[34] examples of which are considered in Section 1.5. This situation arose in the *Pulp Mills* case, where the ICJ was of the view that both procedural and substantive obligations arose out of the treaty obligation of cooperation,[35] possessing their own separate existence with accompanying duties of performance as well as potential for breach.[36]

Notable too are the observations of Fitzmaurice, namely that the "right to access to justice" is a pillar of procedural rights,[37] and of Talmon, that procedural rules are interrelated with remedies and reparation.[38] Since access to justice incorporates redress and remedies, which in turn form an integral part of those core principles, giving rise to accompanying due diligence obligations – protection and prevention, as well as obligations of investigation, punishment and ensuring redress (hereafter PPIPR) – this suggests that due diligence obligations may result from both procedural and substantive rights and duties.

Cognizant of the definitional dichotomies just described, what is of primary concern in the subsequent analysis is not so much any formal classification but rather the existence and identification of binding due diligence obligations, whether accompanied by substantive and/or procedural rights and duties. First, however, it is necessary to consider what the concept of due diligence is.

3 The Concept of Due Diligence

The first thing to note is that the concept of 'due diligence' is not new to international law. It was recognized as early as 1872 in the *Alabama Arbitration* case, where the issue of due diligence arose in relation to the US's allegation that the UK did not fulfil its duties of neutrality during the American Civil War (1861-1865).[39] That said,

> [t]he term "due diligence" is more tricky to define, particularly since definitional nuances and associated normative parameters can differ between legal regimes in which the principle of due diligence can be found.[40]

33 Ibid., pp. 984-985. See too on this David 2010, p. 28; Crawford 2002, p. 219.
34 Talmon 2012, p. 982.
35 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 47, para. 77. Detailed discussion of procedural obligations is at paras. 80-122, and of the alleged violation of substantive obligations at paras. 169-266.
36 Ibid., p. 47, paras. 78-79.
37 Fitzmaurice 2014, p. 603.
38 Talmon 2012, pp. 982-983.
39 Koivurova (2012) Due Diligence. Max Planck Encyclopedia of Public International Law. http://www.arcticcentre.org/loader.aspx?id=78182718-d0c9-4833-97b3-b69299e2f127. Accessed 14 March 2018, para. 34.
40 Ibid.

Although no uniform, widely agreed, definition of due diligence exists,[41] key aspects of due diligence are identifiable, such as the indivisible element of "due, or merited, care" that lies at its core.[42]

Another overarching characteristic of due diligence is that it is normally concerned with *means* and not *result*.[43] Simply put, due diligence obligations of *means* "… require or prohibit certain conduct or behaviour by States…",[44] whereas "… obligations of *result* require States to bring about a certain situation or result…".[45] Therefore, "[a] breach of these [due diligence] obligations consists not of failing to achieve the desired *result* but failing to take the necessary, diligent steps [i.e. *means*] towards that end".[46] As Marks and Azizi have observed, in practice the real issue is commonly the failure by (normally) a state to take any action at all to prevent a violation from occurring.[47] This is illustrated by the recent judicial review case before the UK High Court regarding arms export licences to Saudi Arabia of weapons subsequently inflicting significant civilian casualties in Yemen. One of the matters of concern noted in the pre-action protocol letter for judicial review was the "[f]ailure to take precautions to prevent or minimise the loss of civilian life [or] the infliction of harm or unnecessary suffering on civilians".[48]

Nor are the boundaries of what obligations of due diligence entail in terms of 'means' always well defined, often making them context specific.[49] For this reason, courts and tribunals will often take into consideration factors such as whether some heightened risk existed prior to an alleged breach, which raised the bar in terms of what would be considered 'reasonable' means, rather than trying to approach these issues through the prism of a "single legal matrix".[50] As Brownlie observed, "[r]easonableness is a golden thread in determining which measures States should take to act in a duly diligent manner",[51] although it is itself a concept that needs to be determined within particular contexts.

41 E.g., Duffy 2005, p. 305.
42 Barnidge 2006, p. 118 citing Corino 2000, p. 120.
43 Koivurova 2012, above n 41, para. 8.
44 Increasingly, due diligence standards are expected of non-state actors too, as is discussed in Section 1.2.1.
45 Proulx 2012, p. 270.
46 Rodley 2014, p. 183.
47 See, e.g., Marks and Azizi 2010, p. 729, in the context of human rights, but of wider relevance.
48 Day L (2016) Letter Before Action Sent as Threat of Legal Action Over Arms Export Licences to Saudi Arabia Increases. https://www.leighday.co.uk/News/News-2016/January-2016/Letter-before-action-sent-as-threat-of-legal-actio. Accessed 14 March 2018.
49 Rodley 2014, p. 183.
50 Proulx 2012, p. 281.
51 Brownlie 2008, p. 526.

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4 The Legal Nature of Due Diligence: Non-binding Standard

4.1 Due Diligence as a Standard

The issue of due diligence was examined at length within the *Alabama Arbitration* case, particularly in the dissenting judgment of Sir Alexander Cockburn. The concept arose in this case because of the interest of the international community in safeguarding the law of neutrality.[52] As Chadwick explains,

> in step with steady technological progress, neutral states were forced slowly to devote greater efforts to policing their neutrality. Higher levels of neutral state "due diligence" were demanded as the price for remaining uninvolved.[53]

A principal issue in this case was that the Treaty of Washington[54] agreed between the United States and Great Britain, which established the legal basis on which the case before the Tribunal of Arbitration was to be determined, included a reference to due diligence. Although technically an obligation, since its mention was included within the treaty text and resulted in a large payout by the United Kingdom, normatively at the time due diligence represented a voluntary standard. Not only was the concept of due diligence underdeveloped, especially in an international law context (and certainly could not be considered an obligation as defined earlier), but its inclusion as a factor was *ex post facto* the alleged breaches of the law of neutrality. As Chadwick observes,

> Britain agreed to arbitrate on the basis of rules which were not yet accepted as principles of general international law, and which clearly favoured the case of the United States from the outset,[55]

largely for reasons of political and national self-interest.[56]

The task of bringing clarity to the ambiguous and unclear term of 'due diligence' was largely left to the Tribunal,[57] which had only a number of municipal examples regarding contracts and due care to guide them.[58] The definitional legal contours attributed to due diligence were pivotal to determining whether or not Great Britain was liable, as alleged by the United States, for such omissions as not "… prevent[ing] the equipment of vessels of war in her ports…",[59] in breach of the law of neutrality. Although the Tribunal ultimately ruled in favour of the United

52 Chadwick 1999, pp. 787-789.
53 Ibid., p. 803. As Chadwick further observes, "'due diligence' [was] largely a function of neutral state necessity".
54 Treaty of Washington (entered into force 8 May 1871).
55 Chadwick 1999, p. 790.
56 Ibid.
57 The London Gazette (1872) Reasons for Sir Alexander Cockburn for dissenting from the Award of the Tribunal of Arbitration, Protocol No. XXXII, Annex 1 Decision and Award, Annex 2. https://www.thegazette.co.uk/London/issue/23900/page/4115 ("Cockburn's Dissenting Opinion"). Accessed 14 March 2018.
58 Ibid.
59 Ibid.

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States on the basis of the obligation of notification, the detailed examination of the characteristics of due diligence by Cockburn, in his dissenting opinion, are more consistent with current understanding and approaches. Notably, Cockburn referred to due diligence as a 'standard', in the sense described earlier (Section 1.2.1). He considered it to be a benchmark for determining conduct – in that case, regarding the content of obligations under the law of neutrality[60] – including issues of negligence.[61]

Similarly, in his individual opinion in the *Corfu Channel* case,[62] Judge Alvarez examined what he termed "the obligation of vigilance",[63] a term that seemed to be used in the sense of a non-binding standard. The ICJ specified a number of obligations that formed the basis of the claim before it regarding the damage and resultant heavy loss of life when two British warships hit mines in Albanian territorial waters. The primary obligation was to notify shipping, in general, in Albanian territorial waters of the presence of a minefield and, more specifically, the British warships approaching it that were in imminent danger.[64] Although no mention was made expressly or impliedly to due diligence, it is evident that due diligence standards were under consideration. This is indicated by Judge Alvarez' examination of the issue of "vigilance" – an alternative word for due diligence – which informed how Albania's obligations under international law should be interpreted. Similarly, the conclusion that "… nothing was attempted by the Albanian authorities to prevent the disaster…",[65] thereby constituting "grave omissions",[66] is suggestive also of due diligence failings.

That due diligence can take the form of a standard is also supported by scholarship.[67] For instance, Barnidge categorizes due diligence as a (basic) principle of international law,[68] having the character of "… an objective and international standard of behaviour…"[69] that determines the nature of other primary obligations existing under treaties and customary international law.[70] He is influenced by the views of Pisillo-Mazzeschi, who described due diligence as meaning "… a negligence *standard* of responsibility for transboundary environmental harm, a standard that simply requires a state's taking of 'all

60 See, e.g., Chadwick 1999, pp. 792-793.
61 Cockburn's Dissenting Opinion, The London Gazette 1872, above n 59, p. 4142.
62 ICJ, *Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949 *(Corfu Channel case)*, p. 4.
63 Ibid., Individual Opinion by Judge Alvarez, at p. 44. (Judge Alvarez Opinion).
64 *Corfu Channel* case, ICJ Reports 1949, above n 62, p. 22.
65 Ibid., p. 23.
66 Ibid.
67 See Koskenniemi 1989, p. 391, who refers to "the customary standard of due diligence"; the definition of due diligence suggested by the International Law Association Study Group on "Due Diligence in International Law", Second Report (31 August 2016), 2. https://www.ila-hq.org/index.php/study-groups (Due Diligence in International Law (2012-2016) Documents). Accessed 25 March 2018.
68 Barnidge 2006, p. 91.
69 Ibid., p. 82, Pisillo-Mazzeschi 1991, pp. 15-16. See too Barnidge 2006, pp. 90, 91, and 113, where the language of due diligence "standard" is used.
70 See too Barnidge 2006, p. 86.

