

DUE DILIGENCE OBLIGATIONS OF
INTERNATIONAL ORGANIZATIONS UNDER
INTERNATIONAL LAW

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I. INTRODUCTION

In 2010, an investigation by the International Financial Corporation's (IFC) internal auditor, the Office of the Compliance Advisor/Ombudsman (CAO), revealed that an IFC investment in Dinant, a palm oil company in Honduras, had resulted in forced evictions and violence against farmers.¹ The

1. In response to a recent case in Honduras where country and sector risks of conflict and violence around land were or should have been known to the IFC, the CAO found that the IFC's due diligence was not commensurate with the level of social and environmental risks and impacts, and thus did not meet a key requirement of its own Sustainability Policy. The IFC's

CAO concluded that the IFC failed to exercise due diligence while reviewing the social risks and that it failed to respond adequately to intensifying social and political conflicts in the years after its commitment.²

It has become clear that even with the best of intentions, international development organizations often cause harm to those they attempt to aid.³ Accordingly, there has been a gradual shift in the interpretation of the development mandates and policies of international financial institutions over the last few decades. The Bretton Woods Institutions historically addressed economic growth.⁴ They considered that the “political prohibition” clause in their respective charters mandated that

initial investment was in 2009, and it first became aware of issues in 2010. *See* Office of the Compliance Advisor Ombudsman for the Int’l Fin. Corp, CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras, CAO Ref. C-I-R9-Y12-F161, at 2–3, 5, 18 (Dec. 20, 2013) [hereinafter CAO Audit of Dinant-Honduras Investment]. Other sources also reported killings which were arguably related to the project. *See, e.g.,* Nina Lakhani, *Honduras and the Dirty War Fuelled by the West’s Drive for Clean Energy*, *GUARDIAN* (Jan. 7, 2014, 2:00 PM), <https://www.theguardian.com/global/2014/jan/07/honduras-dirty-war-clean-energy-palm-oil-biofuels>.

2. CAO Audit of Dinant-Honduras Investment, *supra* note 1, at 2.

3. *See, e.g.,* WILLIAM EASTERLY, *THE TYRANNY OF EXPERTS: ECONOMISTS, DICTATORS, AND THE FORGOTTEN RIGHTS OF THE POOR* (2014) (arguing that the involvement of international organizations in certain domains may worsen the status quo for vulnerable populations); *see also* Ralph R. Frerichs et al., *Nepalese Origin of Cholera Epidemic in Haiti*, 18 *CLINICAL MICROBIOLOGY & INFECTION* 158 (2012) (finding that U.N. Peacekeepers from Nepal were the source of Haiti’s recent cholera epidemic); James Raymond Vreeland, *The Effect of IMF Programs on Labor*, 30 *WORLD DEV.* 121 (2002) (finding that IMF austerity programs were not linked to economic growth, and that the harshest impacts of austerity fell on labor, not capital); *Evicted and Abandoned: The World Bank’s Broken Promise to the Poor*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/project/world-bank> (last visited Oct. 10, 2017); *When the World Bank Does More Harm than Good*, NPR (Apr. 17, 2015, 3:43 AM), <http://www.npr.org/sections/goatsandsoda/2015/04/17/399816448/when-the-world-bank-does-more-harm-than-good> (reviewing a recent study which found that the World Bank’s projects in many cases have harmed those they aim to help).

4. *See About the Bretton Woods Institutions*, BRETTON WOODS COMMITTEE, <http://www.brettonwoods.org/page/about-the-bretton-woods-institutions> (last visited Mar. 7, 2018) (describing how, in 1944, member nations at the United Nations Monetary and Financial Conference “agreed to create a family of institutions to address critical issues in the international financial system”).

they not consider human rights explicitly in their operations.⁵ Since the 1980s, there have been increasing calls for “adjustment with a human face,” and moves towards viewing poverty reduction and the realization of human rights as complementary rather than distinct and unrelated goals.⁶

Projects, like Dinant, that have gone terribly wrong raise the question: what are international organizations legally obligated to do vis-à-vis human rights? While states have a clear responsibility to respect, protect, and fulfill human rights,⁷ and private actors now have begun to conduct human rights due diligence and human rights impact assessments volunta-

5. The “political prohibition” clause is contained in Int’l Fin. Corp. [IFC], *IFC Articles of Agreement*, art. III, §9 (Dec. 31, 1956) [hereinafter *IFC Articles of Agreement*], http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/5189430-1381418466421/IFC_Articles_of_AgreementEnglish.pdf. While certain legal counsel of the Bank—and in particular, Anne Marie Leroy—adopted a restrictive reading of the clause, suggesting that the institutions must only take into account economic considerations, others, including Ibrahim Shihata, Roberto Danino and Ana Palacio, have in recent years adopted a range of less restrictive interpretations. For a discussion of the conflicting interpretations, see Hassan Cissé, *Should the Political Prohibition in Charters of the International Financial Institutions Be Revisited? The Case of the World Bank*, in *THE WORLD BANK LEGAL REVIEW* 59, 59 (Hassan Cissé et al. eds., 2012); see also Roberto Dañino, *The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts*, in 509 *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL ENFORCEMENT* 509 (Philip Alston & Mary Robinson eds., 2005); Ana Palacio, *The Way Forward: Human Rights and the World Bank*, 8 *DEV. OUTREACH* 35, 35–37 (2006).

6. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2001) (arguing that the expansion of “freedom” of a political, social and economic variety should be the primary aim for international development organizations, not merely the reduction of material deprivation). International financial institutions in recent years have gradually begun to consider environmental and social risks when carrying out their operations, and the view that human rights are “central to the success of poverty alleviation programs” has become more widely held. See Siobhán McInerney-Lankford, *International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 239, 240, 242 (Daniel D. Bradlow & David B. Hunter eds., 2010); Adam McBeth, *A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights*, 40 *GEO. WASH. INT’L L. REV.* 1101, 1113, 1124 (2009).

7. *What are Human Rights?*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Mar. 7, 2018) (noting that “it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic, and cultural systems”).

rily—or in compliance with domestic law⁸—the legal duties of international organizations are much less clear.

This Note analyzes the legal obligations under international law that bind international organizations and how performance of due diligence can fulfill these requirements. This Note is structured as follows: Part I examines the extent to which an international organization is bound by international law, specifically by international human rights law; Part II introduces the principle of due diligence and explains how it can be used to satisfy an international organization's underlying legal obligations, especially those under international human rights law; and lastly, Part III is a case study of the due diligence practices of a specific international organization: the International Finance Corporation (IFC). This Note concludes that the IFC and its fellow Bretton Woods Institutions are in fact bound by international human rights law, that they can satisfy that duty through performance of due diligence, and that the IFC's current practices can be improved to better comply with the tenets of due diligence.

II. OBLIGATIONS OF INTERNATIONAL ORGANIZATIONS UNDER INTERNATIONAL LAW

International law has traditionally regulated state behavior. However, the increased power exercised by international organizations has generated debate about their legal obligations and responsibilities. In 2011, the International Law Commission (ILC) addressed this topic by adopting the Draft Articles on the Responsibility of International Organizations (DARIO),⁹ modeled on the ILC's 2001 Articles on State Re-

8. Many states require environmental impact assessments, and there is an increasing number of states beginning to require social impact assessments that incorporate some human rights concerns. See generally Rabel J. Burdge & C. Nicholas Taylor, *When and Where is Social Impact Assessment Required?* (May 2012) (unpublished manuscript) (prepared for the annual meeting of the International Association for Impact Assessment), http://www.tba.co.nz/pdf_papers/When_and_Where_is_SIA_Required_19-5-12.pdf.

9. Int'l Law Comm'n, *Rep. on the Work of Its Sixty-Third Session*, U.N.Doc. A/66/10 (2011) [hereinafter DARIO], http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

sponsibility (ASR).¹⁰ The DARIO note that the legal obligations of an international organization under international law may “arise from the rules of the [international] organization” itself, or “may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.”¹¹

While the DARIO do not enjoy the same consensus underpinning the ASR,¹² the International Court of Justice (ICJ) has long agreed that international organizations are subjects of international law and, hence, bound by certain legal obligations. The ICJ stated in 1980 that “[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under *general rules of international law*, under their constitutions or under international agreements to which they are parties.”¹³

The sections below examine the extent to which an international organization is bound by international law, specifically by international human rights law. The analysis supports that, at minimum, an international organization is bound to respect those human rights that have reached the level of customary international law.

10. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N.Doc. A/56/10 (2001) [hereinafter ASR].

11. DARIO, *supra* note 9, art. 10, cmt. (2), (4).

12. Indeed, many prominent commentators have criticized DARIO and suggested that it is not widely accepted as an accurate statement of international law, unlike its predecessor, the Draft Articles on State Responsibility. See, e.g., Jose Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 SUFFOLK TRANSNAT'L L. REV. 591, 612 (2008) (“What the ILC has done is essentially to take the ILC’s previous, and highly successful, effort to delineate articles of state responsibility and do a ‘global search and replace’ so that anywhere the word ‘state’ appeared in the old articles, the word ‘international organization’ now appears.”).

13. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶¶ 89–90 (Dec. 20) (emphasis added) [hereinafter WHO and Egypt ICJ Opinion].

A. *The International Legal Personality of an International Organization*

An international organization may incur international responsibility only if it possesses international legal personality.¹⁴ Legal personality is also generally presumed to be necessary for international organizations to execute the mandate articulated by their member states in the constituent treaty.¹⁵ The ICJ in the *Reparations* case found that the United Nations enjoyed legal personality under international law because the United Nations enjoyed powers which flowed implicitly from the tasks conferred on the organization.¹⁶ The ICJ further noted that “whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”¹⁷ In other words, international organizations do not necessarily have the same comprehensive legal personality as states—rather, their legal personality, including the rights they enjoy and the obligations they have, is determined by their tasks and purposes.¹⁸

B. *International Organizations Have Obligations Under Customary International Law*

International organizations have on occasion argued that since they have not “formally confirmed” international human

14. See DARIO, *supra* note 9, at art. 2(a); see also ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 22 (1995); MAC DARROW, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* 125 (2003); SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* 63–71 (2001).

15. See JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 51 (2d ed. 2009).

16. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, ¶ 10 (Apr. 11).

17. *Id.*

18. See generally Nneoma Chigozie Udeariry, *To What Extent Do International Organizations Possess International Legal Personality?* (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2052555.

rights treaties, they do not have treaty-based obligations.¹⁹ However, the ICJ has ruled that international legal obligations, including human rights obligations, arise not only under treaties but also from “general rules of international law.”²⁰ Consequently, three general arguments for the applicability of international customary law and general principles to international organizations have been advanced: first, international organizations are subjects of international law; second, member states have bound the organization to customary rules; and third, customary rules and general principles are part of “general international law,” which applies to international organizations.²¹

Although the use by international courts and tribunals of the phrase “general international law” is not consistent and has given rise to some confusion,²² an entity with legal personality is arguably bound by customary international law. It has been suggested that, since international organizations cannot create or generate customary international law, the courts’ use of the modifier “general” has been to describe “rights and obligations as generally applicable and binding on every entity that has the capacity to bear them.”²³ Thus, notwithstanding

19. See e.g., IBRAHIM SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* 241 (2d ed. 1994); François Gianviti, *Economic, Social and Cultural Rights and the International Monetary Fund*, INT’L MONETARY FUND 14, 18, 44 (2001), <https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gi-anv3.pdf>.

20. See WHO and Egypt ICJ Opinion, *supra* note 13, ¶¶ 89–90.

21. Henry G. Schermers, *The Legal Basis of International Organization Action*, in *A HANDBOOK OF INTERNATIONAL ORGANIZATIONS* 401, 402 (René-Jean Dupuy ed., 1998).

22. Kristina Daugirdas, *How and Why International Law Binds International Organizations* 11, 16 (N.Y.U. Sch. of Law, Jean Monnet Working Paper Series, Paper No. 16/15, 2015); see also GENNADII DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 9–10 (1993) (noting multiple ways that the term “general international law” and similar variations are used); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 436–37 (1983) (finding that “general international law” is sometimes used to refer to customary international law and general principles of international law).

23. ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 87 (2006) (“[C]ustomary international law (what is sometimes referred to as general international law, as opposed to treaty law) . . . is often employed to hold non-state actors accountable under international law. . . . The adjective ‘general’ is employed here because it is misleading to suggest that

the slight ambiguity of this term, an entity with international legal personality, and hence such capacity, may bear relevant obligations under customary international law.²⁴

The question then becomes: which rules of international human rights law have reached the status of custom? It is broadly accepted that at least some provisions of human rights law have the status of *jus cogens* and bind every subject of international law.²⁵ While these overlap with customary international law, at minimum, *jus cogens* rights bind international organizations.²⁶ All of the provisions of the Universal Declaration of Human Rights (UDHR) may not be binding as a matter

international organizations have generated these rights and obligations through 'custom.'")

24. Sanae Fujita, *The Challenges of Mainstreaming Human Rights in the World Bank*, 15 INT'L J. HUM. RTS. 374, 374–75 (2011) (“[A] legal person is bound by customary international law including some provisions in the Universal Declaration of Human Rights . . .”).

