

The standard of 'due diligence' as a result of interchange between LOAC and general international law

Introduction

'Due diligence' or 'vigilance' is a substantial law obligation which requires that the state take all reasonable efforts within its power to prevent and repress the commission of internationally wrongful acts by others, i.e. non-state actors or other states.¹ Due diligence emerged as a duty of states to take all effective measures to ensure that no harm comes to other states in or from their territory, first in the context of the protection of aliens and the law of neutrality, and subsequently in other special branches of international law as well.² The law of armed conflict (LOAC) has played an important role in the case law of international tribunals that interpreted LOAC with reference to the standard of due diligence. Cases related to armed conflicts gave international tribunals the opportunity to interpret the content of due diligence and the varying circumstances that determine the expected degree of diligence. Moreover, LOAC used the standard of due diligence to elaborate and interpret the still contested obligations of non-state actors. Some of those obligations have been accepted by the International Court of Justice (ICJ), the International Law Commission (ILC), or the International Committee of the Red Cross (ICRC) as reflecting positive law. It will be shown in this article that LOAC not only contributed to the emergence of the core understanding of due diligence, but influenced the concept more generally in international law, while the latter mutually develops the contemporary interpretation of due diligence obligations in LOAC.

The classical concept of due diligence imposes obligations of conduct: the state is obliged to take measures in a certain manner, without requiring the achievement of a particular result (as opposed to obligations of result) On the one hand, the scope of obligations of conduct is broader than the obligation of due diligence defined above, for instance the duty to 'take the necessary steps' 'to make the distinctive emblems indicating medical units and establishments clearly visible' requires a conduct without an obligation to achieve a concrete result,³ but does not require the prevention and repression of the commission of internationally wrongful acts by others.

On the other hand, not all obligations subject to a due diligence standard can be described as obligations of conduct, as in the case of obligations of progressive realisation to fulfil human rights, certain duties in LOAC require taking measures that must be undertaken with some result in mind and the results will be the key to the determination of a violation.⁴ For example, the obligation to realize the repatriation of prisoners of war 'as speedily as possible'⁵ or 'without delay'⁶ after the cessation of active hostilities is clearly such obligation of result with a due diligence standard. It is not an obligation of due diligence as defined above, requiring protective

¹ Timo Koivurova, 'Due Diligence', *Max Planck Encyclopedia of Public International Law* (2010) para 2.

² Robert P Jr Barnidge, 'The Due Diligence Principle under International Law' (2006) 8 *International Community Law Review* 81, 121.

³ GC I, Article 42(4), and Commentary of 2016 of GC I, para 2644.

⁴ ILA, Study group on due diligence in international law, First report, 7 March 2014 [ILA, First report], 17.

⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 [The 1907 Hague Regulations], Article 20.

⁶ 1949 Geneva Convention [GC] III, Article 118(1).

measures against internationally wrongful acts by others, but an obligation of result subject to a due diligence standard.

Likewise, the duty to operate certain institutions ‘diligently’ is considered by some as a due diligence duty.⁷ However, unlike the traditional sense of due diligence, focusing on the protection against violations by others, the ‘operational diligence of institutions’ expects from the state the effective functioning of its institutions in the sense that they are capable of achieving their mandate (e.g. fair trial, effective investigation).⁸ In LOAC, for example, the duty to identify the deceased,⁹ the duty to record and forward information on shipwrecked, wounded, sick, or dead enemy personnel,¹⁰ and the duties of prisoners’ representatives¹¹ shall all be performed with diligence. The present article focuses on the classical understanding of due diligence and does not examine obligations of result and duties of operational diligence.

This article critically examines international instruments and jurisprudence, asking whether due diligence can be viewed as a common standard applicable across international law generally, or whether its operation must be analysed separately for different specialised regimes in international law. The article argues that the due diligence concept, as it applies in LOAC, developed certain specificities as to its content, particularly with regard to the importance of the interests to be protected and the extension of the concept to non-state actors. However, it will be argued that these specificities have been extended to apply not just to the standard in LOAC but also to the standard across international law more generally.

As to the legal sources analysed in the article, while due diligence is based on a plurality of different sources, not all of them fit under the traditional positivist theory of sources with Article 38(1) of the ICJ Statute at its core. Exercises of public authority at the international level today go beyond these orthodox types of sources.¹² The article accepts that the general doctrine of the sources of international law, as set out in Article 38(1) of the ICJ Statute, is applicable to the sources of LOAC, with some specific features as to the secondary norms regulating those classical sources.¹³ This leads merely to the particular application of secondary norms regulating treaties under general international law rather than to the derogation therefrom.¹⁴ One such specificity is the object of humanitarian treaties, which is the safeguard and promotion of fundamental communitarian values, such as human dignity¹⁵, rather the protection of reciprocal interests of the states parties. This explains why every state party and even other duty bearer have a legal interest in their observance.¹⁶ Another specificity is the wide use of international case law and acts of international organisations to interpret the Geneva Conventions, which is a consequence of the low number of subsequent agreements in LOAC and the significant subsequent practice in the application of the Geneva Conventions since their

⁷ ILA, First report (n 4), 22.

⁸ *Kelly and Others v the United Kingdom* Appl no 30054/96 (ECtHR, 4 May 2001), para 96.

⁹ GC I, Article 17, and Commentary of 2016 of GC I, para 1664; GC II, Article 20 and Commentary of 2017 of GC II, para 1842.

¹⁰ GC I, Article 16, and Commentary of 2016 of GC I, para 1550; GC II, Article 19 and Commentary of 2017 of GC II, para 1727.

¹¹ GC III, Article 80 and Commentary of GC III, 395.

¹² Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 148–149.

¹³ Raphael Van Steenberghe, ‘Sources of International Humanitarian Law and International Criminal Law. Specific Features’ in Jean d’Aspremont, Samantha Besson and Sévrine Knuchel (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 892–893.

¹⁴ *ibid* 892.

¹⁵ *Delalić* (Judgment) ICTY-96-21-A (20 February 2001), para 172.

¹⁶ Commentary of 2016 of GC I, para 71.

adoption.¹⁷ As due diligence has been equally applied in other special regimes beyond LOAC, provisions of the Geneva Conventions were recently interpreted with reference to those relevant rules of international law under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),¹⁸ including international human rights law, international criminal law, and customary international humanitarian law.¹⁹

The first part of the article scrutinizes how far the standard is relevant in LOAC and what specificities it has at the level of the substantive obligations and the required degree of diligence. This part clarifies that due diligence obligations defined in LOAC inspired the content of the same standard in international law, while general international law, in turn, influenced the subsequent interpretation of the Geneva Conventions and their Protocols. Regarding the factors influencing the required degree of diligence, LOAC relativized the importance of territorial control and developed the interpretation of military and other capacities in which all states might exert influence over the conduct of the authors of abuses. This has led general international law to open beyond the territorial state where the wrongful act occurs, to other addressees of due diligence obligations. The second part argues that, beyond the content of the due diligence standard, LOAC has some specificity in the addressees of the obligation: whereas the state is the traditional addressee of due diligence obligations, LOAC has extended the obligation to various non-state actors. The article concludes that both of these developments in LOAC, that is the specificities in the content and the addressees of the due diligence obligations, have contributed to the contemporary interpretation of the due diligence standard in general international law and to the subsequent re-interpretation of LOAC in the light of the latter.

I. The content of the due diligence obligation

Considered by the ICJ also as a customary norm²⁰ or general principle of law,²¹ due diligence is understood in the doctrine as a ‘standard’,²² i.e. a norm which prescribes the limits of legal conduct while allowing ‘a certain margin of attainment within the bounds of reason’, as opposed to a ‘rule’, defined as ‘capable of strictly logical application’.²³

Although due diligence was first systematically applied and interpreted in arbitral awards on the protection of foreign nationals, LOAC has also played a role in developing the normative content of the standard. First, LOAC contributed to the general international law qualification of the standard as an obligation to protect against wrongful acts by third parties (A). This is a ‘horizontal’ protection in the sense that due diligence obligation expects states to prevent and mitigate wrongful acts by private actors and other states and not wrongful acts of the state itself. This horizontality applies to due diligence obligations in general international law and in other special branches of international law. Second, as due diligence is a flexible standard, of which content depends on the particular circumstances of the situation, several objective factors influence the degree of due diligence required from the duty bearer.²⁴ LOAC contributed to the

¹⁷ *ibid* para 34.

¹⁸ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, *UNTS*, vol. 1155, 331.

¹⁹ *ibid* para 35.

²⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 55-56, para 101.

²¹ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 22 [*Corfu Channel case*]; Koivurova (n 1) para 2.

