Roma Tre University, Department of Law

International Protection of Human Rights Legal Clinic

"Due Diligence Obligations of States Cooperating in Migration Management"

Report

14 July 2025

Table of contents

List of acronyms

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CIA	Central Intelligence Agency
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EU	European Union
FRA	European Union Agency for Fundamental Rights
HR	Human Rights
HRDD	Human Rights Due Diligence
HRDDP	Human Rights Due Diligence Policy
HRIA	Human Rights Impact Assessment
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law

ILA	International Law Association
ILC	International Law Commission
IOM	International Organization for Migration
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
OHCHR	Office of the United Nations of the High Commissioner for Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights
US	United States

Executive summary in English

This report examines States' due diligence obligations under IHRL applicable to their activities of cooperation in migration management. Specifically, it assesses whether – and to what extent – destination States can be held individually responsible for failing to implement a HRDD framework when engaging in cooperative initiatives for migration.

The concept of due diligence originates in Roman civil law as a reflection of the duty of care expected from a prudent individual. Over time, it evolved into a standard of conduct in international law, requiring States to safeguard internationally protected interests against threats posed by external sources, particularly those involving private actors. Due diligence obligations have emerged across various branches of international law, including the protection of foreign nationals, environmental law, IHL, and most significantly, IHRL.

Unlike obligations of result, which require a specific outcome, due diligence obligations are **obligations of conduct** – they compel States to take **all reasonable and appropriate measures to prevent harm**. States may be held internationally responsible for failing to meet due diligence standards **even if no harm materialises**, as the obligation lies in the conduct itself. These obligations arise when a State exercises **some degree of control or influence**, be it direct, indirect, partial, or even potential, over the third party which constitutes the source of risk. Such third parties may include individuals, corporations, other States, international organisations, or even natural phenomena. Importantly, the threshold for triggering due diligence is met not by establishing full or effective control, but rather **the State's actual capacity to influence the source of risk**. This distinguishes due diligence from both jurisdictional control under IHRL, which needs to be exercised over the right-holders, and attribution of private acts under Article 8 ARSIWA.

Being part of primary norms of international law, due diligence obligations are also distinct from other forms of accessory responsibility, including aid or assistance to third States in the commission of wrongful acts under Article 16 ARSIWA, although the two forms of responsibility may coexist. Article 16 requires proof that the assisting State had actual knowledge of the wrongful act by the principal State. In contrast, due diligence operates based on **constructive knowledge** – i.e., that the State knew or ought to have known of the risk. Moreover, while Article 16 requires a prior wrongful act, due diligence violations focus on the State's own conduct, meaning that **no finding of a prior wrongdoing by the third party is necessary**. As a result, **the indispensable third-party rule does not apply** in proceedings concerning due diligence breaches.

Due diligence is governed by the overarching **standard of reasonableness**, combining both objective and context-specific elements. Objectively, States must act with the level of care expected from a responsible government. Contextually, the standard varies depending on factors such as: (a) the knowledge of the harm or of the risk of harm; (b) the capacity of the duty-bearer to take measures; (c) the degree of risk of harm; (d) the severity of the potential harm; (e) the vulnerability of those affected. These variables may heighten the level of care required to States.

Although flexible by nature, due diligence obligations have been increasingly **proceduralised** in international law. This has limited States' discretion, either through **more precise treaty provisions** or through the judicial clarification that **certain measures are indispensable means to fulfil due diligence obligations**. A clear example is the obligation to conduct EIAs in environmental law, initially developed in international jurisprudence as a procedural necessity for preventing transboundary harm and subsequently codified in numerous treaties.

A comparable development has occurred in IHRL, where States' **duty to protect against third-party abuses** has become increasingly detailed through the practice of human rights courts and monitoring bodies. Though human rights treaties rarely specify the content of this duty, these institutions have progressively interpreted it to include procedural obligations to prevent, investigate, punish, and remedy human rights violations. In addition, the progressive concretisation of due diligence human rights obligations into specific sub-obligations has also appeared in international practice through the development and adoption by international actors of specific HRDDPs in various high-risk activities. These have been developed to allow actors to **identify, prevent, and mitigate the potential negative impacts on human rights resulting from certain human rights-sensitive activities**, including the cooperation with, or delegation of certain tasks to, different entities. Instruments such as the UN Guiding Principles on Business and Human Rights, the UN HRDDP for support to non-UN forces, and EU due diligence frameworks all structure the duty to protect around three core elements: (i) **prevention, via HRIAs**; (ii) **monitoring**, through ongoing independent oversight mechanisms; (iii) **redress**, including mechanisms to address violations and suspend support where violations occur.

In the context of cooperation for migration management, the report argues that destination **States must adopt a comprehensive HRDD framework as the only indispensable measure to comply with their duty to protect human rights**. Given the **high risk** of human rights abuses connected to the migration context, destination States must ensure that cooperation is conditional on human rights compliance. Even without full control over partner States, **providing funding, logistics, or support suffices to establish a degree of control and influence**, triggering due diligence obligations. This entails that States cooperating in migration management must conduct a **prior and specific HRIA**, set up **ongoing and independent monitoring**, and provide **accessible redress mechanisms**, including the ability to suspend support in cases of ascertained violations.

As this is an obligation of conduct aimed at the prevention of human rights violations, failure to subject cooperation to such HRDD framework may constitute a breach of the duty to protect **regardless of whether a human rights violation actually occurs as a result**. Unlike in cases of accessory responsibility, determining the responsibility of the destination State in this case does not require a determination of the wrongful conduct by the cooperating third State or organisation, thereby excluding the invocation of any indispensable third-party rule in either domestic or international judicial proceedings.

Executive summary in Italian

Il presente rapporto esamina gli obblighi di *due diligence* degli Stati ai sensi del diritto internazionale dei diritti umani, applicabili alle loro attività di cooperazione nella gestione dei flussi migratori. In particolare, il rapporto valuta se e in quale misura gli Stati di destinazione possano essere ritenuti autonomamente responsabili per la mancata adozione di uno *human rights due diligence framework* nell'ambito di iniziative di cooperazione in materia migratoria.

Il concetto di *due diligence* ha origine nel diritto civile romano come espressione del dovere di cura atteso da una persona prudente. Col tempo, si è evoluto come standard di condotta statale nel diritto internazionale, imponendo agli Stati l'obbligo di tutelare interessi giuridicamente protetti contro minacce provenienti da fonti esterne, in particolare da attori privati. Obblighi di *due diligence* sono emersi in vari ambiti del diritto internazionale, tra cui la protezione degli stranieri, il diritto ambientale, il diritto internazionale umanitario e il diritto internazionale dei diritti umani.

A differenza degli obblighi di risultato, che impongono il raggiungimento di un esito specifico, gli obblighi di *due diligence* sono **obblighi di condotta**: obbligano gli Stati ad adottare **tutte le misure ragionevoli e appropriate per prevenire danni**. Gli Stati possono essere ritenuti responsabili per non aver rispettato gli standard di diligenza **anche in assenza di un danno effettivo**, poiché l'obbligo risiede nella **condotta in sé**. Tali obblighi sorgono quando uno Stato esercita **un certo grado di controllo o influenza** – diretta, indiretta, parziale o anche solo potenziale – sulla terza parte che costituisce la fonte del rischio all'interesse protetto. Queste parti terze possono essere individui, imprese, altri Stati, organizzazioni internazionali o persino fenomeni naturali. La soglia per l'attivazione degli obblighi di diligenza non richiede il pieno o effettivo controllo, ma piuttosto la **capacità effettiva dello Stato di influenzare la fonte del rischio**. Ciò distingue il concetto di controllo tipico degli obblighi di *due diligence* tanto dal controllo richiesto per stabilire la giurisdizione degli Stati in materia di diritti umani (che deve essere esercitato sui titolari dei diritti), quanto dal "controllo effettivo" richiesto per l'attribuzione di atti di privati allo Stato ai sensi dell'articolo 8 degli Articoli sulla responsabilità degli Stati.

La responsabilità statale conseguente alla violazione di obblighi di *due diligence* deve inoltre tenersi distinta dalla responsabilità accessoria prevista all'articolo 16 degli Articoli sulla responsabilità degli Stati (assistenza o aiuto fornito a Stati terzi nella commissione di atti illeciti), benché le due ipotesi di responsabilità possano coesistere. L'articolo 16 richiede la prova che lo Stato che presta assistenza fosse a conoscenza dell'illecito commesso dallo Stato principale. Al contrario, la *due diligence* opera sulla base della cd. ***constructive knowledge***, ossia che lo Stato sapeva o avrebbe dovuto sapere dell'esistenza del rischio. Inoltre, mentre l'articolo 16 presuppone la previa commissione di un atto illecito da parte dello Stato terzo, la violazione degli obblighi di *due diligence* riguarda la condotta propria dello Stato, e quindi **non richiede alcun accertamento dell'eventuale illecito successivo commesso dalla terza parte**. Di conseguenza, **la regola della terza parte indispensabile non trova applicazione** nei procedimenti relativi alla violazione degli obblighi di *due diligence*.

La *due diligence* è regolata da un generale **standard di ragionevolezza**, che comprende sia elementi oggettivi che contestuali. Oggettivamente, agli Stati è richiesto di agire con il livello di cura atteso da un governo responsabile. Contestualmente, lo standard varia in base a diversi fattori, tra cui: (a) la conoscenza del danno o del rischio di danno; (b) la capacità del soggetto obbligato di adottare misure; (c) il grado di rischio; (d) la gravità del potenziale danno; (e) la vulnerabilità delle persone interessate. Questi fattori possono aumentare il livello di diligenza richiesto agli Stati.

Sebbene per natura flessibili, gli obblighi di *due diligence* sono stati progressivamente **proceduralizzati** nel diritto internazionale, riducendo lo spazio di discrezionalità lasciato agli Stati. Ciò è avvenuto sia attraverso **disposizioni pattizie sempre più dettagliate**, sia tramite interpretazioni giurisprudenziali che hanno identificato l'adozione di **misure specifiche come strumenti indispensabili per adempiere a tali obblighi**. Ne è un esempio l'obbligo di condurre valutazioni di impatto ambientale, inizialmente sviluppato nella giurisprudenza internazionale come attività procedurale necessaria per prevenire danni transfrontalieri, e successivamente codificato in numerosi trattati.

Un'evoluzione analoga si è verificata nel diritto internazionale dei diritti umani, dove il **dovere degli Stati di proteggere i diritti umani da violazioni da parte di terzi** si è progressivamente articolato grazie alla prassi delle corti e degli organi di controllo dei diritti umani. Sebbene i trattati in materia raramente specifichino il contenuto di tale obbligo, queste istituzioni lo hanno progressivamente tradotto in obblighi di prevenzione, indagine, repressione e riparazione delle violazioni. Inoltre, la progressiva concretizzazione degli obblighi di diligenza in materia di diritti umani in sotto-obblighi specifici è emersa anche nella prassi internazionale attraverso lo sviluppo e l'adozione di *human rights due diligence policies* da parte di attori internazionali in settori ad alto rischio. Questi strumenti sono stati elaborati per consentire **l'identificazione, la prevenzione e la mitigazione degli impatti negativi sui diritti umani derivanti da attività sensibili**, inclusa la cooperazione con, o la delega di compiti a, soggetti terzi. Strumenti come i Principi Guida delle Nazioni Unite su imprese e diritti umani, la politica di *due diligence* delle Nazioni Unite per il sostegno a forze non ONU, e il quadro normativo UE sulla *due diligence* strutturano il dovere di protezione intorno a tre elementi principali: (i) **prevenzione, attraverso le valutazioni di impatto sui diritti umani**; (ii) **monitoraggio**, mediante meccanismi di supervisione indipendente e continuativa; (iii) **riparazione**, compresi i meccanismi per reagire alle violazioni e sospendere il sostegno nei casi in cui esse si verifichino.

Nel contesto della cooperazione nella gestione della migrazione, il presente rapporto sostiene che **gli Stati di destinazione devono adottare uno *human rights due diligence framework* completo, quale misura indispensabile per adempiere al loro dovere di protezione dei diritti umani**. Dato l'**alto rischio** di abusi in questo settore, gli Stati di destinazione devono assicurarsi che ogni forma di cooperazione sia subordinata al rispetto dei diritti umani da parte degli Stati partner. Anche in assenza di un pieno controllo su questi ultimi, **la fornitura di supporto logistico, assistenza tecnica e finanziamento può configurare un grado sufficiente di influenza**, tale da attivare gli obblighi di *due diligence* degli Stati di destinazione. Questo implica l'obbligo di: (i) **condurre una valutazione d'impatto sui diritti umani specifica e preventiva**; (ii) **istituire un sistema di monitoraggio indipendente e continuativo**; (iii) **predisporre meccanismi di rimedio effettivo**, inclusa la possibilità di sospendere il sostegno economico e tecnico in caso di violazioni accertate.

Poiché si tratta di un obbligo di condotta volto alla prevenzione delle violazioni dei diritti umani, l'omissione di simili garanzie può costituire una violazione del dovere di protezione **anche in assenza di una violazione successiva dei diritti umani**. A differenza delle ipotesi di responsabilità accessoria, non è in tal caso necessario accertare l'illecito commesso dallo Stato o dall'organizzazione partner, rendendo inapplicabile la regola della terza parte indispensabile nei procedimenti interni o internazionali.

Introduction

In recent years, the practice of externalisation of borders has become a major feature of the migration policies of European States as well as of the EU's response to migration management. The concept of externalisation can be broadly defined as "the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory".[1] Such phenomenon is mainly implemented by destination States through various forms of cooperation with third States (particularly transit States of migratory routes) and international organisations.

