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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Due diligence as a secondary rule of general international law

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Abstract

The conventional understanding of due diligence in international law appears to be that it is a concept that forms part of primary rules. During the preparatory stages in creating the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the International Law Commission (ILC) focused on due diligence as though it could have formed part of secondary rules. Despite this process, no due diligence provision forms part of the ARSIWA. Yet a number of the final provisions are based on primary rules. This is because the ILC relied on the method of extrapolation in attempts to create secondary rules. Extrapolation is a method of international law-making by which the output of an analytical process is reproduced in a different form following an examination of its content that exists in other forms. In using this method, the ILC attempted to create secondary rules by extrapolating from primary rules. Yet it did not do so with respect to due diligence. However, due diligence can be formulated and applied differently by using this same method. This article analyses the steps of this process to construct a vision of where international legal practice should venture in the future. In learning from and amalgamating the dominant trends in different areas of international and domestic law, this article proposes that due diligence could exist as a secondary rule of general international law. By formulating and applying due diligence as a secondary rule, there is potential to develop the general international law applicable to determining state responsibility for the conduct of non-state actors.

Keywords: due diligence; non-state actors; public international law; secondary rules; state responsibility

1. Introduction

This article shows how due diligence could exist as a secondary rule of general international law, and why, in some respects, rather than applying due diligence through primary rules, this formulation might benefit the international law applicable to determining state responsibility for the conduct of non-state actors. Before getting into the details regarding how due diligence can be formulated and possibly applied as a secondary rule of international law, some clarifications need to be made. First, when referring to 'primary' and 'secondary' rules, this article, for better or worse, uses the same terminology that the ILC adopted when creating the ARSIWA, in that primary rules define the content of international obligations, 'the breach of which gives rise to responsibility', and secondary rules define 'the general conditions under international law' for states 'to be

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considered responsible for wrongful actions or omissions'.[1] Second, this article does not critique the primary/secondary rule distinction.[2] Instead, it works within this rote and commonly accepted conceptualization. Third, 'non-state actor' is defined in the negative, in that such an entity cannot be regarded as a 'state' from the perspective of public international law.[3] That said, it should be noted that the seeming dichotomy between states and non-state actors is not always absolute.[4]

Now that these clarifications have been made, this article unpacks an argument that due diligence can and arguably should exist as a secondary rule of general international law, which consists of rules that have general applicability across different sub-fields of international law. Section 2 shows the extent to which due diligence was addressed in the preparatory work of the ARSIWA. This section highlights that the ILC spent significant time and effort focusing on due diligence considering that the concept was ultimately not included in the final version of the ARSIWA. Section 3 examines how due diligence could form part of the general international legal framework on state responsibility, exploring its formulation and potential application as a secondary rule. Section 4 analyses the core elements of due diligence in international law, explaining what factors would need to be taken into consideration if the concept were applied in practice as a secondary rule. Section 5 addresses the links between due diligence, complicity and attribution. It does so because there is potential for overlap between these three modes of state responsibility, especially if due diligence were to apply as a secondary rule.[5]

2. Due diligence and the ARSIWA

Due diligence is referred to once in the ARSIWA, within the commentary.[6] The concept was not included in the ARSIWA because the ILC intended these provisions to embody secondary rules.[7] Yet exceptions to the primary/secondary rule distinction exist.[8] Although the final version does not address the concept, due diligence formed a significant part of the ARSIWA's preparatory work. Chronologically examining this process makes it possible to appreciate the roots of the concept within the state responsibility framework, in particular how the various stages in this drafting process contribute to contemporary understandings of due diligence. This section briefly explores the work of the ILC special rapporteurs on state responsibility to show how due diligence was approached during the drafting process of the ARSIWA.

2.1 In the beginning

The ILC began addressing due diligence through the work of the first special rapporteur on state responsibility, Francisco V. Garcia-Amador.[9] Garcia-Amador contributed to shedding light on

[1]Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 43, UN Doc. A/RES/56/83 (2001), Annex, UN Doc. A/CN.4/L.602/Rev 1, GAOR 56th Session Supp 10, 43, Commentary, para. 1 (see also paras. 2 and 3).

[2]Other studies have done this already. See, e.g., A. Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', (2011) 22 *European Journal of International Law* 993; U. Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System', (2009) 78 *Nordic Journal of International Law* 53.

[3]P. Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in P. Alston (ed.), *Non-State Actors and Human Rights* (2005) 3, at 4 and 19.

[4]See S. Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law', (2017) 55 *Columbia Journal of Transnational Law* 343.

[5]'Mode' in this sense purely refers to the manner in which a concept operates and is dealt with in a particular field, in this instance, state responsibility within international law.

[6]ARSIWA, Art. 2, Commentary, para. 3.

[7]See *supra* note 1.

[8]See Section 3.1 (below).

[9]F. V. Garcia-Amador, First Report, International Responsibility, A/CN.4/96, YBILC (1956), vol. II.

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how due diligence could be used to determine the international responsibility of states for the conduct of non-state actors.[10] What he referred to as 'imputability' at the time concerned state conduct that failed to exercise due diligence with respect to the conduct of a non-state actor.[11] It was clarified that 'what is in essence imputed to the State is not really the act or deed which causes the injury, but rather the non-performance of a duty'.[12] Garcia-Amador viewed due diligence as a concept that should take into consideration any fault or culpability on the part of states when assessing their potential international responsibility for non-state actor conduct.[13]

From these understandings, his work began to develop a 'rule of "due diligence"'.[14] This 'rule' stemmed from the premise that all states should 'guarantee the safety of persons and property', which he argued was 'recognised as an integral part of the international law relating to responsibility'.[15] He also acknowledged that establishing state responsibility for a due diligence failing should not depart from the state in question being bound by an international obligation, as doing so could 'open the door to wholly unjustified claims'.[16] Garcia-Amador considered due diligence to form an important part of international law, one that is needed to ensure that state responsibility is not avoided 'whenever the circumstances genuinely justify a claim against the State for negligence in the discharge of its essential functions'.[17] Before completing his work, Garcia-Amador clarified how he thought due diligence should apply in international law, which consists of establishing state responsibility in situations where a state failed to prevent, suppress or address the conduct of a non-state actor that was contrary to a particular international rule to which the state was bound.[18]

2.2 Building on the work of Garcia-Amador

Although much of Garcia-Amador's work during his role as special rapporteur was shelved by the ILC,[19] the next special rapporteur, Roberto Ago, built on the work that related to due diligence. Ago examined legal practice involving due diligence, which provided further insights into the concept, in particular how it could be applied as part of general international law. In the *Bernadotte* case, Israel was held responsible for 'failure to exercise due diligence and to take all reasonable measures for the prevention of' an assassination.[20] In the *Romanian Legation* case, Romania requested reparation for an attack on a delegation of diplomats that occurred in Switzerland, on the grounds that the Swiss authorities had not anticipated the attack, delayed arresting the offenders, and did not immediately assist the wounded chauffeur of the delegation.[21] This claim was rejected because it was considered 'impossible either to anticipate or prevent the aggression ... the police had taken all steps which the circumstances required', the chauffeur was taken to hospital upon being found by the Swiss authorities, and Switzerland stated it 'would prosecute the perpetrators of the attack, who were in fact sentenced to rigorous imprisonment, deprivation of civic rights and expulsion from Swiss territory'.[22] There were a number of other

[10]Ibid., at 187.
[11]Ibid.
[12]Ibid.; see also ibid., at 208.
[13]Ibid., at 209.
[14]Second Report, International Responsibility, F. V. Garcia Amador, A/CN.4/106, YBILC (1957), vol. II, at 104.
[15]Ibid., at 106.
[16]Ibid.
[17]Ibid.; see also F. V. Garcia-Amador, Third Report, International Responsibility, A/CN.4/111, YBILC (1958), vol. II, at 54.
[18]F. V. Garcia-Amador, Fifth Report, International Responsibility, A/CN.4/125 and Corr. 1, YBILC (1960), vol. II, at 63.
[19]For a summary of why this occurred see D. Müller, 'The Work of Garcia Amador on State Responsibility for Injuries Caused to Aliens', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), at 69.
[20]Fourth Report, State responsibility, Roberto Ago, A/CN.4/264 and Add.1, YBILC (1972), vol. II, at 118.
[21]Ibid.
[22]Ibid.

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cases in which Ago examined the requirements for establishing state responsibility for a due diligence failing.[23] This analysis showed that states were assessed on their vigilance when claims were made against them for not preventing, suppressing or addressing wrongful conduct of non-state actors. Two findings were made at this stage. First, exercising due diligence does not equate to preventing every incident without exception.[24] Second, if proven that a state's due diligence *might have* prevented the wrongful conduct in question from occurring, then the state can be held responsible for not having done so.[25]

In taking these insights forward, Ago proposed Draft Article 23:

> There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.[26]

This draft provision was based on state and judicial practice.[27] The commentary clarifies its scope:

> Clearly, a State cannot be alleged to have breached its obligation to prevent a given event so long as the event has not actually occurred, and the same is true where the feared event has occurred but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach.[28]

This draft provision, had it been retained, would have applied as a secondary rule that included a due diligence assessment. Its application, in combination with the applicable primary rule, would have been used to determine whether state responsibility for the conduct of a non-state actor could be established. Ago emphasized that Draft Article 23 would apply 'without seeking to determine the conditions for the occurrence of such a breach in the various hypothetical cases'.[29] The Drafting Committee and the ILC adopted the draft provision the same year it was proposed.[30] After its adoption, in a further attempt to show that it was grounded in legal practice, the final report of Ago examined further cases involving due diligence.[31]

[23]Ibid., at 131–8.

[24]Ibid., at 133, 137.

[25]Ibid., at 135–6. See, e.g., 'The British Foreign Office also sent to its consular officers abroad the following instruction, which was transmitted to the United States Ambassador in Mexico City by the British Minister in 1913: "Where claims are made for compensation for damages done by insurgents in armed insurrections against a government which was unable to control them, claimants should be reminded that His Majesty's Government do not regard a government as liable in such cases *unless* that government were negligent and *might have* prevented the damage arising"' (emphasis added).

[26]R. Ago, Seventh Report, State Responsibility, A/CN.4/307 and Add. 1 & 2 and Corr. 1 & 2, YBILC (1978), vol. I(1), at 37.

[27]Ibid., at 32–7.

[28]Ibid., at 32.

[29]Ibid., at 36.

[30]ILC Report, thirtieth session, 8 May–28 July 1978, UNGA, Thirty-third session, Supp. No. 10, A/33/10, YBILC (1978), vol. II(2), at 81; Draft articles on State responsibility: Text adopted by the Drafting Committee: Articles 23–7 and title of Ch. IV of the draft – reproduced in A/CN.4/SR.1513 and SR.1524, A/CN.4/L.271 and Add.1, YBILC (1978), vol. I, at 206.

[31]R. Ago, Eighth Report, State Responsibility, A/CN.4/318 and Add.1 to 4, YBILC (1979), vol. II(1), at 63–4.

2.3 After Ago

The next special rapporteur, Willem Riphagen referred to due diligence, but only once.[32] Subsequently, Gaetano Arangio-Ruiz dealt with due diligence, but only insofar as it related to assessing reparations after establishing a state's international responsibility.[33] Draft Article 23 was thus unaltered and adopted by the ILC on first reading.[34] From here states made some observations on the draft provision, which were in favour of it being included in the Draft ARSIWA.[35] There were states, Germany, for example, which considered Draft Article 23 in the form proposed by Ago as being 'too abstract'.[36] Yet the general position of states at the time was that the provision should be retained. The UK stated that Draft Article 23 was 'uncontroversial', but that it required further work.[37] France was of the view that Draft Article 23 related 'to rules of substantive law, which classify primary obligations', and therefore, according to France, had 'no place in a draft of this kind and should be deleted'.[38] This was the only pronouncement that explicitly called for deletion.[39]

2.4 Erasing a potential due diligence provision

In bringing together the work undertaken up to that point and examining it in light of the comments received by states, the final special rapporteur, James Crawford, engaged with the concept of due diligence in a manner that led to it being erased from the final version of the ARSIWA. The reason for this becomes clear when examining Crawford's analysis on Draft Article 23, in which he argued that there was 'clearly a strong case for simply deleting' the draft provision.[40] His reasons for this recommendation were threefold. First, Draft Article 23 had apparently 'been criticized by a number of Governments as over-refined'.[41] However, no state claimed that the provision was 'over-refined'. The critiques predominantly centred on the *under-refinement* of the provision, hence the claims that it was 'too abstract'.[42] Second: 'They [draft Articles 20, 21, paragraph 1, and 23] have been widely criticized in the literature'.[43] However, the references used to support this argument do not show any 'wide' criticism of Draft Article 23 specifically. Third: 'Their [draft Articles 20, 21, paragraph 1, and 23] relationship to similar concepts under national law is obscure and even contradictory'.[44] It is unclear what is meant by this assertion regarding its relevance to Draft Article 23 specifically.