25. Daugirdas, *supra* note 22; Martin Faix, *Are International Organizations Bound by International Human Rights Obligations?*, 5 CZECH Y.B. PUB. & PRIV. INT'L L. 267, 286 (2014). Some of the rights which have been identified as, or are in the course of becoming, *jus cogens* include: the right to life; the right to humane treatment; the prohibition of slavery or forced labor; the prohibition of discrimination on the basis of race, color, sex, language, religion, or social origin; the prohibition of imprisonment for civil debt; the prohibition of crimes against humanity; the right to legal personhood; and the freedom of conscience. The positive source of many of these rights is the International Covenant on Civil and Political Rights (ICCPR), but they are also to be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the Rome Statute of the International Criminal Court (ICC). See FRANCISCO FORREST MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS 34–45 (Francisco Forrest Martin et al. eds., 2006).

26. DARROW, *supra* note 14, at 130–31; *see also* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980 (noting that treaties are void if they conflict with a peremptory norm of general international law); Barcelona Traction, Light & Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 33–34 (Feb. 5) (“[S]uch [erga omnes] obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.”).

of customary international law,²⁷ but many specific provisions of the UDHR have been widely recognized to have acquired the status of customary international law or the status of general principles of international law, hence making them legally binding.²⁸ Some of the political and civil rights that enjoy wide support as customary international law include rules prohibiting arbitrary killing, slavery, torture, detention, and systematic racial discrimination.²⁹

Even if everyone agreed which rights had reached the status of customary international law, what and how much must be done to satisfy them would still be disputed. As Herz argues, “to the extent that there is a live debate in the academy over

27. DARROW, *supra* note 14, at 130.

28. John Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 21–37 (Bertrand G. Ramcharan ed., 1979); Hurst Hannum, *The Status of Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317, 322–54 (1995).

29. CLAPHAM, *supra* note 23, at 86. As an aside, economic and social rights may be of particular concern to international financial institutions, as many of the rights commonly violated in the course of their projects fall into these categories. Economic and social rights that have been found to “enjoy sufficiently widespread support so as to be at least potential candidates for rights recognized under customary international law are: the right to free choice of employment; the right to form and join trade unions; and the right to free primary education, subject to a state’s available resources.” Hannum, *supra* note 28, at 349. Another candidate is the right to housing. *See, e.g., The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998) [hereinafter *Maastricht Guidelines*] (finding that forced eviction results in a violation of the right to housing—a right flowing from the state’s obligation to *respect* economic, social, and cultural rights; additionally, in light of the state’s obligation to *protect* economic, social, and cultural rights, states have a duty to prevent violations of those rights at the hands of third parties). Further, the U.N. Committee on Economic, Social and Cultural Rights has stated that U.N. agencies engaged in projects involving forced labor and large-scale eviction act in contravention of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment 2: International Technical Assistance Measures (Art. 22 of the Covenant), ¶ 6, U.N. Doc. E/1990/23 (Feb. 2, 1990). This requires U.N. agencies to refrain from engaging in projects involving forced evictions or forced labor. Positively, it also requires the agencies to promote projects resulting not only in economic advancement, but also in the enhancement of the broad range of human rights. *See* International Covenant on Economic, Social and Cultural Rights art. 22, Dec. 16, 1966, 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; *see also* CLAPHAM, *supra* note 23, at 144 n.135.

the human rights obligations of international financial institutions, it centers on the scope—not the existence—of those obligations.”³⁰ Do international organizations have a duty to “respect,” “protect,” or “fulfill” human rights in the course of their operations?³¹

The core component of the obligation “to respect” is “to do no harm.”³² The obligation to protect generally requires taking measures necessary to prevent third parties (i.e., individuals or groups) from violating the integrity, freedom of action, or human rights of the individual, whereas the obligation to fulfill human rights requires taking further measures necessary to ensure opportunities for individuals to realize rights recognized in human rights instruments.³³ The tripartite framework for obligations was initially developed in relation to states. It has been argued that if an international organization is not party to any treaties, it does not have the same obligations as states do under those treaties. Accordingly, an international organization may have less extensive obligations to protect human rights than do states with a plenary set of powers. The duty of international organizations to “fulfill” certain human rights obligations is likely more limited than that of states, given their functionally more limited tasks and powers.³⁴ While they need not reach the ceiling, if they are bound

30. CLAPHAM, *supra* note 23, at 150–52; *see also* Steven Herz, *The Role and Responsibilities of International Financial Institutions with Respect to Human Rights and Their Relevance to the Private-Sector*, BANK INFO. CTR. 11 (Feb. 2007), <https://business-humanrights.org/sites/default/files/reports-and-materials/Bank-Information-Ctr-submission-to-Ruggie-Feb-2007.pdf>.

31. *See* Asbjorn Eide, *Realization of Social and Economic Rights: The Minimum Threshold Approach*, 43 INT’L COMM’N JURISTS REV. 40 (1989). For differing perspectives on the appropriate level of obligation, *see* SKOGLY, *supra* note 14, at 109, 145; DARROW, *supra* note 14, at 132–33; CLAPHAM, *supra* note 23, at 151.

32. The duty to “do no harm” first appeared in the Trail Smelter Arbitration in 1941 and was later articulated in the Nuclear Weapons case and in the Stockholm and Rio Declarations. *See* Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1911, 1963–66 (Trail Smelter Arb. Trib. 1941); *see also* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 243 (July 8).

33. Eide, *supra* note 31, at 37.

34. DARROW, *supra* note 14, at 131–32; *see also* CLAPHAM, *supra* note 23, at 151 (arguing that the human rights obligations of international organizations, including those imposed by customary international law, are based on

by human rights at all, they cannot fall below the floor. An international organization must, at a minimum, respect human rights under the “do no harm” principle.³⁵

The negative obligation to do no harm requires international organizations to take affirmative measures to ensure no harm is done.³⁶ For example, a minimum obligation of respect for human rights would require international financial institutions to “ensure that their advice, policies and practices do not lead to violations of the right to food.”³⁷ In order not to infringe relevant human rights, the organization would need to carry out impact studies on vulnerable groups at risk before taking action.³⁸ The “do no harm” principle is linked inherently to causation: but for the international organization’s investment, would the harm have taken place?

In conclusion, international organizations are not immune from international law. Like any entity with legal personality, they are bound by customary international law. While an international organization may not have the same scope of obligations as that of a state, it must reach the minimum stan-

the international legal capacity of the organizations; “therefore [non-state actors can] be said to have obligations, not only to respect human rights, but also to protect and even fulfill human rights in appropriate circumstances.”).

35. Skogly argues that if an international organization is not party to any human rights treaty, it does not shoulder the same obligations as state parties to those treaties. Thus, she concludes, international organizations need only *respect* human rights (i.e. refrain from impinging them). See SKOGLY, *supra* note 14, at 151, 193. This implies a more limited obligation to protect human rights on the part of international organizations as opposed to states. For Skogly, the duty of international organizations to affirmatively fulfill any human rights obligation is constrained, if it exists at all. See *id.* Others have interpreted the obligations of international institutions more broadly. See, e.g., CLAPHAM, *supra* note 23, at 151; DARROW, *supra* note 14, at 131–32.

36. SANAE FUJITA, *THE WORLD BANK, ASIAN DEVELOPMENT BANK AND HUMAN RIGHTS: DEVELOPING STANDARDS OF TRANSPARENCY, PARTICIPATION AND ACCOUNTABILITY* 9 (2013).

37. Comm’n on Human Rights, Economic, Social, and Cultural Rights: Report of the Special Rapporteur on the Right to Food, ¶ 43, U.N. Doc. E/CN.4/2006/44 (Mar. 20, 2006).

38. See Faris Natour & Jessica Davis Pluess, *Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps, and Examples*, BUS. FOR SOC. RESPONSIBILITY 5 (Mar. 2013), https://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf.

dard of “do no harm” and respect the human rights that have reached the level of *jus cogens* or customary international law.³⁹

C. *International Organizations Have Obligations Under the U.N. Charter*

International organizations falling within the U.N. umbrella are arguably governed by the human rights provisions of the U.N. Charter. The World Bank Group is a U.N. specialized agency⁴⁰ and, based on this status, the provisions of the U.N. Charter governing the purposes and principles of the U.N. are applicable to the Bank and its groups.⁴¹ Article 1(3) of the U.N. Charter specifies, among the purposes of the Organization, the promotion and encouragement of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴² Moreover, Article 55(c) of the U.N. Charter expressly requires that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”⁴³ This section will explain how the U.N. Charter may apply to U.N.-umbrella organizations not directly controlled by the General Assembly or Security Council.

This issue is far from settled. Scholars like Fujita argue that, since the specialized agencies’ legal relationship with the United Nations has been established by a separate agreement, the U.N. Charter as a treaty can only bind U.N. member states and organizations established by the Charter.⁴⁴ However, Article 103 of the U.N. Charter provides for the supremacy of the

39. For a list of many of the rights which have been identified as *jus cogens* or in the process of becoming *jus cogens*, as well as the positive sources of those rights, see *supra* text accompanying note 25.

40. Protocol Concerning the Entry into Force of the Agreement Between the United Nations and the International Bank for Reconstruction and Development art. 1(2), Apr. 15, 1948, 109 U.N.T.S. 341; see also World Bank Grp., *The World Bank Group and the United Nations: Working Together for Development*, UN.ORG, <http://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/WBG-UN-Brochure.pdf> (last visited Oct. 13, 2017).

41. See, e.g., KATARINA TOMAŠEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS: A STUDY FOR THE DANISH CENTER OF HUMAN RIGHTS* 31 (1989).

42. U.N. Charter art. 1, ¶ 3.

43. U.N. Charter art. 55; see also *id.* art. 1, ¶ 3.

44. FUJITA, *supra* note 36, at 10; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 799 (Bruno Simma et al. eds., 1994). *Contra* Thomas Buergerthal, *The World Bank and Human Rights*, 31 *STUD. TRANSNAT’L LEGAL*

U.N. Charter over any other international agreement.⁴⁵ This includes the agreement establishing the relationship of the specialized agencies to the United Nations, which can be considered to include implicit assent to the supremacy of the U.N. Charter, including the primacy of the human rights provisions of the Charter.⁴⁶ Hence, scholars like Skogly have said that international financial institutions are “legally obligated to not conduct actions contravening the principles and purposes of the U.N. Charter, and also to respect the Charter, including the human rights provisions.”⁴⁷

If the U.N. Charter applies to the Bretton-Woods organizations, which human rights does it encompass and to what degree? As to which rights are protected, the UDHR arguably serves as an “authoritative interpretation” of the nature of Charter-based obligations.⁴⁸ With regards to scope, the legal obligation established by Articles 55–57 entails a duty to *respect* basic human rights.⁴⁹

POL’Y 95, 97 (1999) (stating that the World Bank nevertheless shoulders obligations under the U.N. Charter and other human rights treaties).

45. U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

46. Skogly notes that this point—developed by the ILC—can be used to argue that agreements the World Bank enters into with its member countries, which are also U.N. member countries, will be subject to Article 103 of the U.N. Charter. See SKOGLY, *supra* note 14, at 101–02; see also DARROW, *supra* note 14, at 128.

47. SKOGLY, *supra* note 14, at 102.

48. DARROW, *supra* note 14, at 128; see also Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 82–108 (1992).

49. DARROW, *supra* note 14, at 124–29. Article 55 of the U.N. Charter states that the United Nations shall “promote . . . universal respect for, and observance of, human rights and fundamental freedoms . . .” U.N. Charter art. 55(c). Article 56 requires that “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” U.N. Charter art. 56. Some commentators argue that Article 57, which brings a specialized agency into relationship with the United Nations, works together with Article 56 to bind U.N. member states and specialized agencies to work with the United Nations to achieve the goals articulated in Article 55. See, e.g., Maryam Elahi, *The Impact of Financial Institutions on the Realization of Human Rights: Case Study of the International Monetary Fund in Chile*, 6 B.C. THIRD WORLD L.J. 143, 148 (1986); see also U.N. Charter art. 57.

D. *International Organizations May Incur Obligations via Member States*

International organizations, which are created by and composed of states, may incur human rights obligations indirectly via its member states. States do not shed their international legal obligations when they create an international organization, including an international financial institution.⁵⁰ If states were to create institutions with lower standards than those the state is required to comply with under international human rights law, they would effectively be circumventing their international legal obligations. Going one step further, an international organization could be bound by the obligations contained in the treaties to which its member states are parties, which has the effect of transferring the relevant obligations of member states to the international organization within the context of its relevant powers and tasks.⁵¹ This has been described as an international organization being “transitively bound” by its member states’ treaty obligations.⁵²

Taken seriously, such an approach could give rise to conflicts between the treaty obligations of states and the provisions of treaties that establish international organizations.⁵³ The number and content of human rights obligations, for example, vary from state to state depending upon how many binding human rights treaties each state has ratified.

The consequence of this argument is *not* that an international organization ought to function as a kind of “human

50. See Paul Hunt, *Using Rights as a Shield*, 6 N.Z. HUM. RTS. L. & PRAC. 111 (2001).

51. See Philip Alston, *The International Monetary Fund and the Right to Food*, 30 HOW. L.J. 473, 479–80 (1987) (“[T]he IMF ought not to encourage or facilitate a state’s violating [its] international legal obligations by encouraging it, or in effect forcing it to enter into an agreement which in fact violates the economic rights of the citizens of that country.”); SKOGLY, *supra* note 14, at 83 (describing Schermers’ and Blokker’s argument that it is “plausible” that treaties can bind international organizations without their consent).

52. Frédéric Mégret & Florian Hoffmann, *The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 318 (2003) (explaining that the United Nations is bound by international human rights standards “as a result and to the extent that its members are bound.”).

