Due Diligence in International Law

Penelope Ridings

Presentation to CAHDI, 26 September 2025

I am delighted to be invited to speak with the Legal Advisers of the Council of Europe today. I want to thank the Chair of CAHDI for inviting me and for giving me this opportunity to talk to you. I am doing so via zoom as I am currently at a meeting in the Federated States of Micronesia. I appreciate your forbearance for allowing me to come to you virtually.

I will be speaking to you about the new topic – *Due Diligence in International Law* – which has been placed on the programme of work of the International Law Commission. And I have been appointed as the Special Rapporteur for the topic.

It is a great honour to be asked to lead this challenging topic by the Commission. I call it challenging because there has been much written about it in recent years. There is also a growing State practice, as witnessed in particular by the pleadings of States before international courts and tribunals. Yet at the same time there is a certain lack of clarity over the contours of 'due diligence'.

Judicial decisions have helped to rectify this to some extent, most notably the International Court of Justice in its Advisory Opinion on Climate Change, and also the Advisory Opinions on Climate Change from the International Tribunal on the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights.

One might ask - what is the point of undertaking work on due diligence when Courts have so fulsomely addressed it? My response is that there are many facets of due diligence. And there are many different fields of international law in which it is applied. But it is like a spider's web with multiple interconnections. Making sense of it is not always easy.

So, the topic is challenging because of a need for clarity over a concept that is sometimes, but not always, clear. It is often unclear in terms of its content, when and where it applies, and how it is to be applied in practice.

As you know, the International Law Commission has a role in the codification and progressive development of international law. More fundamentally in my view the Commission can provide guidance to States in how to apply international law to contemporary issues.

Because of its cross-cutting nature, due diligence has the potential to assist States in determining how they comply with their international obligations, particularly their international obligations of conduct. But to do so there must be a clear understanding of due diligence. I believe this is where the work of the ILC comes in.

That explains a bit about *why* I am undertaking the topic. But today I wanted to explain *how* I intend to approach the topic, at least initially.

My aim is to first undertake a mapping exercise of relevant materials on due diligence. This will examine State practice, jurisprudence and doctrine on due diligence through an inductive methodological approach. In order to have a more coherent and systematic approach to this mapping exercise, I will be approaching it from both a temporal and a thematic perspective.

I believe that due diligence is better appreciated once its historical background is understood.

In order to better understand the history of due diligence I have used three different time periods: from the nineteenth century period until World War II; the post World War II period until the early 2000s; and the early 2000s until the present.

I want to give your flavour of how I see the development of due diligence.

In the late nineteenth century due diligence was seen as a corollary of the fundamental principle of State sovereignty. States are sovereign within their territory and – as Arbitrator Max Huber said in the *Island of Palmas case* - with the right of territorial sovereignty comes the obligation to protect the rights of other States, particularly their inviolability and the rights they may claim for their nationals in that territory.

Due diligence was specifically referenced in the 1871 Treaty of Washington which provided the procedural rules for the *Alabama Claims Arbitration* in 1872. This arbitration recognised that there was an obligation of due diligence in the performance of the obligations of a neutral State.

Due diligence was then applied in judicial decisions relating not only to the international law of neutrality, but also to the international law on the protection of foreigners, diplomatic protection of nationals and the protection of the diplomatic and consular representatives of a State. In the *Trail Smelter Arbitration* it was applied to environmental harm from transboundary pollution.

The decisions over this period shared a common theme. They applied due diligence in areas of international law that had a transboundary dimension; where the actions of one State or persons subject to its jurisdiction or control adversely impacted on the rights of another State or otherwise harmed another State.

In the *Corfu Channel* case of 1949, the International Court of Justice appears to have considered that 'due diligence' had crystallised into a duty according to which every State has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

This manifestation of due diligence as a specific obligation still resonates within some State practice today. This is illustrated, for example, by the application of the *Corfu Channel* formulation in the articulation by many States of how international law applies in cyberspace.