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necessary measures to prevent transboundary damage'".[71] Similarly, Barnidge looks to Corino, whose premise is that due diligence forms "… a *flexible reasonableness standard adaptable to particular facts and circumstances*…"'.[72]

4.2 Sources of Due Diligence Standards

One of the principal legal sources of due diligence standards is general principles of law,[73] many of which possess customary international law status, which is examined later (Section 5.1). Although divergences of judicial and scholarly opinion exist regarding the exact function, nature and scope of general legal principles,[74] including where the intersection between customary and general principles of international law occurs,[75] there is general consensus that they complement other sources of international law.[76] In the case of due diligence, the concept has evolved through state practice into both "… more precise rules [i.e. obligations] and standards as to what due diligence requires of its subjects in certain areas of international relations".[77]

When due diligence performs the role of a non-binding standard, it can act as a source of guidance or even interpretation for treaties and customary international law,[78] for example, in resolving normative conflicts between legal principles and rules,[79] or in determining the nature of rights and interests existing within primary obligations at issue.[80] Furthermore, as a non-binding legal standard, due diligence may play a pivotal role in the development or even codification of conventional and customary international law norms.[81]

A topical illustration of due diligence standards informing the interpretation of a treaty text, together with extending its normative parameters, is the issue of discriminatory conduct or acts of violence towards women.[82] The UN Committee for the Elimination of Discrimination against Women has interpreted the concept of due diligence creatively to extend the substantive scope of the UN Convention for the Elimination of Discrimination against Women (CEDAW)[83] to include domestic violence, even though this occurs in the private sphere and is not

71 Pisillo-Mazzeschi 1991, p. 30. Emphasis added.
72 Barnidge 2006, p. 120.
73 See, e.g., ibid., p. 92.
74 See, e.g., Bassiouni 1990, p. 816.
75 Ibid., p. 791. This is partly attributable to courts not making this demarcation clear.
76 E.g., ibid., pp. 768-770.
77 Koivurova 2012 above n 39, para. 2.
78 See, e.g., Bassiouni 1990, p. 770; Cheng 1953, p. 132.
79 Boyle and Chinkin 2007, p. 224.
80 Barnidge 2006, p. 87 (Emphasis added).
81 Bassiouni 1990, pp. 775-776.
82 See, e.g., Mullally 2011, pp. 459-484.
83 Adopted 18 December 1979; came into force 3 September 1981.

provided for as such in the treaty text.[84] In doing so, the Committee referred to its own General Recommendation 19 on violence against women,[85] whereby

> [u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights.[86]

As the Special Rapporteur on Violence against Women has argued, there seem to be justifiable reasons for adopting a more expansive rather than restrictive approach to determining the contours of due diligence "… in demanding the full compliance of States with international law…",[87] beyond the context of gender-based violence.

4.3 Parameters of Due Diligence Standards

This section examines what the key parameters of due diligence standards are. Despite the focus being on non-binding standards, the parameters identified here also represent baseline requirements for binding due diligence obligations, which are considered in the next section.

Once again, the *Alabama Arbitration* case offers a helpful starting point for analysis. Significantly, an approach established by the Tribunal, which has been followed subsequently, is that when deciding whether or not minimum acceptable standards of due diligence have been met, including what was 'reasonable' in the circumstances, this is determined by international rather than national law and benchmarks.[88] In its final determination, the Tribunal defined due diligence as "… a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it…", then specified what this meant in relation to neutrality: "… such care as governments ordinarily employ in their domestic concerns…".[89] Cockburn disagreed with most of the Tribunal's findings

84 E.g., UN Committee on the Elimination of Discrimination Against Women (CEDAW) (2010), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28, at para. 19 (hereafter "*CEDAW General Recommendation No. 28*"). Similarly, CEDAW, "*General Recommendation No. 19: Violence against women*", (Eleventh session 1992), at para 9. (Hereafter "*CEDAW General Recommendation No. 19*"). That said, CEDAW is unusual as an international human rights treaty in that it does envisage some degree of regulation of private, non-state actors. See, e.g., Arts 2(e)-(f), and Art. 5.

85 CEDAW General Recommendation No. 19, ibid., para. 9.

86 Ibid. See too CEDAW General Recommendation No. 28, above n 84, para. 13.

87 UN Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk (2006*) Integration of the Human Rights of Women and the Gender Perspective: Violence against Women – The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc E/CN.4/2006/61, para. 102.

88 Case presented on the Part of the Government of Her Britannic Majesty in Papers relating to Foreign Relations of the United States 1872, United States Government Printing Office Washington 1872), part 2 vol. 1, at p. 412, cited by Koivurova 2012, above n 39, para. 34.

89 *The Geneva Arbitration (The "Alabama" case) (United States of America v. Great Britain)*, decision of 14 September 1872 (J B Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. I), at pp. 572-73 and 612 respectively.

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of breaches of due diligence and the resultant liability for Great Britain,[90] believing the standard to be too high and loose, not founded on sound legal principles or analysis by the Tribunal.[91] That is, that the Tribunal had too readily found that breaches of due diligence had occurred on both the facts and the law. He argued that due diligence has two essential elements: it requires a government to take all possible steps to inform itself regarding the possibility of any violation of its obligations; and, where necessary, to "… appl[y] its means and power…" to prevent any such violation from occurring. As long as both elements are met, Cockburn was of the view that no government could be held liable for a breach of its obligations.[92]

Although the due diligence test forming the basis of the Tribunal's findings is normally the one cited, Cockburn's approach is more reflective of the one subsequently adopted in practice. The 'international minimum standard' for due diligence is generally understood to mean "… what a 'reasonable' or 'good' government would do in a specific situation…".[93] This is illustrated by the case of *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* (*AAPL v. Sri Lanka*), where the Tribunal found that due diligence obligations had been breached through 'inaction and omission' since the government had failed to "… undertak[e] all possible measures that could be reasonably expected…" to prevent such occurrences.[94] These measures were regarded as forming an integral part of the "… normal exercise of governmental inherent powers…".[95]

In terms of determining what "all appropriate measures" means, Article 3 of the Articles on Prevention of Transboundary Harm is instructive. It requires that states of origin take "… all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof…". As the accompanying Commentary explains, "[t]he standard of due diligence … is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance".[96] What this means in practice is that a state is required to take all reasonable steps both to inform itself of relevant factual and legal matters relating to any underlying risk associated with planned action and to respond to these in a timely and appropriate manner.[97] If a state falls short of the required standard – for example, if it "knew

90 Cockburn's Dissenting Opinion, The London Gazette 1872, above n 57, p. 4368.

91 E.g., ibid., p. 4223.

92 Ibid., p. 4144, similarly at p. 4142.

93 Koivurova 2012, above n 39, para. 16 (referring to transboundary harm).

94 ICSID, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, 30(3) ILM 577, 616 (1991). ("*AAPL v. Sri Lanka*").

95 Ibid.

96 UN (2001) *Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Yearbook of the International Law Commission*, vol II, Part Two, p. 154, para 11. ("Preventive Draft Articles"). Notably, despite multiple resolutions of the General Assembly since the adoption of the Articles "[i]nvit[ing] Governments to submit further comments on any future action, in particular on the form of the respective articles and principles … including in relation to the elaboration of a convention on the basis of the articles", most recently in General Assembly Resolution 71/143 (2016), no further progress in this regard has been made.

97 Ibid., p. 154, para. 10.

or ought to have known" of the situation and failed to "take appropriate measures" or "to exercise due diligence to prevent" or "to do all that could be reasonably expected of it"[98] – it will be considered to have acted negligently and, therefore, to have breached its due diligence obligations.[99] It is evident, too, that, depending on the circumstances, these reasonable measures may be either one-off or ongoing, as in the *Pulp Mills* case where continuous monitoring of the environmental effects of the operations undertaken was considered necessary for the duration of the project.[100]

A number of more specific characteristics of due diligence are discernible too from the *Alabama Arbitration* case. The first is its variable and contextual nature. As Cockburn observed, citing Mr. Justice Story: "… in different times and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle…".[101] Therefore, in the context of the law on neutrality, diligence due to a belligerent "… ought to be exercised … *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".[102] In the *Corfu Channel* case, Judge Alvarez took a similar approach to Cockburn, being of the view that "… this obligation of vigilance…" can vary owing to a range of factors such as geographical ones.[103] Barnidge further notes that such variation may also be attributable to the purpose and accompanying requirements of primary obligations,[104] with the accompanying standard often being for states to make "proper efforts" to meet these.[105]

Part of the variable character of due diligence is attributable to changing risks, meaning that the measures considered necessary and reasonable to meet relevant due diligence standards are not static. Instead, they may evolve over time, for example owing to scientific or technological advances.[106] Additionally, where the risk of potential damage is higher and/or the potential implications of due diligence standards being breached are particularly serious, the associated standard of due diligence is likely to be much higher than normal reasonableness

98 See, e.g., UN Human Rights Committee (CCPR) (2004) *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13, paras. 6, 8. ("*CCPR General Comment No. 31*").

