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HUMAN RIGHTS DUE DILIGENCE

Joanna Kulesza *

INTRODUCTION

Due diligence is a well-recognized, deliberately flexible standard in international law. It has been introduced to complement the system of state responsibility and the international liability framework of commitments. The latter has provided more detail to the understanding of due diligence. Together, these two systems allow for a comprehensive reading and implementation of due diligence in international law.

Due diligence in international law requires states to act with utmost care in meeting their contractual and customary commitments.¹ These duties may include obligations of conduct, where a state is expected to act in a certain way without any guarantee of achieving a certain outcome,² as well as those of result, where a state must meet a specific goal.³ Due diligence comes into play only with regard to the first factor: the obligation of conduct. According to international law, states are expected to act with due care in certain situations, specified in international treaties or through customary normative frameworks, be they universal, regional, multilateral, or bilateral in their nature.⁴

The legal status of due diligence as a principle, standard, norm, or obligation remains disputed.⁵ The obligation of due care is most developed in international environmental law, but a thorough analysis of the law on treaties, protection of aliens, international river flows, diplomatic relations, and human rights shows a plentitude of examples where a state needs to ensure certain prerequisites are met to mitigate an undesired result.⁶ Should such a state act with due care, it is absolved of any liability or responsibility, even if the undesired effect happens.⁷

Two international legal regimes dictate due diligence requirements: the law on international liability and that of the law of state responsibility.⁸ These two regimes

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¹ JOANNA KULESZA, DUE DILIGENCE IN INTERNATIONAL LAW 1, 2, 18, 29–32 (Brill Nijhoff, 2016).

² *Id.* at 2, 136, 191, 257.

³ *Id.*

⁴ *Id.* at 31–32.

⁵ For a detailed discussion, see, e.g., Robert P. Barnidge Jr., *The Due Diligence Principle Under International Law*, 8 INT'L COMM. L. REV. 81 (2006).

⁶ *Id.* at 91–92; KULESZA, *supra* note 1, at 2.

⁷ KULESZA, *supra* note 1, at 31–32, 47.

⁸ *Id.* at 115–16.

have been the focus of the United Nations' (UN) International Law Commission (ILC) since 1947, resulting in two respective distinct work streams.⁹

The ILC is a group of independent, state appointed experts who provide legal guidance and analysis on international law issues to UN bodies.¹⁰ As per the UN Charter (UNC), the ILC was established in 1947 following a resolution of the UN General Assembly to fulfill its mandate under Article 13(1)(a) of the Charter of the United Nations. This provision authorizes the ILC and outlines its mission, to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”¹¹ The ILC currently consists of thirty-four members from different countries, appointed by the General Assembly for a period of five years with the right of re-election.¹² The appointment follows a designation by one of the UN state parties and must reflect due representation of all the world's regions, cultures, and legal systems.¹³ The members of the Commission may only be nominated from among outstanding experts in international law.¹⁴ They serve on the Commission as individuals, not as representatives of states.¹⁵ The Commission was initially composed of fifteen members (1949). Membership was expanded to include representatives from twenty-one states in 1956, then to twenty-five in 1961, to its current form, consisting of thirty-four members following the 1981 reform.¹⁶

The role of the ILC is to further the understanding and implementation of international law.¹⁷ While any detailed discussion on the nature, scope, and sources of international law goes far beyond the scope of this Paper, it is worth noting that the idea behind the foundation of the ILC was the understanding, shared by all UN member states, that there is indeed a system of internationally shared values, reflected in universally accepted and adopted norms. Such a normative framework has priority over national laws and regulations.¹⁸ Its core principles can be found in the UNC—an international treaty which laid the foundation for the United Nations as an international organization. This founding document is often referred to as the constitution of international law and, indeed, of the international community of states. The basic principles

⁹ *Id.* at 8, 115–16, 124.

¹⁰ See INT'L L. COMM'N, <https://legal.un.org/ilc/> [<https://perma.cc/MHU6-P42T>] (last visited Dec. 13, 2021). For a detailed history of the ILC, see *id.* at 124–36.

¹¹ U.N. Charter art. 13, ¶ 1.

¹² G.A. Res. 36/39, at 18–19 (Nov. 18, 1981); G.A. Res. 985 (X), at 45 (Dec. 3, 1955); G.A. Res. 174 (II), Statute of the Int'l Law Comm'n (Nov. 21, 1947).

¹³ G.A. Res. A/RES/600, Review of the Statute of the International Law Commission (Jan. 31, 1952).

¹⁴ Statute of the Int'l Law Comm'n, *supra* note 12, at arts. 2, 3.

¹⁵ *Id.* at arts. 2, 16.

¹⁶ G.A. Res. 1103 (XI), at 53 (Dec. 18, 1956); G.A. Res. 1647 (XVI), at 61 (Nov. 6, 1961).

¹⁷ Statute of the Int'l Law Comm'n, art. 1 (Nov. 21, 1947).

¹⁸ See, e.g., *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/56/10.

of international law, which lie at the core of international cooperation and legal order, provide context for the argument that has been reiterated in Chapter I of the UNC.¹⁹ They include, for example, the principle of sovereign equality, prohibition on the use of force, and due respect for fundamental rights of the individual (generally referred to as human rights law), which is discussed in more detail below.²⁰

The work of the ILC complements that of the UN Security Council and, more significantly, of the International Court of Justice. While non-binding, ILC reports, documents, and draft articles serve as a reiteration of the basic principles of international law as reflected by the UNC.²¹ ILC experts review a variety of sources of international law, including universal, regional, and bilateral treaty practice; customary law; judicial decisions; and academic writings to summarize current progress of international law for the practical application by relevant UN bodies. For international and constitutional law scholars, these are a trustworthy and reliable resource for analyzing and summarizing diverse legal practices based on various legal norms and principles.

For the purpose of this Paper, we shall look at the ILC work concerning state responsibility, reflecting the normative standard of Articles 2, 4, and 51, as well as Chapters VI and VII of the UNC.

The first relevant ILC work stream was focused on state responsibility for acts prohibited by international law.²² Relatively quickly, however, the ILC recognized the need to set standards for state behaviors in cases where international law does not explicitly prohibit an act.²³ This need led to the initiation of a complimentary work stream on international liability for acts not prohibited by international law, headed by the UN Special Rapporteur Pemmaraju Sreenivasa Rao, resulting in the 2001 ILC Draft Articles on State Responsibility.²⁴ The international law regime of state responsibility, as stated in the 2001 ILC Draft Articles on State Responsibility, though contested, is generally viewed as a reiteration of binding customary norms.²⁵ It establishes what is referred to as a “secondary” regime of state responsibility for the violation of any other primary internationally binding norm.²⁶

¹⁹ U.N. Charter, *supra* note 11, at Ch. 1; Elena Basheska & Dmitry Kochenov, “*Good Fences Make Good Neighbors*” and *Beyond . . . Two Faces of the Good Neighborliness Principle*, 35 Y.B. EUR. L. 562, 565–68, 574–76 (2016).

²⁰ See U.N. Charter, *supra* note 11, at art. 2; Basheska & Kochenov, *supra* note 19, at 565–76.

²¹ Statute of the Int’l Law Comm’n, *supra* note 12, at arts. 19–20.

²² KULESZA, *supra* note 1, at 115–16.

²³ Int’l Law Comm’n, Rep. of the Int’l Law Comm’n on the Work of Its Fiftieth Session, U.N. Doc. A/53/10, at 19–20 (1998).

²⁴ Pemmaraju Sreenivasa Rao, *Second Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, ¶ 59, U.N. Doc. A/CN.4/501 (May 5, 1999).

²⁵ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 18.