²² *ibid* 1.; The ILC usually applies this term, see ILC, ‘International responsibility. Second report by F. v Garcia Amador’ (15 February 1957) UN Doc A/CN.4/106, 122, para 3; ILC, ‘The law of the non-navigational uses of international watercourses’ (1994) UN Doc A/49/10, 103, para 5.

²³ This is the terminology used by Roscoe Pound, ‘Standards in International Law’ (1921) 34 *Harvard Law Review* 776, 776.

²⁴ Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, 44.

elaboration of those factors and influenced their adaptability to general international law (B). Furthermore, the latter has been used to interpret various provisions of the Geneva Conventions (GC) and their Additional Protocols (AP) on due diligence duties. Therefore, this part will review the mutual interconnections between the due diligence obligations in LOAC and in general international law.

A. Due diligence as an obligation to protect against horizontal wrongful acts

In general international law, due diligence was originally developed in the jurisprudence as a duty of the sovereign state to protect, within its jurisdiction, foreign sovereigns and citizens.²⁵ One of the first judicial decisions to interpret the standard was the *Alabama Claims Arbitration* case of 1872 with regard to the duties of neutral powers. The arbitral award considered the due diligence standard a flexible concept which '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'.²⁶ The substantial duties of a neutral government were enshrined in a bilateral treaty, the Treaty of Washington, which provided that a neutral government is bound to 'use due diligence to prevent' the fitting out, arming or equipping or departure, within its jurisdiction, 'of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace'.²⁷ Its provisions on due diligence served as model for the adoption of the first multilateral treaties on neutral powers several decades later, in 1907 and 1928 - both enshrining similar due diligence duties.²⁸ Based on the *Alabama* decision, the due diligence duties of neutral powers were considered 'to have ripened into an obligatory custom' by the end of the 19th century,²⁹ and were also used by the ILC in its subsequent reports on state responsibility³⁰ and on the international liability for injurious consequences arising out of acts not prohibited by international law.³¹

The obligation of the neutral state to exert vigilance within its power in order to prevent, in its ports or territorial waters, any violation of its neutrality has been subsequently extended to the protection of foreign citizens in cases of compensation for injuries incurred in civil wars. In the *British claims in the Spanish Zone of Morocco* case, the arbitrator Max Huber relied on the due diligence duty of neutral powers to conclude that the state is obliged to exercise the same

²⁵ See the works of Grotius or Pufendorf in Jan Arno Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2003) 36 *New York University Journal of International Law and Politics* 265, 284–285.

²⁶ *Alabama claims of the United States of America against Great Britain*, 8 May 1871, *UNRIAA*, vol. XXIX, 129.

²⁷ Treaty between Her Majesty and the United States of America, for the Amicable Settlement of all Causes of Difference between the two Countries, Washington, 8 May 1871, in: 12 *Bevans* 170 (1968), Article VI.

²⁸ Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907, Articles 8 and 25; Convention on Maritime Neutrality. Havana, 20 February 1928, Article 26.

²⁹ Pitt Cobbett and Hugh HL (Hugh Hale Leigh) Bellot, *Leading Cases on International Law, with Notes Containing the Views of the Text-Writers on the Topics Referred to, Supplementary Cases, Treaties and Statutes ...*, vol II (London: Sweet and Maxwell, limited 1924) 474.; *Lotus* PCIJ Rep Series A No 10, Dissenting opinion by Mr. Moore, 88-89.

³⁰ eg ILC, 'Seventh report on state responsibility, by Mr. Roberto Ago' (1978) UN Doc A/CN.4/307 and Add.1 and 2 (1978) *YbILC* vol. II (Part One), 93-94, paras 101-102.

³¹ ILC, 'Text of the Draft articles on prevention of transboundary harm from hazardous activities with commentaries thereto' (2001) *YbILC* vol. II (Part Two), 154, para 9 (Draft Article 3).

vigilance, i.e. to do what is reasonably expected with regard to the security of foreign citizens within its territory.³²

The underlying treaty provisions on neutral powers enshrined the concept that the ICJ later called a ‘general and well-recognized principle’ under which every state has the ‘obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.’³³ The ICJ applied this general principle to international environmental law as well.³⁴ With the same judicial technique, relying on LOAC, namely on Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land, the ICJ further extended the due diligence standard to occupying powers in the *DRC v. Uganda* case. The said article provides that the occupying power shall ‘take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’.³⁵ Whereas Article 43 does not expressly stipulate a due diligence obligation to protect against private actors, the ICJ interpreted it as ‘the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party’.³⁶ Likewise, the ICJ interpreted the duty to prevent genocide under Article I of the Genocide Convention as an obligation of due diligence of states ‘to employ all means reasonably available to them, so as to prevent genocide so far as possible’.³⁷ The above mentioned cases show that within LOAC, due diligence obligations have been extended to a greater set of situations beyond the protection of foreign sovereigns and citizens.

Those obligations developed in LOAC clarified the core general international law understanding of due diligence. This can be defined as an obligation of conduct where the state is bound to take all possible measures to prevent or repress the violation of international law, but the occurrence of harm does not necessarily prove that the duty of vigilance was breached.³⁸ Furthermore, early arbitral awards made it clear that under the standard of due diligence, the state is obliged to protect against the unlawful conduct of individuals or entities whose conduct is not attributable to the state, as opposed to the state’s own agents whose conduct is automatically attributable to the state.³⁹ The ICJ also confirmed that the due diligence duty of states protects against ‘persons or groups not directly under their authority’.⁴⁰ The defining

³² *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)*, 1st May 1925, *UNRIIAA*, vol. II, 644.

³³ *Corfu Channel case* (n 21), 22; Judge Alvarez made it clear that the concept for the conclusion was found in The Hague Convention on Neutral Powers in Naval War, Article 25. *ibid* Individual opinion by Judge Alvarez, 44.

³⁴ *Pulp Mills on the River Uruguay* (n 20), 55-56, para 101; in the same sense: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 241-242, para 29 [*Nuclear Weapons AO*]; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 78, para 140; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Merits) [2015] ICJ Rep 706-707, para 104.

³⁵ The 1907 Hague Regulations, Article 43.

³⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 231, para 178 [*DRC v Uganda*].

³⁷ *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 221, para 430.

³⁸ *DRC v Uganda* (n 36), Declaration of Judge Tomka, 352, para 4; *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), 221, para. 430.

³⁹ *Affaire des biens britanniques au Maroc espagnol* (n 32), 642; Dionisio Anzilotti, ‘La Responsabilité Internationale Des États à Raison Des Dommages Soufferts Par Des Étrangers’ (1906) 13 *Revue générale de droit international public* 5, 299-300; Clyde Eagleton, *The Responsibility of States States in International Law* (New York University Press 1928) 79.

⁴⁰ *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), v 113, para 166; *Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council*

element is the protection against ‘others’, ie against wrongful acts by third persons, namely private individuals or the organs of other international subjects such as other states whose conduct is not attributable to the state⁴¹ under the rules of attribution of general international law.⁴² If the wrongful act is attributable to the state, ‘then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a state cannot have satisfied an obligation to prevent’ the wrongful act ‘in which it actively participated’.⁴³ The ILA reports on due diligence were inconsistent in this regard: while the first report admitted cases where states shall protect under the due diligence standard from persons whose conduct is attributable to them,⁴⁴ it also admitted that the main rule is to protect under due diligence against others while ‘States bear direct responsibility for their own organs and agents’.⁴⁵ The second report, however, correctly affirmed that ‘a human rights abuse is a direct result of a state’s own conduct, due diligence would not ordinarily be the applicable standard’.⁴⁶

Consequently, due diligence requires protection against abuses by private parties or other states, that international human rights law terms ‘horizontal protection’.⁴⁷ In LOAC, the horizontality of the due diligence obligations has been contested and can be properly constructed by reference to general international law.

While the provisions of the Geneva Conventions and their Additional Protocols rarely provide expressly on such due diligence duties against abuses by individuals, the commentaries, especially those adopted in 2016 and 2017, rely strongly on general international law.⁴⁸ As a crucial norm underlying LOAC, Common Article 1 of GC, considered as customary international law,⁴⁹ provides that the ‘High Contracting Parties undertake to respect and to ensure respect for’ the Convention ‘in all circumstances’.⁵⁰ The *travaux préparatoires* show that in 1948, the ICRC interpreted the duty ‘ensure respect’ as an obligation with a due diligence standard, in the sense that the state party ‘must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied’.⁵¹ However, it remained highly contested against which actors’ wrongful acts states shall protect under the duty ‘ensure respect’.

Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 95, para 14 (Separate opinion of Vice-President Ammoun); *DRC v Uganda* (n 36), 231, para 179.

⁴¹ Articles on Responsibility of states for Internationally Wrongful Acts, with commentaries [ARSIWA Commentary] (2001) *YbILC* vol. II, Part Two, 39, para 4; Koivurova (n 1) paras 31, 43; Joanna Kulesza, *Due Diligence in International Law* (Brill Nijhoff 2016) 113.

⁴² ARSIWA Commentary (n 41), 38-54.

⁴³ *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), 200-201, para 382.

⁴⁴ ILA, First report (n 4), 13 (‘once overall control was established the State would have to act with due diligence’), 15.

⁴⁵ *ibid*

⁴⁶ ILA Study Group on Due Diligence in International Law, Second Report, July 2016 [ILA, Second report], 32.

⁴⁷ Eirik Borge, ‘Human Rights, Treaties, Third-Party Effect’, *Max Planck Encyclopedia of Public International Law* (2011) para 15. (‘*Drittwirkung*’); on the horizontal effect of LOAC, see Luigi Condorelli, ‘Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks. Remarks by Luigi Condorelli’ (1991) 85 *American Society of International Law Proceedings* 90, 90–93.

⁴⁸ eg Commentary of 2016 of GC I, paras 150, 165-166 (Article 1); Commentary of 2017 of GC II, para 1425, fn. 100 (Article 12); Commentary of 2017 of GC II, para 1635 (Article 18).

⁴⁹ Jean-Marie Henckaerts and others, *Customary International Humanitarian Law*, vol 1 (Rules) (Comité international de la Croix-Rouge ed, Cambridge University Press 2009) 509 (Rule 144).; *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 114, para 220.

⁵⁰ GC I-IV, Article 1 and AP I, Article 1.

⁵¹ ICRC, Draft Revised or New Conventions for the Protection of War Victims, Geneva, May 1948, 5.

In LOAC, the customary law interpretation of the duty ‘ensure respect’ requires the state to protect against wrongful acts committed both ‘by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control’⁵² and by third persons. While the latter seems in accordance with the general international law meaning of due diligence, the former category differs from it.

The first commentaries of Common Article 1 and that of Article 1 of AP I, which enshrines the same obligation, stressed that ‘ensure respect’ protects against violations by state organs too.⁵³ Likewise, state practice⁵⁴ and the new Commentaries⁵⁵ confirm that ‘ensure respect’ protects against the armed forces and other persons or groups acting on behalf of the state. However, Pictet admitted that this ‘wording may seem redundant’, because accepting the obligation ‘respect’ ‘extends *eo ipso* to all those over whom it has authority, as well as to the representatives of its authority; and it is under an obligation to issue the necessary orders’.⁵⁶ As he explained, by extending the clause ‘ensure protect’ to state organs, the drafters intended to emphasize the responsibility of the Contracting Parties.⁵⁷ The obligation to supervise the execution of the Geneva Conventions by state organs does not fall within the traditional scope of due diligence in general international law, because the responsibility for the conduct of state organs is implied in the duty ‘respect’.⁵⁸ Therefore, the correct interpretation of the term ‘ensure respect’ is an obligation of states to take all measures in their power to have the Conventions respected by third parties. This second category, due diligence as the obligation to protect against horizontal wrongful acts is also recognised in LOAC. The first commentaries of Pictet vaguely considered the clause ‘ensure respect’ as an imperative obligation to prevent abuses and prosecute ‘guilty parties’, going beyond the armed forces of the state party.⁵⁹ The Commentary of 2016, however, integrated the ‘subsequent practice in the application of the treaty’, in accordance with Article 31 of the VCLT, drawing on the above-mentioned case law of the ICJ. It expressly recognized that the duty to ‘ensure respect’ ‘constitutes a general duty of due diligence to prevent and repress breaches of the Conventions by private persons over which a state exercises authority, including persons in occupied territory’.⁶⁰ This is the case of private military contractors, armed opposition groups/rebels, or individuals whose action is not attributable to the state. This is the ‘internal dimension’ of the obligation to ensure respect, requiring compliance with LOAC by the whole population over which a state exercises authority or jurisdiction.⁶¹

Beyond private parties within the authority or jurisdiction of the state, ‘ensure respect’ has an ‘external compliance dimension’: all states shall ensure respect for the Conventions by others that are party to a conflict, ie other states or non-state actors in as far as they are bound by the

⁵² Henckaerts and others (n 49) 495 (Rule 139).

⁵³ Commentary of 1952 of GC I, 25-26 (Article 1); Commentary of 1960 of GC II, 25 (Article 1); Commentary of AP I, 35, para 41.

⁵⁴ Henckaerts and others (n 49) 496 (Rule 139).

⁵⁵ Commentary of 2016 of GC I, para 150 (Article 1); Commentary of 2017 of GC II, para 154 (Article 1).

⁵⁶ Commentary of 1952 of GC I, 25-26 (Article 1).

⁵⁷ *ibid* *ibid*

⁵⁸ Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble’ (2010) 21 *European Journal of International Law* 125, 138; Marco Longobardo, ‘State Responsibility for International Humanitarian Law Violations by Private Actors in Occupied Territories and the Exploitation of Natural Resources’ (2016) 63 *Netherlands International Law Review* 251, 262.; in the same sense: *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), v 200-201, para 382.

⁵⁹ Commentary of 1952 of GC I, 27 (Article 1), fn. 5; Commentary of GC III, 18.

⁶⁰ Commentary of 2016 of GC I, para 150 (Article 1); Commentary of 2017 of GC II, para 172 (Article 1).

⁶¹ Robin Geiss, ‘The Obligation to Respect and to Ensure Respect for the Conventions’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 117–120.

Geneva Conventions.⁶² This external dimension did not reflect the drafters' intention at the time of the adoption of the Geneva Conventions, but subsequent state practice recognised it.⁶³ Finally, the ICJ sanctioned this practice when it held that 'all the States parties to the Geneva Convention [...] are under an obligation [...] to ensure compliance by Israel with international humanitarian law as embodied in that Convention'.⁶⁴ All these commentaries reflect the case law in general international law which, as shown above, was itself inspired by the LOAC.

Beyond Article 1, some other provisions of the GC or their AP impose due diligence obligations on the parties to the armed conflict.⁶⁵ As authoritative interpretations of these provisions, the new ICRC Commentaries of 2016/2017 consistently refer to general international law, notably ICJ cases.⁶⁶ However, the consistent reliance on ICJ case law integrates in the Commentaries the inconsistencies of the Court in the interpretation of the due diligence standard. As was explained, due diligence is defined, in its traditional meaning, as horizontal protection against abuses by third parties and not against persons whose conduct is itself attributable to the state. In other words, violations of LOAC by the state's armed forces entails the state's responsibility not because of the breach of a due diligence obligation (primary norm), but on the basis of the attribution of the conduct of its agents to the state (secondary norm).⁶⁷ The ICJ run against this traditional interpretation when it mixed the duty of vigilance (primary rule) and the occupying power's responsibility for the looting by its own armed forces (secondary rule) in the *DRC v. Uganda* case.⁶⁸ The same inconsistency was reproduced in the Commentaries of 2016/2017 that interpreted the duty to protect the wounded and sick as implying 'protection of the wounded and sick against harm posed by others, namely a Party's own soldiers'.⁶⁹ It is all the more surprising that the older commentaries limited the duty to protect to abuses committed by private parties.⁷⁰

In sum, LOAC, especially the obligations of the neutral state and the occupying power, inspired the development of the due diligence standard in international law, while general international law, in turn, influenced the subsequent interpretation of the Geneva Conventions and their Protocols. The core understanding of the due diligence obligation expects from the state to protect civilians against wrongful acts by third parties, while extending the same duty against violations by the state's own organs contradicts logic.

⁶² *ibid* 126.; Commentary of 2016 of GC I, paras.153-157 (Article 1); Commentary of 2017 of GC II, paras 175-178 (Article 1).

⁶³ Théo Boutruche, Marco Sassòli, Expert Opinion on Third States' Obligations vis-à-vis IHL Violations under International Law, with a special focus on Common Article 1 to the 1949 Geneva Conventions, 8 November 2016, <<https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf>> accessed 16 March 2018, 9-13.

⁶⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 200, para 159 [*Wall AO*].

⁶⁵ *eg* GC I, Article 15(1) and Commentary of 1952 of GC I, 152 (Article 15); GC I, Article 18(4) and Commentary of 2016 of GC I, para 1734 (Article 18); GC II, Article 18(1) and Commentary of 1960 to GC II, 133-134 (Article 18); GC IV, Article 29 and Commentary to GC IV, 212-213 (Article 29); AP I, Article 12(1) and Commentary to AP I, 166 (Article 12); Article 15(1), 15(2) and Commentary to AP I, 195 (Article 15).