99 See, e.g., United Nations, *AH Francis (Great Britain) v. United Mexican States*, Decision No 15 (15 February 1930), Report of International Arbitral Awards, vol. 5, at p. 100, para. 5. Similarly, see Judge Alvarez Opinion, ICJ Reports 1949, above n 62, p. 44.

100 *Pulp Mills*, ICJ 2010, above n 35, pp. 83-84, para. 205.

101 Cockburn's Dissenting Opinion, The London Gazette 1872, above n 57, pp. 4141-4142 (Emphasis added).

102 Chadwick 1999, p. 818 (Emphasis added).

103 Judge Alvarez Opinion, ICJ Reports 1949, above n 62, p. 44.

104 Barnidge 2006, p. 90.

105 Ibid., pp. 95-96, referring to the case of *Youmans (US v. Mexico)*, 4 RIAA 110 (1926) at 112.

106 ITLOS (2011) *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion (1 February 2011), ITLOS Reports 2011, at p. 36, para. 117 (hereafter "*Deep Seabed Mining Advisory Opinion*"). This was repeated in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS, at 38, para. 132 (hereafter "*SRFC Advisory Opinion*").

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or due care.[107] Again, the Preventive Draft Articles are illustrative here.[108] The necessary standard of due diligence is that which is "… appropriate and proportional to the degree of risk of transboundary harm in the particular instance".[109] As the accompanying Commentary explains, this means that states must exercise "… a much higher standard of care in designing policies and a much higher degree of vigour … to enforce them…"[110] where particular activities are ultra-hazardous and, therefore, pose the risk of significant transboundary harm.[111] One further observation is that it would seem that due diligence requirements are the strictest for activities that occur within a state's territory over which it has actual physical control.[112]

Another, closely related, factor is that the standard of conduct required is relative to those reasonably available means of a state. As Judge Alvarez commented in the *Corfu Channel* case,[113] "a Power is not obliged to exercise greater vigilance than is consistent with the means at its disposal".[114] The ICJ took a similar approach in the *Nicaragua* case when considering whether or not Nicaragua had breached its due diligence obligations by failing to prevent the trafficking of arms through its territory that were then used by armed opposition in El Salvador. It found that:

> [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 [including the US]…,

referring also to "the much smaller resources at its disposal for subduing this traffic".[115] In contrast, in the *Tehran Hostage* case, the ICJ was of the view that Iran's means were sufficient to meet its international obligations but that these had not been deployed sufficiently.[116] This approach of differentiating between the financial means of states is similarly reflected within other legal regimes, such

107 *Deep Seabed Mining Advisory Opinion*, ibid., p. 43, para. 117.

108 Preventive Draft Articles, above n 96, p. 135. See, e.g., Art. 3 which requires that states of origin take "*all appropriate measures* to prevent significant transboundary harm or at any event to minimize the risk thereof" (Emphasis added).

109 Ibid., p. 154, para. 11. As Barnidge notes, "… an assessment of "risk of causing significant transboundary harm" necessarily must balance probability and magnitude, or risk and harm". Barnidge 2006, p. 118.

110 Ibid.

111 Ibid., p. 155, para. 14.

112 Koivurova 2012, above n 39, para. 19.

113 *Corfu Channel* case, ICJ Reports 1949, above n 62, p. 22.

114 Ibid., Judge Alvarez Opinion, p. 44.

115 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, at p. 85, para. 157. (Hereafter "*Nicaragua* case"). In doing so, the ICJ confirmed a "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", Koivurova 2012, above n 39, para. 40.

116 ICJ, *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p. 33, para. 68 (c). (Hereafter "*Tehran Hostage*" case).

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as in international environmental law. For example, in the *Trail Smelter* case, the court assessed the required standard of due diligence against Canada's (significant) capacity as a state to adopt measures aimed at limiting the possibility of transboundary damage from occurring, including by improving emissions control technologies.[117]

It is, however, equally clear from recent jurisprudence that the capacity of a state, whether, for instance, financial or technological in nature, will not always permit a lower standard of due diligence to be applied. This is illustrated by consistent tribunal jurisprudence on environmental and law of the sea issues. For example, in the *Deep Seabed Mining* Advisory Opinion, the Seabed Dispute Chamber (SDC) examined the issue of whether or not the UN Convention on the Law of the Sea 1982 (UNCLOS) and related instruments permitted a developing state to be afforded more preferential treatment than a comparable developed state.[118] This was in the context of the SDC having just examined how the "… non-binding statement of the precautionary approach in the Rio Declaration should be regarded as a binding obligation when incorporated within the text of binding regulations and treaties".[119] It concluded that the general treaty obligations under UNCLOS it had considered[120] did not permit any distinction to be made between developed and developing nations.[121] Consequently, all states parties shared the same responsibilities and liabilities, which, by implication, included those of due diligence.[122] The underlying rationale for such an approach was

> the need to prevent commercial enterprises based in developed States from setting up companies in developing States … in the hope of being subjected to less burdensome regulations and controls…,

which could have the effect of jeopardizing existing environmental protection arrangements.[123] That said, the Chamber did permit some differentiation to be made between the capabilities of states in meeting their requirement under Principle 15 of the Rio Declaration to adopt the precautionary approach, being of

117 Stephens 2009, p. 158. See further International Law Association Study Group (2016) Due Diligence in International Law, Second Report. https://www.ila-hq.org/index.php/study-groups (Due Diligence in International Law (2012-2016) Documents). (*"ILA Second Report"*). Accessed 23 March 2018.

118 *Deep Seabed Mining Advisory Opinion*, ITLOS 2011, above n 106, p. 46, para. 152.

119 Ibid., p. 40, para. 127, and p. 46, para. 142.

120 See Arts 140, 148, Part XI UNCLOS, concerned with "preserv[ing] and protect[ing] the marine environment".

121 There would need to be express treaty provisions to this effect for such a differentiation to be made. *Deep Seabed Mining Advisory Opinion*, ITLOS Reports 2011, above n 106, p. 48, para. 160; similarly, p. 41, para. 135.

122 *Deep Seabed Mining Advisory Opinion*, ITLOS Reports 2011, above n 106, p. 48, para. 158. A similar approach was taken in the subsequent *SRFC Advisory Opinion*, ITLOS 2015, above n 108, where the Tribunal did not discuss any possibility of differentiated responsibilities between developing and developed states.

123 *Deep Seabed Mining Advisory Opinion*, ibid., p. 48, para. 159.

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the view that a stricter approach for developed states may be justifiable.[124] As Tan commented many years ago, in a premise which appears to remain true: "The contemporary view appears to be a hybrid of the two approaches: diligence is considered in the light of the State's particular capacities – if, however, its conduct falls below an international minimum standard, responsibility will nevertheless lie."[125]

From the above jurisprudence, it is evident that a standard of due diligence has a number of core identifiable and recurring characteristics. It is apparent too, despite their fundamental importance, that a number of closely related concepts, such as "all reasonable means", are often not as sharply defined as the parameters of some legal obligations or even very detailed soft law standards. This is at least in part attributable to the fact that courts and tribunals do not generally engage in the determination of such issues. Indeed, whether or not a particular due diligence standard has been met tends to be decided retrospectively, according to the particular facts and context.[126]

The discussion now turns to examining such content, namely the circumstances in which due diligence may exist as binding substantive and procedural obligations.

5 The Legal Nature of Due Diligence: Binding Obligations

Binding due diligence obligations may be provided for expressly or else implied from a treaty text. Since the latter scenario is more common, this section focuses primarily on how to discern due diligence obligations from implied substantive and procedural treaty provisions. As was described earlier (Section 1.2.2), substantive obligations tend to include such terms as "to protect, prevent, preserve, provide, cease, refrain from, ensure, or abstain"; procedural obligations, while sometimes less clear, tend to be associated with issues of remedies and reparation; and the language of "co-operate, inform, or negotiate"[127] can be substantive and/or procedural depending on the context. PPIPR principles are also interrelated with, and indicative of the existence of, diligence obligations. These obligations are ones of conduct rather than of result.[128]

There appear to be two principal ways in which due diligence obligations may be implied from a treaty text. One of them is that the text uses language normally associated with due diligence obligations, such as the taking of "appropriate and reasonable measures", "due care", or exercising "vigilance". The other avenue is that a PPIPR principle is mentioned. So far as the latter principles are concerned, it would seem that they do not of themselves constitute due diligence obligations; rather they trigger parallel but separate due diligence obligations. Such a

124 Ibid., p. 48, para. 161. See, e.g., further the preventative duties articulated in Art. 194 UNCLOS.
125 Tan 1999, p. 838.
126 See, e.g., *ILA Second Report*, above n 117, p. 7.
127 See further Tan 1999, p. 840.
128 See too Dupuy 1999, p. 379, who discusses obligations of prevention in terms of obligations of conduct.

proposition is supported by a number of commentators, as well as by the case law considered later in this section. For example, Crawford distinguishes between obligations of prevention and parallel obligations of due diligence in the following way:[129]

> Although it has been said that an obligation of prevention "is essentially regarded as a duty of due diligence",[130] when it comes to assessing breach, obligations of prevention may be distinguished from obligations of due diligence in the ordinary sense. A true obligation of prevention is not breached unless the apprehended event occurs,[131] whereas an obligation of due diligence would be breached by a failure to exercise due diligence, even if the apprehended result did not (or not yet) occur.[132]