53. Daugirdas, *supra* note 22, at 31.

rights police”⁵⁴ that engages with a client in a given state only if that state complies with its human rights obligations under international law.⁵⁵ Rather, the argument recognizes that states are the primary bearers of responsibility when it comes to human rights obligations and insists that the IFC ought to anticipate what human rights concerns it needs to take into account in its internal practices in order to assist its member states in meeting their human rights obligations. Echoing this approach, the United Nations Economic and Social Council (ECOSOC) has stated that international financial institutions are obligated to take measures that are in line with member states’ human rights obligations.⁵⁶ Under this line of argument, the IFC should not fund, and thus empower, private-sector rights abusers, whose violations become the member state’s responsibility to control. An argument for hybrid responsibility can also be made: states are required to ensure that an international organization does not contravene its human rights obligations.⁵⁷

54. McBeth, *supra* note 6, at 1106 (citing Jorge Daniel Taillant, *Human Rights and the International Financial Institutions*, CTR. FOR HUMAN RIGHTS & ENV’T (June 2002), <http://center-hre.org/wp-content/uploads/2011/05/Human-Rights-and-the-International-Financial-Institutions.pdf>); see also Office of the U.N. High Comm’r for Human Rights, *Annex 1: Frequently Asked Questions on Human Rights and Multilateral Development Banks*, BUS. & HUMAN RIGHTS RES. CTR. (Mar. 15, 2016), <https://business-humanrights.org/sites/default/files/documents/Annex%20FAQ%20Human%20Rights%20and%20MDBs.pdf>.

55. McBeth, *supra* note 6, at 1106 (“Such a position would render IFIs an enforcement tool of international human rights law in relation to states’ obligations.”).

56. Econ. & Soc. Council, Rep. of the Comm. on Econ., Soc. & Cultural Rights on Its Eighteenth and Nineteenth Sessions, ¶ 515, U.N. Doc. E/1999/22, (1999).

57. An international organization is to some extent obliged to respect its member states’ obligations by taking positive actions to ensure that its internal policies are sufficiently protective of human rights. See Econ. & Soc. Council, Concluding Observations of the Comm. on Econ., Soc. & Cultural Rights: Egypt, ¶ 28, U.N. Doc. E/C.12/1/Add/44 (May 23, 2000) (finding that Egypt had to take into account the social and cultural rights of its vulnerable groups in its negotiations with international financial institutions); see also Econ. & Soc. Council, Concluding Observations of the Comm. on Econ., Soc. & Cultural Rights: Italy, ¶ 20, U.N. Doc. E/C.12/1/Add/43 (May 23, 2000) (finding that Italy was obligated to do everything it could to ensure that International Monetary Fund (IMF) policies and decisions were in conformity with Art. 2(1) of the ICESCR); *Maastricht Guidelines*, *supra* note 29, at

That said, this “transitive duties” argument is not yet widely accepted, nor is it fully accepted that international organizations are at least bound by human rights standards resulting from treaties that have been signed or ratified by nearly all states with the intention to create universal law.⁵⁸

E. *Conclusion: International Organizations’ Human Rights Obligations Under International Law*

In summary, the IFC’s human rights obligations stem from three distinct sources. First, certain international human rights law directly binds the IFC itself as a subject of international law, which must comply with relevant customary international law and general principles. A range of human rights has reached the level of custom and, in some cases, these rights are also considered *jus cogens*. Second, the IFC, as part of the World Bank Group, is part of a U.N. specialized agency and is thus affected by the requirements of the U.N. Charter. Third, the IFC may be bound, within the scope of the tasks and powers conferred upon it, by the obligations contained in the treaties to which its member states are parties.

Considering the IFC’s obligations under international human rights law, Darrow and Arbour suggested in 2009 that the IFC, as a subject of international law, owes a minimum obligation of due diligence to “ensure that the subject’s own policies, actions, or possible neglect do not undermine the human rights obligations of other subjects of international law.”⁵⁹ The

698 (“[T]he obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively.”).

58. Faix, *supra* note 25, at 267, 286. Note that the Convention Against Torture (CAT) has been ratified by 162 states and signed by eight more; the International Convention on Civil and Political Rights (ICCPR) has been ratified by 169 states and signed by six more; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) has been ratified by 166 States and signed by four more. See *Status Of Ratification Interactive Dashboard*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://indicators.ohchr.org/> (last visited Oct. 15, 2017). The ILO Declaration on Fundamental Principles and Rights at Work enjoys near universal adherence. See *Conventions and Recommendations*, INT’L LABOUR ORG., <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang—en/index.htm> (last visited Mar. 7, 2018).

59. See Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT’L L. 446 (2009)

next section analyzes the current scope and content of due diligence under international law and explores how the IFC could satisfy its external human rights obligations through due diligence.

III. DUE DILIGENCE TO SATISFY OBLIGATIONS UNDER INTERNATIONAL LAW

Human rights treaties, and their following jurisprudence, give clear instruction as to what must be done to satisfy human rights obligations. Since international organizations are rarely parties to human rights treaties—and thus these specific directions are unlikely to bind them—their human rights obligations are best operationalized in a more general fashion, “through the prism of due diligence.”⁶⁰ Due diligence is defined by Black’s Law Dictionary as “the diligence *reasonably expected* from, and ordinarily exercised by, a person who seeks to *satisfy a legal requirement* or to *discharge an obligation*.”⁶¹ To build on the previous section’s discussion of the scope of human rights obligations, this section will trace the extent to which due diligence is an emerging general principle under Article 38 of the ICJ Statute and how the performance of appropriate diligence can discharge the duty of an international organization to respect human rights.⁶²

“It is frequently posited that as a general principle of international law within the meaning of Article 38(1)(c) of the statute of the ICJ, and arguably as a norm of customary international law, the minimum obligation owed by any subject of international law is a ‘duty of diligence’ to ensure that the subject’s own policies, actions or possible neglect do not undermine the human rights obligations of other subjects of international law (including states’ human rights treaty obligations).”

60. See CLAPHAM, *supra* note 23, at 151 (noting an argument advanced by Pierre Klein, that an obligation of vigilance, or due diligence, attaches to international organizations with regard to activities under their control, which can affect the rights of other subjects of international law).

61. *Due Diligence*, BLACK’S LAW DICTIONARY (8th ed. 2006) (emphasis added).

62. Statute of the International Court of Justice art. 38, ¶ 1; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (AM. LAW INST. 1987) (describing general principles common to the major legal systems of the world).

A. *Origins of Due Diligence as a Legal Concept*

Due diligence was historically framed as a ruler's duty to prevent harms to third parties by a ruler's own subjects. The idea of due diligence, though differing in application, dates back to at least 1000 BC.⁶³ Equating state and ruler, Grotius imagined the specific duties the ruler of a state might owe due to the malfeasance of its subjects as *patientia* and *receptus*. *Patientia* meant that the ruler had a duty to attempt to prevent the continuing commission of crimes by a subject.⁶⁴ *Receptus* meant that, after the commission of a crime by a subject, the ruler had the duty to attempt to punish the criminal.⁶⁵ Failure in either duty would result in liability being imposed on the ruler.⁶⁶ Thus, the historical notion of due diligence incorporated cross-temporal requirements: *ex ante* to prevent future harm, and *ex post* to redress the harm.

B. *Manifestations of Due Diligence in Various Areas of Law*

The modern concept of due diligence can be found in a range of legal fields including international human rights law, international environmental law, international investment law, as well as domestic corporate and tort law. Due diligence may be owed to shareholders of a corporation, employees or customers, and also to third-party sovereigns or individuals. Due diligence may be owed by sovereign states, corporations, employers, boards of directors, and also by international organizations.

While there is continuing debate on their exact nature and formation, general principles of international law may derive not only from principles developed in domestic jurisdic-

63. See Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265, 265–66 (2004) (citing *The Journey of Wen-Amon to Phoenicia* (John A. Wilson trans.), in *THE ANCIENT NEAR EAST* 14, 16–18 (James B. Pritchard ed., 1958)). Due diligence arose from the ancient principle of *sic utere tuo ut alienum non laedas*, which obliges property owners to use their property in such a way that it does no injury to another's. See *id.*

64. See *id.* at 283–84 (citing HUGO GROTIUS, *ON THE LAWS OF WAR AND PEACE* 257–60 (A.C. Campbell trans., 1901) (1625)).

65. See *id.*

66. See *id.* at 286.

tions but also from international sources.⁶⁷ The breadth of application of the modern principle of due diligence across such a plethora of legal regimes points toward its emergence as a general principle of international law. The following chart summarizes the sources for due diligence standards in various areas.

67. See DARROW, *supra* note 14, at 131; Alec Stone Sweet, *Proportionality, General Principles of Law, and Investor-state Arbitration: A Response to Jose Alvarez*, 46 N.Y.U. J. INT'L L. & POL. 911 (2014); Jose E. Alvarez & Katheryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the International Investment Regime*, in THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009 379, 428–29 n.280 (Karl P. Sauvant ed., 2009) (discussing whether certain bilateral investment treaty provisions are self-judging if their texts do not expressly incorporate general international law, including general principles of law).

		Actors		
		States (Traditionally Public Actors)	Private Actors (Individuals & Corporations)	Int'l Organizations [purely public (e.g., U.N.) or mixed (e.g., IFC)]
Area of Law	Int'l Human Rights Law	Treaties and output of human rights tribunals & treaty bodies (binding); U.N. resolutions & guidelines (if customary IL – binding; if soft law – persuasively relevant)	Domestic Law (binding); Internal institutional law of the private actor (internally binding); Guidelines such as UNGP standards; OECD Guidelines; Thun Group Advisory Paper (soft law or non-binding)	Treaty (binding); Customary IL (binding according to the functional scope of the IO's tasks)
	Int'l Environmental Law	Customary Int'l Law; National Legislation; Treaty Law (Binding)	Domestic Law (binding); Guidelines (soft law or non-binding)	Treaty (binding); Customary IL (binding according to the functional scope of the IO's tasks)
	Int'l Investment Law	Customary Int'l Law; Bilateral Investment Treaties (binding); Ensuuing Arbitral Decisions (binding on parties only)	Arbitral decisions (binding on parties only, otherwise persuasively relevant)	Not applicable
	Internal Institutional Law	Not applicable	Charter/By-Laws (binding), Policy Statements (soft law)	Charter/By-Laws (binding), Policy Statements (soft law); DARIO (parts of which may be binding as custom)
	Domestic Corporate & Tort Law	Not Applicable	Based on jurisdiction, common & statutory law or civil law (binding)	Domestic common & statutory law or civil law (persuasively relevant; not binding)

Source: Author compilation

1. *Transboundary Harms and Modern Environmental Law*

Due diligence first appeared in modern international environmental law as a state's duty to take affirmative measures

to prevent actions taken by third parties within its sovereign territory from causing harm in the sovereign territories of other states.⁶⁸ While states are directly liable for their own actions, the duty of due diligence also requires states to prevent or mitigate harms inflicted by non-state parties.⁶⁹ This account of the underlying duty is evident in early case law. In the 1941 Trail Smelter Arbitration, an international arbitral tribunal ruled that a state “owes at all times a duty to protect other states against injurious acts by individuals from within their jurisdiction.”⁷⁰ This duty was later recognized as customary international law.⁷¹

The obligation of due diligence is presently considered an obligation “of conduct,” not “of result.”⁷² It is a standard by which to measure fulfillment of an underlying duty. The ILC in its Draft Articles for the Prevention of Transboundary Harms describes due diligence as a duty “to take prevention or minimization measures” but not a duty “to guarantee that significant harm be totally prevented, if it is not possible to do so.”⁷³ Moreover, the Commentaries to the ILC’s Articles of State Responsibility (ASR) include “due diligence” in the list of standards of behavior that could be applied to the question of whether an obligation has been breached.⁷⁴

68. See Michael N. Schmitt, *In Defense of Due Diligence in Cyberspace*, 125 YALE L.J. F. 68, 73 (2015).

69. See Hessbruegge, *supra* note 63, at 268 (citing AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATIONS 162 (1918)).

70. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1911, 1963 (Trail Smelter Arb. Trib. 1941); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9).

71. See Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20) (“The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”).

72. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, ¶ 110.

73. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, U.N.Doc. A/56/10, at 154 (2001) [hereinafter *Draft Articles on Transboundary Harm*].

74. ASR, *supra* note 10, at 34 (“Whether responsibility is ‘objective’ or ‘subjective’ in this sense depends on the circumstances The same is true

The question then becomes how much diligence is necessary to fulfill the duty. As noted in the Seabed Disputes Chamber Advisory Opinion, due diligence “is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result” of compliance with legal obligations.⁷⁵ According to the ASR Commentaries the standard will “vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation.”⁷⁶ Some objective factors that further clarify the content of due diligence are predictability of harm and importance of the interest to be protected.⁷⁷ At the very least, the “do no harm” principle—arguably acquiring the status of customary international law—determines how much diligence might be necessary.⁷⁸

Thus, in a situation of possible transboundary harm, the state fulfills its obligation of due diligence if it prevents or minimizes the risk of a foreseeable significant harm. This incorporates *ex ante* duties such as performing an environmental impact assessment,⁷⁹ as well as *ex post* duties of ongoing monitor-

of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence.”).

75. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10.

76. ASR, *supra* note 10, at 34; *see also* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, ¶ 117 (“[D]ue diligence is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.”).

