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ORIGINAL ARTICLE

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Mapping out due diligence in regional human rights law: Comparing case law of the European Court of Human Rights and the Inter-American Court of Human Rights

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Abstract

In international human rights law, the notion of due diligence concerns a qualifier of behaviour to realize human rights protection, including the protection against non-state actor interferences. However, the question remains what due diligence obligations of states in the context of non-state actor interferences exactly entail in international human rights law. The present article aims to address this matter by comparing case law of the European Court of Human Rights (ECtHR) with that of the Inter-American Court of Human Rights (IACtHR). Using a working model of due diligence that has been introduced in recent scholarly work, this article further explores this model and attempts to give further meaning to its two paradigms: 'regulation' and 'risk management'. In that way, it maps out the relevant elements of this foundational concept that lies at the heart of human rights protection.

Keywords: due diligence; human rights law; ECtHR; IACtHR; non-state actors; regulation; risk management

1. Introduction

What happens when a non-state actor interferes with human rights? Can the state be held responsible for such violations? Although it can be challenging to attribute these acts by non-state actors to the state, the latter still has a duty to protect human rights. Almost all substantive human rights compel such a duty, prescribing states to take action to protect human rights, even against non-state actors.[1] Such obligations do not guarantee a successful result of human rights protection, but instead require states to put in the necessary efforts to realize this. These obligations are also known as ones of due diligence.[2] It would be a disproportionate burden to

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[1]See, e.g., in relation to businesses: United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 24: On State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities UN Doc. E/C.12/GC/24 (2017), paras. 14–22. See also B. Baade, 'Due Diligence and the Duty to Protect Human Rights', in H. Krieger, A. Peters and L. Kreuzer (eds.), *Due Diligence in the International Legal Order* (2020), 92.

[2]For general foundational works on due diligence see also R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of International Responsibility of States', (1992) 35 *German Yearbook of International Law* 9; P. M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', (1999) 10(2) EJIL 371; R. P. Barnidge Jr., 'The Due Diligence Principle Under International Law', (2006) 8 *International Community Law Review* 81; T. Koivurova and K. Singh, 'Due Diligence', in *Max Planck Encyclopedia of Public International Law*, February 2010, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd = OPIL; M. N. Schmitt, 'In Defense of Due Diligence in Cyberspace', (2015) 125 *Yale Law Journal Forum* 68;

expect state authorities to ensure that absolutely no human rights violations occur under their jurisdiction or that such violations shall be prevented at all times. At the same time, however, a state cannot stand idly by while non-state actors conduct human rights abuse. In that regard, due diligence obligations require states to take those measures necessary to protect human rights. What precisely due diligence obligations entail in situations concerning human rights interference by non-state actors is not systematically articulated in regional and international human rights law. This leaves legal practitioners and scholars alike with the question of what exactly is required from the duty-bearers of such obligations in this context.

To contribute to a better and more structured understanding of these vague and abstract due diligence obligations, the present article further explores the paradigms of due diligence obligations in regional human rights law and presents a template for practitioners of law, judges and legal scholars outlining the results. This is done by analysing how the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) deal with this matter. In this regard, it should be noted that we chose to conduct a comparative analysis instead of an independent study of case law of a single regional human rights court – a comparative assessment allows for a broader understanding of the subject matter central in this study, providing a more comprehensive and robust analysis. It allows us to examine similarities and differences, identify patterns or trends, and develop more generalizable findings. Such an approach also ensures that the conclusions drawn are not restricted to a single case but can be applied to a larger context, which is arguably its strength in forming a template for both legal scholars and practitioners. It should also be noted that the case law of the ECtHR and IACtHR were selected at the exclusion of other human rights courts and international treaty monitoring bodies for three reasons. First, a comparative study of both regional and international human rights systems would not be possible within one academic article and would place more emphasis on quantity rather than the quality of the comparative study. Second, both the ECtHR and the IACtHR have dealt with due diligence in numerous cases, leading to a large pool of data to work with. Third, the two human rights courts share a *tertium comparationis*. For instance, both courts have the mandate to interpret their regional human rights treaty and judges have a regional background in law. This is very different from international treaty bodies, which could include members from different parts of the world with very different (legal) backgrounds.

A brief note on the methodology and selection of cases is also due. The case law selection is based on a literature review on due diligence in general public international law and human rights law. Relevant works on due diligence from which cases were selected for this article comprise contributions by Monnheimer,[3] Ollino,[4] Baade,[5] Lavrysen,[6] Stoyanova[7], Akandji-Kombe,[8] and Besson.[9] Most of these works discuss due diligence in international law, are recently published, and refer to relevant case law. Against that backdrop, cases were highlighted and selected from these works, and then compiled into a case law matrix. This matrix was categorized by the general themes of due diligence as identified in the abovementioned scholarly contributions.

J. Kulesza, *Due Diligence in International Law* (2016). See also ILA Study Group on Due Diligence in International Law, First Report (Washington DC 2014) (International Law Association, London 2014); ILA Study Group on Due Diligence in International Law, Second Report (Johannesburg 2016) (International Law Association, London 2016); S. Besson, *Due Diligence in International Law* (2023).

[3]M. Monnheimer, *Due Diligence Obligations in International Human Rights Law* (2021).

[4]A. Ollino, *Due Diligence Obligations in International Law* (2022).

[5]See Baade, *supra* note 1.

[6]L. Lavrysen, 'Positive Obligations in the Jurisprudence of the IACHR', (2014) 7 *Inter-American and European Human Rights Journal* 94.

[7]V. Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights', (2020) 33 LJIL 601.

[8]J.-F. Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights', (2007) 7 *Human Rights Handbooks* 1.

[9]See Besson, *supra* note 2.

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Subsequently, the selected cases were integrated into this matrix by theme. Eventually, the matrix was analysed and used to discuss the cases by theme in this article. Given the limitations of the research method, it is possible that some relevant cases have not been included in the analysis. However, the analysis is not intended to be exhaustive, and we believe that the data collected provides sufficient content upon which to base our comparison and subsequent claims. In addition, many of the cases selected concern the right to life, although we did not filter the selection on this basis so as to enable a more thorough analysis of the impact of different rights and interests at stake in a case on the due diligence obligations imposed by the courts.

The structure of this article is as follows. Section 2 briefly addresses a working model of due diligence obligations that builds on the work of Malaihollo.[10] This working model of due diligence in international law contains two paradigms: a regulation paradigm that concentrates on outsourcing further law- and decision-making; and an accountability paradigm that focuses on risk management. This working model forms the basis for an analysis of the most important elements of these paradigms. These concern, 'aspiration', 'discretion in implementation', 'good faith', 'knowledge or foreseeability', 'interests at stake', 'capacity of the state', and 'level of control'. Section 3 addresses the matter of regulation and its three relevant aspects: 'aspiration', 'discretion in implementation', and 'good faith'. For each of these elements, ECtHR and IACtHR case law are compared to find similarities and differences. Subsequently, Section 4 discusses risk management and its relevant aspects, namely 'knowledge or foreseeability', 'interest at stake', 'capacity of the state', and 'level of control'. Again, for each of the relevant aspects, ECtHR and IACtHR case law are compared. Finally, Section 5 concludes and reflects on the findings.

2. Theoretical framework: A working model of due diligence

There is no doubt that international law is familiar with due diligence. Theories of and approaches to international law have engaged with it for a long time and by now, many branches of international law contain obligations that require the norm addressee to conduct a due diligence performance.[11] That is to say, obligations expressing that the duty-bearer has to act with reasonable care in a given case. Such obligations are also known as due diligence obligations. The term 'due diligence' derives from the Latin word *diligentia* and concerns a qualifier of behaviour that can be activated by one or multiple obligations requiring a due diligence performance. Such due diligence obligations are closely linked with the idea of risk management.[12] The classic example in this regard is the duty of a doctor. Generally speaking, a doctor is not required to always heal a patient, but instead the doctor needs to take sufficient care of the patient.[13] Under international human rights law, the same can be said about states that have to deal with human

[10]M. Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights', (2021) 68 *Netherlands International Law Review* 121.

[11]From a theoretical perspective, feminist contributions have already been engaging with due diligence by criticizing the state centricity of human rights law and the division between the private and public domain that left those most vulnerable unprotected from violence in the private sphere. See, for instance, C. Chinkin, 'A Critique of the Public/Private Dimension', (1999) 10 EJIL 387. Another noteworthy alternative is a 'culturally appropriate approach' towards due diligence in international law. See, for instance, M. Malaihollo, 'On Due Diligence and the Rights of Indigenous Peoples in International Law: What a Māori World View Can Offer', (2023) 70 *Netherlands International Law Review* 65. For a culturally sensitive approach to human rights implementation see also J. Fraser, *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (2020), at 41–61.

[12]A. Peters, H. Krieger and L. Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates', in Peters, Krieger and Kreuzer, *supra* note 1, at 2. For a recent definition on due diligence in international law see also Besson *supra* note 2, at 23–4.

[13]See Dupuy, *supra* note 2, at 375; R. Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), 1009; C. P. Economides, 'Content of the Obligation: Obligations of Means and Obligations of Result', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), 371, at 375; Malaihollo, *supra* note 10, at 128–9.