[32]W. Riphagen, Seventh report, State responsibility, (A/CN.4/397 and Corr.1 & 2 and Add.1 & Corr.1), YBILC (1986), vol. II(1), at 8.

[33]G. Arangio-Ruiz, Second report, State responsibility, A/CN.4/425 & Corr.1 and Add.1 & Corr.1, YBILC (1989), vol. II(1), at 6, 15, 16, 26, 27.

[34]ILC Report, forty-eighth session, 6 May–26 July 1996, UNGA, Fifty-first session, Supp. No.10, A/51/10, YBILC (1996), vol. II(2), at 60.

[35]Observations and comments of Governments on chapters I, II and III of Part I of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/328 and Add.1-4, YBILC (1980), vol. II(1), at 92, 93, 100, 101, 103; Comments of Governments on part one of the draft articles on State responsibility for internationally wrongful acts, A/CN.4/342 and Add.1-4, YBILC (1981), vol. II(1), at 75.

[36]Comments and observations received from Governments, A/CN.4/488 and Add. 1–3 (1998), at 123.

[37]Ibid., at 126.

[38]Ibid.

[39]James Crawford inferred that the UK and Germany took a similar position. See J. Crawford, Second report, State responsibility, A/CN.4/498 and Add.1–4 (1999), at 27.

[40]Ibid., at 28.

[41]Ibid.

[42]See note 36 and preceding text.

[43]See Crawford, *supra* note 39, at 28.

[44]Ibid., at 28–9.

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Crawford did note Draft Article 23's value: 'the commentaries to articles 20, 21 and, *especially*, 23 are useful, although they are in need of modification'.[45] And although he proposed deleting the provision, Crawford appeared reluctant:

> The case for deletion is a formidable one, but still there must be a hesitation, given the currency of the terms used, their value in some cases, e.g. in determining when a breach has occurred, and the relative poverty of the conceptual framework of international law in matters relating to breach of obligation.[46]

Despite not showing what specific draft provision was being addressed when asserting his opinion, Crawford saw some of the analysis relating to due diligence as being potentially beneficial towards developing the international law on state responsibility. The ILC did not, however, retain Draft Article 23.[47] What remains of the work can be found in Article 14.[48] Although not apparent from reading the final provisions and their commentaries, due diligence formed part of the ARSIWA's preparatory work. The ILC and its special rapporteurs devoted time and effort towards analysing the concept. However, no due diligence provision forms part of the ARSIWA.

3. Formulating due diligence as a secondary rule

The preparatory work of the ARSIWA shows that there was an attempt to create a secondary rule that included a due diligence assessment. Considering what secondary rules are, in that they set out general conditions for determining state responsibility for wrongful conduct, it is somewhat surprising that the ILC did not ultimately create a due diligence provision for inclusion in the ARSIWA. This surprise is amplified when considering the fact that the ILC used primary rules in attempts to create secondary rules.[49] There are a number of the final ARSIWA provisions that are also found in primary rules.[50] In light of these factors, this section shows that the concept of due diligence can be formulated as a secondary rule and arguably should be applied as such. The section proceeds in three stages. First, it explains the method of international law-making known as extrapolation and how it was used by the ILC to create a number of the provisions in the ARSIWA. Second, this same method is used to show how extrapolating from primary rules of international law and domestic law could create a secondary due diligence rule that would form part of general international law. Third, the rationale for developing a secondary due diligence rule is provided. These three strands of argument help explain that formulating and applying due diligence as a secondary rule would develop the general international legal framework of state responsibly that concerns the conduct of non-state actors. This section thus constructs a vision of where legal practice should venture in the future and attempts to show due diligence in its best possible form within international law.

[45]Ibid., at 29 (emphasis added).

[46]Ibid.

[47]ILC Report, fifty-first session, 3 May–23 July 1999, UNGA, Fifty-fourth session, Supp. No.10, A/54/10, YBILC (1999), vol. II(2), at 50; State responsibility: Titles and texts of draft articles adopted by the Drafting Committee: articles 16 to 26 bis (chapter III), 27 to 28 bis (chapter IV) and 29 to 35 (chapter V) – reproduced in document A/CN.4/SR.2605, para.4, A/CN.4/L.574 [and Corr.1 and 3], YBILC (1999), vol. I, at 275.

[48]See ARSIWA, Art. 14 and Commentary, in particular para. 14.

[49]See analysis in Section 3.1 (below) and also J. Vidmar, 'Some Observations on Wrongfulness, Responsibility and Defences in International Law', (2016) 63 *Netherlands International Law Review* 335, at 349.

[50]Ibid. Vidmar, at 350.

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3.1 Explaining extrapolation

Extrapolation is a method of international law-making by which the output of an analytical process is reproduced in a different form following an examination of its content that exists in other forms.[51] By utilizing this method, general international rules can be developed by extrapolating from specific international rules.[52] This methodology was utilized by the ILC to create the ARSIWA, yet the method 'is by no means particular' to state responsibility.[53] Nor is this method of law-making restricted to international law.[54] Sandesh Sivakumaran has shown that using extrapolation helped the ILC create Article 16 of the ARSIWA:

> The ILC provides for a general rule on complicity – a state aiding or assisting another state in the commission of an internationally wrongful act by the latter – on the basis of international law rules on complicity in the specific areas of aggression, circumvention of sanctions imposed by the UN Security Council and human rights violations. From these three very particular subject areas, a generalized rule on complicity was formulated.[55]

It is not only Article 16 that was created using this method. Article 6 was based on human rights and international trade law.[56] Human rights law and international humanitarian law (IHL) was used to create Article 7, where rules of the latter body are acknowledged in the provision's commentary as 'corresponding' to the attribution test for *ultra vires* acts.[57] The ILC (mistakenly) cherry-picked from (tangentially related but inappropriate) case law in the areas of human rights and investment law to create the 'effective control' test under Article 8.[58] The commentary to Article 9 reveals that the 'principle underlying' the provision is based on rules of IHL.[59] Article 21 replicates the law on the use of force regarding self-defence under the United Nations (UN) Charter.[60]

There exists a sliding scale of reliance on primary rules to form the basis of the ILC's attempts to create secondary rules. This starts from a point in which the created ARSIWA provision has little or no connection with primary rules, towards provisions that contain related primary rules, to provisions that are based on the same normative foundations as primary rules, ending at masquerading secondary provisions that are in fact primary rules in their entirety. This process of utilizing extrapolation can therefore create a warped perception that the law on a particular subject is clear, when it is not. Such an approach 'packages things neatly and presents a coherent picture when, in reality, the international law in the area is rather messy'.[61] This could well be a deeper-rooted reason as to why problems of interpretation continually arise with provisions of the

[51]It is often undertaken with the aim of enhancing the 'original' output and is a commonly used methodology in a number of fields in addition to international law. See R. Kurzweil, 'The accelerating power of technology', *TED Talks*, February 2005, available at www.ted.com/talks/ray_kurzweil_on_how_technology_will_transform_us.

[52]S. Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief', (2017) 28 *European Journal of International Law* 1097, at 1108–16.

[53]Ibid., at 1112. For example, in creating the Draft Articles on the Expulsion of Aliens, the ILC combined 'aspects of traditional customary international law, human rights lat [sic], refugee law' and extrapolated 'current trends' to 'restate' the law in this area (*Harvard Human Rights Journal*, Forum on the International Law Commission's 'Draft Articles on the Expulsion of Aliens', Introduction, available at www.harvardhrj.com/forum-essays/).

[54]C. Engel, 'General and Specific Rules', (2005) 161 *Journal of Institutional and Theoretical Economics* 350; J. D. Dana, Jr. 'General and Specific Legal Rules: A Mechanism Design Approach', (2005) 161 *Journal of Institutional and Theoretical Economics* 347.

[55]See Sivakumaran, *supra* note 52, at 1112.

[56]ARSIWA, Art. 6, Commentary, paras. 2–7.

[57]ARSIWA, Art. 7, Commentary, paras. 4–6.

[58]ARSIWA, Art. 8, Commentary.

[59]ARSIWA, Art. 9, Commentary, para. 2.

[60]ARSIWA, Art. 21 and Commentary.

[61]See Sivakumaran, *supra* note 52, at 1114.

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ARSIWA.[62] If the content of a rule stems from different, albeit related, rules, then, because of the dissimilar content used to create the whole, there can be diverse opinions on it, which can create inconsistencies in how the rule is interpreted and applied.

Nonetheless, the creation of international rules that are general in nature can, and does, result from a shift from the primary rule/rules to the secondary rule. The ARSIWA is, in part, a product of this process. The ILC attempted to create secondary rules on the basis of existing primary rules. It did so by gathering the characteristics held in common by a variety of specific rules part of various sub-fields of international law, and then brought them together, showing how their widespread use across different areas paved the way for the creation of a provision that encapsulated them in an alternative, generalized form.

3.2 Amalgamating dominant trends

As the ILC created a number of provisions in the ARSIWA that are based on primary rules, examining whether this can be done with respect to due diligence is possible. The prevalence of due diligence across many sub-fields of international law raises the question of whether the concept can be formulated to apply as part of the general international law on state responsibility in the form of a secondary rule. The preparatory work on what could have been the due diligence provision in the ARSIWA shows that a more general understanding of the concept existed before it began to develop across primary rules.[63] Due diligence existed as a concept in international law before the distinction between primary and secondary rules was made.[64] However, since the distinction was adopted by the ILC, formulating and applying due diligence as a rule of general international law has remained on the fringes of international law and this field's scholarship.[65] Whether and how this can change rests on showing dominant trends that merit creating such a rule, which could, in turn, allow the concept to form part of general international law.

In order to initiate the process of extrapolation, there must be rules from which to draw. The prevalence of due diligence in primary rules and its potential status as a general principle of law indicate the potential of this particular method working. The remainder of this sub-section illustrates that extrapolating from the practice that has splintered into many areas of international and domestic law can form the basis for developing a general due diligence rule that is secondary in its formulation and application.

3.2.1 Primary rules

Due diligence finds itself in numerous sub-fields of international law and is particularly well-used in environmental,[66] humanitarian,[67] human rights,[68] and investment

[62]See J. Crawford, *State Responsibility: The General Part* (2013), 390.

[63]See Section 2 (above).

[64]It is unclear from where the ILC got the distinction. The terminology might have been adopted from Hart, who made this distinction in the context of domestic law: H. L. A. Hart, *The Concept of Law* (1961). However, it should be noted that 'the ILC's distinction between primary and secondary norms may *prima facie* appear, to a large extent, to be influenced by H. L. A. Hart's *Concept of Law*; nevertheless, Hartian thought should not be considered as the origin of the distinction (A. Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', (2011) 22 *European Journal of International Law* 993, at 1016).

[65]See analysis in Sections 2 (above) and 3.2.2 (below).

[66]R. Yotova, 'The Principles of Due Diligence and Prevention in International Environmental Law', (2016) 75 *Cambridge Law Journal* 445.

[67]A. Boivin, 'Complicity and beyond: International law and the transfer of small arms and light weapons', (2005) 87 *International Review of the Red Cross* 467, at 479, 489–90; R. P. Barnidge Jr, 'The Due Diligence Principle Under International Law', (2006) 8 *International Community Law Review* 81, at 92, 120.

[68]See case law of the Inter-American Court of Human Rights (IACtHR) and European Court of Human Rights (ECtHR) (below).

