

## THE RELEVANCE OF THE CONCEPT OF DUE DILIGENCE FOR INTERNATIONAL HUMANITARIAN LAW

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### ABSTRACT

This article explores the relevance of due diligence for international humanitarian law. The article identifies international humanitarian law rules requiring the application of due diligence and demonstrates that the use of the concept of due diligence in international humanitarian law strengthens some well-established ideas on due diligence in general international law. Finally, the article argues that the inclusion of some due diligence obligations in international humanitarian law furthers states' implementation of this branch of law.

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## INTRODUCTION

This article provides one of the first assessments of the role of due diligence in international humanitarian law.<sup>1</sup> To the best knowledge of this author, despite the growing attention of international scholarship to the notion of due diligence in international law<sup>2</sup> and a well-established academic literature on state responsibility for international humanitarian law violations,<sup>3</sup> only two short studies specifically dealing with due diligence in international humanitarian law have appeared so far.<sup>4</sup> Even the two reports of the International Law Association (“ILA”) on due

<sup>1</sup> For practical reasons, in this article, the expressions “international humanitarian law”, “*jus in bello*”, and “the law of armed conflict” are employed as synonyms. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, at 256 (July 8) [hereinafter Nuclear Weapons Opinion].

<sup>2</sup> See generally RICCARDO PISILLO MAZZESCHI, “DUE DILIGENCE” E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI (1989) [hereinafter PISILLO MAZZESCHI, DUE DILIGENCE]; Riccardo Pisillo Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 9 (1992) [hereinafter Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*]; Robert P. Barnidge, *The Due Diligence Principle Under International Law*, 8 INT’L COMM. L. REV. 81 (2006); JOSÉ FERNANDO LOZANO CONTRERAS, LA NOCIÓN DE DEBIDA DILIGENCIA EN DERECHO INTERNACIONAL PÚBLICO (2007); Timo Koivurova, *Due Diligence*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. (2010); JOANNA KULESZA, DUE DILIGENCE IN INTERNATIONAL LAW (2016); LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE (Société Française pour le Droit International & Sarah Cassella eds., 2018).

<sup>3</sup> For an overview, see generally Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, in 88 RECUEIL DES COURS 263 (1955), reprinted in RESPONSIBILITY OF STATES FOR UNLAWFUL ACTS OF THEIR ARMED FORCES (1957); Fritz Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 INT’L & COMP. L.Q. 827 (1991); PIERRE D’ARGENT, LES RÉPARATIONS DE GUERRE EN DROIT INTERNATIONAL PUBLIC (2002); Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT’L REV. RED CROSS 401 (2002) [hereinafter Sassòli, *Responsibility for Violations*]; ANDREA GATTINI, LE RIPARAZIONI DI GUERRA NEL DIRITTO INTERNAZIONALE (2003); Marco Longobardo, *Rapporti fra strumenti di codificazione: il progetto di articoli sulla responsabilità degli Stati e le convenzioni di diritto umanitario*, 101 RIVISTA DI DIRITTO INTERNAZIONALE 1136 (2018) [hereinafter Longobardo, *Rapporti fra strumenti di codificazione*].

<sup>4</sup> See generally Gabriella Venturini, *Les obligations de diligence dans le droit international humanitaire*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, supra note 2, at 135; Antal Berkes, *The Standard of Due Diligence as a Result of Interchange Between the Law of Armed Conflict and General International Law*, 23 J. CONFLICT & SEC. L. 433 (2018).

diligence dedicate only a few pages to international humanitarian law.<sup>5</sup> However, as this article aims to demonstrate, due diligence plays a substantial role in relation to a significant number of rules of the law of armed conflict, and international humanitarian law implementation benefits from a proper understanding of the notion of due diligence.

For the purposes of this article, international humanitarian law refers to the rules protecting potential or actual victims of armed conflicts and the rules on the conduct of hostilities. Accordingly, this article neither addresses the role of due diligence in neutrality nor in the law of arms control and arms trafficking.<sup>6</sup> Similarly, the article does not explore the topic of due diligence in international human rights law, which is today, in principle, considered applicable to situations of armed conflict as long as there is an exercise of state jurisdiction.<sup>7</sup>

In order to study the relevance of due diligence in international humanitarian law, this article opens with an analysis of the notion of due diligence under general international law. Subsequently, the article explores which rules of international humanitarian law require the application of due diligence in relation to: (i) the implementation of international humanitarian law; (ii) the conduct of hostilities; (iii) the protection of civilians or persons *hors de combat*; (iv) the law of occupation; and (v) the law on non-international armed conflict. The article then goes on to assess whether the employment of the notion of due diligence in international humanitarian law is consistent with the way in which due diligence is understood in general international law, demonstrating a clear harmony and convergence between the use of this notion in the two areas. The final Part of the article discusses whether the

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<sup>5</sup> ILA Study Grp. on Due Diligence in Int'l Law, *First Report*, INT'L L. ASS'N, at 11–14 (Mar. 7, 2014), <http://www.ila-hq.org/download.cfm/docid/EB075BB9-E130-4B48-99745A01E9E1E8FB> [<https://perma.cc/ZQD7-LPG5>] [hereinafter ILA First Report]; ILA Study Grp. on Due Diligence in Int'l Law, *Second Report*, INT'L L. ASS'N, at 20 (July, 2016) [hereinafter ILA Second Report].

<sup>6</sup> See Robert Kolb, *Human Rights and Humanitarian Law*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 1 (2013).

<sup>7</sup> See, e.g., Nuclear Weapons Opinion, Advisory Opinion, 1996 I.C.J. Rep. 226, at 240 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 105–6 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, at ¶¶ 216–17 (Dec. 19); On due diligence in international human rights law, see generally Riccardo Pisillo Mazzeschi, *Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme*, in 333 RECUEIL DES COURS 175 (2008) [hereinafter Pisillo Mazzeschi, *Responsabilité de l'État pour violation*]; and, more recently, Helene Raspail, *Due diligence et droits de l'homme*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, *supra* note 2, at 107–134.

notion of due diligence strengthens the implementation of international humanitarian law or whether it undermines its application, arguing that due diligence obligations are fit to regulate the reality of the battlefield and contribute to expand state accountability in relation to armed conflict.

## I. THE NOTION OF DUE DILIGENCE IN INTERNATIONAL LAW

Due diligence in international law has been described as a “notion,” “concept,” “standard,” and “principle,” which has been studied mainly in relation to state responsibility,<sup>8</sup> even though, technically, due diligence is not a component of state responsibility.<sup>9</sup> Due diligence has emerged in international law through arbitral decisions, mixed claims commissions, and state practice between the end of 19th century and the beginning of 20th century.<sup>10</sup> Today, due diligence has become a very commonly employed notion in international law.<sup>11</sup>

Due diligence may be defined as a standard of care<sup>12</sup> that must be applied in order to assess states’ compliance with international obligations of conduct.<sup>13</sup> According to the African Commission on Human and Peoples’ Rights, “[t]he doctrine of due diligence is therefore a way to describe the threshold of action and effort which a state must demonstrate to fulfill its responsibility” under certain norms.<sup>14</sup> According to the International Court of Justice (“ICJ”), it is clear that, in relation to obligation of conduct, “a state cannot be under an obligation to succeed,

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<sup>8</sup> See Serena Forlati, *L’objet des différentes obligations primaires de diligence: prévention, cessation, répression...?*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, *supra* note 2, at 40.

<sup>9</sup> On the interplay between the law of state responsibility and the emergence of due diligence, see generally Sarah Cassella, *Les travaux de la Commission du droit international sur la responsabilité internationale et le standard de due diligence*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, *supra* note 2, at 11.

<sup>10</sup> On the historical origins of due diligence, see generally Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N. Y. U. J. INT’L L. & POL. 265, 300–01 (2004).

<sup>11</sup> On the risks of an over-application of the notion of due diligence, see Riccardo Pisillo Mazzeschi, *Le chemin étrange de la due diligence: d’un concept mystérieux à un concept surévalué*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, *supra* note 2, at 323.

<sup>12</sup> See Robert Kolb, *Reflections on Due Diligence and Cyberspace*, 58 GERMAN Y.B. INT’L L. 115, 117 (2015) [hereinafter Kolb, *Due Diligence and Cyberspace*].

<sup>13</sup> Koivurova, *supra* note 2, ¶ 1.

<sup>14</sup> Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2002, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 147 (May 15, 2006), [www.achpr.org/communications/decision/245.02/](http://www.achpr.org/communications/decision/245.02/) [https://perma.cc/J9GT-M9M2].

whatever the circumstances, in preventing” a specific event, but rather, the obligation is “to employ all means reasonably available to them, so as to” reach the desired result “so far as possible.”<sup>15</sup> Accordingly, a state “does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the state manifestly failed to take all measures [. . .] which were within its power” to prevent the event.<sup>16</sup> Indeed, due diligence obligations require a state to constantly monitor its implementation of international obligations of conduct. As the ICJ affirmed, a due diligence obligation “entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators.”<sup>17</sup>

The concept of obligations of conduct (or means) in opposition to obligations of result has been suggested by the International Law Commission’s (“ILC”) Special Rapporteur Roberto Ago. Ago considered that “[t]here is a breach by a state of an international obligation requiring it to adopt a particular course of conduct when the conduct of that state is not in conformity with that required of it by that obligation,” and that “[t]here is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation.”<sup>18</sup> In Ago’s view, obligations of conduct were more stringent than obligations of result since they would prescribe a specific conduct to be performed with no leeway, while obligations of result would have allowed a state to choose its means to implement a specific duty. The Special Rapporteur also considered obligations of prevention as obligations of negative result, which allowed states to perform any conduct as long as the event that must be prevented did not occur.<sup>19</sup> However, the

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<sup>15</sup> Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26).

<sup>16</sup> *Id.*

<sup>17</sup> Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 197 (Apr. 20).

<sup>18</sup> See Draft Articles 20 and 21 and the accompanying commentary in Roberto Ago (Special Rapporteur on State Responsibility), *Sixth Rep. on State Responsibility*, at 8–43, U.N. Doc. A/CN.4/302 (July 15, 1977).

<sup>19</sup> Roberto Ago (Special Rapporteur on State Responsibility), *Seventh Rep. on State Responsibility*, at 32–37, U.N. Doc. A/CN.4/307 (July 4, 1978).

ILC did not share Ago's view, and the distinction was not incorporated in the final Draft Articles on the Responsibility of States ("DARS").<sup>20</sup>

In contemporary international law, the distinction between obligations of result and obligations of means is still relevant but, paradoxically, constructed in a way opposite to that purported by Ago.<sup>21</sup> Following a civil law distinction,<sup>22</sup> which was transplanted to international law first by Paul Reuter,<sup>23</sup> obligations of result demand states to specifically perform a certain action that is the aim of a specific duty; in contrast, obligations of conduct require states to "deploy adequate means, to do the utmost, to obtain [a certain] result,"<sup>24</sup> without demanding any specific conduct.<sup>25</sup> In relation to these obligations, states may not be held responsible if, notwithstanding their diligent conduct, the result is not obtained.<sup>26</sup> Accordingly, while "the obligation of result is an obligation to

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<sup>20</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2 Y.B. INT'L L. COMM'N 26, 27 U.N. Doc. A/CN.4/L.602/REV.1/2001 (2001) [hereinafter DARS].

<sup>21</sup> On the significant differences between Ago's view and the concept of obligations of means or conduct and obligations of result in contemporary international law, see generally Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999); Andrea Gattini, *Breach of International Obligations*, in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 25, 35–36 (André Nollkaemper & Ilias Plakokefalos eds., 2014).

<sup>22</sup> See JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 221 (2013) (discussing the civil law origins of the notion of due diligence).

<sup>23</sup> PAUL REUTER, *DROIT INTERNATIONAL PUBLIC* 56–59 (1958); Paul Reuter, *Principes de droit international public*, in 103 RECUEIL DES COURS 9, 472, 598–99 (1962).

<sup>24</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in Area (Nauru v. Tonga)*, Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 ITLOS Rep. 9, 41.

<sup>25</sup> On the contemporary understanding of this distinction in international law, see generally Jean Combacau, *Obligations de résultat et obligations de comportement: quelques questions et pas de réponse*, in MÉLANGES OFFERTS A PAUL REUTER 182 (1981); Benedetto Conforti, *Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme*, in STUDI IN MEMORIA DI MARIO GIULIANO 373 (1989); ANTONIO MARCHESI, *OBBLIGHI DI CONDOTTA E OBBLIGHI DI RISULTATO: CONTRIBUTO ALLO STUDIO DEGLI OBBLIGHI INTERNAZIONALI* (2003); Constantin P. Economidés, *Content of the Obligation: Obligations of Means and Obligations of Result*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 371 (James Crawford et al. eds., 2010); Rüdiger Wolfrum, *Obligation of Result versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 363 (Mahnoush H. Arsanjani et al. eds., 2010); Marco Longobardo, *L'obbligo di prevenzione del genocidio e la distinzione fra obblighi di condotta e di risultato*, 13 DIRITTI UMANI E DIRITTO INTERNAZIONALE 237 (2019) [hereinafter Longobardo, *L'obbligo di prevenzione del genocidio*].