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rights interferences by non-state actors. International human rights law contains positive obligations that require states to take appropriate measures to protect human rights, yet they do not require states to successfully protect every individual from every human rights violation. Instead, states are required to perform their best efforts in doing so. In that sense, due diligence obligations are often qualified as obligations of conduct, and not of result.[14]

It should be noted here that regional human rights courts, like the ECtHR and the IACtHR, usually do not explicitly refer to due diligence in their legal reasoning when assessing whether a state has violated its positive obligation under the relevant treaty.[15] When it comes to ECtHR case law, this is especially true for cases where the Court deals with positive obligations that are clearly and well defined. Examples include the obligation to make certain actions illegal, to conduct investigations, or to establish an effective state apparatus. That said, one may indeed wonder whether such types of obligations should be assessed in the light of due diligence, as it would be incorrect to classify all positive obligations as due diligence obligations.[16] While a positive obligation can also be expressed as an obligation of result, such obligations can still be crucial aspects of the overall obligation of states to safeguard human rights. An example is the domestic implementation of human rights standards.[17] This is because when a human rights court evaluates a state's obligation to protect human rights, it considers whether the state had an adequate apparatus or enacted the necessary legislation. Therefore, the obligations to enact legislation and to establish an effective state apparatus are essential features of the general obligation to protect human rights, and need to be understood against the backdrop of risk management by the state.[18]

It is indeed appropriate to observe due diligence obligations in the terms of risk management, yet it would be misguided to think that due diligence obligations only operate in such a context. As identified elsewhere by Malaihollo, due diligence obligations in international law are also used as a regulatory technique in that these broadly formulated, open-ended obligations make it possible to outsource decision-making, and to some extent, law-making to individual states. Here, 'outsourcing' does not refer to an act of employing outside specialists to create regulations, nor does it include the act of seeking input from the public or experts in the process of making laws. Instead, it comprises a more radical approach where the party outsourcing the task defines the desired outcomes or objectives using 'duties of care'. Such obligations do not prescribe specific methods for achieving a particular goal, but only mandate that the duty-bearer demonstrates their best efforts. It is then up to the duty-bearer to determine how to accomplish the designated objective.[19] With such a mode of regulation, law-making is decentralized in many branches of international law. The advantage of this is that the expertise of individual states can be fully utilized, and regulatory end-goals can be effectively reached. In the end, states are best equipped to regulate further and give more concrete meaning to the open-ended due diligence obligation with more concrete and specific norms.[20] Various states also have their own laws and practices, and specific international obligations can potentially 'cut against the grain' of state sovereignty.[21] Thus,

[14]For a thorough understanding on different perspectives of obligations of conduct and obligations of result in international law see also Malaihollo, *supra* note 10, at 128–35.

[15]A clear exception here is the ECtHR's decision in *Volodina v. Russia*, Judgment of 9 July 2019, [2019] ECHR, in which the Court explicitly and in quite some detail discussed due diligence, following the views of the UN Committee on the Elimination of Discrimination against Women.

[16]See also V. Stoyanova, 'Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women', in J. Niemi, L. Peroni and V. Stoyanova (eds.), *International Law and Violence against Women: Europe and the Istanbul Convention* (2020), 95.

[17]See Fraser, *supra* note 11, at 70.

[18]See also Ollino, *supra* note 4, at 255–6; see Malaihollo, *supra* note 10, at 136.

[19]P. Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (2018), at 2–3, 5; Malaihollo, *supra* note 10, at 131–2.

[20]See in particular Malaihollo, 9ibid., at 132; see Fraser, *supra* note 11, at 4–6.

[21]See ILA Study Group on Due Diligence in International Law, ILA Second Report, *supra* note 2, at 2; Besson, *supra* note 2, at 215.

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in order to reach the regulatory end-goals of a due diligence obligation, the discretion provided by the obligation encourages states to participate in treaty and customary regimes.

Against this backdrop, Malaihollo has introduced a working model of due diligence obligations, which includes two paradigms.[22] On the one hand, they operate in an accountability paradigm where their function is one of risk management. In this paradigm, the central issue is 'how is the accountability of the norm addressee established?' On the other hand, due diligence obligations operate in a regulation paradigm where the discretion of the due diligence obligation makes it possible to outsource further law- and decision-making to states. In this paradigm, due diligence obligations have a completely different role. The central issue in this paradigm is 'what (concrete and specific) measures is a state required to take?' Clearly, due diligence obligations operate differently in these paradigms, leading to different functions. The two paradigms, however, cannot be understood in an isolated or 'black-and-white' manner. Instead, both paradigms are important to each other as one interacts with the other. After all, the assessment of accountability of the duty-bearer depends on what concrete or specific measures the norm addressee could have taken. In addition, the concretization of a due diligence obligation by international courts and tribunals often goes hand in hand with the determination of a violation of the obligation. In this regard, the operationalization of due diligence obligations is important. A comprehensive analysis of this is most suitable in a separate work and not in this article. Instead, this article shall continue analysing the regulation paradigm and the accountability paradigm of due diligence obligations in cases concerning human rights interferences by non-state actors based on a comparison of case law of the ECtHR and the IACtHR.

It should further be noted that Malaihollo's proposed working model of due diligence obligations in international law is used as a theoretical blueprint for the comparative analysis in this article, yet we also aim to build on this working model.[23] By identifying relevant features of due diligence within this model, structuring these in the proposed paradigms, elaborating and expanding on them through a comparative analysis of ECtHR and IACtHR case law, the subsequent parts of our article also give it further meaning.

3. Regulation

In international law, due diligence obligations are useful as a regulatory technique, yet the question remains what happens when the obligations are used as such. This regulation paradigm of due diligence obligations has already been explored in relation to public international law, specifically international environmental law and international human rights law.[24] This section will further develop the obligations in the context of regional human rights law and non-state actors. From a regulatory perspective, or in its regulation paradigm, due diligence obligations contain three important elements: (i) '*aspiration*', (ii) '*discretion in implementation*', and (iii) '*good faith*'. The following subsections will discuss these aspects within ECtHR and IACtHR case law.

3.1 Aspiration

Due diligence obligations in international law always include an aspirational element: its norm addressee is required to take appropriate measures because a certain regulatory end-goal is important and needs to be protected or improved. As such, the norm addressee of a due diligence obligation is expected to aspire to a higher level of performance.[25] In terms of human rights protection in international human rights law, the aspirational aspect of due diligence obligations

[22]See Malaihollo, *supra* note 10, at 134–5.

[23]As called for in ibid., at 135.

[24]Ibid., at 132–3.

[25]See Westerman, *supra* note 19, at 22; Malaihollo, *supra* note 10, at 132.

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always implies the guarantee of a minimum degree of protection. Essentially, while the due diligence obligation strives for a high level of performance, it also ensures that there is a minimum level of protection that must be provided. It follows that while there is a basic level of protection that should be guaranteed, states are encouraged to go beyond this minimum requirement and to strive for a higher level of performance to better protect and promote human rights. But at the very least, a state has a duty to establish and apply an *adequate legal framework* affording human rights protection. This also includes protection from ill-treatment by non-state actors. The basic tenet of the duty to regulate is that states should regulate non-state actors to ensure human rights protection.[26] A state that failed to do so would not be acting diligently.

Having emphasized the duty to regulate for nearly 30 years, the ECtHR is well aware of this duty. For example, in *Costello Roberts* v. *United Kingdom*,[27] the Court found that the United Kingdom's failure to protect the children by effectively enacting laws to criminalize the use of corporal punishment against children by private schools violated Article 3 ECHR. In terms of regulation, the ECtHR noted that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals',[28] which ensures that states cannot delegate their legal human rights responsibilities along with the delegation of public tasks to non-state actors.[29] Also interesting is the partly concurring, partly dissenting opinion by Judges Pinto de Albuquerque and Harutyunyan in *Fernandes de Oliveira* v. *Portugal*, which concerned the suicide of an individual in a private hospital.[30] Albuquerque and Harutyunuan reiterated states' obligation to 'make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patient's lives'.[31] Another case worth mentioning is the case of *Fadeyeva* v. *Russia*,[32] involving a state failure to regulate a non-state actor. A family living near a private steel plant argued that the pollution from the plant interfered with their right to private and family life under Article 8 ECHR. The ECtHR held that the Russian State had a positive obligation to regulate the private industry[33] and to approach the problem with due diligence.[34] According to the Court, in this specific instance the state was required to ensure that Ms. Fadeyeva and her family were resettled to housing outside of the area affected by the pollution. In rendering its judgment, the Court stated that the 'steel plant was not owned, controlled, or operated by the State', but that 'the State's responsibility in environmental cases may arise from a failure to regulate private industry'.[35] Clearly, states are expected to establish some form of minimal regulation in the context of relations between individuals.[36]

The IACtHR appears to take a similar approach. In one of the first cases where the IACtHR discussed the due diligence obligation of Article 1(1) American Convention on Human Rights (ACHR), the Court already expressed that states need 'to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable

[26]See, e.g., UN Committee on Economic, Social and Cultural Rights, *supra* note 1, paras. 9, 18–22; see also L. Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies', (2018) 5 *European Journal of Comparative Law and Governance* 5.

[27]*Costello-Roberts v. United Kingdom*, Judgment of 25 March 1993, [1993] ECHR.

[28]Ibid., para. 27; see also A. Bianchi, *Non-State Actors and International Law* (2009), 454.

[29]See Bianchi, ibid., at 455.

[30]*Fernandes de Oliveira v. Portugal*, Judgment of 28 March 2017, [2017] ECHR.

