Proposal for J.S.D. Thesis
NYU School of Law
For Fall 2011 Admission

A Critical Assessment of the Concept of Due Diligence in International Law

A. Summary
Accountability and compliance is an ever-relevant item on the agenda of the international legal system. This item brings into sharp focus the role of development when the substantive obligations are conduct-oriented, i.e., they are based on due diligence. Due diligence relates to acting to prevent a thing or state of affairs from coming about. This thesis will examine whether due diligence can be an effective and appropriate tool to uphold the 'rule of international law' by ensuring compliance with international obligations through the balancing of competing interests. The thesis will seek to evaluate the concept of due diligence against the legal aims and objectives of achieving justice, effectiveness as well as the practicability of this doctrinal concept in economic terms. This will be done in order to form a view as to whether we should rethink due diligence, its role and scope or completely jettison it from international legal doctrine. The operationalisation of this thesis will involve; a) an examination of the historical development of due diligence and its status, scope and content in international law; b) a comprehensive mapping of due diligence through the assessment of the work of the International Law Commission (ILC) and other drafting committees as well as international judicial treatment of the concept and; c) an inquiry into and questioning of the very rationale and prudence of the due diligence concept by evaluating, inter alia, the scope for its application to non-state actors.

B. Introducing Due Diligence
The essence of due diligence is 'good judgement,' some would say prudence in a situation that has the risk of causing injuries or the coming into being of a prohibited state of affairs. It has been termed differently as many times as it has been used: vigilance, active vigilance or a certain degree of vigilance, to take appropriate measures, to take necessary measures, best practicable means, best efforts or to employ all means reasonably available.

Considering all these terms, I tentatively suggest that due diligence is concerned with:

- Taking positive action to prevent the coming into effect of an injurious or prohibited state of affairs;
- Taking positive action to punish those who willingly bring about the injurious or prohibited state of affairs (as to whether due diligence requires making amends by reparation warrants investigation);
- Taking positive action to limit injury to others, while doing that which is within your right to do;
- Taking positive action that is appropriate for the fulfilment of your affirmative undertaking.
The commonality of these points is the prevention of the coming into being of a certain state of affairs. Here I use prevention in the broad sense. That is, it includes the aims of protection and risk management. Therefore, due diligence relates to acting to prevent a thing or state of affairs from coming about, and where it does or may come about, to ensure that the risk is managed either *ex post facto* or pre-emptively by limiting the negative effects of the injurious or prohibited state of affairs.

Therefore, the concept of due diligence in international law as it relates to the law of international responsibilities is amorphous. This led F.V. Garcia-Amador, Special Rapporteur to the ILC in his Second Report to correctly note:

“The learned authorities are in almost unanimous agreement that the rule of ‘due diligence’ cannot be reduced to a clear and accurate definition which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was ‘diligent’ in discharging its duty of vigilance and protection....”

From these points four observations can be made: (1) Due is applicable to different areas of law: international criminal law/ international human rights, international environmental law and development, international investment and also the law on diplomatic relations, protection of foreign nationals and anti-terrorism; (2) As an aspect of the law on international responsibilities it is varied, in the sense that it has many different meanings in many different circumstances, and as such it raises different questions in each area; (3) It has no definite standard and its scope and content still raise debate and so it is described as being flexible; (4) Given the vagueness of the concept, does it have any limits; can it be characterised as an event or is it a process?

C. Proposed Research & General Outline of the Thesis

This thesis will examine whether due diligence can be an effective and appropriate tool for the propagation of substantive rules of international law for international persons, states and organisations alike. As a corollary to the general thesis, the research will also evaluate the concept of due diligence against such value-based considerations as justice, effectiveness and general economic and political factors.

