British Institute of International and Comparative Law

© The Author (2019). Published by Cambridge University Press for the British Institute of International and Comparative Law.

THE ROLE OF DUE DILIGENCE IN INTERNATIONAL LAW

NEIL MCDONALD*

Abstract This article makes two main propositions about the role of due diligence in international law, in response to recent interest in the topic. First, a legal requirement to exercise due diligence may be a component part of a primary rule of international law, but this can only be determined by referring back to the primary rule in question (eg what degree of fact-finding does treaty provision X require a State party to that treaty to undertake, either explicitly or implicitly, to act consistently with its terms?). In other words, there is no 'general principle of due diligence' in international law. Second, States undertake what could be characterised as 'due diligence' activity (eg by introducing policy guidance for their officials), some elements of which may be a result of a legal requirement and some of which may not (eg where done solely for policy reasons). Current practice of the United Kingdom and United States is used to illustrate the point. The lack of a distinction between the 'legal' and 'non-legal' elements of conduct in a given area gives States the flexibility to act without feeling unduly constrained by international law, and at the same time actually promotes compliance with international law and may assist in its development over time. In contrast, pushing for a 'general principle of due diligence' in international law is unnecessary, and risks having a chilling effect on this positive legal/policy 'due diligence' behaviour by States.

Keywords: public international law, due diligence, International Court of Justice, State practice, policy.

I. INTRODUCTION

This short article is an attempt to clarify the role of due diligence in international law. The expression 'due diligence' is generally used in two senses, both of which involve taking prudent, well-informed steps to avoid a bad outcome.[1] The first sense of the term—'acting

* Assistant Legal Adviser, Foreign and Commonwealth Office. This article was written in a purely personal capacity and should not be taken as an expression of official government policy. The writing of this article has not been subsidised by any public or private source. The author would like to thank Dr Elaine Gorasia and Iain Macleod for helpful comments on an earlier draft. Any errors or omissions are the author's own.

[1] In terms of dictionary definitions, the Collins Dictionary defines due diligence as:

1. the degree of care that is to be reasonably expected or that is legally required, esp. of persons giving professional advice
2. an assessing, evaluating, etc. conducted with prudent or necessary care.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

with due diligence'—means to take the appropriate amount of care, and may amount to a legal standard, ie the bad outcome to be avoided through the action taken is legal liability. The second sense—sometimes referred to as 'doing due diligence'—denotes a broader exercise in risk mitigation, ie there may be many bad outcomes to be avoided through the action taken, including acting unlawfully. Due diligence is a term used in a variety of circumstances in domestic law,[2] in corporate transactions,[3] as well as in general usage outside of these situations. In the *international* context, the exercise of due diligence by States—both 'acting with' and 'doing' due diligence—essentially entails a State undertaking fact-finding, to properly understand a set of circumstances before it takes a particular course of action.

Two main propositions are made here about due diligence in international law. First, a legal requirement to exercise due diligence may be a component part of a primary rule of international law, but this can only be determined by reference to the primary rule in question. In other words, there is no general principle or obligation for States to exercise due diligence within international law, and it is important to rebut the notion that there is. Case law of the International Court of Justice (ICJ) will be used to illustrate this proposition. Second, States undertake due diligence activity, some of which may be a result of a legal duty and some of which may not, ie the same activity involves both 'acting with due diligence' and 'doing due diligence'. The lack of a distinction between the 'legal' and 'non-legal' elements of conduct in a given area gives States flexibility to act without being unduly constrained by international law, but at the same time actually promotes compliance with international law, and may assist in its development over time. Current practice of the United Kingdom and United States is used to illustrate the latter point.

II. BACKGROUND

Between 2012 and 2016, the International Law Association (ILA) established a Study Group to examine the role of due diligence within international law and in particular to 'consider the extent to which there is a commonality of understanding between the distinctive areas of international law in which the concept of due diligence is

The Merriam Webster Dictionary defines due diligence as:

1. law: the care that a reasonable person exercises to avoid harm to other persons or their property;
2. business: research and analysis of a company or organization done in preparation for a business transaction (such as a corporate merger or purchase of securities).

These two senses of the expression have been examined and referred to as different 'concepts of due diligence' elsewhere in recent legal scholarship: J Bonnitcha and R McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) EJIL 899.

[2] In domestic law, the exercise of 'due diligence' by an individual or corporation may be a standard of conduct to defend an allegation of negligence in tort, or as a statutory defence, eg to allegations of money laundering. In the non-legal or commercial context, conducting 'due diligence' refers to investigation done on a company or proposed transaction prior to executing the deal. To take the example of English law, Stroud's Judicial Dictionary (Sweet & Maxwell 2006) lists 13 examples of the expression 'due diligence' being used in English case law and legislation.