<sup>26</sup> See *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26); see also, *Heathrow Airport User Charges (U.S. v. U.K.)*, 24 R.I.A.A. 1, 73 (Perm. Ct. Arb. 1993); *Armed Activities*

‘succeed,’ [. . .] the obligation of diligent conduct is an obligation to ‘make every effort.’”<sup>27</sup> This distinction is applied today by international courts and tribunals and has rendered Ago’s suggestion obsolete.<sup>28</sup>

It should be noted that some scholars suggest that another kind of obligation exists: obligations of progressive realization, which would require a diligent conduct aimed at the attainment of a specific result that must be reached in order to avoid international responsibility.<sup>29</sup> While most of these obligations are embodied in international human rights law conventions,<sup>30</sup> some of them are relevant for international humanitarian law as well.<sup>31</sup> However, they are outside the scope of this essay.

With regard to obligations of conduct, the expression “due” diligence refers to the fact that any specific obligation of conduct requires a certain diligence from states in deploying adequate means to reach a certain result, rather than demanding the achievement of the result *tout court*. Although obligations of conduct are not rare in international law, not every obligation must be assessed with reference to due diligence. For instance, negative obligations are always obligations of result and accordingly, they do not allow the application of due diligence. Similarly, some positive obligations, such as those pertaining to the creation of administrative bodies, are obligations of result.<sup>32</sup>

Only those positive obligations that regulate the relationship between a state and a source of risk are obligations of diligent conduct.<sup>33</sup> Territorial sovereignty is one of the legal factors linking a state to some hazardous activities. Indeed, when there is “a substantial foreseeable risk to a significant legal value which the state can influence, by its available means [in light of] a means–end relationship,” then states are placed under

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on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, at ¶ 352 (Dec. 19) (separate opinion by Judge Tomka, P.).

<sup>27</sup> Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 48.

<sup>28</sup> See, e.g., Bosnia v. Serbia, 2007 I.C.J. Rep. ¶ 430; Nauru v. Tonga, 17 ITLOS Rep. at 34; see also Edwards v. United Kingdom, 2002-II Eur. Ct. H.R. 137, 165 (2002); Bărbulescu v. Romania, App. No. 61496/08, Eur. Ct. H.R. ¶ 23 (2017).

<sup>29</sup> Pisillo Mazzeschi, *Responsabilité de l'état pour violation*, *supra* note 7, at 290–97.

<sup>30</sup> *Id.* at 429–89.

<sup>31</sup> Berkes, *supra* note 4, at 434.

<sup>32</sup> Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 46; ILA Second Report, *supra* note 5, at 20.

<sup>33</sup> Pasquale De Sena, *La «Due Diligence» et le lien entre le Sujet et le Risque qu'il faut Prévenir: Quelques Observations*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, *supra* note 2, at 243.

due diligence obligations.<sup>34</sup> Accordingly, the degree of diligence may “change in relation to the risks involved in the activity.”<sup>35</sup>

From a general perspective, due diligence obligations are primarily connected with state activity involving the exercise of governmental functions over territory and individuals. Governmental activity over territory triggers some due diligence obligations such as the duty not to allow private actors to use one state’s territory to harm another state,<sup>36</sup> whereas the exercise of governmental functions over individuals is at the origin of the due diligence duties to protect foreigners and nationals from interference with their rights.<sup>37</sup> Additionally, due diligence obligations apply when a state is involved in inherently hazardous activities.<sup>38</sup> Although territorial sovereignty is the primary link between a state and a risk, due diligence obligations may be triggered by extraterritorial exercise of state jurisdiction and extraterritorial forms of control.<sup>39</sup>

The structure of a specific obligation of conduct, either customary or conventional, determines case-by-case which is the diligence that is due *in concreto*.<sup>40</sup> With reference to treaty provisions, the elements that are relevant for treaty interpretation—text, context, object, and purpose<sup>41</sup>—

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<sup>34</sup> Anja Seibert-Fohr, *From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?*, 60 GERMAN Y.B. INT’L L. 667, 695 (2017); see generally De Sena, *supra* note 33.

<sup>35</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Nauru v. Tonga), Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 ITLOS Rep. 9, 36.

<sup>36</sup> Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, Separate Opinion of Vice-President Ammoun, ¶ 14 (June 21); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20); see also, Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISR. Y.B. HUM. RTS. 233, 240 (1989).

<sup>37</sup> See the practice analyzed by Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 34–36.

<sup>38</sup> See, e.g., *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, 2 Y.B. INT’L L. COMM’N 154, ¶ 10 (2001).

<sup>39</sup> See, e.g., Federica Violi, *The Function of the Triad “Territory”, “Jurisdiction”, and “Control” in Due Diligence Obligations*, in *DUE DILIGENCE IN INTERNATIONAL LAW* (Anne Peters & Heike Krieger eds.) (forthcoming) (on file with author).

<sup>40</sup> Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26).

<sup>41</sup> See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; on the interpretation of the treaties, see generally, ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES* (2007); ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* (2008); TREATY INTERPRETATION AND THE

must be taken into account. In relation to customary international law, it is necessary to study carefully state practice and *opinio juris* in relation to the implementation of specific duties to find out whether due diligence plays any role.

It should be noted that there is no due diligence standard applicable to *every* obligation of conduct; rather, different primary obligations may require different standards of care.<sup>42</sup> The assessment of a state's diligence in a specific circumstance depends on several factors. These factors include control over territory, degree of influence of a state over the author of unlawful conduct, level of technological development of the state, and the degree of harm.<sup>43</sup>

Consequently, due diligence is a component of certain primary obligations rather than an element relevant for secondary rules on state responsibility.<sup>44</sup> This was clear in the original distinction proposed by Ago, which was related to the modes of commission of a wrongful act in relation to certain primary obligations rather than to a different regime applicable to their violations.<sup>45</sup> On this basis, since the final DARS focused on secondary rules, the ILC removed any reference to due diligence and to the dichotomy between obligations of conduct and of result.<sup>46</sup> Although the distinction between primary and secondary norms in the DARS is not as crystal clear as in Ago's view,<sup>47</sup> and notwithstanding some scholarly

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VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON (Malgosia Fitzmaurice et al. eds., 2010); INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi et al. eds., 2015); RICHARD K. GARDINER, TREATY INTERPRETATION (2d ed. 2017); CHANG-FA LO, TREATY INTERPRETATION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES: A NEW ROUND OF CODIFICATION (2017).

<sup>42</sup> See ILA Second Report, *supra* note 5, at 20; KULESZA, *supra* note 2, at 108; VLADYSLAV LANOVY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 11 (2016).

<sup>43</sup> See Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 44–45; Berkes, *supra* note 4, at 44–50.

<sup>44</sup> See U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 31, 41 (May 24); Construction of a Road in Costa Rica along San Juan River (Nicar. v. Costa Rica), 2015 I.C.J. Rep. 665, 3 ¶ 9 (Dec. 16) (separate opinion by Donoghue, J.); DARS, *supra* note 20, at 34. On the distinction between primary and secondary international law rules, see generally Eric David, *Primary and Secondary Rules*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 25, at 27; Giorgio Gaja, *Primary and Secondary Rules in the International Law on State Responsibility*, 97 RIVISTA DI DIRITTO INTERNAZIONALE 981 (2014).

<sup>45</sup> See Jean Combacau & Dennis Alland, "Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations, 16 NETH. Y.B. INT'L L. 81, 85 (1985).

<sup>46</sup> See DARS, *supra* note 20, at 34.

<sup>47</sup> Report of the International Law Commission on the Work of Its Thirty-Second Session (5 May – 25 July 1980), [1980] 2 Y.B. I.L.C. 27, ¶ 23, U.N. Doc. A/CN.4/SER.A/1980/Add.1.

references to due diligence as a notion pertaining to state responsibility,<sup>48</sup> most authors agree that the application of due diligence is linked to the structure of primary norms.<sup>49</sup> It follows that due diligence is not an autonomous rule of international law, nor is it an autonomous general principle of international law.<sup>50</sup> Rather, due diligence is a notion that must be applied in order to comply with some obligations of conduct that are embodied in treaty or customary international law.<sup>51</sup>

Replacing the old concept of negligence and fault,<sup>52</sup> due diligence obligations are concerned with objective behavior that states are required to undertake in order to implement a certain obligation.<sup>53</sup> Accordingly, due diligence obligations cause a sort of “proceduralization” of relevant areas of international law, with specific impact on the law of armed conflict. A state that faces an allegation regarding a violation of a due diligence obligation only needs to demonstrate that it has implemented that duty with the required diligence. The state may so avoid international responsibility even if the event that the obligation wanted to forestall in fact, and notwithstanding the employed diligence, occurred. This is the

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<sup>48</sup> See Kolb, *Due Diligence and Cyberspace*, *supra* note 12, at 116–17 (due diligence “may also . . . constitute a secondary norm of state responsibility”).

<sup>49</sup> See Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 49; see also CRAWFORD, *supra* note 22, at 226–32. For further references, see the detailed analysis of Forlati, *supra* note 8.

<sup>50</sup> The idea that due diligence is a general principle of international law is implicit in *Construction along the San Juan River (Nicar. v. Costa Rica)*, 2015 I.C.J. Rep. 665, 60, ¶ 1 (Dec. 16) (separate opinion by Dugard, J.); see also, Awalou Ouedraogo, *La due diligence en droit international: de la règle de la neutralité au principe général*, 42 REV. GÉN. 641 (2012); Michael N. Schmitt, *In Defense of Due Diligence in Cyberspace*, 125 YALE L.J.F. 68 (2015); Jonathan Black-Branch, *Due Diligence as a Legal Concept to Ensure Security and Safety of Peaceful Uses of Nuclear Energy as well as Non-Proliferation and Disarmament Obligations*, in NUCLEAR NON-PROLIFERATION IN INTERNATIONAL LAW—VOLUME III 489, 491–92 (Jonathan Black-Branch & Dieter Fleck eds., 2016). On what is a general principle of international law, see generally Elena Carpanelli, *General Principles of International Law: Struggling with a Slippery Concept*, in GENERAL PRINCIPLES OF LAW: THE ROLE OF THE JUDICIARY 125 (Laura Pineschi ed., 2015); Giorgio Gaja, *General Principles of Law*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L., *supra* note 2.

<sup>51</sup> See Riccardo Pisillo Mazzeschi, *Le chemin étrange de la due diligence: d’un concept mystérieux à un concept surévalué*, in LE STANDARD DE DUE DILIGENCE ET LA RESPONSABILITÉ INTERNATIONALE, *supra* note 2, at 332–36.

<sup>52</sup> On the shift from fault to due diligence, see ENZO CANNIZZARO, DIRITTO INTERNAZIONALE 433–35 (3rd ed. 2018).

<sup>53</sup> See Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 42–44; ILA Second Report, *supra* note 5, at 4; Seibert-Fohr, *supra* note 34; *contra* Maja Seršić, *Due Diligence: Fault-Based Responsibility or Autonomous Standard?*, in CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF BUDISLAV VUKAS 151 (Rüdiger Wolfrum et al. eds., 2016).

conclusion reached by Judge Tomka with regard to duties of vigilance, which are typical examples of due diligence obligations:

The occurrence of harm does not necessarily prove that the duty of vigilance was breached. But its occurrence creates the presumption that the obligation of vigilance has not been complied with. In such a case it would be for the state which has the duty of vigilance . . . to demonstrate that it exerted all good efforts to prevent its territory from being misused for launching attacks against its neighbor in order to rebut such a presumption.<sup>54</sup>

It follows that due diligence obligations result in an inversion of the burden of proof: the state that allegedly violated these obligations has the burden to demonstrate that it has acted in a diligent way.<sup>55</sup>

On the basis of this understanding of the notion of due diligence, the following Part demonstrates that a significant number of international humanitarian law norms are obligations of conduct that require the application of the notion of due diligence in order to assess state compliance with them.

## II. DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMANITARIAN LAW

It is often affirmed that, at its origins, the law of armed conflict comprised primarily negative obligations and that everything that was not explicitly prohibited was to be considered permissible, in application of the so-called *Lotus* principle.<sup>56</sup> However, thanks to the process of so-called “humanization” of international humanitarian law,<sup>57</sup> it is no longer true that everything that is not explicitly prohibited by the law of armed conflict is permitted.<sup>58</sup> Contemporary *jus in bello* is a mix of prohibitions and permissions which require states to abstain from certain conduct (negative obligations), allow states to undertake certain other conduct (faculties/rights), and demand states to perform other conduct (positive

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<sup>54</sup> Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 352 (separate opinion by Judge Tomka, P.).

<sup>55</sup> Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 50.

<sup>56</sup> *SS Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

<sup>57</sup> See generally Alessandro Migliazza, *L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'Homme*, in 137 RECUEIL DES COURS 141 (1972); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

<sup>58</sup> See ROBERT KOLB, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 17–21 (2014) [hereinafter KOLB, *ADVANCED INTRODUCTION*].

obligations).<sup>59</sup> Taking into account this framework, this Part aims at identifying those international humanitarian law rules that require the application of due diligence. Indeed, due diligence must be applied only to *some* positive international humanitarian law obligations rather than to international humanitarian law as a whole.