The second half of the twentieth century can be described as the next phase of the development of due diligence. Over this period there were rapid technological advances

which brought with them the potential for a State's activities within its jurisdiction to lead to harm being suffered by another State.

This led to due diligence gaining greater prominence in the context of transboundary harm. In international environmental law, the principle of prevention, the obligation to prevent significant transboundary environmental harm, is seen as a manifestation of the duty of due diligence.

Due diligence was further developed through judicial decisions not only in the environmental field but also in various other fields of international law. In international human rights law, due diligence has been referenced by international courts in relation to the prevention of human rights violations and the protection of vulnerable groups. In international humanitarian law, it has been applied to the obligation to prevent of genocide and is acknowledged as applying in relation to Common Article 1 of the Geneva Conventions.

Due diligence was also applied by courts and tribunals in the context of the responsibility of the State for the conduct of private persons under the State's jurisdiction or control.

It was also during this period that due diligence began to be seen as a standard of conduct attached to primary obligations and against which primary obligations could be assessed. Due diligence engaged a standard of reasonableness and was articulated as such in judicial decisions such as the *Bosnian Genocide* case, and the ITLOS Advisory Opinions on *Obligations in the Area*.

Over this period, it was accepted that due diligence is an obligation of conduct and not an obligation of result. Indeed, due diligence is closely associated with obligations of conduct. That is something which I will return to.

Acting with due diligence means one has to "deploy adequate means, to exercise best possible efforts, to do the utmost" to obtain the result.

But at the same time, due diligence is seen as a variable concept that depends on the specific circumstances, including the risk of harm and the urgency involved. It entails a standard that takes into account evolving technology and differing means and capabilities.

By the early 2000s, due diligence as a standard of conduct seemed to be the preferred approach taken by scholars. The variability of the standard and the flexible way in which it could be applied by States depending on the particular circumstances, and the means and capabilities of States, meant that it was sometimes perceived as giving States discretion and as "soft law". In other words, it was not perceived as being particularly meaningful.

But now we are in the third temporal phase from the 2000s until the present. This has been characterised by evolving State practice on due diligence, especially in the context of the explanation of State positions on the application of international law in cyberspace.

We also had a wealth of State practice in the pleadings before international courts and the three Advisory Opinions on Climate Change issued by the ICJ, ITLOS and the Inter-American Court of Human Rights.

The Advisory Opinions have all addressed due diligence and have assisted in bringing some clarity to due diligence in the environmental and human rights contexts.

I will just mention the Advisory Opinion of the International Court of Justice as that is the one with which many of you will be most familiar.

As a preliminary point, I note that there was a fairly high degree of alignment between many of the written statements to the Court and the eventual opinion of the Court.

The Court essentially considered the concept of due diligence in discussing the customary international law obligation to prevent significant transboundary harm to the environment. According to the Court, 'due diligence is a standard of conduct whose content in a specific situation derives from various elements, including the circumstances of the State concerned, and which may evolve over time'. Due diligence is thus variable and evolutive.

There are elements that the Court considered should be taken into account in assessing what due diligence requires. These elements include States taking appropriate measures, which take account of scientific and technological information, relevant international rules and standards, and the respective capabilities of States. What is required by due diligence needs an assessment of what is reasonable under the specific circumstances in which a State finds itself.

The application of the different elements of the obligation to exercise due diligence to protect the environment in a particular situation 'should be determined objectively'. Diligence entails not only the adoption of appropriate rules and measures but also a certain vigilance in their enforcement and control.

Although the Court confirmed that the due diligence standard was variable and evolutive, the ICJ and ITLOS were explicit that the due diligence standard was a "stringent" one. The Inter-American Court of Human Rights referred to it as a "heightened" or "enhanced" standard. It can therefore no longer be referred to as "all things to all people".

The ICJ Advisory Opinion has provided considerable assistance in setting out the elements that are to be taken into account in assessing whether the standard of due diligence has been met. It largely approached due diligence from the perspective of the customary international law obligation to prevent transboundary environmental harm.