[3] In the sense of 'doing due diligence' on a company before a merger or acquisition is concluded.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

applied'.[4] The Study Group's work resulted in the adoption of a resolution by an ILA conference held in August 2016.[5] The resolution recognised 'the importance of due diligence as a relevant standard of conduct in many areas of international law' as well as the 'continued reliance on due diligence by international courts and tribunals'. The ILA's work has been followed by focus on the topic by other, similar organisations.[6]

Meanwhile, the role and nature of due diligence within international law has been characterised inconsistently. One ILA Study Group report makes reference to due diligence as an 'evolving principle of international law', having referred to a broad 'due diligence obligation [of the State]', and elsewhere talking of 'non-binding due diligence obligations'—all within a single document.[7] Elsewhere in the ILA Study Group discussions due diligence is characterised as a standard of care to be adopted when meeting primary obligations.[8] To one writer it is a 'well-established principle of international law' which can be expansively or restrictively interpreted as required when determining the responsibility of a State for non-State actors within its territory.[9] Elsewhere it is characterised as a 'norm' of international law imposing obligations on States for acts within territory under their control.[10] Another scholar refers to 'the due diligence rule' in the context of State responsibility generally.[11] In no case is any basis given upon which such a principle or rule of due diligence supposedly rests. Overreliance on academic research to develop the law in the absence of States being willing to define the extent of their own obligations of due diligence has been described as 'an unfortunate reality with deleterious consequences for international law making'.[12]

Why might it be seen as desirable to establish a general principle or overarching rule of due diligence in international law? First, a general obligation upon States to behave in a certain way could be viewed as a good tool to promote and expand the regulation of State behaviour, particularly by establishing a basic degree of responsibility of States in

[4] ILA Study Group on Due Diligence in International Law, Second Report (July 2016) 1, available at: <http://www.ila-hq.org/index.php/study-groups?study-groupsID=63>.

[5] Resolution available at <http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045>.

[6] At the time of writing the Max Planck Institute for Comparative Public Law and International Law has also commissioned a study project which aims to determine 'whether a common understanding of due diligence throughout the different areas of international law and possibly across different types of legal persons (states, IOs, other) can be traced and, if so, whether this warrants qualifying due diligence as an overarching principle of international law'. More background available at <http://www.mpil.de/en/pub/research/areas/public-international-law/due-diligence-in-international.cfm>.

[7] ILA Study Group Second Report, at 47, 12 and 28 respectively.

[8] Comment of N French, in ILA Working Session report (August 2016) 6, available at <http://www.ila-hq.org/index.php/study-groups>.

[9] R Barnidge Jr, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (TMC Asser 2008) 69.

[10] M Schmitt, 'In Defense of Due Diligence in Cyberspace' (2015) 125 YaleLJ Forum 68 <https://www.yalelawjournal.org/forum/in-defense-of-due-diligence-in-cyberspace>.

[11] R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 GermanYBIntlL 9. See also generally J Kulesza, *Due Diligence in International Law* (Brill 2016).

[12] In the context of States being 'conflicted' over whether to commit to specific due diligence obligations in the context of cyber, thus hampering their own action as well as that of other actors, or to avoid such regulation and maintain freedom to act but leave their own systems at risk. Schmitt, ibid.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

relation to the activities of third parties such as private and corporate actors, other States, or armed non-State actor groups. The argument would run along the lines that due diligence obligations have proved to be an effective, flexible tool in specific areas, for example to promote protection by States of the natural environment and of human rights. Thus it would make sense to roll out a more general obligation upon States to regulate the behaviour of others, particularly where there may be few other mechanisms to promote good behaviour. Second, pointing to the existence of a general principle of due diligence might be seen as helpful in characterising international law as a coherent legal framework. As will be shown below, international law already constitutes an effective framework for determining the rights, obligations and responsibility of States. Furthermore, an attempt to frame due diligence activity by States as exclusively legal in nature risks having a chilling effect on some constructive existing behaviour by States which is not done solely out of a sense of legal obligation.

III. The Role of Due Diligence is Determined on a Case-by-Case Basis by Reference to a Rule of International Law

There is no broad rule of due diligence in international law. It can be used as a legal standard of conduct (in the sense of 'acting with due diligence'), but only by reference to a pre-existing rule of international law.[13] In this sense, if a State has acted with the required diligence under a particular rule, it can avoid the bad outcome of being found to have violated the rule. Thus the role of due diligence in international law is determined, on a case-by-case basis, by reference to a rule. This will be shown here through a review of case law of the ICJ.[14] All of the case law referred to below has been cited in academic literature as evidence of aspects of a general rule of due diligence in international law, in support of the possible existence of such a rule. However, the case law shows that the ICJ does not treat due diligence as a free-standing concept in international law. Rather, the Court addresses the exercise of due diligence by States either: a) where an obligation upon a State to act with due diligence exists as a corollary of an existing primary rule, right or principle (collectively referred to as 'primary rules'); or b) when the Court otherwise seeks to determine the content of rules of treaty or customary law (rules which may or may not make explicit reference to due diligence). The Court's