As mentioned afore, assessing whether due diligence is relevant for an international humanitarian law obligation is a matter of interpretation of treaty law and of assessment of state practice and *opinio juris* in order to verify whether that specific obligation requires states to reach a specific result or to undertake diligent conduct. In order to navigate this maze, it is helpful to resort to some useful guidelines. The first guideline is that it is not possible to apply due diligence in relation to negative obligations. Accordingly, when an obligation is worded as a negative command (e.g., “thou shalt not kill”), then due diligence plays no role since a state may implement that obligation only reaching the specific negative result demanded by that obligation (e.g., the absence of any killing).<sup>60</sup> With regard to positive international humanitarian law obligations, some textual elements, taken into account along with the relevant context, object, and purposes, may guide the interpreter to find out which rules require the application of due diligence. Clearly, these textual elements are not available when the norms at stake are customary in nature rather than embodied in international conventions.

Among the positive international humanitarian law obligations requiring the application of due diligence, one can count the obligations to *protect* individuals from other actors’ interferences, which are regulated by due diligence not only in international humanitarian law, but in several branches of international law.<sup>61</sup> Additionally, when international humanitarian law provisions are worded as “duties of care,” or require the performance of certain conduct “as far as possible,” or to do “everything possible,” or to undertake “feasible measures” and other similar formulations, then, very likely, due diligence must be applied.<sup>62</sup> However, it should be emphasized that these expressions are not interchangeable, but in contrast, they identify different standards of diligence that are due in relation to specific obligations.

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<sup>59</sup> *See id.* at 19.

<sup>60</sup> *See* Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 46.

<sup>61</sup> *Id.* at 25–30, 34–36.

<sup>62</sup> *But see* Berkes, *supra* note 4, at 433 (according to whom only obligations of prevention, repression, and protection are true due diligence obligations).

For expositive reasons, the identification of international humanitarian law obligations requiring the application of due diligence is parted in five sub-parts: due diligence obligations in relation to the implementation of international humanitarian law; due diligence obligations pertaining to the conduct of hostilities; due diligence obligations regarding the protection of civilians and persons *hors de combat*; due diligence obligations upon the occupying power; and due diligence obligations in non-international armed conflicts.

#### A. DUE DILIGENCE OBLIGATIONS IN RELATION TO THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Due diligence plays a role with regard to a number of obligations pertaining to the application and implementation of international humanitarian law in relation to preventive and repressive measures that states must undertake both in peacetime and during armed conflict. The first rule that deserves close scrutiny is embodied in Article 1, common to the 1949 Geneva Conventions (“GCs”) and Article 1(2) of the 1977 First Additional Protocol (“API”), according to which states “undertake to respect and to ensure respect for” international humanitarian law “in all circumstances.”<sup>63</sup> These provisions embody two distinct obligations, the duty to respect and the duty to ensure respect for international humanitarian law, which deserve separate examination.<sup>64</sup>

The duty “to respect” international humanitarian law is just a repetition of the formula *pacta sunt servanda*<sup>65</sup> for conduct that is

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<sup>63</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 1 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

<sup>64</sup> See Luigi Condorelli & Laurence Boisson de Chazournes, *Quelques remarques à propos de l'obligation des États de «respecter et faire respecter» le droit international humanitaire «en toutes circonstances»*, in *ÉTUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* 17, 22–24 (Christoph Swinarski ed., 1984) (discussing the reason why the duties to respect and to ensure respect for international humanitarian law are two different obligations).

<sup>65</sup> See VCLT, *supra* note 41, art. 26.

attributable to the state. In this regard, it should be noted that international humanitarian law embodies some rules on attribution that are *lex specialis* in respect to the rules on attribution codified in the DARS; in particular, states, under Article 3 of the 1907 Fourth Hague Convention<sup>66</sup> and Article 91 of the API,<sup>67</sup> are responsible for *every conduct* of their armed forces, while, under Article 7 of the DARS, only conduct undertaken by organs in their official capacity are attributable to the state.<sup>68</sup> With regard to the duty to respect international humanitarian law, the notion of due diligence is relevant only to those specific rules requiring the application of due diligence,<sup>69</sup> regardless of whether the conduct attributable to a specific state occurs in its own territory or outside of it. This author does not share the old view that the rules on state responsibility for international humanitarian law violations are themselves due diligence obligations of prevention and prosecution.<sup>70</sup>

Conversely, the duty to “ensure respect” for international humanitarian law has a different nature: it covers conduct that is *not attributable to the state* under the law of international responsibility. The International Tribunal for the Law of the Sea (“ITLOS”) provides an accurate definition of the term “ensure”:

The expression “to ensure” is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a state liable for each and every violation committed by persons under its jurisdiction, it is equally not

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<sup>66</sup> “A belligerent party [. . .] shall be responsible for *all* acts committed by persons forming part of its armed forces.” Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 539 U.N.T.S. 639 (emphasis added).

<sup>67</sup> API, *supra* note 63, art. 91 (according to which “[A] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for *all* acts committed by persons forming part of its armed forces”) (emphasis added).

<sup>68</sup> This difference between the ordinary rules on attribution and those embodied in international humanitarian law conventions was first envisaged by Freeman, *supra* note 3, at 332–342; see also Luigi Condorelli, *L'imputazione à l'état d'un fait internationalment illicite: solutions classiques et nouvelles tendances*, in 189 RECUEIL DES COURS 9, 145–49 (1984); Sassòli, *Responsibility for Violations*, *supra* note 3, at 405–06. For a more recent account, see Longobardo, *Rapporti fra struenti di codificazione*, *supra* note 3, at 1145–50.

<sup>69</sup> See Marco Sassòli, *The Approach of the Eritrea-Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law*, in THE 1998–2000 WAR BETWEEN ERITREA AND ETHIOPIA 341, 348 (Andrea De Guttry, Harry H. Post & Gabriella Venturini eds., 2009). These rules are addressed in the following sub-parts.

<sup>70</sup> See Longobardo, *Rapporti fra struenti di codificazione*, *supra* note 3, at 1140–42. *Contra* *Affaire des biens britanniques au Maroc espagnol* (Spain v. U.K.), 2 R.I.A.A. 615, 645 (Perm. Ct. Arb. 1925). More recently, see Black-Branch, *supra* note 50, at 496.

considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the state under international law.<sup>71</sup>

Although the ITLOS' dictum originated from international law of the sea obligations, this view can be applied to the duty to ensure respect for international humanitarian law as well.

Originally, common Article 1 of the four GCs was envisaged to cover actions of individuals who were not members of the armed forces,<sup>72</sup> such as private business companies operating in the territory of the concerned state.<sup>73</sup> Common Article 1 of the four GCs is relevant also in relation to the conduct of individuals not belonging to the armed forces of a state, but fighting along with them, such as in the case of armed groups fighting on behalf of a state without belonging to its armed forces. As it is well-known, according to the ICJ<sup>74</sup> and the ILC,<sup>75</sup> the conduct of an armed group that is not placed under the effective control of a state is not attributable to that state; nonetheless, a less significant form of control is relevant under international law since when a state exercises overall control over the armed group, then it is possible to apply the rules on international armed conflict, as confirmed by most international criminal case law.<sup>76</sup> The first scenario (i.e., effective control of a state over the

<sup>71</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Nauru v. Tonga), Case No. 17, Advisory Opinion of Feb. 1, 2011, 17 ITLOS Rep. 9, 41.

<sup>72</sup> See Sassòli, *Responsibility for Violations*, *supra* note 3, at 412; Koivurova, *supra* note 2, ¶ 32; accord. Robert Kolb, *Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'article 1 commun des Conventions de Genève de 1949*, 47 REVUE BELGE DE DROIT INTERNATIONAL 513 (2013) [hereinafter Kolb, *Commentaires iconoclastes*].

<sup>73</sup> Kolb, *Commentaires iconoclastes*, *supra* note 72, at 515.

<sup>74</sup> See *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 64–65 (June 27); *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 400 (Feb. 26).

<sup>75</sup> DARS, *supra* note 20, at 47–48.

<sup>76</sup> See the famous statement of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); which was followed, *inter alia*, by the ICTY in the cases *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶¶ 131–34 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); *Prosecutor v. Kordić*, Case No. IT-95-14/2, Judgment, ¶¶ 306–08 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, ¶ 3014 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017); and by the International Criminal Court ("ICC") in the cases

armed group so that the latter belongs to the state) falls into the scope of the duty to respect international humanitarian law, whereas the state is under the duty to ensure respect for international humanitarian law in relation to armed groups under their overall control.<sup>77</sup> This rationale, which denies attribution and, at the same time, considers relevant another autonomous primary rule on prevention, was applied by the ICJ in the famous 2007 *Bosnian Genocide* case with regard to the obligation to prevent a genocide that is about to occur within or without the border of a state party to the UN 1948 Genocide Convention.<sup>78</sup>

However, the duty to ensure respect for international humanitarian law goes further, and encompasses also the duty to protect civilians from international humanitarian law violations committed by armed groups *without* affiliation to the state.<sup>79</sup> In this case, the assessment of the state's diligence would be less strict than with regard to armed groups affiliated with the state or under its overall control, since the relationship between the state and the risk is less intense.<sup>80</sup> Moreover, the duty to ensure respect for international humanitarian law is not only relevant for armed groups, but also applies to other entities, such as private military and security companies fighting on behalf of the state.<sup>81</sup>

Additionally, according to the International Committee of the Red Cross ("ICRC") and most scholars, the duty to ensure respect for international humanitarian law also has an "external dimension" that demands states to try to do the utmost to ensure respect for international

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Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Judgment, ¶ 541 (Apr. 5, 2012); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment, ¶ 1178 (Mar. 7, 2014).

<sup>77</sup> See *Nicar. v. U.S.*, 1986 I.C.J. Rep. at 114–15 (supporting a narrow interpretation); see also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3660 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). For a recent discussion on this, see Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539 (2017).

<sup>78</sup> *Bosnia v. Serbia*, 2007 I.C.J. Rep. at ¶ 427; for more on this duty, see generally Marco Longobardo, *Genocide, Obligations Erga Omnes and Responsibility to Protect*, 19 INT'L J. HUM. RTS. 1199 (2015); Longobardo, *L'obbligo di prevenzione del genocidio*, *supra* note 25.

<sup>79</sup> See Dieter Fleck, *International Accountability for Violations of the Us in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 179, 187–88 (2006); ILA First Report, *supra* note 5, at 13–14.

<sup>80</sup> The existence of this duty with reference to the protection of aliens is at the basis of the development of the concept of due diligence. See, e.g., *Italy-Venezuela Constituted Under the Protocols of 13 February and 7 May 1903*, 10 Rep. Int'l Arb. Awards 499 (1960). However, with regard to the protection of aliens, the focus was not on the protection from international humanitarian law violations and common Art. 1 of the four GCs.

<sup>81</sup> See generally Nigel D. White, *Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs*, 31 CRIM. JUST. ETHICS 233 (2012).

humanitarian law by other states.<sup>82</sup> In the ICRC's words, states "must exert their influence, to the degree possible, to stop violations of international humanitarian law."<sup>83</sup> Although states are reluctant to openly acknowledge the external dimension of common Article 1 of the four GCs,<sup>84</sup> corresponding state practice and *opinio juris* do exist.<sup>85</sup> To this end, one has to distinguish between the duty of a belligerent state to ensure respect for international humanitarian law by other states involved in coalition warfare—a scenario that is similar to that of armed groups not belonging to a belligerent state, but involved in an armed conflict on its side—and the duty of states not taking part in an armed conflict to ensure that the belligerents respect international humanitarian law. Clearly, in the former scenario, the assessment of state diligence is stricter rather than in the latter, since states, when cooperating in the accomplishment of military

<sup>82</sup> This view, famously advocated by Condorelli & Boisson de Chazournes, *supra* note 64, at 29, and Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82 INT'L REV. RED CROSS 67 (2000), is today accepted by the ICRC, *see, e.g.*, Jean-Marie Henckaerts, *Article 1: Respect and Ensure Respect*, in COMMENTARY ON THE FIRST GENEVA CONVENTION 35 (Int'l Comm. of the Red Cross ed., 2016); and by most scholars, *see, e.g.*, OSCAR M. UHLER ET AL., COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 15 (Jean Pictet ed., 1958); Giuseppe Barile, *Obligaciones erga omnes e individui nel diritto internazionale umanitario*, 68 RIVISTA DI DIRITTO INTERNAZIONALE 5 (1985); Paolo Benvenuti, *Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligation of Third States to Ensure Respect for International Humanitarian Law*, 1 Y.B. INT'L INST. HUMANITARIAN L. 27 (1989); Knut Dörmann & José Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707 (2014); Robin Geiß, *The Obligation to Respect and to Ensure Respect for the Conventions*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY 111 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); Andrea Breslin, *A Reflection on the Legal Obligation for Third States to Ensure Respect for IHL*, 22 J. CONFLICT & SECURITY L. 5 (2017).

<sup>83</sup> Rule 144 in JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 509 (vol. I: 2005).

<sup>84</sup> *See generally* Carlo Focarelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 EUR. J. INT'L L. 125 (2010) (arguing against this external dimension).

