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Due Diligence in International Law

Master thesis
20 points

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Field of study:
Public International Law

Spring 2004

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Summary

Due diligence is a quite old concept. Already in the end of the 19th century, it was discussed in matters concerning neutrality. Since then, the concept of due diligence has extended to other areas of law. The fields of international law under examination in this thesis are international environmental law, the protection of the marine environment, diplomatic law, the treatment of aliens and the security of foreign States (terrorism). The intention with the thesis was to describe the possible existence of due diligence in these various fields of law and make a comparison of the concept between the areas. The main question was whether due diligence has a uniform content and function or whether any differences can be displayed.

Due diligence is a generally accepted concept in international environmental law. States must behave in such a way as to ensure that no damage will occur to the environment of other States or other areas, as a result of the activities under their jurisdiction and control. Thus, the necessary measures should be taken in order to prevent environmental harm. Due diligence has a comparable content in the field of marine protection. States are also obliged to act appropriately to maintain the inviolability of the diplomatic agent and the diplomatic mission. The receiving State must therefore identify, understand, and manage possible hazards and carry out appropriate corrective action to prevent injuries or damage arising from these hazards. Whether there is such a principle as due diligence concerning the treatment of aliens is uncertain. Nonetheless, it is sufficient that a State treat aliens according to international minimum standards. Regarding terrorism, due diligence is merely at issue when it comes to State tolerance of activities carried out against other States.

In my opinion, due diligence could well function as the one and only fundamental principle within all these areas of international law because of its uncomplicated content: a minimum level of efforts which a State must undertake to fulfil its international responsibilities. However, the examination of these areas demonstrates that the concept of due diligence has a flexible character and its content is thus not uniform. The largest similarity between the various areas is that due diligence is solely at issue when it comes to the duty of protection. There are indications in State practice that the degree of effectiveness of the State's control over its territory, the importance of the interests to be protected and the predictability of harm are factors a State should consider before taking action. A significant difference emerges concerning the various levels of strictness in the behaviour of a State. Often it is enough if a State behaves according to the standard of due diligence, but sometimes the State needs to follow a stricter standard, or even an absolute one. Due diligence can also be measured by technical and scientific standards of behaviour, for example regarding polluting industrial activities. In conclusion, obligations with a precise content can reduce the general and flexible nature of due diligence.

Abbreviations

AJIL	American Journal of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILM	International Legal Material
ILR	International Law Reports
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
RGDIP	Revue Générale de Droit International Public
(UN) RIAA	(United Nations) Reports of International Arbitral Awards
UNCLOS	United Nations Convention on the Law of the Sea
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 The subject

The general idea of due diligence does not solely originate from a single legal system or tradition, even though it is frequently declared to derive from English common law tort actions for negligence. In any case, the concept of diligence was put forward already in 1872, in the *Alabama Arbitration*. The case concerned the purported failure of the United Kingdom to fulfil its duty of neutrality during the American Civil War.¹ In the Treaty of Washington (1871), which the Tribunal applied when deciding on the claims, due diligence is mentioned in two rules concerning the responsibility of a neutral State for damages caused by private individuals acting within its jurisdiction.² The meaning of due diligence here is that States must make sure that their territory is not used for the purposes of activities involving the violation of the territory of another State.³

The concept has gradually spread to other fields of law. For numerous people the concept of due diligence is known as belonging to the process by which a purchaser of or an investor in a company or business identifies, understand and manage risks before entering in an agreement or transaction. This meaning is not too different from its meaning within international law. Due diligence is a well-known and accepted concept in environmental matters. It is also mentioned in the *Tehran Hostage Case*⁴ regarding the questionable behaviour of the Iranian State during the seizure of the American embassy in 1979. In several of these fields of international law due diligence has been explained as what a responsible State ought to do under normal conditions in a situation with its best practicable and available means, with a view to fulfilling its international obligation.⁵ Due diligence thus refers to a level of judgement, care, prudence and, determination that a State would reasonably be expected to do under particular circumstances.

1.2 Purpose

When a State takes action, it has to respect the obligations formulated in international law. Due diligence is one principle that a State should consider before performing activities under its jurisdiction and control in order not to

¹ Hanqin, p. 162.

² Blomeyer-Bartenstein, pp. 1110-1.

³ Ibid., pp. 1110-1; Dupuy, paragraphs 8-9.

⁴ ICJ Reports 1980.

⁵ Dupuy, paragraph 13; Hanqin, p. 163.

harm other States. The purpose with this thesis was to constitute a descriptive study of the concept of due diligence within various fields of international law as well as a comparison of the concept between these areas. The areas under review are international environmental law, the protection of the marine environment, diplomatic law, the treatment of aliens and the security of foreign States. The main question asked is whether due diligence has a uniform content and function within these areas or if there are any differences, for example if the principle can have various levels of strictness. Another issue coming up is whether a State would be responsible for any harm occurring even though it has complied with the principle of due diligence.

1.3 Disposition and limitations

Chapter two present various theories concerning State responsibility in general. I have chosen only to describe the issue of State responsibility in general terms and not to illustrate the question of responsibility within the fields of international law that I am dealing with in the following chapters. I thought it was important briefly go through these theories since a State not acting with enough diligence may be international responsible for its failure. Chapter three gives an overview of the role of due diligence within international environmental law. The fourth chapter present the concept of due diligence concerning marine protection. Here I have put focus on section 1 in part XII of the United Nations Convention on the Law of the Sea (UNCLOS). However, a few examples of relevant articles in other international instruments are also mentioned. In chapter five an investigation of diplomatic law is given. In the Vienna Convention on Diplomatic Relations (VCDR), there are a number of articles concerning inviolability. I have chosen not to discuss all these articles but merely to concentrate on Article 22 about the premises of the mission and Article 29 regarding the diplomatic agent. The next chapter elaborates with the treatment of aliens. Diplomatic protection and international minimum standards are areas reviewed. The seventh chapter concerns whether the idea of due diligence is existent when it comes to the security of foreign States and terrorism. Chapter eight is the concluding chapter where I am evaluating the meaning of the concept of due diligence in these various fields of international law and comparing the essence to find out whether the concept is uniform or if there are differences.

1.4 Material and method

Riccardo Pisillo-Mazzeschi's article "The Due Diligence Rule and the Nature of the International Responsibility of States" has been a great inspiration and provided me with constructive ideas about the outline of this thesis. In international environmental law due diligence is an accepted

concept and therefore often mentioned in the doctrinal information. Pierre Dupuy's and Riccardo Pisillo-Mazzeschi's articles as well as Pheobe Okowa and Patricia Birnie and Alan Boyle's books have not only given me valuable information and comments on the subject but also functioned as my main reference work. It has been more difficult to find information that explicitly regard due diligence within the fields of marine protection, diplomatic law and security of foreign States. Instead I have first turned to international instruments to find articles formulated in such a way as referring to due diligence. Then I have concentrated on these articles in the preparatory work, doctrine and case law and described the issue from that. When it comes to the treatment of aliens, I have merely explained various features concerning this field of law.

The method used in this thesis is a combined descriptive and analytical study of the subject. The thesis begins with describing State responsibility and the role of due diligence in the five fields of international law and finishes with an analysis of the results.

2 Different theories about State responsibility in general

There exist various theses about international responsibility of States; most of them concern responsibility of some kind for a wrongful act and one is about liability without a wrongful act. Thus, there is a difference between the terms *responsibility* and *liability* in contemporary international law. By *responsibility*, it is usually meant the consequences arising from the breach of an international obligation while *liability* means the duty to compensate damage in the absence of a violation of international law.⁶

2.1 The elements of State responsibility in short

A State is international responsible when it has performed an internationally wrongful act,⁷ meaning conduct consisting of an action or omission that is attributable to a State under international law and that constitutes a breach of the international obligation of the State.⁸ In some cases, a State's actions may be justified because of circumstances precluding wrongfulness. Examples of such circumstances are consent, self-defence, force majeure, distress and necessity. This is for the respondent State to assert and prove.⁹

The rules of attribution specify the actors whose conduct may engage the responsibility of the State. A State will generally only be liable for its conduct of its organs or officials acting as such.¹⁰ Acts of private persons will usually not lead to State responsibility. However, a State may be liable for its failure to prevent such acts, or to take action to punish the individuals responsible.¹¹ The acts of mobs or private individuals may also be attributable to the State if the State had authorized or controlled the acts,¹² or if and to the extent that the State acknowledges and adopts the conduct in question as its own.¹³

⁶ Pisillo-Mazzeschi, 1991, p. 15.

⁷ ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 1.

⁸ Ibid., Article 2.

⁹ Ibid., Chapter V.

¹⁰ Ibid., Article 4.

¹¹ Crawford, and Olleson, p. 455. For example, in the *Tehran Hostage Case*, Iran was held to have breached its special obligation of protection of the US embassy, even before the students occupied the embassy. ICJ Reports 1980, p. 32, paragraph 63.

¹² ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 8.

¹³ Ibid., Article 11. An example of this is the *Tehran Hostage Case* where the students' acts were translated into acts of Iran subsequent a decree of Ayatollah Khomeini. ICJ Reports 1980, pp. 35-6, paragraphs 73-4.

There must as well be a breach of a legal duty in order for international responsibility to incur. It does not matter if it is a treaty obligation or customary international law or any other obligation owed under international law.¹⁴ Neither does the kind of conduct matter. Lysén exemplifies that State conduct might be comprised of “positive acts, omissions, failure to achieve a certain result, or failure to meet a standard of due care, or diligent control or pure lack of vigilance [that] is lawful according to the national law of that State”.¹⁵

2.2 Theories of objective responsibility

The majority of writers and the decisions of international tribunals support the objective theory of responsibility.¹⁶ This theory consists of the idea that responsibility is the result of the breach of an international obligation (responsibility without fault).¹⁷ This means that the breach of the duty by result alone leads to responsibility.¹⁸ Objective and relative responsibility means that a State can absolve itself from responsibility by referring to one of the defences allowed by international law. Objective and absolute responsibility is instead when no circumstance precluding wrongfulness is allowed.¹⁹ Pisillo-Mazzeschi, however, does not consider the theories of objective responsibility persuasive. Instead he prefers to think of responsibility for breach of obligations of result (relative or absolute), meaning obligations in contrast with due diligence obligations.²⁰

2.3 Theories of fault responsibility

Fault responsibility (or subjective responsibility)²¹ mostly refers to the intention (*dolus*) or negligence (*culpa*) of the actor. *Dolus* means that the actor behaves in a certain way with the intention to cause harm. *Dolus* can be helpful in solving the problem of attributability and determining the breach of duty as well as having effect on the remoteness of damage. Noteworthy is that even in case of an *ultra vires* act of a State organ performed with *dolus* and, independent of whether the act is permitted by law or not, the responsibility of the State is not affected.²²

Culpa can be explained as the actor’s attitude of will, blameworthy because of reasonable foreseeability or recklessness. The necessary measures have thus not been taken to avoid the injurious event. In situations where acts of

¹⁴ Lysén, p. 59.