[13] Where a State is required to act with due diligence by a rule, the outcome which is sought to be avoided through the rule will often essentially be negligent conduct by the State, although the concept of negligence is not as well established in international law as it is in domestic tort law. 'Due diligence' is also used as a term to describe a general category of obligation in international law, ie 'obligations of due diligence'. Other categories of obligation include obligations of 'conduct' or 'result' (a civil law distinction not known in common law countries), and obligations of prevention (which would likely include an element of due diligence but additionally require the event in question to have actually occurred). A single treaty provision or other primary rule could conceivably contain obligations of conduct, due diligence, result and prevention. Reference to this taxonomy of obligations was dropped from the ILC Articles on State Responsibility during the drafting process, as it was agreed to be unnecessary and risked causing confusion, including because they are most relevant in describing the nature of primary rules rather than the law of State responsibility. See J Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 219–32.

[14] Although other courts and tribunals have touched upon the issue, the ICJ is chosen for this short article as an authoritative source of interpretation with general international law jurisdiction.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

approach to due diligence in a range of cases supports the idea that due diligence within international law is something which requires a primary rule to be relevant. The ICJ also supports the idea that the nature of a legal obligation to act with due diligence in a given instance relies upon context, and due diligence obligations should thus not be read across from one area of international law to another.

The ICJ's first contentious case, *Corfu Channel*, involved the Court determining obligations of due diligence—but only by reference to a corresponding primary rule of international law.[15] The case arose following an incident in 1946 where British warships passing through Albanian territorial waters were struck by naval mines, resulting in loss of life and damage to the vessels. Although Albania denied laying the minefield, the Court determined that it had actual or constructive knowledge of the minefield's existence. Having determined Albania's state of knowledge, the Court then elaborated on the nature of legal obligations upon Albania in relation to the minefield off its coast: 'The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based … on certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[16] In other words, although Albania was under an obligation to act with due diligence in relation to the minefield, but that legal obligation flowed from three other rules or principles of international law. Due diligence in this sense therefore needs a primary rule to trigger an obligation in international law by necessary implication. Sarah Heathcote addresses the notion of due diligence as expressed in *Corfu Channel*, also noting the significance of being able to refer to a primary rule:

> … when it comes to responsibility for wrongful acts, it is only in relation to established rights that an obligation of due diligence is owed by one State to another (in the Corfu Channel case, the right of innocent passage). In relation to mere interests – such as, for instance, a failure to take adequate measures to prevent the collapse of a banking system leading to a global financial crisis, a field in which only soft obligations exist – it is arguable that if

[15] *Corfu Channel (UK v Albania)* (1949) ICJ Rep 4. *Corfu Channel* is alleged to articulate 'the core content of the due diligence principle' (see ILA Study Group, Second Report, at 5. The *Lotus* case before the ICJ's predecessor court the PCIJ was also cited by the ILA Study Group as a source giving expression to the so-called obligation of due diligence in international law (see ILA Study Group, First Report (March 2014) 2, available at <http://www.ila-hq.org/index.php/study-groups>). While that case does make reference to due diligence (in the Dissenting Opinion of Justice Moore), it is referred to as an aspect of the exercise of *sovereignty* and *jurisdiction* ie as a corollary of existing principles of international law. The principle of exclusive jurisdiction of a State within its own territory 'is attended with a corresponding responsibility for what takes place within the national territory'. A requirement that a State act with due diligence is in the context of the *Lotus* case a reflection of the principle of State sovereignty, and the rules which derive from it. *Case concerning SS Lotus* (*France v Turkey*) 1927 PCIJ (Ser A) No. 10, Dissenting Opinion of Justice Moore, 68. Michael Schmitt notes that due diligence 'derives from the principle of sovereignty', but still considers it a principle in its own right. Schmitt, ibid.

[16] ibid 22.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

> responsibility for a wrongful act were to be invoked, then if at all possible, it would need to rest on an abuse of rights.[17]

The ICJ's judgment in *Pulp Mills* is evidence of how the Court identifies obligations of due diligence upon States only insofar as they exist within particular primary treaty or customary rules of international law, within the particular field of international environmental law.[18] The question at issue in *Pulp Mills* was whether or not Uruguay had breached its primary obligations under a 1975 bilateral treaty which sought to govern the use by each State of those parts of the River Uruguay which formed a common border between them. The obligations were both procedural (each State to notify and consult the other in respect of certain developments) and substantive (not to cause trans-boundary harm). Rather than showing some form of free-standing overarching principle, *Pulp Mills* provides a good example of how the ICJ adopts a context-specific approach where there is an element of due diligence required on the part of a State within a primary rule. The Court in *Pulp Mills* noted that particular care was required when implementing obligations in the field of environmental protection due to the irreversibility of some harm which may occur, ie more may be required of a State for it to be deemed to have acted diligently in discharging an obligation.[19] The Court then looked to other primary rules of customary international law as a means to interpret the extent of the obligation of Uruguay to act under the bilateral treaty with Argentina, in accordance with another set of rules contained within the Vienna Convention on the Law of Treaties. The Court noted that 'the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory', ie the level of fact-finding required to inform a particular course of conduct on the part of the State. This rule, in the field of protection of the environment, required a State to use 'all means at its disposal' to avoid activities 'which take place in its territory or in any area under its jurisdiction, causing significant damage to the environment of another State'.[20]