<sup>85</sup> *See, e.g.*, Int'l Conference on Human Rights, *Final Act of the International Conference on Human Rights*, ¶ 18, U.N. Doc. A/CONF.32/41 (May 13, 1968); the ICRC questionnaire quoted in Antonio Cassese, *Remarks on the Present Legal Regulation of Crimes of States*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 208–10 (Joseph H.H. Weiler, Antonio Cassese & Marina Spinedi eds., 1989); *User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*, at 55, COARM (2015) 172 final (July 20, 2015) (according to which Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party states not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations, and to take appropriate steps to cause such violations to cease. They have a particular responsibility to intervene with states or armed groups over which they might have some influence).

operations, are in a position to exercise a more significant degree of influence over the conduct of each other.<sup>86</sup> However, common Article 1 is also applicable by non-belligerent states, which are requested to exercise a less intense degree of diligence; as affirmed by the ICJ, “every state party to [the four GCs], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”<sup>87</sup> Although some domestic decisions have suggested a contrary view,<sup>88</sup> their interpretation runs against the object and purpose of international humanitarian law conventions and the basic assumption that some international humanitarian law obligations do in fact apply in peacetime to non-belligerent states.

It is worth pointing out that the duty to ensure respect is not an autonomous source of legitimacy for wrongful acts to be adopted in response to violations of international humanitarian law. Rather, the possibility of adopting countermeasures by states different from the directly injured state is related to the *erga omnes/erga omnes partes* character of some international humanitarian law rules<sup>89</sup> and to the consequences envisaged by secondary rules on state responsibility in cases of serious violations of such obligations.<sup>90</sup> As common Article 1 of the four GCs is a primary obligation, the duty to ensure respect for international humanitarian law is unrelated to secondary obligations pertaining to the adoption of countermeasures,<sup>91</sup> even though states may

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<sup>86</sup> Bérénice Boutin, *Responsibility in Connection with the Conduct of Military Partners*, 56 MIL. L. & L. WAR REV. 57, 63 (2017).

<sup>87</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 158 (June 9).

<sup>88</sup> Turp v. Minister of Foreign Affairs, [2017] F.C. 84, ¶¶ 72–74 (Can. Ont. Fed. Ct.); *but cf.* Robert Kolb, *L'article 1 commun des Conventions de Genève de 1949 sur le droit humanitaire s'applique-t-il seulement au conflit armé international?*, 28 SWISS REV. INT'L & EUR. L. 461 (2018) (criticizing this view).

<sup>89</sup> See Condorelli & Boisson de Chazournes, *supra* note 64, at 29–30; *see also*, Heike Krieger, *Rights and Obligations of Third Parties in Armed Conflict*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 448 (Eyal Benvenisti & Georg Nolte eds., 2018); Marco Longobardo, *The Contribution of International Humanitarian Law on the Development of the Law of International Responsibility Regarding Obligations Erga Omnes and Erga Omnes Partes*, 23 J. CONFLICT & SECURITY L. 383 (2018).

<sup>90</sup> On non-forcible countermeasures in response to violations of obligations *erga omnes* and obligations *erga omnes partes*, see Linos-Alexandre Sicilianos, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 25, at 1144–48; MARTIN DAWIDOWICZ, *THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW* (2017).

<sup>91</sup> See Giorgio Gaja, *The Protection of General Interests in the International Community*, in 364 RECUEIL DES COURS 9, 125 (2012).

implement the duty to ensure respect by adopting countermeasures in accordance with the law of international responsibility. Additionally, common Article 1 of the four GCs may require the adoption of inherently *lawful* but unfriendly measures against the state that violated international humanitarian law.

The respect for the duty to ensure respect for international humanitarian law, both with regard to its internal and external dimensions, must be assessed in light of due diligence.<sup>92</sup> With regard to conduct occurring in the territory of the contracting state, the due diligence assessment must take into account the degree of control exercised by the state, as well as the availability of preventive legislative measures and monitoring mechanisms, as in the case of positive obligations under international human rights law conventions. With regard to the conduct of co-belligerent states or armed groups whose actions are not attributable to the state, one author suggests that the relevant nexus between the state and the authors of international humanitarian law violations should be constructed on the basis of a “psychological link” between them;<sup>93</sup> however, this idea does not take into account the progressive reduction of relevance of “psychological” elements in international law, which contributed to the emersion of the concept of due diligence itself. Accordingly, it would be better to assess the state’s capacity to take all measures to prevent international humanitarian law violations in light of the state’s capacity to influence effectively the action of persons likely to commit, or already committing, international humanitarian law violations, on the basis of the link existing in fact between the state and the other actors. This test was described by the ICJ with regard to the duty to prevent genocide<sup>94</sup> and is applicable, *mutatis mutandis*, to the duty to ensure respect for international humanitarian law. According to this test, the state’s capacity to influence a violation of international humanitarian law depends, among other things, on the geographical distance of the state concerned from the scene of the events, on the strength of the political, ethnical, economic, and religious links between the authorities of that state

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<sup>92</sup> See Sassòli, *Responsibility for Violations*, *supra* note 3, at 412; Koivurova, *supra* note 2, ¶ 32; Geiß, *supra* note 82, at 118; Henckaerts, *supra* note 82, at 33–35; Hélène De Pooter, *L’affaire du Tramway de Jérusalem devant les tribunaux français*, 60 ANNUAIRE FRANÇAIS DE DROIT INT’L 45, 65 n.118 (2014) (quoting the statement of the French Ministry of Foreign Affairs in the case TA Paris, AFPS c. État français (Oct. 28, 2011), no. 1004813).

<sup>93</sup> De Sena, *supra* note 33, at 249.

<sup>94</sup> Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 430 (Feb. 26).

and the other actors in the events, as well as on the state's particular legal position vis-à-vis the situations and persons involved in international humanitarian law violations.<sup>95</sup>

Other autonomous international humanitarian law obligations to be assessed in light of due diligence may be seen as specifications of the duty to ensure respect for international humanitarian law. First, the rules regarding the dissemination and training of international humanitarian law as preventive measures to avoid international humanitarian law violations deserve attention. Under international humanitarian law conventions, states must issue instructions to their armed forces regarding compliance with international humanitarian law,<sup>96</sup> include international humanitarian law in the “programmes of military instruction,”<sup>97</sup> and integrate international humanitarian law in military training in order to foster a proper ethos of conducting hostilities while respecting international humanitarian law.<sup>98</sup> The idea underlying these provisions is that education and training in international humanitarian law enhances the implementation of *jus in bello* and, accordingly, the performance of these duties may be seen as a way to control a source of risk. One has to acknowledge that since the performance of these duties is covered by the domestic jurisdiction of every state, these obligations have not been addressed by any autonomous litigation so far, but have only played some role in relation to litigation concerning the respect for other international humanitarian law rules.<sup>99</sup> However, it is undeniable that they are described as obligations by the relevant conventions and, accordingly, in this author's view, the lack of their implementation may be a source of international responsibility.<sup>100</sup> Since these positive obligations govern a

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<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.*, Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 539 U.N.T.S. 631; API, *supra* note 63, art. 83(1).

<sup>97</sup> *See, e.g.*, GCI, *supra* note 63, art. 47; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 30, Mar. 26, 1999, 2253 U.N.T.S. 172.

<sup>98</sup> *See, e.g.*, API, *supra* note 63, art. 6(1); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 14(3), May 3, 1996, 2048 U.N.T.S. 93, 143.

<sup>99</sup> *See generally* Laurie R. Blank, *Examining the Role of Law of War Training in International Criminal Accountability*, 2017 UTAH L. REV. 747 (2017).

<sup>100</sup> *See* Marco Longobardo, *Training and Education of Armed Forces in the Age of High-Tech Hostilities*, in *USE AND MISUSE OF NEW TECHNOLOGIES: CONTEMPORARY CHALLENGES IN INTERNATIONAL AND EUROPEAN LAW* 73, 82–88 (Elena Carpanelli & Nicole Lazzarini eds., 2019).

relationship between a state and a source of risk, it is possible to conclude that they are governed by due diligence.<sup>101</sup>

Similarly, due diligence is critical in the assessment of whether duties connecting to the punishment of war criminals under international humanitarian law<sup>102</sup> are implemented by states.<sup>103</sup> In particular, while the duty to adopt internal legislation that criminalizes war crimes is an obligation of result,<sup>104</sup> the duty to prosecute war crimes requires states to act in a diligent way to find and put war criminals to trial. In relation to a similar duty to criminalize and prosecute acts of torture, the ICJ affirmed that “[w]hile the choice of means for conducting the inquiry remains in the hands of the states parties, [ . . . ] steps must be taken as soon as the suspect is identified in the territory of the state, in order to conduct an investigation of that case.”<sup>105</sup> This statement suggests that the fact that the investigation must be *effective* is a due diligence duty, even in relation to the prosecution of war crimes.<sup>106</sup>

Furthermore, it is possible to consider the rules on responsible command to be due diligence obligations. Pursuant to Article 87(1) of the API, states “shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities any breach of the Conventions and of this Protocol.”<sup>107</sup> This duty must be assessed in light of due diligence.<sup>108</sup> Although this provision has been interpreted as shifting the due diligence obligations from states to individuals (the commanders),<sup>109</sup> the latter are

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<sup>101</sup> *Id.*; this issue was also mentioned briefly by Sassòli, *Responsibility for Violations*, *supra* note 3, at 412.

<sup>102</sup> See, e.g., GCI, *supra* note 63, arts. 49, 50; GCII, *supra* note 63, arts. 50, 51; GCIII, *supra* note 63, arts. 129, 130; GCIV, *supra* note 63, art. 146; API, *supra* note 63, art. 83.

<sup>103</sup> See Sassòli, *Responsibility for Violations*, *supra* note 3, at 412; ILA First Report, *supra* note 5, at 12.

<sup>104</sup> See *mutatis mutandis*, the ICJ’s opinion with reference to the identical obligation embodied in the 1984 UN Conventions against Torture. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 77 (July 20).

<sup>105</sup> *Id.* ¶ 86.

<sup>106</sup> ILA Second Report, *supra* note 5, at 20.

<sup>107</sup> API, *supra* note 63, art. 87(1).

<sup>108</sup> Theodor Meron, *Leaders, Courtiers and Command Responsibility in Shakespeare*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES – ESSAYS IN HONOUR OF YORAM DINSTEIN 403, 409–10 (Michael N. Schmitt & Jelena Pejic eds., 2007) (citing *In re Yamashita*, 327 U.S. 1 (1946)); 4 Law Reports of Trials of War Criminals – Selected and Prepared by U.N. War Crimes Comm’n 33 (1948).

<sup>109</sup> Berkes, *supra* note 4, at 451–53.

relevant only as state organs and, accordingly, states are the addressees of this duty as well. It should be noted that, from the standpoint of international responsibility, since members of the armed forces under the commanders' command and other persons under their control are state organs, their unlawful conduct is directly attributable to the state; consequently, it is unlikely that the violation of the due diligence obligation of the commander—as a state organ—would play any significant role as such in a dispute, that likely would be centered on the violations committed by the subordinates. However, the distinction between the conduct of the commander and that of the subordinate becomes relevant from the different standpoint of individual criminal responsibility, in which context this distinction has been envisaged.

Finally, the duty to determine whether the use of a new weapon would in some or all circumstances be prohibited by API or by other applicable rules of international law is a due diligence obligation pertaining to the implementation of international humanitarian law.<sup>110</sup> This duty, which must be observed in the study, development, and acquisition of a new weapon, requires a particularly low threshold of diligence since the development of new weapons is often “a jealously kept secret by states.”<sup>111</sup> Due to the fact that the development of new means of warfare is considered to be covered by state domestic jurisdiction, so far, this duty has played no significant role in any national or international litigation.

In conclusion, due diligence obligations are pivotal in relation to the prevention and punishment of international humanitarian law violations. In particular, due diligence plays a significant role principally at the level of the general duty to ensure respect for international humanitarian law, in relation to educating and training armed forces, and with regard to criminal prosecution of war crimes.

#### B. DUE DILIGENCE OBLIGATIONS AND THE CONDUCT OF HOSTILITIES

The rules pertaining to the conduct of hostilities are a mix of obligations of result and obligations of diligent conduct. This is particularly manifest in the interplay between the three main principles governing the conduct of hostilities—the principle of distinction, the

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<sup>110</sup> API, *supra* note 63, art. 36.

<sup>111</sup> Natalino Ronzitti, *Modern Means of Warfare: The Need to Rely upon International Humanitarian Law, Disarmament, and Non-Proliferation Law to Achieve a Decent Regulation of Weapons*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 553, 556 (Antonio Cassese ed., 2012).

principle of proportionality, and the principle of precaution—which are the main components of the law of targeting.<sup>112</sup>

A number of the rules on targeting are worded as prohibitions, such as the duty not to direct an attack against civilians, the civilian population, and civilian objects, which must not be made the object of any attack (principle of distinction).<sup>113</sup> If a state does *direct* an attack against civilians or against the civilian population or makes them the *objects* of an attack, then international humanitarian law is violated since the principle of distinction is an obligation of result.<sup>114</sup> The same reasoning applies to the prohibitions embodied in Article 23 of the 1907 Hague Regulations (“HR”). In this author’s view, the principle of proportionality, too, is based on an obligation of result: indeed, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”<sup>115</sup> is prohibited as such in any circumstance, with no leeway depending on what is feasible in warfare.<sup>116</sup> Due diligence only plays a role with the assessment of the expected incidental losses and anticipated military advantage, which fall into the realm of the principle of precaution rather than of the principle of proportionality in the sense of the prohibition of disproportionate attacks as indiscriminate.<sup>117</sup> Accordingly, with reference to all these obligations of result, due diligence plays no role. Conversely, other rules on targeting are obligations of conduct that require the application of due diligence.