¹⁵ *Ibid.*, p. 55.

¹⁶ Okowa, p. 77; Brownlie, p. 39; Crawford and Olleson, p. 459.

¹⁷ Pisillo-Mazzeschi, 1992, p. 9.

¹⁸ Brownlie, p. 38.

¹⁹ Pisillo-Mazzeschi, 1992, p. 9.

²⁰ Pisillo-Mazzeschi, 1991, p. 16.

²¹ *Ibid.*, p. 91.

²² Brownlie, p. 46.

private persons result in damage and the acts are not attributable to the State, the State may still be responsible because of failure to control.²³

Standards of due diligence may be considered to determine the possible fault of a State. The claimant State then has to prove, in addition to the breach of the international obligation, the wilful or negligent conduct of the organs of the respondent State of the wrongful act.²⁴ The issue of knowledge may be helpful when it comes to determine such conduct.²⁵ In the *Corfu Channel Case*,²⁶ where Albania was held responsible since it must have known that the mines had been recently laid and even so failed to warn the British warships passing through the strait of the imminent danger, the court said that:

It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims... [I]t cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.²⁷

Lysén, however, claims that the *Corfu Channel Case* has been wrongly used as support of the theory of fault responsibility since the mental attitudes of the Albanian officials were not examined. Albania had merely not fulfilled its duties, no matter what the intentions for its failure to act.²⁸ Brownlie also asserts that several cases supporting fault responsibility “are concerned with the standard of conduct required by law *in a particular context*”,²⁹ that is the breach of obligation itself. In cases of omission, there are, however, larger room for reflections of fault, whereas when a State conducts in a specific way, the possibilities to dispute that the damaging consequences were unintentional and should be ignored decrease.³⁰ When considering due diligence in a specific case concerns of reasonableness and equity have to be raised.³¹

Lysén concludes that if fault would have to be proven in order for international responsibility to come into play, States could probable quite often escape responsibility because of, for example, procedural difficulties of proving culpa or dolus on the part of the claimant State. If international

²³ Brownlie, pp. 44-45; Pisillo-Mazzeschi, 1991, p. 16; Pisillo-Mazzeschi, 1992, pp. 13-14.

²⁴ Brownlie, p. 45; Pisillo-Mazzeschi, 1991, p. 16; Pisillo-Mazzeschi, 1992, p. 9.

²⁵ Brownlie, p. 45; Pisillo-Mazzeschi, 1991, p. 16; Pisillo-Mazzeschi, 1992, p. 9.

²⁶ ICJ Reports 1949.

²⁷ *Ibid.*, p. 18.

²⁸ Lysén, p. 93.

²⁹ Brownlie, p. 42.

³⁰ Crawford and Olleson, p. 460.

³¹ Lysén, pp. 93-4. Lysén exemplifies by referring to treaty provisions obligating States to take appropriate or necessary measures to reach specific aims, such as Article 22 VCDR concerning the protection of the premises of diplomatic missions.

responsibility was based on fault, it would disturb the legal equality among States as well as deteriorate the respect for the system of international law.

³² Fault may instead be of relevance concerning consequences as causation and damages.³³ Lysén's examination of case-law and doctrine verifies his conclusions that fault, in addition to breach of obligation, is not a general condition of international responsibility.³⁴ Further, according to Articles 2 and 12 of ILC's Draft Articles on State responsibility, fault is not required in order for an act or omission to be characterised as internationally wrongful.³⁵ The Draft Articles are instead based on breach of duty alone.

2.4 Eclectic theories of responsibility

There are also eclectic theories of responsibility that are a compromise between the fault theory and the theory of objective responsibility. This idea concerns the objective and relative responsibility together with a special regime for the particular rules containing the duty of diligence.

There are various opinions about this theory. One group of authors claim that it is the interpreter alone, who shall estimate if the wrongful act requires fault. Swarzenberger believes "the judge's discretion, reasonableness and equity are the guide for seeing whether, in each specific case, in order to have a wrongful act, an additional element to the breach of an international obligation must be required".³⁶ Dupuy thinks that subjective fault sometimes may be considered, especially "when the international obligation is defined in terms of goals and when the lawfulness of the State conduct is to be judged by reference to given standards of diligence".³⁷

Some authors are instead more careful about distinguishing between cases adhering to fault responsibility and those subject to the principle of objective responsibility. In order to do so, they differentiate among groups of wrongful acts and sometimes among groups of norms or of international obligations. Brownlie has argued that objective responsibility is the main rule, but that fault may come into play when a State is obliged by international law to exercise control, accordingly standards of due diligence, over specific activities in order not to cause harm. Thus, it is the content of the international norm in question, which settles whether fault is relevant.³⁸

³² Lysén, p. 95.

³³ Brownlie, p. 45; Pisillo-Mazzeschi, 1991, p. 16; Pisillo-Mazzeschi, 1992, p. 9; Lysén, p. 96.

³⁴ Lysén, p. 95.

³⁵ Crawford and Olleson, p. 460.

³⁶ Pisillo-Mazzeschi, 1992, p. 18. He refers to Swarzenberger, Georg, *International Law*, Vol. I: International Law As Applied by International Courts and Tribunals, I, 3rd ed, 1957, London, pp. 632-652.

³⁷ Pisillo-Mazzeschi, 1992, p. 19. He refers to Dupuy, Pierre-Marie, *Le fait générateur de la responsabilité internationale des Etats*, in RdC, vol. 188, 1984-V, p. 21.

³⁸ Pisillo-Mazzeschi, 1992, p. 19. He refers to Brownlie, Ian, *System of the Law of Nations. State Responsibility*, Part I, 1983, Oxford, pp. 37-49 and *Principles of Public International Law*, 4th ed., 1990, Oxford, p. 436.

Zemanek says that “fault is required in all omissive wrongful acts, but that in such wrongful acts what is decisive now is the rule of due diligence which expresses an “objectivized” concept of fault”.³⁹ Quadri and Conforti contend that the majority of norms of conduct lead to objective responsibility, but that some norms can evoke the rule of diligence and a possible breach will then depend on fault.⁴⁰

The supporters of the eclectic theories have agreed neither as to what the rules containing a duty of diligence nor the definition of such duty. Consequently, there are still problems that need to be solved. Pisillo-Mazzeschi concludes that the eclectic theory in general is acceptable, but that the various individual positions are either insufficient or criticisable.⁴¹ Because of the lack of consensus among the authors, it is therefore doubtful whether the eclectic theories can be considered to be a theory of the same significance as the theories of objective responsibility and of fault responsibility.

2.5 Theories of liability without a wrongful act

Lastly, alongside the various theories of responsibility for a wrongful act, there is also the regime of liability without a wrongful act. Here, the causal link between the activity and the damage done leads to the obligation to pay compensation, or liability, even though the damage occurred from a lawful activity.⁴² It has often been for practical reasons, because of scientific and technological developments,⁴³ that international liability has advanced. The developments have led to activities that are beneficial to society, but that also involve a certain degree of risk of causing harm. Examples of such activities are the transportation of oil, the production of nuclear energy and operations in outer space.⁴⁴ This has resulted in several treaties regulating these activities contain special liability rules.⁴⁵

³⁹ Pisillo-Mazzeschi, 1992, p. 19. He refers to Zelmanek, Karl, Schuld- und Erfolgschaftung im Entwurf der Völkerrechtskommission über Staatenverantwortlichkeit, in *Festschrift für R. Bindschedler*, 1980, Bern, p. 322.

⁴⁰ Pisillo-Mazzeschi, 1992, p. 19. He refers to Quadri, Rolando, *Diritto internazionale pubblico*, 5th ed., 1968, Napoli, pp. 588-590 and 470-2 and Conforti, Benedetto, *Diritto internazionale*, 3rd ed., 1987, Napoli, pp. 346-350.

⁴¹ Pisillo-Mazzeschi, 1992, pp. 18-21.

⁴² Pisillo-Mazzeschi, 1991, pp. 16-17.

⁴³ For example, the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, supplemented by the Hague Protocol of 1955 and, the 1961 Guadalajara Convention.

⁴⁴ Lysén, pp. 135-7.

⁴⁵ For example, in Article III (1) of the 1969 International Convention on Civil Liability for Oil Pollution Damage it is stated that “the owner of a ship at the time of an incident...shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident”. See also the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, the 1963 Brussels Convention supplementary to the Paris Convention and, the 1963 Vienna Convention on Civil Liability for Nuclear Damage.

Most treaties containing rules on liability concerns civil liability, meaning that the operator or owner of a certain activity is obliged to pay compensation for damage resulting from the activity. The liability regarding an accident is restricted to an insurable sum of money and the national courts are the forum for a proceeding. The point is that victims should be appropriately compensated and status quo be restored. A few conventions have assumed international liability.⁴⁶ Since the State parties are not too fond of such solution they instead prefer definite standards to be met by the State parties and/or creating civil liability regimes.⁴⁷ Conclusively, there is not a very large amount of treaties containing liability, and liability is neither common in customary international law.⁴⁸

⁴⁶ For example, the 1958 Geneva Convention on the High Seas, Article 22, which has been incorporated in Article 110 of the UNCLOS, the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Article VII and, the 1972 Convention on International Liability for Damage Caused by Space Objects, Article II. See also the *Cosmos 954 Incident*.

⁴⁷ Lysén, pp. 137-144.

⁴⁸ *Ibid.*, p. 148.

3 Environmental law

3.1 Principle of good neighbourliness and Principle 21

In customary international law there is a principle saying that States cannot do whatever they want without respecting the rights of other States or the protection of the environment. This is the principle of good neighbourliness.⁴⁹ This principle was in 1972 modified into Principle 21 of the Stockholm Declaration.⁵⁰ According to this principle, “States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction”. It is later repeated in Principle 2 of the Rio Declaration.⁵¹ Both these principles have had great influence on the development of law and practice in environmental matters,⁵² much because of the integration between development and environmental protection. Today, the majority of environmental treaties actually aim at preventing future injury which also implies that States have to act with due diligence.⁵³

3.2 Due diligence

Due diligence signify the conduct to be expected of good government in order to effectively protect other States and the global environment.⁵⁴ Failure to exercise due diligence does not have to be identical with negligence or meanness; it merely means that the State has failed to fulfil the standard of conduct expected of good government in the situation.⁵⁵ Flexibility is an essential characteristic of this standard of conduct as well as the fact that even if a State behaves in a desired manner it cannot guarantee total prevention of harm.⁵⁶

⁴⁹ Dupuy, paragraph 13-14; Birnie and Boyle, p. 104.

⁵⁰ Declaration of the UN Conference on the Human Environment, Stockholm.

⁵¹ 1992 Rio Declaration on Environment and Development.

⁵² See for example the London Dumping Convention, the 1985 Ozone Convention, the Basle Convention on the Transboundary Movement of Hazardous Wastes, the Nuuk Declaration of Environment and Development in the Arctic and, the Convention to Combat Desertification.

