Introduction

There has been much debate in recent years about the role of non-state actors in international law. Whereas their presence is undisputedly acknowledged, their status and legal accountability remain unsettled. In many areas of public international law, harm is now significantly often caused by actors other than states.[1] Terrorist groups threaten the territorial integrity of states; private security companies are involved in armed conflicts; individual hackers initiate cyber-attacks; and multinational corporations cause transboundary environmental harm or business-related human rights violations. Nonetheless, international treaties and customary international law still assign rights and duties almost exclusively to states. Outside of international criminal law, there are but few attempts to establish individual responsibility. On the other hand, state responsibility only arises if an international obligation is breached and that breach is attributable to a state, whereas only the actions of state organs acting in their official capacity may implicate state responsibility and the conduct of private individuals usually does not. Such conduct may be attributed if private citizens act as so-called de facto organs or a state acknowledges their behavior as its own – which occurs rather rarely. The nature of state responsibility is inherently restorative with the primary objective to maintain or restore equilibrium between equal and sovereign states. In sum, there is thus a broad range of private activities that remain below the threshold of attribution. This leads to the somewhat dissatisfying situation that there

[1] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), pp. 7 ff.; Nehal Bhuta, "The Role International Actors Other Than States Can Play in the New World Order," in Antonio Cassese (ed.), *Realizing Utopia* (Oxford: Oxford University Press, 2012), p. 61; Anja Seibert-Fohr, "Die völkerrechtliche Verantwortlichkeit des Staates für das Handeln von Privaten: Bedarf nach Neuorientierung?" (2013) 73 *ZaöRV* 37–60 at 38 f.

are quite well-defined regulations on what states are expected to do, whereas comprehensive regulations on private conduct are missing from the international scene. With harmful conduct now often stemming from non-state actors, there exists a substantial accountability lacuna.

It thus comes as little surprise that criticism of an outdated state-centric approach of international responsibility is increasing, arguing that the scope of responsibility needs to be expanded so as to include private actors in order to ensure the full and effective implementation of international law – particularly in the field of human rights protection. When compared with other areas of international law, the field of human rights protection indeed shows several peculiarities: Human rights issues rarely arise in a transboundary context as they do not cause immediate effects on another state's territory. Moreover, human rights violations mostly affect individuals and not other states as such, which explains why states are rather reluctant to bring human rights claims before international courts. The logics undergirding the traditional reciprocal nature of state responsibility do not fully apply to the human rights context,[2] which makes gaps in legal protection particularly worrisome. Further concerns stem from the fact that human rights law requires the balancing of various interests and positions. When regulating private conduct, states may protect the human rights of some while simultaneously infringing upon those of others. A state, therefore, cannot be burdened with too-expansive duties to control private conduct, lest it would encroach on the very freedoms it is supposed to protect. Besides, many states lack capacities to effectively prevent and sanction harmful private conduct in the first place, which further calls into question whether the rules on state responsibility could actually foster global human rights protection at all.

For these reasons, the creation of direct human rights obligations for non-state actors is increasingly considered. As we will further explore, however, there is a range of serious concerns speaking against such obligations. While the desirability of greater liability for human rights contraventions caused by harmful private conduct is beyond question, making non-state actors duty bearers under international human rights law would create substantial legal problems; and it does not seem likely that consensus on such duties could be reached in the foreseeable

[2] Hélène Tran, *Les Obligations de Vigilance des États Parties à la Convention Européenne des Droits de l'Homme* (Brussels: Bruylant, 2013), para. 32.

future, either. The focus should thus be shifted on how the rules of state responsibility could be adjusted to enhance global human rights protection with regard to harmful private conduct.

That international human rights law requires states not only to refrain from actively committing human rights violations but also to actively protect against contraventions stemming from other sources – including harmful private conduct – is now undisputedly recognized. However, these types of obligations are commonly subsumed under the very broad notion of "positive obligations," whereas substantial concretizations of what these obligations actually entail and how they might be adjusted so as to better address the growing role of non-state actors are absent. In order to enhance the coherence and effectiveness of the rules on state responsibility, it is thus necessary to take a closer look at what states are actually expected to do in order to comply with their positive obligations.