²⁶ *Id.*

Enforcing the rules of the *2001 ILC Draft Articles* requires follows a breach of an identifiable norm in international law.²⁷ Once a breach occurs, the regime of state responsibility is activated.²⁸ Upon its activation, state responsibility calls for direct reference to a specific, identifiable and identified norm of international law that has been violated.²⁹ In each case, a norm of international law, either customary or contractual, needs to be identified by the party attempting to hold a state responsible or by a court enacting sanctions under the customary law on state responsibility.

Such duties and obligations are usually negative—that is, they indicate what kind of behavior is prohibited.³⁰ Accordingly, the *2001 ILC Draft Articles* refer to acts “prohibited by international law.”³¹ As the international community evolved, it became clear that more than indirect violations of adopted standards pose a threat to international peace, good neighborly relations, or legally protected interests of others.³² Such harmful effects can be also caused by inaction—that is, a failure to prevent a given event or, more specifically, a failure to take appropriate measures aimed at preventing the undesired, harmful result. It is in this context that the ILC work on international liability comes into play. Originally focused on “significant transboundary harm” and specified in much detailed in international environmental law,³³ the ILC Draft Articles on International Liability reference many other international law regimes, such as diplomatic relations or the protection of aliens, where a state’s failure to act results in its accountability.³⁴

The 2001 ILC Draft Articles serve as the primary framework for identifying the obligations of states under international law.³⁵ Put simply, states can be held internationally responsible for a failure to act.³⁶ While international law requires a specific

²⁷ *Id.* at arts. 1(1), 2(1).

²⁸ *Id.*

²⁹ *Id.* at arts. 2(13), 3(1).

³⁰ KULESZA, *supra* note 1, at 265–66.

³¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 18.

³² Alan E. Boyle, *State Responsibility and International Liability for Injuries Consequences of Acts Not Prohibited by International Law: A Necessary Distinction*, 39 INT’L & COMP. L.Q. 1, 12 (1990). See KULESZA, *supra* note 1, at 128–29.

³³ Nayantara Ravichandran, *Restricting Sovereignty—Transboundary Harm in International Environmental Law*, 2 ENV’T L. & SOC’Y J. 91, 97 (2014).

³⁴ Draft Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, *reprinted in* the Int’l Law Comm’n on the Work of Its Fiftieth Session, ILC Report, 1998, U.N. Doc. A/53/10, ch. IV (1998). See also Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *reprinted in* the Int’l Law Comm’n on the Work of Its Fifty-Third Session, UN Doc. A/56/10, pmb1.(1) (2001). Interestingly, the ILC Draft Articles on International Liability do not share the status of a well-recognized customary law standard, with states opposing its application to any area of international law beyond international environmental law.

³⁵ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 18.

³⁶ *Id.*

duty of care to be identified,³⁷ the overall criteria for the scope and quality of state actions remain fundamentally the same, regardless of whether a state was required to prevent significant transboundary harm to the environment, contamination of foreign rivers, abduction or assassination of foreign diplomats or citizens, or prevent grave violations of humanitarian or human rights law.³⁸ Therefore, international law introduces a flexible framework of reference for assessing a state's efforts in preventing undesired effects originating from actions or events within its jurisdiction or control.

As noted above, the current international legal system relies on the premise that all states have a valid interest in maintaining international peace and peaceful cooperation, as per the Preamble of the UNC. It reflects the 1947 consensus on the need “to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” while “promot[ing] social progress and better standards of life in larger freedom” through “fundamental human rights.”³⁹ The reasoning behind the priority of a state's international law commitments over its national lawmaking is derived from the understanding that states need to abide by their international commitments (*pacta sunt servanda*), including those deriving from the UNC with its unique, peremptory nature, described below.⁴⁰ With due respect for national sovereignty, it is understood that, by engaging in international relations, states agree to limit their individual freedoms for the benefit of the global community. This is done through their compliance with international law obligations, derived from treaties and customary practice. International law includes a category of norms perceived as particularly vital for the peaceful coexistence of the international community, referred to as “peremptory norms.”⁴¹ These include, among others, the commitment to refrain from the use of force or threat thereof, to settle international disputes amicably and, effectively, to abide by rules of state responsibility for the breach of an international obligation.⁴² Many international norms have been detailed through contractual practice and are safeguarded by dedicated international bodies. As an example, one could mention human rights law and relevant regional frameworks, including the Inter-American Commission on Human Rights—the principal body of the Organization of American States (OAS) which is devoted to promoting and protecting human rights in the American hemisphere. Each regional human rights framework, like the OAS, reiterates specific obligations with regard to passive and active duties of states to protect

³⁷ *Id.* at 32.

³⁸ See KULESZA, *supra* note 1, at 91–113.

³⁹ U.N. Charter, *supra* note 11, at pmb1.

⁴⁰ For a general reference on the application of international norms in municipal legal systems, see, e.g., JAMES CRAWFORD, IAN BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45–102 (9th ed. 2019); MALCOLM N. SHAW, INTERNATIONAL LAW 96–154 (8th ed. 2017).

⁴¹ See KULESZA, *supra* note 1, at 25, 279, 291 (2016); N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENV. J. INT'L L. & POL'Y 187, 195 (1974).

⁴² See KULESZA, *supra* note 1, at 18, 22, 28–31.

the rights of an individual within their territory or jurisdiction.⁴³ Their failure to do so results in state responsibility.⁴⁴ However, there is no international treaty or universally adopted customary practice detailing the UNC's state responsibility standard and reiterating how and when it should be applied. The only international document to help us understand when states are to be held accountable for their failure to comply with their international obligations are the 2001 ILC Draft Articles named above. Based on the principle of priority of international law, derived from the *pacta sunt servanda* brocard, the 2001 ILC Draft Articles have been provided to serve as such a comprehensive, metalevel set of norms allowing for a practical understanding of how international law should be applied vis-à-vis states failing to comply with the UNC principles and derivative norms.

I. DUE DILIGENCE IN INTERNATIONAL LAW

The ILC's work indicates that when performing any obligation of conduct—one that requires a state to perform in a certain way, as opposed to achieving a particular result (an obligation of result)—it needs to act with due care.⁴⁵ This flexible standard in the ILC reports and drafts includes direct references to other international law norms and principles, including good faith, good neighborliness, territoriality, sustainable development, a unique standard of a good government, the adherence to best practices in a given area, a pertinent duty to exchange information, and non-discrimination while granting it all of these duties as continuous nature.⁴⁶

A. Principle of Good Faith

Primarily, due diligence implies the obligation to act in good faith. It applies to each state when facing its international duties, whether to act or, more significantly, to prevent a given action from taking place.⁴⁷ This is particularly significant for states' performance of their obligations of conduct (as opposed to those of result), which cover the duty to prevent significant harm to other international actors or shared resources.⁴⁸

B. Principle of Good Neighborliness

This duty of care is also identified through the ILC's reference to the principle of good neighborliness.⁴⁹ It obliges states to prevent harm or damage to others. Such harm or damage might be caused by the one state might cause within the territory

⁴³ *Id.* at 55–57.

⁴⁴ *Id.* at 63.

⁴⁵ *Id.* at 190–91.

⁴⁶ *Id.* at 149–53, 262–70.

⁴⁷ *Id.* at 188–89.

⁴⁸ *Id.* at 167–69.