⁵³ For example, the 1985 Ozone Convention, the MARPOL Convention, the London Dumping Convention and, the 1992 Climate Change Convention with its Kyoto Protocol. Birnie and Boyle, pp. 110-12.

⁵⁴ Dupuy, paragraph 3; Birnie and Boyle, p. 112.

⁵⁵ Okowa, p. 79.

⁵⁶ Birnie and Boyle, p. 112.

A difficulty with a too general wording is that in environmental matters it gives little direction on the needed legislation in respective State and case. Therefore further details are desired to attain a more concrete substance and predictability. A possible way to solve this is to examine the internationally agreed minimum standards in treaties, resolutions or decisions. Another way is to develop standards by referring to wordings like the usage of "best available technology"⁵⁷ or "the latest technical developments"⁵⁸. Various multilateral treaties⁵⁹ contain such kinds of standards in order to describe the obligations of conduct. If there is sufficient international support, the international standards may gain customary validity. This means that as long as the standards can be discerned, the tribunals or supervisory institutions can apply them.⁶⁰

In treaties⁶¹ and in the work of the ILC, due diligence is considered to be a primary environmental obligation of States. The concept of due diligence has gone through a progress in ILC's drafting the Convention on the Prevention of Transboundary Harm.⁶² But there are indications that it is merely a codification of existing international law. Nonetheless, it represents the minimum standard obligated by States dealing with transboundary harm. Four features can especially be distinguished in Articles 3-7 of the convention:

- taking all appropriate measures to prevent and minimise the risk,
- co-operating with other States and competent international organisations,
- implementing through necessary legislative, administrative, or other action, including monitoring mechanisms and,
- a prior assessment of the possible transboundary harm should be done before giving authorisation for an activity or a major change.⁶³

3.2.1 Compliance with due diligence

The international tribunals that have observed due diligence have concluded that the conduct of a State must be connected to an international standard.⁶⁴

⁵⁷ See for example, the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, Article 6.

⁵⁸ See for example, the 1972 Paris Convention for the Prevention of Marine Pollution from Land-based Sources (as amended by the Protocol of 26 March 1986), Article 4 (3).

⁵⁹ For example, UNCLOS incorporates by Articles 210 and 211 the MARPOL Convention and the London Dumping Convention by obliging States to give effect to generally accepted international rules and standards, whether or not they are independently binding on parties. The Basel Convention also refers to internationally accepted standards.

⁶⁰ Birnie and Boyle, p. 113.

⁶¹ For example, 1982 UNLOS, Article 194, 1979 Convention on Long-Range Transboundary Air Pollution, Article 2 and, 1985 Ozone Convention, Article 2.

⁶² Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.

⁶³ Birnie and Boyle, p. 113.

⁶⁴ Okowa, p. 82.

Such standards may consist of various aspects depending on the epoch, the circumstances and the particular situation of the authorities of the State in question, as well as some degree of subjectivity. It is however, elucidated that a State needs to possess a minimum legal and administrative infrastructure in order to guarantee the fulfilment of its international obligations under normal conditions.⁶⁵ Max Huber⁶⁶ has explained this as

No system for the maintenance of public order or the administration of justice is perfect and a considerable margin of tolerance must undoubtedly be accepted even in the best administered countries. But, this restriction on the rights of States to intervene to protect their nationals presupposes that general security in their countries of residence does not fall below a certain level and that their legal protection at least does not become purely illusory.⁶⁷

The State must also use this infrastructure with a degree of diligence suitable for the situation.⁶⁸ Factors like the effectiveness of territorial control, the capacity and means available to the State, and the nature of specific activities may justify variations in the degree of diligence.⁶⁹ Developing States with sparse and ineffective administration may not be required to behave the same way as States with a possibility to strengthen their control. However, States may not renounce their possession and operation of a sufficient infrastructure so that they cannot fulfil their international obligations under normal conditions.⁷⁰

3.3 Foreseeability of harm

International law contains a precautionary approach in the sense that States must not cause or permit serious or significant harm to other States or to common spaces. This rule is primarily an obligation of diligent prevention and control. To answer the question when this obligation of diligent control and regulation arise, one has to look at the foreseeability or likelihood of harm and how serious the harm is likely to be.⁷¹ What will count as objectively foreseeable may change over time, and is dependent on the knowledge concerning the risk that the activity in question brings at the time when valued.⁷²

⁶⁵ Dupuy, paragraphs 10, 12-13.

⁶⁶ Max Huber is a judge.

⁶⁷ Dupuy, paragraph 14. Dupuy is referring to the British claims in the Spanish zone of Morocco, Reports, The Hague, 1925, p. 54.

⁶⁸ Dupuy, paragraph 15.

⁶⁹ Ibid., paragraphs 17-25; Birnie and Boyle, p. 112.

⁷⁰ Dupuy, paragraphs 19-20.

⁷¹ Birnie and Boyle, p. 115. Birnie and Boyle exemplifies by mentioning the *Trail Smelter Case* where it is said that the obligation of diligent control and regulation arises when there is actual and serious harm which is likely to occur whereas according to the *Corfu Channel Case* the obligation arises if there is a known risk to other States.

⁷² Report of the ILC on the work of its forty-eight session 6 May – 26 July 1996, p. 256; Birnie and Boyle p. 115.

If a State has not or could not reasonably have been aware of a potential harm of an activity or, if it did not know and could not reasonable have known it cannot be obligated to regulate such activities. Risk is a difficult matter because one has to regard various elements; probability and scale of harm, causes of harm, effects of the activities, and their interaction over time. Not often can judgements be given with certainty. Sometimes States declare that they do not need to take measures in order to control transboundary or global risks until there is scientific proof of eventual harm. Although it is understandable that States want to know the origin and character of the problem before they take action, such a high standard of proof could endanger the environment. It is when deciding the standard of proof in situations like this that the precautionary principle comes into play.⁷³

3.4 The precautionary principle

The precautionary principle has developed from worries about activities involving a considerable risk of irreversible environmental harm. These activities should be controlled in order to prevent transboundary damage and if necessary forbidden by law, even in case of scientific uncertainty regarding the character of damage that might occur from the activities. Consequently, inaction cannot be justified even if the risk of damage is uncertain or unlikely. States should in fact also be cautious of unknown future risks that might be unknown.⁷⁴ The standard of proof required before preventive measures are needed is supposed to decrease due to the precautionary principle.⁷⁵

The precautionary principle has become very important and is incorporated in Principle 15 of the Rio Declaration. Since 1990 it has also been adopted by several treaty institutions or incorporated in treaties.⁷⁶ The principle should be applied in situations of domestic characters as well as to problems of global environmental risk.⁷⁷

How far Principle 15 must be applied is uncertain. On the one hand the wording in the Rio Declaration indicates it to be obligatory and it is widely affirmed by States and has been adopted by numerous international organisations and treaty institutions. However, in some treaties⁷⁸ the

⁷³ Birnie and Boyle, pp. 115-6.

⁷⁴ Okowa, p. 92.

⁷⁵ Birnie and Boyle, p. 117.

⁷⁶ For example, the 1992 ECE Convention on Transboundary Watercourses and Lakes, Article 2 (5), the 1992 Climate Change Convention, Article 3, the 1991 Bamako Convention, Article 4 (3) (f) and the 1992 Convention on Biological Diversity, Preamble.

⁷⁷ Birnie and Boyle, pp. 116-7.

⁷⁸ For example, the 1992 Climate Change Convention and the 1992 Convention on Biological Diversity.

principle is mentioned but in others⁷⁹ is it not. The thresholds of harm are also different as well as the consequences of application. No guidance is given as how to control a risk or if a certain level of risk is socially tolerable. On the national level there are also differences. A few States⁸⁰ apply the precautionary principle as law whereas the majority thinks of the precautionary principle solely as a principle which governments and legislatures may lawfully consider.⁸¹ Whether and how far States have decided to apply the precautionary principle has depended on their own capabilities, their economic and social priorities, the cost-effectiveness of preventive measures and, the nature and degree of the environmental risk. Consequently, the precautionary principle has been useful when deciding whether a risk is sufficiently foreseeable and severe to call for an action, but it has not been suitable to establish the measure that should be taken.⁸²

3.5 Transboundary co-operation

States should co-operate in several ways in order to forestall situations that might lead to transboundary harm. By making impact assessment, notifying, consulting and negotiating adverse effects on the environment should be avoided.

3.5.1 Environmental impact assessment

In the 1991 Convention on Environmental Impact Assessment in a Transboundary Context an environmental impact assessment is explained as a "national procedure for evaluating the likely impact of a proposed activity on the environment".⁸³ This should be done in order to prevent, reduce, and control significant adverse transboundary effects.⁸⁴ In cases of shared natural resources, an environmental impact assessment is not only supposed to evaluate likely environmental damage but also to make the acting State more cautious of the interest of other States. How the assessment is executed depends on the legal requirements and practical means of the State. Limitations on the assessment might be the State's technical and financial resources. But as long as the State uses its best available and practical capacities in good faith it is considered to have fulfilled its international obligation.⁸⁵

The obligation of environmental impact assessment can also be found in the national laws of several western countries,⁸⁶ case law,⁸⁷ and bilateral

⁷⁹ For example, the 1994 Convention on Nuclear Safety and the 1995 Washington Declaration on the Protection of the Marine Environment from Land-based Activities.

⁸⁰ For example, India and Pakistan.

⁸¹ Birnie and Boyle, pp. 118-20.

⁸² Ibid., p. 120.

⁸³ Article 1 (vi).

⁸⁴ Article 2 (1).

⁸⁵ Hanqin, pp. 167-8.

⁸⁶ For example, USA, Canada and the European Union.

agreements⁸⁸ or EU directives.⁸⁹ In the absence of a treaty obligation, reliance can be put on Principle 17 of the Rio Declaration, which states "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority." However, such assessment is an issue of national control. According to Hanqin, if national law does not demand an environmental impact assessment it is difficult to advocate that such assessment is a requisite of due diligence.⁹⁰ Birnie and Boyle conclude "at present an assessment of harm is at most obligatory under general international law only in cases of transboundary risk to the environment of other States or to the marine environment".⁹¹

3.5.2 Notification

Another way of strengthening international co-operation between States is the duty of notification. If a risk of environmental damage is disclosed by an assessment of harm, the acting State should notify the States concerned of its planned project as early as possible. Alternatively, if an activity causes a foreseeable damage or harms the territory of another State, the affected State should be informed of the potential or actual injurious consequences in order to prevent or minimise any damage as much as possible. The duty of notification and the requirement of response thus assist States in assessing the situation better and subsequently, taking the needed preventive measures.⁹²

3.5.3 Consultation and negotiation

A State not only has to notify affected States about their planned project, but also has an obligation to consult with them. It is clear that the States should consider each other's rights and legitimate interests. If a conflict would arise between the States, they should, accordingly general principles under international law, consult and negotiate with a view to settle the conflict. However, the acting State does not need the acceptance of the affected State before beginning its project.⁹³

⁸⁷ For example, the *Case Concerning the Gabčíkovo-Nagymaros Dam*, paragraphs 112 and 140 and, the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement in the 1974 Nuclear Tests Case*, paragraph 5 in the Order of 22 September 1995, which is referring to paragraphs 73-96 and 108 of the Application of 9 May 1973.