⁶⁶ *eg* Commentary of 2016 of GC I, para 1485 (Article 15), fn. 18; Commentary of 2017 of GC II, para 1635 (Article 18), fn. 22.

⁶⁷ On this distinction, see ARSIWA Commentary (n 41), 31, para 1.

⁶⁸ *DRC v Uganda* (n 36), 252-253, paras 246, 250. In paragraph 246, the Court nevertheless recognizes that '[i]n any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces'.

⁶⁹ Commentary of 2016 of GC I, para 1361 (Article 12); in the same sense: paras 1499 (Article 15), 1734 (Article 18); Commentary of 2017 to GC II, para 1407 (Article 12); *a contrario*: Commentary of 2016 of GC I, paras 150 (Article 1).

⁷⁰ Commentary of AP I, 166 (Article 12); 195 (Article 15).

B. Factors influencing the required degree of diligence

As due diligence imposes an obligation of conduct, it allows some flexibility: it requires reasonable conduct, the content of which depends on the specific circumstances.⁷¹ The predominance of due diligence duties as obligations of conduct, rather than obligations of result, in general international law is explained by the aim to grant states ‘a significant measure of autonomy and flexibility in discharging their international obligations’ and to avoid ‘perfect parity of obligations in favour of a more flexible approach to performance so as to encourage broader participation in treaty and customary regimes’.⁷² In LOAC, however, the flexibility of the due diligence standard has more specific reasons than in general international law: LOAC aims to prevent or alleviate human suffering, while recognising that in armed hostilities it cannot be realised in the absolute term.⁷³ Reconciling military considerations with the alleviation of human suffering is always a difficult balance, with LOAC leaving certain flexibility for the parties to the conflict. As this part will explain, general international law and LOAC have mutual interconnections in defining the factors influencing the required degree of diligence.

As the ILA’s report concluded, an ‘objective standard of due diligence’ means that all states are held to the same standard, irrespective of their individual characteristics, whereas ‘subjective standards of due diligence’ allow for varying expectations of states, taking into account special considerations.⁷⁴ However, the traditional understanding of due diligence, that is a ‘standard’ prescribing the limits of the expected legal conduct and allowing a certain margin as opposed to a rule expecting a strict application, does not allow a strict threshold. It always allows flexibility because the degree of the required diligence depends on the particular circumstances of each specific case.⁷⁵ Those circumstances shall be assessed objectively, ie reasonably.⁷⁶ Therefore, the examples cited by the ILA report for an objective threshold in LOAC⁷⁷ reflect strict minimum rules rather than due diligence standards.

The state incurs responsibility for failing its due diligence duties under two cumulative conditions: 1. it had the means to prevent or to repress the unlawful act and 2. it knew or should have known about the risk of the violation.⁷⁸ Whereas the knowledge element limits the due diligence duties to foreseeable harms, the ‘means’ or ‘capabilities’ element depends on the concrete circumstances of the given situation. The Seabed Disputes Chamber pointed out in the *Deep Seabed Mining Advisory Opinion* that ‘capabilities’, ie specific factors, lead to varying degrees of due diligence.⁷⁹ This advisory opinion, rendered in international environmental law, has been considered as reflecting the standard of general international law.⁸⁰ International tribunals, international organizations, and doctrine have defined the following capabilities under the due diligence standard:

⁷¹ GC I, Article 1 and Commentary of 2016 of GC I, para 150 (Article 15); Commentary to AP I, 1057-1058, para 3660 (Article 91).

⁷² ILA, Second report (n 46), 2-3.

⁷³ See in this sense the objectives of ICRC: *The Fundamental Principles of the Red Cross*. Commentary by Jean Pictet, 1979, 14-15.

⁷⁴ ILA, Second report (n 46), 13.

⁷⁵ *ibid* 44-45.

⁷⁶ *Nicaragua v United States of America* (n 49), 85, paras 157-158; Draft articles on Prevention of Transboundary Harm... (n 31), 154, para 11 (Draft Article 3).

⁷⁷ ILA, Second report (n 46), 18, para 93 (the other examples beyond LOAC cited by the report are not due diligence obligations in the traditional sense either).

⁷⁸ *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), 221-222 paras 430-431.

⁷⁹ *Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion) ITLOS Reports 2011, Case No. 17, paras 161-162 [*Activities in the Area AO*].

⁸⁰ ILA, First report (n 4), 26-27; ILA, Second report (n 46), 7.

- control over territory;⁸¹
- degree of influence a state has over the author of the unlawful conduct;⁸²
- level of development of a state;⁸³
- level of scientific knowledge and technical capability available to the state;⁸⁴
- degree of harm.⁸⁵

As a short examination will illustrate below, LOAC influenced the elaboration of most of these elements in general international law, while the level of economic development, and scientific and technical capability will be jointly discussed as the ‘military and other infrastructural capacity’ in armed conflicts.

a) Control over territory

As it was already mentioned, due diligence was formulated in general international law as a standard expected from the state within its territory.⁸⁶ Gradually, the standard has been applied to any territory under the state’s ‘effective control’.⁸⁷ ‘Effective control’ over territory (not to be confused with effective control over persons and effective control over the subordinates, see below) is understood here as the ‘actual authority’ that a state exercises over the territory of another state.⁸⁸ Thus, the territorial approach of the *Corfu Channel* due diligence standard⁸⁹ has been enlarged to every territory under the formal sovereignty or the *de facto* control of the state.

Control over territory is primarily, but not exclusively, a military question. As the ICTY pointed out, military occupation is established when ‘the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt’.⁹⁰ Control over territory certainly increases the available measures the parties have to take to prevent and repress abuses against LOAC: where a party has control over the area where the wrongful act occurs, it has arguably more authority to prevent and mitigate the

⁸¹ *Leonor Buckingham (Great Britain) v United Mexican States*, 3 August 1931, *UNRIIAA*, vol. V, 286-289, 288; *Wipperman* case, in: John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol 3 (Government printing office 1898) 3041–3042.; *DRC v Uganda* (n 36), 253, para 247; ILA, Second report (n 46), 13.

⁸² *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), 221, para 430; ILC, ‘First report on crimes against humanity by Sean D. Murphy’ (17 February 2015) UN Doc A/CN.4/680, para 80; ICRC, ‘International humanitarian law and the challenges of contemporary armed conflicts. 32nd International Conference of the Red Cross and Red Crescent’ (8-10 December 2015) [IHL and the challenges of contemporary armed conflicts], 26, 55.

⁸³ Draft articles on Prevention of Transboundary Harm... (n 31), 155, para 13 (Draft Article 3); ILA, Second report (n 46), 13.

⁸⁴ *Activities in the Area* AO (n 79), para 162.

⁸⁵ Draft articles on Prevention of Transboundary Harm... (n 31), 155, para 18 (Draft Article 3); ‘Guiding Principles on Business and Human Rights’ (21 March 2011) UN Doc A/HRC/17/31, Principle 17(b); IHL and the challenges of contemporary armed conflicts (n 82), 55.

⁸⁶ n 32-33.

⁸⁷ *Pulp Mills on the River Uruguay* (n 20), 55-56, para 101; *DRC v Uganda* (n 36), 253, para 248; *Wall* AO (n 64), 181, para 112 (although here the ICJ refers expressly only to negative obligations).

⁸⁸ The 1907 Hague Regulations (n 35), Article 42; *Chiragov and Others v Armenia* (2015) 63 EHRR 9, para 96.

⁸⁹ *Corfu Channel case* (n 21), 22.