Cooperation for migration management is typically based on bilateral or multilateral agreements or informal arrangements, which often serve as the basis for the provision of funds, equipment and other logistical support, and training offered to the cooperating third States to strengthen their operational capacities in managing migration flows. As a way of example, Italy signed a MoU with Libya in February 2017,[2] which was subsequently renewed without any changes in February 2020 and February 2023, and four agreements with Tunisia respectively in October 2023[3] and April 2024.[4] Both as a way of implementing such agreements and as independent measures, the State has provided significant financial and logistical support to the Libyan and Tunisian coastguards, including the direct transfer of ships for coastal patrol and fuel, to manage migration flows in the Central Mediterranean route.[5] In 2023, Italy signed a new Protocol on Migration Matters with Albania, providing for the financing of the construction and management of two migrant centers in Albanian territory.[6] Italy also cooperates with IOM, based on the Partnership Agreement signed in 2017 and renewed in 2019.[7] On its part, in 2023 the EU signed a MoU with Tunisia, covering a "Strategic and Comprehensive Partnership Framework" to, *inter alia*, provide technical support and funding to the transit State to carry out search and rescue operations, border management, the fight against migrant smuggling and return policy.[8]

The conclusion of similar agreements, and the ensuing practical support provided by destination States, have notoriously raised concerns over their potential impact on migrants' fundamental rights, particularly in light of existing public evidence of human rights abuses being committed by the transit States directly engaged in migration management activities.[9] Attention has been therefore dedicated to examining the potential international responsibility of destination States in situations where such cooperation results in the violation of the human rights of migrants. Particularly, efforts have been made to determine whether destination States can be held responsible for aiding and assisting transit States in committing human rights violations,

[1] 'Refugee Law Initiative Declaration on Externalisation and Asylum' (2022) 34(1) International Journal of Refugee Law 114 [Refugee Law Initiative Declaration on Externalisation and Asylum] 114.
[2] Italian Government, MoU Italy-Libya, 2 February 2017.
[3] Reuters, Italy signs deal to take migrant workers from Tunisia, 20 October 2023.
[4] The National News, Italy and Tunisia sign three agreements in push to curb migration to Europe, 17 April 2024.
[5] Roma Tre University International Protection of Human Rights Legal Clinic, ASGI and Spazi Circolari, 'Joint Submission to the Universal Periodic Review of Italy' (July 2024) [R3 Legal Clinic, ASGI and Spazi Circolari] 1.
[6] Italian Government, Italy-Albania Protocol, 6 November 2023, annex 1.
[7] Italian Ministry of Foreign Affairs, Partnership Agreement between the Italian Ministry of Foreign Affairs and International Cooperation and IOM, 4 August 2017.
[8] EU Commission, Memorandum of Understanding of a strategic global partnership between the European Union and Tunisia (press release, 16 July 2023).
[9] For an overview of the human rights implications of such cooperation activities, see generally: R3 Legal Clinic, ASGI and Spazi Circolari.

pursuant to Article 16 ARSIWA.[10] Yet, despite its "enormous potential to close the accountability gaps" in this field,[11] efforts to hold States accountable under the notion of aid and assistance have so far proved difficult and unsuccessful.[12]

However, as recently emphasised by a group of UN Special Rapporteurs in their communication to Italy concerning the new Protocol with Albania, "[t]he transnational nature of some State actions in the context of governing international borders does not exempt States from fulfilling *positive human rights obligations*".[13] Indeed, the fact that externalisation measures are, in whole or in part, implemented outside a State's territory will usually not release it from compliance with primary obligations imposed by international law, including obligations stemming from IHRL.[14] In this respect, to assess the potential responsibility of destination States, their conduct within such cooperation shall be first and foremost analysed from the viewpoint of its compliance with the positive obligations of due diligence they bear under IHRL.

The present report, rendered upon the request of ASGI (Associazione per gli Studi Giuridici sull'Immigrazione) in the context of the project Sciabaca&Oruka – Oltre il Confine, is accordingly dedicated to analysing States' due diligence obligations under IHRL, applicable to their activities of cooperation in the context of migration management. More specifically, the report aims to assess whether and to what extent destination States can be held autonomously responsible for their failure to implement a human rights due diligence (HRDD) framework when engaging in cooperation for migration management, as a necessary and indispensable instrument to fulfil their duty to protect human rights.

To this end, the report proceeds as follows.

First, it analyses obligations of due diligence in international law, describing the emergence and evolution of the notion, illustrating their nature as obligations of conduct as opposed to obligations of result, and examining the content and evolution of the "reasonableness" standard of conduct.

---

[10] See, for instance: Tasawar Ashraf, 'State Complicity in Aiding and Assisting Extraterritorial Human Rights Violations: The Case of Informal Externalisation of Asylum Controls' (2025) 27 European Journal of Migration and Law 20; Alice Riccardi, 'Esternalizzazione delle frontiere italiane in Libia e Niger: una prospettiva di diritto internazionale' (2020) 1 Questione Giustizia 163 [Riccardi]; Giuseppe Pascale, 'Is Italy internationally responsible for the gross human rights violations against migrants in Libya?' (2019) 56 QIL 35 [Pascale]; Achilles Skordas, 'A 'blind spot' in the migration debate? International responsibility of the EU and its Member States for cooperating with the Libyan coastguard and militias' (*EU Immigration and Asylum Law and Policy*, 30 January 2018).

[11] James C Hathaway and Thomas Gammeltoft-Hanses, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 284.

[12] Andreina De Leo, 'Fostering Accountability for Human Rights Violations in EU Border Externalization Through the European Ombudsman: The Case of Contesting Financial Support to the Libyan Coast Guard' (2025) 23(1) Journal of Immigrant & Refugee Studies 104, 110-111.

[13] Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on the sale, sexual exploitation and sexual abuse of children; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on trafficking in persons, especially women and children and the Special Rapporteur on violence against women and girls, its causes and consequences, 'Information received concerning the Protocol on Migration Matters, concluded between the Government of Italy and the Government of the Republic of Albania for the provision of the enhanced cooperation in the field of governing migration flows from third countries, and the negative impact it would have on the human rights of migrants in distress at sea, including those in need of international protection' (24 June 2024) 2. Emphasis added.

[14] Refugee Law Initiative Declaration on Externalisation and Asylum, 115.

Second, it discusses questions of international responsibility, illustrating how violations of due diligence obligations, as part of primary norms of international law, constitute autonomous internationally wrongful acts. The report therefore distinguishes responsibility arising from breaches of due diligence from other forms of State responsibility connected to the acts of other persons or entities. In particular, it distinguishes it from (i) responsibility for acts of private persons directly attributable to the State, (ii) responsibility for aid and assistance to another State in the commission of a wrongful act under Article 16 ARSIWA, and (iii) responsibility connected to the obligations resulting from another State's commission of a serious breach of a *jus cogens* norm under Article 41(2) ARSIWA.

Third, the report analyses the content of due diligence obligations in the field of IHRL. It accordingly discusses the duty to protect human rights, as interpreted in international practice, and describes its process of progressive proceduralisation. In this latter regard, the report illustrates the HRDD policies developed in certain areas of international practice (e.g. business and human rights) and by different actors (e.g. the UN, the EU) as tools to identify, prevent, and mitigate the potential negative impacts on human rights resulting from the cooperation with, or support to, other entities on human rights-sensitive activities.

Fourth, the report analyses the content of the duty to protect under certain special HR treaty regimes relevant to the field of migration management. Particularly, it examines States' duty to protect individuals against torture and inhuman or degrading treatment, as well as the duty to protect women from gender-based violence and trafficking, particularly in migration contexts. It highlights the absolute, non-derogable prohibition of torture and the principle of *non-refoulement*, which bars returning individuals to places where they risk such treatment. States must not only refrain from these acts but also take proactive measures to prevent them, including when abuses are committed by private actors or through cooperation with other States. Under the CEDAW and the Istanbul Convention, States also have a duty to protect women from trafficking and violence, requiring gender-sensitive assessments and safeguards throughout the migration and return process.

Finally, the report concludes that States cooperating in migration management have a duty to adopt a HRDD framework to meet their obligation to protect human rights. Even without full control over partner States, a degree of influence sufficient to trigger due diligence obligations is exerted through the provision of funding, logistics, or support. Given the high risk of human rights abuses connected to the migration context, destination States must ensure that cooperation is conditional on human rights compliance. This requires a prior and specific HRIA, ongoing and independent monitoring, and accessible redress mechanisms, including the ability to suspend support. Failing to implement HRDD, regardless of whether violations ultimately occur, may constitute an independent breach of destination States' duty to protect human rights.

The report has been prepared, under the overall direction of Prof. Alice Riccardi, under the supervision of Dr. Laura Di Gianfrancesco and the assistance of Dr. Laura Eligi and Dr. Silvia Turco Liveri, by the students of the International Protection of Human Rights Legal Clinic of Roma Tre University (Rome, Italy), Department of Law, class of 2024-2025. The students who participated in drafting this report are Vittoria Barbato, Névine Belgaied, Lorenzo Capuano, Lucilla Alessandra Guerrini, Clara Laurito, Keya Patel, Gaia Traccitto and Sahar Yahiaoui.

1. Due diligence obligations in international law

1.1. The emergence of the notion of due diligence in international law

The expression "due diligence" derives from Latin, where "due" originates from *debere* ("to owe") and "diligence" from *diligere* ("carefulness" or "attentiveness"). Indeed, the notion traces back to Roman civil law, in connection with the development of the standard of conduct of the "*diligens paterfamilias*".[15] In Ancient Rome, a person could be held responsible for harm caused to others, if the author of the damage failed to meet the required standard of care expected from a prudent head of a household.

Later on, the link between *diligentia* and responsibility influenced Grotius' scripts on State responsibility,[16] where he elaborated on the responsibility of the sovereign as a natural person, in cases of negligent actions or omissions. Over time, when the sovereign came to be separated from the State, the notion of responsibility started to refer to the State as such, rather than to the person of the sovereign.[17] In this context, the sovereign State started to be seen as responsible not only for the actions of its organs, but also for its failure to prevent injuries caused by private actors. In his "*Droit des gens*" of 1758, de Vattel asserted that a State must not only refrain from direct wrongdoing, but must also take all reasonable measures to prevent wrongful acts committed by private individuals within its territory. As he observed, a State "ought to use all possible efforts to restrain subjects whose conduct might injure a foreign power and trigger international responsibility".[18]

It is against this background that the notion of due diligence made its first appearance in international practice. The first branch of international law where the notion appeared was the law of neutrality. In this context, due diligence was intended as the duty of a neutral State to prevent private persons from rendering aid to the belligerent parties. The term was indeed first expressly articulated in the famous 1871 *Alabama Claims Arbitration*, a dispute concerning Great Britain's responsibility for failing to maintain neutrality in the American Civil War by offering ships and vessels to Confederates knowing they were intended for military expeditions. The arbitral tribunal also elaborated on the standard of due diligence for third States in meeting their obligation of neutrality, holding that "due diligence [...] ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part".[19] The standard so developed thus operated "as a counterbalance to state sovereignty",[20] requiring States to balance their sovereign prerogatives with the duty to prevent harm to other States. While sovereignty entailed a State's exclusive jurisdiction over its territory, the notion of due diligence highlighted that, within such a sphere of exclusive jurisdiction, States were still expected to take measures to protect other States' interests.[21]

---

[15] Adedayo Akingbade, 'Due Diligence in International Law: Cause for Optimism?' in Bríd Ní Ghráinne, James Gallen and Richard Collins (eds), *The Irish Yearbook of International Law* (vol 15, Bloomsbury Publishing 2023) 32.

[16] Jan Arno Hessbruegge, 'The historical development of the doctrines of attribution and due diligence in international law' (2003) 36 NYUJILP 265, 266.

[17] Samantha Besson, *Due Diligence in International Law* (Brill 2023) [Besson] 40.

[18] Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns* (transl. Joseph Chitty) 206-08.

[19] *Alabama Claims Arbitration* (*US v UK*) (1871) 29 RIAA 125, 129.

[20] Joanna Kulesza, *Due Diligence in International Law* (Brill 2016) [Kulesza] 58.

[21] Giulio Bartolini, 'The Historical Roots of the Due Diligence Standard' in Heike Krieger, Anne Peters and Leonhard Kreuzer, *Due Diligence in the International Legal Order* (OUP 2020) 23.

In addition to the law of neutrality, the due diligence principle subsequently extended to the protection of foreign nationals and their property. Although States could not be held responsible for every private wrongful act committed against and in violation of foreigners' rights within their territories, international law nonetheless required them to take reasonable steps to prevent such acts.[22] Early practices concerning the protection of aliens and their property also contributed to defining the standard of due diligence applicable to States, acknowledging that the required level of diligence in the protection of aliens corresponded to an international standard of conduct, i.e. a standard of "reasonableness", rather than the *diligentia quam suis* that the State would generally exercise in its internal affairs.[23]

Over the course of the twentieth century, the notion of due diligence progressively appeared in several other branches of international law. Specialised legal regimes, such as environmental law, IHL, and IHRL, started to incorporate tailored due diligence obligations intending to safeguard certain identifiable interests to be protected by international law. Within several of these fields, the content of due diligence obligations has also evolved through a process of progressive "proceduralisation". As will be further illustrated below (Para. 1.3), whereas the overarching standard of any due diligence obligation is one of "reasonableness", a process of proceduralisation has allowed to identify "more specific legal parameters", to the effect that obligations of due diligence can be "spelled out into a series of 'sub'-duties, technical standards or direct obligations".[24] In contemporary international law, discussing due diligence obligations also necessarily requires taking such evolution into account.

1.2. Due diligence as an obligation of conduct

Understanding due diligence obligations requires clarifying their normative nature – particularly their qualification as *obligations of conduct*, as opposed to *obligations of results*, a distinction well-established in international law.[25]

Obligations of conduct – also referred to as obligations of means – require a State to undertake all reasonable efforts towards achieving a certain result. The failure to reach the desired outcome does not, by itself, entail responsibility. By contrast, obligations of result demand the obtainment of the intended outcome, although the State retains discretion as to the choice of the means to be implemented.[26] In such a case, the State is always held responsible if the result is not accomplished, since it commits itself not only to act but to *succeed*.[27] The distinction between these types of obligations accordingly hinges on whether the international obligation is one of performance (such as adopting specific measures, e.g., establishing an adequate legal administrative framework to protect the right to life),[28] or one of result (requiring the creation or maintenance of a specific situation).[29] As such, obligations of conduct are typically more

---

[22] *William E. Chapman Arbitration* (*USA v United Mexican States*) (1930) 4 RIAA 632
[23] Alice Ollino, *Due Diligence Obligations in International Law* (CUP 2022) [Ollino] 25.
[24] Ibid, 232.
[25] James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility* (OUP 2020) [Crawford, Pellet and Olleson] 375.
[26] Rüdiger Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations' in Mahnoush H Arsanjani et al (eds), *Looking to the Future* (Brill 2001) [Wolfrum] 364.
[27] Crawford, Pellet and Olleson, 375.
[28] *Velásquez Rodríguez v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) [*Velásquez Rodríguez v Honduras*] para 175.
[29] Wolfrum, 364.

flexible, imposing a duty to act reasonably and diligently, whereas obligations of result are inherently more rigid, with the State being accountable for the outcome itself.[30]

The distinction is reflected in how the potential breach is assessed. For obligations of result, establishing a violation is relatively straightforward: the claimant must only show that the required result was not achieved.[31] Contrarily, the threshold is higher when it comes to the ascertainment of a violation of an obligation of conduct. Indeed, it is not sufficient to show that an adverse consequence occurred, but it must be demonstrated that the State failed to take all reasonably necessary and available[32] measures to prevent it. In such cases, a breach occurs when a State fails to comply with the required standard of behaviour,[33] rather than failing to achieve the result *per se*. While this standard of conduct grants the State a margin of discretion in choosing the means to fulfil its duties,[34] it nonetheless requires the adoption of diligent conduct[35] and the exercise of due care,[36] to prevent foreseeable or likely undesirable outcomes[37] across all the stages of an activity, ranging from planning and decision-making to implementing and monitoring.[38]