77. *See* Duncan French & Tim Stevens, *ILA Study Group on Due Diligence in International Law: First Report* 3 (Mar. 7, 2014) [hereinafter *First ILA Report*], <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1429&StorageFileGuid=FD770a95-9118-4a20-ac61-df12356f74d0>.

78. *See supra* text accompanying note 32.

79. *See* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, ¶¶ 141–50 (“[T]he obligation to conduct an environmental impact assessment is a . . . general obligation under customary international law.”).

ing, taking timely action in the face of identified harm,⁸⁰ and redressing harm.⁸¹

Because environmental harm, once suffered, can be irreparable, some ICJ judges have argued that a “precautionary principle” has been incorporated into the legal obligation of due diligence as part of customary international law.⁸² Judge Cançado Trindade recently justified this view, stating that “while the principle of prevention assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm.”⁸³ Since a court decision cannot adequately remedy irreparable harms, more care *ex ante*, as well as promptly applied provisional measures, may be in order.⁸⁴ Though widespread agreement on its acceptance as customary international law is lacking,⁸⁵ the “precau-

80. *Draft Articles on Transboundary Harm*, *supra* note 73, at 154 (“Due diligence is manifested in reasonable efforts by a State to inform itself of factual or legal components that relate foreseeably to a contemplated procedure and to take appropriate measures *in timely fashion*, to address them.”) (emphasis added).

81. *See, e.g.*, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, ¶¶ 139–40 (describing article 235 of the U.N. Convention on the Law of the Sea, which requires state parties to ensure the availability of resources to redress any potential damage to the marine environment caused by pollution on the part of any natural or legal persons under their jurisdiction).

82. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep. at 502–04, (Weeramantry, J., dissenting).

83. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, ¶ 55 (Dec. 16, 2015) (separate opinion by Trindade, J.), <http://www.icj-cij.org/docket/files/152/18856.pdf>.

84. *See id.* ¶ 19 (“Precaution, in effect, takes prevention further, in [the] face of the uncertainty of risks, so as to avoid irreparable damages.”); *id.* ¶ 59 (discussing provisional measures to “contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency”).

85. MOX Plant (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001 (separate opinion by Wolfrum, J.), www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf (“It is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law.”). *Contra* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 152 (Apr. 20) (dissenting opinion by Vinuesa, J.)

tionary principle”—with its increased emphasis on timely response to irreparable harms even without definitive proof—cannot be ignored, whether as an approach or a principle.

In conclusion, under the area of law dealing with transboundary harms such as environmental law, a duty of due diligence has emerged as a principle of customary international law. Due diligence refers to a state’s affirmative duty to protect other states against the actions of third parties within its territory and operates as an affirmative defense to liability for harms that nonetheless occur.⁸⁶ The duty depends on the circumstances. It may require heightened advanced action and a more timely mitigating response when the harm feared is irreparable. In addition, this duty is temporal, involving *ex ante* requirements to prevent harm and *ex post* requirements to monitor and mitigate.

2. *International Investment Law (Investor-State)*

Due diligence under international investment law, which pits investors against states in arbitration proceedings, has two prongs. First, the investor must perform due diligence in order not to be held partially responsible for any harm the investor later suffers. Second, the state has the duty to exercise due diligence in order “to ensure the full enjoyment of protection and security” for the investor.⁸⁷ This goes back to the earliest understandings of due diligence—the duty of a sovereign to exercise its police power “to protect citizens from private criminal acts” and “to prosecute and punish those who caused injury to aliens and their property.”⁸⁸

While investment-treaty arbitration decisions do not bind future arbitrators, generally, an investor’s failure to perform due diligence before investing has been understood to operate as contributory negligence. To make a claim that the “fair and equitable treatment” clause of an investment treaty has been violated, investors typically must prove, as one prong of the

("[T]he precautionary principle is . . . a rule of law within general international law as it stands today.")

86. See PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 112 (2d ed. 2002).

87. *Saluka Investments BV v. Czech Republic, Partial Award*, ¶ 484 (Perm. Ct. Arb. 2006), <https://www.italaw.com/documents/Saluka-PartialAwardFinal.pdf>.

88. *First ILA Report*, *supra* note 77, at 3.

analysis, that their legitimate expectations were violated.⁸⁹ When assessing the legitimacy of an investor's expectations, such expectations are considered objectively and not subjectively.⁹⁰ An investor's subjective failure to consider easily available information does not protect them if—presuming they had this information in advance—their expectations would have been objectively unreasonable.⁹¹ Thus, an investor's due diligence obligation is “to determine the extent of the risk to which they are subjected, including country and regulatory risks, and to have expectations that are reasonable in all the circumstances.”⁹² While the investor's duty to perform due diligence is generally measured at the time of investment, the legitimacy of expectations may also be measured at later times if the investment belongs to a series of ongoing decisions.⁹³ Tribunals, for example, have found investors' expectations to be unreasonable and consequently reduced damages where the investor failed to do sufficient research.⁹⁴ This implies that the amount of diligence due will depend on context and must be considered reasonable.

The duty of the state to perform due diligence is understood, generally, as a duty to adopt all reasonable measures to physically protect assets and property from threats or attacks which may particularly target foreigners or certain groups of

89. See Christoph Schreuer & Ursula Kriebaum, *At What Time Must Legitimate Expectations Exist?*, in *A LIBER AMICORUM: THOMAS WÄLDE—LAW BEYOND CONVENTIONAL THOUGHT* 265, 265–77 (Jacques Werner & Arif H. Ali eds., 2009).

90. *Id.*

91. See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 148 (2d ed. 2012) (“Legitimate expectations are not subjective hopes and perceptions; rather, they must be based on objectively verifiable facts.”).

92. See U.N. Conference on Trade and Development, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, at 78, UNCTAD/DIAE/IA/2011/5 (2012).

93. See Schreuer & Kriebaum, *supra* note 89.

94. See, e.g., *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf> (finding that the investor's amount of damages should be reduced by fifty percent because of failure to perform due diligence); Peter Muchlinski, ‘*Caveat Investor?*’ *The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L.Q. 527, 544 (2006).

foreigners.⁹⁵ This duty has gained the status of customary international law.⁹⁶ It arises usually from the “full protection and security” requirement of a bilateral investment treaty, although it is often discussed together with the “international minimum standard” and “fair and equitable treatment.”⁹⁷ All of these are objective standards,⁹⁸ and, similar to international environmental law, encompass due diligence obligations—sometimes referred to as a duty of “vigilance”⁹⁹—of conduct, not outcome.¹⁰⁰ Although it is still a matter of debate, consensus trends toward the proposition that, rather than being an objective duty, the duty depends on the subjective capacity of a

95. See Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 347 (1997).

96. See, e.g., Memorial of United States, *Elettronica Sicula S.P.A. (U.S. v. Italy)*, at 100 (May 15, 1987), <http://www.icj-cij.org/files/case-related/76/9679.pdf> (“One well-established aspect of the international standard of treatment is that States must use ‘due diligence’ to prevent wrongful injuries to the person or property of aliens within their territory.”). This is not usually tied to “human rights,” but the fact patterns often appear to be human rights violations. See, e.g., *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 639 (June 27, 1990) (Asante, J., dissenting); *Neer v. Mexico*, 4 R.I.A.A. 60 (Gen. Claims Comm’n 1926) (claim concerning wrongful death and denial of justice); see generally EMMER DE VATTEL, *THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (6th ed. 1844) (1797).

97. Org. for Econ. Cooperation & Dev. [OECD], *Fair and Equitable Treatment Standard in International Investment Law* 9 n.34 (OECD Working Papers on Int’l Inv., Paper No. 2004/3, 2004) [hereinafter OECD, *FET Standard*], <http://dx.doi.org/10.1787/675702255435>; see also Eric de Brabandere, *Host States’ Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT’L L. & COM. 319, 330 (2015) (noting the blurred distinctions between the full protection and security standard, the international minimum standard, and the fair and equitable treatment standard).

98. See de Brabandere, *supra* note 97, at 329 (explaining how due diligence is applied as a comparator to determine whether a state has satisfied the objective international standard for how investors and investments should be treated).

99. See, e.g., *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (Dec. 8, 2000), 41 I.L.M. 896, 912 (2002) (“[I]ncumbent on the [host state] is an obligation of vigilance, in the sense that the [host state] shall take all measures necessary to ensure the full enjoyment of [the] protection and security of its investments.”).

100. See OECD, *FET Standard*, *supra* note 97 (describing “a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating ‘strict liability’”).

state, since “it would be difficult to accept that a State should provide protection and security to investors beyond the capacity of the State to do so.”¹⁰¹

In conclusion, investment treaty arbitrators have expounded the ways in which the duty of due diligence applies to both states and investors in their determinations of liability and damages. It is a duty of conduct, not result, and varies depending on the circumstances, although as a reasonableness standard it must meet an objective level. Due diligence operates as an affirmative defense to liability for harm. For states, it operates cross-temporally, requiring them to provide full protection and security, using reasonable measures (e.g., a police force), and to provide opportunities for legal redress after the fact. For investors, it applies at the time of investment, although where an investment involves choices over time, it may also apply cross-temporally.

3. *International Human Rights Law*

International human rights law deals primarily with “the internal affairs of states” and with the duties that states—and in some cases, other actors—owe individuals within their jurisdiction.¹⁰² Due diligence in the context of human rights refers to measures taken to protect against, prevent, minimize, or rectify the violation of the human rights of individuals, foreign or local, within an entity’s jurisdiction.¹⁰³ These obligations are imposed on states either through human rights treaties or customary international law. Additionally, positive obligations of due diligence are sometimes imposed on corporations through domestic law in their state of incorporation or are voluntarily undertaken as a matter of business policy.

101. de Brabandere, *supra* note 97, at 357–58.

102. *First ILA Report*, *supra* note 77, at 14; see also Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, 34 REV. INT’L STUD. 445, 452 (2008).

103. See, e.g., Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter General Comment No. 31]; International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, art. 7, ¶ 13, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994); Sheri P. Rosenberg, *Responsibility to Protect: A Framework for Prevention*, 1 GLOB. RESP. TO PROTECT 442, 452 (2009).

Although few human rights treaties actually use the term “due diligence,” a number of human rights courts and treaty bodies have articulated a standard and duty of due diligence. These standards are used to assess the state’s efforts to implement the substantive rights contained in the treaty. The Human Rights Committee, a treaty body established under the International Covenant on Civil and Political Rights, has stated that a failure to ensure covenant rights may “give rise to violations by State Parties of those rights, as a result of State Parties . . . failing to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”¹⁰⁴ Similarly, the Convention on the Elimination of Discrimination Against Women (CEDAW) does not contain the term “due diligence,” but the CEDAW Committee articulated a duty of due diligence where states fail to act in certain circumstances to prevent violations by private parties.¹⁰⁵ Additionally, though the American Convention on Human Rights refers only to a duty to adopt “measures as may be necessary to give effect” to the rights encoded in the charter,¹⁰⁶ the Inter-American Commission on Human Rights has interpreted this as a due diligence standard, ruling that “[a]n illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”¹⁰⁷ The European Convention on Human Rights and the African Charter on Human and People’s Rights also do not explicitly use “due diligence,” yet the respective courts have interpreted the trea-

104. General Comment No. 31, *supra* note 103, ¶ 8.

105. *See, e.g.*, Comm. on the Elimination of Discrimination Against Women [CEDAW], Views of CEDAW Under Article 7, Paragraph 3, of The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Ms. A. T. v. Hungary, ¶ 9.2, Communication No. 2/2003 (Oct. 10, 2003) (finding that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights”).

106. American Convention On Human Rights art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

107. *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 117 (July 29, 1988).

ties to require due diligence.¹⁰⁸ Hence, a duty of due diligence—albeit tailored to the circumstances of each case—has been inferred from the substantive rights guaranteed by major human rights treaties, with a view to making treaty rights practical and effective.¹⁰⁹

The occurrence of a human rights violation does not per se mean that a state has failed to meet its due diligence obligation, as it is a duty of conduct rather than result.¹¹⁰ Drawing out common principles from these varied cases and treaties, it seems that the duty of due diligence under human rights treaties is a duty upon a state to take appropriate action under the circumstances to minimize the risk of violation,¹¹¹ to monitor ongoing activities for evidence of abuse,¹¹² to change course

108. *See* *Opuz v. Turkey* (No. 33401/02), 2009-III Eur. Ct. H.R. 107 (2009) (concluding that the national authorities had failed to uphold their obligation to protect the right to life and could not “be considered to have displayed due diligence”); *see also* *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, No. 245/02, Decision, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶ 143 (May 15, 2006), http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf.

109. *See* *Golder v. United Kingdom* (No. 4451/70), 1 Eur. Ct. H.R. 524 (1975).

110. *See, e.g.,* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GER. Y.B. INT’L L. 9, 15 (1992) (describing the duty not as an “absolute” obligation to prevent or punish harmful activities carried out by private individuals, but as a “relative” obligation to prevent and punish such activities, as required by international law).

111. *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, No. 245/02, Decision, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶ 155 (May 15, 2006), http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf (“This is still a disputed element but the [ICJ] has held due diligence in terms of ‘means at the disposal’ of the State It could well be assumed that for non-der[er]ogable human rights the positive obligations of States would go further than in other areas.”).