[31]*Fernandes de Oliveira v. Portugal*, Partly Concurring, Partly Dissenting Opinion Judge Pinto de Albuquerque joined by Judge Harutyunyan of 28 March 2017, [2017] ECHR, para. 3.

[32]*Fadeyeva v. Russia*, Judgment of 9 June 2005, [2005] ECHR.

[33]Ibid., para. 89.

[34]Ibid., para. 128.

[35]Ibid., para. 89.

[36]Here, we see an interesting overlap with the element of capacities of a state within the risk management paradigm. See Section 4.3, *infra*.

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of juridically ensuring the free and full enjoyment of human rights'.[37] More concretely, this means that states need to prevent, investigate and punish human rights violations under the Convention, and attempt to restore human rights violated and provide compensation for damages caused by such violations.[38] Another example where the IACtHR highlighted the obligation of states to regulate and monitor human rights is *Juridical Condition and Rights of Undocumented Migrants*. In its Advisory Opinion, the IACtHR made the link between 'the obligation to respect and ensure human rights' and the relations between individuals, extending the obligation to these relationships.[39] A similar logic was followed by the San José Court in *Ximenes-Lopes* v. *Brazil*.[40] In this case, the IACtHR explained that:

> States must regulate and supervise all activities related to the health care given to the individuals under the jurisdiction thereof, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity giving such health care.[41]

Reference can also be made to recent case law by the IACtHR confirming the duty of states to regulate, supervise and monitor conduct of third parties by establishing a governmental apparatus that ensures human rights protection.[42]

3.2 Discretion in implementation

Both the ECtHR and IACtHR appear to highlight the efforts of states to establish a legal framework that regulates and supervises the relations between individuals. A prevalent concern, nevertheless, is that states are not provided any concrete direction as to how to realize such a framework. This is because regulating the behaviour of individuals is a challenging task on the international level; regulating this by means of specific rules might 'cut against the grain' of state sovereignty.[43] Against this backdrop, states have discretion when it comes to its implementation.[44] From a regulatory perspective, this entails that a state is expected to create more concrete and specific rules to ensure human rights protection.[45] Put differently, a state needs to establish at the minimum a regulatory framework to guarantee human rights protection, yet what exactly this framework would look like seems to fall within the discretion of the states themselves.

In this regard, the ECtHR has famously adopted the doctrine of the margin of appreciation to address the discretion of states in terms of implementing the required minimum level of human rights protection.[46] The margin of appreciation is flexible in that it takes into consideration the minimum standard of human rights protection that is to be provided by state authorities while, at the same time, a degree of discretion is given to states to accommodate their unique

[37] *Godínez-Cruz v. Honduras (Merits)*, Judgment of 21 July 1989, [1989] IACHR (Ser. C No 8), para. 175.

[38] *Velásquez Rodríguez v. Honduras (Merits)*, Judgment of 29 July 1988, [1988] IACHR (Ser. C No 4), para. 166.

[39] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion of 17 September 2003, [2003] IACHR (Ser. A No 18), paras. 146-7.

[40] *Ximenes-Lopes v. Brazil (Merits, Reparations and Costs)*, Judgment of 30 November 2005, [2005] IACHR (Ser. C No 139).

[41] Ibid., para. 89.

[42] *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina (Merits, Reparations and Costs)*, Judgment of 6 February 2020, [2020] IACHR (Ser. C No 400), paras. 207–208; *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion of 15 November 2017, [2017] IACHR (Ser.A No 23), paras. 119, 144–145.

[43] See ILA Study Group on Due Diligence in International Law, ILA Second Report, *supra* note 2, at 2. See also Malaihollo, *supra* note 10, at 132.

[44] For state discretion in international human rights law see Fraser, *supra* note 11, at 66–88.

[45] See Malaihollo, *supra* note 10, at 132–3.

[46] A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012), 1.

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characteristics.[47] In the end, the ECHR system lacks an absolute uniform implementation of human rights law, but instead calls for the adaptation of multiple specificities of a state, such as its history, political, social and cultural aspects.[48] The rationale here is that states are in a better position to appraise which measures are to be taken.[49]

In the context of Article 8 ECHR (family life, private life, and correspondence), the margin of appreciation is also referred to in giving states discretion in realizing human rights protection against conduct by non-state actors. For instance, in *R.B.* v. *Hungary* the ECtHR made it clear that states 'enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals'.[50] However, the Court also explained that the positive obligations related to Article 8 ECHR required a higher standard of states to respond to 'alleged bias-motivated incidents'.[51] In the assessment of the due diligence performance of the state, the Court concluded that the criminal law mechanisms implemented were defective to the degree that it violated the state's positive obligations under Article 8 ECHR.[52] Put differently, the state had a wide margin of appreciation, but since it failed to fulfil the minimum standard of human rights protection under Article 8 it violated the Convention.

In other cases, the importance of a specific right itself has appeared to influence the matter of discretion given to states. For instance, in terms of the right to life the ECtHR has held that a state is obliged 'to do everything within [its] power' to protect this right, whereas the obligation to protect the right to a peaceful enjoyment of possessions (a non-absolute right) 'cannot extend further than what is reasonable in the circumstances'.[53] Further, although states are not expected to protect all individuals from torture at all times, as this would impose an 'excessive burden' on authorities, they are expected to 'at least' provide effective protection for vulnerable persons and to take 'reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.[54] Connected to this, the Court moved on and asserted that the state enjoys a broader margin of appreciation in deciding what measures to take to protect individuals' right to the peaceful enjoyment of possessions than they do in deciding how to protect the right to life.

Similar to the ECtHR, the IACtHR seems to endorse the idea of the margin of appreciation.[55] As indicated by Duhaime, 'the Inter-American institutions have referred to the [doctrine of the margin of appreciation] or some other form of recognition of deference towards States'.[56] However, the Court follows a more cautious approach.[57] Especially in cases where non-state actors

[47]F. Mégret, 'Nature of Obligations', in D. Moeckli et al. (eds.), *International Human Rights Law* (2018); Malaihollo, *supra* note 10, at 145.

[48]*The Sunday Times v. United Kingdom (No 1)*, Judgment of 26 April 1979, [1979] ECHR, para. 61.

[49]*Ireland v. United Kingdom*, Judgment of 18 January 1978, [1978] ECHR, para. 207; see also Mégret, *supra* note 47, at 102; J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', (2011) 29 *Netherlands Quarterly of Human Rights* 324, at 326.

[50]*RB v. Hungary*, Judgment of 12 April 2016, [2016] ECHR, para. 81.

[51]Ibid., para. 84.

[52]Ibid., para. 85.

[53]*Budayeva and Others v. Russia*, Judgment of 20 March 2008, [2008] ECHR, para. 175. Although this case did not involve non-state actors, it reflects the approach taken in case law that does involve non-state actors, as seen below.

[54]*O'Keeffe v. Ireland*, Judgment of 28 January 2014, [2014] ECHR, para. 144, citing *X and Y v. the Netherlands*, Judgment of 26 March 1985, [1985] ECHR, paras. 21–27; *A v. the United Kingdom*, Judgment of 23 September 1998, [1998] ECHR, para. 22; *Z and Others v. the United Kingdom*, Judgment of 10 May 2001, [2001] ECHR, paras. 74–75; *DP and JC v. the United Kingdom*, Judgment of 10 October 2002, [2002] ECHR, para. 109; *MC v. Bulgaria*, Judgment of 4 December 2003, [2003] ECHR, para. 149.

[55]J.-P. Cot, 'Margin of Appreciation', in *Max Planck Encyclopedia of Public International Law*, June 2007, para. 24, available at opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1438. See also B. Duhaime, 'Subsidiarity in the Americas: What Room Is There for Deference in the Inter-American System?', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standards of Review and Margin of Appreciation* (2014), 289, at 300.

[56]See Duhaime, ibid., at 305.

[57]Ibid., at 301, 303.

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have interfered with human rights, it is difficult to determine whether the Inter-American Court has developed a coherent doctrine on the matter. A possible reason for this is the historic context of the Inter-American human rights system, where the IACtHR has dealt with many cases of enforced disappearances. If the Inter-American institutions had given domestic courts discretion, hardly any state would have ever been condemned.[58]

Although the IACtHR has been very careful in using the doctrine, there have been voices for more support of the doctrine in the Inter-American context these days.[59] One argument is that the contemporary political and social context in which international human rights law operates in the Inter-American region is not the same as that of two or three decades ago.[60] Follesdal also sees potential in adopting the doctrine of the margin of appreciation in the Inter-American system. Although critics may argue that the doctrine is inappropriate due to the less 'democratic' states in the region, the 'democratic quality' between the state parties to the ECHR and those to the IACHR is not so different.[61] With that in mind, the way in which the ECtHR has applied the margin of appreciation to less democratic states may be relevant for the IACtHR. Moreover, the invocation of a margin of appreciation may 'nudge' states to perform a fair balance test themselves, which could promote democratic liberation and the independence of the judiciary.[62]

3.3 Good faith

Good faith comprises a core element of due diligence obligations.[63] After all, a state is not considered diligent if it acts in bad faith or knowingly refuses to take any measures to protect human rights.[64] From a regulatory perspective, this means that good faith is necessary to ensure that states actively fulfil their obligations and achieve the intended regulatory goals. This becomes particularly apparent from the regulatory idea that the norm addressee of a due diligence obligation is persuaded to take measures in such a manner that its regulatory aim shall be achieved. In some branches of international law, this is realized via reporting norms that push the duty-bearer of a due diligence obligation to reach the aspiration or regulatory end-goal by taking action. However, not every branch of international law contains such norms.[65] In such cases, the due diligence obligation needs to be read against the backdrop of good faith. The underlying rationale is that states are required to 'perform their obligations with the genuine intention to achieve a positive result'.[66] This is not merely a moral expression, but also a legal one, as it forms the foundational baseline structure of obligations deriving from the sources of international law.[67]

[58]See also A. A. Cançado Trindade, *El Derecho Internacional de Los Derechos Humanos En El Siglo XXI* (2008), 390; A. Follesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights', (2017) 15 *International Journal of Constitutional Law* 359, at 362; Duhaime, *supra* note 55, at 303.