Due diligence obligations are typically classified as obligations of conduct. Indeed, when the international community identifies a particular interest to be protected, whose attainment would be unreasonable to impose as an obligation of result, it sets obligations of conduct, precisely in the form of due diligence obligations. For instance, in the field of IHRL, as will be further detailed (Para. 3), States are not responsible for every single violation of human rights endured by individuals as a result of the acts of third parties;[39] rather, they must demonstrate that reasonable and appropriate steps were taken to protect individuals – without being subjected to an impossible or disproportionate burden.[40] This understanding has been consistently upheld, *inter alia*, by the ECtHR,[41] the IACtHR,[42] and the HR Committee,[43] which have thoroughly construed due diligence obligations as obligations of conduct, affirming for instance that "while

[30] Crawford, Pellet and Olleson, 375.
[31] Yvonne Breitwieser-Faria, 'State Responsibility for Breaches of Prevention Obligations: Is the Distinction between Obligations of Conduct and of Result Useful?' (2021) 28 Australian International Law Journal 75 [Breitwieser-Faria] 90.
[32] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Merits) [2015] ICJ Rep 665 [*Costa Rica v Nicaragua*] para 104; Kulesza, 61; Breitwieser-Faria, 82.
[33] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/56/10 [ARSIWA with commentaries] art 12.
[34] Medes Malaihollo and Lottie Lane, 'Mapping out due diligence in regional human rights law: Comparing case law of the European Court of Human Rights and the Inter-American Court of Human Rights' (2024) 37 Leiden Journal of International Law 462 [Malaihollo and Lane] 465.
[35] Breitwieser-Faria, 90.
[36] Kulesza, 31.
[37] Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459 [Ferstman] 464.
[38] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Separate opinion of Judge Donoghue) [2010] ICJ Rep 14 [Pulp Mills, Separate opinion of Judge Donoghue] para 9.
[39] Malaihollo and Lane, 465.
[40] *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) [*Osman v UK*] para 116.
[41] *İlhan v Turkey* App no 22277/93 (ECtHR, 27 June 2000) paras 75-76; *Osman v UK*, para 116; *Acar and Others v Turkey* Apps nos 26878/07 and 32446/07 (ECtHR, 27 November 2001) para 77; *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004) para 51.
[42] *Case of the Rochela Massacre v Colombia* (Judgment) Inter-American Court of Human Rights Series C No 163 (11 May 2007) para 127; *Kawas Fernández v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 196 (3 April 2009) para 101.
[43] HR Committee, 'General Comment No 36' (20 October 2018) UN Doc CCPR/C/GC/36, para 7; HR Committee, Chongwe v Zambia (Communication No 821/1998) (23 July 2000) UN Doc CCPR/C/70/D/821/1998, para 5.2.

the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures".[44]

This also explains a fundamental feature of due diligence obligations as obligations of conduct, namely that a State can incur international responsibility for failing to perform its due diligence obligations *as such*, regardless of whether a violation ultimately occurs as a result.[45] In this regard, the ICJ has clarified that compliance with the requested standard of diligence is so unrelated to the verification of the undesired result that "it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed"[46] to prevent it. Accordingly, States are bound to adopt diligent conduct irrespective of whether the undesired result materialises. Failure to meet such a standard may result in holding the State responsible even in the absence of concrete harm, underscoring that the obligation lies in the conduct itself, and not in the outcome.

This logic is grounded precisely on the *rationale* behind due diligence obligations in international law. Obligations of due diligence in various fields of international law have developed with a view to imposing on States a duty to prevent, protect against, or remedy risks of harm to internationally protected interests not deriving from its own organs, but rather from external sources, particularly by private parties. Such obligations are designed to tackle precisely those contexts where the State cannot exercise *full control* over the potential source of harm, particularly when the risk of harm to the protected interest arises from complex, unpredictable, and external sources.[47] As acknowledged by the ECtHR, States operate within the constraints of "the difficulties involved in policing modern societies" and "the unpredictability of human conduct",[48] where risks of harm are numerous, their causes often diffuse, their dynamics uncertain, and their effects potentially widespread.[49]

Nevertheless, this does not mean that due diligence obligations arise in a vacuum. Indeed, a relation must still be established between the State and the source of harm. Specifically, due diligence obligations presuppose that the State exercises, or is in a position to exercise, *some* degree of control over the entity or the factor generating the risk – often referred to as the "third party" of due diligence.[50] Due diligence obligations are indeed premised on the existence of a triangular relationship between States as the duty-bearers, the beneficiaries of the obligation, and a third party which constitutes the source of harm.[51] These third parties can be any subject: this includes not only private persons (such as individuals, groups, or multinational corporations), but also technical installations or natural phenomena – provided that the State has some degree of control over them.[52] Crucially, the third parties can also be other States or international organisations, when the State is in a position to influence their actions.[53]

---

[44] *Velásquez Rodríguez v Honduras*, para 175.
[45] *Pulp Mills*, Separate opinion of Judge Donoghue, para 9.
[46] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 430.
[47] Besson, 89.
[48] *Mastromatteo v Italy* App no 37703/97 (ECtHR, 24 October 2002) [*Mastromatteo v Italy*] para 68.
[49] Anne Peters, Heike Krieger, and Leonhard Kreuzer, 'Due diligence: the risky risk management tool in international law' (2020) 9 Cambridge International Law Journal 121 [Peters, Krieger and Kreuzer] 125.
[50] Besson, 89.
[51] Ibid, 77.
[52] Ibid, 93.
[53] Ibid. For instance, in *El-Masri*, the Grand Chamber of the ECtHR found Macedonia responsible for the applicant's transfer to US custody and his subsequent ill-treatment by CIA agents, based on its own active

Two remarks are necessary on the notion of "control" required between the duty-bearer and the source of harm, triggering the former's due diligence obligations.

First, the "control" necessary to trigger due diligence obligations does not coincide with the notion of "control" required to establish jurisdiction under IHRL. Jurisdiction typically refers to the control States exercise over the right-holders or beneficiaries of its obligations; by contrast, "control" for the purpose of due diligence obligations refers to the relationship between the State and the third party posing the risk of harm – which does not necessarily need to fall within the State's jurisdiction.[54] Indeed, such control may stem from a wide range of "links" – legal, political, territorial, or personal. What matters is not the legal qualification of the link itself, but rather the State's actual *capacity to influence* the source of the risk, even if that influence is partial or indirect.[55]

Second, and as a consequence, the relevant degree of control may also be loose, indirect, or merely potential and does not need to be necessarily active, intentional, or fully effective.[56] Crucially, it logically falls short of the requirement of "effective control" necessary for the purpose of attribution of the conduct of private persons to the State, under the criterion of Article 8 ARSIWA.[57] If it were, the State would be directly responsible for the conduct of the private persons, rather than being responsible for its own organs' negligent conduct.

Against this background, due diligence emerges as a pragmatic legal tool for prevention, suited to navigate the uncertainties and evidentiary challenges inherent in contemporary, multi-actor risk environments – particularly where knowledge about nature, scope, and causation of harm is limited.[58] Accordingly, the focus shifts from direct causation to the actor's *proximity to the risk*, i.e., whether the State was in a position to foresee and take reasonable measures to reduce the likelihood of harm.[59] Imposing an obligation of result in such settings would amount to imposing an impossible or disproportionate burden on authorities,[60] requiring a level of control that no State can reasonably be expected to exercise. It is precisely this flexibility that underpins the preventive logic underlying due diligence obligations. Operating *ex ante*, these obligations are designed to avert harm before it materialises, relying on the State's capacity to anticipate risks,[61] and to respond with reasonable precautionary measures.[62]

---

facilitation of such treatment and its failure "to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring". See: *El-Masri v The Former Yugoslav Republic of Macedonia* App no 39639/09 (ECtHR, 13 December 2012) [*El-Masri*] para 211.

[54] Besson, 89.

[55] Ibid; Monica Hakimi, 'State Bystander Responsibility' (2020) 21 European Journal of International Law 341, 356; Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (2020) ESIL Reflections 1, 2; María Isabel Cubides, 'The Content and Scope of State Obligations in the Draft Treaty on Business and Human Rights: What Role for the State and What Place for State-Owned Enterprises?' (2022) 20 Droits fondamentaux 1, 8.

[56] Besson, 90.

[57] Article 8 ARSIWA provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The degree of control required for attribution was clarified by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, where it held that even extensive support by the United States to the *contras* did not suffice for attribution, absent "effective control" of the United States over the specific operations in which the violations occurred. See also *Costa Rica v Nicaragua*, para 115; ARSIWA with commentaries, art 8, para 4; Besson, 90.

[58] Peters, Krieger and Kreuzer, 125.

[59] Ibid.

[60] *Mastromatteo v Italy*, para 68.

[61] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 [*Pulp Mills*] para 204.

[62] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) [2024] ITLOS No 31, para 242.

1.3. Flexibility of the due diligence standard of "reasonableness"

Under international law, due diligence obligations are governed by the overarching standard of "reasonableness".[63] The latter requires States to act reasonably and to demonstrate "due" or "reasonable" care in preventing harm.[64] The question of how States can clearly ascertain that they are satisfactorily fulfilling – and continuing to fulfil – their due diligence obligations[65] must be answered by drawing on the combined insights of the two main understandings of "reasonableness".

First, the standard of reasonableness sets an objective minimum threshold: States shall adopt measures required by objective reasonableness, i.e. what *any* good government would be expected to do. Yet, this standard does not necessarily simplify the understanding of due diligence. Indeed, determining what is expected from a "reasonable" person is conceived as delicate and contentious already in domestic private law, and becomes even more complex when transposed to international law, where such a standard must be applied to "collective and institutionalised subjects",[66] such as States. To address such uncertainty, two trends have emerged in certain branches of international law: the technicisation and the proceduralisation of due diligence obligations. Due diligence is increasingly shaped by scientific and technical standards, which help to clarify what is expected from States, rendering these obligations more objective and less dependent on subjective legal interpretation. On the other hand, this has led to a proceduralisation of the obligation, requiring States to follow clear procedural steps ("checklists") – for instance conducting EIAs – so that compliance becomes easier to assess and less dependent on open-ended or indeterminate notions of reasonableness.[67]

Second, and beyond this objective baseline, States must take measures "tailored" to the specific circumstances of the case, meaning what that *specific* government can be reasonably expected to do given the peculiar context.[68] Ensuring substantive compliance thus requires taking into account a range of contextual elements that may influence the scope and intensity of the required efforts. The "factors"[69] or "parameters" to evaluate due diligence's variability can be identified in: (a) the knowledge of the harm or of the risk of harm; (b) the capacity of the duty-bearer to take measures; (c) the degree of risk of harm; (d) the severity of the potential harm; (e) the vulnerability of the affected persons.[70]

This entails that, firstly, (a) the more the duty-bearer knew or should have known that there was a risk of harm, the more stringent the level of vigilance is required and the higher its vigilance should have been.[71] Indeed, foreseeability is a pivotal consideration in determining whether and to what extent the due diligence obligation arises – as the harm must have been *objectively* foreseeable in order to trigger such an obligation.[72] Sometimes, there may be even a duty to

[63] ILA Study Group on Due Diligence in International Law, Second Report (2016) [ILA Second Report on Due Diligence] 7.
[64] Besson, 107.
[65] ILA Second Report on Due Diligence, 7.
[66] Besson, 109.
[67] Ibid, 112.
[68] Ibid, 108.
[69] Björnstjern Baade, 'Due Diligence and the Duty to Protect Human Rights' in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) [Baade] 97.
[70] Besson, 120.
[71] Ibid, 121; ILA Second Report on Due Diligence, 12.
[72] Baade, 98.

take active steps and use best efforts to *acquire knowledge*, or the proof of knowledge may be even derived from the impossibility to cause the harm without government's awareness.[73]

Secondly, it is widely accepted that (b) due diligence is contingent upon the State's means and capacity.[74] In this regard, limited financial resources may exclude the feasibility of certain measures.[75] This instrument of flexibility may serve to "support rather than inhibit States in achieving human development objectives", particularly for developing countries.[76]

Thirdly, the diligence expected from the duty-bearer will vary (c) depending on the degree of control over the third party conceived as the source of the risk. As anticipated, the control does not necessarily need to be strictly "jurisdictional" as it may also derive from other "links", including "political" ones,[77] and this will in turn affect the required diligence.

Finally, a heightened standard of due diligence is expected when (d) the objective degree of risk of harm is high,[78] (e) the potential harm is particularly severe and, (f) the victim belongs to a vulnerable category (such as children, women and residents of polluted areas).[79] Each of these factors can increase the level of "reasonable care" expected from the State.

Therefore, the commonly accepted understanding of due diligence obligations, along with its inherent flexibility,[80] entails that different contexts may require different measures and that certain factors have the potential of subjecting States to a higher standard of care. It follows that while "reasonableness" is the "minimum threshold", resource limits and potential conflicts with concurring international law obligations may delineate the outer bounds of what is reasonably expected from a State.[81] Nevertheless, the need to tailor the standard of care to specific circumstances may not result in imposing a "disproportionate burden" on the State. The *discrimen* between lawfully claiming the disproportionate burden test and failing to implement due diligence obligations lies in the principle of good faith, which generally guides the State's choice of measures under the criterion of reasonableness. Therefore, a State cannot be considered to have acted diligently if it has acted in bad faith.[82]

This also entails that, as anticipated, the discretion afforded to States in determining the means to fulfil their due diligence obligations may be circumscribed in several ways.[83]

First, certain primary norms may explicitly prescribe specific measures that States must adopt. In such cases, compliance with their due diligence obligations may require States to adopt the "necessary legislative, administrative framework, or other actions", including the establishment of suitable monitoring mechanisms to prevent a particular harm,[84] e.g. the imposition of legislative procedures requiring prior State authorisation for any activity likely to cause

---

[73] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22.
[74] Kulesza, 74.
[75] Baade, 99.
[76] ILA Second Report on Due Diligence, 14.
[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 430.
[78] ILA Second Report on Due Diligence, 13.
[79] Besson, 123.
[80] Ibid, 107; ILA Second Report on Due Diligence, 7; Kulesza, 263; Anne Peters, Heike Krieger, and Leonhard Kreuzer, 'Due diligence: the risky risk management tool in international law' (2020) 9 Cambridge International Law Journal 121, 126.
[81] Besson, 125.
[82] ILA Second Report on Due Diligence, 13.
[83] Ibid, 7.
[84] ILC, 'Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities' (2001) UN Doc A/56/10, art 5.

significant transboundary damage.[85] Similarly, the content of primary norms may directly require States to implement specific procedural measures (e.g. planning mitigation strategies, implementing monitoring practices, and notifying potentially affected States to proactively manage potential harm).[86]

Second, in certain contexts, the State's discretion may be further restricted, and in particular where a specific type of measure is deemed *indispensable* to prevent harm. For instance, when the harm results from the actions of private entities beyond the State's direct control, States may have no choice but to regulate their conduct to avoid damage (e.g., regulating emissions from private companies to prevent transboundary environmental harm,[87] implementing mechanisms to ensure access to information and legal support advice for prosecution,[88] or establishing a comprehensive policy to prevent, investigate, punish and eliminate violence against women).[89]