⁴⁹ *Id.*; Basheska & Kochenov, *supra* note 19, at 562–88.

of another state's territory or targeted against its legally protected interests.⁵⁰ The notion of "neighborliness" goes beyond the physical proximity of actors; it extends to all those potentially impacted by a given action or omission. The duty to protect one's neighbors and their legally protected interests also covers shared resources and spaces, such as the maritime environment or the air.⁵¹

C. Principle of Territoriality

Additionally, states are obligated to act with due care within their jurisdiction.⁵² This implies a primarily territorial focus on the duty of care. The criterion of jurisdiction also obliges states to take active measures to prevent harm or damage caused by activities within the territories they control as well as any other area or resource under their effective control.⁵³

D. Principle of Sustainable Development

This broad scope of the obligation to prevent harm or damage described above is derived from the principle of sustainable development.⁵⁴ Among other duties, the principle of sustainable development includes the obligation to perform a risk assessment for any new technology, research, procedure, or legislation in order to determine what harmful impact it might have, including measures to mitigate that harm.⁵⁵

E. Principle of Good Government

The flexible standard of a "good government" has long served as a threshold to assess national efforts to prevent foreign harm.⁵⁶ It is usually designated by a reference to "all necessary measures" expected of a "good government" in a given situation.⁵⁷ As per treaty interpretation and international practice, a state is to act in line with this standard when meeting its international obligation of conduct.⁵⁸ The range or set of individual measures, together with criteria for assessing a state's efforts as sufficient or insufficient, regardless of the final result, are always case-specific.⁵⁹ On the universal level for international norm-making, this has been well reflected in, for example, international personal data treaties, such as the Council of Europe's Convention 108

⁵⁰ KULESZA, *supra* note 1, at 167–69.

⁵¹ *Id.* at 91–95, 224–28, 235–39.

⁵² *Id.* at 55–65.

⁵³ *Id.*

⁵⁴ *See id.* at 99–101.

⁵⁵ *Id.* at 189–97.

⁵⁶ *See id.* at 240–41.

⁵⁷ *Id.* at 114.

⁵⁸ *Id.*

⁵⁹ *See id.* at 267.

and Protocols with the requirement for states to introduce risk assessments for national data privacy regulations and practices.⁶⁰

The standard of good government will always be set against specific case scenarios and measures available to a specific actor in a given situation.⁶¹ It is therefore a phrase that is open to interpretation based on national or regional specifics, availability of economic and technological measures, and the actual efficiency of state institutions in all other matters. Regardless of these however, due diligence always requires a state to introduce appropriate and effective administrative or formal procedures.⁶² The goal of these procedures is to safeguard given legal interests and, in the context of technological processes, to ensure authorization for risk-generating activities undertaken within state territory, or under state jurisdiction or control.⁶³ These procedures are to be designated, legislated, and enforced in such a way as would be done by a “good government” in a given situation.⁶⁴ This theoretical model of “good government” reflects the Roman legal tradition with its concept of a “good family man” (*pater familias*), which still operates in statutory civil law systems as one of the criteria in assessing good faith.⁶⁵

The “good government” standard is important when it comes to recognizing potential faults in fulfilling a state’s international obligations. To recognize how a “good government” would have acted in a given case, a court takes into consideration the overall performance of state bodies in their own affairs.⁶⁶ It should also consider the state’s economic condition assessed together with the performance of countries in the region or in a particular economic sector.⁶⁷ To make this assessment, courts also consider testimony from experts in a given field.⁶⁸ This helps to identify the actions required from a government to prevent a given harmful occurrence.

Due diligence implies an obligation to apply expertise in a given area.⁶⁹ This can mean technical measures to prevent a given effect but also implies the need to recognize the latest research in medical, social, cultural, or legal studies. In this context, an individual state’s efforts must be set against its capabilities in accessing knowledge and, among other things, in purchasing technology or equipment. While cultural aspects of human rights interpretation and application are always a factor in assessing a state’s efforts, any state decision regarding any human rights policy must be

⁶⁰ See *id.* at 292–96; Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, art. 7, C.E.T.S. No. 108 (1981).

⁶¹ KULESZA, *supra* note 1, at 57.

⁶² *Id.* at 191.

⁶³ *Id.* at 191–92.

⁶⁴ *Id.* at 183.

⁶⁵ *Id.* at 264.

⁶⁶ See *id.* at 264–65.

⁶⁷ *Id.* at 195–96.

⁶⁸ See *id.* at 100, 103–04.

⁶⁹ Katija L.H. Samuel, *The Legal Character of Due Diligence: Standards, Obligations, or Both?*, 2018 CENT. ASIAN Y.B. INT’L L. 1.

based on reputable research and recognized international standards, such as those coming from the UN or regional human rights bodies.⁷⁰ Local cultural or social considerations must subside yield to treaty interpretations, recommendations, and guidelines from relevant international bodies and organizations.

Precautions taken to safeguard interests that are legally protected by human rights instruments must therefore reflect the current state of knowledge in a given area, while the level of care naturally reflects the financial or organizational capability of the state neighbors. Therefore, the standard of due care with regard to the same international treaty provision may differ when applied to individual states or regions, depending on their economic and organizational capability. These objective restraints cannot serve as mere excuses for inaction or indulgence. The efforts taken by the acting state are set against similar measures taken by other states in the region in given circumstances. What is also to be considered is the gravity of potential harm to fundamental rights and individual interests in cases of lacking the absence of due care. As elaborated below, in the case of the treaty at hand, the protection of human life and health necessitates the utmost level of care, with the use of all available resources.

Due diligence includes an obligation to continuously exchange information with those potentially affected and with international organizations that monitor the implementation of a particular international normative obligation.⁷¹ Depending on a given case, the scope of included partners ranges from other states to non-governmental organizations, and all the way to private companies or groups of individuals. While relevant information on potential risks and the measures taken to mitigate them must be shared, drawing the fine line between transparency and the protection of legitimate state interests to protect often proves challenging in practice.⁷² This considered, any relevant data, including, but not limited to, crime statistics, prevention programs, and international initiatives undertaken to meet the aim of a state's international obligations, fall within the ambit of the duty of care.⁷³ Generally speaking, however, the decision to share information necessary for others to protect themselves from pending grave harm and to share data crucial to state security or the economy is made by the risk-generating state and remains among the most disputed issues in international development.

When sharing information, as well as in the performance of other obligations derived from the duty of care, states must refrain from discrimination.⁷⁴ This implies the duty to protect all those potentially affected equally, regardless of their location, nationality, or personal traits. In the global economic context, this implies the need

⁷⁰ *Id.* at 14.

⁷¹ KULESZA, *supra* note 1, at 112.

⁷² See U.N. GAOR, 55th Sess., Supp. No.10 art. 19, ¶ 1, U.N. Doc. A/56/10 (Aug. 10, 2001) (citing six exceptions to state responsibility when interests conflict).

⁷³ See KULESZA, *supra* note 1, at 105.

⁷⁴ See *id.* at 85 (discussing how states must protect foreigners in their jurisdiction and that states can be liable for omissions in information sharing).

to ensure equal access to mitigation measures; in the human rights context, the duty of care is directly linked to ensuring equal, unlimited access to prevention and protection measures for all potential victims, without discrimination.⁷⁵ Any preference for a state's nationals or specific societal groups in this regard would be considered a violation of the due diligence standard.⁷⁶ This aspect of due diligence is to be applied in the context of its continuous nature, one requiring ongoing efforts aimed at assessing and preventing violations of international obligations. A single or an occasional risk assessment or authorization is not considered dully diligent.⁷⁷ State efforts with regard to potential threats to legally protected interests need to be continuously monitored for potential threats and infringements. Moreover, due diligence may not be assessed based on so-called post facto prevention measures, for example, those taken after damage arises or infringement occurs.⁷⁸ Properly understood, there is no vicarious responsibility for states or risk liability for the actions of individuals, unless there is an implied or direct obligation from an internationally binding norm, whether customary or treaty based.