112. *See, e.g.,* *Opuz v. Turkey* (No. 33401/02), 2009-III Eur. Ct. H.R. 107, ¶ 95 (2009) (noting problems caused by the “failure to monitor the implementation of injunctions”); Inter-Am. Comm’n on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, ¶ 65, OEA/Ser.L/V/II., Doc. 47/15 (Apr. 6, 2016).

when such human rights abuses are discovered,¹¹³ and to provide a legal remedy to parties abused.¹¹⁴

Moreover, the obligation of due diligence requires reasonable conduct. In *Opuz v. Turkey*, the ECHR adopted this reasonableness standard, stating that the state failed to meet the requirements of due diligence when, given a state's capacity, it "knew or ought to have known" of a risk and did nothing.¹¹⁵ In many other cases, human rights bodies have adopted a similar standard.¹¹⁶ In short, the due diligence required is that which is appropriate or reasonable under the circumstances.

In conclusion, where there is an obligation under international human rights law to respect a human right, due diligence is a standard increasingly used to monitor compliance by states with the substantive legal obligation. The duty of due diligence is not merely an *ex ante* duty but applies across time; it begins with the adoption of prevention measures and continues with appropriate ongoing monitoring and the provision of a remedy *ex post*. The diligence required is that which is appropriate or reasonable under the circumstances and depends on the capabilities of the actor.

113. Zimbabwe Human Rights NGO Forum v. Zimbabwe, No. 245/02, Decision, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 157 (May 15, 2006), http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf (identifying as the relevant question in the case the issue of "whether under the present communication, the state . . . having realized violations had taken place, took steps to ensure the protection of the rights of the victims").

114. See Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶¶ 76, 79 (July 29, 1988); see also Rosenberg, *supra* note 103, at 446.

115. *Opuz v. Turkey* (No. 33401/02), 2009-III Eur. Ct. H.R. 107, ¶ 129 (2009).

116. See González v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 249–50 (Nov. 16, 2009); see also Gonzales v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.128, doc. 19 ¶ 134 (2011) (noting that the due diligence obligation is one of "reasonable means, and not results"); Osman v. United Kingdom (No. 87/1997/871/1083), 29 Eur. Ct. H.R. 235, ¶ 116 (1998); Kontrová v. Slovakia, App. No. 7510/04, ¶ 50 (Eur. Ct. H.R. 2007), https://www.coe.int/t/dg2/equality/domesticviolence-campaign/resources/Kontrova%20v.%20Slovakia_en.asp; Tomašić v. Croatia, App. No. 46598/06, ¶ 51 (Eur. Ct. H.R. 2009), <https://www.legal-tools.org/doc/950de1/pdf/>.

4. *Voluntary Corporate Standards: Human Rights Due Diligence*

Apart from the binding due diligence obligations of states under international human rights law, the term “human rights due diligence” has recently also come to describe a set of international and other procedural standards or guidelines addressed to private actors—mainly corporations and banks. Voluntary guidelines, such as those discussed below, have enjoyed great uptake. In some cases, these standards are even legally required under domestic law.¹¹⁷

Human rights due diligence guidelines are based on the “do no harm” principle discussed above.¹¹⁸ Respecting this principle requires an organization to ensure that its “policies, actions or possible neglect do not impede the realization of human rights elsewhere.”¹¹⁹ The “do no harm” principle has been reaffirmed in the development aid context.¹²⁰ In the recent Dutch sector banking guidelines, the adhering banks have committed to going beyond the “do no harm” principle found in the OECD Guidelines and the UNGPs. The Dutch

117. For an analysis of various methods of incorporating human rights due diligence standards in national law, see Olivier de Schutter et al., *Human Rights Due Diligence: The Role of States* (Dec. 2012), <http://icar.ngo/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>.

118. See *supra* note 32 and accompanying text.

119. Siobhán McInerney-Lankford et al., *Human Rights and Climate Change: A Review of the International Legal Dimensions*, WORLD BANK GRP. 46 (Mar. 2011), <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/HumanRightsAndClimateChange.pdf>.

120. See G.A. Res. 70/1, ¶¶ 10, 18–19 (Oct. 21, 2015); Giorgiana Rosa, A *Human Rights Framework for Development Assistance*, AMNESTY INT’L 2 (2010), http://www.ccic.ca/_files/en/what_we_do/002_aid_2010_05_a_time_to_act_chapter_3_e.pdf (“[T]he status of an obligation to ‘do no harm’—to respect and protect rights in the provision of development assistance—has been consistently reaffirmed by the UN treaty bodies and independent experts and is increasingly widely accepted.”); U.N. Dep’t of Econ. & Soc. Affairs, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, ¶¶ 1, 111 (2015), http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAA_Outcome.pdf (endorsed by G.A. Res. 69/313 (July 27, 2015)); World Bank Grp., Accra Agenda for Action ¶ 13(c) (Sept. 4, 2008), <http://siteresources.worldbank.org/ACCRAEXT/Resources/4700790-1217425866038/AAA-4SEPTEMBER-FINAL-16h00.pdf> (containing a commitment to, inter alia, respect human rights in the context of aid effectiveness).

banks' guidelines are undertaking to promote human rights and sustainable development via a "do good" principle.¹²¹

These principles have been operationalized as guidelines by several international actors. In 2007, the Organisation for Economic Co-operation and Development (OECD) adopted a set of legally nonbinding Guidelines for Multinational Enterprises, encouraging them "to respect human rights."¹²² Recent OECD policy guidance also indicates that "do no harm" is a relevant principle for promoting and integrating human rights in development.¹²³ In 2011, the U.N. Human Rights Council adopted the U.N. Guiding Principles on Business and Human Rights (UNGPs), developed by Professor John Ruggie as Special Representative of the Secretary-General. Ruggie explained in the submission to the Human Rights Council that "[t]o respect rights essentially means not to infringe on the rights of others—put simply, to do no harm."¹²⁴ A group of banks in 2011 also formed the "Thun Group," whose 2013 report explores and elaborates on bank-specific obligations under the U.N. Guiding Principles.¹²⁵

After an actor, such as a corporation or a financial institution, makes a policy commitment to follow these guidelines, due diligence is required to give practical effect to the "do no harm" principle. The Ruggie principles declare that corporations "should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they

121. See Soc. & Econ. Council of the Neth., *Dutch Banking Sector Agreement on International Responsible Business Conduct Regarding Human Rights* 15 (2016), https://www.ser.nl/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx.

122. See OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 31 (2011), <http://oecd.org/daf/inv/mne/48004323.pdf> [hereinafter OECD GUIDELINES].

123. DAC *Action-Oriented Policy Paper on Human Rights and Development*, OECD 11 (2007), <http://www.oecd.org/development/governance-development/39350774.pdf>.

124. John Ruggie (Special Representative of the U.N. Secretary-General on Business and Human Rights), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 24, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

125. See Thun Grp. of Banks, UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles (Oct. 2013) [hereinafter Thun Grp. Rpt.], <https://www.credit-suisse.com/media/assets/corporate/docs/about-us/responsibility/banking/thun-group-discussion-paper.pdf>.

are involved.”¹²⁶ The OECD’s updated Guidelines also require a policy commitment to respect human rights and human rights due diligence.¹²⁷ While the OECD Guidelines and UNGPs remain formally non-binding, they purport to articulate the underlying obligations of actors under domestic and international law, and they may also gradually contribute to the emergence of hard law in the area of business responsibility.

All of these sets of principles recognize that the level of due diligence required varies according to a range of circumstances, although they include different factors that affect the diligence owed. The OECD Guidelines suggest that “the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the Guidelines, and the severity of its adverse impacts.”¹²⁸ Banks—which are often more distant from the situation on the ground—are advised by the Thun Group to target their diligence efforts based on the severity of potential harm as well as the strength of the bank’s connection to the project.¹²⁹ This contrasts with the guidance given by the UNGPs, which do not consider the size of the investment to be a relevant factor and suggest targeting based on the severity of the potential harm alone.¹³⁰ The Thun Group guidelines also suggest targeting situations in which groups may be particularly vulnerable to human rights abuses in a particular context.¹³¹

Although the guidelines are often applied to or directed at corporations, banks can also be held responsible for the actions of clients over whom they claim to have very little lever-

126. John Ruggie (Special Representative of the U.N. Secretary-General on Business and Human Rights), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles on Business and Human Rights*].

127. See OECD GUIDELINES, *supra* note 122, at 31.

128. *Id.* at 24; see also *id.* at 20 (noting the level of due diligence required of multinational enterprises).

129. Thun Grp. Rpt., *supra* note 125, at 10, 16–21.

130. See Damiano de Felice, *Banks and Human Rights Due Diligence: A Critical Analysis of the Thun Group’s Discussion Paper on the UN Guiding Principles on Business and Human Rights*, 19 INT’L J. HUM. RTS. 319 (2015).

131. See Thun Grp. Rpt., *supra* note 125, at 10.

age.¹³² The OECD is in the process of formulating guidelines for responsible business conduct in the financial sector.¹³³ At the OECD 2016 Global Forum for Responsible Business Conduct, the specific responsibilities of institutional investors to take action to prevent environmental, social, and governance risks were discussed.¹³⁴ The bank-specific Thun Group report differentiates human rights due diligence for retail and private banking, corporate and investment banking, and asset management practices.¹³⁵ Upon a policy commitment to “do no harm,” the various guidelines articulate more specific means for satisfying this standard through “human rights due diligence.”¹³⁶

Several sources for due diligence procedural standards applicable to the private sector—most notably those set out in the UNGPs, the OECD Guidelines, and the Thun Group Advisory Report Guidelines—provide a detailed to-do list for corporations seeking to do no harm. They exhort companies to (i) identify actual or potential impacts, (ii) prevent and mitigate impacts thus identified, and (iii) account for impacts and responses to them.¹³⁷ These three guidelines to conduct human rights due diligence are examined below.

132. See *Human Rights and the Finance Sector*, U.N. ENV'T PROGRAMME FIN. INITIATIVE (Dec. 2014), <http://www.unepfi.org/humanrightstoolkit/finance.php>.

133. See *Responsible Business Conduct in the Financial Sector*, OECD, <http://mneguidelines.oecd.org/rbc-financial-sector.htm> (last visited Oct. 14, 2017); see also Roel Nieuwenkamp, *The Force of Finance for Responsible Business: How the Financial Sector Could and Should Contribute to Responsible Business Conduct*, OECD INSIGHTS (June 6, 2016), <https://oecdinsights.org/2016/06/06/finance-for-responsible-business-conduct>.

134. See OECD, *Global Forum On Responsible Business Conduct: Programme 7* (June 2016), <http://mneguidelines.oecd.org/global-forum/GFRBC-2016-agenda-outline.pdf>.

135. See Thun Grp. Rpt., *supra* note 125, at 8–18.

136. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, PRINCIPLES FOR RESPONSIBLE CONTRACTS: INTEGRATING THE MANAGEMENT OF HUMAN RIGHTS RISKS INTO STATE-INVESTOR CONTRACT NEGOTIATIONS—GUIDANCE FOR NEGOTIATORS 28–31, U.N. Doc. HR/Pub/15/1, U.N. Sales No. E.15.XIV.5 (2015) [hereinafter PRINCIPLES FOR RESPONSIBLE CONTRACTS].

137. See de Schutter, *supra* note 117.

a. *Step One*. The Vanguard: HRIA

The first step of human rights due diligence under the UNGPs, OECD Guidelines, and Thun Group Guidelines is to identify actual or potential impacts on human rights from activities of principals and their business partners. The UNGPs suggest that, at this stage, meaningful consultation with potentially affected groups and other relevant stakeholders, like human rights experts, should be carried out.¹³⁸ The OECD Guidelines call for similar action.¹³⁹ Even under the most limited corporate standard—the Thun Group standard—financial institutions are encouraged to educate themselves on human rights, hiring a human rights specialist advisor if necessary.¹⁴⁰ Human rights impact assessments are suggested in situations where substantial risk is foreseen, particularly in project finance.¹⁴¹

The first step is often effectuated by a human rights impact assessment (HRIA).¹⁴² An HRIA is a process for systematically identifying, predicting, and responding to the potential human rights impacts of projects, operations, or policies.¹⁴³ HRIAs are designed to complement an entity's other impact assessment and due diligence processes, and they are framed by international human rights principles and conventions.¹⁴⁴ HRIAs “identify rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations) and seek to strengthen the capacities of rights-holders to claim their rights and of duty-bearers to fulfill their human rights obligations.”¹⁴⁵ Echoing the OECD's and UNGP's commitment to

138. See *Guiding Principles on Business and Human Rights*, *supra* note 126, at 17 (discussing Principle 18).

139. See OECD GUIDELINES, *supra* note 122, at 25.

140. See Thun Grp. Rpt., *supra* note 125, at 9, 20–22.

141. *Id.* at 21–22.

142. See Natour & Pluess, *supra* note 38, at 5 (The U.N. Guiding Principles use the term “human rights due diligence” to describe the process actors undertake to ensure respect for human rights. Due diligence includes HRIAs.).

143. Castan Ctr. for Human Rights Law et al., *Human Rights Translated: A Business Reference Guide*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS xvii (2008), http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf.