In some instances, measures initially deemed indispensable for fulfilling due diligence obligations may be subsequently codified into treaty law, thereby becoming explicit components of primary norms. This dynamic is well exemplified by the development of the requirement to conduct an EIA under international environmental law, which originally emerged as a *procedural necessity* under the due diligence obligation to prevent significant transboundary harm. Since the *Trail Smelter* case, States have been under a general obligation to ensure that activities within their jurisdiction or control do not cause significant environmental harm to other States or areas beyond national jurisdiction.[90] This substantive obligation to prevent transboundary harm, as an obligation of conduct,[91] requires States to exercise due diligence in preventing significant adverse impacts.[92] In the *Pulp Mills* case, the ICJ clarified what this due diligence may entail. The Court emphasised that States must not only "adopt appropriate rules and measures", but also ensure a certain "level of vigilance in their enforcement and maintain administrative control over both public and private actors".[93] Crucially, the Court held that "to fulfil its obligation to exercise due diligence in preventing significant transboundary harm, a State must ascertain if there is a risk of significant transboundary harm, which triggers the requirement to carry out an environmental impact assessment".[94]

Importantly, the ICJ remarked that these procedural obligations, such as the duty to conduct an EIA, are distinct from substantive obligations.[95] Indeed, they can be violated even when significant transboundary harm does not ultimately occur.[96] For instance, in *Costa Rica v Nicaragua*, the Court found that the construction of a road near the border with Nicaragua

[85] Ibid, art 6.
[86] Peters, Krieger, and Kreuzer, 128.
[87] Alistair Rieu-Clarke, 'The duty to take appropriate measures to prevent significant transboundary harm and private companies: insights from transboundary hydropower projects' (2020) 20 International Environmental Agreements: Politics, Law and Economics 667, 669.
[88] *Case of González et al. ("Cotton Field") v Mexico* (Judgement) Inter-American Court of Human Rights Series C No 205 (16 November 2009) para 83.
[89] Ibid.
[90] *Trail Smelter Case (USA v Canada)* [1938/1941] RIAA III 1905, 1965.
[91] Sandrine Maljean-Dubois, 'The No-Harm Principle as the Foundation of International Climate Law' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (CUP 2021) 15, 16.
[92] Jutta Brunnée, *ESIL Reflection: Procedure and Substance in International Environmental Law: Confused at a Higher Level?* (ESIL Reflections, 2016) [Brunnée] II.
[93] *Pulp Mills*, para 197.
[94] Ibid, para 204; *Costa Rica v Nicaragua*, para 104.
[95] *Pulp Mills*, para 197.
[96] Brunnée, II.

triggered Costa Rica's obligation to carry out an EIA,[97] which it failed to do.[98] As a result, the Court held that Costa Rica had breached its procedural obligations under general international law, notwithstanding the absence of a resulting material harm to the territory of the affected State.[99]

Over time, the requirement to conduct an EIA started to be explicitly incorporated in treaty law. Several multilateral instruments now mandate EIAs for activities likely to have significant environmental or transboundary impacts, including Article 2(3) of the Convention on Environmental Impact Assessment in a Transboundary Context,[100] Article 206 UNCLOS,[101] Article 14(1) of the Convention on Biological Diversity,[102] as well as Article 7 of the Draft articles on Prevention of Transboundary Harm from Hazardous Activities.[103]

Conclusively, the required measures to comply with due diligence obligations are context-dependent and must be considered in light of the specific branch of international law to which they apply.

2. Due diligence and State responsibility

2.1. Due diligence as part of primary norms

In international legal scholarship, 'primary' and 'secondary' norms were first substantially utilised by the ILC in its work on State responsibility.[104] Primary norms are those rules of international law that establish specific obligations and duties for States, defining the substantive material content of what States must or must not do in a given situation.[105] They stipulate the expected conduct or outcome required by a rule of international law.[106] Secondary norms, in contrast, govern the realm of State responsibility, i.e. the legal consequences that arise when a State breaches a primary norm.[107] The law of State responsibility is thus solely concerned with defining the conditions for, and the content of, the consequences of violating a primary norm of international law. As the ILC stated in its 1980 report, "in preparing the present draft, the Commission is undertaking solely to define those rules which, in contradistinction to the primary rules, may be described as 'secondary', since they are aimed at determining the

[97] *Costa Rica v Nicaragua*, para 158.
[98] Ibid, paras 160-162.
[99] Ibid, para 213.
[100] Article 2(3) Espoo Convention provides: "The Party […] shall ensure that […] an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity […] that is likely to cause a significant adverse transboundary impact".
[101] Article 206 UNCLOS provides: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall […] assess the potential effects of such activities on the marine environment […]."
[102] Article 14(1)(a) Convention on Biological Diversity provides: "Each Contracting Party […] shall (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects […]".
[103] Article 7 of the Draft articles on Prevention of Transboundary Harm from Hazardous Activities provides: "Any decision in respect of the authorization of an activity […] shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment".
[104] Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 993, 1016.
[105] Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (CUP 2021) 92.
[106] Ibid.
[107] Jean Combacau and Denis Alland (1985), 'Primary and Secondary Rules in the Law of State Responsibility Categorizing International Obligations' in René Provost (ed), *State Responsibility in International Law* (Routledge 2002) 89.

legal consequences of failure to fulfil obligations established by the 'primary' rules. Only these 'secondary' rules fall within the actual sphere of responsibility for internationally wrongful acts".[108] Hence, the ARSIWA, ultimately adopted by the ILC in 2001, represent a codification of these secondary norms as established in customary law, and are intended to apply universally, irrespective of the specific primary obligation violated.[109] The distinction between these two categories is essential to understanding the role of due diligence as part of primary, rather than secondary norms.

This distinction is reinforced by the ILC's decision to exclude any consideration of due diligence from the content of secondary rules. While the ILC aimed to codify the general secondary rules of State responsibility, leaving the content of specific primary obligations to be found in other areas of international law, the concept of due diligence was discussed extensively throughout this process, in relation to State responsibility for acts of private individuals, linked to subjective elements of responsibility, such as fault or negligence. For example, the first Special Rapporteur on State responsibility Garcia-Amador focused on establishing State responsibility in situations where a State failed to prevent, suppress or address the conduct of a non-State actor that was contrary to a particular international rule to which the State was bound.[110] However, Special Rapporteur Crawford subsequently undertook to define the general secondary rules that specified the consequences of a breach of primary obligations, rather than elaborating on the content of those obligations themselves, such as whether a duty of due diligence applies in a given context. This shift clarified that the ILC's work focused on secondary rules, such as attribution and legal consequences of breaches, while leaving the identification and scope of obligations like due diligence to the domain of primary rules.[111] This change in focus had a significant impact on how the subjective element of State responsibility was dealt with in the codification project.[112] With fault not being conceived as a general element of international responsibility, the commentary to Article 2(3) ultimately highlights that "whether responsibility is 'objective' or 'subjective' in this sense depends on the circumstances, including the content of the primary obligation in question. […] The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence".[113] Hence, due diligence is not considered in the ARSIWA, as the ILC intended it as part of certain primary norms of international law, thus outside the province of secondary rules of State responsibility.[114]

2.2. The relationship between due diligence and attribution of private acts

Accordingly, under current customary international law, a State incurs international responsibility when it commits an internationally wrongful act, which is defined in Article 2 ARSIWA as a conduct which "constitutes a breach of an international obligation of the State"[115]

---

[108] Report of the ILC, 32nd Session, ILC YB 1980, 2, 27.
[109] Kulesza, 131.
[110] ILC, 'Fourth report on State Responsibility by Mr. F.V Garcia-Amador, Special Rapporteur' (1959) UN Doc A/CN.4/119, 2.
[111] ILC, 'Fourth report on State Responsibility by Mr. James Crawford, Special Rapporteur' (2001) UN Doc A/CN.4/517, 9.
[112] Timo Koivurova and Krittika Singh, 'Due Diligence', *Max Planck Encyclopaedia of International Law* (2023) [Koivurova and Singh] para 4.
[113] ARSIWA with commentaries, 34.
[114] Richard Mackenzie-Gray Scott, 'Due diligence as a secondary rule of general international law' (2021) 34 Leiden Journal of International Law 343, 344.
[115] ARSIWA with commentaries, art 2(b).

and is "attributable to the State under international law".[116] These definitions correspond to what are generally defined as the material and the subjective elements of an internationally wrongful act. The material element requires that the State's action or omission must be contrary to a primary rule of international law. The subjective element involves establishing a relationship between the individual(s) or entity and the State to demonstrate attribution.[117] The ARSIWA, in Articles 4-11, provide detailed criteria for attribution. As a general rule, the conduct of State organs is attributable to the State, regardless of their position or function within the State machinery.[118] While States are generally not responsible for the acts of private individuals or entities who do not qualify as their organs, attribution of private acts can occur in limited circumstances.

First, a State is responsible for the conduct of individuals or entities acting under its instruction, direction or control.[119] In these cases, private conduct will be attributable to a State if the latter "directed or controlled the specific operation and the conduct complained of was an integral part of that operation", namely when the private conduct occurs under the State's "effective control".[120]

Second, private acts become attributable to the State when it acknowledges those acts as its own, in accordance with Article 11.[121] The ICJ's decision in the *Tehran Hostages* case[122] illustrates the rule on attribution under Article 11 ARSIWA and the relationship between State responsibility for private conduct attributable to it and States' autonomous responsibility for the breach of its own due diligence obligations. The Court found that the acts of the militants who seized the US embassy in 1979 could not initially be attributed to Iran, as the militants were private actors whose conduct had not been authorised by the State.[123] However, the Court determined that once Iranian authorities endorsed and adopted the conduct of the militants, the State became directly responsible for those acts under the attribution criterion later codified in Article 11. Crucially, the Court also held that Iran bore international responsibility even prior to this moment, not for the militants' conduct *per se*, but for its own organs' failure to take appropriate steps to protect the embassy and its personnel and prevent the seizure.[124] According to the Court, this failure amounted to an autonomous breach of Iran's own due diligence obligations stemming from diplomatic and consular law. The case therefore illustrates a core feature of due diligence, namely that even when harm is caused by private actors and is not directly attributable to the State, the latter can still incur responsibility for failing to prevent or react adequately to that harm, i.e. for an autonomous breach of applicable due diligence obligations.

Accordingly, while connected to the position of the State with regard to acts of others (including, but not limited to, acts of private persons), responsibility for breaches of due diligence obligations shall not be confused with direct State responsibility for private acts based on attribution criteria. Due diligence obligations remain part of certain primary rules of

[116] Ibid, art 2(a).
[117] Kulesza, 151.
[118] ARSIWA with commentaries, art 4.
[119] Ibid, art 8.
[120] Ibid, 47, para 3.
[121] Ibid, art 11.
[122] *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3.
[123] Koivurova and Singh, para 5.
[124] ARSIWA with commentaries, 53.

international law, setting a standard of conduct which, if breached, entails an internationally wrongful act as such.[125]

2.3. The relationship between due diligence and aid and assistance under Article 16 ARSIWA

Being conceived as part of primary norms of international law, obligations of due diligence must also be distinguished from the notion of aid and assistance (or complicity, as sometimes understood in legal scholarship), a form of accessory responsibility codified in Article 16 ARSIWA.[126]

Article 16 ARSIWA applies to the aid and assistance provided to another State in the commission of a wrongful act. The provision establishes that "[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State". The provision sets a high threshold for establishing responsibility, requiring three essential conditions to be met: first, the knowledge element, requiring that the aiding State positively knew the facts rendering the act internationally wrongful; second, that the aid or assistance must be given with the intention of facilitating the commission of that act, and effectively facilitates it; third, the opposability of the breached obligation to the assisting State.[127] While the provision does not define the type of aid and assistance, the ILC has clarified that it may consist of a broad range of acts, including financing, providing essential facilities or other material aid that will be used to commit a wrongful act, such as human rights violations.[128]

To better understand the relationship between complicity and due diligence, it is necessary to distinguish the features separating the two.

The first key difference hinges on the knowledge requirement in Article 16, or the 'intention' element.[129] Establishing responsibility for complicity requires the assisting State to have knowledge of the internationally wrongful act being committed by the principal State.[130] The ICJ clarified in the *Genocide* case that the assisting party must act knowingly, being aware of the specific intent of the principal perpetrator, which could only be inferred from having full knowledge of the facts.[131] In practice, establishing responsibility under Article 16 is particularly difficult because it requires proof that the assisting State had actual knowledge of the

[125] Vladyslav Lanovoy, 'Due Diligence in International Law: A Useful Renaissance or All Things to All People?' (2024) 35 EJIL 1029, 1041.
[126] A similar provision is enshrined in the ILC articles on the responsibility of international organizations, positing that States are internationally responsible for aiding and assisting an international organisation in the commission of an internationally wrongful act. See: ILC, 'Draft articles on the responsibility of international organizations' (2011) UN Doc A/66/10, art 58(1).
[127] ARSIWA with commentaries, 66.
[128] Ibid, 66-67.
[129] There is debate among scholars and within the ILC's history regarding whether this requires mere knowledge or a more stringent element of intention ("with a view to facilitating" or "intended... to facilitate"). The ILC Commentary to Article 16 includes language suggesting an intention to facilitate, even though the text of Article 16 itself only mentions "knowledge of the circumstances".
[130] Anja Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?' (2017) 60 German Yearbook of International Law 667, 668; Pascale, 49-50.
[131] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [*Genocide*] para 432.

internationally wrongful act and intended to facilitate its commission.[132] If such knowledge cannot be shown, the legal threshold for responsibility is simply not met.

By contrast, establishing responsibility for failure to exercise due diligence requires a lower threshold regarding the knowledge element, namely that of *constructive knowledge*, pursuant to which a State can be held accountable for failure to exercise due diligence if it knew or ought to have known of the harmful conduct or of a significant risk of harm. In other terms, the standard is met if the State, "even though it had no certainty", was "aware, or should have been aware, of the serious danger" to the protected interest.[133]

Secondly, under Article 16 ARSIWA, the responsibility of the assisting State is logically premised on the commission of a wrongful act by the third party, being "essentially derivative" in nature.[134] As such, the judicial ascertainment of the assisting State's responsibility also presupposes an evaluation of the assisted State's conduct, which may raise issues with the admissibility of claims in light of the indispensable third-party rule,[135] also known as the "Monetary Gold" principle in international law.[136]

Contrariwise, as anticipated, evaluating whether a State failed to exercise due diligence does not require proving that the third party was responsible for a wrongful act. In such circumstances, the focus is entirely on the State's direct responsibility for its own failure to act.[137] Scholars support the view that the "Monetary Gold" principle generally does not apply when a State is brought before the ICJ for violating due diligence duties, such as the duty to ensure respect for IHL.[138] Assessing compliance with due diligence focuses on the respondent State's own efforts and awareness, making the assessment of its violation independent from any definitive legal ascertainment of the third State's responsibility. Following the same logic, any other indispensable third-party rule applicable at the domestic level would not apply in these cases as well.