The principle of precaution is the principle on targeting that best illustrates the significant role played by due diligence in the conduct of hostilities and in the targeting process. International humanitarian law

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<sup>112</sup> See generally WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* (2012).

<sup>113</sup> See API, *supra* note 63, arts. 48, 51(2), 52; Nuclear Weapons Opinion, Advisory Opinion, 1996 I.C.J. Rep. 226, at 257 (July 8).

<sup>114</sup> Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgment, ¶¶ 55–57 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); see also JEAN D’ASPREMONT & JÉRÔME DE HEMPTINNE, *DROIT INTERNATIONAL HUMANITAIRE: THÈMES CHOISIS* 259, 270 (2012).

<sup>115</sup> See API, *supra* note 63, arts. 51(5)(b) (embodying the principle of proportionality), 57(2)(b) (referring to attacks against civilian objects).

<sup>116</sup> See *id.* art. 51(4).

<sup>117</sup> On the autonomous character of the principle of precaution and its interplay with the principles of distinction and proportionality, see Marco Longobardo, *L’obbligo di verificare l’obiettivo e le conseguenze di un attacco ai sensi del diritto internazionale umanitario e nuove forme di intelligence: profili di responsabilità internazionale*, in *LA RESPONSABILITÀ DEGLI STATI E DELLE ORGANIZZAZIONI INTERNAZIONALI: NUOVE FATTISPECIE E PROBLEMI DI ATTRIBUZIONE E DI ACCERTAMENTO* 37, 39–42 (Andrea Spagnolo & Stefano Saluzzo eds., 2017) [hereinafter Longobardo, *L’obbligo di verificare*].

acknowledges that, although civilians and civilian objects must not be targeted directly under the principle of distinction, they may suffer harm as a consequence of an attack against military objectives during the conduct of hostilities. While, as mentioned above, the principle of proportionality requires that the unintended harm against civilian objectives (so-called “collateral damage”) must not be excessive in light of the expected military advantage of an attack against legitimate targets,<sup>118</sup> the principle of precaution in attack requires the belligerents to undertake every feasible measure to limit the negative effects of an attack upon protected persons and objects. The principle of precaution demands that states endeavor to collect the information and act in ways that would allow them to respect the principles of distinction and proportionality; consequently, the principle of precaution is, at the same time, an autonomous source of legal obligations—thanks to its autonomous regulation in the API—and a rule whose respect is linked to the implementation of the principles of distinction and proportionality.<sup>119</sup>

What we call principle of precaution is, in fact, a group of several different obligations, most of which are obligations of diligent conduct. First, international humanitarian law recognizes the existence of a general duty of care that must be observed in the targeting process. The first formulation of this duty is embodied in Article 27 of the HR, according to which “[i]n sieges and bombardments all necessary steps must be taken to spare, *as far as possible*,” non-military objectives.<sup>120</sup> This norm is reproduced with a wider scope by Article 57(1) of the API, which posits that “[i]n the conduct of military operations, *constant care* shall be taken to spare the civilian population, civilians and civilian objects.”<sup>121</sup> These due diligence obligations of care are umbrella obligations that frame the entire principle of precaution, which is detailed in more specific duties.<sup>122</sup>

The second specific obligation of the principle of precaution is related to the verification *ex ante* of the objective and the effects of an

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<sup>118</sup> On the assessment of proportionality, see generally (among many others), the essays collected in *WEIGHING LIVES IN WAR* (Jens D. Ohlin et al. eds., 2017); Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, in CHATHAM HOUSE (2018).

<sup>119</sup> Longobardo, *L’obbligo di verificare*, *supra* note 117, at 39–42.

<sup>120</sup> Convention Respecting the Laws and Customs of War on Land, *supra* note 66, art. 27 (emphasis added).

<sup>121</sup> API, *supra* note 63, art. 57(1) (emphasis added).

<sup>122</sup> See ILA Study Grp., *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare, Final Report*, at 43 (2017).

attack. Article 57(2)(a)(i) of the API demands that “those who plan or decide upon an attack shall: (i) *do everything feasible* to verify that the objectives to be attacked are”<sup>123</sup> legitimate targets and that the attack is not otherwise prohibited by the API, as in the case of a disproportionate attack;<sup>124</sup> this reading is confirmed by the government of Israel, according to which “militaries are required to exercise due diligence and to devote reasonable efforts to collect information with respect to the collateral damage expected.”<sup>125</sup> Furthermore, under Article 57(2)(a)(ii) of the API, states must “*take all feasible precautions* in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians[,] and damage to civilian objects.”<sup>126</sup> In both provisions, “feasible” should be interpreted as excluding “precautions that are practically impossible,”<sup>127</sup> even if the “obligation to do everything feasible is high,”<sup>128</sup> and the judgment on the feasibility of these measures requires the application of the notion of due diligence.<sup>129</sup> According to a number of states, feasible precautions are those that may be practically undertaken in light of both humanitarian and military considerations.<sup>130</sup> Similarly, Article 3(4) of the Protocol II to the 1980 Convention on Certain Conventional Weapons (“CCW”), as amended on 3 May 1996, affirms that “[f]easible precautions are those

<sup>123</sup> API, *supra* note 63, art. 57(2)(a)(i) (emphasis added).

<sup>124</sup> The link between the duty to verify and the principle of proportionality is noted by Marco Sassòli & Anne Quintin, *Active and Passive Precautions in Air and Missile Warfare*, 44 *ISR. Y.B. HUM. RTS.* 69, 89–90 (2014); Longobardo, *L’obbligo di verificare*, *supra* note 117, at 41–42.

<sup>125</sup> STATE OF ISRAEL, *THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS* ¶ 326 (2015).

<sup>126</sup> API, *supra* note 63, art. 57(2)(a)(ii) (emphasis added).

<sup>127</sup> Partial Award: Central Front – Ethiopia’s Claim 2 (Eth. v. Eri.), 26 *R.I.A.A.* 155, 190 (Eth.-Eri. Claims Comm’n 2004).

<sup>128</sup> N. Atl. Trade Org. [NATO], Final Rep. to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, ¶ 29 (June 8, 2000).

<sup>129</sup> See U.S. DEP’T OF DEF., *LAW OF WAR MANUAL* § 5.2.3.2 (2016); see also Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 *INT’L REV. RED CROSS* 793, 798 (2006); D’ASPREMONT & DE HEMPTINNE, *supra* note 114, at 270; Kimberly Trapp, *Great Resources Mean Great Responsibility: A Framework of Analysis for Assessing Compliance with API Obligations in the Information Age*, in *INTERNATIONAL HUMANITARIAN LAW AND THE CHANGING TECHNOLOGY OF WAR* 153, 154–55 (Dan Saxon ed., 2013); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 165 (3d ed., 2016).

<sup>130</sup> See the declarations appended to the API by a number of states: UK, Statement on Ratification of API (Jan. 28, 1998), 2020 *U.N.T.S.* 75, 76; Canada, Statement on Ratification of API (Nov. 20, 1990), 1591 *U.N.T.S.* 462, 464; Germany, Statement on Ratification of API (Feb. 14, 1991), 1607 *U.N.T.S.* 526, 529; Netherlands, Statement on Ratification of API (Jun. 26, 1987), 1477 *U.N.T.S.* 300.

precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”<sup>131</sup>

Moreover, due diligence also governs the duty to provide for effective advance warning prior to the attack. Since Article 57(2)(iii)(c) of the API, which reproduces largely Article 26 of the HR, requires that states provide warnings “unless circumstances do not permit,” states are not responsible if they omit warnings due to specific circumstances that made them unfeasible.<sup>132</sup>

Similarly, due diligence is relevant with regard to the implementation of precautions against the effects of attack. According to Article 58 of the API, states

shall, *to the maximum extent feasible* [ . . . ] (a) *endeavour* to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) *take the other necessary precautions* to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.<sup>133</sup>

It follows that a state does not incur international responsibility merely for its failure to undertake the measures listed in Article 58 of the API, as long as it demonstrates that it acted diligently in light of the specific circumstances at hand in order to fulfil its obligations.<sup>134</sup>

Additionally, due diligence plays a role in relation to the targeting process when cultural property is involved.<sup>135</sup> Articles 7 and 8 of the Second Protocol to the Hague Convention for the Protection of Cultural Property<sup>136</sup> demand the application of the principle of precaution in attack and defense to the protection of cultural property, so that states must act with diligence in order to limit the negative impact of hostilities against cultural property. Moreover, other due diligence obligations, not related to

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<sup>131</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *supra* note 98, art. 3(10).

<sup>132</sup> API, *supra* note 63, art. 57(2)(c); *see also* Convention Respecting the Laws and Customs of War on Land, *supra* note 66, art. 26; KOLB, *ADVANCED INTRODUCTION*, *supra* note 58, at 170–71.

<sup>133</sup> API, *supra* note 63, art. 58 (emphases added).

<sup>134</sup> *See* U.S. DEP’T OF DEF., *supra* note 129, § 5.14; *see also* MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 372–73 (1982); Quéguiner, *supra* note 129, at 820.

<sup>135</sup> *See* Venturini, *supra* note 4, at 137–38.

<sup>136</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict arts. 7–8, Mar. 26, 1999, 2253 U.N.T.S. 172 [hereinafter *Second Protocol*].

targeting, apply to the protection of cultural property in armed conflict, such as the duty to safeguard cultural property<sup>137</sup> and the prevention and repression of private actors' conduct against cultural property.<sup>138</sup>

Finally, although the protection of the environment in armed conflict is reinforced by the existence of other specific prohibitions, which are not to be assessed under due diligence,<sup>139</sup> due diligence is still relevant for assessing respect for the duties of care pertaining to the protection of the environment during armed conflict. According to Article 55(1) of the API, “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage.”<sup>140</sup> As an obligation of care, the implementation of this provision must be assessed in light of due diligence, taking into account the preventive measures adopted by states so that their attacks do not result in widespread, long-term and severe damage to the environment.<sup>141</sup> Similarly, the ICRC has identified a customary international law rule according to which “[m]ethods and means of warfare must be employed with *due regard* to the protection and preservation of the natural environment”<sup>142</sup> and “*all feasible precautions* must be taken to avoid, and in any event to minimize, incidental damage to the environment,”<sup>143</sup> which clearly requires an assessment in light of due diligence.<sup>144</sup>

Accordingly, taking into account the relevant treaty and customary norms, it is possible to affirm that the law of targeting embodies a variety of obligations governed by due diligence, which is today a fundamental notion in relation to the conduct of hostilities.

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<sup>137</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Said Convention art. 3, May 14, 1954, 249 U.N.T.S. 215; Second Protocol, *supra* note 136, art. 5.

<sup>138</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Said Convention, *supra* note 137, art. 4(3).

<sup>139</sup> API, *supra* note 63, arts. 35(3), 55.

<sup>140</sup> API, *supra* note 63, art. 55(1) (emphasis added).

<sup>141</sup> See KAREN HULME, WAR TORN ENVIRONMENT: INTERPRETING THE LEGAL THRESHOLD 80–88 (2004).

<sup>142</sup> Cf. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 83, at 147 (emphasis added) (discussing Rule 44: “methods and means of warfare must be employed with due regard for the protection and preservation of the natural environment”).

<sup>143</sup> *Id.* (emphasis added).

<sup>144</sup> See generally Michael Bothe, *Military Activities and the Protection of the Environment*, 37 ENVTL. POL’Y L. 236 (2007); see also Int’l Law Comm’n, Rep. on the Protection of the Environment in Relation to Armed Conflicts, Session No. 71 U.N. Doc. A/CN.4/L.937, at 2 (2019) (discussing the obligation of vigilance over the activity of corporations) [hereinafter ILC Draft Articles on Environment].

C. DUE DILIGENCE AND THE PROTECTION OF CIVILIANS AND PERSONS  
*HORS DE COMBAT*

With regard to the protection of civilians and the protection of persons *hors de combat*, due diligence plays a significant role for the implementation of a number of specific obligations embodied in international humanitarian law treaties and customary law.<sup>145</sup>

Article 27 of the GCIV demands that civilians “shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” Similarly, in relation to the protection of the wounded, sick and shipwrecked, the basic rule is that “the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected” and they “shall receive, *to the fullest extent practicable* and with the least possible delay, the medical care and attention required by their condition.”<sup>146</sup> Since the reference to protection implies a duty for the state to prevent and punish private actors’ actions against civilians and the wounded, sick and shipwrecked, compliance with similar duties requires an assessment under due diligence, as with regard to every duty to protect individuals under international law.<sup>147</sup> Similarly, the duty to provide medical care, as with every duty of care, is governed by due diligence.<sup>148</sup>

Moreover, Article 15 of the GCI provides that the belligerents must “*take all possible measures* to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled,” employing a wording that clearly requires the application of the notion of due diligence.<sup>149</sup> Similarly, the duty to identify the dead is an obligation of conduct subject to due diligence.<sup>150</sup> Moreover, due diligence

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<sup>145</sup> The role of due diligence with regard to the protection of civilians in occupied territory is addressed in the next sub-part.

<sup>146</sup> API, *supra* note 63, art. 10 (emphasis added); *see also* GCI, *supra* note 63, art. 12; GCII, *supra* note 63, art. 12; GCIV, *supra* note 63, art. 16(1).