Consequently, in the specific context of the Ph.D. thesis the following issues will be investigated and

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2 See Section D: Contextualising the Thesis by Illustration (duty to prevent genocide and international environmental law and development and international investment law).
3 *Ibid.*, In particular, see section on international investment law.
addressed:

PART I:  Introduction & examination of historical development, status and nature of due diligence in international law

This portion of the thesis will contain:

1. An examination of whether due diligence, in international law, is a doctrinal rule for interpreting other substantive rules or whether it is a conceptual framework through which substantive obligations are operationalised. In doing this, the paper will engage in an evaluation of the historical development of the concept and its status at international law. This examination will help to contextualise what the idea of due diligence really is, in an effort to assist in a later investigation as to its appropriateness for establishing substantives rules of international law.

2. As such, an examination of what the exact scope and content of due diligence and specific due diligence obligations are will be required in order to: (1) help determine whether substantive obligations can flow from it; (2) investigate its relationship with other primary rules on international responsibility; (3) investigate whether there can be a minimum international standard and; (4) investigate whether due diligence is truly capable of being objectively assessed.

PART II:  Descriptive & Comprehensive Mapping of Due Diligence (assessment of drafting deliberations and judicial interpretation of explicit and analogous due diligence clauses)

3. The analyses in Part I will be followed by an examination of the practical application of due diligence. This will entail examining the ILC’s considerations of due diligence in an effort to understand why due diligence has not been specifically referenced in the Draft Articles on States Responsibility for Internationally Wrongful Acts, even though it is being used in other instruments. Is the ILC's characterisation of due diligence as a primary rule of international responsibility appropriate or even helpful in fully guiding us as to its use in the promulgation of substantive rules? In order to answer these questions, a comparative analysis of the ILC's approach towards due diligence with that of other drafting committees will be undertaken.

4. At this point the analysis turns to an investigation of the means by which the expression and theoretical foundation of due diligence has been interpreted by various international and domestic courts and tribunals. By “expression” I mean explicit and analogous reference to the concept in

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treaties, and binding and non-binding resolutions of international bodies. The focus will lie on international criminal law/international human rights, international environmental law and international investment law. In essence the analysis seeks to understand how the courts have interpreted the expression of due diligence.

5. This examination of the basis and application of due diligence; will serve to establish the foundation for an investigation and assessment of the overall advantages and disadvantages of the use of due diligence as a tool to uphold the 'rule of international law’ by ensuring compliance with international obligations through the balancing of competing interests. This will help in determining its overall attractiveness for further propagation of international law.

PART III: **Questioning Due Diligence** (evaluating its scope for application to non-state actors, assessment of suitability by analysis against background of justice and effectiveness as well as an economic analysis)

6. Considering the discussion up to this point, the focus of the research will here turn to the issue of the applicability of due diligence to international governmental organisations (IGO). The paper will also explore the extent to which these due diligence obligations, if any, will affect the ability of the IGO's to fulfil their mandate. A secondary issue for examination in this section is whether the standard of obligation of an international organisation, as it relates to due diligence, is equal to that of a state; where the mandate of the organisation overlaps with the international obligations of a state.

I will focus on the United Nations (UN) in this section since it has the highest exposure to due diligence obligations. The principles extrapolated from the assessment of the UN will be used to explore the applicability and suitability of due diligence to the process of establishing international responsibilities for IGOs in general. Here, reference will also be made to how the duty, if its use continues, may implicate private enterprises such as multinational corporations, non-governmental organisations and intergovernmental organisations. Can this doctrine be a means by which international civil responsibility may be developed, something akin to international criminal liability?

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8 See Section D: Contextualising the Thesis by Illustration (duty to prevent genocide and international environmental law and development and international investment law).
7. The analysis continues by looking at the 'Bretton-Woods System' and the World Trade Organisation. These organisations have come under continuous criticism for engaging states in policies that are allegedly inimical to their development. This section seeks to address the question of whether these organisations have a substantive due diligence obligation to ensure that when they engage states it is done in a manner that has the least injurious effect on the development of the state. Should the answer to this question be in the affirmative, how should this obligation be operationalised and what rights are states then entitled to?