The *Pulp Mills* case also shows how the starting point of a reviewing court (in this case the ICJ), when it is asked by States to resolve a dispute, is to identify what is required by the rule at issue. It is at this stage that the court can set out the due diligence element of the rule, if any. Article 41 of the bilateral treaty at issue in *Pulp Mills* required the parties to 'protect and preserve the aquatic environment and, in particular, to prevent its pollution' through the adoption of appropriate rules, adherence to international agreements and consideration of the views of technical bodies. This obligation required both conduct (the absence of acts taken to protect the aquatic environment) and a result (pollution) to establish a breach. In relation to the due diligence element of the rule, the Court noted that the responsibility of Uruguay would be established 'if it was shown that it had failed to act diligently and thus taken all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction'.[21] The Court found that Uruguay had not breached Article 41 as there was 'no conclusive evidence in

[17] S Heathcote, 'State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility' in K Bannelier, T Christakis and S Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the* Corfu Channel *Case* (Routledge, 2012).

[18] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (2010) ICJ Rep 14.

[19] ibid, paras 185–187, citing its earlier judgment in *Gabcikovo Nagymaros Project* (*Hungary v Slovakia*) (1997) ICJ Rep 78, at para 140.

[20] ibid, para 101.

[21] ibid, para 197.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

the record to show that Uruguay has not acted with the requisite degree of due diligence' or that harm had been caused to the River Uruguay.

States do not refer to general obligations of due diligence in international law when pleading before the ICJ, but to specific primary rules of treaty or custom which require a particular act or omission by other States ie which *might* require a State to act with due diligence in order to act consistently with the rule. In the *Armed Activities* case, the ICJ considered the situation where the Democratic Republic of the Congo (DRC) alleged that Uganda had 'breached its obligation of vigilance incumbent upon it as an occupying Power by failing to enforce respect for human rights and international humanitarian law' in parts of DRC where it was present.[22] In isolation, the reference by the DRC to Uganda's 'obligation of vigilance' might be taken as synonymous with an overarching obligation of due diligence. However, DRC listed specific treaty provisions under seven different treaty regimes which were alleged to have been violated by Uganda as a result of its occupying DRC territory.[23] The Court in its judgment found that Uganda violated international law obligations including 'by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district'. Central to determining whether Uganda was responsible for breaching treaty provisions was establishing whether as a matter of fact Ugandan forces 'were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government'.[24] Thus the obligation of Uganda to act with due diligence, as expressed through the identified treaty provisions, turned on the exercise of control over territory. The so-called 'obligation of vigilance' referred to in DRC's pleadings, whilst summing up some of those obligations of treaty and custom, was not a rule in and of itself.

In *Genocide in Bosnia*, the ICJ is clearest in how it comprehends the role of due diligence in international law—framed by reference to specific rules, and with regard to the context of the dispute at hand.[25] Significantly, the Court in *Genocide in Bosnia* explicitly cautions against transposition of the type of conduct required to discharge a legal obligation (ie to act with due diligence) from one area of international law to another. That case included the allegation by Bosnia that Serbia had failed in its duty to prevent genocide under Article I of the Genocide Convention by not acting to prevent the Srebrenica massacre in 1995. The Court noted that similar 'obligations to prevent' existed in various treaties,[26] but that the content of the respective obligations to act was not comparable:

> The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be

[22] *Armed Activities on the Territory of the Congo* (*DRC v Uganda*) Judgment (2005) ICJ Rep 168, at para 189.

[23] In terms of the Geneva Conventions, DRC alleged breaches specifically of arts 27, 32 and 53 of the fourth Geneva Convention, but did not allege a breach of art 1.

[24] ibid, para 173.