[59]C. Gaviria, 'Towards a New Vision of the Inter-American Human Rights System', (1996) 4 *Journal of Latin American Affairs* 4, at 9; see also M. Pinto, 'National and International Courts-Deference or Disdain?', (2008) 30 *Loyola of Los Angeles International & Comparative Law Review* 247, at 256; Duhaime, *supra* note 55, at 302.

[60]J. Contesse, 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights', (2017) 15 *International Journal of Constitutional Law* 414, at 415. Important to note, however, is that Contesse does not assert this in the specific context of the margin of appreciation. Instead, he makes a general observation of the historical and social developments of the Inter-American human rights system and links this to the question of whether states should have greater room for deference.

[61]See Follesdal, *supra* note 58, at 368–9.

[62]Ibid., at 369–70.

[63]See Malaihollo, *supra* note 10, at 149–50.

[64]See ILA Study Group on Due Diligence in International Law, ILA Second Report, *supra* note 2, at 13.

[65]See Malaihollo, *supra* note 10, at 133.

[66]Ibid., at 133.

[67]*Nuclear Tests (Australia v. France)*, Jurisdiction and/or Admissibility, Judgment of 20 December 1974, [1974] ICJ Rep. 253, at 268, para. 46; see also J. Wouters, 'Bronnen van Het Internationaal Recht', in N. Horbach, R. Lefeber and O. Ribbelink (eds.), *Handboek Internationaal Recht* (2007), 81, at 103.

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Without the notion of good faith persuading states to take action, a due diligence obligation would only require states to 'try and do something' within the scope of the discretionary powers they have. In such a scenario, states would not be pushed by law to reach the aimed aspiration of the obligation.[68] The notion of good faith, therefore, fills up this gap and 'deploys a certain kind of constitutional quality within the international law scheme and beyond that is conceived to be the very foundation of all law'.[69]

In the context of the ECHR, its human rights system is based on the discretion that states have and the rather subsidiary function that the ECtHR has.[70] Due to the diversity of state parties to the ECHR, the social field that is to be supervised by the ECtHR is particularly diverse. As indicated earlier, states have discretion in terms of implementation and the underlying rationale is that realizing the required efforts of states as regards human rights protection under the ECHR heavily depends on the mandate and consent of member states.[71] Continuing co-operation is, without a doubt, important to realize an adequate level of human rights protection amongst the state parties. The Strasbourg Court has been aware of this in that the enforcement of its judgments fundamentally rely on the good faith of the states.[72] Domestic authorities, therefore, are required to take the discretion they have seriously by implementing the ECHR with the genuine intention to protect human rights. In doing so, the notion of good faith pushes the member states to take action in light of protecting human rights.

In contrast to the ECtHR, the IACtHR appears to follow a more maximalist approach. In the landmark case *Almonacid Arellano* v. *Chile*, the IACtHR revealed a doctrine that the members of the IACtHR had been 'waltzing' with for some time, namely the doctrine of constitutionality control.[73] This doctrine, which also has been qualified as 'a genuine constitutional big bang',[74] refers to the obligation of public authorities of all state parties to the ACHR to set aside domestic laws that are in conflict with the Convention and interpretations of the IACtHR.[75] Some argue that the basis for the constitutionality control doctrine is Article 2 ACHR,[76] while others refer to *pacta sunt servanda*.[77]

[68]See Malaihollo, *supra* note 10, at 147.

[69]M. Kotzur, 'Good Faith (Bona Fide)', *Max Planck Encyclopedia of Public International Law*, January 2009, para. 25, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?prd = OPIL.

[70]L. R. Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (2016), 43. Note that Glas does not express this explicitly. She rather discusses the developments of the ECHR having a lesser subsidiary role, making the system relying less on states taking measures in good faith. Reasoning *a contrario* it can be said that the ECHR system is based on the idea that states are required to act in good faith.

[71]Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), 3, 17; Malaihollo, *supra* note 10, at 148.

[72]Y. Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry', in A. Follesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (2013), 62, at 63. For a more general critical discussion of the enforcement of ECtHR judgments see É. Lambert Abdelgawad, 'The Enforcement of ECtHR Judgments', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (2017), 326.

[73]The artistic metaphor is borrowed from Burgorgue-Larsen who qualified the process of this judicial creation as 'the judicial waltz in three quarter time'; L. Burgorgue-Larsen, 'Conventionality Control: Inter-American Court of Human Rights (IACtHR)', in *Max Planck Encyclopedia of International Procedural Law*, December 2018, paras. 4–12, available at opil.ouplaw.com/view/10.1093/law-mpeipro/e3634.013.3634/law-mpeipro-e3634?prd = OPIL.

[74]L. Burgorgue-Larsen, 'Chronicle of a Fashionable Theory in Latin America: Decoding the Doctrinal Discourse on Conventionality Control', in Y. Haeck, O. Ruiz-Chiriboga and C. Burbano-Herrera (eds.), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (2015), 647, at 653.

[75]See Contesse, *supra* note 60, at 415; Burgorgue-Larsen, *supra* note 73, para. 2.

[76]See Burgorgue-Larsen, ibid., para. 14. Art. 2 provides that where legislative or other provisions do not already ensure the exercise of the rights in the ACHR, 'States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.'

[77]According to Art. 26 of the Vienna Convention on the Law of Treaties, this means that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 26; see Contesse, *supra* note 60, at 418.

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From a regulatory perspective, the constitutionality control doctrine may be praised in terms of advancing regional human rights. The doctrine significantly supplements the general due diligence obligation to protect human rights, and strongly persuades states to take action and realize human rights protection. Nonetheless, it has received profound criticism.[78] As Contesse notes, the IACtHR failed, for instance, to sufficiently take into account the realities of different models of judicial review in its member states.[79] According to the constitutionality control doctrine, a domestic judge shall have to follow the Inter-American Court and review a domestic law. This leads to a paradoxical situation for domestic judges. In some domestic legal systems, not all judges have power of judicial review. In Chile, for instance, only one single specialized court possesses the power to review domestic laws, but at the same time, it is obliged by the doctrine of constitutionality to set aside a domestic law if it contravenes the ACHR. To make matters even more complex, some states – like Colombia – use a mixed system where the powers of judicial review are shared between the Constitutional Court and district judges.[80] In later case law, the IACtHR has added slight adjustments to the doctrine of constitutionality in that 'organs of the Judiciary' must apply the doctrine 'evidently in the context of their respective spheres of competence and the corresponding procedural regulations'.[81] However, this still did not solve the issue of the IACtHR overthrowing domestic legal standards in those states where courts of first instance have no power to review a domestic law at all. In the light of this, some authors have proposed models of making the constitutionality control doctrine more compatible, yet various attempts to make sense of the doctrine have been unsuccessful.[82] Others have proposed alternatives of a more subtle approach of judicial dialogue between the IACtHR and domestic courts.[83] Perhaps employing the notion of good faith in a less maximalist and supreme manner would suffice. This remains an open question.

4. Risk management

As illustrated above, due diligence is relevant in light of risk management. But what are the parameters or benchmarks that influence a due diligence performance? Early judicial practice has provided multiple benchmarks in this regard.[84] These comprise: (i) 'knowledge or foreseeability';[85] (ii) 'interests at stake';[86] (iii) 'capacity of the state';[87] and (iv) 'level of

[78]See also Contesse, ibid., at 422.

[79]Ibid., at 419–20.

[80]Ibid., at 419.

[81]*Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 24 November 2006, [2006] IACHR (Ser. C No 158), para. 128; Contesse, ibid., at 420.

[82]See, generally, Contesse,ibid; see, in particular, M. Carmelina Londoño Lázaro, 'El Principio de Legalidad y El Control de Convencionalidad de Las Leyes: Confluencias y Perspectivas En El Pensamiento de La Corte Interamericana de Derechos Humanos', (2010) 43 *Boletín Mexicano de Derecho Comparado* 761, at 811; N. P. Sagües, 'Obligaciones Internacionales y Control de Convencionalidad', (2010) 8 *Estudios Constitucionales* 117, at 130; K. A. Castilla Juárez, 'Control Interno o Difuso de Convencionalidad? Una Mejor Idea: La Garantía de Los Tratados', (2013) 13 *Anuario Mexicano de Derecho Internacional* 51, at 92–3.

[83]See, in particular, Contesse, ibid., at 424–34.

[84]For an extensive analysis of the development of these parameters in early judicial decisions and arbitral awards see G. Bartolini, 'The Historical Roots of the Due Diligence Standard', in Krieger, Peters and Kreuzer, *supra* note 1, at 23.