Despite due diligence and aid and assistance being two distinct institutions, the two forms of responsibility may coexist. A prior assessment of a breach of due diligence may even facilitate a subsequent finding of aid and assistance. A known and purposeful failure to exercise due diligence might not just be a breach of a primary obligation, but it might also help prove a subsequent finding that a State aided or assisted in a wrongful act by omission.[139] For instance, a State that refrains from embarking on a reasonable inquiry into the factual circumstances indicating a serious risk that another State is committing (or will imminently commit) an internationally wrongful act, may be found to be wilfully blind.[140] Indeed, while a due diligence breach is not itself equivalent to aid or assistance, it may support such a finding when accompanied by awareness of the principal wrongful act and the knowing facilitation of its commission.

---

[132] ARSIWA with commentaries, 66.
[133] *Genocide*, para 432.
[134] Miles Jackson, *Complicity in International Law* (OUP 2015) 127.
[135] ARSIWA with commentaries, 67.
[136] The principle stems from the ICJ judgment in the case of *Monetary Gold Removed from Rome in 1943 Italy v France et al* (Judgement) [1954] ICJ Rep 19, 34.
[137] Ferstman, 470.
[138] Marco Longobardo, 'The Monetary Gold Principle and States' Obligations Triggered by a Serious Risks of Atrocities Being Committed by Another State: The Cases of the Duty to Prevent Genocide and the Duty to Ensure Respect for IHL' (2025) 27 ICLR 1, 4.
[139] Ferstman, 471.
[140] Ibid, 470.

2.4. The relationship between due diligence and the consequences of serious breaches of peremptory norms under Article 41(2) ARSIWA

Under Article 41(2) ARSIWA, two obligations are imposed upon States: the obligation not to "recognize as lawful situations created by a serious breach within the meaning of Article 40" and not to "render aid or assistance in maintaining that situation".[141]

A breach is deemed 'serious' under Article 40 where it involves a "gross or systematic failure"[142] by a State to fulfil an obligation arising under a peremptory norm, i.e. a norm of *jus cogens* (e.g. the prohibition against genocide or torture).[143] These norms are defined in the law of treaties as those "accepted and recognised by the international community of States as a whole as [norms] from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character".[144] Given that the law of State responsibility governs the legal consequences of internationally wrongful acts irrespective of the substantive area of law violated, Article 41(2) applies to any breach of *jus cogens*.[145]

Article 41(2) ARSIWA refers to an "after the fact" conduct, in which the State assists in maintaining a situation created by the violation of *jus cogens* norms.[146] This prohibition extends beyond the commission of the breach itself, and it applies irrespective of whether the breach is of a continuing nature. As opposed to Article 16, the provision does not mention the 'intent' element, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

Thus, to the extent that a rule breached by a third State is a rule of *jus cogens*, the State's aid and assistance triggers an autonomous instance of State responsibility, which is thus not contingent on any subjective intent or knowledge. Even though this framework is distinct from that of due diligence – as it pertains to secondary norms – the two may also be complementary. Due diligence obligations require States to actively monitor and evaluate their conduct so as not to become complicit, even indirectly, in maintaining a serious breach of *jus cogens* norms.[147]

Thus, due diligence can operate as a standard of conduct to evaluate whether, on the one hand, a State should have known that its conduct risked supporting the unlawful situation, and, on the other, to assess if it has complied with its negative obligations of abstaining from actions that support or legitimise a situation created by a serious breach of peremptory norms of international law.[148] Failure to meet this standard of conduct engages the secondary rules of State responsibility for aiding in serious breaches of peremptory norms.

---

[141] ARSIWA with commentaries, art 41(2).
[142] Ibid, art 40(2).
[143] International Law Commission, 'Report of the International Law Commission on the work of its seventy-first session, Chapter V: Peremptory norms of general international law (jus cogens)' (2019) UN Doc A/74/10, ch V, 146.
[144] Vienna Convention on The Law of Treaties (23 May 1969) 1155 UNTS 332 (VCLT) art 53.
[145] Antal Berkes, 'The Obligation to Cooperate to Protect Against Serious Breaches of the European and American Conventions on Human Rights' (2024) 26 ICLR 550, 563.
[146] ARSIWA with commentaries, art 41(2), para 11.
[147] Riccardi, 176.
[148] Eric Wyler and Leon Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms' in André Nollkaemper and Ilias Plakokefalos (ed), *Principles of Shared Responsibility in International Law* (CUP 2014) 304.

Finally, a breach of due diligence can also coexist with a violation of the secondary obligation not to assist in maintaining a situation resulting from a serious breach, as the two forms of responsibility are not mutually exclusive, but rather reinforce each other.[149]

3. Due diligence obligations in IHRL

3.1. The emergence of due diligence obligations in human rights protection: the duty to protect human rights

The concept of due diligence, as in other branches of international law, has progressively found full expression within IHRL, particularly in relation to the content of the obligations imposed on States by human rights treaties.

According to the UN interpretation of due diligence under global human rights treaties (e.g. the ICCPR or the ICESCR), human rights obligations entail duties to respect, to protect and to fulfil.[150] Indeed, to comply with its human rights obligations, it is not sufficient for States merely to refrain from direct interferences. Rather, they must also protect human rights against any infringement, no matter its source.[151] This includes refraining from providing any form of support – whether direct or indirect – that could facilitate or enable such violations. Most human rights treaties, in their initial provisions, expressly impose on States the obligation to ensure or protect the rights they enshrine.[152] Consequently, when dealing with human rights, States must observe a specific standard of conduct (Para 1.2) in order to avoid responsibility for treaty violations, regardless of the outcome.[153] Thus, they are not bound to guarantee a certain objective result, but only to make a diligent effort to seek to reach such result.[154] This standard

---

[149] Riccardi, 173.

[150] See, for example, UN Economic and Social Council, 'Report on the Right to Adequate Food as a Human Right by Special Rapporteur Asbjørn Eide' (7 July 1987) UN Doc E/CN.4/Sub.2/1987/23, paras 66-69; UN CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)' (2000) UN Doc E/C.12/2000/4, para 33.

[151] *Öneryildiz v Turkey*, App no 48939/99 (ECtHR, 30 November 2004) para 71; *İlhan v Turkey*, App no 22277/93 (ECtHR, 27 June 2000), paras 75-76; UN Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev1/Add.13 [HR Committee, General Comment No 31] para 8.

[152] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 2(1)(d); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(1); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 2(e); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 2(1); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) arts 2 and 19(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2004) 2220 UNTS 3 (ICMW) art 7; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 4(1).

[153] *Mastromatteo v Italy*, paras 68-69; *Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-American Courts of Human Rights Series A No 23 (15 November 2017) [*Environment and Human Rights*, Advisory Opinion] paras 118-121, 143; UN Human Rights Committee, 'General Comment No 36: Article 6: Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 [HR Committee, General Comment No 36] para 7.

[154] Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' in René Provost (ed), *State Responsibility in International Law* (Routledge 2002) [Pisillo-Mazzeschi] 126-127.

includes the adoption of what many treaties refer to as "appropriate measures" to facilitate the realisation of rights and enhance access to them.[155]

As noted by the CESCR in General Comment No 3,[156] although such provisions grant States a significant margin of discretion in selecting the measures to be adopted, their conduct must ultimately be assessed against the criterion of "appropriateness". While the ILA Study Group on Due Diligence in International Law has affirmed that this entails an obligation for States to take all measures that could *reasonably* be expected of them,[157] none of the core UN human rights treaties precisely defines what the exact standard of conduct required of States is.

For this reason, the monitoring bodies established under various human rights treaties have issued several interpretative pronouncements aimed at clarifying the content of the conduct-based obligations imposed on States. They have noted that, to avoid incurring responsibility for breaches of their obligation to protect human rights, it is not sufficient for States merely to adopt legislative measures or for their officials to refrain from committing violations.[158] Rather, States must actively implement all necessary measures, assessed in light of their "appropriateness" and "reasonableness", to ensure "effective protection" against human rights violations.[159] To clarify the scope of this obligation and to provide a clear standard of conduct for States when dealing with risks of infringement on human rights, treaty bodies have affirmed that this duty requires States to "exercise due diligence to prevent, punish, investigate or redress the harm" caused by violations of human rights committed by third parties.[160] A similar expression can be found in the Istanbul Convention.[161] Similarly, the HR Committee has found that States, when dealing with a reasonably foreseeable threat to human rights, shall take all the reasonable, positive measures within their power to protect these rights.[162] As observed by the CAT in General Comment No 2, a State's failure to diligently take affirmative steps to protect human rights, and particularly its indifference or inaction before violations, provides "a form of encouragement and/or de facto permission",[163] undermining the full effectiveness of human rights protection. This principle has gradually been incorporated into soft law instruments as well, such as the UNGA Declaration on the Elimination of Violence against Women,[164] which expressly refers to States' due diligence obligations with respect to violations committed by other States or private actors.

---

[155] ICERD, art 2(1)(d); ICESCR, art 2(1); CEDAW, arts 2(e) and 5; CRC, art 19(1); ICMW; CRPD, art 4(1).
[156] UN CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, para 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 4.
[157] ILA, 'ILA Study Group on Due Diligence in International Law' in International Law Association Second Report of the Seventy-Seventh Biennial Conference (Johannesburg 2016) 8.
[158] UN CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, para 1 of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 4; UN CRC, 'General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)' (27 November 2003) UN Doc CRC/GC/2003/5, para 12.
[159] UN CESCR, 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24 [CESCR, General Comment No 24] paras 14, 32.
[160] UN CEDAW, 'General Recommendation No 19: Violence against Women' (1992) UN Doc A/47/38, para 9; HR Committee, General Comment No 31, para 8; UN CAT, 'General Comment No 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2 [General Comment No 2] para 18.
[161] CoE, Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 [Istanbul Convention].
[162] HR Committee, General Comment No 36, para 21.
[163] CAT, General Comment No 2, para 18.
[164] UNGA, 'Declaration on the Elimination of Violence against Women' (20 December 1993) UN Doc A/RES/48/104, art 4.

The jurisprudential turning point in the affirmation of due diligence as the applicable standard for fulfilling the obligation to protect human rights is represented by the *Velásquez Rodríguez* case,[165] in which the IACtHR clearly articulated the standard of due diligence in relation to the duty to protect. In the judgment, the Court held that a State may incur international responsibility for a human rights violation – even if the act in question has been committed by third parties – whenever it fails to exercise due diligence to prevent the violation or to respond to it as required under IHRL.[166] For the first time, a State was thus found internationally responsible not for committing a specific act, but for failing to fulfil its duty to protect human rights, thereby establishing a concrete standard of conduct.

This principle has since been fully embraced by other regional human rights courts,[167] particularly by the ECtHR. In *Osman v United Kingdom*,[168] the Court affirmed – specifically in relation to the right to life under Article 8 ECHR – that "the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".[169] At the same time, in clarifying the scope and limits of such State obligations, the Court held that the standard of due diligence must not impose an impossible or disproportionate burden on the authorities.[170] It further specified that a State can only be held responsible if the authorities knew or ought to have known – on the basis of a duly diligent assessment – of the existence of a real and immediate risk to the rights in question.[171]

Furthermore, regional courts have acknowledged and enforced due diligence obligations in response to threats to human rights stemming from the conduct of other States. In this regard, the ECtHR has highlighted that States can incur international responsibility both if they fail to take the necessary measures to protect individuals from other States – where there are substantial grounds for believing that there is a real risk of human rights violations[172] – and if they facilitate such violations.[173]

In conclusion, the due diligence standard has progressively become the normative benchmark for fulfilling the duty to protect human rights. It constitutes the principal framework for assessing the "appropriateness" of the measures adopted by States in safeguarding such rights, particularly when these are threatened by the actions of third parties, including other States.[174]

3.2. The proceduralisation of Human Rights Due Diligence (HRDD): the development of HRDD policies

As anticipated, the standards of "appropriateness" and "reasonableness" to which HR treaties and the monitoring bodies refer grant a degree of flexibility in the choice of the measures to be adopted by States in fulfilling their duty to protect human rights. However, similarly to other areas of international law, and in an effort to concretely determine the parameters for assessing

---

[165] *Velásquez Rodríguez v Honduras*.
[166] Ibid, para 172.
[167] *Opuz v Turkey*, App no 33401/02 (ECtHR, 9 June 2009) paras 77, 84,149; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No 245/2002 (AComHPR, 15 May 2006) para 146.
[168] *Osman v UK*.
[169] Ibid, para 115.
[170] Ibid, para 116; see also HR Committee, General Comment No 36, para 21.
[171] *Osman v UK*, para 116.
[172] *Ilaşcu and Others v Moldova and Russia* [GC] App no 48787/99 (ECtHR, 8 July 2004) paras 317-318.
[173] *El-Masri*, paras 205–211, 239.
[174] Ollino, 253-265.

compliance with the duty to protect,[175] these standards in IHRL have been progressively translated into both substantive and procedural obligations.[176] As a result, due diligence obligations in IHRL, too, have undergone a process of "proceduralisation".

This process has taken place via the codification of concrete sub-obligations in treaties, interpretative efforts of international courts, tribunals and monitoring bodies,[177] with sometimes recourse of the latter to international minimum standards adopted by other technical bodies.[178]

New generation treaties in the area of human rights provide examples of standardisation of State parties' protective obligations. The 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons specifies the concrete measures States are bound to adopt to implement the general obligation to assist and protect victims.[179] These include providing victims with counselling and information on their rights. Furthermore, States must offer medical, psychological and material assistance, along with employment and education opportunities.[180] Additionally, Article 4 requires States to "take into account […] the age, gender and special needs of victims […] in particular of children" when applying these provisions. Therefore, said reference to specific circumstances allows for flexibility, requiring that even the specified measures are implemented according to the peculiarities of the situation, with "best efforts". Similarly, the Istanbul Convention complements the general due diligence obligation to prevent, set out in its Article 5, by requiring several specific measures, i.e. promoting awareness-raising campaigns or programs, including lessons on equality between men and women and non-stereotyped gender roles in teaching material, or providing adequate training for professionals who deal with victims and perpetrators of violence.[181]

Second, interpretative efforts have been made by regional courts to define procedural human rights obligations stemming from States' positive obligation to protect HR. Particularly, the ECtHR[182] and the IACtHR[183] clarified that the right to life must be interpreted as encompassing a duty to effectively investigate violations.[184] This includes the duty to cooperate with other States in cross-border investigations when necessary.[185] An equivalent duty to effectively investigate has been affirmed by the ECtHR in relation to the right to be free from torture, inhuman and degrading treatment or punishment,[186] forced labour and human trafficking[187] or breaches of the right to physical integrity.[188] The Strasbourg court has also established that States are bound to enact procedures and legal mechanisms to provide effective remedies in

[175] Pisillo-Mazzeschi, 123-127.
[176] Ollino, 256.
[177] Ibid, 233-234.
[178] Ibid, 261.
[179] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) art 6(1).
[180] Ibid, arts 6(3)(a)-(b)-(c).
[181] Istanbul Convention, arts 13-16.
[182] *Mastromatteo v Italy*, paras 68-69.
[183] *Case of the 'Street Children' (Villagran-Morales et al.) v Guatemala*, IACHR Series C No 77 (19 November 1999) paras 144-146; *Environment and Human Rights*, Advisory Opinion, paras 108-109.
[184] *Hugh Jordan v United Kingdom* App no 24746/94 (ECtHR, 4 May 2001) para 107; *Case of Anzualdo Castro v Peru*, IACHR Series C No 160 (22 September 2009) para 123.
[185] *Güzelyurtlu and others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019) para 229.
[186] *El-Masri*, para 182.
[187] *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 288.
[188] *M. C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) paras 152–3.

case of violation of said rights: failure to provide them amounts to a violation of the obligation to protect.[189] The CESCR has taken a similar stance in General Comment No 24.[190] For example, it has contended that the "overarching standard" of reasonableness sets as a minimum threshold the development of a legal and administrative framework to adequately protect the rights guaranteed by human rights treaties.[191]

Finally, to avoid hyper-contextualisation in deciding what is 'due' only in specific circumstances,[192] human rights courts have had recourse to international minimum standards adopted by technical bodies. For instance, the ECtHR has referred to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in a case concerning safeguards against arbitrariness and abuse of power by police officers.[193]

It follows from the foregoing that proceduralisation of due diligence is particularly relevant when a measure is "indispensable to avoid harm",[194] as "only one available measure may be sufficiently effective".[195]

In addition to these forms of proceduralisation, the progressive concretisation of due diligence human rights obligations into specific sub-obligations has also appeared in international practice through the development and adoption by international actors of specific HRDDPs. These have been developed with a view to allowing actors to identify, prevent, and mitigate the potential negative impacts on human rights resulting from the cooperation with, or support to, other entities on human rights-sensitive activities. These policies have consistently articulated the duty to protect human rights into duties of prevention (entailing the performance of risk assessments), monitoring and redress. The following paragraphs will illustrate some examples of these policies adopted both at the UN and EU levels.