This explanation points to the existence of two obligations: one is the express treaty obligation to prevent the occurrence of harm, while the other is a resultant, implied, and concurrent due diligence obligation (i.e. to take reasonable and appropriate steps) against which the obligation of prevention is assessed. The second form of due diligence obligation would not exist without the express obligation of prevention. Similarly, obligations of investigation, prosecution and ensuring adequate redress appear to be obligations of conduct from which due diligence obligations arise if, for example, the associated required actions are not carried out effectively.[133]

Nonetheless, it can still be difficult to discern the exact nature and parameters of PPIPR and their related principles. This is illustrated by the principle of prevention, where the exact nature of its associated obligations is often unclear, even within some treaty texts and agreements.[134] This is attributable to diverse factors, ranging from the preference of some governments to allow room for political manoeuvring[135] to the developing nature of international law.[136] Such uncertainties, however, do not impact on the associated due diligence requirements. These will remain ensuring "best efforts" and that "all reasonable or necessary measures" are taken, for example, to prevent a given event from occurring.[137] Where such due diligence obligations arise, whether sourced in substantive or procedural obligations, their breach may

129 Crawford 2002, pp. 227-28. Similarly, see Tan 1999, p. 839 regarding the obligation to prevent transboundary harm.
130 Rao 1999, p. 116.
131 See, e.g., Art. 14(3) ASR, above n 3.
132 See, e.g., McCaffrey 1988, pp. 237-242.
133 See, e.g., *ILA Second Report*, above n 117, pp. 19-20, e.g., that "the investigation be *effective* is a duty of due diligence".
134 Proulx 2012, p. 280 citing as an example Principle 21, UN Conference on the Human Environment, Stockholm Declaration (16 June 1972), UN Doc. A/CONF.48/14.
135 See, e.g., *ILA Second Report*, above n 117, p. 3, describing "[d]ue diligence as an open-ended standard or principle"; similarly, Proulx 2012, p. 269.
136 Proulx 2012, p. 280 illustrated by the precautionary principle and sustainable development.
137 Crawford 2002, p. 140.

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constitute a wrongful act for the purpose of triggering international legal responsibility.

Although, potentially, due diligence obligations may exist in any field of international law, currently they are most developed in the areas of international environmental law, diplomatic law, protection of aliens, law of the sea, and international human rights law, which, accordingly, are the primary focus for the remainder of the current investigation.

5.1. General Principles of Law and Customary International Law

General principles of law and customary international law are examined first since they normally form the basis of treaty texts, including those examples of treaty obligations drawn from different legal regimes considered later, and coexist with them.[138] Both of these sources are considered together since many, if not all, of the general principles relating to due diligence examined here have now acquired customary international law status, thereby making it difficult to differentiate between them. As Bassiouni suggests, general principles are not confined to interpretative functions or as a means for developing treaty and customary international law rules. Rather, they may act as "[a] supplemental source to conventional and customary international law",[139] thereby creating due diligence obligations in their own right as is recognized by Article 38(1)(c) ICJ Statute 1945.[140]

As explained earlier, due diligence obligations can exist and operate in their own right, in parallel with those obligations triggering them. That such a distinction and separate existence is possible should not be surprising since many of these principles (including PPIPR ones) find their origin in general principles creating due diligence obligations. For example, in the *Pulp Mills* case, the ICJ observed that "… the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory".[141] Similarly, the established principle, in both general and customary international law, requiring states to not knowingly allow their territory to be used for acts contrary to the rights of other states, has been instrumental to developing due diligence obligations across different legal regimes and in diverse contexts.[142] This principle has played a key role in the development of due diligence obligations within specific legal regimes also. For example, in international environmental law, the requirement on states to prevent the causing of significant damage to the environment of another state has become an established obligation in its own right and is now widely considered to form part of the corpus of international law

138 See, e.g., *Deep Sea Mining Advisory Opinion*, ITLOS 2011, above n 106, p. 72, para. 242 (B) regarding the obligation to conduct an environmental impact assessment, which is a general obligation under customary law and a direct treaty obligation contained in Art. 206 UNCLOS.

139 Bassiouni 1990, pp. 775-776.

140 See, e.g., Commentary to Art. 12 of ASR, above n 3, para. 3.

141 *Pulp Mills*, ICJ 2010, above n 35, p. 55, para. 101.

142 See, e.g., *Corfu Channel Case*, ICJ Reports 1949, above n 64, p. 22; also, *ILA Second Report*, above n 117, p. 5.

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governing the environment.[143] It is commonly embedded within treaty texts, illustrated by the Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (Watercourses Convention 1997)[144] considered later (Section 5.2.1).

The ability of due diligence principles to create their own binding obligations has been confirmed by courts and tribunals in relation to the different legal sources considered here. A leading example, drawn from diplomatic law, is the *Tehran Hostages* case, in which the ICJ had to assess whether or not the acts of private individuals (Iranian revolutionary militants) attacking the US embassy in Tehran on 4 November 1979 could be attributed to the state. Although the Court held that the armed attack itself was not attributable to the state of Iran, it found that there were a number of acts and omissions in breach of its international obligations for which Iran was internationally responsible.[145] Particularly noteworthy here is that, in addition to finding breaches of Iran's treaty obligations under the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963,[146] the ICJ held that Iran had breached parallel obligations sourced in general international law. These comprised "… fail[ing] 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…"; and "… similarly fail[ing] to take appropriate steps for the *protection* of the United States Consulates at Tabriz and Shiraz on the 5 November 1979".[147] The ICJ would not have found Iran responsible had it been willing and able to take such appropriate steps to prevent the US diplomats from being taken hostage.[148] In this diplomatic context, it would seem that due

143 See, e.g., ICJ (1995) *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, ICJ Reports 1996 (I), p. 242, para. 29.

144 Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (Watercourses Convention 1997), Adopted on 21 May 1997, entered into force 17 August 2014. At the time of writing, there are 36 states parties. See further, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&lang=en. Accessed 20 March 2018.

145 *Tehran Hostage* case, ICJ Reports 1980, above n 116, p. 111, paras. 29-30.

146 Vienna Convention on Diplomatic Relations 1961 (adopted on 18 April 1961, entered into force 24 April 1964). Vienna Convention on Consular Relations 1963 (adopted on 24 April 1963, entered into force 19 March 1967), reflected in Art. 31(3). In the *Tehran Hostages* case, (ibid., p. 3, para. 30), the ICJ described such treaty provisions as representing "the most categorical obligations … to take appropriate steps to ensure the protection of' the US missions and their personnel".

147 *Tehran Hostages* case, ibid., p. 31, para. 63. Similarly, the ICJ has found states to have fallen short of their due diligence obligations in a number of cases, including the *Corfu Channel case*, ICJ Reports 1949, above n 62, p. 23; and ICJ (2005) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, ICJ Rep 2005, p. 231, para. 179.

148 Dupuy 1999, para. 278. Similarly, see Barnidge 2006, p. 112 including his observation that a state is required to make "best effort[s]"; Koivurova 2012, above n 39, paras. 37-38.

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diligence requires "… a special standard of care over and above the normal obligation to show due diligence in protecting aliens within the State".[149]

A different context is the protection by a state of aliens on its territory. The case of *AAPL v. Sri Lanka* is illustrative. During a governmental counterterrorism operation against Tamil Tigers, in what AAPL termed a "… murderous overreaction…", a shrimp farm invested in by AAPL was heavily damaged, with significant resultant loss of civilian life.[150] During the subsequent dispute settlement proceedings, the International Centre for Settlement of Investment Disputes (ICSID) articulated generally applicable principles, including regarding the "… standard of protection required…" for foreign investors within its territory.[151]

In determining the existence of any breach of due diligence obligations, it held that the standard was an objective one:

> which assesses the "required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State".[152]

On the facts, the ICSID found that Sri Lanka's failure to exhaust all peaceful measures with the farm prior to carrying out its raid meant that it had breached its due diligence obligations to take all possible reasonable measures to prevent the perpetration of killings and damage to property from occurring.[153] It regarded the taking of such preventive measures as an inherent element of the exercise of normal government powers.[154] On the facts, the breach of due diligence obligations alone sufficed to trigger Sri Lanka's international responsibility.[155]

More recently, in a law of the sea context, the International Tribunal for the Law of the Sea (ITLOS) held in the Sub-Regional Fisheries Commission (SRFC) Advisory Opinion that, in the absence of guidance on flag state liability from other sources (notably here UNCLOS, which codifies customary international law, and the MCA Convention[156]), general rules of international law could be drawn

149 Crawford 2012, p. 403.

150 *AAPL v. Sri Lanka*, ICSID 1991, above n 94, para. 583.

151 Ibid., paras. 609-610.

152 Ibid., para. 612.

153 Ibid., para. 616. Similarly, see the approach of the General Claims Commission in, e.g., *Neer and Neer (US v. Mexico)*, 4 RIAA (1926), pp. 61-62; and of the ICJ in ICJ (2007) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 221, para. 430, including the requirement to "prevent genocide so far as possible" such that breach occurs only where a state "*manifestly* fail[s] to take all measures to prevent genocide which were within its power". (*Genocide* case).

154 *Genocide* case, ibid., para. 430.

155 *AAPL v. Sri Lanka*, ICSID 1991, above n 94, paras. 615-619.