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law.[69] The concept is also called upon to address issues in newly developing areas, such as cyberspace.[70] It is also used to bolster protections regarding violent conduct, for example, in the context of suppressing terrorism,[71] or domestic abuse.[72] The Outer Space Treaty also has a due diligence rule enshrined within it:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for *assuring* that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require *authorization and continuing supervision* by the appropriate State Party to the Treaty.[73]

Although establishing state responsibility under this treaty will likely hinge on what the term 'national activities' encompasses, applying a due diligence assessment is one way of determining whether a state could be held responsible for the conduct of 'non-governmental entities'.[74]

The first clear example of due diligence existing as part of international law arose in the *Alabama Arbitration* with respect to the rule of neutrality.[75] The, then, Confederacy commissioned several warships from private companies operating in the UK, which was a neutral state regarding the conflict. The war vessels in turn damaged US ships.[76] The question before the arbitration panel was whether the UK had failed to exercise due diligence when it allowed a warship to be constructed and armed within its territory. The arguments of the US and the UK put forward different understandings of due diligence with respect to the rule of neutrality. The US viewed lack of due diligence as meaning:

> a failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation.[77]

The UK viewed due diligence as a domestic law concern, meaning if a state conducted itself within the parameters of its own legislation, then there could be no responsibility for a due diligence failing. The US argued that due diligence was not a question concerning the operation of domestic

[69]Y. Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law', (2020) 67 *Netherlands International Law Review* 233; E. De Brabandere, 'Host States' Due Diligence Obligations in International Investment Law', (2015) 42 *Syracuse Journal of International Law and Commerce* 319.

[70]M. N. Schmitt and S. Watts, 'Beyond State-Centrism: International Law and Non-state Actors in Cyberspace', (2016) 21 *Journal of Conflict & Security Law* 595, at 602–7.

[71]T. Becker, *Terrorism and the State: Rethinking the Rules on State Responsibility* (2006), 119–30 (reviewing practice on this issue); R. B. Lillich and J. M. Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities', (1977) 26 *American University Law Review* 217, at 251–76.

[72]*Goekce v. Austria*, UN Doc. CEDAW/C/39/D/5/2005 (2007), at paras. 12.1.2–12.1.4; *Opuz v. Turkey*, App. no. 33401/02, (ECtHR, 9 June 2009), at paras. 165, 200; L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection', (2010) 8 *Northwestern Journal of Human Rights* 190.

[73]UNGA Res. A/RES/21/2222, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, Art. 6 (emphasis added).

[74]K. Tinkler, 'Rogue Satellites Launched into Outer Space: Legal and Policy Implications', *Just Security*, 7 June 2018, available at www.justsecurity.org/57496/rogue-satellites-launched-outer-space-legal-policy-implications/.

[75]*Alabama claims of the United States of America against Great Britain (United States v. Great Britain)*, Award of 14 September 1872, RIAA, vol. XXIX (1872), at 125–34.

[76]Ibid., at 127.

[77]R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law* (1987), vol. X, at 139.

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law, rather, a neutral state owes an obligation of 'active diligence' commensurate with the foreseeable magnitude of the results arising from negligence.[78] For the US it was 'inconceivable that the belligerents were required to submit without redress to the injuries resulting from neutral negligence'.[79] The Tribunal held in favour of the US, stating due diligence:

> ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.[80]

It continued, ruling that a key factor for its decision was the UK's failure to exercise due diligence in light of the fact that the state had been warned about the implications of the warship's construction, yet it did not 'take in due time any effective measures of prevention', and when it attempted to do so it was 'so late' (i.e., last minute) that these steps were 'not practicable'.[81]

Daria Davitti argues that the 'specific content of the due diligence principle can be traced back to the 1920s'.[82] This period saw the emergence of cases where states were beginning to be assessed on their 'duties to protect and apprehend and punish when non-state actors commit injuries against foreign nationals'.[83] These cases clarified that state responsibility for non-state actor conduct could be established for a failure to ensure protection,[84] or for not 'diligently prosecuting and properly punishing'.[85] The International Court of Justice (ICJ) has also provided insights regarding due diligence. In the *Tehran Hostages* case, the Court considered Iran to be responsible for its failure to take action against rebels that attacked the US embassy.[86] It held that Iran had failed to take 'appropriate steps' to protect the premises, staff and archives of the US embassy from attack, as well as failing to put an end to the wrongdoing 'before completion'.[87] These failures were held to be 'more than mere negligence or lack of appropriate means'.[88] As Iran did not prevent the non-state actors from undertaking conduct that was contrary to the state's obligations, Iran was held responsible for a due diligence failing. In determining whether a state has conducted itself diligently, the ICJ has also ruled that the available resources of a state are an important factor when assessing international responsibility.[89] In the *Paramilitary Activities* case, although Nicaragua had not prevented weapons crossing its territory from being trafficked into El Salvador, the ICJ assessed the extent of due diligence required from the state in the broader context of the ongoing activities in the region.[90] Due diligence was thus assessed through a lens of reasonableness.[91] There were non-state actors in Nicaraguan territory undertaking conduct contrary to international law, yet because other (more resource-rich) states had not prevented the non-state actors from undertaking this conduct, it was ruled unreasonable to expect Nicaragua, a state with comparably fewer resources

[78]Ibid.

[79]Ibid.

[80]See *Alabama claims*, *supra* note 75, at 129.

[81]Ibid., at 130.

[82]D. Davitti, 'On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence', (2012) 12 *Human Rights Law Review* 421, at 445.

[83]R. Barnidge Jr, *The Due Diligence Principle Under International Law* (2006), at 98–9.

[84]*Thomas H. Youmans (U.S.A.) v. United Mexican States*, UNRIAA (1926), vol. IV, at 110, para 11.

[85]*Massey v. United Mexican States*, UNRIAA (1927), vol. IV, at 155, para. 159.

[86]*United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*), Judgment, 24 May 1980, (1980) ICJ Rep., at 3.

[87]Ibid., para. 63.

[88]Ibid.

[89]*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, [1986] ICJ Rep. 14, paras. 157–60.

[90]Ibid., para. 157

[91]See Section 4 (below) for further analysis on this matter.

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at its disposal, to do more in attempting to stem the flow of arms trafficking.[92] This case shows that variable applications of due diligence can originate from the same international obligation, depending on the state in question.[93]

The *Pulp Mills* case is also a prominent part of the jurisprudence relating to due diligence.[94] This case involved environmental harm caused by pulp mills to a river bordering Argentina and Uruguay. The ICJ ruled that a state should 'use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage'.[95] From this reading, it can be taken that states must do everything they can to prevent non-state actor conduct from doing harm.[96] The ICJ saw a crucial part of this process to entail states undertaking assessments as to how they should conduct themselves in order to ensure that non-state actors do not cause harmful outcomes through their conduct.[97]

In addition to international tribunals and the ICJ, regional human rights courts have furthered understandings of due diligence. The IACtHR has held that states are obligated to exercise due diligence in preventing non-state actors from infringing a person's right to life, physical integrity and liberty.[98] In the *Velasquez Rodriguez* case, the IACtHR made a number of pronouncements on this matter. This case concerned the abduction and disappearance of a student, which was linked to a pattern of similar incidents whereby Honduras was accused of such acts in the suppression of dissidents. The non-state actors who carried out the abduction were, as held by the IACtHR, 'agents who acted under cover of public authority'.[99] However, the Court emphasized:

> even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under ... the [American Convention on Human Rights].[100]

The IACtHR held the state responsible for its failure to exercise diligence in preventing the non-state actors from carrying out the abduction. The Court was not convinced that Honduras had acted with due diligence.[101] It went on to rule that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it.[102]

[92]Ibid.

[93]However, this flexibility is limited. See E. Askin, 'Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers', *EJIL: Talk!*, 1 March 2017, available at www.ejiltalk.org/due-diligence-obligation-in-times-of-crisis-a-reflection-by-the-example-of-international-arms-transfers/; A. V. Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces* (1955), at 277–8.

[94]*Case Concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Judgment of 20 April 2010, [2010] ICJ Rep. 14.

[95]Ibid., para. 101.

[96]This stance takes insights from the work of the ILC in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), UN Doc. A/RES/56/82 (2001), 56 UN GAOR Supp (No. 49) at 498, Supp. (No. 10) A/56/10 (V.E.1). It should be noted that these provisions apply 'to activities not prohibited by international law' (see Art. 1, Commentary, paras. 1–17) and thus concern international *liability*, which is a separate issue from international *responsibility* for conduct that *is* prohibited by international law; see N. L. J. T. Horbach, 'The Confusion About State Responsibility and International Liability', (1991) 4 *Leiden Journal of International Law* 47.

[97]See *Pulp Mills*, *supra* note 94, para. 205.

[98]*Velasquez Rodriguez v. Honduras*, (Ser. C) No. 4 (IACtHR, 29 July 1988), para. 166.

[99]Ibid., para. 182.

[100]Ibid.

[101]Ibid., para. 79.

[102]Ibid., para. 172.

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The key reason for Honduras' due diligence failings was because it 'did not take effective action' to ensure that the rights owed through its obligations were realized to the extent that they could be 'freely and fully' exercised.[103] Under this reading of due diligence, states are required to conduct themselves in a way that attempts to ensure that non-state actors do not detrimentally affect the rights of others. Other judgments of the IACtHR have followed this precedent.[104] Another component of this judgment is the emphasis the IACtHR placed on clarifying that states are required to exercise due diligence over their jurisdiction, implying due diligence is not strictly limited to a state's territory.[105]

The ECtHR has made similar pronouncements to the IACtHR, clarifying that states must act diligently with respect to conduct undertaken within their jurisdiction.[106] The ECtHR's jurisprudence taps into one of the overarching aims of applying due diligence, in that states are expected to put in place measures that set out to achieve, or at the least attempt to realize, a common goal that is set by obligations part of a particular framework. These obligations predominantly concern preventing, suppressing or addressing conduct that can affect the corollary rights at issue. In the human rights field, as stressed by the ECtHR, the obligations regarding a state's due diligence are ones 'of conduct' not 'of result'.[107] This is true of due diligence under international law more generally,[108] where states tend to 'have obligations of conduct, rather than result'.[109]

Across primary rules, due diligence does not have a fixed set of elements and is indeterminate. What application of the concept through primary rules does clarify is that states should implement measures that ensure the protection of, or, at the very least, endeavour to protect, the legal obligations they owe to others. The only apparent limitation of a due diligence assessment is a state's capabilities with respect to regulating conduct, in which an expectation of due diligence extends to the extent considered reasonable.[110] In the practice analysed above, the issue that threads it together is establishing state responsibility for non-state actors whose conduct cannot be attributed to the state but operate within the ambit of a state's power and authority.

3.2.2 General principle

It is beyond doubt that the concept of due diligence forms part of primary rules. It has been argued that due diligence is not a general principle of international law.[111] However, this is not the same as

[103]Ibid., paras. 180, 167 respectively.

[104]See, for example, *Caso 19 Comerciantes*, (Ser. C) No. 109 (IACtHR, 5 July 2004), paras. 29, 30, 112, 140, 203; *'Mapiripán Massacre'*, (Ser. C) No. 122 (IACtHR, 15 September 2005), paras. 226, 246, 304; *Pueblo Bello Massacre*, (Ser. C) No. 140 (IACtHR, 31 January 2006), paras. 126, 139, 140, 151, 170, 201; *Masacres de Ituango*, (Ser. C) No. 148 (IACtHR, 1 July 2006), paras. 134, 291, 310, 315, 316, 317, 328, 330, 399, 402, 417; *Masacre de La Rochela*, (Ser. C) No. 163 (IACtHR, 11 May 2007), paras. 2, 111, 149, 150, 155-164, 165, 172, 194, 199, 202, 203, 209, 288, 293,-297.

[105]*Velasquez Rodriguez*, *supra* note 98, paras. 166, 174, 176, 180, 188.

[106]See, for example, *Lopes De Sousa Fernandes v. Portugal*, App. no. 56080/13 (ECtHR, 19 December 2017), paras. 31, 47, 49, 64; *Ilaşcu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), paras. 322–52; *Tahsin Acar v. Turkey*, App. no. 26307/95 (ECtHR, 8 April 2004); *Slivenko v. Latvia*, App. no. 48321/99 (ECtHR, 9 October 2003); *Kudła v. Poland*, App. no. 30210/96 (ECtHR, 26 October 2000), paras. 109, 129; *Osman v. United Kingdom*, App. no. 87/1997/871/1083 (ECtHR, 28 October 1998), para. 116.

[107]Ibid. *Lopes De Sousa Fernandes*, para. 31.