[85]See Section 4.1, *infra*. See also ILA Study Group on Due Diligence in International Law, ILA Second Report, *supra* note 2, at 12–13; Bartolini, *supra* note 84, at 38–9; Baade, *supra* note 1, at 98; Monnheimer, *supra* note 3, at 117–21; Ollino, *supra* note 4, at 156–63.

[86]See Section 4.2, *infra*. See also ILA Study Group on Due Diligence in International Law, ILA Second Report, ibid., at 12; J. Sarkin, 'A Methodology to Ensure That States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence against Women Around the World', (2018) 40 *Human Rights Quarterly* 1, at 18; Bartolini, ibid., at 38–9; Baade, ibid., at 98–9; Ollino, ibid., at 178–80.

[87]See Section 4.3, *infra*. See also ILA Study Group on Due Diligence in International Law, ILA Second Report, *supra* note 2, at 10–11; Bartolini, ibid., at 36–7; Baade, ibid., at 99; Monnheimer, *supra* note 3, at 121–8; Ollino, ibid., at 180–3.

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control'.[88] Similar to the previous section, these elements will be examined by comparing ECtHR case law with IACtHR case law.

Before we assess these matters, two notable issues require consideration. First, our analysis refrains from discussing the issue of causation, which 'plays an important role in the practice of international responsibility'.[89] Causation is an important element when determining a breach of a due diligence obligation and its consequences. However, the aim of this article is not to present a comparison of the ways in which these Courts engage with the issue of causation in such context – which also has been extensively discussed in legal literature already – but to compare the relevant elements related to due diligence within the context of risk management.[90]

Second, as will be seen in Sections 4.1–4.4, the concept of reasonableness (*bonus pater familias*) takes an important role when it comes to risk management. Deriving from the nature of sovereignty, the state, after all, is expected to act competently.[91] This is relevant in the context of assessing each individual parameter that influences a due diligence performance, as will be shown in the following subsections. Besides being used for the assessment of an individual parameter, the concept of reasonableness is also used as an overarching standard to fairly balance all parameters collectively against each other in the operationalization of a due diligence obligation. Consider, for instance, a small degree of foreseeability that may be counterbalanced by a significant risk to an interest of fundamental weight, like the protection of life that could be at stake. In such a situation, the state would likely fail in terms of risk management if it did not take action that could be reasonably expected from it to protect the life of an individual.[92] As illustrated by these examples, due diligence obligations of states are extremely context-dependent and, hence, flexible to apply in cases of human rights interferences by non-state actors.[93]

4.1 Knowledge or foreseeability

As emphasized by multiple authors, knowledge is a crucial parameter that triggers a due diligence obligation.[94] States can usually only be expected to perform due diligence if they have knowledge of a particular activity or potential risk.[95] The ECtHR has acknowledged that the presence of actual knowledge may trigger a due diligence obligation. This knowledge may be determined by the adoption of legislation that addresses a particular harm or risk thereof,[96] scientific research,[97] national reports[98] or history indicating potential harm.[99] Further, the Strasbourg Court has repeatedly emphasized that states are not responsible for preventing all instances of human rights abuse caused by non-state actors but must take certain measures in circumstances where they 'knew or ought to have known at the time of the existence of a real and immediate risk' to an

[88]See Section 4.4, *infra*. See also ILA Study Group on Due Diligence in International Law, ILA Second Report, ibid., at 11–12; Bartolini, ibid., at 39–40; Baade, ibid., at 99; Ollino, ibid., at 133–56.

[89]See Besson, *supra* note 2, at 154.

[90]For relevant analyses on causation see I. Plakokefalos, 'Causation in the Law of Responsibility and the Problem of Overdetermination: In Search of Clarity', (2015) 26 EJIL 471; V. Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR', (2018) 18 *Human Rights Law Review* 309.

[91]See Stoyanova, *supra* note 7, at 605; Besson, *supra* note 2, at 67–8.

[92]For similar examples see Baade, *supra* note 1, at 101.

[93]On the variability of due diligence see also Besson, *supra* note 2, at 117–20.

[94]See Pisillo-Mazzeschi, *supra* note 2, at 44; Baade, *supra* note 1, at 98; Monnheimer, *supra* note 3, at 204; Bessonibid., at 101–2, 121.

[95]See ILA Study Group on Due Diligence in International Law, ILA Second Report, *supra* note 2, at 12.

[96]See *O'Keeffe v. Ireland*, *supra* note 54, para. 168; *Brincat and Others v. Malta*, Judgment of 24 July 2014, [2014] ECHR, para. 105.

[97]See *Brincat and Others v. Malta*, ibid., para. 106.

[98]*Öneryildiz v. Turkey*, Judgment of 30 November 2004, [2004] ECHR, para. 98.

[99]For instance, a state may be expected to monitor a situation to protect children from a family member who already has been convicted of sexual offences; *E and Others v. United Kingdom*, Judgment of 26 November 2002, [2002] ECHR, para. 96.

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individual's rights.[100] The IACtHR also has illustrated that actual knowledge, if proven, can trigger a state's due diligence obligation.[101]

Human rights courts have also acknowledged that constructive knowledge may trigger a due diligence obligation.[102] What matters is that a state ought to have known about a human rights violation or the risk thereof, not necessarily whether a state actually had specific prior knowledge. The ECtHR, in this respect, often refers to 'knew or ought to have known'.[103] A case in point here is the Court's landmark ruling in *Osman* v. *United Kingdom*.[104] The Court used the language of constructive knowledge, which it has repeatedly reiterated and which is comparable to standards found elsewhere in international human rights law.[105] IACtHR case law also shows that constructive knowledge can trigger a due diligence obligation. For example, in *Pueblo Bello Massacre* v. *Colombia* the forced disappearance of 37 persons and an extrajudicial execution of 6 individuals was carried out by paramilitary groups with the acquiescence of state agents. Although no 'specific prior knowledge' by the state authorities was proved, it was irrelevant for the proceedings to establish the existence of such evidence since, according to the Court, 'this could never condition the State's obligation to provide protection'.[106] As such, constructive knowledge appears to be a satisfactory requirement to trigger a due diligence obligation.[107]

Both ECtHR and IACtHR case law also notably illustrate that the parameter of 'knowledge or foreseeability' operates in combination with the 'proximity of a risk'. The language of the ECtHR suggests that a state will only be subject to an obligation under the Convention to take appropriate action when it either knew or ought to have known of a '*real and immediate*' risk to an individual and does not take appropriate measures to remove them from the situation or risk.[108] Similar to the ECtHR, the IACtHR assesses knowledge or foreseeability in relation to risk proximity. For instance, the existence of actual knowledge would only be relevant if the state is aware of an 'imminent danger'. If the state would only be aware of an abstract danger, its failure to prevent the situation would not *per se* result in a violation.[109] This also reflects the common observation that the obligation to protect is one of conduct and not of result.[110]

This being said, the parameter of 'knowledge or foreseeability' appears to work in a non-binary manner and can have different degrees. In that way, it operates on a sliding-scale assessment

[100]*Osman v. United Kingdom*, Judgment of 28 October 1998, [1998] ECHR, para. 116; *Opuz v. Turkey*, Judgment of 9 June 2009, [2009] ECHR, paras. 129–130; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Judgment of 17 July 2014, [2014] ECHR, para. 130.

[101]See, for instance, *Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)*, Judgment of 29 March 2006, [2006] IACHR (Ser. C No 146), paras. 155–160.

[102]See Baade, *supra* note 1, at 98; Monnheimer, *supra* note 3, at 205; Stoyanova, *supra* note 7, at 606.

[103]See *Osman v. United Kingdom*, *supra* note 100, para. 116; *Opuz v. Turkey*, *supra* note 100, paras. 129–130; *Mahmut Kaya v. Turkey*, Judgment of 28 March 2000, [2000] ECHR, para. 86; see *DP and JC v. United Kingdom*, *supra* note 54, para. 112; *Mastromatteo v. Italy*, Judgment of 24 October 2002, [2002] ECHR, para. 68; see *O'Keeffe v. Ireland*, *supra* note 54, para. 144; *Kemaloğlu v. Turkey*, Judgment of 10 April 2012, [2012] ECHR, para. 36; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, *supra* note 100, para. 130. For means of assessing constructive knowledge see also Stoyanova, *supra* note 7, at 607–8.

[104]See *Osman v. United Kingdom*, *supra* note 100.

[105]For example, in the context of the right to liberty, see *Storck v. Germany*, Judgment of 6 June 2005, [2005] ECHR. For other practice, in particular the UN Committee on the Elimination of Discrimination Against Women, see also *Angela González Carreño v. Spain*, Communication no. 47/2012, UN Doc. CEDAW/C/58/D/47/2012 (2014). For a discussion see Lane, *supra* note 26, at 59–60.

[106]*Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, Judgment of 31 January 2006, [2006] IACHR (Ser. C No 140), para. 135.

[107]See *The Environment and Human Rights Opinion*, *supra* note 42, para. 120; Monnheimer, *supra* note 3, at 205.

[108]See *Osman v. United Kingdom*, *supra* note 100, para. 121; *CN v. United Kingdom*, Judgment of 13 November 2012, [2012] ECHR, para. 67. For an analysis of 'real and immediate risk' see also Stoyanova, *supra* note 7, at 612–15.

[109]*González et al. ('Cotton Field') v. Mexico (Preliminary Objection, Merits, Reparations, and Costs)*, Judgment, of 16 November 2009, [2009] IACHR (Ser. C No 205), paras. 281–283.

[110]See Baade, *supra* note 1, at 92.