156 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine 20 Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC) (adopted 8 June 2012, entered into force 16 September 2012).

upon in determining issues of liability.[157] Significantly, the Tribunal held that liability could be established if a flag state failed to satisfy its due diligence obligations,[158] once again signifying that such obligations exist independently and may be breached in their own right.

5.2 Treaties

The other possible source of binding due diligence obligations is treaties, which normally take the form of implied obligations since states seem reluctant to include express references to due diligence. As will become apparent, a number of key terms seem to be indicative of the existence of due diligence obligations. Most commonly, either the treaty text will expressly mention one or more of the PPIPR principles from which implied, parallel due diligence obligations arise; and/or the treaty text will articulate phrases reflective of the character of due diligence, such as a treaty obligation to take "all reasonable/appropriate measures", "proper steps",[159] or to act with "reasonable care".

5.2.1 International Environmental Law

Currently, due diligence obligations are probably the most developed in relation to transboundary harm in international environmental law, where many material treaty and customary international law obligations are ones of due diligence.[160]

In the *Pulp Mills* case, the ICJ held that a substantive obligation of preventing the causing of significant damage to the environment of another state existed, sourced in the customary international law principle of prevention. Additionally, the ICJ identified many other substantive and procedural obligations sourced in the treaty text of the Statute of the River Uruguay (1975 Statute) signed between Uruguay and Argentina,[161] some of which triggered due diligence ones. A closely related procedural obligation was the requirement to inform the Administrative Commission of the River Uruguay (CARU) in order to attain the "… co-operation between the Parties which is necessary in order to fulfil the obligation of prevention…",[162] with an accompanying obligation of notification as precursor to cooperation.[163]

The ICJ examined due diligence in relation to Article 36 (a substantive/procedural obligation of coordination with the objective of "… prevent[ing] any transboundary pollution liable to change the ecological balance of the river…") and Article 41 (a substantive obligation of preventing pollution, protecting and preserving the aquatic environment) of the 1975 Statute. Finding that the obligations arising under Article 36 incumbent on both parties were obligations of conduct, not result, the Court held that this provision triggered a parallel

157 *SRFC Advisory Opinion*, ITLOS 2015, above n 106, pp. 41-42, paras. 146-149.
158 Ibid., p. 42, para. 148.
159 Barnidge 2006, p. 94.
160 Koivurova 2012, above n 39, paras. 9, 45.
161 Statute of the River Uruguay, UNTS, Vol 1295, No. I-21425 (Signed by Argentina and Uruguay at Salto), on 26 February 1975, which entered into force September 18, 1976.
162 *Pulp Mills*, ICJ 2010, above n 35, p. 56, para. 102.
163 Ibid., p. 59, paras. 113, 115.

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obligation "… to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river".[164] The associated due diligence requirement was "… to take positive steps to avoid changes in the ecological balance".[165] Similarly, the ICJ held that due diligence obligations arose from Article 41's requirement to protect and preserve the aquatic environment,[166] particularly by preventing its pollution. The Court described the "… obligation to act with due diligence…" inherent within Article 41 as "… an obligation which *entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement* …".[167] It was evident too from the ICJ's reasoning that vigilance – an alternative term for due diligence – is an integral part of the obligation against which conduct is to be measured.[168]

The most recent case dealing with due diligence obligations, in the context of international environmental law, is *Costa Rica v. Nicaragua; Nicaragua v. Costa Rica*,[169] in which both states brought a host of claims against each other. One of these was an environmental claim brought by Costa Rica that Nicaragua had violated international law when it carried out dredging work in the San Juan River. Once again, the ICJ differentiated between procedural and substantive obligations. Citing its early ruling in the *Pulp Mills* case,[170] the Court was of the view that in order "… to fulfil *its obligation to exercise due diligence in preventing* significant transboundary environmental harm…", a state would be required (in order to meet its substantive obligations of preventing transboundary harm) to carry out an environmental impact assessment (an accompanying procedural obligation) triggered by that risk of harm.[171]

In articulating the parameters of this due diligence obligation, the ICJ reiterated its earlier approach in *Pulp Mills*, namely to take into consideration such factors as

> 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.[172]

164 Ibid., p. 77, para. 188, referring to such "vigilance and prevention" in terms of being an "obligation". ICJ (1997) *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, pp. 77-78, para. 140 ("*Gabčíkovo-Nagymaros Project*"), where the Court discussed due diligence obligations in terms of "vigilance and prevention".

165 *Pulp Mills*, ibid., p. 76, para. 185.

166 E.g., ibid., p. 82, para. 204.

167 Ibid., p. 79, para. 197 (Emphasis added).

168 Ibid., pp. 79-80, para. 197.

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

170 *Pulp Mills*, ICJ 2010, above n 35, pp. 55-56, para. 101.

171 *Costa Rica v. Nicaragua; Nicaragua v. Costa Rica*, ICJ Reports 2015, above n 169, p. 45, para. 104.

172 *Pulp Mills*, ICJ 2010, above n 37, pp. 83, para. 205.

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If it is determined that such a risk of transboundary harm exists, then

> the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.[173]

On the facts, the ICJ held that Nicaragua was not required to carry out such an assessment since there was no risk of significant transboundary harm from its dredging activities.[174] The second claim, brought by Nicaragua alleging a violation of international law by Costa Rica due to its significant road construction activities in the border area by the San Juan River, was premised on the same due diligence obligation. In contrast to the first claim, the Court found on the facts that Costa Rica had failed to meet its due diligence obligations to conduct a proper environmental assessment. No international responsibility, however, was triggered since there was no evidence of significant transboundary harm having been caused. In adopting such an approach, the ICJ once again confirmed the need for a causal link between the existence of due diligence obligations and the occurrence of actual damage.

Perhaps one of the clearest examples of due diligence obligations being implied within a treaty text in an environmental context is the Watercourses Convention 1997. This is illustrated by Article 7.[175] The original draft article expressly referred to a due diligence obligation: "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" (Art. 7(1)), an obligation of conduct rather than result.[176] In the subsequently adopted treaty text, Article 7(1) had been amended to: "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",[177] perhaps reflective of some of the political sensitivities associated with due diligence mentioned at the outset. That said, although express mention of 'due diligence' has been removed, its existence is still evident from the requirement to "take all appropriate measures", as well as the provision's reference to 'prevent', which has associated due

173 *Costa Rica v. Nicaragua; Nicaragua v. Costa Rica*, ICJ Reports 2015, above n 169, p. 45, para. 104; p. 61, para. 168.

174 Ibid., p. 48 at para. 112.

175 Similarly, see Arts 21 and 22 Watercourse Convention 1997, which articulate implied due diligence obligations; and the accompanying commentary, International Law Commission (ILC) (1994) Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater, *ILC Yearbook*, vol II, Part Two (Water Convention Commentaries), p. 122, para. 4; p. 124, para. 3.

176 *Water Convention Commentaries*, ibid., p. 103, para. 4 (Emphasis added). The final treaty text of 7(1) Water Convention 1997 states: "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." The language of "take all appropriate measures" still points to due diligence obligations.

177 Emphasis added.

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diligence obligations (requiring positive steps to be taken beyond the negative duty of not "caus[ing] significant harm"). The related Commentary confirms that the provision is underpinned by due diligence obligations and not merely standards. For example, it states that

> [w]hat 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.[178]

As for what this obligation means, the Commentary further explains that in interpreting whether or not a state has breached its due diligence obligations, for which it may be responsible under international law, relevant considerations include: "… not enacting necessary legislation, … not enforcing its laws …, or … not preventing or terminating an illegal activity, or … not punishing the person responsible for it";[179] and whether or not the state concerned

> 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.[180]

Certainly, there seems to be a body of general consensus that a breach of the "no harm" principle may occur where a state fails to act with due diligence, even if there is no express reference to this requirement within the relevant instruments.[181] A logical explanation for this, which seems to be consistent with case law as was explained by the ICJ in the *Gabčíkovo-Nagymaros Project* case, is that

> in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[182]

Notably, Tan suggests that where such risk of environmental harm exists in relation to ultra-hazardous activities, a "… failure to prevent automatically translates into a failure of due diligence".[183]

5.2.2 Law of the Sea

Binding due diligence obligations may similarly be discerned in the context of law of the sea. This is clearly illustrated by recent decisions of the ITLOS (including

178 Ibid. Emphasis added. See further, *Water Convention Commentaries*, ibid., p. 6, para. 103 for other examples of treaty provisions that create due diligence obligations, e.g., Art. 194(1) UNCLOS.
179 Ibid., p. 103, para. 4.
180 Ibid.
181 Koivurova 2012, above n 39, para. 15.
182 *Gabčíkovo-Nagymaros Project*, ICJ Reports 1997, above n 164, p. 78, para. 140.
183 Tan 1999, p. 840.

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the SDC) and the Permanent Court of Arbitration (PCA), whose jurisprudence has been consistent and mutually reinforcing.