1. Due Diligence in International Human Rights Law

The notion of human rights has been developing alongside the international community.⁷⁹ Legal bias based on race or gender was the normative standard until the twentieth century, and it was primarily through the painful lessons of World War II that a universal understanding of human dignity as the source of human rights, granted to all individuals equally, found its way into international treaties, national acts of law, and local courtrooms.⁸⁰ What seemed incomprehensible to the greatest minds of the eighteenth century (for example, Thomas Jefferson—a human rights architect who was doubtful of the successful abolition of slavery and a slave owner

⁷⁵ See, e.g., U.N. GAOR, *supra* note 72, art. 37, ¶¶ 7–8 (clarifying that even distressed states must focus on saving lives “regardless of nationality”); KULESZA, *supra* note 1, at 168 (noting each state must use resources with “due respect for the interests of others” and to “uphold sustainable development”).

⁷⁶ See KULESZA, *supra* note 1, at 116 (noting that the League of Nations’ definitions of state responsibility in 1924 was composed entirely of the need to compensate foreigners for damages).

⁷⁷ *Id.* at 111 (explaining that even when a state’s efforts are fruitless, they are obligated to “take all reasonable and possible action aimed at [prevention]”).

⁷⁸ *Id.* at 112 (“The obligation to prevent violations . . . arise[s] at the moment when state authorities become aware of or should have [known] . . . about a serious risk of crime.”).

⁷⁹ See *id.* at 113 (using the Bosnian Genocide as an example of how the international community, via international law, has played an important role in human rights law).

⁸⁰ See, e.g., Jonathan Mann, *Dignity and Health: The UDHR’s Revolutionary First Article*, 3 HEALTH & HUM. RTS. 30, 30–31 (1998) (asserting the UDHR began the human rights “revolution” and was “a seismic shift in human consciousness”); Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998) (describing the UDHR as “the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today”).

himself)⁸¹ is now considered the foundation of international consensus two centuries later.⁸² As the evolution of human rights unfolds, new values—such as environmental or sexual rights—will be permanently included in its scope. This evolution, formally recognized by the international community in the 1948 Universal Declaration of Human Rights (UDHR), which was initially non-binding but is currently viewed as the foundation of customary human rights law.⁸³ This unique evolution of the human rights system may be conceptualized as “generations” of human rights. The very basic compromise on rights pertinent to every human being, expressed in the UDHR and numerous international treaties,⁸⁴ is perceived to include two different categories of human rights (despite the fact that human rights ideology emphasizes their indivisibility).⁸⁵ Economic, social, and cultural rights listed in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are considered to be positive, resource-intensive, progressive, vague, political (ideologically divisive), socialist, and nonjusticiable, which makes them more aspirations or goals, than traditional “real” legal requirements. Civil and political rights, on the other hand, are considered negative in their nature.⁸⁶ To implement such rights, the state must allow for certain individual liberties rather than provide additional resources or services.⁸⁷ These rights are cost-free, immediate, precise, non-ideological (non-political), capitalist, and justiciable, and are therefore considered real “legal” rights, on par with traditional legal rights. Human rights dogma conditions the fulfillment of the right to subsistence on the provision of rights in the first generation. It is particularly in this group where the notion of due diligence and a required standard of state conduct comes into play.

Numerous international human rights treaties and customary normative frameworks depend on this flexible standard of due diligence.⁸⁸ It is the litmus test for assessing state efforts with regard to their active obligations: a state government’s

⁸¹ Aaron Schwabach, *Jefferson and Slavery*, 19 T. JEFFERSON L. REV. 63, 89 (1997).

⁸² See, e.g., Mann, *supra* note 80, at 30–31; Glendon, *supra* note 80.

⁸³ Mann, *supra* note 80, at 30–31.

⁸⁴ See, e.g., the International Convention on the Elimination of All Forms of Racial Discrimination, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 1965; International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171.

⁸⁵ See *Vienna Declaration and Programme of Action*, U.N. GAOR, 48th Sess., 22d plen. mtg., at 3, U.N. Doc. A/CONF. 157/24 (June 25, 1993) (“All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”).

⁸⁶ See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986) (noting our Constitution is about freedom from government intervention, and therefore negative in nature).

⁸⁷ See Fred. E. Inbau, *More about Public Safety v. Individual Civil Liberties*, 89 J. CRIM. L. & CRIMINOLOGY 1421, 1421 (1999) (explaining upholding civil liberties requires limitations on state power).

⁸⁸ KULESZA, *supra* note 1, at 141 (defining due diligence as “effectively vague, ambiguous, and imprecise” and noting its importance to contemporary international jurisprudence).

duties to ensure effective protection and enforcement of individual rights.⁸⁹ Among international organizations focused on protecting individual human rights, the Council of Europe (CoE)—founded in 1951 and comprising of 47 states, spanning from Russia and Turkey through Balkan states all the way to Spain and Portugal—has been the home of numerous international law treaties aimed at protecting individual rights and enforcing respective state obligations.⁹⁰ With the European Convention of Human Rights as its founding document, the Council of Europe’s Treaty Series has served as a comprehensive and detailed framework for specifying and detailing human rights law enforcement across states, cultures, and regions.⁹¹ Whether addressing freedom of expression or personal data protection, the CoE has offered effective and detailed international law provisions specifying what a diligent state is expected to take upon itself to meet the required international standard of due care.⁹²

Privacy holds a well-established place in the human rights catalogue, with Article 12 of the Universal Declaration on Human Rights and Article 17 of the International Convention on Civil and Political Rights (ICCPR) granting every individual freedom from “arbitrary interference” with their “privacy, family, home, or correspondence” as well as from any “attacks upon his honor and reputation,” placing privacy among the catalogue of personal rights known to every national legal system.⁹³ The UN devoted much attention to individual privacy protection while discussing the issues of terrorist prevention. As Special Rapporteur on human rights and terrorism, M. Scheinin correctly notes it was the war on terrorism that led to a speedy erosion of the right to privacy.⁹⁴ The reason for this speedy erosion was primarily the inherent deficiency of Article 17 of the ICCPR (granting the individual right to privacy): the lack of a limiting clause requiring states to meet three basic criteria—even though the necessity, proportionality, and reasonableness of the opposition continue to

⁸⁹ *Id.*; see also Robert P. Barnidge Jr., *The Due Diligence Principle under International Law*, 8 INT’L CMTY. L. REV. 86–97 (2006) (mentioning the relationship between due diligence, state responsibility, and human rights).

⁹⁰ See generally European Convention on Human Rights, Sept. 3, 1953, E.T.S. 5.; see also Martyn Bond, *Council of Europe: Conscience of a Continent*, 65 THE WORLD TODAY 21, 21 (2009).

⁹¹ See Claire Salignat, *The Impact of the Emergence of the European Union as a Human Rights Actor on the Council of Europe, The Special Theme*, 4 BALTIC Y.B. INT’L L. 55, 57–58 (2004).

⁹² See Ruth Donner, *Council of Europe Treaty-Making*, 1 FINNISH Y.B. INT’L L. 489, 489–93 (1990) (discussing the Council of Europe’s historical importance).

⁹³ See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 17 (Dec. 16, 1966).

⁹⁴ Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms), *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, at 1, U.N. Doc. A/HRC/13/37 (Dec. 28, 2009).

argue that its very context imposed such an obligation resting upon states.⁹⁵ The contents of such an obligation and the limits of individual privacy permissible under international human rights law are the core of the challenge posed by online communications, since, as already mentioned above, the global online community needs a global privacy standard for its protection to be truly effective.