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against the backdrop of the reasonableness standard *bonus pater familias*.[111] For instance, in *Osman* the Strasbourg Court used the foreseeability test, yet it held that the obligation to take operational measures must not 'impose an impossible or disproportionate burden on the authorities'.[112] In other words, the notion of reasonableness should guide the determination of measures a state can be expected to take.[113] The IACtHR appears to follow a similar logic, but strikingly the IACtHR pays more attention to groups requiring some form of 'special protection' to determine when a situation or risk is reasonably foreseeable. For instance, foreseeability is earlier determined if the victims of human rights violations are members of a vulnerable group or in need of special protection, such as human rights defenders[114] or vulnerable members of indigenous peoples.[115]

4.2 Interests at stake

In terms of risk management, the specification of the protected rights and interests is important, as well as the vulnerability or special quality of the beneficiary of a state's best-efforts performance.[116] In that way, a state's degree of expected efforts will be higher if the beneficiary of these efforts is more vulnerable. Examples include women,[117] children[118] or persons belonging to an indigenous community.[119] At the same time, the context-specific nature of due diligence is very clearly evidenced in relation to the parameter of the interests at stake in a particular case. A state, for instance, cannot be responsible for all human rights violations committed between individuals within its jurisdiction because 'the specific circumstances of the case and the execution of these guarantee obligations must be considered'.[120] In the context of the European human rights system, there are two main aspects of this that can impact what is expected of states.

First, the existence of other obligations and interests, which must be balanced against the interests and rights at stake in the case. In this respect, the Court has made it clear that international human rights law does not require the state to violate other rules of international law to perform a particular due diligence standard and that, against the backdrop of *bonus pater familias*, competing interests and rights need to be balanced against one another.[121] This was

[111]See Stoyanova, *supra* note 7, at 618–19. According to Baade, 'foreseeability can have different degrees. How close or remote the risk ought to have seemed is a sliding-scale factor in the assessment of what reaction would have been reasonable'. See Baade, ibid., at 98.

[112]See *Osman v. United Kingdom*, *supra* note 100, para. 116; *O'Keeffe v. Ireland*, *supra* note 54, para. 114.

[113]This has been further reiterated in many cases, such as *Rantsev v. Cyprus and Russia*, Judgment of 7 January 2010, [2010] ECHR, para. 287; *LE v. Greece*, Judgment of 21 January 2016, [2016] ECHR, para. 67; see V. Stoyanova, 'Chowdury and Others v. Greece: Further Integration of the Positive Obligations under Article 4 of the ECHR and the CoE Convention on Action against Human Trafficking', *Strasbourg Observers*, 28 April 2017, available at strasbourgobservers.com/2017/04/28/chowdury-and-others-v-greece-further-integration-of-the-positive-obligations-under-article-4-of-the-echr-and-the-coe-convention-on-action-against-human-trafficking/.

[114]*Valle Jaramillo et al. v. Colombia (Merits, Reparations, and Costs)*, Judgment of 27 November 2008, [2008] IACH (Ser. C No 192), para. 81; Monnheimer, *supra* note 3, at 217.

[115]See *Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)*, *supra* note 101, para. 157; Monnheimer, ibid., at 217.

[116]See Besson, *supra* note 2, at 63–6,123–4.

[117]See *Opuz v. Turkey*, *supra* note 100, paras. 129–130; *Talpis v. Italy*, Judgment of 2 March 2017, [2017] ECHR, paras. 29, 98–99; L. Grans, 'The Concept of Due Diligence and the Positive Obligation to Prevent Honour-Related Violence: Beyond Deterrence', (2018) 22 *International Journal of Human Rights* 733; C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (2008).

[118]See *O'Keeffe v. Ireland*, *supra* note 54, para. 144; Besson, *supra* note 2, at 123; Ollino, *supra* note 4, at 178; Monnheimer, *supra* note 3, at 217.

[119]See *Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)*, *supra* note 101, para. 157; Monnheimer, ibid., at 217; Malaihollo, *supra* note 11, at 77.

[120]See *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, *supra* note 106, para. 123.

[121]See *Osman v. United Kingdom*, *supra* note 100, para. 116; *Opuz v. Turkey*, *supra* note 100, para. 129.

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clearly stated in *Ilaşcu and Others* v. *Moldova and Russia*, where in the words of the Court: '[i]n determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual'.[122] The second aspect affecting the level of activity required by states is the nature of the right being claimed in a case (i.e., whether or not it is absolute) and the seriousness of the (potential) harm that an individual has/would suffer. In the ECtHR's view, for example, 'where there is evidence of patterns of violence and intolerance against an ethnic minority ... the positive obligations incumbent require a higher standard of States to respond to alleged bias-motivated incidents'.[123] On a more general basis, the Court has suggested that the seriousness of (risks of) harm caused by a non-state actor to an individual dictates to some extent the degree to which a state should involve itself to protect the individual. For instance, in *Özgür Gündem* v. *Turkey* the seriousness and widespread nature of attacks against a newspaper and its staff prompted the Court to find that the state's reliance on investigations that had been ordered on a case-by-case basis by individual public prosecutors was not sufficient to fulfil the duty to 'investigate and, where necessary, provide protection against unlawful acts involving violence', especially given that the applicants had alleged that the authorities tolerated, if not supported, the campaign of which the attacks in question were part.[124]

The IACtHR follows a similar logic. A good example can be found in *The Environment and Human Rights*.[125] In this landmark Advisory Opinion, the IACtHR reaffirmed that the successful exercise of human rights depends on the existence of a healthy environment. States, in that respect, must take appropriate measures to prevent significant environmental harm to individuals. Nonetheless, measures that a state needs to take may be greater and different in the case of fragile ecosystems compared to those it needs to take to manage risks of damages to other components of the environment. The underlying reason for this is that fragile ecosystems have unique features and resources, and can impact global climate – making it more vital for a state to take measures.[126] Therefore, the IACtHR follows the same general rule of thumb as the ECtHR: the more important an interest or right, the more necessary it becomes to take action.[127]

Notably, non-derogable rights – such as the right to life – can have an important impact on a state's performance to act with due diligence. Although states should ensure all human rights, in several cases, both the ECtHR and the IACtHR have emphasized the fundamental role of the right to life. For instance, in *Opuz* v. *Turkey*, the ECtHR determined that 'in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity'.[128] Similarly, the Court holds it to be 'especially necessary' when dealing with absolute rights to determine whether (and to what extent) a minimum effort on behalf of the state to act to protect individuals was possible despite a state's total or partial failure to act, and if indeed possible, whether that effort should have been made.[129] In the same way, the IACtHR has pointed out that the right to life is an 'essential corollary for realising other human rights' and that states need to 'adopt all the appropriate measures' and must 'adopt the necessary

[122]*Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, [2004] ECHR, para. 332.

[123]See *RB v. Hungary*, *supra* note 50, para. 84. In the context of children and other vulnerable persons, it also appears that states are required to take effective measures. See also *E and Others v. United Kingdom*, *supra* note 99, para. 88; *O'Keeffe v. Ireland*, *supra* note 54, para. 144.

[124]*Özgür Gündem v. Turkey*, Judgment of 16 March 2000, [2000] ECHR, paras. 44–45.

[125]See *The Environment and Human Rights Opinion*, *supra* note 42.

[126]Ibid., para. 142.

[127]The IACtHR also takes the position that 'the State has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority'. *Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations, and Costs)*, Judgment of 17 June 2005, IACHR (Ser. C No 125), para. 162.

[128]See *Opuz v. Turkey*, *supra* note 100, para. 147.

[129]See *Ilaşcu and Others v. Moldova and Russia*, *supra* note 122, para. 334.

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measures' to realize sufficient protection of the right to life.[130] Human rights courts, thus, regard the status and hierarchical rank of human rights as a serious one, leading to a heightened standard of care that is to be expected from a state, and less leeway to discharge its due diligence obligation.[131]

4.3 Capacity of the state

As explained by Bartolini, early judicial practice in international law identifies the means at disposal for the state as a factor influencing a state's due diligence performance.[132] The underlying idea is that the performance of due diligence obligations is to be balanced in light of the available means for the state. With that in mind, it cannot be expected for a state to be responsible for omissions if it lacks, for instance, financial resources to mitigate and manage potential harm or the risks thereof.[133] In respect of human rights protection, the ECtHR often interprets due diligence obligations as taking measures that are 'at a State's disposal'[134] and measures should not be applied in a way that would 'impose a disproportionate burden on the authorities'[135] or 'impose' an excessive burden on the authorities'.[136] A clear enunciation of the parameter *capacity of the state* was provided in *CN* v. *United Kingdom*.[137] Here, the Court stated that in the face of knowledge or foreseeability of a state concerning a real and immediate risk to an identified individual, the state is under an obligation to 'take appropriate measures *within the scope of their powers*' to protect the individual.[138] We see the notion of reasonableness coming back here, as the Court went on to note that 'the difficulties involved in policing modern society' should be considered and that 'impossible' burdens should not be imposed on authorities.[139] It is thus clear that states are not expected to act outside of their capacity.[140] The Court has been less instructive in laying down how the state's capacity to protect an individual should be assessed, instead opting for a case-by-case approach dependent on the situation in/of a given state.

The IACtHR follows a similar line of thought. For instance, in *González et al. (Cotton Field)* v. *Mexico*, the Court held that:

> the obligation to adopt measures of prevention and protection for private individuals in their relations with each other is conditional on its awareness of a situation of real and imminent

[130]See *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, *supra* note 106, para. 120.