144. See *id.*

145. WORLD BANK GRP., HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS AND RELE-

impact assessments, the Dutch banking sector guidelines go further to overcome some of the challenges of conducting human rights due diligence and HRIAs: they seek to develop a matrix/database tool, where parties can share their knowledge and research on actual and potential human rights impacts in various sectors.¹⁴⁶

HRIAs differ from other risk evaluation tools, like social or environmental impact assessments. Generic social assessments can overlook “important human rights conditions that are embedded in a particular society, such as discrimination . . . or restrictions on freedom of expression or collective bargaining.”¹⁴⁷ HRIAs, on the other hand, “use international human rights standards (the UDHR, ICCPR, ICESCR) as their framework, and assess the state of realization of a broad spectrum of rights.”¹⁴⁸ In recent years, public institutions have also begun utilizing HRIAs to satisfy their human rights obligations before adopting and implementing policies or projects.¹⁴⁹ The United Nations in particular has adopted a rights-based approach to its development programming.¹⁵⁰

VANCE FOR DEVELOPMENT 3 (Feb. 2013) [hereinafter NORDIC TRUST FUND-COMMISSIONED HRIA REPORT], http://siteresources.worldbank.org/PROJETS/Resources/40940-1331068268558/HRIA_Web.pdf.

146. See Soc. & Econ. Council of the Neth., *supra* note 121, at 9–10.

147. Steven Herz et al., *The International Finance Corporation’s Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?*, CTR. FOR INT’L ENV’T LAW 12 (Aug. 2008), http://www.ciel.org/wp-content/uploads/2015/06/Ruggie_Submission.pdf (citing Rep. of the Special Representative of the Secretary-General, *Human Rights Impact Assessments – Resolving Key Methodological Questions*, at 2, U.N. Doc. A/HRC/4/74 (Feb. 5, 2007)).

148. *Id.*

149. James Harrison, *Human Rights Impact Assessments of Free Trade Agreements: What is the State of the Art?* 1 (Nov. 2013), <https://pdfs.semanticscholar.org/9eb2/852a0fb152e5f62733bbe92d9b8c2753e070.pdf> (“HRIAs have been used to allow policymakers to take into account the human rights impact of laws, policies, [and] programmes in a wide range of fields including in the economic sphere: Development programming; Various government policy and legislative initiatives; International Trade Agreements; and Government Spending Decisions.”).

150. See McNerney-Lankford et al., *supra* note 119, at 45; *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, U.N. PRACTITIONER’S PORTAL ON HUMAN RIGHTS BASED APPROACHES TO PROGRAMMING, <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (last visited Oct. 14, 2017).

The duty to identify also includes a duty to monitor. The due diligence obligations of actors under these guidelines extend beyond ex ante research when exposure to risk remains. The UNGPs and OECD Guidelines note that human rights due diligence must be “ongoing,”¹⁵¹ although the Thun Group argues that this may be particularly difficult for financial institutions, taking the view that these institutions may find it particularly difficult to access the necessary information.¹⁵² However, as previously noted, at a minimum, such financial institutions should either negotiate ex ante for access to information, or prove that they at least attempted to gain access to the information.

b. *Step Two. Taking Action: Prevention and Mitigation*

The second step is to take measures to prevent or mitigate adverse impacts to the human rights of local communities. The UNGPs and the OECD Guidelines call for companies to use their leverage to cease the adverse human rights impact caused or funded by their investments.¹⁵³ The OECD Guidelines suggest that enterprises should put remediation processes in place in advance.¹⁵⁴ The UNGPs also emphasize the ongoing nature of corporate human rights due diligence and suggest that extra speed and effort be used in cases where harms are irremediable.¹⁵⁵ Additionally, they encourage actors to increase their leverage to compel reduction of the harm.¹⁵⁶ The OECD Guidelines note that “[g]ood faith behavior . . .

151. OECD GUIDELINES, *supra* note 122, at 34; *see also Guiding Principles on Business and Human Rights*, *supra* note 126, at 18–19.

152. *See* Thun Grp. Rpt., *supra* note 125, at 19 (“Ongoing due diligence is often challenging as the leverage and access to documentation can be limited.”). Some academics have suggested that writing disclosure practices during contract negotiations could alleviate this—indeed, establishing information sharing mechanisms in advance would allow maximum disclosure and access for underprivileged potential victims. *See* Blair E. Kanis, *Business, Human Rights, and Due Diligence: An Approach for Contractual Integration*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK* 414, 418 (Jena Martin & Karen E. Bravo eds., 2016).

153. *See Guiding Principles on Business and Human Rights*, *supra* note 126, at 18–19 (discussing Principle 19); OECD GUIDELINES, *supra* note 122, at 24, 33.

154. *See id.* at 23, 34.

155. *See* Ruggie, *supra* note 124, at 21 (discussing Principle 24).

156. *See id.* at 18, 21 (discussing Principles 19 and 24).

means responding in a timely fashion” when difficulties with implementing the guidelines arise.¹⁵⁷ The Thun Group suggests, at least in project finance, that a timetable for response be included in action plans.¹⁵⁸

Banks in particular may encounter legal difficulty in extricating their investments after human rights abuses come to light, since they may not have the necessary control over the companies in which they have invested to force an end to abuses.¹⁵⁹ This provides another argument for integrating human rights due diligence into “the contracting process, such as by codifying mitigation mechanisms in contract negotiations and developing prevention and mitigation plans based on awareness of potential adverse impacts foreseeable from due diligence assessments.”¹⁶⁰

c. *Step Three. Follow Up: Accountability*

The third step entailed by human rights due diligence is to account for impacts and responses. This generally includes a duty to promptly report to superiors within the company—and in some cases, to make findings transparently available to the public—on the actions taken.¹⁶¹ The guidelines suggest reporting requirements, specifically tracking, measuring, and reporting on performance.¹⁶²

The OECD states that responsible business practices can “represent a competitive advantage for firms, creating increased returns for investors, while irresponsible practices can pose serious risks and costs.”¹⁶³ Finally, investment that results in human rights abuses carries reputational costs to the benefit

157. OECD GUIDELINES, *supra* note 122, at 81.

158. See Thun Grp. Rpt., *supra* note 125, at 22.

159. See *Human Rights Impact Briefing No. 1: Labour Standards Violations in IOI Corporation’s Malaysian Plantations*, BANKTRACK (Feb. 2016), http://www.banktrack.org/ems_files/download/ioi_corporation_human_rights_impact_briefing_160216_pdf/ioi_corporation_human_rights_impact_briefing_160216.pdf.

160. Kanis, *supra* note 152, at 418.

161. See Natour & Pluess, *supra* note 38, at 15 (In most cases, an appropriate level of transparency includes disclosing a summary report that describes how the HRIA was conducted and “high-level findings.” In some cases, disclosing too much information may put some stakeholders at risk for sharing.)

162. See *id.* at 5.

163. See Nieuwenkamp, *supra* note 133.

of competitors.¹⁶⁴ However, reputational benefits can be earned by reporting practices in ways that affected communities can easily access and trust.

In conclusion, while not in themselves legally binding, these three sets of guidelines on human rights due diligence for the private sector provide greater detail on how the principles of due diligence may be applied.

5. *Duties of Due Diligence in Domestic Law: Corporate and Tort*

Under common law, the duties of “due care” and “due diligence” were at times historically conflated in both corporate and tort law.¹⁶⁵ In general, both implied a duty to prevent harm to third parties.

Under U.S. corporate law, the duty to perform due diligence is part of the fiduciary duty of care.¹⁶⁶ This duty may be owed by individual board members and also by the board in totality. The duty often includes a requirement to conduct sufficient research before taking or recommending an action.¹⁶⁷ In certain cases, it may also require ongoing due diligence, especially if representations were made that monitoring would continue.¹⁶⁸ The duty of due diligence is required in several contexts, including with regard to mergers and acquisitions,¹⁶⁹

164. John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 3 U. PA. J. LAB. & EMP. L. 463, 473 (1999) (explaining how Pepsi’s goodwill was damaged by their complicity in perpetuating inhumane labor conditions in Burma, to the benefit of rival Coca-Cola).

165. *See, e.g.*, *Dana v. Nat’l Bank of the Republic*, 132 Mass. 156, 158 (1882) (holding that plaintiffs had failed to discharge their duty to the defendant by submitting erroneous inculpatory evidence when due diligence would have disclosed the mistake); *see also Hudson v. Lynn & Bos. R.R. Co.*, 185 Mass. 510, 519 (1904) (finding no distinction between the phrases “due diligence” and “due care”).

166. Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 1–2 (2006).

167. *See id.*

168. *See* Lorna A. Schnase, *An Investment Adviser’s Fiduciary Duty* (Aug. 1, 2010), <http://www.thefiduciaryinstitute.org/wp-content/uploads/2013/02/lornaschnaseFiduciary-Duty-Paper.pdf>.

169. *See* Arthur Fleischer, Jr. & Alexander R. Sussman, *Directors’ Fiduciary Duties In Takeovers And Mergers*, SEC. REG. INST. (2004), http://www.friedfrank.com/siteFiles/ffFiles/sri_directors_duties.pdf.

securities registration,¹⁷⁰ and the investment fiduciary duties.¹⁷¹ For example, before an investment is made, boards are often required to hire experts, spend sufficient time in review, and ask adequate questions in board meetings in order to show appropriate diligence to fulfill the duty of care or duty of good faith.¹⁷²

Under civil law, the requirements are similar. For example, under German law, certain members of a company must act with “the due diligence of a prudent businessman” or face consequences.¹⁷³ This duty of due diligence also encompasses a duty to avoid damage to the company’s reputation.¹⁷⁴ Under French law, the duty of directors to shareholders is much broader; even “[i]mpacts on non-shareholders, occurring within or outside of the jurisdiction, must be taken into account if they also have an impact on the general interest of the company.”¹⁷⁵

These examples show that under corporate law, due diligence is a duty based either on a statutory requirement or, more relevantly for our purposes, the fiduciary duty of care to protect both investors and the corporation itself. This duty can

170. See *Due Diligence & Fiduciary Responsibility*, LAWYERS.COM, <http://securities.lawyers.com/securities-basics/due-diligence-and-fiduciary-responsibility.html> (last visited Oct. 15, 2017).

171. See Zachary G. Newman & Jonathan M. Proman, *I’ve Been Sued for What? — Fiduciary Duty Claims Against Hedge Fund Managers and How to Avoid Them*, HAHN & HESSEN LLP, <https://www.hedgeco.net/whitepapers/files/Fiduciary-Duty-Claims-Against-Hedge-Fund-Managers-and-How-to-Avoid-Them-White-Paper.pdf> (last visited Oct. 15, 2017); see also *Schwarz v. Thinkstrategy Capital Mgmt. LLC*, 797 F. Supp. 2d 439, 448 (S.D.N.Y. 2011) (finding that a fund manager’s failure to conduct due diligence is a breach of fiduciary duty).

172. See, e.g., *Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005) (finding that company directors have to be “reasonably informed” in order to meet the requirements of the duty of care); *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (finding the directors grossly negligent).

173. Birgit Spiesshofer, *Memorandum: Legal Perspective on an Annual Board “Statement of Significant Audiences and Materiality” — Draft German Law Perspective*, SALENS FMC SNR DENTON EUROPE LLP (Dec. 18, 2014), http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/german_legal_memo.authcheckdam.pdf.

174. Thun Grp. Rpt., *supra* note 125, at 3.

175. Cotty Vivant Marchisio & Lauzeral, *Corporate Law Project—Jurisdiction: France 4* (Sept. 2009), <https://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-tools-france-cotty-vivant-for-ruggie-28-sep-2009.pdf>.

be fulfilled by undertaking and documenting sufficient research *ex ante*, and by performing ongoing due diligence in situations where exposure to risk remains.¹⁷⁶ Failure to perform sufficient diligence is a breach of the fiduciary duty of care, and exposes the Board and executives to liability.

Under the common law of tort, due diligence is an affirmative duty, which arises either because one party created the risk of harm,¹⁷⁷ or because of a relationship between the parties,¹⁷⁸ irrespective of risk. Both forms of the duty require that “reasonable care” be taken to minimize the harm. The duty of due diligence can also arise under a statute. For example, under the U.S. Alien Tort Statute (ATS), a foreign national can in some cases sue an American company for harms occurring abroad,¹⁷⁹ while performance of sufficient diligence can operate as a defense.¹⁸⁰ A requirement of actual or constructive knowledge of the human rights abuses has been applied under the ATS,¹⁸¹ and corporations would be well-advised to perform due diligence to protect themselves from liability.¹⁸²

As seen above, under domestic law, due diligence is an action undertaken to comply with a separate legal obligation. As a duty of conduct, it varies depending on the circumstances, employs the standard of a “reasonable person,” and operates as an affirmative defense against liability. The major

176. Directors of a corporation breach their duty to monitor when they “utterly fail[] to implement any reporting or information system or controls” or if “having implemented such systems or controls, consciously fail[] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.” *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

177. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 39 (AM. LAW INST. 2005) (finding that when an actor’s prior conduct creates a continuing risk of harm, the actor owes an affirmative duty of “reasonable care” to minimize the harm).

178. See *id.* §§ 40–41.

179. 28 U.S.C. § 1350 (2012).

180. See Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT’L L. REV. 455, 458 (2008).

181. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

182. See Dhooge, *supra* note 180, at 455 (noting how corporations can satisfy the procedural aspects of due diligence); Yihe Yang, *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel*, 40 W. ST. U.L. REV. 195, 207 (2013) (recommending that corporations integrate due diligence into their code of conduct).

difference under domestic law and international law is that due diligence in domestic law arises out of a relationship which creates the underlying duty, whereas under international law, there need be no legal relationship, as understood in contract or tort, between the harmed party and the actor causing harm.¹⁸³

C. *Conclusion: Common Elements of the Principle of Due Diligence*

The duty of due diligence, common across multiple legal systems, is arguably emerging as a general principle of international law.¹⁸⁴ Common elements of due diligence emerge from a range of legal regimes under domestic and international systems of law.