[108]N. White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs', (2012) 31 *Criminal Justice Ethics* 233.

[109]T. Christakis, 'Challenging the "Unwilling or Unable" Test', in A. Peters and C. Marxsen (eds.), *Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War* (MPIL Research Paper Series No. 2017-07), at 18; see also 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 *European Journal of International Law* 371, at 376–8; J. Crawford, 'Revising the Draft Articles on State Responsibility', (1999) 10 *European Journal of International Law* 435, at 440–2.

[110]See Garcia-Amador, *supra* note 9, at 190; see also Section 4 (below).

[111]N. McDonald, 'The Role of Due Diligence in International Law', (2019) 68 *International & Comparative Law Quarterly* 1041.

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the concept existing across domestic legal systems.[112] As understood from the perspective of Article 38(1)(c) of the ICJ Statute,[113] a general principle of law can come from a concept that is commonly used in various states.[114] General principles can come from domestic legal systems and can also be deduced from international law directly. For example, the ICJ stated that international legal obligations incumbent on states can be based on:

> certain *general* and well-recognized 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.[115]

References to 'general principles' can either derive from domestic law, which is more common, or international law, which happens when principles have no parallel in domestic law.[116] Whether due diligence exists as a general principle for the purposes of the concept being used as part of international law is, therefore, more likely to derive from domestic law.

From the perspective of domestic law, due diligence finds itself closely linked to the duty of care principle, foreseeability, and negligence, forming part of the law on tort, delict and contract.[117] Cases in these areas turn on the scope and exercise of a person's duty of care, assessed through a lens of reasonableness.[118] The extent of required due diligence conferred on a person and their execution of conduct meeting that threshold determines their liability. For example, take the obligation of a doctor in relation to a patient:

> He or she must do everything that a reasonable person and competent physician can do in order to look after a patient. But a doctor has no obligation, in the strict meaning of the term, to heal or cure the patient.[119]

As mentioned above, the concept of due diligence can be associated with so-called 'obligations of conduct', which, under domestic law, require the person owing the obligation in question to ensure actions are taken that endeavour to achieve a certain outcome.[120] Even if the desired outcome is not achieved, the obligation will not be breached so long as the person did everything they could in taking steps to protect the corollary rights arising from the corresponding obligation at issue. This is due diligence understood from the perspective of domestic law.

[112]There can sometimes be conflation between 'general principles of law' and 'principles of international law'. See analysis on this issue in C. Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law', (2008) 31 *Nordic Journal of Law & Justice* 3, at 5–9; see also M. C. Bassiouni, 'A Functional Approach to "General Principles of International Law', (1990) 11 *Michigan Journal of International Law* 768.

[113]Statute of the ICJ, 59 Stat. 1055 (1945) TS 993, Art. 38(1)(c); see also A. Pellet, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), at 731.

[114]W. Friedmann, 'The Uses of "General Principles" in the Development of International Law', (1963) 57 *American Journal of International Law* 279; A. McNair, 'The General Principles of Law Recognized by Civilized Nations', (1957) 33 *British Yearbook of International Law* 1.

[115]*Corfu Channel Case (United Kingdom v. Albania)*, Judgement, 9 April 1949, [1949] ICJ Rep., 4, at para. 22 (emphasis added).

[116]J. Ellis, 'General Principles and Comparative Law', (2011) 22 *European Journal of International Law* 949.

[117]R. Versteeg, 'Perspectives on Foreseeability in the Law of Contracts and Torts: The Relationship Between "Intervening Causes" and "Impossibility"', (2011) 5 *Michigan State Law Review* 1497; J. Bonnitcha and R. McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights', (2017) 28 *European Journal of International Law* 899, at 902–3.

[118]*Hadley v. Baxendale* [1854] EWHC J70; *Blyth v Birmingham Waterworks Co* [1856] 11 Ex Ch 781; *Palsgraf v. Long Island Railroad* (NY, 1928) 162 NE 99; *Smith v. Littlewoods* [1987] UKHL 18; *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22; *D v. East Berkshire Community Health NHS Trust* [2005] 2 WLR 993.

[119]See Dupuy, *supra* note 109, at 375.

[120]See notes 107–9 and preceding text.

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It has been claimed that due diligence existing as a general principle applies as part of international law 'unless state practice or *opino* [sic] *juris* excludes it'.[121] This assertion suggests that due diligence can apply as a general international rule unless customary international law prevents it, or a more specific rule of this type is applicable.[122] The ICJ has formulated due diligence in such general terms, implying that the concept can apply to the conduct of all states.[123] This standpoint developed from the understanding that, at a minimum, states must not knowingly allow any entity to use their territory to injure other states.[124] *Trail Smelter* helped-formulate this precedent.[125] Here it was held that a state 'owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction'.[126] There is an additional practice of due diligence being formulated and applied in more generalizable terms. A district court in the US held: 'The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation'.[127] A similar ruling was made in *R (on the application of Gentle and another)*.[128] In this case, the House of Lords held:

> In reality, all that the nation state can do is to use its best endeavours to conform its actions to international law, just as all that anyone else can do is to use their best endeavours to conform their actions to the law ... The Government should have taken reasonable care ("used due diligence") to ascertain whether the war was lawful before ordering its troops into battle. Of course we all hope that Governments will take reasonable care, especially before making such momentous decisions as this. But the point of taking reasonable care is to discover what you can and cannot do.[129]

This ruling is linked with, and a mix of, the pronouncements made by the ICJ in *Corfu Channel* and those of domestic courts regarding the duty of care principle.[130] It is clear that the House of Lords assessed due diligence through a lens of reasonableness, which appears to be a common approach when applying the concept.[131]

What is also clear is that the concept of due diligence can be found across domestic legal systems and thus arguably does exist as a general principle of law.[132] Domestic laws could therefore form the basis to transpose the concept of due diligence into general international law.[133] Whether this means that due diligence is a general principle of *international* law for the purpose of being

[121]M. N. Schmitt, 'In Defense of Due Diligence in Cyberspace', (2015) 125 *Yale Law Journal* 68, at 73.

[122]See ARSIWA, Art. 55, Commentary, paras. 1–6.

[123]See *Corfu Channel Case*, *supra* note 115, at 22.

[124]J. A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', (2004) 36 *Journal of International Law & Politics* 265, at 275.

[125]*Trail smelter case (United States v. Canada)*, UNRIAA (1941), vol. III, at 1905.

[126]Ibid., at 1963; see also C. Eagleton, *The Responsibility of States in International Law* (1928), at 80.

[127]*United States v. Hasan and ors*, Decision on motion to dismiss (29 October 2010), No 2:10 cr56 [ED VA], at para. 72.

[128]*R (on the application of Gentle and another)*, [2008] UKHL 20.

[129]Ibid., at para. 59.

[130]See *supra* note 118.

[131]In addition to the practice already analysed above (see notes 91 and 118 and preceding text), see Section 4.1 (below); see-also-*Federal Securities Act* (1933) US; see Bonnitcha and McCorquodale, *supra* note 117, at 906.

[132]For some further examples, although there are more, see C. Bright at al., 'Options for Mandatory Human Rights Due Diligence in Belgium', *Leuven Centre for Global Governance Studies* (2020); R. McCorquodale et al., 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises', (2017) 2 *Business and Human Rights Journal* 195; T. Baudesson et al., 'New French law imposing due diligence requirements in relation to human rights, health and safety, and the environment', Briefing Note (*Clifford Chance*, 3 March 2017); N. Ahiauzu and T. Inko-Tariah, 'Applicability of anti-money laundering laws to legal practitioners in Nigeria: NBA v. FGN & CBN', (2016) 19 *Journal of Money Laundering Control* 329; M. Conway, 'A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains', (2015) 40 *Queen's Law Journal* 741; Decree n. 8.420 (2015), Art. 42, XIII (Brazil).

[133]C. Eggett, 'The Role of Principles and General Principles in the "Constitutional Processes" of International Law', (2019) 66 *Netherlands International Law Review* 197.

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applied as such in the international legal system is another question, in which an argument can be made that this principle does currently exist as part of international law,[134] or does not.[135] Regardless of either position being accurate, there is no secondary due diligence rule that currently exists in general international law. This rule becoming positive international law will likely depend on whether it is *perceived* as forming part of customary international law.[136] Note it need not actually exist as such.[137] *If* customary international law is actually created through widespread and consistent practice *of states* coupled with *their opinio juris*,[138] not the rulings of international courts/tribunals and the opinions advanced by selected scholars,[139] then it falls to states to create a secondary due diligence rule.[140] However, in order for this to happen, such a rule needs to first be advanced, which is a gesture that need not be provided by a state.

3.2.3 Legitimacy of an extrapolated secondary due diligence rule

With the aim of advancing a secondary due diligence rule, this article now turns to the matter of whether doing so by utilizing the method of extrapolation is legitimate, and not only because the ILC utilized this method to create provisions of the ARSIWA.[141] The analysis above clarifies that the concept of due diligence forms part of many primary rules of international law and exists in a number of areas of domestic law across states. The importance of these findings is that it is 'easier to extrapolate from a series of consistent' rules where there exists considerable practice.[142] It is also possible 'to generalize from a series of consistent domestic laws … where they are sufficiently numerous and similar in content'.[143] A rule's prevalence is thus a crucial aspect of it existing in an alternative form.

[134]T. Koivurova, 'Due Diligence', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010).

[135]McDonald, *The Role of Due Diligence in International Law* (2019), at 1044–9, 1054.

[136]There is an issue concerning what is actually positive international law within the state responsibility framework that is believed by many ostensible positivists to be legal doctrine. The act of pretending (knowingly or unknowingly) that a concept is part of positive international law versus it genuinely existing as such raises many questions about international law-making and reality, which are beyond the scope of this article. See H. J. Morgenthau, 'Positivism, Functionalism, and International Law', (1940) 34 *American Journal of International Law* 260.

[137]For example, consider how the ARSIWA are presumed to reflect customary international law. See F. L. Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and the ILC Draft Articles in International Law', (2014) 63 *International & Comparative Law Quarterly* 535; D. D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', (2002) 96 *American Journal of International Law* 857.

[138]*North Sea Continental Shelf* (Germany/Denmark; Germany/Netherlands), Judgment, 20 February 1969, ICJ Rep. [1969], 3, para. 77; Statute of the ICJ, 59 Stat. 1055 (1945) TS 993, Art. 38(1)(b).

[139]Related to the points raised in notes 136 and 137, the 'invisible college of international lawyers' has arguably created the contemporary international law of state responsibility, not states. International courts/tribunals in relying on the ARSIWA have claimed that certain provisions reflect international custom. Well-known scholars, usually based in North America or Western Europe, then adopt these rulings to assert that those same provisions are customary rules. This process occurs independently of whether state practice and *opinio juris* exists to substantiate such assertions. Furthermore, the UN General Assembly resolution (56/83) that included the ARSIWA was passed without a vote and states that the General Assembly 'takes note of' the ARSIWA, which is not an expression for adopting its content as such. State silence is not a robust argument for claiming that customary international law exists. See UNGA Res. 56/83, UN Doc. A/RES/56/83 (12 December 2001); O. Schachter, 'The Invisible College of International Lawyers', (1977) 72 *Northwestern University Law Review* 217; K. T. Gaubatz and M. MacArthur, 'How International Is "International" Law?', (2001) 22 *Michigan Journal of International Law* 239; R. D. Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility', (2012) 106 *American Journal of International Law* 447; S. Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', (2015) 26 *European Journal of International Law* 417.

[140]Several problems arise when the matter of customary international law is raised. See M. Hakimi, 'Making Sense of Customary International Law', (2020) 118 *Michigan Law Review* 1487.

[141]See Section 3.1 (above).

[142]See Sivakumaran, *supra* note 52, at 1116.

[143]Ibid.

