

CONTENTS

*Acknowledgments*      page xv  
*List of Abbreviations*      xvi

**Introduction**      1

**1 Why to Analyze State Responsibility for Human Rights Violations: The Flawed Debate on Direct Human Rights Obligations for Non-State Actors**      9

    I. Introductory Remarks      9

    II. Why the Existing Human Rights Regime Cannot Be Construed to Contain Direct Obligations for Non-State Actors      13

        1. Customary International Law      14

        2. General Principles      16

        3. Human Rights Treaties      17

            a. Human Rights Treaties as Living Instruments      18

            b. *Drittwirkung*      23

            c. “Abuse of Rights” Clauses      26

        4. Summary      28

    III. Reasons Speaking for Direct Human Rights Obligations on Behalf of Private Actors      30

    IV. Reasons against Imposing Direct Human Rights Obligations on Non-State Actors      32

        1. Procedural and Definitional Questions      32

            a. Non-State Actors and International Norm Setting      32

            b. Making Non-State Actors Duty Bearers: “Capacity” as an Adequate Yardstick?      34

            c. Shared Accountability between States and Non-State Actors?      37

2. Legitimacy Questions: Non-State Actors and the Balancing of Public Interests	38
3. Abuse Concerns	41
a. A Chance for States to Neglect Their Own Duties	42
b. Awarding Corresponding Rights to Non-State Actors	42
V. Conclusion: The Necessity of Exploiting the Full Potential of State Responsibility	43
<b>2 Establishing State Responsibility for Human Rights Violations: Proposal for a Conduct-Based Typology of Human Rights Obligations</b>	<b>47</b>
I. Introductory Remarks	47
II. The Inadequacy of Traditional Human Rights Typologies	48
1. Three Generations of Human Rights	49
2. Obligations to Respect, Protect, and Fulfill	51
3. Positive versus Negative Obligations	52
III. Proposal for a Conduct-Based Typology of Human Rights	54
1. Positive Human Rights Obligations of Result	55
a. Preventive Obligations of Result	56
aa. The Duty to Enact Legislation	56
(1) Failure to Enact Legislation	58
(2) Enacting Legislation That Violates Human Rights	60
bb. The Duty to Establish an Administrative Apparatus	61
b. Punitive Obligations of Result	63
aa. The Duty to Establish an Investigative and Judicial Apparatus	63
bb. The Duty to Create Legal Remedies	64
cc. The Duty to Investigate Allegations of Human Rights Violations	65
dd. The Duty to Provide for Specific Criminal Legislation	67
ee. The Duty to Award Reparations	68
2. Positive Human Rights Obligations of Diligent Conduct	69
a. Preventive Obligations of Diligent Conduct	71

## CONTENTS

vii

b. Repressive Obligations of Diligent Conduct	71
3. Positive Obligations of Progressive Realization	74
4. Margin of Appreciation	75
IV. Summary	76
<b>3 The Origins of Due Diligence in International Law</b>	<b>78</b>
I. Introductory Remarks	78
II. Due Diligence in Early Scholarly Writings	78
1. Grotius's Concept of <i>Patientia</i> and <i>Receptus</i> Responsibility	79
2. Pufendorf and the Presumption of Capacities to Prevent	80
3. Wolff and Vattel: From Responsibility of the Monarch to Responsibility of States	80
4. Hall and Oppenheim: Reasonable Measures of Prevention and Vicarious Responsibility	81
5. Summary	82
III. Due Diligence in Early Jurisprudence	83
1. The Duty to Protect Foreigners and the Establishment of Claims Commissions	83
2. The Jurisprudence of the Claims Commissions	84
a. Preventive Obligations of Due Diligence	85
b. Repressive Obligations of Due Diligence	86
c. Due Diligence versus Complicity	87
d. Responsibility in Case of Civil Insurgency	88
3. Due Diligence Obligations in Transboundary Cases	89
IV. Due Diligence within the System of State Responsibility	90
1. Failed Attempts at Codification	90
2. The ILC's Work on State Responsibility and the Due Diligence Concept	92
V. Confusion of Concepts: Distinguishing Due Diligence from Other Responsibility Concepts	92
1. Actions and Omissions	93
2. Fault	94
a. The Role of Fault within the Law on State Responsibility: General Remarks	95
b. Due Diligence Obligations and Negligence	96