<sup>147</sup> *See* Robin Geiß & Helen Durham, *Protection and Care of the Wounded and Sick*, in UPDATED COMMENTARY ON THE SECOND GENEVA CONVENTION ¶ 1360 (2017).

<sup>148</sup> *Id.* ¶ 1380.

<sup>149</sup> GCI, *supra* note 63, art. 15 (emphasis added); *see* Robin Geiß, *Search for Casualties. Evacuation*, in COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 82, ¶¶ 1485, 1499, 1507.

<sup>150</sup> GCI, *supra* note 63, art. 17; GCII, *supra* note 63, art. 20; *see* Sandesh Sivakumaran, *Prescriptions Regarding the Dead. Graves Registration Service*, in COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 82, at ¶ 1664; *see also* the similar provision in GCII, *supra* note 63, art. 18; and remarks by Robin Geiß & Bruno Demeyere, *Search for Casualties After an Engagement*,

is relevant in the assessment of compliance with the rule according to which a state must locate medical establishments and units, “as far as possible,” in a way that would render them safe in case of attacks against military objectives,<sup>151</sup> and with the rule demanding states to “take the necessary steps” to make the emblem of medical units clearly visible to enemy armed forces.<sup>152</sup>

Additionally, the imposition of a duty to protect coastal rescue crafts “so far as operational requirements permit”<sup>153</sup> requires an assessment of the “operational considerations by a reasonable commander” in light of “reasonableness [. . .] depend[ing] on the prevailing circumstances.”<sup>154</sup> As observed, it “is impossible to define the terms in an abstract manner,”<sup>155</sup> but rather, the provision requires the assessment of due diligence on a case-by-case basis. A reference to due diligence must be read also in the provision demanding that “sick-bays shall be respected and spared *as far as possible*.”<sup>156</sup>

Moreover, the regime governing the treatment of prisoners of war also requires due diligence.<sup>157</sup> While Article 13(1) of the GCIII imposes negative obligations and obligations of result upon the state with regard to mistreatments of prisoners of war by its organs, Article 13(2) of the GCIII demands that detaining states “protect” prisoners of war from private actors’ conduct. This provision has been interpreted as pertaining to the duty to undertake positive measures to be assessed under due diligence.<sup>158</sup> For instance, the Eritrea-Ethiopia Claims Commission (“EECC”) held that states may be “liable for failing to take effective measures to prevent”

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in UPDATED COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 147, ¶¶ 1635, 1881.

<sup>151</sup> GCI, *supra* note 63, art. 19(3); see Alexander Breitegger, *Protection of Medical Units and Establishments*, in COMMENTARY ON THE FIRST GENEVA CONVENTION *supra* note 82, ¶ 1820.

<sup>152</sup> GCI, *supra* note 63, art. 44; API, *supra* note 63, art. 14; see Alexander Breitegger, *Marking of Medical Units and Establishments*, in COMMENTARY ON THE FIRST GENEVA CONVENTION, *supra* note 82, ¶ 2644.

<sup>153</sup> GCII, *supra* note 63, art. 27.

<sup>154</sup> See Wolf Heintschel von Heinegg, *Protection of Coastal Rescue Craft and Fixed Coastal Installations*, in UPDATED COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 147, ¶ 2206.

<sup>155</sup> *Id.*

<sup>156</sup> GCII, *supra* note 63, art. 28 (emphasis added); see Wolf Heintschel von Heinegg, *Protection of Sick-Bays*, in UPDATED COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 147, ¶ 2232.

<sup>157</sup> See ILA First Report, *supra* note 5, at 14.

<sup>158</sup> See Silvia Sanna, *Treatment of Prisoners of War*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, *supra* note 82, at 981–82; Venturini, *supra* note 4, at 142–43.

abuses against prisoners of war,<sup>159</sup> and the duty to undertake feasible measures to protect prisoners of war has been ascertained both by domestic and international courts.<sup>160</sup> Furthermore, another rule pertaining to the protection of prisoners of war, the duty to “take *all suitable precautions* to ensure the [prisoners’ of war] safety during evacuation,”<sup>161</sup> must be assessed in light of the diligence employed by the detaining state. Finally, the duties to provide adequate food, shelter, healthcare, clothing, etc. to prisoners of war should be assessed in light of due diligence as well.<sup>162</sup>

#### D. DUE DILIGENCE AND THE LAW OF OCCUPATION

With regard to the duties and powers of the occupying power, the law of occupation embodies a number of obligations requiring an assessment under due diligence. In relation to occupied territory, the link between the state and the source of risk is not territorial sovereignty, but instead, the actual authority exercised by the occupying power.<sup>163</sup>

The first provision deserving analysis is Article 43 of the HR, which requires the occupying power to administer the occupied territory in the place of the ousted sovereign while, at the same time, preserving the sovereignty of the latter.<sup>164</sup> Article 43 of the HR provides for the occupying power’s duty to “restore and ensure” public order and civil life.<sup>165</sup> Public order encompasses “responsibility for preserving order, punishing crime, and protecting lives and property within the occupied territory.”<sup>166</sup> The

<sup>159</sup> Eritrea’s Damages Claims (Eri. v. Eth.), Final Award, 26 R.I.A.A. 505, 581–82 (Eri.-Eth. Claims Comm’n 2009).

<sup>160</sup> At a domestic level, see, e.g., British Military Court at Essen, The Essen Lynching Case (Dec. 18–19 and 21–22, 1945), in 1 L. REP. OF TRIALS OF WAR CRIMS. 88, 90 (1947); at an international level, see, e.g., Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Judgment, ¶¶ 72–74 (Int’l Crim. Trib. for the Former Yugoslavia May 5, 2009).

<sup>161</sup> GCIII, *supra* note 63, art. 20 (emphasis added).

<sup>162</sup> GCIII, *supra* note 63, arts. 25–27, 29, 30, 34, 38, 51.

<sup>163</sup> Convention Respecting the Laws and Customs of War on Land, *supra* note 66, art. 43; Violi, *supra* note 39, ¶ IV (on file with author).

<sup>164</sup> See generally MARCO LONGOBARDO, THE USE OF ARMED FORCE IN OCCUPIED TERRITORY, 164–240 (2018) (providing more on Art. 43 HR also in relation to issues beyond the purview of this article) [hereinafter LONGOBARDO, THE USE OF ARMED FORCE].

<sup>165</sup> See Edmund H. Schwenk, *Legislative Power of the Military Occupant Under Article 43 Hague Regulations*, 54 YALE L.J. 390, 393 (1945) (noting that the French-only authoritative text refers to “vie publique” (“civil life”), which must be employed rather than the non-authoritative English version (“safety”).

<sup>166</sup> Trial of Wilhelm List and Others, 8 L. Rep. Trials War Crims. 34, 57 (1949); see also Ochoa v. Hernandez y Morales, 230 U.S. 139, 158 (1913); Aboitiz & Co. v. Price, 99 F. Supp. 602, 610 (D. Utah 1951).

Supreme Court of Israel implicitly acknowledged that the duty to restore and ensure public order must be assessed in light of the concept of due diligence.<sup>167</sup> On the other hand, the due diligence obligation to restore and ensure public life concerns civilian issues such as the “whole social, commercial and economic life of the community.”<sup>168</sup>

The duty to restore and ensure public order under Article 43 of the HR encompasses a number of other due diligence obligations related to the administration of occupied territory. For instance, the occupying power is responsible for the safety of UN facilities and property in occupied territory,<sup>169</sup> as well as for the safety of foreign states’ diplomatic missions located in occupied territory.<sup>170</sup> Furthermore, the occupying power has an obligation of vigilance over private actors’ conduct that may violate international humanitarian law and international human rights law, which may be seen as a specification of the broader duty to ensure respect for international humanitarian law under common Article 1 of the four GCs.<sup>171</sup> Similarly, the occupying power replaces the sovereign with regard

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<sup>167</sup> See H CJ 69/81 Aita v. Regional Commander 37(2) PD 1, 129 (1983) (Isr.) (“The drafters of the Regulations defining these duties did not use unequivocal and absolute language, but from the outset kept in mind the objective difficulties that might emerge from a change of government resulting from a military operation, when the new government continues to function as a military government which is of legal temporary character. Hence, the duties were defined as being conditional on what is possible (d’autant qu’il est possible); the degree of possibility of fulfillment of the duties is measured according to a complex of circumstances, that is, not only in the light of the needs of the territory, but also in the light of the legitimate needs of the military government.”) (emphasis added); the same argument on art. 43 of the HR as source of due diligence obligations is advanced by Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT’L L. 661, 663–64 (2005); LONGOBARDO, *THE USE OF ARMED FORCE*, *supra* note 164, at 171–73.

<sup>168</sup> *Grahame v. Director of Prosecutions*, 14 I.L.R. 228, 232 (Control Comm’n Ct. Crim. App. 1947) (Ger., British Zone); see also CA 393/82 *Society Lawfully Registered v. Commander of the IDF* 37(4) PD 785, ¶ 18 (1983) (Isr.).

<sup>169</sup> See U.N. SCOR, 58th Sess., 4812th mtg. at 8–10, U.N. Doc. S/PV.4812 (Aug. 21, 2003) (regarding the statements of Germany and China in the aftermath of an attack against UN facilities in Iraq).

<sup>170</sup> See the remarks by China, *id.* at 9–10; and the practice collected by Stefan Talmon, *Diplomacy Under Occupation: The Status of Diplomatic Missions in Occupied Iraq*, 6 ANUARIO MEXICANO DE DER. INTERNACIONAL 461, 502–05 (2006).

<sup>171</sup> See *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 178, 250 (Dec. 19); see also *Central Front—Eritrea’s Claims* 2, 4, 6, 8, & 22 (Eri. v. Eth.), Partial Award, 26 R.I.A.A. 115, ¶ 67 (Eri.-Eth. Claims Comm’n, 2004). For more on this, see generally Marco Longobardo, *State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources*, 63 NETH. INT’L L. REV. 251 (2016) [hereinafter Longobardo, *Private Actors in Occupied Territories*].

to the duty not to allow private actors to use the controlled territory to harm other states.<sup>172</sup>

According to the ILC, due diligence is also relevant in relation to the protection of the environment in occupied territory. Under draft Article 20(2) of the Draft Articles on the Protection of the Environment in relation to Armed Conflicts, “[a]n Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.”<sup>173</sup> This duty is a specification of the obligation to restore and ensure civil life in occupied territory under Article 43 of the HR.<sup>174</sup> Moreover, draft Article 22 of the same document affirms that “[a]n Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.”<sup>175</sup> This duty appears to be in line with the duty not to cause harm to other states as a result of the occupation under Article 43 of the HR.<sup>176</sup>

Additionally, the occupying power’s duties to protect cultural heritage in occupied territory are subject to the clause “as far as possible,” requiring the application of due diligence.<sup>177</sup> Some of these duties are obligations of prevention, such as in relation to any illicit export, any archaeological excavation, and any alteration to, or change in use of, cultural property;<sup>178</sup> accordingly, they are governed by due diligence.

Other provisions of the law of occupation requiring the application of due diligence are those concerning the occupying power’s right to collect taxes and contributions, which shall, *as far as possible*, respect the rules of assessment and incidence in force prior to the occupation;<sup>179</sup> similarly, contributions must be paid, *as far as possible*, in cash.<sup>180</sup> Due

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<sup>172</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (June 21, 1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 228 (June 21); *Joint Statement of Iraq’s Neighboring States* (Nov. 2, 2003), in THE OCCUPATION OF IRAQ, VOL II: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY AND THE IRAQI GOVERNING COUNCIL 1454 (Stefan Talmon ed., 2013).

<sup>173</sup> ILC Draft Articles on Environment, *supra* note 144, at 4.

<sup>174</sup> Convention Respecting the Laws and Customs of War on Land, *supra* note 66, art. 43.

<sup>175</sup> ILC Draft Articles on the Environment, *supra* note 144, at 4.

<sup>176</sup> Convention Respecting the Laws and Customs of War on Land, *supra* note 66, art. 43.

<sup>177</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Said Convention, *supra* note 137, art. 5(1).

<sup>178</sup> *Id.* art. 9.

<sup>179</sup> See Convention Respecting the Laws and Customs of War on Land, *supra* note 66, arts. 48, 51(2).

<sup>180</sup> *Id.* art. 52(3).

diligence is also relevant for the occupying power's duties to "facilitate" child identification and the work of institutions protecting children;<sup>181</sup> for the duty to provide for food, medical supplies, and healthcare of the population of the occupied territory;<sup>182</sup> for the duty to ensure adequate human conditions in cases of evacuation or transfers of civilians;<sup>183</sup> and for the duty to provide adequate human conditions of detention.<sup>184</sup>

#### E. DUE DILIGENCE AND THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS

Due diligence obligations also play a significant role in non-international armed conflicts, both in relation to states' and armed groups' conduct. Indeed, as long as one assumes that customary and treaty international humanitarian law binds organized non-state actors,<sup>185</sup> it must be concluded that international humanitarian law obligations of conduct governed by due diligence bind them as well.<sup>186</sup>

Some treaty rules on the law on non-international armed conflict require the application of the concept of due diligence. For instance, Article 8 of APII—which requires that “[w]hen circumstances permit, [ . . . ] all possible measures shall be taken [ . . . ] to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them”—and Article 4(3)(b) of the APII—according to which “all appropriate steps shall be taken to facilitate the reunion of families temporarily separated”—are clearly drafted with a wording revealing that they are obligations of diligent conduct. Similarly, the duties to protect wounded, sick, and

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<sup>181</sup> GCIV, *supra* note 63, art. 50.