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These observations are apposite to the matter at hand. There is abundant practice showing the application of due diligence across numerous sub-fields of international law and in various areas of domestic law. The existence of due diligence in positive law is supported in doctrine from international, regional and domestic legal systems. The identification of a due diligence template is therefore possible, which is the result of amalgamating the dominant trends on this concept:

> Where a template can be identified, extrapolation from the template is more understandable. In essence, there needs to be an assessment as to whether generalization and extrapolation is appropriate in a particular circumstance, for example, with respect to a particular norm.[144]

There are questions of degree when making *lex ferenda* arguments. Formulating and applying due diligence as a secondary rule is not a baseless idea. Even so, apparent rules can, 'without a proper explanation', be adopted and used 'out of habit or convenience'.[145] It has been argued that in 'many respects, this is a normal part of law-making'.[146] Yet it is 'more legitimate to refer to a standard that already exists than to "invent" one'.[147] A secondary due diligence rule based on the above analysis rests on solid foundations, as it is 'not going beyond what can be based on existing law'.[148] This is crucial when proposing new rules, as states are more likely to accept developments that stand on firm legal footing, instead of those based on moral or political biases, for example.[149]

Adopting the methodology of extrapolation is appropriate in the case of due diligence, meaning the shift from primary rules and domestic laws can be made towards a secondary due diligence rule. This line of reasoning converges the fragmented practice applying due diligence towards a formulation of the concept whereby it can be applied as part of general international law, owing to it being generalizable.[150] Bringing together the key elements of due diligence across all the areas of law examined above and condensing those elements in more general terms, means that there is a potential opportunity to apply the concept uniformly. The law of state responsibility could use more consistency, especially with respect to its engagement with non-state actors.[151] These potential benefits raise the question as to whether there are further reasons why a secondary due diligence rule should be created to form part of general international law.

3.3 Rationale for creating a secondary due diligence rule

The conventional formulation of due diligence in international law appears to be that it is a concept that forms part of primary rules and domestic laws.[152] There exists considerable uncertainty surrounding the due diligence concept in both legal practice and scholarship. It has been described as 'one of the most ambiguous terms in the contemporary discourse on international liability and state responsibility'.[153] This is owed to the widespread treatment of the concept across many areas

[144]Ibid.

[145]Ibid., at 1115.

[146]Ibid.

[147]Ibid.

[148]Ibid., at 1126; see also W. Kälin, 'The Guiding Principles on Internal Displacement – Introduction', (1998) 10 *International Journal of Refugee Law* 557, at 561–2.

[149]See V. Held, 'Morality, care, and international law', (2011) 4 *Ethics & Global Politics* 173, at 176–8, 185–8; T. M. Franck, 'Non-Treaty Law-Making: When, Where and How?', in R. Wolfrum and V. Roeben (eds.), *Developments of International Law in Treaty Making* (2005), 417, in particular at 425.

[150]This understanding corresponds with rulings like that of the ICJ in *Corfu Channel*, which also expounded a generalized formulation of due diligence.

[151]F. Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality', (2008) 9 *Melbourne Journal of International Law* 47.

[152]See Koivurova, *supra* note 134; R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', (1992) 35 *German Yearbook of International Law* 9.

[153]J. Kulesza, *Due Diligence in International Law* (2016), 1.

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of law. What the application of due diligence through primary rules clarifies is that states should or must implement measures that ensure the protection of, or, at the very least, endeavour to protect, the international obligations they owe to others. This *is not* how a secondary due diligence rule would apply. The new rule would not place any obligations on states. It would instead be used to determine state responsibility in situations where the conduct of a non-state actor was contrary to international law, setting out the conditions under general international law for whether the state in question can be considered internationally responsible for its omissions.[154]

The absence of such a rule in general international law reflects the state-centric approach of the ILC towards international responsibility that the ARSIWA embodies, which contemporary international law and its scholarship are struggling to unshackle from because of automatic, habitual tendencies towards applying the ARSIWA provisions whenever questions of state responsibility for non-state actor conduct arise.[155] It is important to reflect on and address these mainstream trends and consider how non-state actors can be brought further within the scope of the general framework of secondary rules on state responsibility, especially considering the frequency with which states act in consort with, use, enable or allow non-state actors to undertake wrongful conduct.[156] The ARSIWA is not exhaustive of all the secondary rules in general international law applicable to state responsibility for non-state actors.[157] The ARSIWA provisions relevant to non-state actors may not even be positive international law.[158] This begs the question why not attempt to create additional generalizable rules in this area, instead of questioning why and thereby settling for the provisions of the ARSIWA, which becomes a more perplexing argument given the numerous criticisms that have been made regarding their apparent shortcomings.[159] By applying a new secondary rule of due diligence, the general international law applicable to state responsibility for non-state actor conduct would have a new tool at its disposal.

This rule would apply alongside the secondary rules on attribution and complicity. There are many scenarios in which establishing state responsibility for non-state actor conduct may not be possible by applying attribution or complicity, even where a nexus between the two entities contributed to conduct contrary to an international rule. The 'attribution approach targets a narrower range' of wrongdoers, meaning non-state actors may not be 'sufficiently connected to any state for their conduct to be attributable to a state'.[160] A due diligence secondary rule would thus help address state conduct that involves it with a non-state actor, but 'short of the participation

[154]This assessment would not be solely after the fact, as part of it would depend on what knowledge a state had at the relevant time when the wrongful conduct of the non-state actor occurred.

[155]The potential for this problem was noticed recently after the ILC finalised its work. See V. Lowe, 'Responsibility for the Conduct of Other States', (2002) 101 *Japanese Journal of International Law & Diplomacy* 1, at 2.

[156]In light of such realities, international law could use more imaginative solutions to the problems it faces: A. Bianchi, 'Imagination's Place in International Law', *Graduate Institute of International and Development Studies*, 17 April 2019, available at www.graduateinstitute.ch/communications/news/imaginations-place-international-law.

[157]See, for example, the developing complicity rule in general international law that encompasses non-state actors: R. Mackenzie-Gray Scott, 'State Responsibility for Complicity in the Internationally Wrongful Acts of Non-State Armed Groups', (2019) 24 *Journal of Conflict & Security Law* 373; see also the developing general rule of state instigation in international law: M. Jackson, 'State Instigation in International Law: A General Principle Transposed', (2019) 30 *European Journal of International Law* 391.

[158]See analysis in notes 136–40 and preceding text.

[159]These criticisms are particularly prevalent with respect to the ARSIWA provisions on attribution, in which a number of arguments have been advanced in attempts to contend that new attribution rules should be created. See, for example, L. Chircop, 'A Due Diligence Standard of Attribution in Cyberspace', (2018) 67 *International & Comparative Law Quarterly* 643; V. Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct', (2017) 28 *European Journal of International Law* 563; V. Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Rejoinder to Ilias Plakokefalos', (2017) 28 *European Journal of International Law* 595; V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016), 306–29; D. Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law', (2011) 24 *Leiden Journal of International Law* 989, at 991–4.

[160]M. Hakimi, 'State Bystander Responsibility', (2010) 21 *European Journal of International Law* 341, at 349.

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necessary for attribution' or complicity to be utilized, should the non-state actor's conduct be contrary to international law.[161] Recall state responsibility for complicity in non-state actor wrongdoing is also narrowly construed.[162] Therefore, in settings where applying attribution tests or complicity cannot establish state responsibility for its contribution to the wrongful conduct of a non-state actor, consideration can be given as to whether the state exercised due diligence, thus allowing for an additional avenue to be pursued in attempting to establish the international responsibility of the state for its involvement in wrongdoing.[163]

The argument of why a secondary due diligence rule should be created also becomes pressing in light of the shortcomings posed by applying due diligence through primary rules. When due diligence is applied through a primary rule it is not always possible to clarify what conduct is required from the state.[164] What constitutes 'due diligence', even in the most specific cases, can be difficult to determine – there can be a number of ways to interpret it depending on the situation.[165] There are consequences here. Such indeterminacy presents challenges in developing and prescribing concrete lines of conduct to states, as the amount and diversity of primary rules alter the requirements for exercising due diligence depending on circumstance, which perpetuates and aggravates fragmented practice.[166] It has been argued that the ICJ can help address this fragmentation by advancing judicial integration regarding the state responsibility framework and how it is applied.[167] Another way to achieve such integration, not only in the work of judicial bodies, is to have rules that are generally applicable to settings concerning state responsibility, which a secondary due diligence rule would be. It is not always clear what a primary rule obligation requires from states regarding the regulation of non-state actor conduct in order for state conduct to be deemed 'diligent',[168] a feature that has attracted criticism.[169] This is not necessarily problematic. Yet the concept arguably has more to offer international law if formulated and applied as a secondary rule, by showing what due diligence actually *is* in general terms, helping the legal practice regarding state responsibility coalesce, whilst prescribing generalizable lines of diligent state conduct regarding their interactions with, and regulation of, non-state actors.

The potential knock-on effect of this process could be states aligning their conduct in ways that might help them better regulate non-state actors, essentially learning from each other's past

[161]Ibid., at 354.

[162]See Mackenzie-Gray Scott, *supra* note 157, at 384–406.

[163]Within international criminal law an analogous framework exists through the doctrine of superior responsibility. See S. Sivakumaran, 'Command Responsibility in Irregular Groups', (2012) 10 *Journal of International Criminal Justice* 1129, in particular at 1130–7; I. Bantekas, 'The Contemporary Law of Superior Responsibility', (1999) 93 *American Journal of International Law* 573.

[164]See Askin, *supra* note 93

[165]This point is also emphasized in N. McDonald, 'The Role of Due Diligence in International Law', (2019) 68 *International and Comparative Law Quarterly*, at 1054.

[166]A. Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization', (2017) 15 *International Journal of Constitutional Law* 671; G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', (2004) 25 *Michigan Journal of International Law* 849.

[167]R. Garciandia, 'State responsibility and positive obligations in the European Court of Human Rights: The contribution of the ICJ in advancing towards more judicial integration', (2020) 33 *Leiden Journal of International Law* 177.

[168]R. P. Barnidge Jr, 'States' Due Diligence Obligations with Regard to International Non-State Terrorist Organisations Post-11 September 2001: The Heavy Burden that States Must Bear', (2005) 16 *Irish Studies in International Affairs* 103.

[169]To the extent that human rights treaty bodies have considered claims for such differentiation, they have not been willing to accept it: see, for example, Human Rights Committee, Concluding Observations: Algeria, UN Doc. CCPR/C/79/Add.95 (1998), at para. 3 ('a general climate of violence heighten the responsibilities of the State party to re-establish and maintain the conditions necessary for the enjoyment and protection of fundamental rights'); Human Rights Committee, Concluding Observations: Tanzania (1992), para. 5; see also L. Rajamani, *Differential Treatment in International Environmental Law* (2006), 20.

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mistakes.[170] In this sense, a due diligence secondary rule would be objective, as it would allow state conduct to be measured against an external standard of expected conduct, instead of taking into consideration subjective factors such as the intentions of states.[171] Applying due diligence in this way could aid determinacy by creating consistency in practice, which in turn would assist decision-makers at the state level in addressing situations where there exists a real risk that non-state actor conduct could be contrary to international law if it were to transpire. General international law could thus help prevent foreseeable, unlawful consequences from occurring in the first place.

No 'generalized framework exists for appraising when a state must protect against third-party harm'.[172] A secondary due diligence rule could help lay the foundations for such a framework existing as part of general international law. The idea of due diligence applying as a secondary rule is based on the premise that the concept need not form part of a primary rule in order to be used in international law. A secondary due diligence rule would apply to states in their relationships with all non-state actors, in particular when states actively delegate to a non-state actors, which becomes even more acute if a public function is delegated.[173] This would be important in cases where the conduct of the non-state actor could not be attributed to the state.[174] No state would be obligated to take measures that could feasibly prevent non-state actor conduct that might be contrary to international rules, but states would be assessed on whether they had exercised due diligence should wrongful conduct transpire. Multiple legal regimes, at the international, regional and domestic levels, take this approach towards assessing whether due diligence has been exercised.[175] Generally speaking, states have power and authority over many non-state actors, meaning they can exert influence to prevent, or attempt to prevent, these non-state actors from undertaking conduct that is contrary to international law.[176] This argument may be deemed heterodox. However, by showing how this formulation of the due diligence concept could form part of positive international law, the first step is being taken towards a clearer and more cohesive framework of state responsibility. The remaining question is what would be the requirements for satisfying this rule if it were to form part of general international law?