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

[26] The Court cited the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, art 2; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973, art 4; the Convention on the Safety of United Nations and Associated Personnel 1994, art 11; and the International Convention on the Suppression of Terrorist Bombings 1997, art 15.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

> prevented … The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts.[27]

The above passage from *Genocide in Bosnia* is of central importance when considering due diligence within international law. In it, the ICJ firstly acknowledges that various primary treaty obligations involve a similar 'obligation to prevent', ie an obligation of conduct which involves exercising a requisite level of fact-finding in order to inform a course of conduct to discharge the obligation. The ICJ then explicitly states that it is *not* appropriate in this case to compare the due diligence element of assessing compliance between various treaty regimes, or among different rules of customary international law. In other words, there is no general principle or rule of due diligence; one must start with a primary rule, and then consider what is required under that rule in a given case to satisfy any due diligence requirement contained therein.[28] Indeed, even the nature of a due diligence obligation by reference to a specific rule or principle will vary from case to case.[29]

In summary, academic commentators have used the above-cited cases, as well as other ICJ jurisprudence, as evidence of some kind of coherent due diligence principle of international law in action.[30] However, it is not to an 'obligation of due diligence' as such which the ICJ looks in any given case, but to the applicable rules of international law. The exercise carried out by the Court is one of examining: a) the scope of the customary rule, or extent of jurisdiction of the treaty regime which is alleged to have been breached; b) the level of control exerted, or of jurisdiction exercised, by the State

[27] ibid, para 429.

[28] ICJ case law also shows that due diligence is an expression whose meaning depends on the context of a given rule. The ILA Study Group asserts that in the *Border Area/Road* case the ICJ distinguished the 'procedural and substantive' elements of due diligence in international environmental law (see ILA Study Group, Second Report, 5). Again this is to mischaracterise the focus of the Court in that particular case. The ICJ was called upon in *Border Area/Road* to apply procedural and substantive *rules of customary international law* and *treaty provisions*. In terms of the Court's approach in *Border Area/Road*, it in each case examines the primary rule in question, determines whether the rule is applicable, and then determines what either State might have been required to do in order to discharge the obligation under the treaty, including due diligence activity. These are not 'due diligence obligations' as such, but rather treaty obligations whose discharge may require a State to conduct due diligence activity. *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*) Joined Cases, Judgment (2015) ICJ Rep 665.

[29] For example, the due diligence aspect of the exercise of sovereignty is case-specific, and control of territory alone is not necessarily enough to establish the responsibility of a State for actions occurring therein. In *Nicaragua*, recalling *Corfu Channel*, the ICJ stated that whether a State knew or should have known about occurrences on its territory must be established on a case-by-case basis. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) Judgment (1986) ICJ Rep 14, at paras 154–156. See also ILA Study Group, First Report, 12.

[30] The *Tehran Hostages* case is cited by one academic as an instance of the Court looking to the so-called 'due diligence rule' to establish the responsibility of States. However, that case again involved the Court being concerned with the application of primary rules of treaty law. Similarly, in *Military and Paramilitary Activities* (another case cited in support of the existence of this so-called rule) the ICJ sought to identify the content of the customary prohibition on the threat or use of force within international law, as well as the conduct which would be required for a State to act consistently with the prohibition on the threat or use of force as contained within the UN Charter, ie the due diligence aspects were identified by reference to a primary rule. See Pisillo-Mazzeschi (n 11).

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

in order to determine any corresponding obligation; and c) whether the State's responsibility is engaged through its actions. Due diligence may feature as an idea within any of these analyses by reference to a primary rule. James Crawford makes the point well in his commentary to the International Law Commission (ILC) Articles on State Responsibility:

> … the essential point is surely this, that different primary rules of international law impose different standards ranging from 'due diligence' to strict liability, and that breach of the correlative obligations gives rise to responsibility without any additional requirements. There does not appear to be any general principle or presumption about the role of fault in relation to any given primary rules, since it depends on the interpretation of that rule in the light of its object or purpose. Nor should there be, since the functions of different areas of the law, all underpinned by State responsibility, vary so widely.[31]

IV. State due diligence activity may include both 'legal' and 'non-legal' exercise of due diligence, often in the same category of activity

'Due diligence' is a term used by States to describe prudent steps taken by them to avoid a range of bad outcomes, one of which might be being held to have violated a rule of international law.[32] In addition to breaching international law, other bad outcomes for the State to avoid via due diligence include: incurring economic loss; suffering political opposition or embarrassment; or being subjected to public outcry or unfavourable coverage in the media. When used in this sense, it is difficult to know when a State is acting out of a sense of legal obligation (to use the language from the introductory section above, 'acting with due diligence' as well as 'doing due diligence'), and when it is not.

Due diligence—fact-finding to inform conduct—is an important tool of international policy as well as law, often with little distinction made between the two uses by States. Considerations of law to one side, 'due diligence' is used as a byword for responsible decision-making in the policy sphere. There may be various motivations other than a sense of legal obligation for a State to establish procedures to conduct what might be characterised as due diligence: political expediency; efficient use of resources; ensuring that the State makes decisions effectively and then acts effectively;[33] and controlling costs. From the point of view of States, due diligence can thus be carried out during decision-making either due to a sense of legal obligation or as a policy decision, or both. There may be an element of deliberate ambiguity. Absent a clear official statement on where the State considers its legal obligations to end, or the decision of a reviewing body, it is difficult (if not impossible) to establish what element of the practice is done as a result of a sense of legal obligation, and what is

[31] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2005) 13.