One of the most recent such examples where due diligence serves as a flexible reference for assessing state efforts is Article 5 of the Istanbul Convention.⁹⁶ It introduces state obligations and includes a due diligence clause by stating that state parties are to “refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.”⁹⁷ In paragraph 2, it states that all state “[p]arties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-state actors.”⁹⁸

These provisions are to be interpreted in light of the CoE preparatory and working documents.⁹⁹ They set the tone for implementing all substantial normative statements of the treaty. The CoE initiated the work on the Istanbul Convention in line with its overall mandate to ensure efficient protection of human rights of individuals within the jurisdiction of member states.¹⁰⁰ This initiative followed research justifying the need to ensure effective protection against violence against women, including domestic violence.¹⁰¹ The Action Plan to Combat Violence against Women which was the direct result of these efforts, included references to the international law standards of due care, together with a policy framework to be implemented by national administrations.¹⁰² These guidelines and specific instructions should be read in the context of the “good government” standard discussed above.¹⁰³

A reading of the due diligence clause must also be framed in the context of the broad-spanning efforts that resulted from the 2005 Warsaw Summit of the CoE

⁹⁵ See generally G.A. Res. 2200A (XXI), *supra* note 93, at art. 17.

⁹⁶ Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 5, C.E.T.S. No. 210 (2011) [hereinafter Convention on Preventing and Combating Violence against Women].

⁹⁷ *Id.* art. 5 ¶ 1.

⁹⁸ *Id.* art. 5 ¶ 2.

⁹⁹ See TRAVAUX PRÉPARATOIRES TO THE CONVENTION, COUNCIL OF EUR., https://www.echr.coe.int/documents/library_travPrep_table_eng.pdf; Samuli Miettinen & Merita Kettunen, *Travaux to the EU Treaties: Preparatory Work as a Source of EU Law*, 17 CAMBRIDGE Y.B. EUR. LEGAL STUD. 1 (2015).

¹⁰⁰ See Convention on Preventing and Combating Violence Against Women, *supra* note 96, at pmb1.

¹⁰¹ See COUNCIL OF EUR., EXPLANATORY REPORT TO THE COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE, ¶¶ 2–4 [hereinafter COUNCIL OF EUR., EXPLANATORY REPORT].

¹⁰² *Id.* ¶¶ 9–10.

¹⁰³ See KULESZA, *supra* note 1, at 114 (explaining the standard of a “good government”).

Heads of State and Government; this summit included the work of the Task Force to Combat Violence against Women, including Domestic Violence.¹⁰⁴ The fact that the campaign led by the Task Force covered three levels—intergovernmental, parliamentary, and local—reflects the scope of actors involved in meeting a state’s international obligation of care.¹⁰⁵ The recommendations regarding the policy areas to be covered (legal and policy measures, support and protection for victims, data collection, and awareness-raising) also indicate where input from a “good government” is to be expected.¹⁰⁶ While the work of the Task Force resulted from a non-binding commitment, the work it had done allowed all those involved to benefit from the results. Nevertheless, this was a clarifying overview of the clearly understand what actions a state must take in order to meet the duty of care and prevent the aforementioned crimes.¹⁰⁷ The procedure of sharing good practices among all states must also be viewed in the context of meeting one’s due care obligation, in particular one’s obligations of keeping up to date with the latest advancements in a given area of policy and practice.¹⁰⁸ Ignoring good practices shared by others or failing to attempt to implement them according to local circumstances could easily be seen as a failure to act in due care. Qualifying such actions as a failure to meet one’s international obligation became much easier once after the recommendation from the Task Force issued and implemented their Final Activity Report.¹⁰⁹ This report sought to develop a human rights convention to prevent and combat violence against women.

2. State Responsibility for Lack of Due Care

Article 5 of the Istanbul Convention ties international obligations of states with due diligence. It does so in two ways: by reaffirming that states are to “refrain from engaging in any act of violence against women”; then, in paragraph 2, it links this negative obligation with the positive duty to “take the necessary legislative and other measures” to ensure the prevention, investigation, punishment, and reparation of all acts of violence covered by the scope of the Convention when perpetrated by private individuals or other non-state actors.¹¹⁰

This provision clearly identifies the scope of a state’s obligation, by directly naming authorities, officials, agents, institutions, “and other actors acting on behalf of the State” as those who are under the direct duty to act in conformity with the

¹⁰⁴ See COUNCIL OF EUR., EXPLANATORY REPORT, *supra* note 101, at Part I, ¶ 10.

¹⁰⁵ *Id.* ¶ 11.

¹⁰⁶ *Id.* ¶¶ 16, 18, 23.

¹⁰⁷ *Id.* ¶ 21.

¹⁰⁸ *Id.* ¶ 48.

¹⁰⁹ COUNCIL OF EUR., FINAL ACTIVITY REPORT. TASK FORCE TO COMBAT VIOLENCE AGAINST WOMEN, INCLUDING DOMESTIC VIOLENCE 6 (2008).

¹¹⁰ Convention on Preventing and Combating Violence Against Women, *supra* note 96, at art. 5, ¶¶ 1–2.

Convention and ensure its due implementation.¹¹¹ The reference to actors acting on behalf of the states implies the theory of effective control in international law of state responsibility.¹¹² This narrower reading of states' due diligence obligations is expanded in paragraph 2 to include actions outside state control. This objective responsibility is limited to situations in which the state has failed to "take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors."¹¹³

In summary, the question of fault or damage in the context of state responsibility, even limiting the scope solely to the primary obligation of prevention, may result in state responsibility if that obligation is violated through an action or omission of a state agent. Customary law on state responsibility holds a state responsible for the commission of an internationally wrongful act only once such an act, be it an action or omission, is attributed to the state.¹¹⁴ Attribution follows an act, which is the result of an action or omission on the part of state's authorized representatives, such as the police officers, immigration officers, or prison officers.¹¹⁵ A state can only be held responsible when the connection between an action or omission of a designated state representative and a violation of the state's international obligation is made. Reference to "all necessary measures" implies the need for the state to comply with the flexible due diligence standard in international law, as identified above. It is therefore under a duty to keep informed about the latest international advancements, including good practices, that states address as the aims of the convention. While consideration must be made to the social or economic limits of each state's capacity, insufficient funding or cultural prerequisites must not prevent a state from fully implementing its treaty-based duties. These include a duty to introduce relevant national legal frameworks, ensure their effective enforcement, and monitor them for progress or challenges.¹¹⁶ The Convention must be implemented in good faith, understood also as the need to contact international organizations for assistance in order to prevent any violations of state's international obligations, minimize such risks, or curtail its effects.¹¹⁷ The principle of good faith in the good neighborly

¹¹¹ *Id.* at art. 5, ¶ 1.

¹¹² For a detailed discussion *see, e.g.*, Alan E. Boyle, *State Responsibility and International Liability for Injuries Consequences of Acts Not Prohibited by International Law: A Necessary Distinction*, 39 INT'L & COMP. L.Q. 1, 9 (1990); James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, in INTERNATIONAL LAW 455 (Malcom D. Evans ed., 2010).

¹¹³ Convention on Preventing and Combating Violence Against Women, *supra* note 96, at art. 5, ¶ 2.

¹¹⁴ *See* COUNCIL OF EUR., EXPLANATORY REPORT, *supra* note 101, ¶ 57.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at Part I, ¶ 5.

¹¹⁷ *See* Int'l Law Comm'n, Rep. of the Int'l Law Comm'n on the Work of Its Forty-Eighth

relations principle implies that the duty to take preventive measures is to be complemented by the explicit premise of good faith rather than being an absolute one. The duty applies only to activities within state jurisdiction and under its control. A state is not responsible for unpredictable occurrences or results from acts not prohibited by international law, even if carried out under its jurisdiction or control. Moreover, a state is not obligated to take preventive measures against “clandestine activities” which it has no opportunity to learn of, as long as the state engages the appropriate available resources.¹¹⁸ Anything below this level of care however should be viewed as a failure to act with due diligence and, therefore a violation of Article 5 in the context of a specific duty imposed by the convention.