⁸⁸ For example, the 1993 North American Agreement on Environmental Cooperation, Article 2, the 1994 German-Polish Agreement on Co-operation in Environmental Protection and, the 1994 Polish-Ukrainian Treaty on Environmental Co-operation.

⁸⁹ Council Directive 97/11/EC.

⁹⁰ Hanqin, p. 167.

⁹¹ Birnie and Boyle, p. 132.

⁹² Hanqin, pp. 168-170.

⁹³ *Ibid.*, pp. 173-5.

The duty to consult and negotiate has become a legal obligation, shown by often being considered in international jurisprudence⁹⁴ as well as in treaties.⁹⁵ Moreover, it has been included in Principle 19 in the Rio Declaration. This indicates that non-compliance with these duties might be considered as a failure of diligent action in protecting the environment of other States.⁹⁶

⁹⁴ See for example the *Lac Lanoux Arbitration*, at 119, 126-30, 140-1, the *North Sea Continental Shelf Cases*, paragraph 85 and, the *Case Concerning the Gabčíkovo-Nagymaros Dam*, paragraphs 141-3.

⁹⁵ For example, ILC's Draft Convention on Prevention of Transboundary Harm, Articles 9-13, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Articles 3 and 5 and, the 1997 UN Convention on International Watercourses, Part III.

⁹⁶ Birnie and Boyle, p. 127.

4 The protection of the marine environment

At a time where the oceans are exploited more intensively than in the past, both when it comes to fisheries and as pollution sink, the awareness of the need to protect the marine environment has increased. This is important since new uses continue to emerge.⁹⁷

4.1 1982 Convention on the Law of the Sea

In Article 1 (4) of the 1982 United Nation Convention on the Law of the Sea (UNCLOS) pollution of the marine environment is defined as “the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities”. With this convention, the ocean is seen from a more holistic point of view, as a natural resource that is exhaustible and finite. Further, the fact that one State’s use or abuse may negatively affect another State’s use of the ocean as a resource is emphasized.⁹⁸

Consequently, States have accepted that they cannot use the ocean totally free and random anymore and that there is a need for provisions that provides a balance and limitations of usage in order to protect the ocean as a resource as well as reduce conflicts.⁹⁹ Therefore, the international law concerning marine pollution is enclosed almost entirely in treaties. There are a significant number of such treaties,¹⁰⁰ the most important being the UNCLOS.¹⁰¹ The UNCLOS contains legal binding duties for the protection of the marine environment as well as accommodates the rights of the world community to utilize the ocean.¹⁰²

Part XII of the UNCLOS contains articles concerning the marine environment. It starts with general provisions in section 1, which are then followed by the substantive rules. But it is in these general provisions that

⁹⁷ Juda, p. 285.

⁹⁸ Ibid., p. 241.

⁹⁹ Ibid., p. 242.

¹⁰⁰ For example, the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, replaced by the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area and, the 1976 Convention for the Protection of the Mediterranean Sea against Pollution.

¹⁰¹ Churchill and Lowe, pp. 333-8.

¹⁰² Juda, p. 242.

due diligence can be found. Worth noticing is that although the wording in articles 194, 195 and 196 is *shall*, this is not absolute obligations, but merely qualified ones.¹⁰³

According to article 192 States are obliged to protect and preserve the marine environment. This article has a wide obligation and connects to the Preamble which states that through this Convention there is a desire to endorse the study, protection and preservation of the marine environment.¹⁰⁴ Article 193 relates to article 192 and is much influenced by Principle 21.¹⁰⁵ It declares that States have the sovereign right to exploit their natural resources, but that they have to consider their environmental policies and their duty to protect and preserve the marine environment while doing it.

Article 194 is the connection between the two general principles enclosed in articles 192 and 193 and the formal rules of law in the following articles of Part XII. The article contains rules about the three elements prevention, reduction and control of pollution of the marine environment.¹⁰⁶

According to the first paragraph “States shall take, individually or jointly as appropriate, all measures consistent to this convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection”. The scope of the provision is broad. What is meant by “necessary” measures is unclear, but the wording “individually or jointly as appropriate” indicates that the decision to be made is not merely for the States concerned. Because of worries of developing States that a too heavy burden might be imposed on them by this article the choice was made to include “in accordance with their capabilities”. The phrase “consistent with this convention” together with the fact that the article is to be applied by all States implies that even measures taken by non-parties must be consistent with the convention as a whole, under the assumption that it is part of customary law. In addition, States may only impose protection measures which are compatible with the convention as a whole. The final phrase “shall endeavour to harmonize their policies in this connection” means that a State has to make certain that it satisfies the requisites in the convention when adopting laws or regulations.¹⁰⁷ Further, co-operation among States are demanded both on a global and regional basis when formulating rules.¹⁰⁸

Paragraph 2 of article 194 says that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment,

¹⁰³ Nordquist, p. 36.

¹⁰⁴ Ibid., pp. 35-40.

¹⁰⁵ Ibid., pp. 44-49.

¹⁰⁶ Ibid., p. 53.

¹⁰⁷ Ibid., pp. 64-65.

¹⁰⁸ UNCLOS, Article 197; Nordquist, p. 77.

and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this convention”. This is a reflection of the general rule that States may not use its territory in a way that is damaging to another State.¹⁰⁹

When taking action under article 194 States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this convention.¹¹⁰ Measures taken by a State to prevent, reduce and control the marine environment from pollution shall also not be such as to transfer pollution from one medium to another. Neither shall the measures lead to transformation of one type of pollution into another.¹¹¹

Article 196 UNCLOS concerns the use of technologies and the introduction of alien or new species. The article consist of a mixture of two unequal concepts, namely the duty of States to prevent, reduce and control pollution of the marine environment resulting from the use of technologies within their jurisdiction and control and the duty of States to maintain the natural state of the marine environment. The latter duty is a separate issue from that of the pollution of the marine environment. The purpose was to put focus on what happens when the ecological balance of marine environments is being disturbed. This disturbance is a consequence of the introduction of living organisms, which did not exist in the sea before, or transferring a form of marine life to an area where the implications of its existence were unknown. Including this perception in international law was a novelty that has been repeated in several regional agreements.¹¹²

4.2 Other conventions

Similar formulations as in articles 194 and 196 UNCLOS can be found in other treaties. When it comes to pollution all contracting parties to the MARPOL Convention shall “take all appropriate measures in accordance with the provisions of this Convention and those Protocols in force to which they are party, to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea area and to protect and enhance the marine environment in that area”.¹¹³ In some cases a formulation like this has been replaced by a stricter one. In Article 6 (1) of the 1974 Baltic Convention the parties were obligated to “take all

¹⁰⁹ Ibid., pp. 65-66.

¹¹⁰ UNCLOS, Article 194 paragraph 4; Nordquist, pp. 67-68.

¹¹¹ UNCLOS, Article 195; Nordquist, pp. 69-72.

¹¹² Nordquist, pp. 73-76.

¹¹³ Article 4 (1). Other examples can be found in Article 9 of the MARPOL Convention, Article 3 and Annex I of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic and Article I of the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

appropriate measures to control and minimise land-based pollution” whereas in its new form from 1992 the parties “are to prevent and eliminate pollution by using inter alia best environmental practice for all sources and best available technologies for point sources”.¹¹⁴

An example with regard to dumping is Article 5 of the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution which states that parties shall take all appropriate measures to prevent and abate pollution in the Mediterranean caused by dumping from ships and aircrafts. Further, the parties are obligated to take all steps to conform with international law concerning the prevention of pollution from ships and to ensure the effective implementation of relevant international rules.¹¹⁵

The 1992 Baltic Convention also contains provisions concerning the protection of special areas. In its Article 15 parties are, individually or jointly, to take all appropriate measures to conserve natural habitats and biodiversity, protect ecological processes, and ensure the sustainable use of natural resources.

¹¹⁴ Churchill and Lowe, pp. 384-5.

¹¹⁵ Article 6.

5 Diplomatic law

In the *Tehran Hostages Case* the ICJ pointed out the importance of inviolability as a matter of diplomatic relations between States. In the case, the ICJ stated, “there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for the purpose”.¹¹⁶

5.1 Three theoretical bases of diplomatic immunities

The legal basis of the immunities which a diplomat is granted in the territories of the receiving State can be found in three different theories. The doctrine of extritoriality is the oldest one. According to this theory the premises of a mission does not belong to the receiving State but is a prolongation of the territory of the sending State. The representative character of the envoy is another basis for giving diplomatic immunities. In this theory, the diplomatic agent is representing a sovereign State and therefore owes no loyalty to the receiving State.¹¹⁷

The last doctrine is functional necessity, which is the modern view of allowing immunities to diplomats. This means that unless the diplomatic mission, of which the diplomatic agent is a member, enjoys these privileges it could not exercise its functions completely. This also implies that if the diplomats were answerable to ordinary legal and political interference from the receiving State, they could be influenced in a way that would hinder them in their work.¹¹⁸ The Vienna Convention on Diplomatic Relations (VCDR) is founded on this theory.¹¹⁹

¹¹⁶ Order of 15 December 1979 made on the application for provisional measures, ICJ Report 1979, p. 19; Judgement of 24 May 1980, ICJ Reports 1980, p. 42; Sen, p. 108; Barker, p. 71.

¹¹⁷ Sen, pp. 96-7.

¹¹⁸ Ibid., pp. 97-8; Barker, p. 75.

¹¹⁹ In its preamble it is uttered that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states”; Sen, p. 98.

5.2 Personal inviolability

Every diplomatic privilege and immunity has progressed from the fundamental and universally recognised principle of personal inviolability.¹²⁰ In the VCDR the rule regarding personal inviolability is contained in Article 29:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

The purpose is that diplomats shall be protected from actions of immediate constraint.¹²¹ The receiving State must also offer special protection, meaning that it must take all measures to prevent any violation of the personal inviolability of the diplomatic official.¹²² Przetacznik calls this the duty of prevention.¹²³ This duty is acknowledged in judicial decisions of several countries, in the practice of States, in the codification of diplomatic and consular law as well as in the doctrine of international law.¹²⁴ There are no exceptions to the rule regarding personal inviolability of the diplomatic agent in the VCDR and it is therefore held to be absolute.¹²⁵ However, it is the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State.¹²⁶

In the four Vienna Conventions¹²⁷ it is stated that the receiving State must take all appropriate measures to prevent any attack on officials of foreign States' person, freedom or dignity. There is no clear definition of "appropriate steps". Neither is it established who decides if the measures taken are appropriate or not. This has to be determined in each and every case in relation to the circumstances. Foreign officials working in places where violent crimes are common or terrorist groups are active might need greater protection than those officials sent to calmer and more peaceful cities. The Vienna Conventions use the phrase "to take all appropriate steps", by which they demand the result of non-violation of the personal inviolability. The receiving State may choose how to achieve this result, thus it is the receiving State that decides what steps are appropriate. Whether the receiving State fulfils its obligation of giving foreign officials special protection is showed by the non-occurrence of the violation of their personal inviolability. If the receiving State does not manage to keep the

¹²⁰ Nascimento e Silva, pp. 91; Barker, p. 71; Przetacznik, p. 11.