3.2.1. The Guiding Principles on Business and Human Rights

The proceduralisation of due diligence in the field of business and human rights became increasingly widespread with the adoption of the UN Guiding Principles on Business and Human Rights in 2011, which introduced a duty for companies to respect human rights by identifying, preventing, mitigating, and accounting for adverse human rights impacts associated with their operations.[196]

The Guiding Principles frame due diligence as a proactive and continuous process, rather than as a one-time obligation.[197] Companies are expected to integrate human rights risk assessment mechanisms into corporate policies and decision-making. Key components of the preventive process are identified in: mapping human rights risks, evaluating their seriousness and

[189] *Tysiac v Poland* App no 5410/03 (ECtHR, 20 March 2017) paras 117–18; *Kotov v Russia* App no 54522/00 (ECtHR, 3 April 2012) para 114.
[190] CESCR, General comment No 24, para 16.
[191] Ollino, 255.
[192] Ibid, 262.
[193] *Makaratzis v Greece* App no 50385/99 (ECtHR, 20 December 2004) para 59.
[194] ILA, 'ILA Study Group on Due Diligence in International Law' in International Law Association Second Report of the Seventy-Seventh Biennial Conference (Johannesburg 2016) 8.
[195] Björnstjern Baade, 'Due Diligence and the Duty to Protect Human Rights', in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 102.
[196] UN HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) UN Doc A/HRC/17/31 [UNGPs] principle 17.
[197] Ibid, principles 15-21.

likelihood, and establishing internal procedures to prevent or mitigate them.[198] These risks extend beyond a company's direct actions, to include harms it may contribute to or be directly linked with.

Prevention alone is insufficient without a robust system for monitoring and evaluation. The UNGPs emphasise that companies must track the effectiveness of their responses to human rights risks over time, using appropriate qualitative and quantitative indicators.[199] Monitoring ensures that mitigation strategies are not only implemented, but also recalibrated in light of their effectiveness or shifting operational conditions.[200]

The third pillar of the Guiding Principles is the provision of mechanisms for enforcement and accountability. This includes both internal corporate mechanisms (such as grievance channels or ethics hotlines) and external legal or non-legal remedies. Companies should be prepared to demonstrate how they have conducted their HRIAs, and should cooperate in providing remedy to affected individuals or communities.[201] The OHCHR Guide further clarifies that for a remedy to be effective, it must *inter alia* be accessible, transparent, and rights-compatible.[202] Legal trends are now consolidating these soft-law norms. The recently adopted EU Corporate Sustainability Due Diligence Directive, for instance, binds EU Member States to hold companies liable for preventable harms and impose on them enforceable duties to provide effective grievance mechanisms.[203]

Significantly, the Guiding Principles not only define a HRDD policy for business enterprises, but they also address the role of States in regulating the former's conduct as part of their duty to protect human rights. In particular, in addressing States' public regulation of, and private contractual relationships with, business enterprises under their jurisdiction or control, the Guiding Principles establish that "States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights" and "promote respect for human rights by business enterprises with which they conduct commercial transactions".[204] They also require States to deny "access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation" and ensure that the entire State's legal and administrative framework is "effective in addressing the risk of business involvement in gross human rights abuses".[205]

3.2.2. The UN Human Rights Due Diligence Policy

The due diligence standard is fully articulated in the context of the UN Human Rights Due Diligence Policy on support to non-UN forces. Endorsed in 2011, it is an internal commitment by the UN to uphold human rights standards in its own activities. Its overall purpose is to

[198] OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (United Nations 2012) [OHCRC, Interpretive Guide] 7.
[199] Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2(2) Business and Human Rights Journal 195, 217-221.
[200] UNGPs, principle 20.
[201] Ibid, principle 22.
[202] OHCHR, Interpretive Guide, 74.
[203] European Parliament and Council, Directive (EU) 2024/1760 of 13 June 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 2024/1760, art 10.
[204] UNGPs, principles 5-6.
[205] Ibid, principle 7(c)-(d).

prevent UN entities from assisting, directly or indirectly, international law violations by third-party security forces that are supported by UN assistance.[206] Adopted to prevent reputational risks and legal ambiguities concerning UN involvement in combat or unstable situations, especially following scandals in the Democratic Republic of the Congo and elsewhere, the HRDDP reflects a precautionary stance rooted in prevention.[207] Significantly, it obliges UN entities to conduct an assessment[208] of "the potential risks and benefits involved in providing support".[209] Such an assessment shall include "the degree to which providing or withholding support would affect the ability of the United Nations to influence the behaviour of the receiving entity in terms of its compliance with international humanitarian law, human rights and refugee law".[210] Where the assessment reveals the existence of a risk that grave violations may be committed while support is provided, the UN entity is required to identify mitigatory measures aimed at reducing that risk and ensuring that, in the event of violations, appropriate mechanisms are in place to address them adequately.[211]

Once engagement begins, the policy requires continued and proactive monitoring of the supported forces to ensure both their compliance with human rights norms and the proper use of the support provided.[212] HRDD monitoring also obliges UN entities to gather information on alleged HR violations committed by the recipient, and to engage with the latter to discuss such allegations and identify appropriate responses.[213] These obligations correspond to the supervisory limb of due diligence, which entails ongoing monitoring and, where necessary, adjustment of support measures.

Significantly, the HRDDP also includes an internal accountability mechanism requiring UN officials and agencies to pre-establish clear procedures to be followed in the event of violations committed by the recipient entity. UN officials must suggest corrective measures and monitor their implementation until the violation has been stopped or remedied.[214]

By articulating concrete sub-obligations, the HRDDP has effectively operationalised human rights due diligence in peacekeeping and humanitarian operations, offering a clear framework to prevent the UN from incurring responsibility for violations committed by recipient entities.

3.2.3. Human rights due diligence policies at the EU level

Under EU primary law human rights constitute general principles of the Union[215] and serve as a guiding framework for its external action.[216] This commitment has been reinforced[217] by the entry into force of the CFR and the prospective accession of the Union to the ECHR.[218]

---

[206] United Nations, Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces 2011 (Guidance Note and text of the Policy, UN 2015) [UN HRDDP], Section I.1-2.
[207] Ibid, Section I.2.
[208] Ibid, Section III.1.
[209] Ibid, Annex IV, para 14.
[210] Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2015) 20 Journal of Conflict & Security Law 61, 65-66.
[211] UN HRDDP, Section III.2, 25.
[212] Ibid, Section IV, 31.
[213] Ibid, Section IV, 30.
[214] Ibid, Section V.
[215] Treaty on European Union, art 6(3).
[216] Ibid, art 21(1).
[217] Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (25 June 2012) 11855/12 [EU Strategic Framework and Action Plan], 2.
[218] Treaty on European Union, art 6(2).

The development of the EU external policies further witnesses the ongoing proceduralisation of due diligence human rights obligations into specific sub-obligations, to (i) prevent violations, (ii) monitor human rights impacts, and (iii) guarantee redress for eventual breaches.

Firstly, the Union bears a duty of due diligence to prevent its actions from causing human rights violations even outside its territory.[219] To fulfil this duty, the EU has shaped several guidelines[220] and undertaken a variety of initiatives aimed at concretely promoting human rights beyond its borders.[221] Moreover, since 1992, the Union has incorporated a clause in all its agreements with third countries designating respect for human rights as an "essential element" of their relationship.[222]

The Union institutionalised preventive mechanisms within its policymaking process, to ensure that policies and trade agreements do not inadvertently undermine human rights.[223] The 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy[224] mandated the systematic inclusion of human rights considerations in *ex ante* impact assessments, and subsequent instruments have further clarified the methodology to be adopted for assessing such impacts.[225] The assessments must analyse the likely effects of distinct policy options both on the human rights of individuals in the territories concerned, and on the ability of the EU and its partner countries to fulfil their human rights obligations.[226] Tool 29 of the 2023 Better Regulation Toolbox provides specific guidance for identifying potential human rights impacts during the initial screening phase, using either the CFR or IHRL, depending on the policy's scope.[227]

Moreover, the 2020–2027 EU Action Plan on Human Rights and Democracy calls for the development of a human rights due diligence policy,[228] marking a step towards embedding preventive safeguards in external operations.

Secondly, the EU's human rights due diligence policy foresees sustained monitoring of the implementation and effects of its external action, in order to ensure that human rights are neither violated nor undermined throughout the policy lifecycle. The HRIAs themselves include *ex post* evaluation and monitoring of the human rights implications of such policies.[229] In this regard, the 2021 Better Regulation Guidelines made fundamental rights analysis mandatory in the final reports of all Commission-conducted impact assessments.[230] The monitoring function is further reinforced by the European Ombudsman, an independent body responsible for

[219] Ferstman, 474.
[220] European Union External Action, The EU Human Rights Guidelines (26 February 2021).
[221] See, for example, Euro-Mediterranean Conference, Barcelona Declaration (27-28 November 1995); European Commission, The European Initiative for Democracy and Human Rights.
[222] European Commission, Communication from the Commission to the Council and the European Parliament: Reinvigorating EU actions on Human Rights and Democratisation with Mediterranean partners — Strategic guidelines (Brussels, 21 May 2003) COM(2003) 294 final, para 3.3.
[223] Ferstman, 474.
[224] EU Strategic Framework and Action Plan, 6.
[225] See, for example, European Commission, Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments SEC(2011) 567 final (Brussels, 6 May 2011); Council of the European Union, Guidelines on the Analysis of Human Rights Impacts in Impact Assessments for Trade-Related Policy Initiatives (2015) [Council of the European Union, Guidelines on the Analysis of Human Rights Impacts]; European Commission, Better Regulation Guidelines SWD(2021) 305 final (Brussels, 2021); European Commission, Better Regulation Toolbox (July 2023).
[226] Council of the European Union, Guidelines on the Analysis of Human Rights Impacts, para 1.
[227] European Commission, Better Regulation Toolbox, 245-246.
[228] Council of the European Union, EU Action Plan on Human Rights and Democracy 2020–2027 (2020) 21.
[229] Council of the European Union, Guidelines on the Analysis of Human Rights Impacts, para 5.5.
[230] European Commission, Better Regulation Guidelines, ch IV para 3.

investigating instances of maladministration within EU institutions. In a recent decision concerning the Union's financial support for border control initiatives undertaken by the Tunisian authorities, the Ombudsman affirmed that EU funding "should not support actions that are at odds with the provisions of the CFR and IHRL".[231] The Ombudsman further clarified that HRIAs are mandatory for all EU policies and actions that affect individuals. Such an impact is inherent in measures designed to deter irregular migration and must, therefore, be evaluated even in the case of non-binding agreements with third States on this matter.[232] Informal monitoring mechanisms are insufficient in this regard: thorough assessments are indispensable for ensuring accountability and transparency in the EU's external action.[233] Furthermore, to ensure effective oversight on the use of EU funds, the Ombudsman recommended that the Commission require implementing partners to establish complaint mechanisms, through which individuals may report alleged breaches of their rights in the context of EU-funded programmes.[234]

In parallel, the FRA contributes to the monitoring landscape through independent data collection and analysis, thereby enabling evidence-based evaluations of ongoing practices. While the FRA does not possess binding advisory powers, its recommendations offer valuable guidance to Member States. For instance, in its guidance on mitigating the risk of *refoulement* in external border management operations involving third countries, the Agency had already recommended that Member States conduct a careful assessment of the human rights situation in the recipient country prior to the deployment of experts or the implementation of operational cooperation potentially involving the interception or disembarkation of migrants.[235] Although non-binding, this guidance reflects the EU's broader procedural commitment to human rights protection, encouraging preventive evaluations of potential human rights impacts, both by the Union itself and by the Member States.[236]

Thirdly, the FRA and the Ombudsman play an important role in supporting redress by issuing non-binding expert guidance[237] that influences institutional responses and encourages the revision or suspension of high-risk operations by the EU.