It is in this context that the standard of due diligence could provide substantial guidance on how state responsibility for failure to prevent human rights contraventions by non-state actors might be established and even extended so as to cover constellations that are considered to fall outside the scope of human rights law as it stands today. Concretizing and expanding the reach of positive obligations appears to be a more promising (and more realistic) approach than creating direct human rights obligations for actors other than states.

Due diligence obligations of states[3] have a long history in international law, and while they are mainly associated with the sphere of environmental law today, they originally evolved in the context of alien protection laws and thus within an area of international law that is genuinely concerned with the protection of individuals. Meanwhile, the concept has long transcended its historical origins and is applied in various fields of international law, where it is acknowledged that states not only have a negative obligation to refrain from breaching their international duties through actions of their own officials; they also have a positive obligation to take reasonable measures to prevent harmful activities by non-state actors and to sanction such conduct, should it occur nonetheless.[4] Due

[3] Due diligence standards are also applied in a private law context where they describe duties of care on behalf of private actors including multinational corporations.

[4] Cedric Ryngaert, "State Responsibility and Non-State Actors," in Math Noormann et al. (eds.), *Non-State Actors in International Law* (Oxford: Hart, 2015), p. 164; Robert Barnidge, "The Due Diligence Principle Under International Law" (2006) 8 *International Community Law Review* 81–121 at 91 ff.; Riccardo Pisillo-Mazzeschi, "The

diligence obligations are mostly considered a necessary corollary to the concept of state sovereignty in that they oblige states to prevent incidents and activities on their territory that cause harm to other states.[5] Even if harmful private conduct is not attributable to a state, failure to act in a sufficiently diligent manner could give rise to an independent ground for state responsibility.[6] What constitutes diligent measures will vary according to individual circumstances – in particular the likelihood of harm and the extent and seriousness of such harm.[7] It is essential to notice, however, that such duties are not strict obligations of result but rather obligations to employ "best efforts."[8]

It is due to their inherently flexible and broad character that due diligence obligations are often criticized for being too vague and of limited reach.[9] Since the concept would lack any precise content, it could not serve as an adequate basis for state responsibility. Applying flexible standards that are subject to individual circumstances would lead to differing results that would not only undermine the basic principles of fairness but also unduly burden states due to a lack of legal clarity and certainty.[10] As a matter of fact, due diligence is among the most ambiguous terms in international law. It has been referred to

Due Diligence Rule and the Nature of International Responsibility of States" (1992) 35 *GYIL* 9–51 at 22 ff.

[5] François Dubuisson, "Vers un Renforcement des Obligations de Diligence en Matière de Lutte Contre le Terrorisme?" in Karine Christakis-Bannelier et al. (eds.), *Le Droit International Face au Terrorisme* (Paris: Pedone, 2002), p. 142.

[6] Ryngaert, "State Responsibility and Non-State Actors," 181; Seibert-Fohr, "Völkerrechtliche Verantwortlichkeit," 43; Astrid Epiney, *Die völkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (Baden-Baden: Nomos, 1992), p. 205.

[7] Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence," in Denis Alland et al. (eds.), *Unity and Diversity of International Law* (Leiden: Martinus Nijhoff, 2014), pp. 125 f.; Pisillo-Mazzeschi, "The Due Diligence Rule," 44.

[8] Seibert-Fohr, "Völkerrechtliche Verantwortlichkeit," 50; Epiney, "Völkerrechtliche Verantwortlichkeit von Staaten," p. 208.