But the Court also referred to due diligence in its consideration of the setting of nationally determined contributions (NDCs) under Article 4 of the Paris Agreement. It stated that Parties are obliged to exercise due diligence and ensure that their NDCs fulfil their obligations under the Paris Agreement and that they are capable of achieving the 1.5% temperature goal and the overall objective of the Agreement.

The Court also applied the standard of due diligence to primary obligations of conduct. Thus the mitigation and adaptation obligations in the Paris Agreement are to be to be assessed against a standard of due diligence. Following the Advisory Opinion of ITLOS, the Court applied due diligence as a standard by which to assess compliance with obligations to protect and preserve the marine environment under the UN Convention on the Law of the Sea.

In short, a State that does not exercise due diligence in the performance of its primary obligation to prevent significant harm to the environment 'commits an internationally wrongful act entailing its responsibility'. As the Court considered that there was an obligation on States to regulate the activities of private actors as a matter of due diligence, a State may be responsible where 'it has failed to exercise due diligence by not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction'.

The climate change Advisory Opinions have provided clarity to elements of due diligence in international law. But they have not resolved all the challenges posed by due diligence. Some of the challenges are the following.

First, looking across the centuries, the duty of due diligence seems to exist not only as a standard of conduct but also as a standalone source of primary legal obligations which is distinct from the 'prevention principle'. If there is a duty not to harm the *rights* of other States, what are the specific rights under international law which trigger the application of due diligence?

Second, what is the relationship between due diligence obligations and obligations of conduct. Do they overlap in practice on the basis of a one-to-one correlation? What kind of treaty language triggers a due diligence obligation and does this depend on the context in which the particular treaty obligation is found?

Third, there is an issue over how to conceptualise due diligence within the theory of international responsibility. Due diligence was referred to as a standard of conduct which is attached to a primary obligation but also as a duty and can entail international responsibility if it is violated. The concept of fault-based responsibility was discarded by the ILC in the Articles on State Responsibility. Is the obligation of due diligence bringing fault-based responsibility through the back door?

Fourth, the Advisory Opinions, confined as they were to the situation pertaining to climate change, did not address the legal character of due diligence. There are doctrinal differences as to whether due diligence is a general principle of international law, or an obligation under international law.

Fifth, the ICJ and ITLOS Advisory Opinions referred to due diligence as a 'stringent' standard. However, there is no explanation as to what a 'stringent' standard requires over and above a lower standard.

Sixth, in the international environmental field, the submissions made by States to the ICJ have illustrated inconsistent and overlapping usages of terms such as the 'prevention principle', the 'no-harm' principle, and the 'duty of due diligence'. They have not assisted in clarifying this emerging confusion.

Today I have tried to highlight the development of due diligence over the centuries. However, in doing so I have only scratched the surface of due diligence.

To summarise the mapping exercise through which I wish progress the due diligence topic in the ILC:

First, there is State practice that due diligence, along the lines of the *Corfu Channel* formulation, is seen as a primary obligation. This was the original incarnation of due diligence in the 18th century and has been referred to in various areas of international law since then. Due diligence has had a revival in this form as expressed in the positions of States on the application of international law in cyberspace.

Second, due diligence is seen as a standard of conduct which is attached to a primary obligation, whether that is a customary international law obligation, such as the duty to prevent environmental harm, or a treaty obligation. Even though a 'standard of conduct', failure to meet that standard is a violation of international law.

Third, there may also be specific due diligence obligations under treaties which involve obligations of conduct. This aspect is less studied but is worth exploring further.

In this presentation I have only explained my initial mapping exercise, and not how I envisage the entire topic progressing. My views on the general scope of the topic and the proposed final form of the topic are set out in the syllabus attached to the 2024 Annual Report of the ILC.

The final point I would like to make is to emphasise the importance I attach to engaging with States to ascertain their practice and views on due diligence. I consider that such engagement is essential to ensure that an ILC topic meets the needs of States.

I therefore look forward to continuing this dialogue. I am always available should you wish to discuss the topic as it progresses. Hopefully I will be able to attend a CAHDI meeting in person in future.

Thank you once again for inviting me. I would be happy to answer any questions you may have.