<sup>182</sup> GCIV, *supra* note 63, *Id.* arts. 55–56; API, *supra* note 63, arts. 14(1), 69; *see* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 77, ¶¶ 2780–85.

<sup>183</sup> GCIV, *supra* note 63, art. 49(3).

<sup>184</sup> *Id.* art. 85.

<sup>185</sup> Prosecutor v. Norman, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (Special Ct. for Sierra Leone May 31, 2004).

<sup>186</sup> On the challenges of this topic, *see* generally Marco Sassòli, *Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 5 (2010).

shipwrecked,<sup>187</sup> and to search for them,<sup>188</sup> the duty to protect medical personnel and units and religious personnel,<sup>189</sup> and the duty to protect the civilian population and civilians<sup>190</sup> require the application of due diligence, as does every obligation to protect. Moreover, the duty to assist displaced civilians<sup>191</sup> and the duties to provide adequate food, shelter, healthcare, clothing, etc. to internees and detainees must be assessed in light of due diligence.<sup>192</sup> Finally, APII contains another obligation of diligent conduct, according to which APII must be disseminated “as widely as possible.”<sup>193</sup>

Moreover, due diligence obligations are applicable even to non-international armed conflicts at times because some specific treaties do not distinguish between non-international and international armed conflicts, rendering the obligations embodied in such treaties applicable to both types of conflict. This is the case of the principle of precaution in attack under Article 3(10) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices<sup>194</sup> and Article 7 of the Second Protocol to the Hague Convention for the Protection of Cultural Property.<sup>195</sup> Both of these rules are drafted in a way that makes clear the need to assess whether the attacking state has employed diligence in the targeting process or in the employment of a specific weapon.

In addition, the ICRC has identified some customary rules that are applicable to non-international armed conflicts and which require the application of due diligence. For instance, besides the aforementioned principle of precaution, the ICRC considers that the duty to ensure respect for international humanitarian law applies even in non-international armed conflict.<sup>196</sup> It should be noted that common Article 1 to the four GCs refers to an obligation upon states only, whereas there is no reference to such a

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<sup>187</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II) art. 7, June 8, 1977, 1125 U.N.T.S. 611, 614 [hereinafter APII].

<sup>188</sup> *Id.* art. 8.

<sup>189</sup> *See id.* arts. 9, 11.

<sup>190</sup> *See id.* arts. 13, 14.

<sup>191</sup> *See id.* art. 17.

<sup>192</sup> *See id.* art. 5(1)(b).

<sup>193</sup> APII, *supra* note 187, art. 19.

<sup>194</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, *supra* note 98, art. 3(10).

<sup>195</sup> Second Protocol, *supra* note 136, art. 7.

<sup>196</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 83, at 509.

duty upon armed groups. Nonetheless, such an obligation may bind armed groups as international customary law.

Finally, due diligence may play a role if one acknowledges the applicability of some rules and principles of the law of occupation to the territory controlled by insurgents in non-international armed conflict. Indeed, traditionally the law of occupation has been considered only applicable in international armed conflict, as recognized by international case law.<sup>197</sup> However, some authors have suggested that the law of occupation might be applicable, *de lege ferenda* if not *de lege lata*, to insurgents controlling portions of territory,<sup>198</sup> since there is nothing in Article 42 of the HR explicitly requiring that only states may be occupying powers.<sup>199</sup> Accepting this view, due diligence obligations regarding the protection of the civilian population and persons not taking part in the hostilities embodied in the law of occupation might in the future apply to insurgents controlling portions of territory, as demonstrated by some embryonic state practice.<sup>200</sup>

In relation to the law on non-international armed conflict, a number of factors, including the level of organization of the armed group, its ability to control a portion of the state's territory, and the protracted nature of the armed confrontation, all influence the level of diligence required of states and organized armed groups.

### III. THE IMPACT OF INTERNATIONAL HUMANITARIAN LAW ON THE LEGAL DISCOURSE ON DUE DILIGENCE

This overview of relevant international humanitarian law provisions demonstrates that the notion of due diligence plays a significant role in the application of a number of rules of the law of armed conflict. More significantly, international humanitarian law reinforces some well-established ideas on due diligence that are relevant for the wider understanding of this notion from a general international law perspective.

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<sup>197</sup> See Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Judgment, ¶ 983 (Mar. 2, 2009), <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf> [<https://perma.cc/C8BS-D2T5>].

<sup>198</sup> See Sandesh Sivakumaran, *Re-envisioning the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 245–47 (2011); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 61 (2d ed. 2012).

<sup>199</sup> See generally the overview offered by LONGOBARDO, THE USE OF ARMED FORCE, *supra* note 164, at 33–34.

<sup>200</sup> See the discussion in Berkes, *supra* note 4, at 453–55.

Preliminarily, it is useful to emphasize that due diligence obligations of conduct are as frequent in international humanitarian law as in international law in general.<sup>201</sup> In international humanitarian law, the reference to due diligence obligations pertains principally to the exercise of governmental functions in relation both to individual and territory (such as in occupied territory) and individuals alone (such as with regard to most duties to protect). Other due diligence obligations pertain to the “proceduralization” of the law of armed conflict, as in relation to the precautions in attack.<sup>202</sup> Accordingly, international humanitarian law confirms the idea that due diligence obligations mainly pertain to governmental activities requiring specific procedures in relation to sources of risk, either in the territory under state sovereignty or under state control/jurisdiction.

International humanitarian law also confirms the widely accepted idea that due diligence is not a component of state responsibility, but rather, a notion related to the structure of certain primary rules. Indeed, international humanitarian law does not consider that an autonomous primary rule entirely based on due diligence exists, but instead, takes into account due diligence only in relation to existing obligations. Indeed, no general principle of due diligence exists with regard to the protection of the environment in armed conflict,<sup>203</sup> while other general due diligence obligations are rooted in the duty to ensure respect for international humanitarian law under common Article 1 of the GCs and the duty to restore and ensure public order and civil life in occupied territory under Article 43 of the HR.

Addressing the notion of due diligence in the realm of primary norms, international humanitarian law confirms that due diligence should not be considered a form of attribution. For instance, as demonstrated by the law of occupation, identifying a due diligence obligation as the breached primary rule may have important consequences: a violation of

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<sup>201</sup> ILA Second Report, *supra* note 5, at 2.

<sup>202</sup> For more on this, see generally Javier Guisàndes Gómez, *El proceso de la decisión del comandante y el derecho internacional umanitario. Acciones ostile y objetivos militares*, in DER. INTERNACIONAL HUMANITARIO 171 (José Luis Rodríguez-Villasante y Prieto eds., 2002); Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419 (2015); Eliav Liebllich & Eyal Benvenisti, *The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapons Systems Are Unlawful*, in AUTONOMOUS WEAPONS SYSTEMS: LAW, ETHICS, POLICY 245 (Nehal Bhuta et al. eds., 2016).

<sup>203</sup> See generally Dieter Fleck, *The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules*, 82 NORDIC J. INT'L L. 13 (2013).

the occupying power's duty to prevent private actors from illegally exploiting natural resources in occupied territory would never be the legal basis of individual responsibility for the war crime of pillage, since this war crime is not built on violations of Article 43 of the HR; however, should the same conduct be attributable to the state, then the state organ may be individually responsible for the war crime of pillage.<sup>204</sup> Nonetheless, it should be acknowledged that, at the practical level, sometimes the violation of some primary due diligence obligations of prevention has the same result as would attributing private actors' conduct to a state. For instance, following the ICJ's finding of a violation of Uganda's *duty to prevent* private actors from violating international humanitarian law and international human rights law in occupied territory,<sup>205</sup> the Democratic Republic of Congo might decide to seek reparation for the breach of the duty of vigilance under the same conditions that it would have advanced if Uganda itself would have been *found responsible* for the international humanitarian law and international human rights law violations.<sup>206</sup>

Moreover, international humanitarian law confirms that there is no due diligence standard applicable to *every* obligation of conduct, but rather, different primary obligations may require different standards of care. Indeed, two different factors may influence the level of required diligence in international humanitarian law. First, the primary rule may demand a lower or higher standard by employing different expressions (e.g., the difference between the duty to take "every feasible measure" and the duty to "take adequate care").<sup>207</sup> This view is confirmed by the preparatory works of some relevant due diligence obligations, such as that pertaining to the duty to verify the objective and consequences of an attack under the API, wherein states discussed the differences between feasible and reasonable precautions.<sup>208</sup> Differences in wording must be considered intentional even when they may appear odd. For instance, the principle of precaution requires different levels of diligence depending on whether an attack takes place entirely on land, or it is launched by the sea or the air

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<sup>204</sup> See Longobardo, *Private Actors in Occupied Territories*, *supra* note 171, at 269–70.

<sup>205</sup> DRC v. Uganda, Judgment, 2005 I.C.J. Rep. 168, ¶ 178 (Dec. 19).

<sup>206</sup> On the resuming of this case to address the issue of reparation, see *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Order, 2015 I.C.J. Rep. 580 (Jul. 1).

<sup>207</sup> Accordingly, considering some different expressions as synonyms (as suggested by the U.S. DEP'T OF DEF., *supra* note 129, ¶ 5.2.3.1) may be an oversimplification.

<sup>208</sup> See BOTHE ET AL., *supra* note 134, at 362.

but it affects land as well, or it pertains entirely to naval warfare: in relation to land warfare, all *feasible* precautions must be taken;<sup>209</sup> in relation to the conduct of military operations at sea or in the air affecting the civilian population, individual civilians or civilian objects on land,<sup>210</sup> the text is less stringent, as states must take all *reasonable* precautions to avoid losses of civilian lives and damage to civilian objects;<sup>211</sup> finally, the threshold of diligence in relation to naval warfare and air warfare is based again on a feasibility test.<sup>212</sup> Second, factual circumstances may influence the standard of required diligence even in cases of identical wording. For instance, in occupied territory, the duty to protect prisoners of war requires a higher degree of diligence than the duty to protect the local population, since prisoners of war are under a more direct control of the occupying power.

Furthermore, international humanitarian law supports the idea that due diligence must be addressed as an objective standard rather than as a subjective standard based on fault or negligence. For example, the objective nature of due diligence is particularly clear with regard to the duty to take feasible precautions in attack. State practice as well as national and international case law demonstrate that the targeting process is taken into account as a series of linked facts that are relevant to assess the diligent behavior of a state organ, rather than as elements to ascertain the mental element of the organ (intent or fault).<sup>213</sup>

In conclusion, the study of due diligence obligations in international humanitarian law reinforces the general understanding of due diligence as a concept relevant for general international law too. Situations involving international humanitarian law obligations contribute to the

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<sup>209</sup> See API, *supra* note 63, art. 57(2)(a)(i).

<sup>210</sup> API, *supra* note 63, art. 49(3) (explaining that Articles 48–67 do not apply to operations entirely conducted at sea or in air).

<sup>211</sup> API, *supra* note 63, art. 57(4).

<sup>212</sup> In relation to naval warfare, see SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA § II, art. 46(a) (Louise Doswald-Beck ed., 1999); Rep. of the Turkel Comm'n, The Public Commission to Examine the Maritime Incident of 31 May 2010, 230 (Jan. 2010); Turkish Nat'l Comm'n of Inquiry, Rep. on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, 88 (Feb. 2011). In relation to air warfare, see *Black-Letter Rules of the HPCR Manual on International Law Applicable to Air and Missile Warfare*, in HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE XIX, ¶¶ 20, 31, 32, 39, 40 (2013).

<sup>213</sup> On the objective character of the assessment in the targeting process, see the provocative analysis of Marco Sassòli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, 90 INT'L L. STUD. 308, 332–335 (2014).

totality of state practice and case law on due diligence that should be taken into account across every field of international law.

#### IV. THE IMPACT OF DUE DILIGENCE ON THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

After the above analysis, it is necessary to assess whether the frequent resort to the notion of due diligence in international humanitarian law is an advantage or a disadvantage with regard to its implementation. Indeed, it is no mystery that implementation is the Achilles' heel of the law of armed conflict due to the weakness of its monitoring and implementation mechanisms.<sup>214</sup>

It is indisputable that the effect of due diligence is, "in some contexts, to dilute the stringency of state obligations,"<sup>215</sup> as a state may avoid responsibility if it demonstrates to have undertaken diligent conduct. Indeed, it is easier to ascertain whether a certain event occurred rather than exploring the conduct behind an event and comparing it with abstractly required diligence.<sup>216</sup> Furthermore, since states enjoy discretionary powers with respect to the conduct to be undertaken in order to fulfill a certain obligation, it may be difficult to scrutinize before a competent court the decision to adopt certain measures rather than others.<sup>217</sup> Additionally, the conduct of hostilities is characterized by the "fog of war," that shroud of uncertainty, secrecy, and imponderable factors that make it challenging to assess facts in armed conflict.<sup>218</sup> Accordingly, it may be problematic to reconstruct state conduct *ex post facto* and to assess whether the judgments of value undertaken by state organs were diligent enough.