¹²¹ Hardy, pp. 50-1.

¹²² Nascimento e Silva, p. 91; Sen, p. 107; Przetacznik, p. 39.

¹²³ Przetacznik, p. 39.

¹²⁴ Ibid., pp. 39-49.

¹²⁵ Nascimento e Silva, p. 93.

¹²⁶ VCDR, Article 41 § 1. See also Sen, p. 109.

¹²⁷ The Vienna Convention on Diplomatic Relations, the Vienna Consular Convention, the Vienna Convention on the Representation of States and the Vienna Convention on Special Missions.

personal inviolability of the foreign officials free from violation, the sending State may dispute that the measures taken were not effective. The receiving State is in such a case internationally responsible for not fulfilling its obligation of protecting the foreign officials.¹²⁸

The first thing the receiving State should do is thus to take preventive measures. Foreign officials should be notified of any information concerning warnings or threats that have been put forward against him by the receiving State. Przetacznik mentions some examples of preventive measures, depending of course on the situation as well as the local conditions. Suitable measures could be inspections by the police of the surroundings of the offices and houses, protection while travelling in the receiving State or control of mail deliveries. Sometimes it could even be reasonable to permit the officials to carry weapons for the personal defence or letting armed guards protect them on their premises.¹²⁹

If a diplomatic representative would be assaulted the receiving State is bound to take every reasonable measure to make sure that the perpetrator is brought to justice.¹³⁰ The receiving State must have in its internal law provisions providing appropriate punishment for violation of the personal inviolability of the foreign officials.¹³¹ If the receiving State would fail to take all reasonable steps to capture and punish the offender, it could also be internationally responsible for its neglect.¹³²

During the last three decades international law has developed towards greater protection of internationally protected persons. Conventions directed against terrorist attacks on diplomatic personnel and other internationally protected persons are nowadays more common.¹³³ The States are also obliged under the principles of contemporary international law to cooperate in order to prevent the commission of acts violating the personal inviolability of foreign officials as well as punish the persons guilty of such crimes.¹³⁴

¹²⁸ Przetacznik, p. 50.

¹²⁹ Ibid., p. 52.

¹³⁰ Nascimento e Silva, p. 91; Przetacznik, p. 73.

¹³¹ Przetacznik, pp. 65-69.

¹³² Nascimento e Silva, p. 91.

¹³³ Barker, p. 237. See for example the 1973 Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons, the 1979 Organisation of American States' Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, the 1976 European Convention on the Suppression of Terrorism and, the 1975 United Nations Vienna Convention on the Representation of States in Their Relations with International Organisations.

¹³⁴ Przetacznik, pp. 87-98.

5.3 Inviolability of the diplomatic mission

ILC utters in its commentary to Article 20 VCDR¹³⁵ that “the inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending State by reason of the fact that the premises are used as the headquarters of the mission”.¹³⁶ Thus, the mission premises enjoys inviolability in order for the premises to be used for the aims of the mission’s functions (*franchise de l’hôtel*). The receiving State is thus obliged to guarantee that the premises of the mission are not under any restrictions and is well protected. In carrying out these tasks the receiving State shall start from its own accessible means. It is up to the sending State to decide how the premises shall be used.¹³⁷ But there are limits in Article 41 § 3 saying that the premises should not be used “in any manner incompatible with the functions of the mission” as prescribed in Article 3 of the Convention, or “by other rules of general international law or by any special agreement in force between the sending and receiving State”. However, no exceptions may be made to the inviolability of the premises of the mission.¹³⁸

One large controversy during the negotiating history of Article 22 was the situation where an emergency threatening human life or public safety arose on mission premises. Did such an exception exist? During the Conference, one concluded that the inviolability of mission premises should be absolute.¹³⁹ Co-operation between the mission and the local authorities is though supported whenever suitable, although it is not considered a legal obligation.¹⁴⁰ Barker therefore concludes, “there can be no derogation from the principle of inviolability of the diplomatic mission even in cases of extreme emergency”.¹⁴¹ Hardy writes that “even if a mission fails to use its premises in accordance with legitimate purposes, its inviolability must still be respected by the receiving State”.¹⁴² Nascimento e Silva on the other hand thinks that “in certain cases the prior consent for entry is implied, as when the premises are on fire, in the case of earthquakes or similar cataclysms or where there is imminent danger that a crime of violence is about to be perpetrated upon the premises. In these cases it would be absurd to wait for the consent of the head of mission and the possibility of a refusal would still be more absurd”.¹⁴³

Following practice shows a tendency that in case of fire or riot, instead of calling on local emergency services, missions prefer to either protect or

¹³⁵ Article 20 later became Article 22 in the VCDR.

¹³⁶ Watts, p. 182; Nascimento e Silva, p. 95.

¹³⁷ Hardy, p. 41-2.

¹³⁸ Denza, p. 118.

¹³⁹ Watts, p. 183; Denza, pp. 120-1.

¹⁴⁰ UN Doc A/Conf.20/14, pp. 140-1; Barker, p. 72.

¹⁴¹ Barker, p. 72.

¹⁴² Hardy, p. 44.

¹⁴³ Nascimento e Silva, p. 96.

destroy their archives.¹⁴⁴ It was also considered unsuitable if expropriation in the public interest of the mission premises would be allowed.¹⁴⁵ Furthermore, the subsequent practice has confirmed abstention from enforcement on mission premises. As Denza writes, “In case of enforcement actions on mission premises, these have often been brief and unintentional activities and in the face of protest of breach on international law, it has not been justified by the receiving State”.¹⁴⁶ However, there have been some exceptions. Where the national security of a State has been threatened or the diplomatic immunities have been blatantly misused, the mission premises have a few times been entered with the authorization of the receiving State.¹⁴⁷ These exceptions, however, do not change the rule of strict inviolability of mission premises. If a situation would occur where the functions of the mission were being abused and interference by the receiving State would be validated, the VCDR offers remedies through declaration of *persona non grata* and breach of diplomatic relations.¹⁴⁸ Denza concludes that self-defence would be the only legal justification for forcible entry. Although States would be reluctant to prohibit this possibility, in case of emergency they must take every measure to receive the head of the mission’s consent on beforehand. The reason for this is of course to prevent any danger happening to its own embassy and diplomats as well as the sending State from breaking diplomatic relations.¹⁴⁹

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.¹⁵⁰ This duty is not an absolute one, and what is appropriate depends on the degree of threat to a particular mission and on whether the receiving State has been made aware of any unusual threat.¹⁵¹ The duty of taking all appropriate steps means that authorities of the receiving State are obligated to prevent unauthorised intrusion on mission premises and on the request of the head of the mission to expel intruders. Since expulsion often involves the police entering the mission premises and functioning enforcement, it is repeatedly entailed with trouble because without the consent from the mission such expulsion would be unlawful.¹⁵²

On several occasions, the receiving State has accepted that it is under an obligation to prevent intrusion into mission premises.¹⁵³ For example, following the siege in 1980 of the Embassy of the Dominican Republic in Bogotá 12 ambassadors were held hostages for two months while the guerrillas demanding ransom and the release of political prisoners. When

¹⁴⁴ Denza, p. 121.

¹⁴⁵ Ibid., p. 122.

¹⁴⁶ Ibid, p. 123-4; (Vol.) 71 IRL 552, p. 560.

¹⁴⁷ Denza, p. 125. Denza mentions 1974 RGDIP 511, 1979 RGDIP 756, 1981 ICLQ 42 (at p. 51) and 1990 RGDIP 495 as examples.

¹⁴⁸ Denza, p. 126; VCDR, Articles 9 and 2; ICJ Reports 1980, para. 85.

¹⁴⁹ Denza, p. 126.

¹⁵⁰ VCDR, Article 22 (2).

¹⁵¹ Denza, p. 139.

¹⁵² Ibid., p. 135; (Vol.) 34 IRL 148.

¹⁵³ Denza, p. 138.

the guerrilla did not get through their demands they took five ambassadors with them to Cuba where the ambassadors were later released unharmed.¹⁵⁴ The chargé d'affaires and other members of the diplomatic staff were in 1980 held hostage at the Iran Embassy in London. The intruders, who did not approve the Islamic regime in Tehran, threatened to kill the hostages during five days until the Special Air Service succeeded with a rescue operation. All but one terrorist were killed during the liberation.¹⁵⁵ Another occasion in 1980 where protesters seized control of a diplomatic mission happened in Guatemala to the Spanish Embassy. The Guatemalan Government commanded a liberation action despite that the Ambassador did not approve of this. The operation ended with a fire and the death of 39 persons. Spain of course broke diplomatic relations with Guatemala. There were also massive protests and requirements that such a manoeuvre would never take place without the consent of the head of mission.¹⁵⁶ However, there is one incident where the receiving State did not acknowledge its responsibilities under Article 22 § 2 VCDR; that is the seizure of the United States Embassy in Tehran in 1979. The ICJ stated in the *Tehran Hostages Case* that: “the Iranian Government failed altogether to take any “appropriate steps” to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion”.¹⁵⁷ As to the second phase, during which the occupation of the mission premises by militants continued, this “clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff”.¹⁵⁸ The court deplored the frequency if disregard by individuals of the principles of international law governing diplomatic relations, but the seizure of the Embassy in Tehran was “[u]nique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself”.¹⁵⁹

The receiving State is also according to Article 22 § 2 VCDR under a special duty to take all appropriate steps to prevent any disturbance of the peace of the mission or impairment of its dignity. French J said on appeal in *Minister for Foreign Affairs and Trade and Others v. Magno and Another* that disturbance of the peace of a mission and impairment of its dignity overlap, but that impairment of dignity included activity not amounting to disturbance of peace: “Offensive or insulting behaviour in the vicinity of and directed to the mission may fall into this category. The burning of the flag of the sending State or the mock execution of its leader in effigy if committed in the immediate vicinity of the mission could well be construed

¹⁵⁴ Ibid., p. 136, who is referring to 1980 RGDIP 856.

¹⁵⁵ Denza, p. 136, who is referring to 1980 RGDIP 1134.

¹⁵⁶ Denza, p. 187, who is referring to 1980 RGDIP 866.

¹⁵⁷ ICJ Reports 1980, paragraph 63.