[9] Malgosia Fitzmaurice, "Legitimacy of International Environmental Law" (2017) 77 *ZaöRV* 339–370; Menno Kamminga, "Due Diligence Mania: The Misguided Introduction of an Extraneous Concept into Human Rights Discourse" (2011) Maastricht Faculty of Law Working Paper No. 07, p. 6; Vassilis Tzevelekos, "In Search of Alternative Solutions: Can the State of Origin Be Held Responsible for Investors' Human Rights Abuses That Are Not Attributable to It?" (2010) 35 *Brooklyn Journal of International Law* 155–231 at 199; Danwood Mzikenge Chirwa, "In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights" (2008) 8 *African Human Rights Journal* 294–311 at 307.

[10] Fitzmaurice, "Legitimacy of Environmental Law," 364 ff.

as "principle,"[11] "doctrine,"[12] "test,"[13] "concept,"[14] "general principle,"[15] and "obligation,"[16] with the ILC still mostly referring to due diligence as a "standard,"[17] underlying more "specific expressions" in various sub-branches of international law.[18] Already, this brief summary of definition attempts illustrates the great difficulties in assessing what due diligence means in the context of state responsibility.

Against the background of this terminological confusion, this book seeks to explore what due diligence obligations actually entail for states and how state responsibility for failure to comply with them can be established. A comparative analysis of their application in different fields of international law will reveal how the standard was tailored and modified to meet the challenges of each individual field. In a second step, it will be discussed if and to what extent due diligence obligations can be conceptualized or even expanded so as to address the growing problems stemming from harmful private conduct in the human rights context. Assessing their potential will help decide whether the state responsibility regime in human rights law is in need of general reform or whether it can be adjusted so as to effectively confront private human rights contraventions. While some lessons might be drawn from the application of due diligence obligations in other fields of international law, due regard has to be paid to the peculiarities of human rights regimes. Against this

[11] Joanna Kulesza, *Due Diligence in International Law* (Leiden: Brill Nijhoff, 2016), p. 11; Ryngaert, "State Responsibility and Non-State Actors," 177; Michael Schmitt, "In Defense of Due Diligence in Cyberspace" (2015) 125 *Yale Law Journal Forum* 68–81 at 69.

[12] Jan Arno Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law" (2003) 36 *JILP* 265–306 at 266; Xue Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003), p. 162.

[13] Richard Lillich/John M. Paxman, "State Responsibility for Injuries Caused to Aliens Occasioned by Terrorist Activities" (1977) 26 *The American University Law Review* 217–313 at 269.

[14] Pisillo-Mazzeschi, "The Due Diligence Rule," 44.

[15] Awalou Ouedraogo, "La Due Diligence en Droit International: de la Règle de la Neutralité au Principe Général" (2012) 42 *Revue Générale de Droit* 641–683 at 644; Timo Koivurova, "What Is the Principle of Due Diligence?" in Jarna Petman/Jan Klabbers (eds.), *Nordic Cosmopolitanism* (Leiden: Martinus Nijhoff, 2003), p. 344.

[16] Yakin Ertürk, "The Due Diligence Standard: What Does It Entail for Women's Rights?" in Carin Benninger-Budel (ed.), *Due Diligence and Its Application to Protect Women from Violence* (Leiden: Martinus Nijhoff, 2008), p. 38.

[17] Among many others: ILC, Report of its 46th Session, ILC Yearbook 1994, Volume II, UN Doc. A/49/10, pp. 169 f.

[18] ILA Study Group on Due Diligence, Second Report of July 2016, available at www.ila-hq.org/index.php/study-groups, p. 6.

background, the following analysis will investigate the role due diligence duties could play when it comes to preventing and sanctioning private actions contrary to international human rights law. It will engage critically with arguments that due diligence as a concept is inadequate to meet the challenges imposed by the rise of non-state actors and seeks to reveal unexploited possibilities of how such obligations could contribute to an effective human rights protection.