c.	Due Diligence as a Standard of Conduct Contained in Primary Norms	97
3.	Liability for Acts Not Prohibited by International Law	99
a.	Responsibility versus Liability	99
b.	Draft Articles on Prevention of Transboundary Harm	101
4.	Obligations of Conduct and Obligations of Result	102
a.	Ago's Proposal	102
b.	Why the Distinction Matters: The Temporal Dimension of a Breach	103
c.	The ILC's Proposal on Preventive Obligations	105
5.	Complicity	106
a.	Complicity in Wrongful Conduct of Other States	107
b.	Complicity in Non-State Conduct	109
aa.	Complicity in Case of Individual Criminal Responsibility	109
bb.	Complicity as Ground for Attribution	110
cc.	Complicity versus Due Diligence: Where the Confusion Comes From	111
(1)	Why the Distinction Is Relevant	112
(2)	Distinction Based on the "Knowledge" Criterion	112
VI.	Summary	114
4	The Components of the Due Diligence Standard	116
I.	Introductory Remarks	116
II.	Knowledge	117
1.	Positive Knowledge	118
2.	Constructive Knowledge	118
a.	An Obligation to Acquire Knowledge	119
b.	Determination by Objective Factors	119
III.	Capacities	121
1.	Institutional Capacities	122
2.	Territorial and Financial Capacities	123
a.	Territorial Capacities	124
b.	Technical and Financial Capacities	126
c.	<i>Force Majeure</i> / Necessity	127

CONTENTS

ix

IV. Reasonableness	128
1. Elements of Reasonableness under International Law	129
a. Reasonableness and Proportionality	130
b. Reasonableness and Rationality	132
c. Reasonableness and Compliance	133
d. Reasonableness and Balancing	134
2. Assessing Reasonableness: Objective versus Subjective Approaches	136
3. Burden of Proof	137
V. Summary	140
<b>5 Lessons to Be Learned from the Application of Due Diligence Obligations in Other Fields of International Law</b>	<b>142</b>
<b>5.1. Due Diligence Obligations in International Environmental Law</b>	<b>144</b>
I. Introductory Remarks	144
II. Preventive Obligations and the No-Harm Rule	145
III. Knowledge	147
1. Precautionary Obligations	147
2. An Obligation to Acquire Knowledge: Environmental Impact Assessments	150
3. An Obligation to Share Knowledge? Duties to Cooperate	153
IV. Capacities	154
1. Best Available Technologies	155
2. Common but Differentiated Responsibilities	156
V. Reasonableness	159
1. Technological Development	159
2. Sustainability	159
3. Objective versus Subjective Standards of Care	160
4. Burden of Proof	161
VI. Summary	163

x	CONTENTS
5.2.	<b>Due Diligence Obligations to Curb Terrorist Activities</b> 167
I.	Introductory Remarks 167
II.	Knowledge 171
III.	Capacity 172
1.	Institutional Capacities 172
2.	Financial and Territorial Capacities 173
a.	Self-Defense against Non-State Actors? 173
b.	The Unwilling or Unable-Standard 177
aa.	Is There an Obligation to Enhance Capacities? 178
bb.	Does Inability Justify a Forceful Response by Other States? 179
cc.	Broadening the Scope of Reasonable Efforts 181
IV.	Summary 183
5.3.	<b>Due Diligence Obligations in the Cybersphere</b> 185
I.	Introductory Remarks 185
II.	The Problem of Attribution in the Cybersphere 186
III.	Due Diligence in the Cybersphere 188
1.	Due Diligence Obligations in the Aftermath of a Cyber Incident 189
2.	Preventive Due Diligence Obligations in the Cybersphere 190
a.	Knowledge: The Foreseeability of Harmful Cyber Incidents 190
b.	Reasonable Measures of Prevention 193
c.	Shifting the Burden of Proof? 195
d.	Capacities in the Cybersphere 197
IV.	Summary: Is There Room for Preventive Cyber Obligations? 199
5.4.	<b>Summary</b> 202