A fundamental role in this respect is further played by the CJEU, for instance with regard to the monitoring of compliance with human rights due diligence obligation, particularly in the context of the EU's relations with third States. Notably, in the Front Polisario line of case-law, the Court has reaffirmed the necessity of conducting a human rights impact assessment in order to avoid the Union's responsibility for breaches of international law. In *Front Polisario v Council*,[238] the General Court clarified – albeit without explicitly referring to HRIAs – that the Union may be held liable for violations of international law where it concludes a trade agreement with a third country responsible for serious human rights abuses – consisting in that case in the violation of the right to self-determination of the people of Western Sahara – when such an agreement has the effect of indirectly encouraging those violations or deriving benefit

[231] European Ombudsman, Decision on how the European Commission intends to guarantee respect for human rights in the context of the EU-Tunisia Memorandum of Understanding (OI/2/2024/MHZ) (2024) [European Ombudsman, Decision on how the European Commission intends to guarantee respect for human rights] para 27.
[232] Ibid, paras 30-31.
[233] Ibid, para 41.
[234] Ibid, para 42.
[235] EU FRA, Guidance on How to Reduce the Risk of Refoulement in External Border Management when Working in or Together with Third Countries (December 2016) para 1.
[236] Ferstman, 476.
[237] Ibid.
[238] Case T-512/12 *Front Polisario v Council of the European Union* [2015] ECLI:EU:T:2015:953.

from them.[239] Indeed, the Court of Justice has consistently held that trade agreements intended to apply to a particular territory inevitably impact the rights of the people concerned.[240] Thus, their consent is necessary, even where those people constitute a third party to the agreement.[241] The Union may avoid liability by conducting, prior to the conclusion of an agreement, a thorough analysis of all relevant circumstances, including an assessment of whether the third country is fulfilling its duty to respect and protect human rights.[242] Where the third country is found to be in breach of its human rights obligations, it is incumbent upon the Union to decide whether to proceed with the agreement. This decision must ensure that the Union neither encourages such violations nor benefits from them. In case of liability, the EU has a duty to adopt corrective measures, such as suspending, renegotiating, or terminating the agreement to halt violations and prevent further harm.[243] According to the Court, trade agreements concluded by the Union that infringe international law, and particularly human rights, are invalid under EU law.[244]

4. The duty to protect human rights under specific treaty regimes

4.1. The duty to protect against torture, inhuman or degrading treatment

The prohibition of torture is a cornerstone of IHRL, firmly established in a wide range of multilateral and regional treaties. These include Article 7 ICCPR,[245] Article 3 ECHR,[246] and Article 2 CAT.[247] Moreover, the prohibition of torture is recognised as a peremptory norm of international law.[248] According to Article 1 CAT, torture consists in "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person […] by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." As provided by Article 2(2) of the same Convention, this prohibition is absolute and non-derogable: no exceptional circumstances may be invoked by a State Party to justify acts of torture.[249]

Under the mentioned international instruments, beyond the negative obligation to refrain from torture or other cruel, inhuman or degrading treatment or punishment, States are also bound by a positive duty to *prevent* such acts from occurring.[250] Indeed, each State party is required to

---

[239] Ibid, paras 230-231.
[240] Case C-779/21 P, *Commission v Front Polisario* [2024] ECLI:EU:C:2024:835, para 93; Case C-778/21 P, *Commission v Front Polisario* [2024] ECLI:EU:C:2024:833, paras 119-120.
[241] Case C-779/21 P, *Commission v Front Polisario* [2024] ECLI:EU:C:2024:835, paras 125, 132.
[242] Case T-512/12 *Front Polisario v Council of the European Union* [2015] ECLI:EU:T:2015:953, paras 227-228.
[243] Ibid paras 241, 247.
[244] Case C-779/21 P, *Commission v Front Polisario* [2024] ECLI:EU:C:2024:835, paras 125, 132-133.
[245] Article 7 ICCPR provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".
[246] Article 3 ECHR provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[247] Article 2 CAT provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture".
[248] ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)' (2022) UN Doc A/77/10, conclusion 23.
[249] CAT, General Comment No 2, para 5; see similarly HR Committee, General Comment No 31, para 3.
[250] Ibid para 3.

take effective[251] and evolving[252] legislative, administrative, judicial, or other measures that may be necessary[253] to prevent acts of torture. This obligation extends not only to a State's sovereign territory but also to any area under its jurisdiction[254] or effective control, whether exercised *de jure* or *de facto*.[255] This duty to prevent torture goes beyond the mere formal criminalisation of such acts. It also entails the adoption of appropriate measures to prevent public authorities and other persons acting with official capacity from directly committing, inciting, encouraging, acquiescing in or being complicit in acts of torture.[256] States parties are thus required to ensure that these actors do not consent to, nor remain passive in the face of such acts of torture.[257]

When a State fails to fulfil these obligations, it incurs international responsibility.[258] This is particularly the case where public authorities or persons acting with official capacity know, or ought reasonably to know, that acts of torture or ill-treatment are being committed by non-State actors, yet fail to exercise due diligence in order to prevent such acts. Indeed, by failing to act – whether by omission or deliberate inaction – the State facilitates and enables the commission of such abuses by private individuals, thereby providing what the CAT has referred to as "a form of encouragement and/or *de facto* permission."[259] This principle has been notably affirmed in the context of gender-based violence, including rape, domestic violence, female genital mutilation, and trafficking – which clarifies that the concept of monitoring conditions to prevent torture and ill-treatment shall be adapted to tailored situations in which violence is privately inflicted.[260] Finally, the absolute nature of the prohibition of torture shall undergo no balancing against competing interests. States can neither invoke concerns related to increased migratory pressure,[261] or national security[262] to justify derogation from this obligation, nor can they rely on extradition treaties, bilateral readmission agreements, or diplomatic assurances to circumvent their duties under international law.[263]

From a different but closely related perspective, a fundamental expression of this preventive dimension is the principle of *non-refoulement*, which prohibits the transfer, expulsion, extradition or return of individuals to a State where they would face a real risk of torture or other forms of ill-treatment. This principle is expressly enshrined in Article 3 CAT, which obliges States parties to refrain from removing a person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[264] The ECtHR has affirmed that the principle also stems from Article 3 ECHR.[265] The prohibition

---

[251] CAT, art. 2.
[252] CAT, General Comment No 2, para 14.
[253] UN Human Rights Committee, 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc CPR/C/21/Rev.1/Add.3, para 2.
[254] CAT, General Comment No 2, para 16.
[255] Ibid, para 7.
[256] Ibid, para 17.
[257] Ibid, para 3.1.
[258] Ibid.
[259] Ibid.
[260] Ibid, para 25.
[261] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) [*Hirsi Jamaa and Others v Italy*] para 122.
[262] *Chahal v United Kingdom* App No 22414/93 (ECtHR, 15 November 1996) para 80.
[263] CAT, 'General comment No 4 on the implementation of article 3 of the Convention in the context of article 22' (4 September 2018) UN Doc CAT/C/GC/4 [CAT, General Comment No 4] para 20; *Trabelsi v Italy* App No 50163/08 (ECtHR, 4 March 2010) paras 19-20.
[264] See also: CAT, 'Concluding observations on the fifth and sixth combined periodic reports of Italy' (18 December 2017) UN Doc CAT/C/ITA/CO/5-6, para 21.
[265] *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) [*Saadi v Italy*] paras 124-125.

of *refoulement* is triggered when the risk is "foreseeable, personal, present, and real",[266] and it must be assessed by taking into account all relevant factors, including the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in the receiving State.[267] This protection extends to all forms of removal – whether by deportation, extradition, expulsion, pushbacks at sea, or indirect transfers[268] – and applies irrespective of whether these actions take place within or beyond the State's territory. The concept of jurisdiction, in this context, is interpreted functionally, encompassing any situation in which the individual is under the effective control or authority of the State.[269] As a result, any person at risk of torture must be allowed to remain in the territory under the jurisdiction or authority of the expelling State for as long as the risk persists.[270] This also includes cases of indirect *refoulement*, i.e., where individuals may be sent to transit countries from which they may be subsequently re-transferred to third States posing the same risk.[271]

To ensure compliance with their obligations under the *non-refoulement* principle – whether under Article 3 of the CAT or under the interpretation of Article 7 ICCPR[272] and Article 3 ECHR[273] – States must adopt proactive legislative, administrative, judicial, and other preventive measures to guard against any potential violation of the principle.[274] A central element of this duty is the *obligation to assess the risk* of return. As such, the risk-assessment must be carried out on a case-by-case basis and the evaluation of the existence of the risk must be assessed primarily with reference to facts that were known or should have been known to the Contracting State at the time of the expulsion or removal.[275] Accordingly, States are required to consult a wide range of reliable, adequate, and objective sources – including reports from the UN agencies, information from third States, or data provided by reputable NGOs – and not limit their analysis only to information directly submitted by the applicant.[276] Thus, a violation of the *non-refoulement* obligation may also be found where the removing State fails to undertake a proper assessment of the risk posed by the receiving State. This includes cases where the expelling State neglects to evaluate the risk of extradition to a country in which, according to reliable and credible international sources, torture is systematically practiced, and rights are routinely disregarded.[277]

Importantly, a State's responsibility is not confined to direct acts of expulsion or removal. It also extends to failures to prevent such violations, particularly where the State has given its support to the acts of foreign agents violating the rights at stake and resulting in the prohibited treatment. Indeed, under the principle of *non-refoulement*, responsibility may also arise in situations of indirect participation, when State authorities knew or ought to have known that torture or ill-treatment were being, or would likely be, committed.[278] For instance, in *El-Masri*, the ECtHR held that indirect involvement in the CIA's rendition programme violated Article 3 ECHR, and concluded that Macedonia was responsible for facilitating a transfer that led to

[266] CAT, General Comment No 4, para 4.
[267] Ibid, para 27.
[268] Ibid, para 4.
[269] *Hirsi Jamaa and Others v Italy*, paras 69, 74.
[270] CAT, General comment No 4, para 12.
[271] Ibid, 12.
[272] HR Committee, General Comment No 31, para 12.
[273] *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) [*Soering v UK*] para 91.
[274] CAT, General Comment No 4, para 18.
[275] *Sharifi v Austria* App no 60104/08 (ECtHR, 5 December 2013) para 31; *Saadi v Italy*, para 133; *Hirsi Jamaa and Others v Italy*, para 121; *El-Masri*, para 214.
[276] *F.G. v Sweden* App No 43611/11 (ECtHR, 23 March 2016) para 117.
[277] *Eshonkulov v Russia* App no 68900/13 (ECtHR, 15 January 2015) para 39.
[278] *El-Masri*, para 176.

torture abroad.[279] Accordingly, as consistently affirmed by the ECtHR, a sending State may incur responsibility whenever its actions result, either directly or indirectly, in the exposure of an individual to a real risk of torture or other forms of ill-treatment.[280]

These principles also notably apply to the context of cooperation for migration management. International human rights bodies and authorities have clarified that States that "externalise" their borders – by financing, supporting, or approving other States' migration prevention techniques aimed at reducing the arrival of migrants to their territory – may bear responsibility for human rights violations committed by their partners. Indeed, "the obligation to take measures to prevent acts of torture or other ill-treatment includes actions that a State takes in its own jurisdiction to prevent such acts in another jurisdiction".[281] In this regard, there is no need to "cross an international border for this obligation to apply", as "that the prohibited acts occur outside the territory or the direct control of the State in question does not relieve that State from responsibility for its own actions *vis-à-vis* the incident".[282] In other words, States are not only bound to abstain from having acts of torture occur in their jurisdiction – or areas under their effective control – but they are also "required to abstain from acting within their territories and spheres of control in manners that expose individuals […] to a real risk of torture or other ill-treatment".[283] The principle of *non-refoulement* thus implies a broader obligation, whereby "States must ensure that their actions do not lead to a risk of torture *anywhere in the world*".[284]

Practically, this means that States "knowingly providing instructions, directions, equipment, training, personnel, financial assistance or intelligence information in support of unlawful migration deterrence or prevention operations conducted by third States incur legal responsibility for these violations".[285] States indeed "cannot circumvent their own international obligations by externalizing or delegating their migration control practices to other States or non-State actors beyond their jurisdictional control".[286] This holds true "regardless of the direct attributability of the relevant acts of torture or ill-treatment." Indeed, responsibility arises "whenever States fail to exercise due diligence to protect migrants from violations by private actors, to punish perpetrators or to provide remedies".[287] Accordingly, in 2018 the UN Special Rapporteur on torture recommended States to "refrain from […] supporting or otherwise facilitating or participating in pushbacks operations".[288]

This position reinforces the evolving interpretation of the prohibition of torture as embraced by the CAT. The Committee has indeed clarified that when it comes to the "scope and nature of the prohibition", "evolving effective measures" are needed "to prevent it in different contexts",[289] in line with a good-faith interpretation of the principle of *non-refoulement*. Such

---

[279] Ibid, paras. 211, 216-218.
[280] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012), para. 115; *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008), para. 126; *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) para 67; *Soering v UK*, para 91.
[281] UNGA, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (7 August 2015) UN Doc A/70/303, para 38.
[282] Ibid.
[283] Ibid.
[284] HRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (10 April 2014) UN Doc A/HRC/25/60, para 46. Emphasis added.
[285] HRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer' (23 November 2018) UN Doc A/HRC/37/50 [Report of the SR on torture 2018] para 56.
[286] Ibid, para 57.
[287] Ibid, para 67.
[288] Ibid, para 78.
[289] CAT, General Comment No 2, para 14.

an interpretation implies that States may not "pass laws or regulations, engage in policies or practices, or conclude agreements with other States or non-State actors that would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement that they know, or ought to know in the circumstances, would subject or expose migrants to acts of risks of torture or ill-treatment by perpetrator beyond their jurisdiction and control".[290] According to the CAT, this also entails that States entering into cooperation for migration management shall set up effective *monitoring mechanisms* as part of their duty to protect migrants against the risk of torture abroad. Indeed, in relation to the Italy-Libya cooperation stemming from the 2017 MoU, the CAT expressed its deep concern over the absence of any "particular provision that may render cooperation and support conditional on the respect of human rights, including the absolute prohibition of torture" and of "assurances that cooperation […] would be reviewed in light of possible serious human rights violations".[291] Accordingly, it called Italy, "as a matter of urgency", to establish "an effective mechanism for monitoring the conditions on the ground in Libya for the implementation of the cooperation projects".[292] The UN Special Rapporteur on the human rights of migrants has more recently taken a similar stance.[293]

4.2. The duty to protect women from exposure to gender-based violence and trafficking

The CEDAW is an internationally binding instrument aimed at eliminating gender discrimination, which also forms part of the IHRL framework against human trafficking.[294] Under Article 2 CEDAW, States are under the general obligation to respect, protect and fulfil women's right to non-discrimination in "all its forms".[295] The CEDAW Committee recognises that gender-based violence, which includes trafficking,[296] is a form of discrimination within the meaning of Article 1 of the Convention.[297] This is reinforced by Article 6, which binds States parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women.