¹⁵⁸ Ibid., paragraph 76.

¹⁵⁹ Ibid., paragraph 92. See also Denza, p. 138.

as attacks on its dignity. So too might the depositing of some offensive substances and perhaps also the dumping of farm commodities outside mission premises”.¹⁶⁰ Further, the sending State has to revere the receiving State along with its traditions of free expression and international human rights commitments.¹⁶¹

In connection with the shooting from the Libyan People’s Bureau in 1984 which killed a policewoman, The House of Commons Foreign Affairs Committee noted in their Report on the Abuse of Diplomatic Immunities and Privileges that the duty to protect the peace of the mission “[c]annot be given so wide an interpretation as to require the mission to be insulated from expressions of public opinion within the receiving State. Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or the staff injured, the requirements of Article 22 are met”.¹⁶² Worth remembering is that freedom of expression and freedom of peaceful assembly are guaranteed in several international conventions.¹⁶³

¹⁶⁰ (Vol.) 101 IRL 202, pp. 231-2; Denza, p. 143.

¹⁶¹ Denza, p. 143.

¹⁶² House of Commons First Report from the Foreign Affairs Committee, paragraph 48; Denza, p. 144.

¹⁶³ Denza, p. 144. See also the European Convention on Human Rights, Articles 10 and 11 and the United Nations International Covenant on Civil and Political Rights, Articles 19 and 21.

6 The treatment of aliens

6.1 Diplomatic protection of natural persons

During the last decades, the movement of people, goods, capital, and services over State boundaries has escalated and the contacts between individuals and foreign States have thus increased. Besides this expanding freedom, the movement also creates more friction between States and foreigners. This is when diplomatic protection is brought to the fore. Diplomatic protection is the protection given by a State to private individuals (or companies) against a violation of international law by another State. The usual aim of diplomatic protection is reparation for damage.¹⁶⁴

Customary international law is the main basis for diplomatic protection. It is also referred to diplomatic protection in Article 3 § 1b of the VCDR and Article 5a and e of the Vienna Convention on Consular Relations.¹⁶⁵ Although treaty law has expanded as well as the reference of diplomatic protection, most treaties are limited to the nationals of the State parties. However, human rights covenants and conventions grant treaty rights to all individuals regardless of nationality.¹⁶⁶

Diplomatic protection has evolved from the contradictory principles of the personal sovereignty and the territorial sovereignty of States. The latter principle means that the State has jurisdiction over its full territory and everything or everyone within it. Personal sovereignty implies that the State also has jurisdiction over all its nationals, wherever they may be. Diplomatic protection comes into question when one State's territorial jurisdiction is being confronted with another State's jurisdiction over its nationals.¹⁶⁷ However, a State is under no duty to admit entrance to its territory to foreign nationals. But when a foreign national is legally admitted into the territory of a State, that State must treat the foreigner according to an international minimum standard of protection for his person and property.¹⁶⁸

¹⁶⁴ Geck, pp. 1046-8.

¹⁶⁵ *Ibid.*, p. 1047.

¹⁶⁶ *Ibid.*, p. 1059.

¹⁶⁷ Joseph, p. 3.

¹⁶⁸ *Ibid.*, p. 3; *Nottebohm Case (second phase)*, ICJ Reports, 1955-6, pp. 46-7.

6.2 Diplomatic protection on private business companies

There are two often debated issues when it comes to diplomatic protection of companies. The first issue is what requisites should be fulfilled for a State to protect a given company.¹⁶⁹ In order for diplomatic protection to be considered regarding corporations, there must be some meaningful link binding the State to the company. In the *Barcelona Traction Case*, the ICJ emphasised that a company has to be incorporated under some system of municipal law in order to acquire rights in municipal law. Another essential link was in whose territory the company has its registered office.¹⁷⁰

The second issue is whether diplomatic protection only covers the legal person of the company itself or if a State can protect its nationals in their capacity as shareholders in a company regarding injury caused to the company where that State is not entitled to protect the company itself.¹⁷¹ The *Barcelona Traction Case* deals also with this question. The case concerned a company incorporated in Canada and whose shareholders were Belgian nationals. The company was producing electricity in Spain and was declared bankrupt after certain financial measures taken by Spain. Because of the injuries suffered by Belgian nationals, Belgium invoked a claim against Spain on behalf of the Belgian shareholders. Spain argued that Belgium was not entitled to claim on behalf of the shareholders since the injury was inflicted on the company and not the shareholders.¹⁷² ICJ followed this argumentation and said “where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim”.¹⁷³

Customary international law is still unclear on the issue. The prevailing view is that the shareholders’ only alternative is diplomatic protection in favour of the corporation.¹⁷⁴ However, nationals in their capacity as shareholders may receive diplomatic protection from their home State in cases where their rights have been directly damaged by violation of international law. Example of situations may be expropriation of shares without adequate compensation or the prevention of a corporation’s payment of dividends. In certain situations where damage has been inflicted on the shareholders due to damage caused to the company, for example expropriation or dissolution of a company, it might be approved to lift the veil of corporate personality. In such situations, the giving of diplomatic

¹⁶⁹ Staker, p. 156.

¹⁷⁰ ICJ Reports 1970, pp. 3, 42; (Vol.) 46 ILR, pp. 178, 216; Staker, p. 171; Shaw, p. 566.

¹⁷¹ Staker, p. 156.

¹⁷² ICJ Reports 1970, pp. 45-6.

¹⁷³ Ibid., p. 46; Shaw, p. 566.

¹⁷⁴ Brownlie, p. 477.

protection by the shareholder's home State is supported by reasons of justice and equity.¹⁷⁵

6.3 International minimal standard

In the past the western States contended that foreign nationals should be treated accordingly an "international minimum standard" irrespective of how the State treats its own nationals. Other States instead argued that they merely had to treat the foreign nationals as it treats its own nationals, which is called the "national treatment standard". These latter States disliked the economic domination of the developed countries in the West and were afraid of intervention in their internal affairs.¹⁷⁶

The idea of an international standard developed during the nineteenth century and has been supported by the practice. In the *Neer Case* it was said "that the propriety of governmental acts should be put to the test of international standards".¹⁷⁷ The existence of a common or generally accepted international law respecting the treatment of aliens, which is applicable to them despite municipal legislation, was acknowledged in the *Certain German Interests in Polish Upper Silesia Case*.¹⁷⁸ That there was an international standard regarding the taking of human life was held in the *Garcia Case*.¹⁷⁹ In the *Roberts Claim*, it was considered whether foreigners were treated accordingly ordinary standards of civilisation.¹⁸⁰

However, there is no exact definition of the principle. In the *Neer Claim* the Commission asserted that in order for the treatment of an alien to be a crime it "should amount to an outrage, to a bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would really recognise its insufficiency".¹⁸¹ As Shaw concludes, "a fairly high threshold is specified before the minimum standard applies".¹⁸² Others have instead maintained that the issue is a "process of decision" entailing in each case an examination of the whole situation, regarding the responsibility of the State for the damage suffered by the foreigner. It has also been explained as denial of justice, which is the inadequate administration of civil and criminal justice regarding to a foreigner.¹⁸³

In ILC's report on international responsibility from 1956, Garcia-Amador introduced two principles that he believed were integrated in the concept of

¹⁷⁵ Geck, p. 1054; *Barcelona Traction Case*.

¹⁷⁶ Shaw, p. 569-70.

¹⁷⁷ (Vol.) 3 IRL 213, p. 214; Shaw, p. 570.

¹⁷⁸ (Vol.) 3 IRL 429; Shaw, p. 570.

¹⁷⁹ IV UNRIAA, p. 119; Shaw, p. 570.

¹⁸⁰ (Vol.) 3 ILR 227, p. 228; Shaw, p. 570.

¹⁸¹ (Vol.) 3 ILR 213; Shaw, p. 570.

¹⁸² Shaw, p. 570.

¹⁸³ *Ibid.*, pp. 570-1.

the international recognition of the essential rights of man. The first approach is that foreigners and nationals should be granted equal rights, which should never be less than the fundamental rights recognised and defined in international instruments. The second principle is that solely in case of an infringement of such internationally recognised fundamental human rights would international responsibility come into question.¹⁸⁴ Although these principles were not appealing to the ILC at the time, certain minimum standards of State conduct concerning civil and political rights can today be found in human rights law.¹⁸⁵

6.4 Different actors, different consequences?

Practice shows that due diligence plays no role regarding State responsibility for actions of competent State organs that involves a breach of the duty to safeguard the security of aliens. Even in case of *ultra vires* acts of a State's organs, which are attributed to the State, due diligence is of no concern regarding the responsibility of the State. There are also situations where private persons commit wrongful acts against aliens. Such acts are not attributable to the individuals' State of origin according to Pisillo-Mazzeschi, since it is only when the State's own organs have breached the State's obligation of protection that the State can be responsible.¹⁸⁶

Pisillo-Mazzeschi writes further that due diligence is only used regarding a State's duty to protect aliens from harmful activities carried out by third persons on its territory.¹⁸⁷ The first substance of the duty to protect is the obligation to prevent, meaning that the State must apply due diligence to prevent individuals from performing acts that are harmful to the security of aliens. The State is also obliged to punish the persons responsible for the wrong suffered by the alien. Following this, the State needs to possess a minimum legal, administrative and judicial apparatus suitable for punishing wrongs committed against aliens and use it with the diligence that the circumstances require. However, this obligation of possession is not stipulated by due diligence. It is the use of the law enforcement organization that put focus on due diligence. But it is not in every circumstance that due diligence comes into play. When the usage of the apparatus concerns activities prior to the trial, in particular the investigation of events and the hunting and arrest of the offenders, due diligence conditions the obligation. The activities related to the trial or the execution of the sentence are not

¹⁸⁴ Shaw, p. 571. Shaw is referring to YILC 1956, vol. II, pp. 173, 199-203 and YILC, 1957, vol II, pp. 104, 112-3.

¹⁸⁵ Shaw, p. 571.

¹⁸⁶ Pissillo-Mazzeschi, 1992, pp. 25-7.

¹⁸⁷ Ibid., p. 23.

limited by due diligence since these obligations are not provisioned by any external uncertain factors.¹⁸⁸

¹⁸⁸ Pissillo-Mazzeschi, 1992, pp. 28-30.