The first relevant case is the *Deep Sea Mining* Advisory Opinion. In this case, the SDC clearly defined the meaning of key UNCLOS provisions before it. Of especial note, it distinguished the meaning of 'responsibility' in the text of UNCLOS – which it held to mean "obligation" – from "responsibility" as used by the ILC in the Draft Articles on state responsibility (which in UNCLOS was the term "liability") which relates to the consequences of breach of primary obligations.[184] Accordingly, it would seem reasonable to conclude that the Chamber's reference to an "obligation of due diligence"[185] – repeated similarly in the subsequent *SRFC* Advisory Opinion,[186] and by the PCA in the *South China Sea Arbitration* case[187] – was intended to mean a binding obligation rather than a standard against which to measure conduct of a different obligation.[188] Indeed, in the *Deep Sea Mining* Advisory Opinion, the SDC went to some length to clearly differentiate between due diligence obligations and other Treaty obligations:

> The obligations of sponsoring States are not limited to the due diligence 'obligation to ensure'. Under the Convention and related instruments, *sponsoring States also have obligations with which they have to comply independently of their obligation to ensure* a certain behaviour by the sponsored contractor. These obligations may be characterized as 'direct obligations'.[189]

Significantly, in terms of identifying more generally applicable principles, it is evident that obligations of due diligence and obligations of conduct (which may take the form of a 'direct' treaty obligation or PPIPR principles) are connected.[190] This is suggested by the SDC's observation that despite the separate existence of direct and due diligence obligations, a close relationship exists between them in that

> *compliance with these [direct] obligations can also be seen as a relevant factor in meeting the due diligence 'obligation to ensure'* and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule.[191]

184 *Deep Seabed Mining Advisory Opinion*, ITLOS Reports 2011, above n 106, pp. 22-23, paras. 64-66; p. 24, paras. 69-71; pp. 33-36, paras. 103-116. Similarly, see *SRFC Advisory Opinion*, ITLOS 2015, above n 106, at p. 41, para. 145.

185 *Deep Seabed Mining Advisory Opinion*, ibid., p. 56, para. 189; p. 64, para. 219.

186 *SRFC Advisory Opinion*, ITLOS 2015, above n 106, p. 61, para. 219(3).

187 Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)* (The Hague, July 12, 2016), Case no 2013-19, Award, PCA 2016, p. 375, para. 944; p. 381, para. 956; p. 383, para. 964. ("*South China Sea Arbitration*").

188 *Deep Seabed Mining Advisory Opinion*, ITLOS Reports 2011, above n 106, p. 34, para. 110.

189 Ibid., p. 38, para. 121 (Emphasis added), similarly, at pp. 70-71, para. 242 (A) and (B); see, too, p. 73, para. 242 regarding the causal link between an alleged due diligence failure and damage.

190 Ibid., p. 35, para. 111. Similarly, see *SRFC Advisory Opinion*, ITLOS 2015, above n 106, p. 36, para. 125.

191 *Deep Seabed Mining Advisory Opinion*, ibid., p. 38, para. 123 (Emphasis added).

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For example, the Chamber found that when the sponsoring state complied with its direct treaty obligations "to ensure" under Article 153(4), its corresponding due diligence obligations under Article 139 UNCLOS[192] – to "deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result" – were also fulfilled.[193]

In the *SRFC* Advisory Opinion, due diligence obligations arising from procedural (and possibly substantive) treaty obligations were found to exist. Specifically, it considered due diligence obligations to arise in relation to obligations to "seek to agree" (Art. 63) and "to cooperate" (Art. 64(1)) in good faith pursuant to Article 30 of the Convention,[194] as well as to investigate allegations of treaty breaches and to "take any action necessary to remedy the situation".[195] In a similar vein, in the most recent case of *South China Sea Arbitration* case, the PCA found that

> anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.[196]

On the facts, the PCA found that China had breached its due diligence obligations in a number of ways, including:

> [T]hrough the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal in May 2013, [thereby] fail[ing] to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its exclusive economic zone.[197]

These cases are informative too in identifying what due diligence obligations require. Once again, the required standard was that states would make "best possible efforts" to ensure compliance.[198] In the case of the *Deep Sea Mining* Advisory Opinion, this meant that any laws, regulations and administrative measures adopted within national legal systems to meet these requirements were expected to be "… reasonably appropriate…", including to "secur[e] compliance by persons under its jurisdiction".[199] The *SRFC Advisory Opinion* took the same

192 Ibid., p. 38, para. 124; similarly, p. 37, para. 118. Art. 139(2) UNCLOS requires states parties to take "all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4".

193 Ibid., p. 34, para. 110. A similar approach, in a different context, was adopted by the ITLOS in *SRFC Advisory Opinion*, ITLOS 2015, above n 108, p. 36, para. 125, reference to obligations of conduct.

194 *SRFC Advisory Opinion*, ibid., p. 57, para. 210.

195 Ibid., p. 61, para. 219.

196 *South China Sea Arbitration*, PCA 2016, above n 187, p. 294, para. 744.

197 Ibid., p. 297, para. 757. The PCA also found that due diligence obligations pursuant to Arts 192 and 194 UNCLOS had been breached (pp. 383-84, paras. 964).

198 *Deep Seabed Mining Advisory Opinion*, ITLOS Reports 2011, above n 106, p. 70, para. 242 (A).

199 Ibid., p. 70, para. 242 (A); similarly, see p. 37, paras. 118-119.

approach in relation to the due diligence obligations of a flag state regarding vessels flagged to it, namely "… to deploy adequate means, to exercise best possible efforts, to do the utmost…"[200] to prevent illegal fishing by those ships. In doing so, the Tribunal explained that since this due diligence obligation was one of conduct rather than of result[201] – the flag state was "… to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag…" – it did not necessarily need to cross the threshold of securing this compliance.[202] That said, as the PCA held in the *South China Sea Arbitration* case, since "… a certain level of vigilance" is required in relation to enforcing Treaty obligations,[203]

> [u]pon receipt from another State of reports of non-compliance, the flag State "is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action".[204]

From this analysis, another important conclusion may be drawn regarding the nature of due diligence obligations, namely that they do not attract strict liability. In order to establish a failure to meet these obligations, an actual causal link between the alleged failure and actual damage must be established.[205] For example, as the SDC held in the *Deep Sea Mining* Advisory Opinion, "… liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence…".[206]

One final key point to note here is that, in the *Deep Seabed Mining* Advisory Opinion, the Chamber commented that "[t]he standard of due diligence may vary over time and depends on the level of risk and on the activities involved".[207] Here, it was using the term 'standard' in the sense of a non-binding benchmark that determines what is considered to be diligent in a particular context, reflecting the fact that such a benchmark is not static but rather evolves. Therefore, with respect to the precautionary approach – which the Tribunal regarded as being "… an integral part of the general obligation of due diligence of sponsoring States…" – it was of the view that states needed to consider issues of potential risk, such as potential negative environmental impact,[208] as the standard against which to

200 *SRFC Advisory Opinion*, ITLOS 2015, above n 106, p. 34, para. 110; similarly, p. 65, para. 219 (6). Referring to *Pulp Mills*, the SDC were of the view that such obligations extend to "a certain level of vigilance" to enforce these regulations; i.e. their mere adoption does not suffice (p. 38, para. 131).
201 *SRFC Advisory Opinion*, ibid., p. 34, para. 110; p. 35, para. 111.
202 Ibid., p. 37, para. 129.
203 Specifically here, Arts 58(3), 192 and 194 UNCLOS.
204 *South China Sea Arbitration*, PCA 2016, above n 187, p. 376, para. 944; similarly, p. 387, para. 974.
205 *Deep Seabed Mining Advisory Opinion*, ITLOS Reports 2011, above n 106, pp. 72-73, para. 242(4). Similarly, see *SRFC Advisory Opinion*, ITLOS 2015, above n 106, p. 42, para. 150.
206 *Deep Seabed Mining Advisory Opinion*, ibid., p. 61, para. 189.
207 Ibid., p. 71, para. 242 (A).
208 Ibid., p. 40, para. 131.

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gauge the adequacy of the measures being taken in order to meet their binding due diligence obligations.

5.2.3 International Human Rights Law

Implied due diligence obligations are evident in a number of human rights treaties as well. For example, the UN Committee on Human Rights recognized the relationship between PPIPR principles and due diligence obligations when it observed that: "[t]he associated aspects of 'protect' include 'due diligence to *prevent, investigate, punish and ensure redress* for the acts of private individuals or entities that impair the rights enshrined in the Convention'".[209] As de Schutter notes, "[t]he existence of an obligation to protect cuts across the full range of the rights listed in the ICCPR".[210] As with other legal regimes, due diligence obligations may be triggered by substantive and/or procedural treaty obligations. Substantive treaty obligations here are normally indicated by such language as *respect, ensure, protect, fulfil* and *prevent*, whereas the terminology of *investigate*,[211] *punish and ensure redress* are generally indicative of procedural ones.

Taking Article 2(1) International Covenant on Civil and Political Rights 1966 (ICCPR)[212] as an example of a substantive obligation, it provides that a state party "… undertakes to *respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".[213] 'Respect' means that the state party will itself not violate the rights specified in the treaty text by 'ensure', requiring that it takes whatever positive action is needed to enable individuals to enjoy those rights afforded to them under the ICCPR.[214] In order to meet these requirements, states are required to take the necessary steps such as "… legislative, judicial, administrative, educative and other appropriate measures…".[215] to meet their obligation.

This positive obligation of 'ensuring' human rights obligations can be broken down into a number of discrete obligations: to '*protect*' and '*fulfil*' the treaty obligations, and to *ensure* the availability of adequate remedies in the event of their breach. The notion of 'protect' requires that states act proactively to ensure the safeguarding of those rights guaranteed under a particular human rights treaty.[216] Where a state fails to 'take proper steps' to protect an individual,

209 *CCPR General Comment No. 31*, above n 98, at para. 8 (Emphasis added). Similarly, see CEDAW (2013) *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*', UN Doc. CEDAW/C/GC/30, para 15. ("*CEDAW, 'General recommendation No. 30*'").