As part of their obligation to protect women stemming from the CEDAW, States parties have the duty, individually and collectively, to prevent women and girls from being exposed to violations of the Convention rights committed by private persons and non-State actors.[298] This duty comprises an obligation to punish those responsible for the violation of CEDAW's rights and a duty to exercise due diligence in order to prevent their violation.[299] Article 2(e) CEDAW

---

[290] Report of the SR on torture 2018, para 42.
[291] CAT, 'Concluding observations on the fifth and sixth combined periodic reports of Italy' (18 December 2017) UN Doc CAT/C/ITA/CO/5-6 [CAT, Concluding observations Italy 2017] para 22.
[292] Ibid, para 23.
[293] HRC, 'Human rights violations at international borders: trends, prevention and accountability' (26 April 2022) UN Doc A/HRC/50/31 [HRC, Human rights violations at international borders] para 81.
[294] CEDAW, 'General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (5 November 2014) UN Doc CEDAW/C/GC/32 [CEDAW, General recommendation No 32] para 9.
[295] CEDAW, 'General recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) UN Doc CEDAW/C/GC/28 [CEDAW, General recommendation No 28] para 8.
[296] CEDAW, 'General recommendation No 38 on trafficking in women and girls in the context of global migration' (20 November 2020) UN Doc CEDAW/C/GC/38, para 25.
[297] CEDAW, General recommendation No 28, para 23.
[298] CEDAW, General recommendation No 32, paras 7-3.1.
[299] CEDAW, 'General recommendation No 19: Violence against Women' (1992) UN Doc A/47/38 [CEDAW, General recommendation No 19] para 9.

further incorporates this latter principle by explicitly providing that States parties are to take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise".[300] In parallel, the Committee mandates States to: abstain from performing, sponsoring or condoning any practice, policy or measure that violates the Convention,[301] adopt comprehensive action plans and implementation mechanisms for the practical realisation of CEDAW's rights,[302] investigate, prosecute and punish perpetrators and provide reparation to victims of violence.[303]

The Committee clarifies that, despite the fact that the Convention does not contain an explicit *non-refoulement* provision, the obligation in Article 2(d), whereby States parties undertake to refrain from engaging in any act or practice of discrimination against women and ensure that public authorities act in conformity with that obligation, entails that States parties shall protect women from exposure to the risk of *refoulement*.[304] Indeed, the Committee has clarified that State parties bear the duty to protect women from being exposed to discrimination and gender-based violence, "irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party".[305] Accordingly, State Parties shall refrain from adopting "policies, regulations, programmes, [and] administrative procedures […] that directly or indirectly"[306] result in the forcible return of women victims of trafficking to their country of origin when there is a real risk of re-trafficking. The Committee emphasises that this applies at every stage of the displacement cycle. Accordingly, this duty applies both during status determination procedures in the State of destination and throughout the return or resettlement process of the migrant in the States of transit and origin.[307]

This legal framework converges with that of the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). The Convention aims, *inter alia*, to protect women from gender-based violence, and promote international cooperation with a view to eliminating violence against women.[308] Article 5(1) of the Istanbul Convention explicitly enshrines a due diligence obligation, binding States parties to "refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation". This positive obligation is complemented by Article 12(2), which requires States to take the necessary legislative and other measures to prevent all forms of violence "by any natural or legal person". This specifically applies to the protection of migrant women,[309] who are particularly vulnerable to gender-based violence due to an increased risk of both experiencing violence as women, and facing structural barriers in overcoming such violence as migrants.[310] The Istanbul Convention specifically incorporates, in Article 61, an obligation to

[300] CEDAW, 'General recommendation No 35 on gender-based violence against women, updating general recommendation No 19' (26 July 2017) UN Doc CEDAW/C/GC/35 [CEDAW, General recommendation No 35] para 24.2.
[301] CEDAW, General recommendation No 28, para 37.
[302] Ibid paras 17, 24.
[303] CEDAW, General recommendation No 19, para 9. See also CEDAW, General recommendation No 35, para 24.2(b).
[304] CEDAW, General recommendation No 32, para 22.
[305] Ibid.
[306] CEDAW, General recommendation No 28, para 9.
[307] CEDAW, General recommendation No 32, para 20.
[308] Council of Europe, Convention on preventing and combating violence against women and domestic violence (CETS 210) art 1.
[309] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, para 87.
[310] Ibid, para 298.

respect the prohibition of *refoulement*, in accordance with existing obligations under international law. Crucially, the Convention also addresses measures of international cooperation in Article 62, requiring that States cooperate for the purpose of preventing all forms of violence against women, as well as protecting and providing assistance to victims.

Finally, concerning States' positive obligations with respect to migrant women at risk of trafficking, it is worth recalling that the UN Special Rapporteur on trafficking in persons, especially women and children, has recently reaffirmed that the obligation to prevent trafficking in persons and protect victims of trafficking "is undermined by measures that restrict access to asylum", and that "[m]easures to shift and transfer responsibility for the reception of asylum-seekers and the determination of asylum claims raise many serious human rights concerns and questions of compatibility with international law, including obligations to identify, assist and protect victims of trafficking or persons at risk of trafficking who are seeking asylum".[311] The Special Rapporteur particularly raised concerns in relation to arrangements to transfer asylum seekers to third States, holding that these measures may breach "the positive obligation on States to put in place an effective system to protect potential or confirmed victims of trafficking (…) in the absence of an individualized and procedurally fair assessment of (…) the safety and dignity of removals or transfers"[312] and expose victims of trafficking to prohibited *refoulements*.[313]

5. The obligation of States cooperating in migration management to adopt a HRDD framework as an indispensable measure to comply with their duty to protect human rights

Migration management is an inherently high-risk activity, as many of its practices can expose migrants to serious human rights violations,[314] including ill-treatment, violence against women, or *refoulement*. As underlined in the previous sections, situations of risk to protected interests, combined with a State's capacity to influence the "third party" which constitutes the source of the risk, trigger that State's due diligence obligations (Para. 1.2).

In this regard, when States engage in cooperation with third countries – whether by externalisation of border controls through formal or informal agreements, or through the provision of funding and other technical and logistical support – they exercise a form of indirect or partial control over the actions of their partners. Also, as already discussed, the threshold for triggering the due diligence obligation does not require full or effective control, but rather a real capacity to influence the source of the risk. In the context of migration cooperation, this threshold appears to be met.

Cooperation in migration management therefore constitutes a scenario in which a *clear and foreseeable risk* of human rights violations exists, combined with the State's ability to affect that risk.[315] In such circumstances, due diligence obligations of destination States are engaged. This entails that destination States are required to adopt all reasonable and appropriate measures to ensure that activities do not result in human rights violations by the cooperating transit States.

---

[311] HRC, 'Refugee protection, internal displacement and statelessness' (23 May 2023) UN Doc A/HRC/53/28, para 30.
[312] Ibid, para 31.
[313] Ibid, para 32.
[314] UNHCR, 'Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations' (3 January 2018) UN Doc A/HRC/37/34, para 15.
[315] UN Special Rapporteur on the human rights of migrants, 'Call for inputs: Externalization of Migration and the Impact on the Human Rights of Migrants' (2025).

As previously discussed, despite the flexible nature of the "reasonableness" standard for due diligence obligations, in certain circumstances the adoption of specific measures might be *indispensable* to comply with it (Para. 1.3).

In this regard, as showed by practice in other areas of human rights protection (Para 3.2), the adoption of a comprehensive HRDD framework has already developed as the appropriate and reasonable tool for States to mitigate risks to human rights committed by third parties acting as partners, and thus fulfil their duty to protect human rights. A robust HRDD framework shall thus consist of (i) a prior HRIA; (ii) adequate mechanisms of periodic monitoring; and (iii) the provision of mechanisms of redress, including the suspension of cooperation and financial and logistical support, in case of violations of human rights resulting from the activity of the third State. The necessity of such a measure is even heightened when cooperating third States have questionable prior human rights records and destination States are aware of it. In such a case, measures to ensure that the cooperation does not lead to human rights abuses become *indispensable.* The gravity of the risk, the proximity with the source of the risk and the duty-bearer's awareness of it (Para. 1.3) indeed entail a reduction of the available options for the State, and render the implementation of a HRDD framework the indispensable safeguard for destination States to be able to comply in good faith[316] with their duty to protect human rights.

Accordingly, if destination States fail to adopt such a framework, they might be held autonomously and individually responsible for breaching *their* duty to protect human rights (including, *inter alia*, the duty to protect migrants from torture, inhuman or degrading treatment and trafficking, particularly of migrant women, and more generally the prohibition of *refoulement*).

This has found confirmation in the positions expressed by several human rights monitoring actors both at the UN and European levels. For instance, in their joint communications to Italy and the EU following the signature of cooperation agreements with Libya and Tunisia, several UN Special Rapporteurs have expressed repeated concerns over the absence of effective consideration of the potential human rights impact of these agreements.

Concerning Italy's partnership with Libya, in February 2017, a group of UN Special Rapporteurs expressed concern over such cooperation having the potential to "contribute to pervasive and consistent patterns of human rights violations" and complained about the "absence of an adequate assessment of the human rights implications of such measures, despite robust documentation that Libya does not meet the criteria to be considered a place of safety".[317] They accordingly requested Italy to provide information on the Government's strategy to "[assess] the human rights implications of any migration management programmes and policies […] and what independent oversight mechanisms [the] Government will put in place to ensure that it is duly informed of the consequences of the returns to Libya for the individuals returned and therefore that returns to Libya effectively do not lead to human rights violations".[318] These concerns were reiterated in November 2017, following the signature of Italy's MoU with Libya, which the Special Rapporteurs deemed problematic for its lack of "mitigating measures to

[316] HRC, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (23 November 2018) UN Doc A/HRC/37/50, para 42.
[317] Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Information received concerning the possible return of migrants, under the partnership framework under discussion between your Excellency's Government and the Government of the State of Libya, in violation of the principle of non-refoulement' (2 February 2017) 3.
[318] Ibid, 5.

reduce the risk of violations [and] monitoring by civil society, UN agencies or even Italian officials".[319] Accordingly, Italy was reminded of "its obligations to prevent the loss of life of migrants and abiding by the principle of non-refoulement" and asked to provide information on whether any analysis was made to assess the impact of the MoU on the human rights of vulnerable migrants.[320] As anticipated (Para 4.1), the same concerns were reiterated by the CAT in its Concluding observations on the combined fifth and sixth periodic reports of Italy in December 2017, where the Committee complained about the absence of "any particular provision that may render cooperation and support conditional on the respect of human rights, including the absolute prohibition of torture" and of "assurances that cooperation […] will be reviewed in light of possible serious human rights violations".[321] The CAT accordingly affirmed that the State "should take all necessary legal, political and diplomatic measures to ensure that any cooperation and/or support that it may provide under bilateral or regional migration management agreements is consistent with […] international human rights law and refugee law" and, to this end, recommended that the State established "an effective mechanism for monitoring the conditions on the ground in Libya for the implementation of the cooperation projects".[322] Moreover, in view of the preparation of Italy's seventh periodic report, the CAT requested the State to clarify whether the cooperation with Libya within the framework of the MoU of 2017 has been reviewed in light of the public information concerning human rights abuses by the Libyan coastguard.[323]

Similarly, in relation to the EU partnership with Tunisia, in August 2023 the Special Rapporteurs criticised the decision to "enter a memorandum of understanding in absence of migrants' protection-related guarantees and comprehensive human rights protection", including the absence of "clear guidelines in ensuring that the financial or material support provided by the EU to Tunisia will not support – directly or indirectly – human rights violations".[324] In particular, the Special Rapporteurs shared concerns already expressed by the CoE

[319] Mandates of the Working Group of Experts on People of African Descent; the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material; the Special Rapporteur on minority issues; Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on trafficking in persons, especially women and children; and the Special Rapporteur on violence against women, its causes and consequences, 'Information received concerning the enslavement and auctioning of enslaved African migrants in markets in Libya, which increasingly expose them to trafficking and forced labour, following the signature of the Memorandum of Understanding (MoU) between Italy and the Libyan Government of National Accord in February 2017' (28 November 2017) 2.
[320] Ibid, 7.
[321] CAT, Concluding observations Italy 2017, para 22.
[322] Ibid, para 23.
[323] CAT, 'List of issues prior to submission of the seventh periodic report of Italy' (5 January 2021) UN Doc CAT/C/ITA/QPR/7, para 9.
[324] Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the human rights of internally displaced persons; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women and girls, its causes and consequences and the Working Group on discrimination against women and girls, 'Information received concerning the Strategic and Comprehensive Partnership Framework between the Government of Tunisia and the European Union, whose future implementation of modalities could give rise to possible violation of the principle of non-refoulement and the human rights of migrants, including children' (17 August 2023) 5.

Commissioner for Human Rights over the fact that the MoU includes only "very general language on human rights", instead of providing for necessary safeguards, including, at a minimum, "the publication of a comprehensive *human rights impact assessment*, full transparency in the provision of funding, the setting up of *independent monitoring mechanisms* to assess the human rights impact of specific activities under the agreement, and *the ability to suspend any activities* found to be negatively impacting on the human rights of refugees, asylum seekers and migrants".[325]

The same principles have been recently reaffirmed by the EU Ombudsman following a *proprio motu* inquiry into how the EU Commission intends to guarantee respect for human rights in the context of the EU-Tunisia MoU. The Ombudsman concluded that all EU actions in non-EU countries, including those based on non-binding political agreements, should be grounded on a prior and public HRIA, particularly when there is a risk of human rights impacts on those directly affected by such actions, as an "essential" measure to mitigate possible violations of human rights and thus comply with the CFR and IHRL.[326] Crucially, the Ombudsman found the general references to respect for human rights included in the MoU insufficient to substitute for this requirement.[327] Although it recognised that the Commission does monitor the implementation of the MoU, it found that these measures still fall short of a formal, standalone periodic HRIA, since a large part of the monitoring is delegated to external actors, its results are not public and there is no complaint mechanism allowing individuals to report alleged breaches of their human rights.[328] Accordingly, the Ombudsman recommended the Commission to publish (i) a summary of the risk assessment conducted prior to entering the MoU; (ii) information on the outcome of monitoring activities; (iii) the criteria for the suspension of contracts in case of human rights violations, and to set up (iv) complaint mechanisms for individuals to report violations of their human rights in the implementation of EU-funded projects/programs in Tunisia.[329]

Concerning the requirement of a prior HRIA, the EU Ombudsman has also clarified that this must be actual and *specific*. In relation to the negotiations of a free trade agreement between the EU and Vietnam, it rejected the claim that a previous sustainability impact assessment carried out in the context of a different agreement, or alternative measures such as political human rights dialogues or *ex-post* assessments, would be a proper substitute to this end.[330] Similarly, the UN Special Rapporteur on torture has criticised the practice of readmission agreements based on concepts such as that of "safe country" and considered diplomatic

[325] Ibid. Emphasis added. See also: CoE Commissioner for Human Rights, 'European states' migration cooperation with Tunisia should be subject to clear human rights safeguards' (press statement, 17 July 2023).
[326] European Ombudsman, Decision on how the European Commission intends to guarantee respect for human rights, paras 27-34. The Ombudsman had already affirmed, in the context of the EU-Turkey agreement of 18 March 2016, that the political nature of a cooperation agreement does not absolve the Commission of its responsibility to conduct a human rights impact assessment as a necessary tool to ensure that its actions comply with the EU's fundamental rights commitments. See: European Ombudsman, 'Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-794-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement' (18 January 2017) paras 25-27.
[327] Ibid, para 36.
[328] Ibid, paras 41-42.
[329] Ibid.
[330] EU Ombudsman, 'Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement' (26 February 2016) paras 11, 25.

assurances as insufficient measures to satisfy the requirement of an effective risk assessments.[331]

Against this background, destination States' failure to implement a HRDD framework, encompassing a prior and specific HRIA, an effective monitoring system and mechanisms of redress – in particular provisions conditioning support and financing to human rights compliance – as the sole effective measure to avoid that such cooperation ends in human rights abuses, would constitute an autonomous internationally wrongful act.

Also, as explained above (Para. 1.2), deriving from the breach of an obligation of conduct, such responsibility may exist independently of subsequent human rights violations, as it results from the State's *own* failure not to contribute to the risk. In turn, differently from instances of accessory responsibility (Paras. 2.3; 2.4), this also entails that the judicial ascertainment of destination States' responsibility would not require a determination of the responsibility of the cooperating third State, and would not trigger the application of any indispensable third-party rule in either domestic or international proceedings.

[331] Report of the SR on torture 2018, paras 43-44. Similarly: HRC, Human rights violations at international borders, para 47.