7 Security of foreign States – terrorism

A good way to start any report about terrorism is to figure out the meaning of the concept. That is not easy since there is no universal definition of terrorism among States.¹⁸⁹ One reason is that States have different opinions about what is criminal behaviour. Some States might characterize a person as a terrorist while other States think of that person as a freedom fighter. It comes down to fundamental differences between States, for example their political systems and governments that occasionally have very different goals and methods to achieve these goals.¹⁹⁰ However, in order to complete this study there is no need of an exact definition. It is enough to know the common meaning. Cameron defines terrorism as “a method by which an organisation seeks to achieve a goal, usually political, by means of violence and the creation of fear”.¹⁹¹ Primoratz says “terrorism is the deliberate use of violence, or threat of its use, against innocent people, with the aim of intimidating some other people into a course of action they otherwise would not take”.¹⁹²

7.1 Different kinds of participation by States

Private individuals sometimes carry out hostile acts of force against a foreign State. Although the private individuals can be part of, for example, armed bands, groups of irregulars, volunteers or even a private army, the home State of the private individuals may be considered to indirectly have harmed the other State if it has participated in the acts of force in some way. Principally, there are three kinds of participation: direct organization and sending of individuals who commit the hostile acts against foreign States, State support of such acts and State tolerance of them.¹⁹³

7.2.1 Direct organization and sending

It is of course wrong of a State to directly organize and send individuals to perform hostile acts against another State. Where a military and strategic operation is taken place by a group of individuals, their home State is often in full control of the operation. These individuals should be considered as de facto organs of the sending State, meaning that the acts are attributable to

¹⁸⁹ Cameron, p. 196.

¹⁹⁰ Ibid., p. 200; Primoratz, pp. 116-9.

¹⁹¹ Cameron, p. 194.

¹⁹² Primoratz, p. 24.

¹⁹³ Pisillo-Mazzeschi, 1992, p. 31.

the sending State which is then responsible for direct aggression. In the rare situation where the State is not in control of the individuals, the State will only be responsible for breach of its duty to abstain from organizing hostile acts of individuals. However, practice verifies that due diligence has no influence on the responsibility arisen in cases of a breach of the obligation to abstain.¹⁹⁴

7.2.2 State support of hostile acts against foreign States

It is also wrong of a State to provide military, financial or organizational support to individuals who perform acts of force against a foreign State, without there being evidence of direct organization and of the sending of such individuals by the State. In these situations, it is mostly common that the acts of individuals are not attributable to the State since it often lacks control of the private individuals. Hence, the State is, by supporting the individuals, committing a wrongful act which is linked de facto to the acts of the individuals. These acts, however, remain the acts of the individuals. The aggression is indirect and due diligence does not come into question here. There is support of this in the practice, and it is especially clear in the *Nicaragua Case*.¹⁹⁵ ICJ declared in the case that even though the United States had for example organised, armed, trained, equipped, financed and supplied the contra forces, it still lacked such effective control of the operations to be responsible.¹⁹⁶ However, by its active support the United States was responsible for breach of its duty to abstain.¹⁹⁷

7.2.3 State tolerance of hostile acts against foreign States

When a State tolerates that individuals within its own territory are organizing hostile acts against foreign States, the State is considered responsible for the wrongful omission of its State organs for breach of the obligation to prevent and punish the acts of the individuals. Only in case of breach of the due diligence rule can the State's conduct be wrongful. However, the due diligence rule is solely of reference regarding the duty of the State to use its own legal and administrative apparatus in activities of prevention and in some punishment activities.¹⁹⁸

Practice confirms these conclusions and it is especially evident in the *Alabama Arbitration*. The conclusions from this case are that a State has the duty not to tolerate the use of its territory by private individuals as a base of

¹⁹⁴ Ibid., pp. 31-2.

¹⁹⁵ ICJ Reports 1986.

¹⁹⁶ Ibid., Part VII, paragraphs 4-5.

¹⁹⁷ Pisillo-Mazzeschi, 1992, pp. 32-34.

¹⁹⁸ Ibid., p. 34.

hostile military operations against a belligerent State. This duty of protection is provisioned by due diligence. According to the duty of protection, a State is obliged to both prevent and punish, as well as to possess and use a legal and administrative apparatus.¹⁹⁹ In the *Nicaragua Case*, the court said that even if the evidence was weak, it could be concluded that arms traffic had taken part from Nicaraguan territory to the armed opposition in El Salvador. Nicaragua's tolerance was part of the positive duty to protect conditioned by the due diligence rule.²⁰⁰

7.2 An important case – the Corfu Channel Case

The principle of due diligence has been mentioned in the important and famous *Corfu Channel Case*.²⁰¹ What happened was that in October 1946 British warships passing through the North Corfu Strait struck mines and were badly damaged. Britain alleged Albania to have placed a minefield in the channel.²⁰²

One issue concerned whether Britain had performed a permissible innocent passage. After having decided that the strait was used for navigation, the court went on examining, among other facts, how the warships had been proceeding and whether they had been manoeuvring. The intention of the United Kingdom with the passage was not only to test Albania's attitude but also to demonstrate its force. However, the court found these measures of precaution reasonable considering the previous incidents of Albania firing at British ships passing through the strait. The court arrived at the conclusion that the passage was innocent and that the United Kingdom had not violated Albanian sovereignty.²⁰³

The main question asked was, however, whether Albania was responsible under international law for the explosions that occurred and for the damage and loss of human life that resulted from them. The court stated that only because of the minefield, which caused the explosions, was discovered in Albanian territorial waters could knowledge of the minelaying not be imputed to Albania. Since the victim State often has problems with furnishing direct proof of facts giving rise to responsibility from circumstances within the exclusive territorial control of another State, a more liberal recourse to interference of fact and circumstantial evidence should be allowed. The court then considered facts concerning Albania's

¹⁹⁹ *Ibid.*, pp. 34-5.

²⁰⁰ ICJ Reports 1986, Part VIII, para. 1; Pisillo-Mazzeschi, 1992, pp. 32-4.

²⁰¹ ICJ Reports 1949.

²⁰² *Ibid.*, pp. 12-5.

²⁰³ *Ibid.*, pp. 28-32.

attitude before and after the explosions and the possibility of observing minelaying from the Albanian coast.²⁰⁴

The court concluded that Albania had been obliged to notify shipping of the existence of the minefield and should therefore have warned the British warships of the imminent danger. This conclusion was founded on elementary considerations of humanity, 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.²⁰⁵

However, the obligation to notify depended on when Albania knew about the minefield and the obligation to warn depended on the time that went by between the warships being reported and the first explosion. Although it would have been difficult to notify all States before the moment of the explosion, Albania should have taken all necessary steps immediately to warn ships near the danger zone. From the moment the warships were reported, Albania had two hours to warn of the danger before the first explosion occurred. Since Albania did not do anything to prevent the disaster, the court found Albania responsible under international law.²⁰⁶

The court made two important statements in this case. Firstly, that it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. Secondly, that States should take all necessary steps to prevent any harm from happening to another State. Already in the *Alabama Arbitration* in 1872 was this idea mentioned, namely that States must make sure that their territory is not used for the purpose of activities involving the violation of the territory of another State.²⁰⁷

²⁰⁴ Ibid., p. 18.

²⁰⁵ Ibid., p. 22.

²⁰⁶ Ibid., pp. 22-3.

²⁰⁷ Blomeyer-Bartenstein, pp. 1110-1; Dupuy, paragraphs 8-9.

8 ANALYSIS

Today, an increasing number of aspects of law have an international character, meaning that many problems in human society have to be dealt with global action. In some areas, there has also been a complete ideological change, for example in environmental matters one should nowadays bear in mind that future generations shall also benefit from the environment. Global pollution, economic instability and terrorism are a few other examples of areas that need to be solved on the global level. It is therefore more common to discuss a holistic international agenda.

Worth to remember is that not all States have the same opportunities to deal with a problem and some States may not even be or feel that they have any responsibility in the matter. Historically, industrialised States are to blame for much, and it is often the developing States that suffer the consequences. However, blame cannot only be laid on the industrialised States. All States should by taking joint efforts try to solve the problems. Provisions containing due diligence are often formulated like “best practical means”, “at their disposal” or “resources available”, which indicates that each State shall take such actions as their resources provide. Formulations as these are especially evident in the areas of international environmental law, including the marine environment, and diplomatic law.

One may wonder whether a State may use the degree of diligence it usually applies within its internal affairs concerning its own people, or if there is an international standard that has to be followed. The practice has measured due diligence by evaluating international standards in generally accepted international rules and principles. The factors that have been considered are the breach of an international rule and the behaviour of the State. When all circumstances have been taken into account, it is like an objective standard of behaviour have appeared.

Due diligence is a well-known and accepted concept in international environmental law. In this field of law, due diligence has the meaning that legal subjects of international law must behave in such a way as to ensure that no damage will occur to the environment of other States or other areas, as a result of the activities under their jurisdiction and control. The principle of due diligence is present in a number of elements of international environmental law, for example notification, consultation and environmental impact assessment.

Preserving the interests of the world community demands joint efforts on the global level. Not only must the environment be restored but also new threats be fought. A difficulty is that it often takes a long time before the effects on the environment appear and that one can never be certain about the possible effects. It is anyway important to try to identify possible future

environmental problems and not merely be concerned about solving the already existing problems. As one of the many measures applied in order to protect the environment due diligence can be of great value and should preferably be expressed more precisely in international instruments.

The protection of the marine environment is a well-regulated area of the environment. It is a known fact that there are also a wide variety of actions involving ocean resources and the marine environment. The global awareness of the need to protect the marine environment has however increased. Within this area, it is as well difficult for States to address the problems on the national level, and the problems may even be more complicated at the international level.

The concept of precaution can with advantage be used in matters of either environmental or marine character. Where the consequences of an action are not clear, greater weight should be given precaution. Due diligence connects well with the concept of precaution, since according to it the States shall behave in such a way as not to cause damage to the marine environment. Thus, in cases of uncertain consequences and in order not to cause any harm States should take the necessary measures to make sure damage is avoided. In the field of marine protection due diligence is expressed in formulations like "States shall take all appropriate measures". In this area, as in the area of international environment, it seems as the function of due diligence is to effectively prevent damage affecting other States or global interests. Flexibility is important as well as remembering that even if States behave in a desirable way they cannot guarantee complete prevention of damage.

Another area where due diligence is a rather familiar concept is diplomatic law. In the VCDR, it is asserted that appropriate measures should be taken to maintain the inviolability of the diplomatic person and the diplomatic mission. The receiving State is thus obligated to identify, understand, and manage possible hazards and to carry out the appropriate corrective action to prevent injuries or damage arising from these hazards. By taking preventive action the receiving State might avoid attacks on the diplomatic agent or the diplomatic mission. What the receiving State needs to do depends much on the circumstances in a specific situation. However, this is of great importance since diplomatic relations is such an essential part within international law. If diplomacy is working well in this sometimes rather unstable world, the better possibility of managing critical situations and perhaps even preventing them from arising.

Nowadays terrorism is a common threat to the security of many States. It is a phenomenon of constant change, which cannot always be dealt with effectively at the national level. Acts of terrorism are today often of large scale over borders resulting in many innocent peoples' death, massive destruction and major economic loss. The terrorists are often supported financially by and provided with weapons from people and groups from other countries. Some States commit terrorist acts as a mean to achieve a specific political goal. Other States who have suffered terrorist attacks do

not care if they breach international law in their 'war' against terrorism. As we have seen, it is a difficult 'war' to fight and the violence of terrorism may generate even more violence in the world, and in turn threaten the peaceful coexistence between States. As noted above, due diligence does not have much influence when it comes to terrorism. It is solely in case of State tolerance of hostile acts that due diligence comes into play. Then it only concerns the obligation of the State to use its legal apparatus in order to bring the perpetrators to justice. However, it is likely that some States can be reluctant to prosecute those who have carried out acts that have served the State's own purpose. Perhaps these States will not even extradite the suspect accordingly the principle of *aut judicare aut dedere*. This could be explained by the State considering terrorism as being a political crime.