[131]See Monnheimer, *supra* note 3, at 250. Importantly, a link can be identified between risk management and the regulation paradigm of due diligence obligations here. The more important an interest, the less discretion a state will have. In that regard, the 'interest at stake' influences the choices of measures of a state from a regulatory perspective.

[132]See Bartolini, *supra* note 84, at 36.

[133]See Besson, *supra* note 2, at 121–12.

[134]See *Öneryildiz v. Turkey*, *supra* note 98, para. 91.

[135]See, for example, *Osman v. United Kingdom*, *supra* note 100, para. 116; see *Mahmut Kaya v. Turkey*, *supra* note 103, para. 86; *Mastromatteo v. Italy*, *supra* note 103, para. 68; *Ilaşcu and Others v. Moldova and Russia*, *supra* note 122, para. 332; *Opuz v. Turkey*, *supra* note 100, para. 129; *Rantsev v. Cyprus and Russia*, *supra* note 113, para. 287; *Öneryildiz v. Turkey*, ibid., para. 107; *CN v. United Kingdom*, *supra* note 108, para. 68.

[136]See, for instance, *O'Keeffe v. Ireland*, *supra* note 54, para. 144; *Kemaloğlu v. Turkey*, *supra* note 103, para. 36; *LE v. Greece*, *supra* note 113, para. 67.

[137]See *CN v. United Kingdom*, *supra* note 108.

[138]Ibid., para. 67; see *Osman v. United Kingdom*, *supra* note 100, paras. 116–117; *Mahmut Kaya v. Turkey*, *supra* note 103, para. 86.

[139]This was also stated in *inter alia*: *Rantsev v. Cyprus and Russia*, *supra* note 113, para. 287; *Ilaşcu and Others v. Moldova and Russia*, *supra* note 122, para. 332; *Opuz v. Turkey*, *supra* note 100, para. 129; *Osman v. United Kingdom*, *supra* note 100, para. 116.

[140]It should be noted that positive obligations may require states to enhance their capacities. See, for instance, Stoyanova, *supra* note 90. Nonetheless, a separate study on this would be more appropriate for analysing how regional human rights courts transform ambiguous due diligence obligations into more precise obligations, such as the obligation to develop the capacity to take action.

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> danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger.[141]

A similar example can be found in *Sawhoyamaxa Indigenous Community* v. *Paraguay* where the state failed to ensure ancestral property rights of an indigenous community and its members, which affected their right to life. For the IACtHR it was clear that a state could not be responsible for every possible risk to the right to life. Operative choices, planning and adopting public policies, after all, have to be made by a state. In this respect, the obligations of the state must be understood in that it is not to be placed under a 'disproportionate burden'.[142] This indicates that the Court assesses the parameter of capacities against the backdrop of the overarching principle of *bonus pater familias*. The other side of the coin, however, is that the mere lack of resources cannot be used to completely discharge human rights responsibilities.[143] The IACtHR also appears to make the link between the parameter of capacity of the state in the context of risk management and the duty to establish a governmental framework to regulate and supervise human rights. In the famous *The Environment and Human Rights*, the Court stated that although limited resources may exclude particular means, at the bare minimum a state is required to establish a proper governmental framework to meet the requirement of actual capacity.[144] As this has to do with the establishment of a regulatory framework, it can be said that there is an overlap between the two paradigms of due diligence obligations.

4.4 Level of control

The final parameter that influences due diligence obligations has to do with the level of control exercised by states. It is essential to note that this parameter is a ground for a due diligence performance and something else than 'jurisdiction' or 'control over the right holder'.[145] The 'level of control as a ground for due diligence' is a common parameter for a due diligence performance, which is rather loose and operates in relation to the degree of care that is required to protect a particular interest or right. In other words, this level of control is connected to the source of the harm (or the risk thereof). It concerns the question whether the state has a particular level of control over the source of harm (or the risk thereof).[146] The matter of 'jurisdiction' or 'control over the right holder', however, is something else and forms rather a unique condition for a due diligence obligation to arise in international human rights law. Other branches in international law do not require that the norm addressee of a due diligence obligation exercises control over the beneficiary of the best-efforts performance for that obligation to arise. Arguably, this has to do with the special character of due diligence obligations in international human rights law.[147] In international human rights law, the condition of 'jurisdiction' or 'control over the right holder' requires a form of 'control over the right holder' that must be 'effective'. In contrast, the 'level of control over the source of the harm (or the risk thereof)' as a parameter of a due diligence performance is rather loose and does not have to be effective *per se*.[148]

[141]See *González et al. ('Cotton Field') v. Mexico (Preliminary Objection, Merits, Reparations, and Costs)*, *supra* note 109, para. 280.

[142]See *Sawhoyamaxa Indigenous Community v. Paraguay (Merits, Reparations and Costs)*, *supra* note 101, para. 155.

[143]See *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, *supra* note 106, para. 140; *Ituango Massacres v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 1 July 2006, [2006] IACHR (Ser. C No 148), para. 134. See also Monnheimer, *supra* note 3, at 229.

[144]See *The Environment and Human Rights Opinion*, *supra* note 42, paras. 120, 144.

[145]See Besson, *supra* note 2, at 89–93.

[146]See also, generally, Ollino, *supra* note 4, at 133–56, 184–5.

[147]For a comparison of the different characters of due diligence obligations in international human rights law and general international law see also Malaihollo, *supra* note 10, at 138–40.

[148]See also Besson, *supra* note 2, at 189.

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When it comes to the 'level of control over the source of the harm (or the risk thereof)', ECtHR case law shows that this can have different dimensions: (i) control over an individual; or (ii) control over a certain subject matter. With regard to the state's control over an individual, in its discussion of a possible violation of Article 5 ECHR in relation to enforced disappearances, the Court emphasized in *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, that '[h]aving assumed control' over an individual the State authorities have an obligation to account for the individual's whereabouts and to 'take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into arguable claims that an individual has not been seen since allegedly being taken into custody'.[149] While this case is quite a specific example, the Court's wording suggests that the obligations are triggered whenever a state takes an individual into custody (i.e., assumes control over them). It is important to note, however, that this dimension applies to state authorities and not to situations of non-state actors infringing human rights of individuals.

The scope of states' due diligence obligations can also be impacted by the control they have over a certain subject matter. If a matter falls under the regulation and control of a state, harm – including 'accidents in this sphere' – is brought within the state's responsibility. However, responsibility for failure to protect human rights appears to be excluded when there is no control over a particular subject matter.[150] Further, the parameter *level of control* is highly context-dependent and operates, similar to the other parameters, on a normative spectrum against the backdrop of the reasonableness standard, leading to a higher standard of care that is expected of states exercising a higher level of control. In other words, the more a state 'supports' or 'tolerates' the infringement of human rights, the more diligent measures a state needs to take.

IACtHR case law supports this proposition too.[151] For instance, in *Mapiripán Massacre* v. *Colombia*, members of paramilitary groups committed a massacre without a dependent relationship between the state and the paramilitary groups. Although the state did not conduct the massacre itself directly, the Court noted that 'the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance, expressed through several actions and omissions, of the Armed Forces of the State, including high officials of the latter' and that the relevant acts by the paramilitary groups were attributable to the state 'as they in fact acted in a situation and in areas that were under the control of the state'.[152] After all, the massacre was planned several months in advance and carried out with full knowledge, logistic preparations, and collaboration by the state, enabling the groups to leave the areas under the control of the state and leaving the civilian population defenceless by transferring troops to other areas.[153] Clearly, Colombia had control over the paramilitary groups and, without any preventive or protective measures set in place, it failed to protect the lives of the civilian population.

Nonetheless, states may have a 'special obligation' when they actively contribute to the creation of harm or the risk thereof, even if the state creates a regulatory framework to prohibit, prevent and punish human rights violations. This was acknowledged by the IACtHR in *Ituango Massacres* v. *Colombia* where members of the law enforcement and paramilitary groups robbed and killed unarmed civilians. After the Court admitted that there was a regulatory framework in place, it maintained that the state 'objectively created a situation of danger for its inhabitants and did not

[149] *El-Masri v. The Former Yugoslav Republic of Macedonia*, Judgment of 13 December 2012, [2012] ECHR, para. 233.

[150] See also Ollino, *supra* note 4, at 141.

[151] According to the IACtHR, 'it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention'; *White Van (Paniagua-Morales et al.) v. Guatemala (Preliminary Objections)*, Judgment of 25 January 1996, [1996] IACHR (Ser. C No 23), para. 91.

[152] *Mapiripán Massacre v. Colombia (Merits, Reparations, and Costs)*, Judgment of 15 September 2005, [2005] IACHR (Ser. C No 134), para. 120.

[153] Ibid.