However, this author believes that there is a good reason to embody due diligence obligations in international humanitarian law. If we consider that due diligence obligations pertain to "a substantial foreseeable

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<sup>214</sup> See generally Paolo Benvenuti & Giulio Bartolini, *Is There a Need for New International Humanitarian Law Implementation Mechanisms?*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 509 (Robert Kolb & Gloria Gaggioli eds., 2013); Silja Vöneky, *Implementation and Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 647 (Dieter Flecker ed., 3d ed., 2013).

<sup>215</sup> ILA Second Report, *supra* note 5, at 3.

<sup>216</sup> Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 50.

<sup>217</sup> See Marco Longobardo, *The Palestinian Right to Exploit the Dead Sea Coastline for Tourism*, 58 GER. Y.B. INT'L L. 317, 323–38 (2015) (regarding the due diligence obligation to restore and ensure civil life in occupied territory).

<sup>218</sup> See CARL VON CLAUSEWITZ, ON WAR 101 (1984).

risk to a significant legal value which the state can influence, by its available means [in light of] a means–end relationship,”<sup>219</sup> it is obvious that they are particularly fit to regulate armed conflict scenarios which are inherently hazardous. Indeed, the standard of diligence required is not diminished by the armed conflict, but in contrast, it is raised, since it is well-established that the standard of care in due diligence obligations increases along with the risk.<sup>220</sup> It follows that, in a situation of armed conflict, where the risks inherent to the conduct of hostilities are dramatically high, the standard of diligence must be set accordingly.<sup>221</sup>

Moreover, in relation to the conduct of private actors, due diligence obligations of prevention may widen state responsibility. Indeed, due diligence obligations create a legal link between the conduct of private actors which, in principle, is not attributable to any state, and a state with the capacity to influence that conduct. Consequently, that conduct may be the catalyst element triggering state responsibility.<sup>222</sup> Accordingly, these obligations reduce legal black holes in relation to private actors’ conduct, forcing states to undertake all measures in their power to forestall the causation of events that the international community aims at eliminating.

Additionally, the reality of armed conflict demands a certain flexibility of the relevant rules in order to make them practically applicable.<sup>223</sup> This is the tribute to military necessity, i.e., the states’ desire to gain military advantage, which, along with considerations of humanity, has shaped the development of international humanitarian law.<sup>224</sup> Due diligence obligations are effective tools to maintain this balance since they emphasize the need to consider the concrete situations at hand when dealing with state conduct. Whereas a system of international humanitarian law rules of result would be trumped by considerations of military necessity if it proves too rigid, due diligence obligations give states *espace de manoeuvre* without depriving the law of armed conflict of its binding character. Obviously, some minimum standards must be guaranteed in every circumstance irrespective of what is practically achievable. Indeed, due diligence obligations are usually framed as

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<sup>219</sup> Seibert-Fohr, *supra* note 34, at 695.

<sup>220</sup> See ILA Second Report, *supra* note 5, at 12.

<sup>221</sup> See *Affaire des biens britanniques au Maroc espagnol* (Spain v. U.K.), 2 R.I.A.A. 615, 645 (Perm. Ct. Arb. 1925) (“l’État doit être considéré comme tenu à exercer une vigilance d’un ordre supérieur en vue de prévenir les délits commis, en violation de la discipline et de la loi militaires.”).

<sup>222</sup> See the crystal-clear words of LOZANO CONTRERAS, *supra* note 2, at 151.

<sup>223</sup> See BOOTHBY, *supra* note 112, at 176–82.

<sup>224</sup> On these principles, see generally Nobuo Hayashi, *Basic Principles*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 89 (Rain Liivoja & Tim McCormack eds., 2016).

umbrella obligations covering a certain topic (e.g., the duty to protect prisoners of war; the duty to maintain and ensure public order in occupied territory). The protection offered by these due diligence umbrella obligations is completed by specific obligations of result and negative obligations to protect fundamental humanitarian values, which are minimum yardsticks that do not require due diligence (e.g., the prohibition of inhumane treatment of prisoners of war and of collective punishments in occupied territory). From this perspective, the combination of due diligence obligations and obligations not related to due diligence maintains the balance between opposing interests at the basis of the law of armed conflict.

In international armed conflict, the degree of flexibility granted by international humanitarian law due diligence obligations ensures that belligerents are liable only for those events they could have diligently prevented, in light of their capabilities. For instance, in relation to the duty to verify the objective of an attack, states with more advanced technological capabilities must explain why it was not feasible to use their capabilities to verify a specific objective, while the same standard of precision is not required of states with less developed means.<sup>225</sup> Similarly, in relation to the choice of the means to launch an attack, states with precision-guided munitions would be required to use them, whereas states with more primitive weapons would not be required to employ the same level of precision, since the relevant due diligence obligations take into account what is feasible case-by-case. As noted by Schmitt, “[t]he technology available to an attacker determines whether an action is feasible, reasonably expected, or apparent, as well as when choice is possible. In other words, belligerents bear different legal burdens of care determined by the precision assets they possess,”<sup>226</sup> even if states are reluctant to admit the existence of a duty to acquire more precise weapons.<sup>227</sup> In Blum’s words, “[o]ne could imagine a differential reading of the law that would impose on richer countries the obligation to spend more money on the deployment, procurement, or development of better

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<sup>225</sup> See Human Rights Council, Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, ¶ 61, U.N. Doc. A/HRC/12/48 (Sep. 25, 2009); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 77, ¶ 2199; Longobardo, *L’obbligo di verificare*, *supra* note 117, at 54.

<sup>226</sup> Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT’L REV. RED CROSS 445, 460 (2005).

<sup>227</sup> *Id.*; Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 163, 193–94 (2011); Trapp, *supra* note 129, at 156–57.

intelligence and more discriminating munitions.”<sup>228</sup> However, it should be emphasized that a minimum standard of precision is required by the different *negative obligation* not to launch indiscriminate attacks.<sup>229</sup> In brief, far from being a violation of the principle of equality of belligerents,<sup>230</sup> due diligence obligations manage to maintain the *legal* equality of belligerents along with taking into account the *factual* asymmetries that may affect their compliance with international humanitarian law.

Similarly, in relation to the law on non-international armed conflict, the inherent flexibility of due diligence obligations allows for the application of some rules to both states and armed groups alike. In this case, states’ diligence is assessed against their own capabilities, which are based on state sovereignty; on the other hand, armed groups’ diligence is assessed on the basis of their organization and the effective control they exercise over portions of territory—if any. Accordingly, some due diligence obligations are legally the same for states and armed groups, but their implementation is assessed in light of what is feasible or possible or necessary under specific circumstances, taking into account the ontological differences between states and armed groups.

Furthermore, the fact that an obligation should be assessed in light of due diligence does not mean that that obligation does not exist or is not justiciable.<sup>231</sup> For instance, it would be incorrect to assert that the occupying power’s duty to restore and ensure public order in occupied territory cannot be scrutinized before a competent court;<sup>232</sup> rather, as demonstrated by international practice, international courts and tribunals may consider the occupying power responsible for the failure to implement its duty with diligence.<sup>233</sup> This conclusion applies to any due

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<sup>228</sup> Blum, *supra* note 227, at 194; see Trapp, *supra* note 129, at 158–59.

<sup>229</sup> See Giulio Bartolini, *Air Operations Against Iraq (1991 and 2003)*, in *THE INTERNATIONAL HUMANITARIAN LAW OF AIR WARFARE* 227, 264 (Natalino Ronzitti & Gabriella Venturini eds., 2005).

<sup>230</sup> This criticism was voiced, e.g., by Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 *VAND. J. TRANSNAT’L L.* 431, 465 (2004).

<sup>231</sup> For this assertion, see Michael J. Glennon, *Foreword* to ROBERT B. BARNIDGE, *NON-STATE ACTORS AND TERRORISM APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE* (2008).

<sup>232</sup> This is the position of YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 102 (2d ed., 2019).

<sup>233</sup> See UN Compensation Comm’n, Governing Council Decision no. 9 (Mar. 6, 1992), 109 *ILR* 593, ¶¶ 12–15; *DRC v. Uganda*, Judgment, 2005 *I.C.J. Rep.* 168, ¶ 250 (Dec. 19).

diligence obligation of prevention and protection that is embodied in international humanitarian law.

It is also not completely correct to affirm that it is more difficult to ascertain the violation of a due diligence obligation. Such an assertion is only sound with regard to non-diligent conduct which does *not* result in any unlawful event,<sup>234</sup> since states usually only bring disputes before international courts and tribunals when an event does occur. Accordingly, the violation of a due diligence obligation is usually asserted *ex post facto*.<sup>235</sup> However, when the event does occur, the state that was under a due diligence obligation must prove that it acted diligently.<sup>236</sup> This shift of the burden of proof has had extremely positive consequences on the application of international humanitarian law in several areas, such as the law of targeting, since states are under a duty to disclose the information concerning the targeting process in order to escape responsibility.<sup>237</sup> For instance, in the context of the 2009 Israeli military operations against the Strip of Gaza, the fact-finding mission dispatched by the UN Human Rights Council considered some Israeli errors in the targeting process, in light of the available information, as “a substantial failure of due diligence on the part of Israel.”<sup>238</sup> However, subsequently, one of the members of the mission noted that a disclosure of information regarding the Israeli targeting process could have led to different conclusions.<sup>239</sup> Accordingly, it was Israel’s duty to disclose relevant information to demonstrate compliance with the principle of precaution, and the fact-finding mission cannot be blamed for having reached its conclusion based on Israel’s non-cooperation. Similarly, in a number of cases before German courts, German military authorities had to describe step-by-step their decision-

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<sup>234</sup> See Pisillo Mazzeschi, *The Due Diligence Rule and International Responsibility*, *supra* note 2, at 50.

<sup>235</sup> ILA Second Report, *supra* note 5, at 7. However, nothing in international law prevents states from claiming responsibility for the violation of a due diligence obligations notwithstanding the non-occurrence of any event, see with regard to different obligations, KOLB, *ADVANCED INTRODUCTION*, *supra* note 58, at 168; KULESZA, *supra* note 2, at 267; Longobardo, *L’obbligo di verificare*, *supra* note 117, at 48; Longobardo, *L’obbligo di prevenzione del genocidio*, *supra* note 25, at 253–254.

<sup>236</sup> See KULESZA, *supra* note 2, at 204–05.

<sup>237</sup> See Eritrea-Ethiopia Claims Commission, *Partial Award: Central Front* (Apr. 28, 2004), ¶ 112 (offering an example in which, when states refuse to do so, international courts have considered them responsible for the breach of the due diligence obligations at hand).

<sup>238</sup> Human Rights Council, *supra* note 225, ¶ 864.

<sup>239</sup> See Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, Apr. 1, 2011.

making processes in order to demonstrate their diligent behavior with regard to the precautions adopted before executing and in the course of an attack that had resulted in civilian casualties.<sup>240</sup>

In this author's view, the fact that states must justify their conduct step-by-step is a great contribution to the implementation of international humanitarian law. Thanks to due diligence: i) today, states undertake preventive measures at every stage of a military operation in order to avoid the occurrence of a negative event; ii) those measures are disclosed in order to demonstrate diligent conduct if the event occurs, furthering the transparency of the conduct of hostilities; and iii) a culture based on the need to justify actions in armed conflict is strengthened. Accordingly, international humanitarian law, as a result of the increased application of the notion of due diligence obligations, is facing a progressive "proceduralization" that contributes to strengthening the implementation of the law of armed conflict.

In conclusion, the notion of due diligence affects the implementation of international humanitarian law both by reducing or widening state liability, depending on the circumstances, and strengthening compliance with the law of armed conflict in others. The fact that many international humanitarian law rules require the application of due diligence is a consequence of the interests pursued by this branch of international law, which combines due diligence obligations and obligations of result in order to further humanity's goals while allowing the achievement of military advantage. Accordingly, due diligence is a reasonable component of some international humanitarian law obligations.

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<sup>240</sup> See, e.g., Ermittlungsverfahren wegen des Luftangriffs vom 4. September 2009 eingestellt (Apr. 19, 2010), [www.generalbundesanwalt.de/de/showpress.php?searchstring=kunduz&newsid=360](http://www.generalbundesanwalt.de/de/showpress.php?searchstring=kunduz&newsid=360) [<https://perma.cc/Y4YV-C3YF>]; see also Wolf Heintschel von Heinegg & Peter Dreist, *The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces*, 53 GER. Y.B. INT'L L. 833 (2010); BGH, Oct. 6, 2016, III ZR 140/15, ¶ 55, [juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=76401&pos=35&anz=487](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=76401&pos=35&anz=487) [<https://perma.cc/R9WC-7TNP>]; Paulina Starski, *The Kunduz Affair and the German State Liability Regime – The Federal Court of Justice's Turn to Anachronism*, EJIL: TALK! (Dec. 5, 2016), [www.ejiltalk.org/the-kunduz-affair-and-the-german-state-liability-regime-the-federal-court-of-justices-turn-to-anachronism](http://www.ejiltalk.org/the-kunduz-affair-and-the-german-state-liability-regime-the-federal-court-of-justices-turn-to-anachronism) [<https://perma.cc/66MC-WH67>].