4. The core elements for satisfying a secondary due diligence rule

Applying due diligence as a secondary rule would entail assessing whether conduct undertaken by a state did enough, if anything, to attempt preventing a non-state actor from undertaking conduct contrary to an international rule. Having laid the foundations for a secondary due diligence rule, what elements would need to be satisfied if state responsibility for non-state actor conduct were to be established when applying this rule? The elements examined below are drawn from the characteristics that are shared in common when due diligence is applied through primary rules and domestic laws. Identifying these elements was possible by observing and recognizing their consistent treatment across areas where an assessment on due diligence was made.[177] This section helps clarify what due diligence *is*, as well as showing that reasonableness would be the lens used

[170]The consequences of such a practice could create harmonized 'best practices', which could even become binding on states under customary international law through their own state practice and *opinio juris*. In this sense, a binding framework of standard-setting within the law of state responsibility for non-state actors could emerge.

[171]See Bonnitcha and McCorquodale, *supra* note 117, at 902.

[172]See Hakimi, *supra* note 160, at 344.

[173]See analysis in Section 4 (below).

[174]Communication No. 17/2008 (29 July 2011), UN Doc. CEDAW/C/49/D/17/2008; Communication No. 1020/2001 (19 September 2003), UN Doc. CCPR/79/D/1020/2001.

[175]See analysis in Section 3.2 (above).

[176]ILA Study Group on Due Diligence in International Law, First Report (7 March 2014), at 26.

[177]This includes the findings present in the preparatory work of the ARSIWA.

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to determine whether a state had exercised due diligence in a particular case involving wrongful conduct of a non-state actor.

4.1 Assessing due diligence through a lens of reasonableness

The capabilities of a state are brought into sharp focus when assessing what is required from it when sharing a nexus with a non-state actor.[178] These capabilities are relative between states and must be taken into consideration with respect to due diligence assessments.[179] In *R (Smith)*, the Supreme Court of the United Kingdom held:

> Troops on active service are at risk of being killed despite the exercise of due diligence by those responsible for doing their best to protect them. Death of a serviceman from illness no more raises an inference of breach of duty on the part of the State than the death of a civilian in hospital.[180]

The application of reasonableness to due diligence assessments means that state responsibility would not necessarily turn on the state actually preventing wrongdoing. The idea underpinning the concept of reasonableness is that a state should be assessed on whether it was feasible for it to address the wrongful conduct of a non-state actor. It has been emphasized that states 'have myriad measures for restraining third parties'.[181] These measures, and the feasibility of implementing them, will vary from state to state. For example, enacting domestic legislation that obligates companies to change their codes of conduct so that certain types of potentially unlawful conduct become unlikely.[182] Stronger measures would be the imposition of criminal sanctions against non-state actors or summoning the state's military, for example, to protect civilians from a rebel group operating in the 'host' state.[183] States do not have the same capacities for addressing non-state actor conduct; whether economic, legislative, military, technological, etc.[184] This reality should be taken into account if a secondary due diligence rule were applied in practice.

4.1.1 State power and authority

A balance must be struck to ensure states do not have complete discretion in defining whether their own conduct meets the threshold of exercising due diligence. What is particularly crucial in this regard is the nexus between a state and a non-state actor and the severity and scale of the latter's wrongdoing.[185] A secondary due diligence rule would be used to assess states against the yardstick as to whether they did everything that was reasonably within their power and authority to address the non-state actor conduct in question.[186] Irrespective of whether attribution

[178]See *Prosecutor v. Stanislav Galic* (Judgement and Opinion), Case No. IT-98-29-T (5 December 2003), at para. 58.

[179]See *supra* note 20, at 134, 138.

[180]*R. (on the application of Smith) and Equality and Human Rights Commission (intervening) v. Secretary of State for Defence* [2010] UKSC 29, para. 84.

[181]See Hakimi, *supra* note 160, at 371.

[182]See, for example, the Modern Slavery Act 2015.

[183]G. Cronogue, 'Rebels, Negligent Support, and State Accountability: Holding States Accountable for the Human Rights Violations of Non-State Actors', (2013) 23 *Duke Journal of Comparative & International Law* 365.

[184]This would also depend on the norm and (probably) the non-state actor in question.

[185]See, for example, *Da Penha v. Brazil*, Case 12.051, IACHR, Report No. 54/01 (2000), para. 56; *Opuz v. Turkey*, App. no 33401/02 (ECtHR, 9 June 2009), paras. 91–106, 132; *Saadi v. Italy*, App. no. 37201/06 (ECtHR, 28 February 2008); *Ilaşcu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), paras. 28–185, 380–2, 393–4. However, see also Committee on the Elimination of Discrimination Against Women, Communication No. 6/2005: *Yildirim v. Austria*, UN Doc. CEDAW/C/39/D/6/2005 (2007), para. 12.1.2 (Austria held responsible without consideration of scale).

[186]Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary (2016), paras. 118, 153.

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tests would be satisfied, states should act diligently towards non-state actors with which they share a nexus.[187] This extends to wherever a state exercises its authority and depends on the specific circumstances, particularly the 'means reasonably available' to the state and 'the degree of influence' it wields over the non-state actor in question.[188]

The type of nexus between state and non-state actor thus assists in determining the extent of due diligence that would be required. Where, for example, a non-state actor is a private military company that has been employed by a state to guard one of its military bases abroad, there would be an expectation of a higher degree of due diligence from the 'employer' state to ensure that the company does not undertake conduct contrary to rules of international law,[189] compared to the extent of due diligence that would be expected from the 'host' state whose territory the company is stationed in, which would be lower, because, for example, the host state is economically and militarily weak.[190] The due diligence required by a state over the conduct of a non-state actor thereby decreases the further the capacity of the state to act is impaired by circumstance. When assessing whether a state can bear a burden, it is crucial to know whether that state can bear that burden 'without abandoning other responsibilities that ought not to be abandoned'.[191] The ICJ and the UN Security Council have endorsed this understanding of reasonableness within the context of determining state power and authority to act in effectively addressing non-state actor conduct.[192]

The ability of a state to influence the outcome of a non-state actor's conduct is a key element in determining whether due diligence was exercised by a state. This was an issue dealt with in the *Bosnia Genocide* case.[193] Here it was made clear by the ICJ that a state 'does not incur responsibility simply because the desired result is not achieved'.[194] The Court then held that 'responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power'.[195] Part of this ruling shows that due diligence is inextricably linked to a state's capabilities, meaning adopting measures that may contribute to preventing non-state actor wrongdoing will vary across states. In determining whether a state has exercised due diligence with respect to a non-state actor, the ICJ emphasized that 'various parameters operate', particularly 'the capacity to influence effectively the action of persons likely to commit, or already committing' the wrong in question, 'which varies greatly from one State to another'.[196] The Court continued:

> This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.[197]

[187] Ibid., para. 135.

[188] Ibid., paras. 150, 165.

[189] This becomes particularly important if the company's conduct cannot be attributed to the state, for example, under Arts. 5, 8 or 11 (ARSIWA).

[190] M. Turcan and N. Ozpinar, '"Who let the dogs out?": A critique of the security for hire option in weak states', (2009) 2 *Dynamics of Asymmetric Conflict* 143.

[191] J. W. Nickel, 'How Human Rights Generate Duties to Protect and Provide', (1993) 15 *Human Rights Quarterly* 77, at 81. This understanding brings with it a normative dimension about what a due diligence secondary rule should do.

[192] See *Nicaragua*, *supra* note 89, para. 220; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, [2005] ICJ Rep., at 168, paras. 211, 345; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep., at 136, paras. 158–9; UNSC Res. 681 (20 December 1990), UN Doc. S/RES/681, para. 5.

[193] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep., at 43.

[194] Ibid., para. 430.

[195] Ibid.

[196] Ibid.

[197] Ibid.

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A state's proximity/remoteness (whether factual, legal, political and/or otherwise) to a non-state actor and its subsequent conduct is determinative. In the *Bosnia Genocide* case, this assessment led Serbia to be viewed as especially capable of being in a position to restrain the non-state actors that ultimately committed genocide.[198] The overall circumstances of a case determine reasonable expectations and whether a state can be considered to have acted with due diligence, which is not always equated with preventing conduct contrary to international law. If a state knows, or ought to have known, that territory subject to its power and authority is being used to carry out conduct contrary to international law, it must deploy *its best efforts* 'to put an end to [the] threat, even if the outcome cannot be ensured'.[199] If a state conducts itself along these lines, then it cannot be held responsible for failing to exercise due diligence, even if the non-state actor conduct at issue was contrary to an international rule.

In applying the secondary due diligence rule there is an assumption that a state has the power and authority to act, meaning it can literally take steps within its ability to prevent situations from occurring that could jeopardise that state's international obligations. At its core, due diligence consists of the 'efficiency and care used by governmental instrumentalities'.[200] This understanding of due diligence links to the interpretation of 'effective control' offered by the Dutch courts, which is read as a state having the capacity to prevent wrongdoing.[201] Yet the secondary due diligence rule would differ to the extent that a state wielding such power but not exercising it, would not result in the wrongful conduct being attributed to the state, but would establish the state's responsibility if it was considered reasonable that the state could have prevented the wrongdoing in question.[202] This finding is particularly important to situations where a state delegates public functions to an autonomous non-state actor. Here there exists a link with the attribution provisions of the ARSIWA that concern the exercise of de jure governmental authority.[203] Should a state delegate to a non-state actor, a higher degree of diligence is expected from the state when compared to other non-state actors that the state did not delegate to, as the state has a greater ability to influence a non-state actor to which it delegated because of a pre-existing arrangement. This approach is also conceptually viable, as it avoids the collapse of the analytic distinction between attribution and due diligence.[204]

4.1.2 Foreseeability and precaution

Another element to bear in mind if due diligence were applied as a secondary rule would be the foreseeability of circumstances. Foreseeability encapsulates occurrences where consequences of conduct reasonably result in predictable outcomes. The concept is used as a test for determining liability by way of negligence. It is inextricably linked to due diligence assessments, with its roots tracing back to the sixth century (AD).[205] Responsibility for wrongdoing has for centuries been based on the premise that 'what should have been foreseen by a diligent [person] was not

[198]Matters of proximity/remoteness are also linked to attribution considerations, especially with respect to the interpretations of 'effective control' expounded by the Dutch courts (see *infra* note 201).

[199]T. Christakis, *Challenging the "Unwilling or Unable" Test* (2017), 18.

[200]F. V. Garcia-Amador, Second Report, International Responsibility, A/CN.4/106, YBILC (1957), vol. II, at 122.

[201]See *Hasan Nuhanovic v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN: BR5388; 200.020.174/01; *Mustafic et. al. v. the Netherlands*, Court of Appeal in The Hague, Civil Law Section (5 July 2011), LJN: BR5386; 200.020.173/01; *Hasan Nuhanovic v. the Netherlands*, District Court in The Hague, Civil Law Section (10 September 2008), LJN: BF0181; 265615/HA ZA 06-1671; *Mustafic et. al. v. the Netherlands*, District Court in The Hague, Civil Law Section (10 September 2008), LJN: BF0182; 265618/HA ZA 06-1672; *Mothers of Srebrenica v. The Netherlands*, Judgment (16 July 2014), The Hague District Court, Case No. C/09/295247.

[202]See analysis on the link with attribution in Section 5.2 (below).

[203]Arts. 5 and 7.

[204]There can be a tendency to conflate due diligence with attribution because of the shortcomings in the latter group of tests. See Chircop, *supra* note 159; *Velasquez Rodriguez*, *supra* note 98, para. 172.

[205]Justinian, *The Digest of Roman Law: Theft, Rapine, Damage and Insult* (1979), at 91.

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foreseen'.[206] According to the International Law Association, in order to establish that a state failed to exercise due diligence, it must be shown that the state did not 'prevent foreseeable significant damage, or at least minimize the risk of such harm'.[207] This premise of 'foreseeable harm' is used in environmental law.[208] The ILC's work on the prevention of transboundary harm also shows that:

> due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them.[209]

Foreseeability is also ingrained in other sub-fields of international law, such as IHL.[210] The foreseeability of an IHL breach and a state's knowledge thereof determines whether the state is responsible for failing to ensure respect for a particular rule.[211] The prohibition on disproportionate attacks stipulates that 'launching an attack which may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited'.[212] The use of the words 'expected' and 'anticipated' put forward the rationale that this IHL principle is embedded with traits of the foreseeability concept. There is also the IHL principle of precaution.[213] The requirement under this principle is one of all feasible precautions, where 'feasible' means 'practicable' or 'practically possible'. This means that certain harm might be foreseeable, but it might not be possible to prevent it. Provided an attack complies with other rules of IHL (for example, legitimate target, proportionality, etc.) it will not be unlawful.[214] This principle requires all belligerents to take preliminary measures before conducting military operations, which includes assessing the apparent nature of the situation and conducting the operation in a manner that is expected to have the least amount of damage.[215] Breaches of these rules can occur when the perpetrator's actions were not carried out with precaution in the planning and decisions regarding the method(s) of warfare used throughout the course of the particular operation. In correlation with the concept of foreseeability, the importance of the precautionary principle is that it intends to minimize damage, which can be catalyzed and amplified if foreseeable consequences of conduct are not considered.