210 De Schutter 2014, p. 443.

211 E.g., CCPR considers "investigation" to be a procedural obligation. CCPR, "*General Comment No. 6, The Right to Life (Article 6)*", (30 April 1982), para. 4 (Emphasis added). ("*CCPR, General Comment No. 6*").

212 Adopted 16 December 1966; came into effect 28 March 1979.

213 Emphasis added.

214 See, e.g., White 2013, pp. 186-187.

215 *CCPR General Comment No. 31*, above n 98, para. 7. Similarly, in the context of preventing or eliminating discrimination being perpetrated against women, see, e.g., *CEDAW, General Recommendation No. 28*, above n 86, para. 13; *CEDAW, General recommendation No. 30*, above n 209, para. 15.

216 See, e.g., Mégret 2014, p. 102.

including through its failure to prevent a human rights violation from occurring in the first place and then by not making 'proper efforts' to bring those responsible to account (though investigation and punishment), it will be found to have acted negligently and therefore in breach of its due diligence obligations.[217] Similarly, the concept of 'fulfil' is closely related to the primarily negative duty of 'respect', which requires states not to deliberately violate human rights; 'fulfil' requires states to take the positive steps necessary to implement rights, without which they could be rendered meaningless or at least less effective.[218] This obligation goes far beyond merely adopting necessary legislation to implement international rights within national legal systems. It can extend to supplementing legislation "… with a comprehensive set of measures to facilitate its implementation, enforcement and follow-up and monitoring and evaluation of the results achieved".[219] As Doswald-Beck aptly notes:

> All the treaty bodies have recognized that the duty to 'ensure' or to 'secure' rights *includes the obligation to take reasonable measures to prevent* abuses by private persons and *to properly follow up* on such abuses….[220] … *This obligation, typically referred to as 'due diligence'*, is applicable to all rights and the lack of such due diligence is the basis of findings of violations in many cases.[221]

The existence of due diligence obligations, as opposed to mere standards, has been confirmed by case law. Initially, this was by the Inter-American Court of Human Rights (IACtHR) in the context of enforced disappearances, developing related obligations under the American Convention on Human Rights[222] in the process. The Court was concerned with addressing potential impunity gaps, and to not leave the families of those who had disappeared without a remedy regarding them also as victims.[223] Such concern was attributable to the fact that enforced disappearances were usually carried out by private persons for which states would not normally be responsible.

217 This is a long established principle. See, e.g., *Youmans (U.S. v. Mexico)* (1926), above n 107, para. 114. For further discussion of the case, together with a similar case of *Janes (U.S. v. Mexico)*, 4 RIAA 82 (1926), see Barnidge 2006, pp. 95-96. See too Doswald-Beck 2011, p. 37, who concludes that this is the consistent approach too of UN treaty bodies.

218 See, e.g., Mégret, above n 216, p. 103.

219 CEDAW (2014) *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, UN Doc, CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014), para. 41.

220 See, *CCPR General Comment No. 31*, above n 98, para. 8.

221 Doswald-Beck 2011, p. 37. Similarly, Bantekas and Oette 2013, p. 76 have suggested that: "The general obligation to protect and fulfil rights means that a state has to take measures to *prevent* and *repress* violations, irrespective of whether they are committed by state or non-state actors, and *provide* adequate remedies in case of breach. This duty is one of means, not result … States have to exercise "due diligence", i.e. take all measures that can reasonably be taken in the circumstances in order to ensure the rights granted."

222 American Convention on Human Rights, Pact of San Jose, Costa Rica (adopted 22 November 1969, entered into force 18 July 1978).

223 See, e.g., de Schutter 2014, p. 441.

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Consequently, in the first related case that the IACtHR considered due diligence, *Velasquez Rodriguez v. Honduras*, it developed the principle that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (e.g., because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the *lack of due diligence to prevent the violation or to respond to it* as required by the [American] Convention [on Human Rights].[224]

The Court's approach had the effect of extending a state party's obligations beyond the public sphere of its own machinery to private actors over which it may have no direct control.[225] Since it was examining circumstances in which a state can incur international responsibility – which, by implication, requires the existence of a primary international obligation that has been breached, as was the case here – it is clear that the IACtHR was concerned with due diligence obligations and not merely standards. Put differently, the international responsibility of a state can arise in circumstances where human rights violations perpetrated are indirectly imputable to it "… not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention".[226]

The IACtHR's approach was not entirely new in that it reinvigorated a diplomatic principle of due diligence developed, or at least confirmed, by the United States/Mexico General Claims Commission, which was created in 1923.[227] The principle is that state responsibility arises in relation to the commission of wrongs by non-state actors against foreign nationals in circumstances where a state either conspired in, or failed to take adequate steps to prevent or respond (for example, to provide *ex post facto* justice) to, injuries perpetrated against foreign nations.[228] This general principle was applied in a number of cases,

224 Inter-American Court of Human Rights (IACtHR), *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, IACtHR, Series C No. 4 (1988), para. 172. ("*Velasquez Rodriguez v. Honduras*"). Similarly, in the case of *Pueblo Bello Massacre v. Colombia*, the IACtHR found that a positive obligation existed on the state "[to exercise] due diligence … to avoid operations [by paramilitary groups against civilian populations' in a zone that had been declared an emergency zone". IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006, IACtHR, Series C No. 140 (2006), para. 139. Similarly, in relation to similar obligations of prevention of harm existing in an environmental context, see Tan 1999, p. 834.

225 Similarly, see, e.g., *CEDAW, General Recommendation No. 19*, above n 84, para. 9.

226 *Velasquez Rodriguez v. Honduras*, IACtHR (1988), above n 224, paras. 172, 176. The Court stated that "what is decisive is whether a violation … has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible". (para. 173).

227 For an extensive examination of the General Claims Commission's due diligence jurisprudence, see Barnidge 2006, pp. 92-97.

228 Hillier 1998, p. 355 cited by Barnidge 2006, p. 92.

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notably *Janes v. Mexico*,[229] *Youmans v. Mexico*,[230] and *Massey v. Mexico*,[231] in which the Commission found that a state has due diligence obligations[232] in such circumstances to protect foreign nationals as well as to apprehend and punish the non-state actors concerned. For instance, in *Massey v. Mexico*, the state was found responsible for failing to "diligently prosecute and properly punish" the person who had killed Massey.[233]

In terms of what these substantive obligations entail, the IACtHR held that "[t]he State has a legal duty to take *reasonable steps to prevent* human rights violations".[234] It went on to specify that

> [t]his duty to prevent includes all those means of a legal, political, administrative and cultural nature … that promote the protection of human rights … It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.[235]

Similarly, the UN Committee on Human Rights, in relation to Article 6 ICCPR right to life, has observed that there is an accompanying duty on states parties to take "*specific and effective measures*" as preventative steps against such disappearances,[236] again highlighting that such obligations are ones of means and not result. As Pisillo-Mazzeschi observed, in relation to the activities of non-state actors, states' obligations cannot be construed

> as an "absolute" obligation to prevent or punish harmful activities carried out by private individuals; but as a 'relative' obligation to maintain, with regard to such activities, that particular conduct of prevention and punishment which is required by international law[237]

for example, to "take the necessary reasonable steps to prevent certain acts from being committed in the first place".[238]

Such interpretative approaches, including regarding the inherent relationship between due diligence obligations and PPIPR principles, is evident in relation to other human rights treaty provisions too. For example, regarding the prohibition against torture et al, a state may breach its due diligence obligations through its failure to prevent abuses from occurring by its own state machinery, as well as by

229 *Janes (U.S. v. Mexico)* (1926), above n 217, which was a model case for the other cases raising such due diligence issues.
230 *Youmans (U.S. v. Mexico)* (1926), above n 107.
231 United Nations, *Massey (U.S. v. Mexico)*, 4 R.I.A.A 155 (1927).
232 E.g., suggested by the Commission's language regarding the failure by Mexico "to take proper steps". *Janes (U.S. v. Mexico)* (1926), above n 217, para. 86. Similarly, see *Youmans (U.S. v. Mexico)* (1926), above n 107, para. 112.
233 *Massey (U.S. v. Mexico)* (1927), above n 231, para. 159.
234 *Velasquez Rodriguez v. Honduras*, IACtHR (1988), above n 224, para. 174.
235 Ibid., para. 175.
236 *CCPR, General Comment No. 6*, above n 211, para. 4 (Emphasis added).
237 Pisillo-Mazzeschi 2002, p. 103.
238 Bantekas and Oette 2013, p. 331.

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the actions of non-state actors in certain circumstances despite the fact that the Convention against Torture 1984[239] is framed around the obligations of states.[240] For instance, it is evident that part of the duty of preventing the commission of acts of torture, including under Article 7 ICCPR, is a due diligence obligation on the state to "… take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power".[241] Another clear illustration is the CEDAW considered earlier, whereby "… States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights…",[242] especially the perpetration of domestic violence against women.