[32] Such activity takes place as part of a broader category of State activity which might be characterised as compliance or risk management, where a State aims to ensure that its conduct is consistent with its policy commitments and legal obligations, and identifies and mitigates risk more generally.

[33] See eg *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (The White House, December 2016) 14. Available at: <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf>.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

done for some other reason. Current examples of such practice by the United States and United Kingdom are described below to illustrate the point.[34]

The United States engages in 'due diligence' conduct for both legal and policy reasons when carrying out military operations. In his remarks to the 2016 American Society of International Law Conference, US State Department Legal Adviser Brian Egan outlined the legal framework through which the US engaged in the fight against ISIL.[35] Egan noted that one of the activities in which the US engages (like most States) is what he describes as 'legal diplomacy', which 'extends to promoting law of armed conflict compliance by our partners'. According to Egan the US takes 'a variety of measures to help our partners comply with the law of armed conflict and to avoid facilitating violations through our assistance. Examples of such measures include vetting and training recipients of our assistance and monitoring how our assistance is used.' Egan pointed to those who argue that the legal obligation under Article 1 common to the four Geneva Conventions to 'ensure respect' for those treaties requires the US 'to undertake such steps and more vis-à-vis not only our partners, but all States and non-State actors engaged in armed conflict'. Egan refuted the notion that this due diligence activity was undertaken due to a legal requirement, stating that whilst the US 'does not share this expansive interpretation of common Article 1, as a matter of policy we always seek to promote adherence to the law of armed conflict generally and encourage other States to do the same'.[36] Egan's comments are interesting for two reasons. They are interesting firstly for what they do say—describing a situation where the US is acting and engaging with international law, sometimes due to policy preference rather than out of a sense of legal obligation. Secondly, the comments are interesting for what they do not say—namely, Egan does not specify under what circumstances the US would say that it definitively *is* bound to act through legal obligation in ensuring respect for the Geneva Conventions, and what conduct it would instead characterise as policy choice.

Recent US practice in relation to the conduct of targeted military strikes is another example of a State policy response framed around international law requirements but which also includes a broader, non-legal, due diligence component as detailed below. The US takes the position that there is 'no requirement under international law to provide legal process before a State may use lethal force in accordance with the law of armed conflict',[37] but accepts that military force must be deployed consistently with the relevant rules and principles of international humanitarian law, such as necessity,

[34] These are convenient examples from two States which are permanent members of the UN Security Council and which have historically contributed significantly to the development of international law. There are other examples, such as: national implementation of the non-binding UN Guiding Principles on Business and Human Rights which overlaps with States' treaty and customary law obligations, see eg.EU report 'Implementation of the UN Guiding Principles on Business and Human Rights' (2017) <http:www.europarl.europa.eu> 24. For a specific example from a State outside the permanent members of the UN Security Council, see eg Kenyan National Policy and Action Plan on Human Rights (April 2014) available at <http:www.knhcr.org>.

[35] 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign', remarks to the American Society of International Law Annual Conference (1 April 2016) <http://www.state.gov/s/l/releases/remarks/255493.htm>.

[36] This position was repeated in a formal White House report, the *Report on the Legal and Policy Frameworks*, which states at 26 that an Executive Order on the protection of civilians in military operations is 'fundamentally consistent with the effective, efficient and decisive use of force in furtherance of U.S. national interests'.

[37] ibid 20.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

proportionality, distinction and humanity. As a matter of policy in 2013 the US adopted the Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Outside the United States and Areas of Active Hostilities (PPG).[38] When the US considered using military force when taking lethal action against terrorist targets under the PPG outside 'areas of active hostilities' (eg in situations where the US is not a party to a conflict), it did so within a set of policy rules which were in some cases more restrictive than strictly required by the law. For instance, before carrying out lethal strikes in such circumstances, the US as a policy choice established a threshold of 'near certainty' that non-combatants would not be killed.[39] Under IHL, whilst States are required to take precautions before carrying out attacks,[40] the strict requirements of customary and treaty rules allow for higher levels of civilian casualties. For example, Article 52 of Additional Protocol I to the Geneva Conventions prohibits 'indiscriminate' attacks, which 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[41] The US has adopted further formal measures in excess of legal obligations under IHL.[42] Former US State Department Legal Adviser Harold Koh describes this Obama-era approach as a reliance 'on both policy *and* legal frameworks to promote the stickiness of internalised international norms. By so doing, Obama apparently counted on the future "hardening" over time of norms first articulated as policy into binding legal rules.'[43]

United Kingdom policy measures also encapsulate fact-finding to inform State conduct which could be characterised as due diligence, one objective—but not the *sole* objective—of which is acting consistently with international law obligations.[44] In 2011 the UK introduced Overseas Justice and Security Assistance (OSJA) human rights guidance. The OSJA guidance was designed to embed international human rights law considerations into foreign policy initiatives. Like the US approach outlined above, it is partly designed to promote compliance with international law by other

[38] Following the change of US administration in 2017, the PPG was replaced by the Principles, Standards and Procedures (PSP) guidance. See L Hartig 'Trump's New Drone Strike Policy: What's Any Different? Why It Matters' Just Security (21 September 2017) <https://www.justsecurity.org/45227/trumps-drone-strike-policy-different-matters/>.