⁹⁰ *Prosecutor v Mladen Naletilić* (Judgement) ICTY-98-34 (31 March 2003), para 217.

breach.⁹¹ As the ICJ recognised, '[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States'.⁹²

Furthermore, one can argue that even in situations falling apart from 'effective control' over territory – when the territorial state's authority is displaced – the mere presence of the state's forces in another state's territory without effectively controlling the area might ensure closer links to the wrongdoers and thus instigate a higher degree of vigilance.⁹³ As it will be shown, the more influence a state has over the perpetrator of the violation abroad, the higher the degree of the required diligence.

a) Influence over the author of the unlawful conduct

Once it is established that the violation of LOAC is not attributable to the state, the required degree of diligence depends on the influence of the state over the perpetrator. With respect to genocide, the ICJ held that the standard of due diligence must take into account the state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide'.⁹⁴ As the Court added, this capacity itself depends, 'among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that state and the main actors in the events'.⁹⁵ The new Commentaries of 2016/2017 to the Geneva Conventions refer to the same capability.⁹⁶ As the ICRC formulated, the 'capacity to exert influence or to intervene' 'depends on factors such as geographical proximity, as well as military and humanitarian considerations'.⁹⁷

Furthermore, LOAC develops the standard by relativizing the importance of territorial control. The duty to 'ensure respect' under Common Article 1 of GC has been gradually interpreted as a duty of all 'High Contracting Parties' to the Geneva Conventions to take all efforts within their power to ensure that LOAC is respected universally.⁹⁸ Most states have a wide range of individual or collective measures at their disposal to ensure respect for LOAC by others.⁹⁹ Consequently, the ICRC recognised the customary duty of all states to 'exert their influence, to the degree possible, to stop violations of international humanitarian law' as a rule of customary international humanitarian law (*erga omnes*).¹⁰⁰ In the *Wall* advisory opinion, the ICJ adopted the same interpretation.¹⁰¹ Furthermore, one may argue that Common Article 1 has anticipated

⁹¹ As Tzevelekos argues, 'the more effectively the state is linked to a situation the higher the standards of diligence become for it.' Vassilis P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129, 176–177.

⁹² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 54, para 118.

⁹³ As Judge *ad hoc* Verhoeven argued, even without occupation, LOAC still imposes a duty of vigilance on the state in areas where its troops are present without belligerent occupation. See *DRC v Uganda* (n 36), 358-359, para 4 (Declaration of Judge *ad hoc* Verhoeven).

⁹⁴ *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 37), 221, para 430.

⁹⁵ *ibid*

⁹⁶ eg Commentary of 2016 of GC I, paras 150, 165, 166-167 (Article 1); Commentary of 2016 of GC I, para 1365 (Article 12); Commentary of 2017 to GC II, para 1411 (Article 12).

⁹⁷ Commentary of 2016 of GC I, para 1365 (Article 12); Commentary of 2017 to GC II, para 1411 (Article 12).

⁹⁸ Commentary of 1952 to GC I, 26 (Article 1); Commentaries to AP I, 36, para 45 (Article 1); 30th International Conference of the Red Cross and Red Crescent, Geneva, 2007, Res. 3, para 2.

⁹⁹ Commentary of 2016 of GC I, paras 180-183; Umesh Palwankar, 'Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law' (1994) 34 International Review of the Red Cross 9.

¹⁰⁰ Henckaerts and others (n 49) 509 (Rule 144).

¹⁰¹ *Wall* AO (n 64), 200, para 159.

the formulation of the principle of ‘responsibility to protect’,¹⁰² namely the obligation of the international community to protect populations of other states from the most egregious international crimes.¹⁰³

b) Military and other infrastructural capacity

In other areas of international law, notably environmental law and the law of the sea, it is well-established that developing states may not be able to exercise due diligence in the same way as developed states, and that this will influence the evaluation of whether they have breached their due diligence obligation.¹⁰⁴ In LOAC, economic development, scientific knowledge and technical capability, as such, are not, or are only indirectly, taken into account: the new Commentaries of 2016/2017 to the Geneva Conventions refer to ‘capacity and available resources’.¹⁰⁵ A state with more resources might have a more elaborated military and other infrastructural capacity, but this is not necessarily the case if a developed state has allocated insufficient resources to its military or administrative infrastructure. Less developed countries might exercise greater control over a given territory of strategic importance than developed countries in a remote part of their territory.

Within an ongoing armed conflict or a belligerent occupation, numerous due diligence obligations leave the parties certain latitude with regards to the deployment of their military and other infrastructural means. For example, the occupying power’s duty to re-establish and insure public order and safety depends on the means within its power.¹⁰⁶ Among other means, one can think of the factual criteria revealing the establishment of the occupation as: the degree of the temporary administration established over the territory, and the degree of the elaboration, enforcement, and compliance of directions issued to the civilian population.¹⁰⁷ These factors assess the degree of the occupying state’s ability ‘to substitute its own authority for that of the occupied authorities’¹⁰⁸ – the basic criterion of the establishment of military occupation.

c) ‘Degree of harm’

Finally, in accordance with general international law, LOAC recognises that ‘the gravity of the breach’¹⁰⁹, ‘the imminence, the type and the extent of the harm’¹¹⁰ do increase the diligence expected from the party to the conflict. The extent to which the state shall take administrative, disciplinary, or even penal sanctions to suppress an abuse depends on its gravity and the circumstances.¹¹¹ LOAC distinguishes between ‘grave breaches’ (war crimes),¹¹² ‘serious violations’¹¹³ of the Geneva Conventions and AP I, and other breaches of humanitarian law not falling under the two former categories. ‘Serious violations’ entail the duty of all High

¹⁰² Laurence Boisson de Chazournes and Luigi Condorelli, ‘De La ‘Responsabilité de Protéger’, Ou d’une Nouvelle Parure Pour Une Notion Déjà Bien Établie’ (2006) 110 *Revue Générale de Droit International Public* 11, 14.

¹⁰³ ‘2005 World Summit Outcome’ (15 September 2005) UN Doc A/60/L.1, para 139.

¹⁰⁴ ILA, First report (n 4), 27.

¹⁰⁵ Commentary of 2016 of GC I, para 1365 (Article 12); Commentary of 2017 to GC II, para 1411 (Article 12).

¹⁰⁶ Article 43 of The 1907 Hague Regulations; In a similar sense, see the view of Judge Shilo cited in: Israeli Supreme Court, *Bassil Abu Aita et al.*, H.C. 69/81 and H.C. 493/81 (5 April 1983), para 50.

¹⁰⁷ *Prosecutor v Mladen Naletilic* (n 90), para 217.

¹⁰⁸ *ibid*

¹⁰⁹ Commentary of 2016 of GC I, paras 150, 165 (Article 1).

¹¹⁰ *ibid* para 1365 (Article 12).

¹¹¹ Commentary of AP I, 975, para 3402; Commentary of 2017 to GC II, para 3006 (Article 50).

¹¹² GC I, Article 50; AP I, Articles 11(4), 86(1), 88(1).

¹¹³ AP I, Articles 89 and 90(2)(c)(i); The ICRC defined it as ‘conduct contrary to these instruments which of a serious nature but which is not included as such in the list of ‘grave breaches’. Commentary of AP I, 1033, para 3591 (Article 89).

Contracting Parties ‘to act, jointly or individually, in co-operation with the United Nations’ under AP I.¹¹⁴ ‘Grave breaches’, however, give rise to the duty of states to either prosecute or extradite the perpetrator¹¹⁵ and to ‘afford one another the greatest measure of assistance in connection with criminal proceedings’.¹¹⁶ These norms arguably influenced the limitation of ‘responsibility to protect’ of the international community to the most egregious abuses (crimes against humanity, war crimes, ethnic cleansing, genocide).¹¹⁷

Subsequently, the factors discussed above have been taken into account in the recognition of due diligence duties in the new Commentaries of the Geneva Conventions,¹¹⁸ in international criminal law,¹¹⁹ international human rights law¹²⁰, or international environmental law.¹²¹ Especially the influence or control over the conduct of others, even in the absence of territorial control by the state over the area where the abuse occurs, has contributed to general international law.

To summarise, this part showed that general international law and LOAC have mutual interconnections in shaping the standard of due diligence. LOAC inspired the development of the due diligence standard in general international law which, in turn, influenced the subsequent interpretation of LOAC. While connected to the general international law due diligence standard, LOAC has certain specificities in interpreting the factors influencing the required degree of diligence. In general international law, the reason behind the flexibility of due diligence is the autonomy left for the state in implementing its international obligations. In LOAC, however, alleviating human suffering during armed hostilities is the *raison d’être* of the flexibility due diligence leaves for parties to the armed conflict. Among the capabilities, LOAC relativized the importance of territorial control and developed the interpretation of military and other infrastructural capacities and the various ways in which all states might exert influence over the conduct of the authors of abuses.

II. The addressees of the due diligence obligation

In the traditional meaning of the due diligence standard, as formulated in the *Corfu Channel* case, the sovereign state is obligated to protect.¹²² In this sense, due diligence is perceived as a limit of state sovereignty.¹²³ However, LOAC and international criminal law are the first branches of international law having imposed obligations on subjects beyond the state. LOAC, in particular, has been extended in various ways to regulate the conduct of individuals, non-state armed opposition groups and international organisations. This extension is, however, not unproblematic, given the fundamental differences between the nature of the influence/control those subjects exert over others, on the one hand, and between the responsibility of the state and that of other non-state actors, on the other hand. As for the first major difference, states

¹¹⁴ AP I, Article 87.