3. Non-state Actors

As noted above, states are not directly responsible for the actions and omissions of private individuals. State responsibility is directly linked to acts of states—it is their action or omission, when attributable, that can result in the state being held responsible for violating its international obligation. The duty to act with due care is the baseline for state responsibility for its omissions, resulting in the breach of an international duty. Particularly in the human rights law context, states are required to act with due care to prevent violations of individual rights by non-state actors within their jurisdiction or effective control. Using the same example, the Istanbul Convention reflects most explicitly this aspect of due diligence in Article 7 and Article 60. Under Article 7, states are obligated to ensure due respect of all the rights granted in the convention, including by non-state parties, though “comprehensive and coordinated policies”. In light of this, national laws, regulations and policies must reflect the standards imposed by the Convention. National authorities must ensure effective enforcement of these vis-à-vis third parties within their jurisdiction or control. Only through such an approach can a holistic response to violence against women be ensured. Under paragraph 2 of Article 7, states are obligated to ensure adoption and implementation of relevant policies through “multi-agency co-operation”.¹¹⁹ Due care with regard to ensuring compliance, including by non-state parties, requires states to acknowledge and implement good state practice in relevant areas, such as joint cooperation of law enforcement, judiciary, non-governmental organizations working in the field of women’s rights as well as child protection agencies or other relevant parties. These can work together in providing risk assessments or safety plans, not just on voluntary a basis but based on enforceable normative guidelines.¹²⁰

Session, art. IV, ¶ 1, U.N. Doc. A/51/10 (July 26, 1996).

¹¹⁸ *Id.* at art. 22, ¶ 5.

¹¹⁹ COUNCIL OF EUR., EXPLANATORY REPORT, *supra* note 101, ¶ 64.

¹²⁰ *Id.* ¶ 65.

Article 60 of the Convention complements this obligation to work together with non-state actors by reflecting the need to protect victims of gender-based violence in the case of asylum seekers.¹²¹ While asylum laws reflect the principle of non-discrimination, a gender-based approach to individual needs must be accommodated in relevant national normative and policy frameworks. A state acting in due care must therefore strike a balance in recognizing the unique needs of asylum seekers under threat from gender-based violence while ensuring fair and equitable access to safe and secure environment for all those fleeing conflict or persecution. Such an approach can be facilitated through interpretation and implementation of Article 1 section 2 of the 1951 Convention relating to the Status of Refugees, where violence against women is to be viewed as form of gender-related persecution.¹²² Effective measures to properly recognize the threat of such violence, by providing reliable risk assessments and prevention plans, can only be accomplished through close cooperation of non-state actors. These can serve as sources of reliable information, but such cooperation can also be seen as due care in ensuring that non-state actors under state's jurisdiction or control refrain from facilitating, concealing, enabling, or factoring gender-related violence. This includes but is not limited to violence or harassment related to giving or receiving of dowry, female genital violence, home abuse or human trafficking.

Cooperation with non-state actors to prevent gender-based crime and prejudice also falls within the ambit of Chapter III of the same convention. Article 12 calls for states to "take necessary measures" to "promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."¹²³

While paragraph 2 refers directly to introducing relevant "legislative and other measures",¹²⁴ in the context of Article 5 it should be read to include states' duty to monitor non-state actors for any possible activities that violated this provision. As an example, any non-state actor, whether commercial or operating not-for-profit, who initiates an information campaign, political campaign, or business approach in violation of the requirement to eradicate prejudices should face legal consequences. These need to be included in statutory law, whether criminal or civil. For example, within the consumer protection guarantees, and their interpretation must be in line with the overall aims and goals of the Convention. Negligence in identifying and prosecuting acts of prejudice by non-state actors, whether political parties, commercial entities, or educational institutions violates Article 12, in conjunction with Article 5, of the Convention.

¹²¹ *Id.* ¶ 310.

¹²² *Id.*

¹²³ Convention on Preventing and Combating Violence Against Women, *supra* note 96, at art. 12, ¶ 1.

¹²⁴ *Id.* at art. 12, ¶ 2.

The scope of states' obligations with regard to non-state actors is to be understood in line with Article 9 of the Convention, which refers to the roles and responsibilities of "Non-governmental organizations and civil society."¹²⁵ It obliges member states to "recognize, encourage and support . . . work of relevant non-governmental organizations and of civil society . . . in combating violence against women and establish effective co-operation with these organizations."¹²⁶ It is this last section of Article 9 that implies states' duties to support relevant non-state actors in advancing the goals of the convention. Any activity aimed at restricting the capabilities of these organizations, whether administrative, judicial, or financial, is in direct violation of states' duties.¹²⁷ In the context of Article 5 however, state support for organizations involved in the debate around gender-based violence, however they should fail to "combat" violence against women through their action—for example by praising gender biased societal roles—would be seen as grounds for state responsibility, and would violate Article 9 in conjunction with Article 5.

4. Prevention and Deterrence

Chapters II and III of the Istanbul Convention reiterate the duty of care with regard to preventing, protecting, prosecuting and redressing gender-based crimes. The "Prevent, Protect, Prosecute, Redress" framework has been detailed in the 2006 Ertürk report, which reiterates due diligence for the purpose of mitigating gender-based violence.¹²⁸ According to the provisions of the aforementioned chapters and the Ertürk reports, prevention of gender-based crimes implies good faith and continuous care in introducing comprehensive and coordinated policies based on reliable data and updated risk assessments together with their enforcement.¹²⁹ The Convention refers to these tools as the "4Ps": "Prevention", "Protection", "Prosecution" and "integrated Policies".¹³⁰ These are to be interpreted in line with Article 5 and Article 7, which obliges states to diligently introduce comprehensive and coordinated policies targeting gender-based violence. As explained in Section 1, the duty to act with due care is to be read in the context of individual economic and social capacities.¹³¹ Article 8, however, obliges member states to ensure proper financial and human

¹²⁵ *Id.* at art. 9, ¶ 1.

¹²⁶ *Id.*

¹²⁷ *Id.* at art 5, ¶¶ 1–2.

¹²⁸ *Compare* Yakin Ertürk (Special Rapporteur on Violence Against Women), *Its Causes and Consequences: Intersections Between Culture and Violence Against Women*, U.N. Doc. A/HRC/4/34 (Jan. 17, 2007), *with* Yakin Ertürk (Special Rapporteur on Violence Against Women), *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. Doc. UN E/CN.4/2006/.

¹²⁹ Ertürk, *supra* note 128.

¹³⁰ COUNCIL OF EUR., EXPLANATORY REPORT, *supra* note 101, ¶¶ 63, 12.

¹³¹ *Id.*

resources for activities of relevant public bodies as well as for the cooperation with non-state actors.¹³²

While member states present individual approaches to government funding for non-governmental organizations, Article 5 in conjunction with Article 8, implies an obligation to the allocation of “appropriate” resources, that is those “suitable for the target set or measure to be implemented.”¹³³ It should be noted, however, that as per the international law interpretation of the due diligence standard, economic constraints must not be the only prerequisite for limiting support to policies aimed at combating gender based violence.

Enacting the due care standard in light of local circumstances, as reiterated in Chapters II and III as well as in the Ertürk reports, states must ensure: active awareness-raising measures (Article 13), education (Article 14), professional training (Article 15), preventive intervention and treatment programs (Article 16), as well as ensure participation of the private sector and the media in these initiatives, in line with the duty to ensure comprehensive efforts aimed at meeting treaty aims (Article 17). As per the provision of Chapter III, protection and support on behalf of state parties includes but is not limited to ensuring access to information about crime mitigation and victim support (Article 19), access to support services (Article 20), assistance in individual and collective complaints (Article 21), as well as specialist support services (Article 22). The specific measures to be implemented as parts of these due care efforts include: access to victim shelters, telephone helplines, psychological and legal support for victims of sexual violence, and child witnesses to be complemented with up-to-date, reliable reporting on criminal statistics and mitigation measures, to be done by trained professional (Articles 23 through to 28, respectively). All of this falls under the general obligation to act with due care in the specific context of gender-based discrimination and violence.