## CONTENTS

xi

<b>6 Applying the Due Diligence Framework to the Field of Human Rights Protection</b>	<b>204</b>
I. Introductory Remarks	204
II. Knowledge	204
1. Obtaining Knowledge: The Risk of Excessive Surveillance and Control	206
2. The Knowledge Standard in Human Rights Jurisprudence	208
a. Information of Human Rights Risks	209
b. Constellations in Which States Create or Contribute to the Creation of Human Rights Risks	212
aa. Licensing Procedures	212
bb. Creation of Risks	213
c. Consistent Patterns of Human Rights Violations	214
aa. Frequency of Human Rights Contraventions in the Past	215
bb. Frequent Human Rights Violations in a Particular Region	215
cc. Particular Risks for Certain Groups of Individuals	216
d. Summary	217
3. Human Rights Impact Assessments	218
III. Capacities	220
1. Human Rights Due Diligence Obligations of Developing Countries	222
2. Human Rights Due Diligence Obligations in Times of Economic Crisis	225
3. Human Rights Due Diligence Obligations in Conflict Situations	227
4. Human Rights Obligations Not Dependent on Capacities	231
a. Nondiscrimination	232
b. Duties to Monitor and to Inform	233
c. Duties of Cooperation	236
aa. Obligations to Seek Assistance	237
bb. Obligations to Render Assistance: Drawing Inspiration from the “Common but Differentiated Responsibilities” Approach	239
d. Core Obligations	241
aa. Nonderogable Rights	242
bb. Minimum Core Obligations	242

xii	CONTENTS
5. Summary	244
IV. Reasonableness	244
1. Scope of Measures	248
a. Status of the Right That Is to Be Protected	248
b. Preventive Obligations: Seriousness of Risk	250
c. Punitive Obligations: Seriousness of Violation	251
d. Balancing with Other Human Rights and Public Interests	252
2. Nature of Measures	254
3. Conclusion	255
V. Concluding Remarks	256
7 A Case for Extraterritorial Due Diligence Obligations in the Human Rights Context	258
I. Introductory Remarks	258
II. Between Universal Human Rights Protection and the Principle of Non-Intervention: The Tension Underlying Extraterritorial Human Rights Protection	260
III. Jurisdictional Clauses in International Human Rights Regimes	263
IV. Jurisdictional Clauses and State Responsibility	265
V. Negative versus Positive Obligations in Extraterritorial Cases	267
1. The ECtHR's Perspective	268
2. The ICJ's Perspective	272
VI. The Underdeveloped Potential of Positive Obligations of Diligent Conduct in Extraterritorial Constellations	274
1. When Knowledge Can Be Expected in Extraterritorial Constellations	275
a. Due Diligence Obligations When the Victim is within a State's Jurisdictional Reach	276
b. Due Diligence Obligations When the Perpetrator is within a State's Jurisdictional Reach	277



CONTENTS

xiii

2. Reasonable Efforts in Extraterritorial Constellations: Reconciling Positive Obligations with the Principle of Non-Intervention	278
3. Capacities	284
VII. Can There Be an Obligation to Act Extraterritorially? Drawing Inspiration from the “Unwilling or Unable” Standard	284
1. Human Rights as a Common Concern and the Issue of Diverging Capacities	286
2. How Extraterritorial Regulations Based on the Active Personality Principle Could Improve Human Rights Protection	289
VIII. First Steps in the Right Direction: Social and Economic Rights	290
IX. Areas in Which Extraterritorial Due Diligence Obligations Could Be Applied	292
1. Licensing Procedures	292
a. Foreign Trade Promotion: Drawing Inspiration from Procedural Obligations in Environmental Law	293
b. Applying the Due Diligence Standard to Arms Transfer Control	296
aa. International Norms Applicable to Arms Transfer	296
bb. Human Rights Law and Arms Transfer	297
cc. Attribution, Complicity, and Aiding and Abetting in the Context of Arms Transfers	299
dd. Due Diligence Obligations in the Context of Arms Transfers?	300
(1) The <i>Tugar</i> Decision	300
(2) Knowledge	301
(3) Capacities	301
(4) Reasonableness	302
(5) Impact Assessments	303
ee. Summary	306
c. Conclusion	306
2. Regulating Extraterritorial Corporate Conduct	307
a. Introductory Remarks	307
b. The French Law on Duty of Care 2017	309

- c. Proposals on Corporate Regulations within the European Union 312
  - aa. EU Directive 2014/95/EU 313
  - bb. EU Flagship Initiative on the Garment Sector 313
- d. The Californian Transparency in Supply Chains Act of 2010 314
- e. The UK Modern Slavery Act of 2015 315
- f. Domestic Proposals on the Regulation of Extraterritorial Corporate Conduct 316
  - aa. Proposal by the German Green Party of 2016 and Coalition Agreement of 2018 316
  - bb. Switzerland: *Konzerninitiative Verantwortung* 318
- g. Conclusion 319

**Summary and Outlook 322**

*Index 327*