In *Velasquez Rodriguez v. Honduras*, the Court additionally identified due diligence obligations arising from procedural requirements. For instance, it found that

> [t]he State has a legal duty … *to use the means at its disposal* to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation,[243]

identifying a number of the PPIPR principles that can trigger due diligence obligations. The Court further clarified the parameters of these obligations when it found that it was insufficient for a state merely to possess a legal system that is technically compliant with these formal obligations,[244] expecting that it would be possible also for all human rights to be fully exercisable in practice.[245] Similarly, the UN Committee on Human Rights has found, in cases of disappearances where the right to life is at risk, that states parties are obliged to ensure that effective *investigative* facilities and procedures are in place.[246] It is notable too, in linking due diligence to the Article 2(1) ICCPR obligation of 'ensuring' those human rights guaranteed under it, that the Court suggested that some obligations may have both substantive and procedural elements

239 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987).

240 See further UN Committee against Torture (CAT) (2012) *General Comment No. 3 (2012): Implementation of article 14 by States parties*', UN Doc CAT/C/GC/3, (13 December 2012), para. 7; and CAT, *General comment No. 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008), para. 18, which examined the due diligence obligations of states in relation to non-state official and private actors, including any failures to prevent, investigate, prosecute and punish them.

241 *CCPR, General Comment No. 31*, above n 98, para. 8. Similarly, see too Arts 2(1), 10, and 16 Convention against Torture for other positive obligations on states parties aimed at preventing the commission of torture et al.

242 *CEDAW, General Recommendation No. 19*, above n 84, at para. 9. Similarly, see *CEDAW, General Recommendation No. 28*, above n 84, para. 13.

243 *Velasquez Rodriguez v. Honduras*, IACtHR (1988), above n 224, para. 174.

244 Ibid., para. 167.

245 Ibid.

246 *CCPR, General Comment No. 6*, above n 211, para. 4.

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> not only to prevent, investigate and punish any violations, but additionally – where possible – to attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.[247]

As was the case in relation to substantive obligations, it is evident that due diligence obligations arising out of procedural (sometimes linked to substantive) treaty obligations exist in other human rights instruments too. Once again, the Convention against Torture is illustrative here. For example, Article 4 specifies that a "… State Party shall *ensure* that all acts of torture are offences under its criminal law", which has the substantive aspect of 'ensuring', and the procedural element of legislating, both of which can have associated due diligence obligations. That these and other Convention provisions[248] reflect one or more PPIPR principle(s) is once again indicative of the likelihood that parallel due diligence obligations exist alongside these and similarly worded treaty provisions.

A further issue to note is that, as with the other legal regimes examined earlier, what are considered to be 'reasonable' measures can be context specific. These are likely to be extensive in circumstances where there are known risks of the likelihood of attempted or actual breaches of human rights obligations.[249] For example, where particular categories of individuals are repeatedly targets of human rights violations,[250] or are more vulnerable to their occurrence,[251] additional precautionary measures may be required. Therefore, in *Velásquez Rodríguez v. Honduras*, in an environment where enforced disappearances were commonplace, under the doctrine of effectiveness state authorities were expected to take "*all* necessary" and not merely "reasonable" investigative measures to identify and bring the perpetrators to account.[252] Indeed, the IACtHR has distinguished between a more general obligation of prevention,[253] and a second category of "strict due diligence", when the state is aware of the existence of significant and imminent risk to the human rights of certain individuals, as was

247 *Velasquez Rodriguez v. Honduras*, IACtHR (1988), above n 226, para 166.

248 See too Convention against Torture: Art. 12 (prompt and impartial investigation); Art. 13 (prompt and impartial examination of allegations); and Art. 14 (ensuring that victims obtain redress).

249 E.g., in the case of, EHRR, *Osman v. UK* (1998), p. 245, para. 116, the European Court of Human Rights held that a government that "knew or ought to have known … of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party", must take "measures within the scope of their powers which, judged reasonably, might … [be] expected to avoid that risk". That said, the associated obligations are not absolute. For a similar approach in a counterterrorism context, see White 2013, p. 187.

250 Such as journalists and human rights defenders in some countries. Bantekas and Oette 2013, p. 323.

251 Ibid., p. 323, such as those in the custody and physical control of the state, e.g., prisoners.

252 *Velasquez Rodriguez v. Honduras*, IACtHR, (1988), above n 226, para. 39; see too para. 243.

253 Ibid., para. 282. This more general obligation could be violated by a state not taking measures against certain risks through practical measures or through adequate legal protection.

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the case in the *Cotton Fields* case.[254] In such circumstances, the obligation of means on states is more stringent and can require, inter alia, *exhaustive* search activities to be undertaken, and *any other necessary action* to be conducted *promptly*, *without delay*.[255] In the *Cotton Field v. Mexico* case the state failed to meet these obligations owing to such factors as lack of urgency, unnecessary delays[256] and the lack of a proper investigation,[257] all of which could have prevented the abuses to and deaths of the victims.

6 Conclusion

From the preceding analysis, it has been possible to identify a number of key generic characteristics of due diligence, which remain consistent across the different legal regimes examined, that assist in answering the four research questions posed at the outset. The first two questions concerned the legal nature of due diligence, whether it possesses the qualities of a non-binding standard or binding obligation. These may be answered succinctly, namely that due diligence may take both forms, depending on the specific context in which it operates.

In relation to the third question, regarding the circumstances in which due diligence standards and/or legal obligations exist, a number of important conclusions may be reached. In the form of a standard, the concept of due diligence is often incorporated within the text of a non-binding, voluntary instrument, such as guidelines or codes of practice. When it takes this form, due diligence acts as a benchmark against which to determine whether or not binding obligations, such as those contained in a treaty, have been complied with adequately. Typically, although by no means exclusively, due diligence standards aim to secure increased adherence to particular principles by non-state actors, who cannot be formally bound by corresponding, legally binding obligations, such as treaty provisions to which they cannot become parties.

As it was established, due diligence can take the form of legal obligations too. Significantly, as courts, tribunals and other mechanisms have made clear, these due diligence obligations operate in parallel with, but are separate from, the obligations that triggered their existence. As a consequence, not only may a breach of a due diligence obligation constitute a breach of an international obligation, triggering international responsibility in its own right, but also its breach does not necessarily mean the breach of the obligation from which it arose, or vice versa. Closely related to this is another significant attribute, namely

254 IACtHR, *González et al (Cotton Field) v. Mexico*, Judgment of 16 November 2009, Series C No. 205, para. 283. ("*Cotton Field v. Mexico*"). In this case, obligations of "strict due diligence" arose as soon as the women went missing and the state was aware, since in that particular context, there "was a real risk that the victims would be sexually abused, subjected to ill-treatment and killed", as has happened previously to other women.

255 Ibid., para. 283. (Emphasis added). A similar approach was adopted by the IACtHR in *Pueblo Bello Massacre*, IACtHR (2006), above n 224, paras. 139-140; IACtHR, *Ituango Massacres v. Colombia*, Judgment 1 July 2006, Series C No. 148, paras. 134-138.

256 *Cotton Field v. Mexico*, IACtHR (2009), above n 254, paras. 284, 286.

257 Ibid., paras. 290-291.

that as obligations of means and not of result, there must be a causal link between alleged breaches of due diligence and actual damage caused.

With respect to their sources, due diligence obligations may exist in the form of general and customary international law principles, as well as in treaty texts. Owing to a reluctance on the part of many states to agree to express due diligence obligations, they generally take the form of implied rather than express provisions. They can be established in one of two ways. One method is for due diligence requirements to be implied through inclusion in the treaty text of terms normally associated with them, such as a duty to exercise 'vigilance', 'due care' or 'take appropriate measures'. Alternatively, they may be triggered by other treaty provisions, whether specific 'direct' treaty obligations and/or certain principles (especially PPIPR). Notably, due diligence obligations can exist in relation to both substantive and procedural obligations, whatever their legal sources.

The fourth, and final, questions were concerned with identifying the parameters of due diligence. These can be more difficult to identify exactly since the concept of due diligence is not static but rather constantly evolving within individual legal regimes and contexts.[258] By way of illustration, circumstances considered today as posing a high degree of risk to the environment may be regarded as posing a lesser risk in the future, commensurate with increased scientific knowledge and more advanced technological developments. On the other hand, however, the core elements of due diligence are constant and unchanging as jurisprudence since the *Alabama Arbitration* attests. Its essence has remained the duty to exercise appropriate levels of 'vigilance', of 'due/reasonable care' and to take 'any appropriate measures' or 'proper steps' as a particular context determines. These essential criteria remain the backbone of due diligence standards against which it may be determined whether or not particular legal obligations have been complied with.

Perhaps the most surprising conclusion of all has been the degree of consistency of interpretative approaches by courts and tribunals since the *Alabama Arbitration* case and across a broad and diverse spectrum of legal regimes, in their differentiation between the notions of due diligence standards and corresponding obligations. The significant consistency found was far greater than was anticipated at the outset of this study, with only the occasional incident of conflation discerned when the terminology of standard and obligation was not used in the strict sense defined here.

Such a trend of general jurisprudential consistency is a positive and most welcome finding, not least regarding the future normative development of this increasingly important concept in the global arena as it extends into other legal regimes where due diligence standards and obligations are less established. That said, as the ILA Due Diligence Report (2016) concluded,[259] much work remains to be done in relation to clarifying the exact legal qualities, parameters and application of due diligence, particularly in contexts where its role is emerging and, therefore, its accompanying standards and obligations are less well

258 *ILA Second Report*, above n 117, pp. 46-47.
259 Ibid., p. 47.

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understood and established. In this regard, it is hoped that this article might make a modest contribution towards increased clarity.

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