Regarding the treatment of aliens, due diligence seems only to be part of some of the aspects of a State's duty to protect. The State has to apply due diligence when preventing private persons from carrying out activities that might harm aliens as well as punishing the persons responsible. Further, the State needs thus to possess an apparatus suitable for law enforcement, but it is only the use of this apparatus that is stipulated by due diligence. With regard to diplomatic protection it is more uncertain whether due diligence exist. I have not found anything that indicates this. The issue of an international minimum standard is also rather uncertain. It is affirmed that there exist such standards, but their exact content have not been clarified. Overall, such standard seems to mean that States should treat the aliens not only as they treat their nationals but with such respect and care as is recognised in the world community. These standards most probably include the acknowledgment of human rights and freedoms.

This shows that the concept of due diligence does not have a uniform content in international law. Moreover, due diligence has a flexible nature. By this I mean for example that due diligence includes different factors depending on field of law. Co-operation is for example a common measure in both diplomatic law and environmental law. One great similarity between all the various fields of international law is that due diligence is merely at issue when it comes to the duty of protection. Another similarity between diplomatic law and State tolerance of hostile acts is the obligation to punish the offender. Moreover, the importance of due diligence concerning the possession of minimum legal and administrative infrastructure as well as the usage of such infrastructure has been pointed out regarding State tolerance of hostile acts, the treatment of aliens and environmental law.

The degree of diligence that a State must observe depends naturally on the circumstances in each case. State practice has, however, shown a few indications on what the State should consider. The degree of effectiveness of the State's control over its territory, the significance of the interests to be protected and the predictability of harm are examples of such factors. There are also differences in the diligence of the standards of behaviour in the various areas described above. In many cases, it is enough if the State behaves in a civilized way, but in some areas, a good or outstanding effort is

needed. Due diligence is sometimes also measured in more technical and scientific standards of behaviour, for example regarding polluting industrial activities. Noteworthy is that States should exercise due diligence in every situation and can therefore not make excuses for not fulfilling its obligation, unless harm could not have been avoided in any way.

It seems like the content and function of due diligence is quite similar when it comes to the environment and the protection of the marine environment. However, these are broad fields of law since numerous activities can be performed herein. Many activities require the same considerations of facts and the consequences are also much the same as well as the damage may often extend to areas beyond national jurisdiction and thus become global in nature. A major problem is of course that the environmental impacts may become irreversible. It is rather easy to imagine a feasible course of events because these two fields are relatively concrete and straightforward. However, it is possible that the acting State must follow different levels of strictness depending on the activity at issue. In case of risky activities, for example activities that might lead to nuclear accidents, there is a stricter standard whereas in other situations, as when it comes to pollution, the standard of due diligence might be sufficient. In some situations, even an absolute standard may be required. Perhaps it is more common with the lower degree of strictness, like the obligation of co-operation or taking appropriate measures to prevent certain consequences. But it seems as this might be changing. One indication is how the formulation in the 1974 Baltic Convention changed from taking all appropriate measures to control and minimise pollution to preventing and eliminate such pollution.

The protection of the representatives of foreign States requires also a higher degree of due diligence than the protection of ordinary aliens, if there exist such concerning the treatment of aliens. In any case, this is understandable since the diplomatic representatives benefit from the principle of functional necessity whereas ordinary aliens are people like you and me.

In conclusion, the more precise content of the obligations of diligent conduct, the more precise is the concept of due diligence and what is expected by the acting State. Predictability then increases whereas characteristics as generality and flexibility reduce. In my opinion, due diligence could easily function as the one and only fundamental principle within most areas of international law. It has an uncomplicated content - a minimum level of efforts, which a State must undertake to fulfil its responsibilities. By respecting other people, States and common interests as well as taking into account possible effects of an activity one can get far and harm can hopefully be avoided.

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UN Doc A/Conf.20/14

House of Commons First Report from the Foreign Affairs Committee *The Abuse of Diplomatic Immunities and Privileges*, session 1984-85
Available at <http://www.bopcris.ac.uk/bopall/ref20238.html>, last visited 17/12/04 21:30.

Report of the International Law Commission on the work of its forty-eight session, 6 May – 26 July 1996
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International Instruments

Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929, supplemented by the Hague Protocol of 1955

Universal Declaration of Human Rights, adopted on 10 December 1948

European Convention for Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4 November 1950

Convention on the High Seas, signed at Geneva, on 29 April 1958

Convention on Third Party Liability in the Field of Nuclear Energy, of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982, done in Paris, on 29 July 1960

Convention of 31 January 1963 Supplementary to the Paris Convention of 29 July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982, done in Brussels, 31 January 1963

Convention on Diplomatic Relations, adopted at Vienna, on 14 April 1961

Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a

Person Other than the Contracting Carrier, adopted at Guadalajara, on 18 September 1961

Convention on Consular Relations, adopted at Vienna, 1963

Vienna Convention on Civil Liability for Nuclear Damage, adopted at Vienna, on 21 May 1963

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, concluded at London, Moscow and Washington D.C, on 27 January 1967

Convention on Special Missions, opened for signature at New York, on 16 December 1969

Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969

Convention on International Liability for Damage Caused by Space Objects, concluded at London, Moscow and Washington D.C., on 29 March 1972

Declaration of the UN Conference on the Human Environment, adopted at Stockholm, on 16 June 1972

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, opened for signature at London, 9 December 1972

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York, on 14 December 1973

Convention for the Prevention of Marine Pollution from Land-based Sources, Paris, 1974

Convention on the Protection of the Marine Environment of the Baltic Sea Area, adopted on 19 March 1974, replaced by the *Convention on the Protection of the Marine Environment of the Baltic Sea Area*, done at Helsinki, on 9 April 1992

United Nations Convention on the Representation of States in their Relations with International Organisations, adopted at Vienna, 1975

European Convention on the Suppression of Terrorism, 1976

The Convention for the Protection of the Mediterranean Sea Against Pollution, adopted at Barcelona, on 16 February 1976

The 1973 International Convention for the Prevention of Marine Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL), adopted at London, 1978

Convention on Long-Range Transboundary Air Pollution, concluded at Geneva, on 13 November 1979

Organisation of American States' Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 1979

United Nations Convention on the Law of the Sea, concluded at Montego Bay, 10 December 1982

International Covenant on Civil and Political Rights, adopted at New York on 10 December 1984

Convention for the Protection of the Ozone Layer, concluded at Vienna, on 22 May 1985

Convention on the Transboundary Movement of Hazardous Wastes, Basle, 1989

Convention on Environmental Impact Assessment in a Transboundary Context, signed at Espoo, on 25 February 1991

OAU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted at Bamako, on 31 January 1991

Convention on the Protection and Use of Transboundary Watercourses and Lakes, concluded at Helsinki, on 17 March 1992

United Nations Framework Convention on Climate Change, signed at New York, on 9 May 1992

Convention on Biological Diversity, concluded at Rio de Janeiro, on 5 June 1992

Declaration of the UN Conference on Environment and Development, adopted at Rio de Janeiro, on 14 June 1992

Convention for the Protection of the Marine Environment of the North-East Atlantic, signed on 22 September 1992

Agreement between the Republic of Poland and Ukraine on the Legal Relations on the Polish-Ukrainian State Border and the Cooperation and Mutual Assistance in Border-Related Matters, signed at Kiev, on 12 January 1993

Declaration of Environment and Development in the Arctic, adopted at Nuuk, on 16 September 1993

North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, came into force on 1 January 1994

United Nations Convention to Combat Desertification, adopted at Paris, on 17 June 1994

Convention on Nuclear Safety, adopted at Vienna, on 17 June 1994

German-Polish Agreement on Co-operation in Environmental Protection, 1994

Washington Declaration on the Protection of the Marine Environment from Land-based Activities, adopted at Washington, D.C., on 1 November 1995

Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed at Kyoto, on 10 December 1997

Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, published in Official Journal No L 073, on 14 March 1997

Draft articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the International Law Commission at its fifty-third session, 2001

Final Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session, 2001

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Neer Case, 15 October 1926, United States and Mexico, General Claims Commission. (Volume 3 International Law Reports 213)

H. Roberts Case, 2 November 1926, United States and Mexico, General Claims Commission. (Volume 3 International Law Reports 227)

Teodoro Garcia and M. A. Garza (United Mexican States v. United States of America), 3 December 1926, General Claims Commission. (IV United Nations Reports of International Arbitral Awards)

Trail Smelter Arbitration (United States v. Canada), 16 April 1938 and 11 March 1941, Arbitral Tribunal. (AJIL 33 (1939) 182 and 35 (1941) 716, Volume 9 International Law Reports 315)

The Corfu Channel Case, 9 April 1949 (Merits), International Court of Justice. (ICJ Reports 1949)

Nottebohm Case (Second Phase), 6 April 1955 (Judgement), International Court of Justice. (ICJ Reports 1955)

Lac Lanoux Arbitration (France v. Spain), 16 November 1957, Arbitral Tribunal. (Volume 24 International Law Reports 101)

Fatemi et al v. United States, 12 July 1963 (Judgement), Court of Appeals, District of Columbia, United States. (Volume 34 International Law Reports 148)

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969 (Judgement), International Court of Justice. (ICJ Reports 1969)

Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase), 5 February 1970 (Judgement), International Court of Justice. (ICJ Reports 1970)

Dorf Case, 24 August 1973 and 4 October 1973, Magistrate's Court and Supreme Court, Norway. (Volume 71 International Law Reports 552)

Cosmos 954 Incident, 1979. (International Legal Material 1979)

Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), 15 December 1979 (Order made on the application for provisional measures) and 24 May 1980 (Judgement), International Court of Justice. (ICJ Reports 1980)

Almedia de Quinteros and Quinteros Almedia v. Uruguay, 21 July 1983 (Communication No R24/107), United Nations Human Rights Committee. (Volume 79 International Law Reports 168)

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986 (Merits), International Court of Justice. (ICJ Reports 1986)

Minister for Foreign Affairs and Trade and Others v. Magno and Another, 26 November 1992, Federal Court, General Division, Australia. (Volume 101 International Law Reports 202)

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement in the 1974 Nuclear Tests Case (New Zealand v. France), 22 September 1995 (Order) and 9 May 1973 (Application), International Court of Justice. (ICJ Reports 1995)

Case Concerning the Gabčíkovo-Nagymaros Dam (Hungary/Slovakia), 25 September 1997 (Judgement), International Court of Justice. (ICJ Reports 1997)