[39] The test was reportedly still used by the Trump administration under the PSP. See Hartig ibid.

[40] See eg Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, art 57.

[41] ibid, art 51(5)(b).

[42] See for example: Executive Order 13732 on US Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force; the PPG also applied more restrictive measures than required under IHL in relation to capture operations, where it required that a capture operation was not feasible before proceeding (so-called 'least restrictive means').

[43] H Koh, *The Trump Administration and International Law* (Oxford University Press 2019) 98.

[44] Other examples of UK practice which could equally be said to consist of due diligence conducted partially out a sense of legal obligation, partially through policy choice, include implementation of the UN Guiding Principles on Business and Human Rights ('Good Business: *Implementing the UN Guiding Principles on Business and Human Rights: Updated May 2016*' available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf>).

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

States,[45] whilst ensuring that the UK does not itself contribute to breaches of international law through assistance provided to other States. The OSJA guidance sets out a non-exhaustive list of legal risks to be taken into account when the UK provides assistance overseas.[46] In practice assistance will either be capacity building (eg justice sector institutional reform) or case-specific (eg a request for support to a police investigation following a terrorist attack). Under the OSJA guidance, a policy official must conduct an assessment of the internal situation in the country in which assistance is to be provided. They then identify particular human rights or IHL risks in that country. Where risks are identified, consideration is given to whether steps can be taken to mitigate any risk that the assistance might 'directly or significantly contribute' to violations of the identified human rights and IHL provisions. An assessment is then made of whether there is a 'serious risk that the assistance might directly or significantly contribute to a violation of human rights and/or IHL, and determine whether senior personnel or Ministers' need to provide approval before the assistance is provided. The test of whether the activity might 'directly or significantly' contribute to violations of international law is consistent with the test for establishing responsibility under Article 16 of the ILC Articles on State Responsibility.[47] However, the associated assessment would in many cases exceed the standard strictly required to avoid a finding of responsibility on the part of the UK for subsequent internationally wrongful acts by the recipients of support.

Ambiguity over the extent of legal obligation acknowledged within such policy initiatives allows a State to take risks in pursuing policy goals without feeling bound by having to undertake a specific course of conduct. The UK OSJA Guidance was the subject of judicial review proceedings before the High Court in England and Wales in 2015, in relation to training provided by the UK to the Sudanese Armed Forces (SAF).[48] The claimant in that case, a Sudanese human rights lawyer, sought to challenge the UK Government's decision to provide a training programme to SAF which included courses entitled 'Psychology of Leadership', 'Managing Defence in a Wider Security Context', as well as English language and human rights training. As

[45] See eg the UK Building Overseas Strategy, at 9.14: 'Providing assistance for the security sector in fragile states means working with countries and institutions where we have concerns about their respect for human rights and democracy. In conducting this work, it is vital that we engage with the security and justice sector in ways which promote rather than undermine human rights, and that we take steps to mitigate any potential risks to human rights.'

[46] In terms of specificity, the guidance does not refer to individual treaties or rules, but states that 'the types of human rights and IHL risks that should be considered are: use of the death penalty; unlawful or arbitrary arrest or detention; torture or cruel, inhuman or degrading treatment (CIDT) (including standards of detention); unlawful killing and/or unlawful use of force (e.g. disproportionate, indiscriminate); enforced disappearance; unfair trial or denial of justice; unlawful interference with democratic rights (e.g. freedom of assembly or expression); violations of the rights of the child including ensuring that soldiers under the age of 18 take no direct part in hostilities; *refoulement* (forced return where there is a danger of torture, CIDT, or flagrant denial of another right); human trafficking and/or sexual violence; persecution of an identifiable group (eg on racial or ethnic grounds) in combination with any of the above violations'.

[47] Crawford (n 31) 149. See also H Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (Chatham House November 2016) at para 21. Moynihan also notes, at paras 48–49, that to the extent that due diligence obligations exist they would be more properly characterised as part of individual primary rules of international law rather than the rules of State responsibility.

[48] *R (Nour) v Secretary of State for Defence* [2015] EWHC 2695 (Admin).