8. Given the paradigmatic divide that exists in the scholarship on how development ought to be approached, in this light, the paper now critically assesses the attractiveness of due diligence obligations to states. This is done considering that due diligence does, at the very least, two things that impact a state's development policy: (1) it requires states to use their resources, sometimes limited, to take positive actions in pursuit of their general international obligations and; (2) specific to environmental protection, due diligence obligations limit how states may go about exploiting their own resources in furtherance of their development goals. An economic analysis of due diligence will help us to understand how due diligence obligations burden some states as oppose to others. An analysis of due diligence against the background of justice and effectiveness will be done in order to properly contextualise the concept as well as the observations made by the economic analysis.

This will then guide in assessing the overall attractiveness of using due diligence as a tool for upholding the ‘rule of international law.’ What are the appropriate minimum international standards for acting with due diligence and how much is the fulfilment of the requirement of due diligence determined by a state's level of development?

PART IV: Conclusion

9. In completing the analysis this section of the project will take stock of the overall impact, potential and limits of the due diligence concept on the normative and institutional structures of international law. In so doing, this section of the project will seek to resolve the question of whether due diligence can be effective given its particular characteristics, such as the vagueness of existing legal conceptions. In broader terms, the project will seek to normatively evaluate the concept of due diligence, in order to form a view as to whether we should rethink its role and scope (possibly confining its use to specific areas of international law) or completely jettison it from international legal doctrine. In so doing, the thesis will consider whether the continuous proliferation of the due diligence is a 'desirable'
tool for meeting the contemporary aims, objectives and challenges of the international legal system. Ultimately, the aim is to make a substantive contribution to deliberations on the role that due diligence should play in the functioning and development of international law.

D. Contextualising the Thesis by Illustration (duty to prevent genocide, international environmental law and development and International investment law)

The tool of due diligence has been applied in many areas of international law. For the purpose of this proposal, I will use the duty to prevent genocide, international environmental law and development and international investment law to illustrate why this thesis presents an important opportunity to consider due diligence and its effectiveness in balancing competing interests, thereby upholding the 'rule of international law'. These three areas will form case studies in the thesis.

Duty to Prevent Genocide

Considering their capacity to influence the belligerent party in a situation where genocide is being committed or there is a risk of it being committed, under the Genocide Convention States Parties, must “...employ all means reasonably available to them, so as to prevent genocide as far as possible.” By capacity the ICJ would consider, inter alia, (a) the geographical distance between the State Party concerned and the scene of the events of genocide (or potential genocide); (b) the strength of the political links between the State Party concerned and the perpetrators; and (c) all other kinds of links through which the State Party concerned can effectively influence the actions of the perpetrators.

The questions that immediately arise from the ICJ’s s guidance are: Is there an international minimum standard to assess the State Party’s due diligence, or is it a wholly relativistic standard? Do substantive obligations flow from a duty that is operationalised by due diligence; what should the state do to prevent genocide? What margin of appreciation do states have, in light of their resource availability and competing interests? Who determines the threshold strength of the political link? What other kinds of links will be considered? Is this obligation determined by the character, quality and strength of the state concerned? Is it a wholly subjective duty; that is to say, the kinship between the state and victims will determine what actions are considered appropriate?

International Environmental Law

10 Ibid

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Principle 21 of the Stockholm Declaration, which is said to reflect customary international law, notes that States have the right to exploit their own resources and the responsibility not to do so in a manner that causes damage to other states. This principle is reflected in Article 7 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. Given that private entities also exploit resources within a state it would appear that this principle would enjoin the state to regulate the activities of private entities as well.

Noting that states need to exploit their environment in order to properly pursue developmental goals. There appears to be a paradigmatic divide that features in the discussion about due diligence and international environmental protection, as the developing world argues that developed countries have achieved that status because they had the latitude to exploit their environment. As such, they, the developing countries, must be left to do the same. Seemingly then, the due diligence obligation in this field bears much difficulty for the developing world as it limits how the states may pursue some items in their development agenda.