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adopt the necessary and sufficient measures to avoid … groups continuing to perpetrate acts such as those of the instant case'.[154] Against this backdrop, Colombia was subjected to 'special obligations of prevention in the zones where the paramilitary groups were present'.[155]

Finally, a more complex scenario arises as for 'control over domestic activities with extraterritorial effect'.[156] In *The Environment and Human Rights*, the IACtHR was the first human rights court to address this matter by discussing a new extraterritorial jurisdiction based on control over domestic activities having a cross-border effect.[157] As highlighted by Berkes, this opened the door for:

> extraterritorial jurisdiction in various scenarios where a State is factually linked to extraterritorial situations, without physical control over territory or persons, and where it has the knowledge on the risk of wrongful acts and the capacity to protect due to its effective control over activities within its territory.[158]

As such, the IACtHR seems to have expanded the extent of jurisdiction through causality.[159] For instance, when a company in state A infringes the right to life of an individual in state B due to environmental pollution having a cross-border effect, the individual would fall under state A's jurisdiction as long as the other parameters of the due diligence obligation are present in terms of the company's behaviour. As jurisdiction depends on causality here, a strong link between the two is created. Violi also qualifies this as a legal state of affairs where 'jurisdiction' and 'causality' are seen as equals by the IACtHR.[160] Although this novel construction of the jurisdictional link is at first sight very much welcomed in the context of environmental damage and human rights, the Court methodologically failed to describe the complicated relation between a state's omission and extraterritorial consequences in this context.[161]

Additionally, the IACtHR seems to be undermining the requirements for jurisdiction by considering a state's control over the source of harm (or the risk thereof) as a key factor in fulfilling its due diligence obligations. This poses a problem as it disrupts the traditional understanding of how human rights obligations are established, questioning the normative relationship between those who hold rights and states who have a duty to uphold them.[162] As we have noted before, it is important to distinguish between jurisdiction or control over the right holder and control over the source of harm or risk. However, the newly introduced extraterritorial jurisdictional link by the IACtHR seems to confuse 'conditions of human rights obligations with those of due diligence',[163] hence blurring the lines between human rights obligations and the concept of due diligence.

5. Conclusions and reflections

The present study has shown that due diligence obligations operate in two paradigms: a regulation paradigm (outsourced law), and an accountability paradigm (risk management).[164] In this regard,

[154]See *Ituango Massacres v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, *supra* note 143, para. 134.

[155]Ibid.

[156]See, generally, A. Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR', *EJIL:Talk!*, 28 March 2018, available at www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/.

[157]See, in particular, *The Environment and Human Rights Opinion*, *supra* note 42, para. 101. See also Ollino, *supra* note 4, at 154.

[158]Ibid.

[159]F. Violi, 'The Function of the Triad "Territory", "Jurisdiction" and "Control" in Due Diligence Obligations', in Krieger, Peters and Kreuzer, *supra* note 1, at 82.

[160]Ibid.

[161]Ibid.; see Berkes, *supra* note 156. See also Monnheimer, *supra* note 3, at 221.

[162]See Besson, *supra* note 2, at 92–3.

[163]Ibid., at 198.

[164]See also Table 1.

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Table 1. Comparison of due diligence obligations in ECtHR and IACtHR jurisprudence

Element	Function	Interacts with	ECtHR	IACtHR
Aspiration (regulation)	Regulatory end-goal of the open formulated obligation	Capacity of the state, discretion in implementation	Guarantee minimum protection with state apparatus	Guarantee minimum protection with state apparatus
Discretion in implementation (regulation)	state's leeway in choices of means to fulfil the aspiration	Aspiration, good faith	Margin of appreciation	More cautious approach to deference
Good faith (regulation)	Persuades states to implement measures an fulfil aspiration	Discretion in implementation	Pushes states to take action	Constitutionality control
Reasonableness (risk management)	Used to assess individual features of risk management, but also as overarching standard to fairly balance these features against each other	Knowledge/ foreseeability, interest at stake, capacity of the state, level of control	Important for risk management	Important for risk management
Knowledge/ foreseeability (risk management)	Whether the state knew or should have known about the risk	Reasonableness	Operates in combination with risk-proximity and has different degrees	Operates in combination with risk-proximity and has different degrees
Interests at stake (risk management)	Affects the level of stringency of state activities	Reasonableness, discretion in implementation	The more important an interest or right, the more necessary it becomes to take action and the less discretion a state has in implementing measures	The more important an interest or right, the more necessary it becomes to take action and the less discretion a state has in implementing measures
Capacity of the state (risk management)	State's activity needs to be assessed in light of the available means of the state	Reasonableness, aspiration	No disproportionate burden on state	No disproportionate burden on state and at bear minimum a proper governmental framework to meet the requirement of actual capacity is necessary
Level of control (risk management)	Level of control	Reasonableness	The more a state 'supports' or 'tolerates', the more diligent measures a state needs to take	The more a state 'supports' or 'tolerates', the more diligent measures a state needs to take and control over domestic activities may have cross-border effect

these paradigms have been given further meaning through a comparative study of ECtHR and IACtHR case law. The findings of this comparison are outlined in Table 1.

Reflecting upon this, it can be said that, in terms of regulation, 'discretion' and 'good faith' are robustly connected to each other. The more discretion is given to a state, the more human rights protection relies on good faith. One could perceive this as a weakness in terms of enforcement of human rights obligations, but also appreciate it as a regulatory strength. By giving a particular leeway of choices to states, a regional human rights system can take into consideration the social realities on the ground. As such, an optimal focal point between minimal human rights protection and differences between states can be found. In light of this rationale, the ECtHR uses the margin of appreciation doctrine and outsources further decision- and law-making to states to decide what

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measures to take.[165] If hardly any discretion is given to a state, the door is opened for a supreme approach of human rights protection, which is more the case in the Inter-American human rights system that has introduced the constitutionality control doctrine.[166] In this regard, the regulatory strength of due diligence obligations is not used to its full potential in the Inter-American human rights system. However, the IACtHR has taken ambitious steps as regards risk management, especially when it comes to the element of 'knowledge or foreseeability'[167] and 'level of control'.[168] As regards the latter, the IACtHR's ambitious approach related to control in the context of extraterritorial situations has nonetheless led to a puzzled muddle of, on the one hand, 'jurisdiction' or 'control over the right holder' and, on the other hand, 'control over the source of harm (or risk thereof)'. Arguably, this has the potential of inverting the normative framework of human rights law.

Moreover, a reflection on this comparative study shows that there is an overlap between risk management and regulation. Normally, the extent of due diligence to be performed by a state can only be determined within the scope of the state's available resources and powers. Otherwise, a disproportionate burden would be imposed on it. This relates to the parameter of 'capacity of the state' in the context of risk management. However, it would be unreasonable for a state to be able to invoke its limited capacity to completely neglect human rights protection. At the bare minimum, a state is still required to realize minimum efforts by establishing a regulatory framework to protect human rights. This shows notable similarity to the aspirational element of due diligence obligations in the context of regulation. In order to realize the regulatory end-goal of a due diligence obligation, the bare minimum that is required is the establishment of a regulatory framework. As such, it appears that the failure to establish such a framework most likely leads to a state failing its required due diligence performance, and it would be due to such conduct that the regulatory end-goal of a due diligence obligation would not be achieved.[169] Another example of the overlap between risk management and regulation is the relation between 'interests at stake', which is part of risk management, and a 'State's discretion in implementation', which is an element of the regulatory dimension of due diligence obligations. The more important an interest at stake is, the less discretion a state will have in its implementation. In other words, more efforts and more concrete measures are expected from the state. In such cases, the latter has less leeway in choices of measures to implement.

Furthermore, the reasonableness standard is significantly employed by both the ECtHR and the IACtHR in providing guidance as to what constitutes 'appropriate measures'. Remarkably, each parameter of risk management operates against the backdrop of reasonableness, but the standard is also used in the exercise of fairly balancing all parameters collectively so that the ECtHR or IACtHR can give direction of what efforts a state is expected to take. The question remains, however, of how regional human rights courts concretize and specify the due diligence performance into concrete measures. That is to say, how do human rights courts operationalize the abstract concept of due diligence into concrete and specific measures that a state is required to take in order to speak of a state performing its due diligence? Moreover, one may wonder what its impact is on the doctrine of the horizontal effect of human rights.[170]

Other crucial questions to be addressed in this context concern the environment and human rights protection. It cannot be denied that in times of climate change, and in particular in the

[165] See Section 3.2, *supra*.

[166] Ibid.

[167] See Section 4.1, *supra*.

[168] Ibid.

[169] For the link between 'capacity' and 'aspiration' see also *The Environment and Human Rights Opinion*, *supra* note 42, para. 144.

[170] On the horizontal effect of international human rights see, for example, Lane, *supra* note 26; A. Clapham (ed.), *Human Rights and Non-State Actors* (2013); J. Knox, 'Horizontal Human Rights Law', (2008) 102 AJIL 1. The role of due diligence in the context of the horizontal effect of human rights is also the subject of further study by the authors.

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context of contemporary climate change litigation, due diligence will play a crucial role in safeguarding human rights within regional human rights systems. As climate change continues to pose significant threats to various aspects of human rights, such as the right to life and the right to respect for private life, family life and home, it becomes imperative to address these concerns within the framework of regional human rights systems. The emergence of climate change litigation in the context of human rights, with cases currently pending before both European and American courts, reinforces the need for a robust and fundamental understanding of due diligence in regional human rights law.[171] We have mapped out due diligence as a vital concept to protect human rights in regional human rights systems and believe that this article serves as a blueprint for such understanding. Nonetheless, there remains much to be explored.

[171]For discussions on these recent cases see also O. W. Pedersen, 'Climate Change Hearings and the ECtHR Round II', *EJIL: Talk!*, 9 October 2023, available at www.ejiltalk.org/climate-change-hearings-and-the-ecthr-round-ii/; A. Auz and T. Viveros-Uehara, 'Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights', *EJIL:Talk!*, 2 March 2023, available at www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/.

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