5. The Question of Jurisdiction

While the concept of due diligence has been relatively well identified in international law, the pragmatic question, which usually follows with its implementation, concerns is the one on the limits of state obligation. These should be relatively easy to answer with the reference to international jurisdiction and its principles. However, there is, however, no binding international accord on principles of state jurisdiction in international law and their application across international policies. Jurisdiction is the natural consequence of countries exercising their sovereignty as a unique, constitutive element of statehood, granting each of them the exclusive right to decide over individual's, actions and events within their territory or control. State sovereignty is understood as a unique competence to decide over its own affairs.¹³⁴ Originally

¹³² *Id.*

¹³³ *Id.* ¶¶ 67, 12.

¹³⁴ Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 ADEL. DEL. L. REV. 219, 223–24 (1999).

a concept derived from the 1648 Westphalian accord, it was designed to allow communities to manage their own interests according to what was perceived as the common interest of the state, separate and superior from those of the king or the community itself.¹³⁵ This notion, drafted to meet the current needs of the conflicted European continent, was well reflected by “raison d’État” (national interest)—a notion designating the need to protect the overall interests of a given nation rather than those of the king or a specific group within the community. In the twenty-first century, the Westphalian concept of sovereign states or its later reiteration of sovereignty of “nation-states” no longer applies.¹³⁶ The development of international law as a safeguard for collective peace, security, stability, and globalized economic interest was granted priority over individual interest for purely pragmatic reasons. *Pacta sunt servanda*, the fundamental principle of international law for contracts to be obeyed, can be justified with the collective interests of states to ensure a level playing field among all world’s actors. “Sovereignty” is being replaced by its derivatives, such as “shared sovereignty,” and amended to a much narrower scope with such international law instruments such as peremptory norms or humanitarian intervention.

Specific territories have enforced sovereignty differently, reflecting historical developments, their own unique culture, history, and enforcement capacity.¹³⁷ Yet it has always included states’ exclusive prerogatives to enact, interpret, and enforce laws, respectively referred to as its legislative, judicial, and executive jurisdiction.¹³⁸ This exclusive competence is most frequently implemented over persons and events located within national territory, it can however also be exerted outside states’ national borders. This is referred to as extraterritorial jurisdiction. While there is no single binding international catalogue or treaty framing the rules of exercising jurisdiction, court decisions and legal scholarship have identified six key principles often used by states when justifying their expectation of being able to regulate or adjudicate certain acts or events, also outside their borders.¹³⁹ State jurisdiction is therefore determined by general principles regulating the manner of exercising jurisdiction that has been “adopted without objections or complaints” from other parties and across international treaty based regimes.¹⁴⁰

¹³⁵ See generally Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 FORDHAM INTELL. PROP., MEDIA, & ENT. L.J. 1311, 1316–19; *Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies*, YALE L. SCH.: THE AVALON PROJECT, http://avalon.law.yale.edu/17th_century/westphal.asp [<https://perma.cc/4BSC-R435>].

¹³⁶ Juliane Kokott, *States, Sovereign Equality*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 6 (Heidelberg and Oxford University Press 2013).

¹³⁷ See, e.g., HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 207 (The Lawbook Exchange 2002).

¹³⁸ See Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145 (1972–1973).

¹³⁹ *Id.* at 147.

¹⁴⁰ See, e.g., The Case of S.S. Lotus (France v. Turkey) (The *Lotus Case*), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶¶. 45, 46 (Sept. 7) (“Now the first and foremost restriction imposed

6. Jurisdiction as a Principle in International Law

General principles of jurisdiction principles are reflected in individual jurisdictional regimes, such as environmental or human rights law and treaties and customs they have been founded on. These normative frameworks are adapted and applied respectively to each state's capacity to establish norms (prescriptive jurisdiction), enforce them (executive jurisdiction), and adjudicate violations (judicial jurisdiction). The matrix of territorial, personal, and effective grounds for state's exercising jurisdiction as a facet of their sovereignty can be identified in a set of principles reflected, fully or in part, in all relevant international documents and accompanying practice. In order of frequency of their application, one can identify six jurisdictional principles, which include: (1) subjective territorial jurisdiction; (2) objective territorial jurisdiction, also known as effective jurisdiction; (3) active personal jurisdiction; (4) passive personal jurisdiction; (5) protective jurisdiction and (6) universal jurisdiction.¹⁴¹

Territorial jurisdiction, in its most narrow reiteration and at times referred to as subjective territorial jurisdiction, implies states' exclusive competence to regulate activities and events within their territorial borders.¹⁴² As noted above, this is done through adjudication and enforcement of laws. According to this principle, jurisdiction in its prescriptive, executive, or judicial form cannot reach beyond state borders and as such is the most specific and concise approach to sovereignty. This principle usually serves as the primary and fundamental rule of any normative activity of a state. Any restriction on this emanation of state sovereignty can only result from international law, such as humanitarian or human rights law, e.g. prohibiting discrimination. This specific aspect of territorial jurisdiction supports the implementation of the rule of law principle, where actions within a state's territory and in accordance with its national laws may be in breach of international legal standards.¹⁴³

States may also act however when an act or event is outside their territorial borders, but its impact or result happens to fall within them. This precondition for exercising authority is usually referred to as effective jurisdiction, although it is an

by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.”). *See also* A. Bos, *The Extraterritorial Jurisdiction of States: Preliminary Report*, 65(1) Y.B. THE INST. OF INT'L L. 39 (1993) (naming discretionary assessment the essence of jurisdiction).

¹⁴¹ B.J. George, Jr., *Jurisdictional Bases for Criminal Legislation and Enforcement*, 4 MICH. J. INT'L L. 3, 3–4 (1983).

¹⁴² *Id.*

¹⁴³ *See, e.g.*, CJM Safferling, *German Participation in the Nuremberg Trials and Its Implications for Today*, in THE NUREMBERG WAR CRIMES TRIAL AND ITS POLICY 41 (Beth A. Griech-Polle ed., Nomos 2020).

extension on the notion of territoriality.¹⁴⁴ This principle can be applied with regard to external events that allow for criminal persecution of cross-border torts or crimes with substantial effects within state territory.

The principle of personal jurisdiction complements the two identified above by allowing a state to act outside its territory with regard to its nationals residing, temporarily or permanently, abroad. It is the principle usually referenced when states exercise diplomatic care or with regard to individuals' duties. In the latter case, personal jurisdiction can be evoked when enforcing tax or criminal laws against citizens residing abroad, though in the criminal case only when the precondition of double penalty is met, and the enforcement is supported by effective bilateral agreements. This way of referencing nationality for a state to exercise its authority can be described as "active" personal jurisdiction as it targets the "actor" behind a given event or occurrence.

Complementarily, there is also the passive personal jurisdiction, which is based on a link between the national who had fallen victim to a violation while abroad. Up until the early twenty-first century, states were reluctant to include passive personality principle into the array of applicable jurisdictional norms, primarily for diplomatic reasons. They found it unsuitable to imply that a state, within whose territorial jurisdiction the individual had found themselves and suffered harm, was falling short of its duty of protection and/or persecution of the crime.¹⁴⁵ For this reason the use of passive personal jurisdiction was limited to cases of hostage taking,¹⁴⁶ offences against diplomatic personnel,¹⁴⁷ and torture.¹⁴⁸

Yet as the threat of terrorist attacks increased, more states found it justifiable to reach beyond their territories to seek justice for their nationals who had fallen victim to terrorist crimes abroad. This surge in terrorist motivated crimes was accompanied by certain states' reluctance to persecute relevant crimes and prosecute culprits.¹⁴⁹

¹⁴⁴ See, e.g., *The Lotus Case*, 1927 P.C.I.J. at ¶ 95 (J. Loder, dissenting) ("Turkey, having arrested, tried, and convicted a foreigner for an offence which he is alleged to have committed outside her territory, claims to have been authorized to do so by reason of the absence of a prohibitive rule of international law"); MICHAEL HIRST, *JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW* 45–47 (L. Henkin ed. 2003); *RESTATEMENT OF THE LAW (FOURTH): FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 402(d) (AM. L. INST. 2018).