Considering that, how attractive are environmental protection rules that are based on due diligence to developing countries? Appreciating the paradigmatic divide, is there an international minimum standard for due diligence in international environmental law? Do states now have a duty to establish and maintain a regulatory framework to police private entities? Seeing that many private entities are also multinational corporations, this seems to be an avenue through which states could enact extraterritorial environmental regulations, thereby impacting the development policies of other states. The questions raised again are: (1) Should countries be burdened with this sort of obligation? (2) When will states know that they have fulfilled their obligation? (3) In cases where resources are limited, how much should be expended on this matter and who determines whether the amount expended is, necessary, best effort or the appropriate degree of vigilance? An evaluation of due diligence against the background of effectiveness, justice and economic efficiency may help to address some of these questions.

International Investment Law
In the general, Investment Treaties requires the Host State to give fair and equitable treatment to the foreign investors and to accord full protection and security to the foreign investments. Investment arbitral tribunals

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11 OECD, Report by the Environment Committee, ‘Responsibility and Liability of States in Relation to Transfrontier Pollution’ (1984), 4. – There is a ‘custom based rule of due diligence imposed on all states in order that activities carried out within their jurisdiction do not cause damage to the environment of other states’.

12 See also, Trail Smelter Case UN Reports of International Arbitral Awards III, 1905 arbitral decision of 11 March 1941.

13 Article 7(1) Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States. See too ILC Commentaries on the Draft Articles.
have held that both these duties are based on a due diligence standard.\textsuperscript{14} Newcombe and Paradell concluded that “[a]lthough the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence in its particular circumstances.”\textsuperscript{15}

This approach invites many questions: How will a balance be struck between the objective minimum standard and the subjective capacity of the state in question? For the objective minimum standard it is necessary to find a comparator; how will this be determined considering (1) the diversity of approaches to development and (2) the variance of priorities for each state? What will be the position regarding the objective minimum standard, when the state in question is incapable of attaining it? Should the objective minimum standard be used as a means of pushing states towards development (i.e., they will be responsible irrespective of their capacity)?

What is clear is that the due diligence standard raises a different set of questions for each field, in which it is utilised. However, a common theme in each set of questions is the capacity of the state in question (i.e., its level of development). When has a state done enough and is it the state liable for its incapacity? These questions concerned the effectiveness of due diligence in balancing competing interests so as to ensure compliance with international obligations. My thesis will probe into this issue deeply.

E. Contribution of Ph.D. to Scholarship

F.V. Garcia-Amador in his Second Report to the ILC aptly described the current tone of the scholarship on due diligence in international law. He said, “… though the rule [due diligence] is vague and, consequently, of only relative value in practice, there is no choice—so long as some better formula is not devised in its stead—but to continue to apply the rule of ‘due diligence’ in these cases of responsibility.”\textsuperscript{16} The existing scholarship on due diligence in international law, which my thesis will take into full account, assesses the concept of due diligence from the premise that it is a matter of fact.\textsuperscript{17} However, my thesis will contribute to the scholarship

\textsuperscript{14} Wena Hotels Ltd v Egypt, ICSID Case No. ARB/98/4, 8 December 2000; AMT v Congo ICSID Case No. ARB/93/1, 21 February 1997; AAPL v Sri Lanka; Rymedi Telekom A.S. & Telsim MobilTelekomikasyon Hizmetleri A.S. v Kazakhstan, ICSID Case No. ARB/05/16, 29 July 2008; Laud v Czech Republic (UNITRAL Arbitration) final award 3 September 2001; UNCTAD Series on International Investment Policies for Development, Investor-State Disputes Arising from Investment: Review (2005);
\textsuperscript{15} Andrew Newcombe and Lluis Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARD OF TREATMENT, Kluwer Law International: 2009, 310, which was approved by Sole Arbitrator Jan Paulsson in Pantechnika S.A. Contractors & Engineers (Greece) v Albania ICSID Case No. ARB/07/21, 20 July 2009.
\textsuperscript{17} See however, Peter Malanczuk AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW, Routledge: 1997
in that: a) it will comprehensively analyse the concept of due diligence from the position of whether it should exist - it will seek to question the very basis of a doctrine, that appears to have be widely invoked yet very vague; b) it will examine extensively an area that has been greatly under-theorised, and whose normative limits and potential are not fully explored.