¹¹⁵ GC II, Article 50(1)-(2).

¹¹⁶ AP I, Article 88(1).

¹¹⁷ 2005 World Summit Outcome (n 103), para 1329.

¹¹⁸ n 96-97, 105, 109-111.

¹¹⁹ ILC, ‘Text of the draft articles on crimes against humanity provisionally and commentaries thereto’, UN Doc A/70/10 (2015), 78-79, para, 12 (Draft Article 4).

¹²⁰ *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) paras 174-175; *Osman v The United Kingdom* (2000) 29 EHRR 245, para 116; *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 46, paras 333, 341, 349.

¹²¹ n 79, 83-85.

¹²² ILA, Second report (n 46), 5.

¹²³ *Island of Palmas case (Netherlands, USA)*, 4 April 1928, UNRIIAA, vol. II, 839; Joanna Kulesza, *Due Diligence in International Law* (Brill Nijhoff 2016) 57.

have full original legal personality and exert their powers over other third parties in their domestic order and international relations, while the authority of non-state actors is limited to the sphere of activity where their rights and obligations allow them to exercise influence over others. Individuals, especially superiors, have more restricted authority than that which international organisations and armed opposition groups have over others, as the authority of such individuals is limited to the internal structure of the same party to the armed conflict. Secondly, the non-compliance with the due diligence obligations leads to different types of responsibilities; while the rules of state responsibility are codified norms of international law, the ILC draft articles on the responsibility of international organizations are regarded as progressively developing international law. The international responsibility of unsuccessful insurrectional or other movements is not codified at all but recognised as a concept.¹²⁴ Finally, the individual's criminal responsibility for the serious breaches of responsible command is well codified in international treaties. The responsibility of these non-state actors for the non-compliance with their obligations is without prejudice to the independent responsibility of the state for the failure of its own due diligence obligations.¹²⁵ Because of these fundamental differences, the substantive due diligence obligations of non-state actors, if any, present certain differences. The ILA studies addressed the due diligence obligation of international organisations,¹²⁶ but only briefly mentioned it¹²⁷ and did not conceptualise that of other non-state actors.

This part examines to what extent due diligence obligations apply to those non-state actors, ie individuals as commanders (A), non-state armed opposition groups (B), and international organisations (C), and what characteristics such duties have when applicable to non-state actors.

A. Due diligence duties of individuals: responsible command

Various early humanitarian conventions¹²⁸ established the principle of 'responsible command' which 'demands of superiors that they should ensure that forces under their command are properly organized, that they are disciplined, and that they are capable of complying with humanitarian standards'.¹²⁹ LOAC requires any superior to exercise control over their troops all the time, to impose discipline to a sufficient degree, and to enforce compliance with the rules of LOAC.¹³⁰ The principle is defined as a duty to take 'preventative measures which commanders are in a position to take, by virtue of the effective control which they have over their subordinates, thereby ensuring the enforcement of international humanitarian law in armed conflict'.¹³¹

The concept of responsible command focuses on the duties comprised in the idea of command, whereas the doctrine of 'command responsibility' in international criminal law, resulting from the former humanitarian law principle, looks at the criminal liability flowing from breach of

¹²⁴ ARSIWA Commentary (n 41), 52, para 16.

¹²⁵ ARSIWA, Articles 57-58 and their Commentary (n 41), 141-143; Text of the draft articles on the responsibility of international organizations (2011) UN Doc A/66/10 [DARIO], 104, Article 66 and its commentary,

¹²⁶ ILA, Second report (n 46), 39-46.

¹²⁷ *ibid* 44.

¹²⁸ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Article 1; The 1907 Hague Regulations, Article 1; Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, Articles 18, 33; AP I, Article 43(1).

¹²⁹ Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press 2009) 53.

¹³⁰ *Hadžihasanović & Kubura* (Jurisdiction) ICTY-01-47 (7 Dec 2001), paras 66, 174, 197; *Halilović* (Judgment) ICTY-01-48 (16 November 2005), paras 39-40, 87; Commentary of AP I, 1018, para 3550.

¹³¹ *Halilović* (n 130), para 39.

those duties.¹³² Not every violation of the principle of responsible command leads to command responsibility, but serious breaches of responsible command entail criminal liability for the commander.¹³³ Command responsibility has two cumulative criteria: the knowledge about the risk of a violation of LOAC and the material ability to influence it, similarly to the two cumulative conditions of due diligence in general international law. As the ICTY formulated it: ‘the accused knew or had reason to know that the crime was about to be or had been committed’ and ‘the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.’¹³⁴ The material ability focuses on the standard to prevent or to repress the violation of LOAC, or in other words the ‘effective control’ to take ‘reasonably’ the measures required to prevent or punish a crime.¹³⁵

Taking ‘reasonable’ measures required to prevent or to punish allows certain flexibility for the judge to assess the individual circumstances of the commander. Whereas in general international law, reasonable is what is expected from ‘a reasonably well organized modern State’,¹³⁶ in LOAC the ‘relevant point of reference is what would be expected of a reasonable commander under the given circumstances’.¹³⁷ It is submitted that the principle of responsible command in LOAC allows similar flexibility as the criminal liability flowing from the breach of those duties. As AP I formulates the due diligence duty, ‘[t]he High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.’¹³⁸ Commanders are obliged to ‘take all measures in his power to achieve this’,¹³⁹ ‘to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose’.¹⁴⁰ Therefore, responsible command also recognises the flexibility of the standard in the assessment of the superior’s material ability to influence the conduct of their subordinates.

Contrary to the state’s due diligence duties, responsible command obliges the superiors to prevent and punish only those acting under their ‘effective control’, ie military forces or ‘other persons under their control’ including civilian agents, whereas the state is bound to protect against abuses by third parties, especially private parties. The reason for that is that the horizontality of the protection of due diligence in general international law only narrowly applies to individuals who cannot exert authority over third parties (private persons, other parties to the conflict) in their personal capacity, but only over other individuals subject to the command structure within the same party to the armed conflict. Confusingly, the Commentary of AP extends the responsible command to the protection of the civilian population of the

¹³² *Hadžihasanović & Kubura* (Jurisdiction) ICTY-01-47 (16 Jul 2003), para 22 ; *Delalic* (Judgment) ICTY-96-21-T (16 November 1998), para 334; Mettraux (n 130) 55.

¹³³ *ibid* 56.

¹³⁴ *Tihomir Blaškić* (Judgment) ICTY-95-14-T (3 March 2000), para 294; United States, Military Tribunal, Tokyo, *Toyoda case*, Trial transcript, 6 September 1949, 14-15.

¹³⁵ *Blaškić* (n 134), para 335.

¹³⁶ International Centre for the Settlement of Investment Disputes, *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* (1997) 30 ILM 612, para 77; Ariel Gould and Dinah Shelton, ‘Positive and Negative Obligations’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 577.

¹³⁷ Commentary of 2016 of GC I, para 1499 (Article 15).

¹³⁸ AP I, Article 87(1).

¹³⁹ Commentary to AP I, 1020, para 3555 (Article 87).

¹⁴⁰ *ibid* 1022, para 3560 (Article 87).

occupied territory from private individuals,¹⁴¹ while, in fact, this due diligence derives from the due diligence duty of the occupying state (see I/A), not from that of the commander.

Thus, the conditions of the individual's due diligence duty in LOAC applies analogically to those of the due diligence obligation of states in general international law: knowledge of an activity or potential risk and absence of reasonable measure within the material capacity of the duty bearer entail responsibility for the breach of the due diligence standard. However, contrary to the state's diligence where the factors concern the state's organisation and agents, LOAC measures the individual's personal circumstances (knowledge, bad faith). The protection of the responsible command is limited to the wrongful conduct of those acting under the 'effective control' of the superior, while due diligence in general international law requires protection against abuses by any third parties.

B. Due diligence duties of non-state armed opposition groups

A further novelty that LOAC has introduced is the extension of due diligence duties to all parties to an armed conflict, i.e. beyond states, even non-state armed opposition groups (AOGs).