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

the court notes, the claimant accepted that the OSJA Guidance 'does not require or prohibit any substantive outcome'.[49] In other words, the OSJA Guidance still permits assistance to be provided even where the risk is identified to be high. Through the OSJA Guidance the UK has also put in place measures to 'internalise international norms' and promote their 'stickiness', to use Koh's language, whilst retaining the space in which to take decisions where the legal, political and reputational risks may be high, but where liability would not be established solely by virtue of its decision-making—due diligence—process having led to a particular outcome.[50]

Due diligence as a policy response as described above, reaching above and beyond the strict requirements of the law, is a positive phenomenon in international law terms for a number of reasons. Firstly, the behaviour/practice helps to ensure compliance by those States with the primary obligations which it does touch upon. For instance, the UK practice of carrying out due diligence prior to providing security and justice assistance overseas (the OSJA guidance) aims to ensure that this is done consistently with a variety of international legal obligations. The end result is intended to be that the UK's actions are a degree below the threshold of breaching any primary rules of international law. Second, policy and process responses by States which feature an expansive due diligence element, and which 'talk the language' of international law as those identified above, have the effect of promoting good practice by other State and non-State actors (be they commercial entities or armed groups). Third, due diligence practice by States can, of course, also serve a law-generating function, over time. The types of activity described above might, if undertaken on a sufficiently widespread basis and with evidence of *opinio juris*, be held to constitute practice in response to existing or nascent rules of customary international law in specific contexts.[51] Fourth, due diligence practice by States on the international law plane can additionally have law-creating effects downwards into national jurisdictions. The ILA Study Group

[49] ibid, para 18.

[50] Another example is the UK Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (2010, available at <http:www.gov.uk>). The Consolidated Guidance 'sets out the principles, consistent with UK domestic law and international law obligations, which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees'. The Guidance adds that 'Personnel whose actions are consistent with this guidance have good reason to be confident that they will not risk personal liability in the future.' Again the due diligence carried out (introducing and applying the guidance) ensures that (in the view of the UK) the State acts consistently with its obligations, but conducting due diligence is not an explicit part of the obligation. See also 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (May 2016, available at <http:www.gov.uk>). The UK has produced a National Action Plan to implement the (non-binding) UN Guiding Principles (due diligence as a policy choice), within which it notes a range of the UK's international human rights law obligations; domestic law implementing these obligations (due diligence as a legal obligation); and domestic policy initiatives within the NAP which may or may not be to ensure UK adherence to international law obligations (due diligence as policy choice and/or legal obligation). Para 11 of the NAP is an example of this in action, stating that 'there is no general requirement for States to regulate the extraterritorial activities of business enterprises domiciled within their jurisdictions, although there are limited exceptions to this, for instance under treaty regimes. The UK may also choose as a matter of policy in certain instances to regulate the overseas conduct of British businesses.'

[51] In *Pulp Mills* the exercise of due diligence by carrying out environmental impact assessments was held by the ICJ to 'have gained so much acceptance among States that it may now be considered a requirement under general international law'. *Pulp Mills*, ibid, para 204.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press

looked into the 'normative content of due diligence in terms of standards of good governance and administration'.[52] It described how in the field of corporate responsibility, voluntary guidelines have subsequently been reproduced in other international (still non-binding) regulations, and then reflected in domestic statutory (legally binding) requirements upon businesses.[53]

V. CONCLUSIONS

The nature of the role of due diligence in international law depends on the context. Acting with due diligence can be explicitly required under a rule, be part of a rule, or be required by necessary implication to act in conformity with a rule. But there is no general rule or principle of due diligence in international law. Due diligence is also used in international law to describe mixed policy–legal responses used by States to manage risk. The fact that a State chooses to 'do due diligence' does not always mean that a legal requirement for that State to 'act with due diligence' exists. Conflating these two senses of the expression risks causing confusion around, and potentially having a chilling effect upon, a growing body of processes adopted by States which promote the development of international law, among several other objectives of the State in question.

Characterising the role of due diligence in international law in the way outlined in this article is realistic, and acknowledges that States have a wide degree of latitude in terms of how they implement their primary obligations, even where these require the exercise of due diligence. More importantly, taking this approach does not overextend the reach of international law. The world today represents a challenging environment within which to push the boundaries of international legal obligations. The need to comply with some fairly fundamental rules is being called into question by apparently contrary practice.[54] Against this backdrop, it seems prudent to focus on reinforcing the existing obligations (eg primary rules) and core structure (eg secondary rules) of international law. Indeed, it is difficult to see what would be achieved by characterising due diligence in any other way, unless one sees the function of the international legal system as first and foremost to ensure that a State's responsibility in law can be said to be engaged in the broadest variety of situations, which is not the objective of this body of law.

[52] ILA Study Group, Second Report, 1.
[53] ibid, 33, 39. Examples include the US Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) section 1502, which imposes disclosure requirements on companies to address the risk of trade in conflict minerals.
[54] For example, the general prohibition of the use of force is being tested by various instances of the use of force by States in Syria without offering a justification in international law.

https://doi.org/10.1017/S0020589319000344 Published online by Cambridge University Press