F. Research Method and Sources to be Consulted
The research will be mainly a qualitative analysis of various sources, both primary and secondary. This will include international instruments: treaties, declarations, binding and non-binding resolutions from international bodies. I will also review the decisions of international courts and tribunals. The existing scholarship on due diligence will, however, be used as a starting point for my research. Crucial to my investigations will be an analysis of discussions of the ILC and other drafting committees on the matter of due diligence.

Where the paper engages in the economic analysis of due diligence both the positive and normative approaches approach will be utilised. The positive approach will be used in the papers’ discussion on the ‘...principles extrapolated from the assessment of the UN... [in examining the] ...applicability and suitability of due diligence to the process of establishing international responsibilities for non-state actors in general.’ The normative approach will be used in the paper’s discussion on the relationship between due diligence and development and any policy recommendations that may come from the analysis.

NB. This proposal presents my preliminary assessment of the area and may be changed in consultation with my assigned supervisor.

G. Why NYU School of Law
There are three main reasons why the NYU School of Law is the most appropriate place for this research to be undertaken. Firstly, the School provides an environment that allows for and encourages a complete immersion into my specific area of research. Secondly, the School boasts a leading environment for the interdisciplinary and comparative study of law. This fully accords with how I see the law as being a tool for the ordering of our societies. Thirdly, School’s large and diverse community of international law scholars and JSD candidates will enrich the research process by advancing a holistic approach. In sum, the NYU School of Law provides a rigorous yet congenial, engaging and intellectually stimulating environment, suitable for my research.


See II. Proposed Research – part 6
H. Full-time Faculty with whom I hope to work with:

1. Professor Ryan Goodman
2. Professor José Enrique Alvarez
3. Professor Richard B Stewart

I. Preliminary Bibliography

*Books*


[9] Timo Koivurova “What is the Principle of Due Diligence?” in NORDIC COSMOPOLITANISM: ESSAY IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 341 (Jarna Petman and Jan


Journal Articles


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[38] 46 Nat. Resources J. 157 Natural Resources Journal Winter 2006 THE ROLE OF CUSTOMARY RULES AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW IN THE PROTECTION OF SHARED INTERNATIONAL FRESHWATER RESOURCES Owen MCIntyre


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[49] 26 Hastings Int'l & Comp. L. Rev. 83 Hastings International and Comparative Law Review Fall 2002 Notes STATE SPONSORSHIP AND SUPPORT OF INTERNATIONAL TERRORISM:
CUSTOMARY NORMS OF STATE RESPONSIBILITY Scott M. Malzahn


[52] 12 Transnat'l Law. 153 Transnational Lawyer Spring, 1999 INTERNATIONAL RESPONSIBILITY OF AN OCCUPYING POWER FOR ENVIRONMENTAL HARM: THE CASE OF ESTONIA Lisa M. Kaplan


[58] 83 Am. Soc'y Int'l L. Proc. 372 American Society of International Law Proceedings April 5-8, 1989 STATE RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS Theodor Meron Mary Margaret McCarthy

[59] 23 AJIL Spec Supp 173 American Journal of International Law, Special Supplement 1929 THE LAW OF RESPONSIBILITY OF STATES FOR DAMAGES DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS (1929 Harvard Draft), Articles 10-12; See also 55 AJIL 545, 1961 Harvard Draft, Article 13

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