First, due diligence is a procedural obligation that arises from another underlying legal duty or obligation as a means to give effect to that duty or obligation. It is a standard used to measure compliance with the underlying legal duty or obligation, and it is a duty of conduct, not result. Important in the context of international organizations—who are unlikely to be directly violating human rights norms like the right against torture—due diligence applies not to directly criminal actions, but to second-degree actions or the prevention of actions by third parties. Second, the content and extent of diligence required varies depending on context. Greater diligence may be due in situations where the harm feared would be irreparable. In general, across all areas of law examined, the standard of due diligence is one of reasonableness according to the specific circumstances. Third, the requirement of diligence generally operates over time and is a continuing obligation. It entails an *ex ante* duty to identify risks and to minimize the risk of harm. It also entails an ongoing duty to monitor and mitigate where exposure to the relevant risk continues. In some

183. Robert P. Barnidge Jr, *The Due Diligence Principle under International Law*, 8 INT'L COMM. L. REV. 81, 83 (2006) (noting that the breach of due diligence under international law is based on the breach of an international obligation).

184. For arguments to this effect, see, for example, JOANNA KULESZA, *DUE DILIGENCE IN INTERNATIONAL LAW* (2016), and Robert P. Barnidge, *The Due Diligence Principle Under International Law*, 8 INT'L COMMUNITY L. REV. 81 (2006).

circumstances, it requires that follow-up access to a remedy or reparations be provided.

As previously explained, an international organization must respect the human rights that reach the level of customary international law.¹⁸⁵ So, what must an international organization actually do in order to be deemed to respect these rights, as it funds or supports the actions of third parties who may violate these rights? The direct answer is due diligence. Understood as an emerging general principle of international law, due diligence operationalizes the baseline duty to respect or “do no harm.” While a duty to protect or fulfill human rights might require action beyond due diligence, due diligence is the *minimum* necessary to satisfy the duty to respect human rights. Thus, when an international organization plans an operation or investment, it must adequately perform due diligence in order to comply with its duties under international human rights law. Studying due diligence as a general principle has highlighted several facets that remain constant across legal systems and areas of law, such as the fact that due diligence is understood both *ex ante* and *ex post*, and that due diligence is generally required of parties that do not directly cause the harm. Extrapolating this principle to international organizations, we conclude particularly that they have the *ex ante* duty to identify and mitigate potential human rights risks exacerbated by their operations, as well as the ongoing duty to monitor and mitigate newly emerging human rights violations.

IV. CASE STUDY: COMPARING THE IFC’S INTERNAL DUE DILIGENCE TO THE INTERNATIONAL LAW STANDARD

The International Finance Corporation (IFC) is a legally and financially independent member of the World Bank Group. It is the world’s largest international development organization that focuses on the private sector.¹⁸⁶ The IFC’s Articles of Agreement call for it to “further economic development by encouraging the growth of productive private enter-

185. See *supra*, Section II (Obligations of International Organizations Under International Law).

186. See *About IFC—Overview: We Work With the Private Sector in Developing Countries to Create Markets that Open Up Opportunities for All*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/aboutifc_new (last visited Oct. 15, 2017).

prise in member countries, particularly in the less-developed areas.”¹⁸⁷ The IFC mission is to fulfill its mandate by providing capital and guidance to private-sector entities in developing countries.

The IFC has greatly expanded its due diligence practices since its founding,¹⁸⁸ to the point of becoming an industry leader with regard to its sustainability policies.¹⁸⁹ It now imposes a range of due diligence obligations regarding environmental and social risks on its clients through its Sustainability Framework.¹⁹⁰ This due diligence, as will be discussed in detail subsequently, takes many forms and is performed by both the

187. *IFC Articles of Agreement*, *supra* note 5, art. I.

188. There have already been two iterations of the IFC’s sustainability policies, and each successive version is said to have incorporated “valuable lessons from IFC’s implementation experience and feedback from stakeholders and clients around the world.” See *Fact Sheet: IFC’s Updated Sustainability Framework*, INT’L FIN. CORP. 1 (2011), http://www.ifc.org/wps/wcm/connect/6c6cd30049800a1fa93bfb336b93d75f/Updated_SustainabilityFramework_Fact-sheet.pdf?MOD=AJPERES. The current Sustainability Policy notes the centrality to the “IFC’s development mission [of] is its efforts to carry out investment and advisory activities with the intent to ‘do no harm’ to people and the environment.” *International Finance Corporation’s Policy on Environmental and Social Sustainability*, INT’L FIN. CORP. ¶ 9 (2012) [hereinafter *IFC Sustainability Policy*], https://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES. Moreover, the IFC seeks to ensure costs of economic development do not fall disproportionately on those who are poor or vulnerable. *Id.*

189. See Ana Maria Estevez, *Social Impact Assessment: The State of the Art*, 30 IMPACT ASSESSMENT & PROJECT APPRAISAL 34, 36 (2012); Daniel M. Franks & Frank Vanclay, *Social Impact Management Plans: Innovation in Corporate and Public Policy*, 43 ENV’T IMPACT ASSESSMENT REV. 40, 40–45 (2013). The IFC initially published Performance Standards in 2006, expanding on the safeguard policies that had been in place since 1998. INT’L FIN. CORP., INTERNATIONAL FINANCE CORPORATION’S PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (2006), http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards. For the first time, the Performance Standards required environmental and social action plans for all projects. The Performance Standards, as further updated in 2012, were influential in the development of the Equator Principles, which are presently used by many financial institutions. See INT’L FIN. CORP., PERFORMANCE STANDARDS ON SOCIAL & ENVIRONMENTAL SUSTAINABILITY (2012), http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

190. The IFC makes investments in compliance with its Policy on Environmental and Social Sustainability (“the Sustainability Policy”) and Performance Standards (PSs)—together referred to as the Sustainability Framework.

investee and the IFC. Though the IFC has established some due diligence responsibilities under its internal institutional law, gaps and weaknesses remain.¹⁹¹ The IFC has been the target of criticism after several of its projects have been implicated in serious human rights violations.¹⁹²

Are these occurrences merely unfortunate or has the IFC violated its duties under international law? As delineated in the previous section, international organizations with legal personality can have legal obligations under international law. Following the logic of the International Court of Justice in the *Reparations* case, the IFC, like other international organizations, enjoys rights and incurs obligations under international law to the extent necessary for the performance of its functions and tasks.¹⁹³ In addition, member states explicitly conferred legal personality on the IFC in its Articles of Agreement.¹⁹⁴ Because of this possession of legal personality, the

See *IFC Sustainability Framework*, INT'L FIN. CORP., <http://www.ifc.org/sustainabilityframework>.

191. The OECD has suggested that some international financial institutions are notable outliers in their approach to human rights; further, it notes that many multilateral development agencies are now significantly more involved in human rights mainstreaming, dialogue, and projects. See OECD & THE WORLD BANK, *INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: DONOR APPROACHES, EXPERIENCES, AND CHALLENGES* 149 (2d ed. 2013); *DAC Action-Oriented Policy Paper on Human Rights and Development*, *supra* note 123, at 1 (OECD's Development Assistance Committee (DAC) members and multilateral donors are now "seeking to promote human rights more comprehensively as a means to improve the quality of development co-operation").

192. While the IFC enjoys immunity under Article VI of its Articles of Agreement, see *IFC Articles of Agreement*, *supra* note 5, art. VI, such immunity is likely to continue to serve as a point of dispute in domestic courts and other fora. See, for example, the recent "Earthrights" litigation in *Jam v. International Finance Corp.*, 172 F. Supp. 3d 104 (D.D.C. 2016).

193. INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 11 (Daniel Bradlow & David Hunter eds., 2010). Scholars and practitioners of international law generally agree that "international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law." August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 37, 46 (Philip Alston ed., 2005).

194. *IFC Articles of Agreement*, *supra* note 5, art. VI, § 2 ("The Corporation shall possess full juridical personality and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.").

IFC thus has legal obligations under customary international law.¹⁹⁵ However, it has not acceded to any of the human rights treaties. Thus, the IFC's specific human rights obligations primarily stem from customary international law and the terms of the U.N. Charter, and not from treaty law directly.¹⁹⁶ As described above, the IFC can fulfill its obligation to respect customary international law of human rights through performance of sufficient due diligence.¹⁹⁷

The fact that the IFC itself did not directly harm vulnerable populations—that the harm was directly caused by an organization funded by the IFC—is irrelevant given a legal duty of respect or “do no harm” operationalized through due diligence. The question is whether the IFC's action in investing caused the harm to a legally sufficient degree and, if so, whether the IFC has performed sufficient due diligence to prevent its investee from directly harming vulnerable local populations.¹⁹⁸

This section analyzes the adequacy of the IFC's internally adopted due diligence policies, measuring them against the due diligence requirements under international law as summarized in the previous section. Upon identifying shortcomings, recommendations are proposed to remedy the gaps between the IFC's current due diligence practice and the common international standards of due diligence.

A. *Due Diligence as a Procedural Obligation for Duty Bearers*

This section examines to what extent the IFC's current due diligence policies operationalize its obligation to respect human rights and do no harm. To be eligible for IFC funding, a project must meet a number of criteria, including “[b]e[ing] environmentally and socially sound, satisfying [the IFC's] envi-

195. *See supra*, Section II (Obligations of International Organizations Under International Law).

196. *See supra* Sections II.B (International Organizations Have Obligations Under Customary International Law), II.C (International Organizations Have Obligations Under the U.N. Charter).

197. *See supra*, Section III (Due Diligence to Satisfy Obligations Under International Law).

198. If the IFC were sending its own operatives to Honduras to illegally evict and torture civilians, the standard applied to the IFC's legal liability would not be due diligence. For further discussion of the allegations of abuse, see *supra* note 1 and accompanying text.

ronmental and social standards as well as those of the host country.”¹⁹⁹ To determine whether a project is environmentally and socially sound, the IFC adheres to requirements articulated in its Policy on Environmental and Social Sustainability (“Sustainability Policy”) and Performance Standards (PS), together referred to as the Sustainability Framework.²⁰⁰ The Sustainability Policy defines the IFC’s due diligence responsibilities, while the Performance Standards define clients’ roles and responsibilities for managing their projects and the requirements for receiving and retaining the IFC’s support.²⁰¹ The IFC commits itself through its policies to providing ongoing environmental and social due diligence in the various stages of an IFC-financed project.²⁰²

199. See *Solutions—How To Apply For Financing: IFC Offers a Wide Variety of Financial Products for Private Sector Projects in Developing Countries*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/how-to-apply-for-financing (last visited Oct. 15, 2017).

200. The 2012 edition of the IFC’s Sustainability Framework applies to all clients whose projects go through IFC’s initial credit review process after January 1, 2012. The 2006 edition of the IFC’s Sustainability Framework applies to investments that went through IFC’s initial credit review process between April 30, 2006 and December 31, 2011. See *Sustainability: Overview*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/our+approach/risk+management/ifcsustainabilityframework_2006 (last visited Oct. 15, 2017).

201. Many environmental and social risks are articulated in the eight performance standards: (1) Assessment and Management of Environmental and Social Risks and Impacts; (2) Labor and Working Conditions; (3) Resource Efficiency and Pollution Prevention; (4) Community Health, Safety, and Security; (5) Land Acquisition and Involuntary Resettlement; (6) Biodiversity Conservation and Sustainable Management of Living Natural Resources; (7) Indigenous Peoples; and (8) Cultural Heritage. See generally *IFC Sustainability Policy*, *supra* note 188, ¶ 5.

202. Environmental and social due diligence is integrated into the IFC’s overall due diligence policies with respect to direct investments, financial intermediary investments, and advisory services. *IFC Sustainability Policy*, *supra* note 188, ¶ 21. A business project goes through twelve stages to become an IFC-financed project. The IFC completes most of its due diligence during the pre-investment stages (1-4). See *Solutions: IFC Project Cycle*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/solutions/ifc-project-cycle (last visited Mar. 7, 2018). As a part of its broader due diligence process, which includes review of financial and reputational risks, the IFC sets out procedures for separate teams responsible for assessing investment, environmental, and social risks. Employ-

Additionally, the Sustainability Policy notes that central to the “IFC’s development mission is its efforts to carry out investment and advisory activities with the intent to ‘do no harm’ to people and the environment.”²⁰³ The IFC’s internal articulation of its mission is consistent with an international organization’s obligation of due diligence under international law as identified above: namely, to respect human rights. Despite the strengths of the Sustainability Framework, however, the IFC has internally committed itself to these objectives through voluntary procedural *guidelines* rather than an acceptance of *obligations* stemming from external sources of law.²⁰⁴

Two important gaps in these guidelines are examined below, and a number of changes are proposed. The first concern is that the IFC’s current policies do not explicitly attempt to comply with human rights despite the IFC’s status as a bearer of international human rights obligations.²⁰⁵ Even though the IFC has adopted a sustainability policy operationalized through due diligence procedures, a sustainability policy is not a human rights policy. In this case—despite admitted overlap between IFC “sustainability” and human rights—using an explicitly human rights-based framework is substantively different than a sustainability framework due notably to the incentives and consequent outcomes that come from the former.²⁰⁶ The adoption of an explicit commitment to a human rights framework would focus the IFC’s attention on international le-

ees use the Environmental and Social Review Procedures (ESRP). See INT’L FIN. CORP., ENVIRONMENTAL AND SOCIAL REVIEW PROCEDURES MANUAL: ENVIRONMENT, SOCIAL AND GOVERNANCE DEPARTMENT (Oct. 2016), www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP_Oct2016.pdf?MOD=AJPERES [hereinafter ESRP MANUAL].