In domestic law, Lord Atkin laid down a famous precedent in *Donoghue* v. *Stevenson*: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.[216] This understanding is viewed as an objective test under domestic law.[217] However, in international law, especially in the context of state interactions with non-state actors, foreseeability can be subjective. As summarized by one scholar: 'To attempt to draw the line between the foreseeable and the unforeseeable in the world of everyday affairs raises

[206]Ibid.

[207]ILA Study Group on Due Diligence in International Law, First Report (7 March 2014), at 26.

[208]Ibid., Second Report (July 2016), at 13.

[209]Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art. 3, Commentary, para. 10; see also paras. 5, 18.

[210]See also, for example, the principle of 'non-refoulement': J. Pirjola, 'Shadows in Paradise – Exploring *Non-Refoulement* as an Open Concept', (2008) 19 *International Journal of Refugee Law* 639.

[211]Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary (2016), para. 150.

[212]ICRC, Customary IHL Database, Rule 14, available at ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14

[213]ICRC, Customary IHL Database, Rule 15, available at ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15

[214]I. Robinson and E. Nohle, 'Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas', (2016) 98 *International Review of the Red Cross* 107.

[215]Ibid.

[216]*Donoghue v. Stevenson* [1932] UKHL 100.

[217]J. C. Smith and P. Burns, 'Donoghue v. Stevenson: The Not So Golden Anniversary', (1983) 46 *Modern Law Review* 147; R. F. V. Heuston, 'Donoghue v. Stevenson in Retrospect', (1957) 20 *Modern Law Review* 1.

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even more difficulties than the determination of where space leaves off and outer space begins'.[218] Yet, at the very least, viewing state responsibility for non-state actor conduct through a lens of foreseeability compels states to think about the potential future consequences of their decisions at a policy level, and take precautions in their relations with non-state actors.

The International Tribunal for the Law of the Sea has noted that:

> it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States. ... The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor, [including in] situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.[219]

Foreseeability being part of due diligence assessments means that states are assessed on whether and how they have considered the potential future consequences of their inaction, how such considerations relate to non-state actor conduct (or potential conduct), and whether reasonably feasible measures were taken to help ensure that non-state actors did not undertake conduct contrary to international law. Due diligence thereby concerns what was or ought to have been known by the state in regulating non-state actor conduct, and realizing that wrongful conduct could well occur in the ordinary course of events if due diligence is not exercised. States that know or should know of imminent threats must take reasonable measures to avert wrongdoing.[220] This notion is evidenced in practice and scholarship.[221]

There is an element of foreseeability in due diligence assessments, whereby state responsibility can arise because of 'the failure of agents of the State to foresee the consequences' of their inaction.[222]

> To ascertain whether an assisting State had "knowledge" will include looking at questions of what a State was able to foresee about the act in question, and whether, on the evidence, it must have known about the underlying illegality.[223]

The International Criminal Court has adopted a similar stance in establishing recklessness, whereby a party 'foreseeing the occurrence of the undesired consequences as a mere likelihood or possibility' proceeds with its conduct regardless.[224] Due diligence failings can come about when a state suspects or can foresee potential wrongful outcomes resulting from non-state actor conduct, which it could attempt to prevent, but does not. Taking this a step further, it has been argued that: 'As a matter of general principle States must be supposed to intend the foreseeable consequences of their acts'.[225] This argument applies with respect to the actions of states, which can assist in establishing state responsibility for complicity. However, with respect to the omissions

[218]L. Green, 'Foreseeability in Negligence Law', (1961) 61 *Columbia Law Review* 1401, at 1413.

[219]*Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, No. 17, 1 February 2011, ITLOS rep. [2011] at 10, para. 131.

[220]See Hakimi, *supra* note 160, at 380.

[221]Restatement (Third), *Foreign Relations Law of the United States* (1987), s. 711 n. 2B; F. V. García-Amador, L. B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), at 27; Committee on the Elimination of Discrimination against Women, Communication No. 5/2005: *Goekce v. Austria*, UN Doc. CEDAW/C/39/D/5/2005 (2007), para. 12.1.4; *Osman v. United Kingdom*, para. 116.

[222]F. V. Garcia Amador, Sixth Report, International Responsibility, A/CN.4/134 and Add.1, YBILC (1961), vol. II, at 41.

[223]H. Moynihan, 'Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility', (2018) 67 *International & Comparative Law Quarterly* 455, at 464.

[224]*Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, Judgement, ICC-01/05-01/08, 15 June 2009, para. 363.

[225]See Lowe, *supra* note 155, at 8.

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of states, intent does not need to be established in order for a state to be held responsible for failing to exercise due diligence. A clear example of exercising due diligence would be a state taking precautionary measures in an attempt to avoid conduct of a non-state actor that is foreseeable to an extent where there exists a *real risk* of that conduct being contrary to an international rule.[226]

Foreseeability serves two functions. First, it forms part of state decision-making,[227] meaning it could be developed to be used as part of a code of best practices for states to follow in their policies concerning non-state actors, where state conduct would be guided by a principle of precaution.[228] Second, foreseeability assists in dealing with the more vague aspects of due diligence. Foreseeability being an element of the secondary due diligence rule would mean that a reasonably close nexus must exist between state and non-state actor if state responsibility is likely to be established. If the potential actions of a non-state actor are reasonably foreseeable in the eyes of a reasonable state, then the state should exercise due diligence towards that non-state actor so long as it is reasonable to do so. For example, if a state were to employ a non-state actor to undertake a specific function, and that non-state actor did something wrong that could have been prevented by the state, or measures could have been put in place in an attempt to prevent such wrongdoing, if the wrong in question was foreseeable, then state responsibility can be established for a due diligence failure. Reasonable foreseeability is an inextricable part of due diligence assessments. State action with respect to forming a nexus with a non-state actor brings with it the burden of being assessed on whether due diligence was exercised towards that non-state actor should it undertake conduct contrary to international law.

5. Links with other secondary rules

During the preparatory work of the ARSIWA, Garcia-Amador spotted a link between due diligence and complicity.[229] Both concepts can involve degrees of connivance, which is the willingness of a state to allow or be involved in wrongdoing.[230] Although due diligence is a distinct concept, it can be linked to others. This means that if due diligence were to be applied as a secondary rule, it could overlap with other secondary rules part of the state responsibility framework. This matter is addressed in this section in order to clarify that formulating and applying due diligence as a secondary rule would be conceptually separate from complicity and attribution, as well as showing that even if there were some overlap depending on the situation at hand, this would likely not cause problems in legal practice.[231]

5.1 Complicity

A secondary due diligence rule that applied as part of general international law would share commonalities with complicity.[232] Due diligence has links with complicity in two predominant ways. First, if complicity is conceptualized as including omissions by states.[233] Second, if wilful blindness forms part of a consideration of the mental element when state responsibility for complicity is

[226]*Soering v. United Kingdom*, App. no. 14038/88 (ECtHR, 7 July 1989), paras. 88, 91, 92, 98, 111.

[227]See I. Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity', (2015) 26 *European Journal of International Law* 471.

[228]Such an outcome, however, may not be beneficial or desirable depending on the context. See C. R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2012).

[229]See Garcia-Amador, *supra* note 17, at 54.

[230]A. Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?', *EJIL: Talk!*, 24 December 2012, available at www.ejiltalk.org/the-ecthr-finds-macedonia-responsible-in-connection-with-torture-by-the-cia-but-on-what-basis/.

[231]See also the point made in the second paragraph of Section 3.3 (above).

[232]A. Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', (2017) 60 *German Yearbook of International Law* 667.

[233]See Mackenzie-Gray Scott, *supra* note 157, at 386–7.

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being determined.[234] However, generally speaking, due diligence and complicity differ in two key ways. First, complicity applying as a secondary rule determines the responsibility of a state for its participation *in* an internationally wrongful act of a non-state actor, whereas a secondary due diligence rule would determine the responsibility of the state *for a separate* wrongful act due to its own failure to prevent, suppress or address the non-state actor conduct that was contrary to an international rule, or at least attempt to do so.[235] Second, unlike state responsibility for complicity, it is not necessary for the non-state actor in question to have the same international obligation as the state in order to establish state responsibility for a due diligence failing.[236] Instead, what is required is that the non-state actor conduct was contrary to an international rule that corresponded to an international obligation of the state.

The link between complicity and due diligence was present in the *CERD* case.[237] This case shows that the due diligence of a state can be assessed where it enables a non-state actor to undertake conduct contrary to international rules. The case arose from a claim that Russia's connection with conduct in two Georgian regions violated the International Convention on the Elimination of All Forms of Racial Discrimination.[238] Georgia argued that 'the *de facto* separatist authorities of South Ossetia and Abkhazia enjoy unprecedented and far-reaching support from the Russian Federation'.[239] In the Order for Provisional Measures, the ICJ directed Russia and Georgia to 'do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination'.[240] Assuming that Russia *did not* direct, empower, etc. the separatists (i.e., that the state conducted itself in a manner falling short of satisfying any attribution test), but supported them to an extent that *may* constitute complicity, the state is thereby presumed to have wielded the power and authority to influence the non-state actors to an extent that could have prevented the wrongful conduct in question.[241] Due diligence assessments become relevant when a state is seen to be passively implicated in wrongdoing, but not necessarily actively contributing to it, which would lean closer towards complicity. The judgment of the ICJ shows that Georgia accused 'the Russian Federation and its forces of complicity in ethnic cleansing against ethnic Georgians in Abkhazia'.[242] Although the Court found 'force' in this argument, Russia was not held responsible for complicity in the acts of the separatists, as the Court ultimately ruled that it had no jurisdiction over the dispute.[243]

From the ICJ's perspective at least, it cannot be determined whether Russia failed to exercise due diligence in this case. Yet the overall context of the case allows for further insights regarding due diligence to be drawn out, which highlight the concept's link with complicity. Georgia's claim rested on Russia being allegedly supportive of the acts of discrimination undertaken by the

[234]Ibid., at 393–4.

[235]It might be argued that so long as state responsibility is established then it does not matter whether such responsibility is direct or indirect. However, such arguments would fail to consider the factors that come into play *after* state responsibility for non-state actor conduct has been established. Whether state responsibility is direct or indirect affects the legal consequences relating to how the wronged party can lawfully respond. Consider, for example, the type of countermeasures that could be utilized, which must be proportional, or the reparations that the responsible state would be under an obligation to make. See T. M. Franck, 'On Proportionality of Countermeasures in International Law', (2008) 102 *American Journal of International Law* 715; D. Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', (2002) 96 *American Journal of International Law* 833; ARSIWA, Art. 31, Commentary, paras. 1–14; E. Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', (2001) 12 *European Journal of International Law* 889. See also note 258 and preceding text.

[236]See Mackenzie-Gray Scott, *supra* note 157, at 402–6.

[237]*Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russia*), Judgment, 1 April 2011, [2011] ICJ Rep., at 70.

[238]Ibid., Order for Provisional Measures, 15 October 2008, [2008] ICJ Rep., at 353, paras. 109–11.

[239]Ibid., para. 13.

[240]Ibid., para. 149(4).

[241]Where the language of 'support' is used, state involvement will likely be more akin to complicity.

[242]See *supra* note 237, para. 77.

[243]Ibid., para. 187(2).

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separatists, and that Russia had also failed to prevent such acts 'in areas under its control'.[244] Although conflated at times, Georgia's argument took two strands: claiming state responsibility for due diligence failures, and for complicity in wrongdoing. The due diligence aspect of the case arose because the non-state actors in question were operating within a territory that Russia had de facto control over, and because Russia did not stop the wrongdoing, it was arguably enabling these actors to undertake conduct contrary to international law to an extent whereby this inaction was viewed as being comparable to complicity.