The debate on direct human rights obligations for non-state actors will serve as a starting point for the analysis. While the creation of such obligations has become an increasingly popular suggestion,[19] the first chapter identifies several substantial but often neglected concerns. Given the fact that direct human rights obligations for non-state actors are neither particularly desirable nor overly realistic, alternative means to address private human rights contraventions need to be explored. However, when analyzing typical categorizations of human rights, it soon becomes clear that they fail to precisely describe what states are required to do. Against this background, a conduct-based typology of human rights obligations is suggested in the second chapter, which will render the broad notion of positive obligations more accessible. As we will see, positive human rights obligations entail both obligations of result as well as obligations of diligent conduct to adequately prevent and sanction private harmful conduct. Yet, not only are obligations of diligent conduct of higher practical relevance, they are also more difficult to narrow down. In order to explore how the rules on state responsibility could be better adjusted in reaction to the increasing importance of private actors, it is thus necessary to elaborate in greater detail on how due diligence obligations might operate in the human rights context.

To this end, the origins of due diligence duties in international law will be retraced in a general but concise manner that concludes with an attempt to classify the status of the principle of due diligence within the state responsibility system in Chapter 3. In order to then compare and contrast how due diligence obligations are applied in different fields of

[19] Lee McConnell, *Extracting Accountability from Non-State Actors in International Law* (London: Routledge, 2017), p. 73; David Bilchitz, "The Necessity for a Business and Human Rights Treaty" (2016) 1 *Business and Human Rights Journal* 203–227; Jean Thomas, "Our Rights, but Whose Duties?" in Tsvi Kahana/Anat Scolnicov (eds.), *Boundaries of State, Boundaries of Rights* (Cambridge: Cambridge University Press, 2016), p. 7; Jennifer Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents" (1999) 31 *Columbia Human Rights Law Review* 81–121 at 120.

international law, Chapter 4 will conceptualize an analytical framework of the individual components of due diligence obligations. It will help define in a more precise manner the different requirements generally contained in due diligence obligations and identify common problems. It will focus on how the foreseeability threshold can be overcome and how the inherently vague reasonableness standard could be filled with content. In addition to this, it will address the fundamental question of whether diverging capacities are to be taken into consideration or whether uniform standards of diligence apply to all states. Embedded in this analytical framework, the fifth chapter will discuss the application of due diligence duties in different areas of international law that are confronted with similar challenges as the field of human rights protection. This will allow drawing more general conclusions on the character of diligence duties in international law, and more importantly, it will reveal several tests and standards that have been developed to address specific problems such as evidentiary hurdles or diverging capacities. Later on, it will be discussed whether those concepts might provide guidance for the further development of human rights due diligence obligations and could help overcome substantial and procedural hurdles that stand in the way of more effective human rights protection.

With this in mind, the sixth chapter will analyze human rights due diligence along the general framework introduced previously. Narrowing down the broad and vague notion of due diligence to a general analytical framework will help assess more accurately what states are expected to do with regard to harmful private conduct. While thereby contributing to greater legal certainty, the analysis will also reveal severe problems – most notably that powerful non-state actors often operate in states that lack the capacities to effectively control harmful private activities. Accordingly, the final chapter will discuss if and to what extent the concept of human rights due diligence obligations could be adequately applied to extraterritorial constellations and whether states with sufficient resources could be expected to diligently react toward human rights risks beyond their territory. As we will see, a strong case can be made for such extraterritorial due diligence obligations as a viable alternative to directly binding obligations for non-state actors. While due regard has to be paid to the principle of non-intervention and no undue burden should be imposed on any state, there are several constellations in which states could be reasonably expected to exercise due diligence with regard to human rights risks abroad. Even though there still is significant reluctance, some recent examples of state practice implement extraterritorial due

diligence frameworks. In contrast to the complicated and possibly fruitless task of creating human rights obligations for a whole new array of actors, expanding the reach of human rights due diligence obligations to extraterritorial constellations could be easily integrated in the existing human rights system and thus presents a more promising way to foster global human rights protection, with the importance of non-state actors ever increasing.