Some of the humanitarian obligations binding states are of customary nature and applicable to non-state parties to armed conflicts. ICRC and the UN often affirmed the responsibility of AOGs for their failure to protect civilian populations in armed conflict.¹⁴² However, a closer regard of those statements shows that the duties of AOGs to protect apply against abuses by persons whose conduct is attributable to the AOG rather than against abuses by others. For instance, the Commentary of 2016 states that armed opposition 'groups have to 'ensure respect' for common Article 3 by their members and by individuals or groups acting on their behalf'.¹⁴³ This duty to 'ensure respect' for LOAC is understood within the armed group's own structure, in accordance with the principle of responsible command which is a basic element of the definition of insurgent groups under Article 1 of AP II.¹⁴⁴ This is not the due diligence obligation to protect against wrongful acts by others as understood in the present article. This duty to ensure respect for LOAC within the AOG's internal structure does not express the same horizontal protection as in the case of the due diligence of states.¹⁴⁵ Such horizontal obligations of AOGs are however discussed *de lege ferenda* in terms of engaging with groups exerting exclusive control over a territory and willing to comply with norms of good governance and human rights.¹⁴⁶ Based on the similarities between belligerent occupation and the authority exercised by AOGs that effectively control territory, some authors propose to apply by analogy certain aspects of the law of occupation such as the obligation to maintain public order and safety (Article 43 of The Hague Regulations), the provisions on the protection of persons (Articles 47-

¹⁴¹ *ibid* 1020, para 3555.

¹⁴² ICRC, 'Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity' (16 June 1993); 'Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict' (30 March 2001) UN Doc S/2001/331, para 7.

¹⁴³ Commentary of 2016 of GC I, para 132 (Common Article 1).

¹⁴⁴ Commentary of AP II, 1352, para 4463.

¹⁴⁵ Condorelli (n 47) 92.

¹⁴⁶ Andrew Clapham, 'Detention by Armed Groups under International Law' (2017) 93 *International Law Studies Series*. US Naval War College 1, 41; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing 2016) 195–197, 234.

78 of GC IV)¹⁴⁷, or even the entirety of the law of occupation¹⁴⁸ to non-international armed conflicts. As mentioned above, this would suppose the application of the occupying power's due diligence obligation.

Moreover, the extension of the occupying power's vigilance by analogy to AOGs exercising exclusive control over a territory has found echo in certain resolutions of the UN Security Council calling on AOGs to 'protect' civilians and children.¹⁴⁹ Likewise, the United Nations Fact-Finding Mission on the Gaza Conflict confirmed that the Gaza authorities are equally 'obliged under international law to control the activities of armed groups operating on the territory under their control'.¹⁵⁰ The proposed examination of primary and secondary rules applicable to AOGs by the ILC in its work about the protection of the environment in relation to armed conflicts¹⁵¹ confirms that the extension of due diligence to AOGs might go beyond LOAC to other specific branches of international law such as the protection of environment. In other words, once an AOG has effective control over a territory with the exclusion of the territorial control of the state, pragmatism and the universal protection of certain values, such as human dignity, the environment or cultural heritage, justify the extension of horizontal due diligence duties to AOGs. As for the factors influencing the required degree of diligence, it seems that the diligence is proportional to the stability of the control over territory and persons or other non-state actors, and to the military and infrastructural capabilities of the AOG (together: its 'effectiveness') as it is in the case of states.

Consequently, customary international law only recognises the duty of AOGs to respect and ensure respect for LOAC by their members and by individuals or groups acting on their behalf, but not by others. However, there is an emerging trend to apply the due diligence obligations of states by analogy to AOGs exerting exclusive control over an area, where the diligence should be proportionate to the group's effectiveness.

C. Due diligence duties of international organizations

Contrary to individuals and AOGs, general international law has codified the responsibility of international organizations.¹⁵² Nevertheless, their primary obligations have not been codified, while mostly non-binding instruments reflect their emerging due diligence duties. Due diligence duties of international organisations are relevant if LOAC applies to peacekeeping or peace enforcement operations and international territorial administrations.

¹⁴⁷ Sandesh Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 *European Journal of International Law* 219, 245–246; Sandesh Sivakumaran, 'Courts of Armed Opposition Groups' (2009) 7 *Journal of International Criminal Justice* 489, 510; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' [2010] *International Humanitarian Legal Studies* 5, 35.

¹⁴⁸ Dieter Fleck, 'The Law of Non-International Armed Conflicts' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 2008) 628; Michael Bothe, 'Occupation, Belligerent' in Rudolf Bernhardt and Peter Macalister-Smith (eds), *Encyclopedia of Public International Law*, vol III (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, 1997) 764–765.

¹⁴⁹ UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291, para 15; UNSC Res 1417 (14 June 2002) UN Doc S/RES/1417, para 5; UNSC Res (28 January 2014) UN Doc S/RES/2134, paras 22-23.

¹⁵⁰ 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48, paras 498, 1682, 1954.

¹⁵¹ ILC, 'Third report on the protection of the environment in relation to armed conflicts, submitted by Marie G. Jacobsson' (3 June 2016) UN Doc A/CN.4/700, para 269.

¹⁵² DARIO (n 125), Article 2(a) and its commentary, *ibid* 76, paras 8-9.

As in the case of AOGs, it is recognised that international organisations shall ‘ensure respect’ for LOAC by persons whose conduct is attributable to the IO.¹⁵³ First of all, the primary obligations of international organisations are, most often, laid down in acts which the ILC calls the ‘rules of the organization’,¹⁵⁴ ie constitutive documents of the given peace operations and other acts of the international organisation. For instance the Secretary General’s Bulletin expressly recognized in 1999 that the UN is bound by the duty to ensure respect for ‘principles and rules of the general conventions applicable to the conduct of military personnel’ by the same UN forces¹⁵⁵ and to ‘take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property’.¹⁵⁶ Although it was issued in a non-binding document, its authority has been accepted in subsequent UN documents.¹⁵⁷

It is also widely accepted that Common Articles 1 and 3 of the GC and other customary law provisions bind international organisations.¹⁵⁸ This means that when an international organisation exercises operational control over national contingents, it is obliged to respect and to ensure respect for the LOAC by those forces.¹⁵⁹ ‘Operational control’ or ‘command and control’ implies the decisive role in the conduct performed by a unit or an agent of the military forces¹⁶⁰ and thus the attribution of the conduct to the international organisation. However, the above mentioned duties do not fall within the traditional understanding of due diligence obligations because they require the international organisation to ensure respect by persons whose conduct is attributable to it.

Nevertheless, the classical standard of diligence to prevent and repress violations by others was later extended to international organisations through the interpretation of Common Article 1 of the GC. Beyond the compliance of the forces under its operational control which are attributable to the international organisation, the ICRC held that ‘ensuring respect’ imposes a duty of horizontal protection on the international organisation: ‘even absent any such exercise of command and control, international organizations, whether or not they are themselves party to the conflict, are also obliged under customary international law to ensure respect by others’.¹⁶¹ The ICJ seemed to base its conclusion on the same Common Article 1, with a recommendatory wording, when it held that the UN ‘should consider what further action is required to bring to

¹⁵³ See generally ILA, Berlin Conference (2004), Accountability of international organisations, Final report, 15 (‘obligation to ensure the lawfulness of actions and decisions’).

¹⁵⁴ DARIO (n 125), Article 2(b).

¹⁵⁵ Secretary-General’s Bulletin, ‘Observance by United Nations forces of international humanitarian law’ (5 August 1999) UN Doc ST/SGB/1999/13, para 3.

¹⁵⁶ *ibid* para 5.3.; other examples of due diligence are paras 5.4, 9.2.

¹⁵⁷ ‘Human rights due diligence policy on United Nations support to non-United Nations security forces’ (5 March 2013) UN Doc A/67/775–S/2013/110, Annex [HRDDP], para 1.

¹⁵⁸ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 89-90, para 37; OHCHR, ‘International legal protection of human rights in armed conflict’ (2011) UN Doc HR/PUB/11/01, 29.

¹⁵⁹ ILA, Second report (n 46), 44; Commentary of 2016 of GC I, paras 138, 140 (Article 1); see also in this sense the status-of-forces agreements concluded between the United Nations and a state hosting a UN peace operation, cited *ibid* para 141; ICRC, ‘International humanitarian law and the challenges of contemporary armed conflicts. 32nd International Conference of the Red Cross and Red Crescent’ (8-10 December 2015), 25.

¹⁶⁰ DARIO (n 125), 23-24, para 10 (Commentary of Draft Article 7); see a similar definition cited in Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009) 10 Melbourne Journal of International Law 346, 353.