It is this type of situation that would cause difficulties if the omissions of states were to be considered as part of determinations of state responsibility for complicity; a secondary due diligence rule could become superfluous, as the two concepts would share commonalities that might not be possible to distinguish between.[245] That said, although complicity by state omission is conceptually possible, it is not used or embraced as a matter of legal practice.[246] Furthermore, there is a key advantage in the interaction between the concepts of due diligence and complicity, in that if states exercise due diligence they can avoid situations where their international responsibility is called into question for complicity, which favours states and thus encourages them to exercise due diligence.[247] Recall the likelihood that states act, react or refrain from acting out of self-interest, self-preservation and their own political motivations.[248]

It might be considered to be more realistic to argue that, because there is a 'more established' secondary rule on complicity compared to the currently non-existent secondary rule on due diligence, the existing complicity rule should be interpreted to include omissions rather than applying a new rule on due diligence. However, because of the mental element quandaries that arise in complicity assessments, in addition to the other requirements that are necessary for establishing state responsibility for complicity – in particular a non-state actor actually being bound by an international obligation – it is not practicable to accept complicity by omission. For instance, the intent of a state may need to be proven if state responsibility for complicity is to be established, whereas a secondary due diligence rule would require that a state had knowledge alone, which is a lower mental element threshold to satisfy. There is also the question as to whether the type of intent threshold adopted and then satisfied in a complicity assessment shifts the responsibility of the state from indirect to direct.[249] In other words, whether establishing that a state expressly intended for the wrongful conduct of a non-state actor to occur, could in turn attribute that conduct to the state for the purpose of establishing its direct responsibility.[250] It may be that establishing the direct intent of states can be used to attribute non-state actor conduct to them, meaning in such cases they would not be considered complicit *in* wrongdoing, but responsible *for* it.[251]

It is conceptually confusing and practically unhelpful to have complicity by omission apply in international law, especially if a secondary due diligence rule were also to apply. In addition to not accepting the idea that complicity by state omission is practicable, due diligence can be kept separate from complicity, both conceptually and in practice, by formulating a secondary due diligence rule as an assessment that takes into consideration whether a state was in a position to regulate a non-state actor that, if not regulated, would be better enabled to undertake conduct contrary

[244]Ibid., para. 165.

[245]See Mackenzie-Gray Scott, *supra* note 157, at 386–7.

[246]Ibid.

[247]H. P. Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', (2015) 20 *Journal of Conflict & Security Law* 61.

[248]M. García-Salmones Rovira, 'The Politics of Interest in International Law', (2014) 25 *European Journal of International Law* 765; D. Sloss, 'Do International Norms Influence State Behavior?', (2006) 38 *George Washington International Law Review* 159; E. A. Posner, 'Do States Have a Moral Obligation to Obey International Law?', (2003) 55 *Stanford Law Review* 1901.

[249]See Mackenzie-Gray Scott, *supra* note 157 at 396–8.

[250]Ibid.

[251]Ibid.

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to international law.[252] Despite the potentially close link with complicity, which would depend on the facts in a given case, this formulation is not what complicity assessments take into consideration, even if state conduct that can be considered 'complicit' in wrongdoing is broadly construed. Lack of action by a state that allows for the creation of a setting that helps enable a non-state actor to carry out wrongful conduct could be argued as being 'active participation' in the wrongdoing. Crucially, however, the inaction would be missing any direct input of the state (i.e., that the state *did* something), which is required to establish state responsibility for complicity.[253]

The above analysis shows that the failure of a state to exercise due diligence is understood as a form of passive implication in wrongdoing, which can establish indirect state responsibility for non-state actor conduct. There thus exists a sliding scale of state responsibility for non-state actor conduct: starting with attribution (which establishes direct state responsibility *for* the wrongdoing of a non-state actor), moving towards complicity (which establishes indirect state responsibility for *involvement in* the wrongdoing of a non-state actor), and ending with due diligence (which establishes indirect state responsibility *for* the wrongdoing of a non-state actor without the state being deemed the legal author of that wrongful conduct).[254]

5.2 Attribution

The link between due diligence and attribution was subtle in the preparatory work of the ARSIWA, particularly towards the beginning, where a view existed that attribution should be based on state fault.[255] The idea behind this view was that when non-state actors were involved in wrongdoing, a nexus with a state could attribute conduct of the former to the latter based on '*culpa*'.[256] This form of attribution was considered in light of discussions regarding the *Janes* case.[257] The ILC referred to this case as part of its work on reparations. However, Garcia-Amador argued that when assessing damages, appropriate weight must be given to 'the nature or gravity of the conduct imputable to the State'.[258] The negligence of a state was seen as a component of attribution.[259] The understanding was that wrongful conduct of a non-state actor could be attributed to a state where it failed to exercise due diligence. This formulation is close to the way due diligence is currently applied through primary rules, in which the wrongful conduct of a non-state actor is not attributed to the state with respect to its positive obligations, as the state in such an instance is not responsible for the conduct of the non-state actor *per se*, but its own conduct in relation to preventing, suppressing or addressing the wrongdoing of the non-state actor.

Historical perspectives show that attribution was grounded in the concept of fault and was conditional on state misconduct in the form of some type of negligence, whereby the state knowingly acted, or did not act, in a particular way.[260] This form of attribution may be viewed as subjective, in that a degree of discretion in the application of such an attribution test would rest with states and judicial bodies.[261] How the final ARSIWA attribution provisions differ in terms of such apparent subjectivity is not immediately clear. A fault-based approach towards attribution offers

[252]For more on why complicity by omission is problematic and unhelpful see Mackenzie-Gray Scott, *supra* note 157, at 386–7.

[253]Ibid., at 387–9.

[254]It should be noted that if viewed from the perspective of primary rules, a due diligence breach is conventionally construed as direct responsibility for a state's *own* failings with respect to preventing, suppressing or addressing the wrong of a non-state actor, and not for the non-state actor's conduct itself. See analysis in Section 5.2 (below).

[255]See Garcia-Amador, *supra* note 18, at 60–6.

[256]Ibid., at 63.

[257]*Janes et al. (USA) v. United Mexican States*, UNRIAA (1925), vol. IV, at 82–98.

[258]F.V. Garcia-Amador, Sixth Report, International Responsibility, A/CN.4/134 and Add.1, YBILC (1961), vol. II, at 34.

[259]Ibid., at 63.

[260]Ibid.

[261]V. P. Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility', (2014) 36 *Michigan Journal of International Law* 129, at 133.

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flexibility. This was one reason why the ILC attempted to create a draft provision that included a due diligence assessment, as there were concerns that if such a provision did not form part of the Draft ARSIWA the attribution provisions 'could fail to reflect practical realities'.[262] This concern was warranted. More recently, it has been argued that due diligence should apply as an attribution 'standard' in cyberspace.[263] The underlying rationale behind this contention is that because of the apparent shortcomings of the attribution provisions in the ARSIWA when applied to modern-day realities, a similar due diligence-type 'standard' 'should operate as a secondary rule of international law', whereby states 'incur direct responsibility' for non-state actor conduct.[264] The problem with this argument is that attribution, both conceptually and practically, is separate from due diligence.[265]

Ultimately, no attribution provision was created by the ILC that involved a due diligence assessment. The reasons for this may appear obvious in hindsight, with the ILC's adoption of the idea to separate primary and secondary rules spearheading such thoughts. However, the discourse on the link between attribution and due diligence that took part during the work of the ILC on the ARSIWA assists in clarifying how to formulate and apply a secondary due diligence rule. In this respect, practical realities that are grounded in the likelihood of state acceptance must be taken into consideration if this rule is ever to form part of positive international law, assuming states create international law.[266]

The three different modes of state responsibility (attribution, complicity and due diligence) are distinct, both conceptually and practically. Yet in some ways they are also linked, the extent to which depends on the facts in a given case. What is clear is that these three modes of state responsibility coalesce to form a framework part of international law that is continuing to develop. If applying one of the three modes cannot establish the international responsibility of a state in a case where the state has contributed to the conduct of a non-state actor that was contrary to international law, then applying another mode might establish state responsibility, albeit through a different avenue. Considering the current dearth and limitations of secondary rules part of the framework of general international law applicable to determining state responsibility for the conduct of non-state actors, having an additional rule would not be superfluous.[267] Yet the use of such a rule would perhaps be problematic for states that wish to continue getting off scot-free with their (sometimes profound) involvement in conduct that runs contrary to international rules to which they have voluntarily and, in some senses, hypocritically bound themselves.

6. Conclusion: Due diligence *de lege ferenda*

The basis for the secondary due diligence rule being proposed in this article is founded on four main arguments. First, there was an attempt by the ILC during the preparatory work of the ARSIWA to create a secondary rule that contained a due diligence component. Second, the ILC adopted the methodology of extrapolation in attempts to create secondary rules for the purposes of the ARSIWA. Third, this same method can be implemented with respect to the concept of due diligence, in which a secondary due diligence rule can be formulated by extrapolating from primary rules of international law and domestic law. Fourth, by undertaking this process, there is potential to develop the general international law applicable to determining state responsibility for the conduct of non-state actors. The dominant formulations, applications and elements of due diligence, found in a considerable amount of practice concerning many different rules part of various areas of international and domestic law, can be extrapolated to form a consolidated secondary rule of due diligence.

[262]See Garcia-Amador, *supra* note 258, at 63.

[263]See Chircop, *supra* note 159.

[264]Ibid., at 645 and 653 respectively.

[265]See notes 201 and 204 and preceding text.

[266]See analysis in notes 136–140 and preceding text. See also W. D. Coplin, 'International Law and Assumptions about the State System', (1965) 17 *World Politics* 615.

[267]See also the arguments in the second and third paragraphs of Section 3.3 (above).

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A secondary due diligence rule could well encapsulate the concept in its best possible form and could assist in addressing fragmentation in international law.

In light of the above analysis, which sets the foundations allowing for a working draft of a secondary due diligence rule to be proposed, the test for establishing state responsibility under this rule might thus read:

> In the event that conduct of a person or entity is not attributable to a state, but there was a nexus between the state and the person or entity to the extent that the state could have prevented, suppressed or addressed the conduct in question, the state is internationally responsible for failing to exercise due diligence in connection with the conduct of that person or entity if:
>
> (a) Considered reasonable, which should take into account (i) the power and authority of the state relative to its nexus with the person or entity; and (ii) the foreseeability of the conduct of the person or entity in the applicable circumstances; and
> (b) The state had an international obligation corresponding to the rule of international law that the conduct of the person or entity would have breached if that person or entity bore the same international obligation as the state with respect to the applicable rule.

This precise wording can be improved by further work and input from others, much in the same way that the ARSIWA provisions were improved over the course of their drafting. What this draft test does is set out the general conditions of the proposed secondary due diligence rule, which can be used to determine whether a state is internationally responsible for the conduct of a non-state actor that is contrary to a rule of international law. Whether the proposed secondary due diligence rule becomes part of positive international law will likely depend on how states, international organizations, state-empowered entities, courts, tribunals, civil society organizations and scholars focus on, digest and engage with it. Depending on who does so, it could one-day form part of positive international law, which would arguably enrich the legal machinery in general international law applicable to determining state responsibility for the conduct of non-state actors. Equally, depending on who dismisses it, this proposal could merely gather dust for the remainder of its days.

This article has also been about expanding the limits of thought in the field of international law, particularly how due diligence is approached in the context of state responsibility for non-state actor conduct. The concept forms an important part of the international law in this area. The formulation of due diligence that has been proposed here is *lex ferenda*. Perhaps one day it might be *lex lata*. Such a rule would have an important role to play. Forming part of the toolbox alongside attribution and complicity, it would serve as an additional tool for addressing situations in which non-state actors that share a relationship with states undertake conduct contrary to international law. After all, situations of this type are sadly not few and far between. In the slightly amended words of the person that initiated the discourse on due diligence within the ILC during the preparatory work of the ARSIWA:

> [T]here is no choice – so long as some better formula is not devised in its stead – but to continue to apply the rule of 'due diligence' in these cases of responsibility [where a state and a non-state actor shared a nexus that resulted in wrongdoing, which demands that] the conduct of the [state] authorities must, in each particular case, be judged in the light of the circumstances.[268]

[268]See Garcia-Amador, *supra* note 200, at 122.

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