¹⁴⁵ On the international law principle of protection of aliens, see, e.g., J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE*, 276–304 (6th ed. 1963) (discussing the "Limitation upon a State's Treatment of Aliens"); CRAWFORD, *supra* note 40, at, 542–45.

¹⁴⁶ G.A. Res. 146 (XXXIV), 34th Sess., Supp. No. 46, International Convention Against the Taking of Hostages, U.N. Doc. A/34/46 (1979).

¹⁴⁷ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 1035 U.N.T.S. 167.

¹⁴⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁴⁹ For the "unwilling and unable" doctrine, see, e.g., Niaz A. Shah, *The 'Unwilling' and 'Unable' Test in International Law: The Use of Force against Non-State Actors in Pakistan and Afghanistan*, 4 *ASIAN Y.B. HUM. RTS. & HUMANITARIAN L.*, 109–38 (2020).

Similar reasons can be evoked for the increase in references to the principle of protective jurisdiction, allowing a state to act when there is a reasonable suspicion of a direct threat to its vital interests arising from acts or omissions outside its territory. The leading case exemplifying this principle was the joint US/UK intervention in Iraq in 2003, aimed at identifying and defeating nuclear weapons possessed by Baghdadi authorities, causing a direct threat to the national security interests of the respective countries.¹⁵⁰ While disputed for its scope, criteria and application, the principle of protective jurisdiction holds a well-established place in international legal scholarship and practice.

To complete this brief summary of international jurisdictional principles, universal jurisdiction must be mentioned. Dating back to medieval times and based on the universal consent on the need to prosecute maritime piracy as harmful to the safety and economic benefit of all sovereigns, universal jurisdiction allows for the persecution of certain categories of crimes recognized as most grave and detrimental to international peace and security.¹⁵¹ While the catalogue of crimes under universal jurisdiction are non-exclusive, under international treaties it applies to crimes covered by international criminal law with the Rome Statute of the International Criminal Court defining them in much detail.¹⁵² Universal jurisdiction has also been mentioned as applicable to some categories of terrorist crimes, just to such international treaties aimed at ensuring maritime or air traffic security.¹⁵³ While significantly limited in scope, universal jurisdiction allows for the persecution of individuals who are suspected of having committed any crime within this category by any national court or relevant international tribunal. Human rights law violations fall within the ambit of universal jurisdiction as per specific provisions of international humanitarian law and the ICC Statute.¹⁵⁴

7. Jurisdiction Under International Human Rights Law

Human rights treaties provisions are not the only normative framework applicable to the issue at hand. Referring to the example used above, the Istanbul Convention

¹⁵⁰ See Iain Cameron, *International Criminal Jurisdiction, Protective Principle*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2007) (referring to the ‘protective principle’ (Staatschutzprinzip) as a “principle of international criminal jurisdiction permitting a State to grant extraterritorial effect to legislation criminalizing conduct damaging to national security or other central State interests”); see also THE IRAQ WAR AND INTERNATIONAL LAW 23–34 (Philip Shiner & Andrew Williams eds. 2008); MARC WELLER, *IRAQ AND THE USE OF FORCE IN INTERNATIONAL LAW* (2010).

¹⁵¹ See THOMAS HEEBØLL-HOLM, *PORTS, PIRACY, AND MARITIME WAR*, 192–94 (Brill 2013).

¹⁵² Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

¹⁵³ J. Jin & E. Techera, *Strengthening Universal Jurisdiction for Maritime Piracy Trials to Enhance a Sustainable Anti-Piracy Legal System for Community Interests*, 13 SUSTAINABILITY, 13 (2021).

¹⁵⁴ See generally Darren Hawkins, *Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality*, 9 GLOB. GOVERNANCE 347 (2003).

is part of the Council of Europe's framework for human rights protection, its provisions need to be interpreted in line with relevant treaties such as the, for example, the European Convention on Human Rights as well as other relevant treaties. Should those include jurisdictional provisions, which can be applied to specific gender-based crime as per their circumstances, relevant safeguards are to be activated, while access to comprehensive and comprehensible information must be ensured to potential victims. Once national legal remedies have been exhausted, those who have fallen victim to individual offences are in disposal of recourse to regional and international treaty-based complaints procedures. Reaching beyond the CoE treaties, victims can use procedures enshrined in international organization efforts, for example, such as the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women and specified in the recommendations of the Committee on the Elimination of Discrimination against Women.¹⁵⁵

The 1998 Rome Statute of the International Criminal Court (ICC) introduced the first universally implementable binding treaty to pursue perpetrators of the gravest international crimes, implementing the principle of universal jurisdiction.¹⁵⁶ Building upon the experience of temporary criminal courts from 1948 onward, it reinstates a catalogue of offences covered by universal jurisdiction. Although it has only been implemented only by 60 parties thus far, it serves as the ultimate reference for identifying criteria for universal jurisdiction over gender-based crimes. As noted above, victims of gender-based crimes—as per the Istanbul Convention—are to be informed also of other avenues for international recourse of the crimes, to which they have fallen victim to. The universal jurisdiction of the ICC, as per Article 5 of the Rome Statute, can be implemented over the crime of genocide, crimes against humanity, as well as war crimes.¹⁵⁷

The Rome Statute includes provision on a broad range of sexual and gender-based crimes. These explicitly include proscribing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence committed as war crimes and crimes against humanity.¹⁵⁸ The key category of “gender” is defined for the purpose of this treaty and constitutes a ground for qualifying a crime against humanity for persecution.¹⁵⁹ Under the Rome Statute, sexual and gender-based crimes may be considered within the jurisdiction of the ICC granted they meet the criteria set for acts of genocide, other crimes against humanity, or war crimes. Should this be the case, the ICC Rules of Procedure and Evidence are to be applied, including the right to individual prosecution of suspects.¹⁶⁰ Cases of complementary jurisdiction between the CoE Istanbul Convention and the Rome Statute

¹⁵⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 2979, 1249 U.N.T.S. 13.

¹⁵⁶ See Rome Statute, *supra* note 152.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

cover, for example, cases of sexual and gender-based crimes to be qualified as war crimes, crimes against humanity or genocide. This qualification will be made according to the Statute and Rules of procedure with due reference to the type, way of commission, intention, impact, and circumstances of each individual crime.

CONCLUSION

Protecting human rights in the contemporary world of geopolitical conflict and globalization may seem a particularly difficult challenge, yet international law provides detailed guidelines for their enforcement. Rich human rights jurisprudence and scholarly writing allow for identification of the limits of allowed intrusions of individual rights, while international law on state responsibility contains states' obligation to actively prevent breaches of human rights within their jurisdictions. The crucial element for the successful human rights protection is not the legal challenge but rather the lack of political will. Such political will may be induced by the civil society, aware of individuals' rights and states' obligations. While national or regional perceptions of human rights such as privacy, data protection, or free expression differ, the existing body of international human rights law makes it possible to identify enforceable standards and safeguards. As the recent example of the European Unions' General Data Protection Regulation shows, globalization of online markets is inducing extraterritorial implementation of regional human rights standards. While this is not an easy task, the global community of peers, should it decide to further develop the digital realm they have created, must look into human rights law once again and ensure all peers act with due care in enforcing the standards they have universally agreed upon.