¹⁶¹ Commentary of 2016 to GC I, para 140 (Article 1); Daphna Shrager, ‘The United Nations as an Actor Bound by International Humanitarian Law’ (1998) 5 International Peacekeeping 64, 71–72; Éric David, *Principes de droit des conflits armés* (5e édition, Bruylant, DL 2012) para 3.13.

an end the illegal situation resulting from' the violation of LOAC.¹⁶² The UN accepted these customary norms as binding it in its external dimension.¹⁶³

As with the case of states' *erga omnes* obligation to influence other states to comply with the Geneva Conventions, the degree of the required diligence is dependent on the factors of the international organisation.¹⁶⁴ It is clear that the UN, with its competence under Chapter VII of the Charter, might have much more influence on a state than a regional organisation without binding decision-making powers in the area of security (eg the Council of Europe) or an international organisation having no competence in peace and security (eg the Universal Postal Union) where the latter's 'capabilities' might be negligible. However, as the capabilities of the international organisation increase, especially with respect to its actual influence on the perpetrator or its effective control over territory, the degree of the expected diligence increases, as in the case of states. The degree of diligence is arguably stronger when the international organisation participated in the decision to deploy the armed forces under the operational control of member states. As the ICRC held, the international organisation is bound by the due diligence obligation, in particular 'where the organization has mandated the use of armed force in the first place or engages in operations in support of other Parties to the conflict'.¹⁶⁵

A similar due diligence obligation of international organisations to protect against violations by others was recently confirmed in a report about the 'human rights due diligence policy on United Nations support to non-United Nations security forces'.¹⁶⁶ The report recognises the duty of due diligence of UN entities whenever they provide support to non-UN security forces to evaluate whether there is a risk of the receiving entities committing grave violations of IHL and whether the relevant authorities fail to take the necessary corrective or mitigating measures, in which case the support must be denied.¹⁶⁷ This policy considers due diligence as risk assessment, transparency, and effective implementation with more detailed requirements for each category.¹⁶⁸ As novel and progressive as it might be, the document is not yet regarded as part of customary international humanitarian law,¹⁶⁹ but UN Security Council resolutions increasingly require UN peace or assistance missions, UN mandated multinational operations or peace missions to comply with the UN human rights due diligence policy.¹⁷⁰

Furthermore, the due diligence duty of international organisations was recognised in case of international territorial administrations, where an international organisation exercises state functions and effective control over territory. Human rights monitoring bodies set up within the administering international organisation have recognised the responsibility of the international organisation for the violation of its own due diligence obligations to prevent, mitigate, and

¹⁶² *Wall* AO (n 64), 200, para 160.

¹⁶³ 'Statement by the Under-Secretary-General for Legal Affairs, the Legal Counsel Programme, procedures and working methods of the Commission and its documentation' (7 June 2012) UN Doc A/CN.4/SR.3132, 7.

¹⁶⁴ Giorgio Gaja, 'The Relations Between the European Union and Its Member States from the Perspective of the ILC Articles on Responsibility of International Organizations' (Amsterdam Center for International Law 2013) SHARES Research Paper 25 4–5 <<http://www.sharesproject.nl/publication/the-relations-between-the-european-union-and-its-member-states-from-the-perspective-of-the-ilc-articles-on-responsibility-of-international-organizations/>> accessed 4 November 2018.

¹⁶⁵ Commentary of 2016 to GC I, paras 142, 138 (Article 1).

¹⁶⁶ HRDDP (n 157).

¹⁶⁷ HRDDP (n 157), para 1.

¹⁶⁸ *ibid* para 14.

¹⁶⁹ ILA, Second report (n 46), 45.

¹⁷⁰ See the overview until 2014 in UNSC Presidential Statement 3 (2014) UN Doc S/PRST/2014/3, Addendum, 27-28, 43; recently, see eg UNSC Res 2333 (23 December 2016) UN Doc S/RES/2333, para 15; UNSC Res 2348 (31 March 2017) UN Doc S/RES/2348, para 34(i)(d), etc.

investigate human rights violations by third parties,¹⁷¹ as it is in the case of states. Beyond the case law of those monitoring bodies, there is another way to argue for the due diligence obligations of international territorial administrations, on the basis of customary international law. If one accepts the doctrinal claim that at least part of the law of occupation, especially the obligation to ensure public order and safety (Article 43 of The Hague Regulations) and the provisions on the protection of persons in occupied territory (Articles 47-78 of GC IV) are applicable by analogy to international territorial administrations,¹⁷² the due diligence obligation applies. Such an analogy is reasonable because those treaty norms aim at protecting individuals vis-à-vis a ‘mere administrator of fact’ other than the territorial state¹⁷³ and since they have probably acquired a customary character.¹⁷⁴ These examples demonstrate that the application of due diligence obligations to international organisations emerged in LOAC and influenced the same extension in international human rights law.

In sum, the scope of the subjects bound by due diligence obligations is extending. The content of their diligence is similar to states’ due diligence duties in LOAC, as far as they impose obligations of conduct to protect against violations by others. Furthermore, the factors influencing the required degree of diligence (control over territory and influence over others, military and infrastructural capabilities, etc.) seem to be the same as in the case of states.

While the traditional concept of the due diligence standard, as formulated in the *Corfu Channel* case, linked diligence to state sovereignty (‘sovereignty as responsibility’), LOAC linked it to influence or control over other subjects (‘control as responsibility’). As a common element, the non-state subject ‘that is best positioned to act effectively and within the law to prevent’ the wrongful act has the due diligence duty to prevent.¹⁷⁵ Whereas the core of due diligence obligations of individuals, non-state armed opposition groups, and international organizations in LOAC, as defined above, have their source in customary international law, certain codifications, such as the UN project on human rights and transnational corporations and other business enterprises, go further and recommend to apply IHL and, arguably, even due diligence standards to private companies.¹⁷⁶

¹⁷¹ Human Rights Review Panel, *A, B, C and D v EULEX* (decision) 2012-09, 2012-10, 2012-11 and 2012-12 (20 June 2013), para 50; *H & G v EULEX* (decision) of 2012-19 & 2012-20 (30 September 2013), para 42; Human Rights Advisory Panel, *N.M. and Others v UNMIK* (Opinion) 26/08 (26 February 2016), paras 201-231; *Kostić and Others* (Opinion) 111/09 et al (23 October 2015), paras 228-269; *S.C. v UNMIK* (Opinion) 02/09 (6 December 2012), paras 111, 113, etc.

¹⁷² Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 *European Journal of International Law* 661, 691; Sylvain Vit , ‘L’applicabilit  Du Droit International de l’occupation Militaire Aux Activit s Des Organisations Internationales’ (2004) 86 *International Review of the Red Cross* 9, 31–32; Timothy McCormack and Bruce M Oswald, ‘The Maintenance of Law and Order in Military Operations’ in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 445.

¹⁷³ Commentary of 1958 of GC IV, 274 (Article 47).

¹⁷⁴ *Nuclear Weapons* AO (n 34), 256, para 75; *Wall* AO (n 64), 172, para 89 ; *DRC v Uganda* (n 36), 243, para 217.

¹⁷⁵ Tom Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’ (2010) 51 *Harvard International Law Journal* 113, 157; Kirsten E Boon, ‘Are Control Tests Fit for the Future: The Slippage Problem in Attribution Doctrines’ (2014) 15 *Melbourne Journal of International Law* 330, 373.

¹⁷⁶ ‘Guiding Principles on Business and Human Rights’ (n 85), 14 (Principle No. 12).

Conclusions

The duty of vigilance or due diligence in general international law has its origin in the law of neutrality and the protection of foreigners from injuries occurring in civil wars. The general international law standard of due diligence has been further interpreted and developed in the domain of armed conflict.

The progressive interpretation of LOAC has introduced several novelties to the standard. The law of belligerent occupation and the Geneva Conventions enabled the ICJ to ‘deterritorialise’ due diligence, i.e. to recognize that the state is equally obliged by the standard outside its territory, e.g. when it controls the territory of another state. With regard to factors influencing the required degree of diligence, such as control over territory, influence over other subjects, or the effectiveness of military or other infrastructural capabilities, LOAC has contributed to the further development of general international law. Furthermore, LOAC relativized the importance of territorial control and took into account military and other infrastructural capacities and various ways in which all states might exert influence over the conduct of the authors of abuses. In the *Corfu Channel* and the *Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* cases, the ICJ defined the due diligence standard as an obligation of conduct and specified certain factors influencing the required degree of diligence, without limiting it to specific branches of international law. Subsequently, the same factors have been considered as reflecting general international law and have been applied in other special branches of international law.

Another remarkable impact of LOAC is the extension of the scope of subjects bound by due diligence duties to individual commanders, AOGs, and international organisations. The content of the non-state actor’s due diligence obligation operates analogously to the states’ due diligence duties, with similar factors influencing the expected degree of diligence. The core of due diligence obligations of those non-state actors has its source in customary international humanitarian law. Instead of the traditional concept of the due diligence standard formulated in the *Corfu Channel* case, ie that due diligence operates as a limit of state sovereignty (‘sovereignty as responsibility’), LOAC related it to influence or control over other subjects (‘control as responsibility’).