203. IFC Sustainability Policy, *supra* note 188, ¶ 9.

204. See *infra* Section IV.A.1.

205. Duty bearers are actors with an “obligation or responsibility to respect, promote and realize human rights and to abstain from human rights violations. The term is most commonly used to refer to State actors, but non-State actors can also be considered duty bearers Depending on the context, individuals (e.g. parents), local organizations, private companies, aid donors and international institutions can also be duty-bearers.” U.N. Int’l Child. Emergency Fund [UNICEF], *Gender Equality, UN Coherence & You—Glossary: Definitions A-Z*, <https://www.unicef.org/gender/training/content/resources/Glossary.pdf> (last visited Oct. 15, 2017).

206. See *infra* Section IV.A.1.

gal standards of conduct, with a view to discharging its legal *obligation* to “do no harm” to human rights.

The second gap is created by the continuing ambiguity and lack of transparency about the exact nature of the responsibilities and procedures undertaken by the IFC’s environmental and social teams—as opposed to the clients—in their apparent discharge of due diligence obligations. Enhancing transparency about the procedures that IFC teams currently use to verify client due diligence documentation would help clarify whether the IFC is meeting its international obligations.

1. *Recommendation 1: The IFC Should Adopt a Clear Policy Commitment to Respect and ‘Do No Harm’ to Human Rights*

The IFC has adopted its own due diligence policy but has made no express commitment to human rights, and there is no indication that human rights risks are systematically considered in its due diligence processes. An express commitment would require the IFC to consider international standards of conduct and to adopt appropriate procedures to ensure that its obligation to “do no harm” to human rights is respected.²⁰⁷

The adequacy of the IFC’s existing commitment to human rights can be evaluated by looking at its Sustainability Policy, Performance Standards, and Guidance notes. First, while the phrase “environmental and social due diligence” is used in the Sustainability Policy, the language of human rights is used infrequently. The IFC Sustainability Policy does mention human rights in the twelfth paragraph, stating that it “recognizes the responsibility of *business* to respect human rights, independently of the state duties to respect, protect, and fulfill human rights,”²⁰⁸ and in a footnote, noting that the IFC “will be *guided by* the International Bill of Human Rights and the eight core conventions of the International Labour Organiza-

207. Under the U.N. Guiding Principles, states ensure policy coherence while corporations institute a policy commitment indicating the entity’s responsibilities toward human rights. See OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at 22, 26, U.N. Doc. HR/PUB/14/3, U.N. Sales No. E.14.XIV.6 (2014) [hereinafter OHCHR, GUIDING PRINCIPLES].

208. *IFC Sustainability Policy*, *supra* note 188, ¶ 12 (emphasis added).

tion.”²⁰⁹ Apart from these references, the IFC does not explicitly explain how it will meet its own obligation to respect human rights in its activities and procedures.

Second, the IFC’s Performance Standards do not acknowledge any legal *obligations* to respect human rights. While two of the Performance Standards do include, as an objective, compliance with human rights principles,²¹⁰ these Performance Standards are directed at the client and not at the IFC. Furthermore, even when the IFC refers to human rights due diligence as part of the clients’ duty, the policy effectively operates as a warning against engaging with human rights, rather than as an invitation to undertake human rights due diligence as a core part of assessing project risk. Footnote twelve of the IFC’s Performance Standards on Environmental and Social Sustainability states that “[i]n *limited* high risk circumstances, it *may* be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.”²¹¹ The footnote leaves unanswered the question of the appropriate criteria to render the footnote applicable in a high-risk case, given the use of language such as “may” and “limited.” Based on publicly available information, the IFC has not imposed such a duty on its clients in a single project.

Lastly, the associated Guidance Notes provide additional advice to clients on the implementation of the Performance Standards,²¹² although clients are not required to comply with this advice. In several of the Guidance Notes, the IFC draws on

209. *Id.* ¶ 12 n.4 (emphasis added).

210. For Performance Standard Four (Community Health, Safety, and Security), one objective is “[t]o ensure that the safeguarding of personnel and property is carried out in accordance with relevant human rights principles and in a manner that avoids or minimizes risks to the Affected Communities.” INT’L FIN. CORP., IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 27 (Jan. 1, 2012), https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES. For Performance Standard Seven regarding indigenous peoples, one objective is “[t]o ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.” *Id.* at 47.

211. *Id.* at 8 n.12.

212. INT’L FIN. CORP., INTERNATIONAL FINANCE CORPORATION’S GUIDANCE NOTES: PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY ii (Jan. 1, 2012), [hereinafter GUIDANCE NOTES], <http://>

the UNGPs to illustrate the private sector duty to respect human rights, independent of the state's duty to respect, protect, and fulfill.²¹³ The IFC directs the client to the UDHR, ICCPR, and ICESCR, noting that there are certain rights that are of "particular relevance to business."²¹⁴ Although one of the Guidance Notes expressly links compliance by companies with the Performance Standards to their obligation to respect human rights,²¹⁵ the message is clear: it remains the client's duty—and not the duty of the IFC—to perform due diligence to ensure respect for human rights in operations.

In summary, the three texts—the Sustainability Policy, Performance Standards, and Guidance Notes—make only limited references to human rights. It has been argued that this situation results in clients abiding by alternative or lower standards than those actually required by international human rights law.²¹⁶ To more robustly comply with its due diligence obligations under international law, the IFC's first step would be to articulate a clear policy commitment which would have the effect of linking its practices to external international human rights standards. The U.N. Guiding Principles exhort private companies to explicitly embed their lesser duty of "*responsibility to respect*" in a publicly available "Human Rights Policy Statement."²¹⁷ If the IFC acknowledged and articulated its human rights obligations explicitly using human rights language, this would demonstrate the link between the IFC's cur-

www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Documents.pdf?MOD=AJPERES.

213. *Id.* at 3, 45–47.

214. *Id.* at 3, 44.

215. *Id.* at 1 ("Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project.")

216. See McBeth, *supra* note 6, at 1138–39 (noting that the IFC stated that international human rights law contains obligations only for states, and that the IFC attempts to support human rights through its own version of performance standards).

217. OHCHR, GUIDING PRINCIPLES, *supra* note 207, at 27.

rent due diligence practices and the expectations of clients and international human rights law standards.²¹⁸

The explicit use of human rights language in a policy statement is important. As a recent U.N. Special Rapporteur on Extreme Poverty and Human Rights has noted:

Human rights provides a context and a detailed and balanced framework; . . . it emphasizes that certain values are non-negotiable; it brings a degree of normative certainty; and it brings into the discussion the carefully negotiated elaborations of the meaning of specific rights that have emerged from decades of reflection, discussion and adjudication. . . . [I]t makes a difference if one is calling for the realization of agreed human rights to equality or to water, rather than merely making a general request or demand.”²¹⁹

If, for example, the IFC’s procedures ensured that compliance with Performance Standard Five (on Land Acquisition and Involuntary Resettlement) required that evictions and resettlement be carried out in conformity with relevant provisions of international human rights law,²²⁰ this would require at least adequate notice, genuine consultation to explore all feasible alternatives to evictions, adequate alternative housing, and appropriate compensation if necessary.²²¹ Further, the IFC would need to clarify when involuntary resettlement is permitted under “exceptional circumstances.”²²² Interpreting this

218. *Id.*

219. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 85, U.N. Doc. A/70/274 (Aug. 4, 2015).

220. Accountability Counsel et al., *IFC Must Demonstrate its Commitment to Respect Human Rights: Joint Civil Society Statement on IFC’s Draft Sustainability Framework*, BRETTON WOODS PROJECT (Mar. 7, 2011), www.brettonwoodsproject.org/2011/03/art-567851/.

221. See Amnesty Int’l, *Submission to the Review of the International Finance Corporation (IFC) Sustainability Framework*, 15–18 (May 1, 2010) [hereinafter *Amnesty International Submission*], <https://business-humanrights.org/en/amnesty-intl-submission-to-the-review-of-international-finance-corporation-ifc-sustainability-framework>. It would also require the IFC to consider secondary rights violations related to the primary right violation.

222. Leilani Farha (Special Rapporteur on Adequate Housing), *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, ¶¶ 6, 21, U.N. Doc. A/HRC/4/18 (2007).

term in accordance with international human rights law would require that the project in question be genuinely in the public interest and that all other alternatives to forced eviction have been explored.²²³

2. *Recommendation 2: The IFC Should Increase Transparency About Its Due Diligence Responsibilities and Those of Its Clients*

Though the Sustainability Policy purports to define the IFC's responsibilities and the Performance Standards define clients' roles and responsibilities, ambiguities remain about the precise due diligence responsibilities of the IFC's environmental and social teams and those of the client.²²⁴ Some of the IFC's responsibilities are articulated clearly in a manner that is consistent with international law. For example, to comply with the IFC's Access to Information policy, the IFC must disclose the environmental and social review summary on the IFC website, along with relevant sponsor documentation.²²⁵ The IFC also agrees to notify countries potentially affected by the transboundary effects of proposed business activities to consider possible adverse effects.²²⁶ This is consistent with the IFC's due diligence duties in the area of transboundary harms.²²⁷

Transparency is more suspect in the Sustainability Framework, which clearly delegates many responsibilities to the cli-

223. See Comm. on Econ., Soc. & Cultural Rights, General Comment No. 7: The Right to Adequate Housing (Art. 11(1) of the Covenant): Forced Evictions, Sixteenth Session, ¶¶ 2, 7, 9, 14–18, U.N. Doc. E/1998/22, annex IV (May 20, 1997).

224. The Sustainability Policy states that the Performance Standards support the “responsibility of the private sector.” *IFC Sustainability Policy*, *supra* note 188, ¶ 12. Moreover, the IFC merely aids clients in “manag[ing] and improv[ing] their environmental and social performance.” *Id.* ¶ 6. The IFC thus reaffirms that the client has the responsibility, as a business, to respect human rights. *Id.* ¶ 12.

225. *Id.* ¶ 14; see also Int'l Fin. Corp., *International Finance Corporation: Access to Information Policy*, WORLD BANK (Jan. 1, 2012) [hereinafter *Access to Information Policy*], <http://documents.worldbank.org/curated/en/232091480670640577/pdf/110692-AIP-English-2012.pdf>.

226. *IFC Sustainability Policy*, *supra* note 188, ¶ 18.

227. Multiple ICJ decisions have noted the need to notify the possibly affected parties in the case of possible transboundary harms. See, e.g., *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, (Apr. 20).

ent. The responsibilities include conducting the environmental and social impact assessments and submitting an “annual monitoring report,” which provides information on the client’s progress in meeting the environmental and social terms of the investment agreement.²²⁸ There may be areas where the IFC improperly delegates non-delegable duties. For example, according to the Sustainability Framework, it is the client who must engage and consult with affected communities.²²⁹ The client may have incentives not to disclose adverse effects on affected communities to the IFC. Only for projects where the IFC has identified potentially significant adverse impacts on affected communities, and projects involving indigenous peoples, must the IFC itself determine the level of “broad community support” for the project.²³⁰ In other cases, its policy provides that the IFC only needs to verify that engagement between the client and affected communities occurred.²³¹ The IFC cannot disclose what it does not make the effort to know.

Overall, the IFC’s policy commitments inadequately address its *own* responsibilities. The Sustainability Framework should delineate how the IFC is to fulfill its own duty of due diligence. Disclosing how the IFC teams verify the client’s due diligence documentation would help external observers and communities clarify whether the IFC through its own set of due diligence procedures is discharging its responsibilities and obligations under international law.

B. *The IFC’s Due Diligence Must Comply with a Reasonableness Standard*

As discussed in Section III.C above, the standard of due diligence is one of reasonableness according to the specific circumstances. Moreover, greater diligence may be required in situations where the harm feared may be irreparable.²³² These key principles apply to the IFC’s due diligence. This section

228. In the loan agreement, the client also agrees to comply with the applicable Performance Standards, to report material changes, to provide regular monitoring reports, and to cooperate with IFC supervision visits. *IFC Sustainability Policy*, *supra* note 188, ¶ 24-25.

229. *IFC Sustainability Policy*, *supra* note 188, ¶ 30.

230. *Id.*

231. See ESRP MANUAL, *supra* note 202, at 31.

232. See *supra* Sections III.B.1 (Transboundary Harms and Modern Environmental Law) and III.B.3 (International Human Rights Law).

examines the degree to which the IFC complies with this duty to change the amount of diligence performed subject to the particular circumstances of the investment.

In the context of direct investments, the IFC declares that its due diligence is “commensurate with the nature, scale, and stage of the business activity, and with the level of environmental and social risks and impacts.”²³³ Similarly, for financial intermediary lending, the capacity of the client’s management system should be “commensurate with the level of environmental and social risks in its portfolio, and prospective business activities.”²³⁴ This language is akin to the reasonable-ness—“known or ought to have known”—standard.

To assess a project’s risk level to assign the appropriate provisional risk categorization, the IFC relies on due diligence in the early stages of review.²³⁵ This early due diligence looks to whether the project is part of the so-called “Exclusion List” and considers the risks and impacts of the proposed investment provided by the client to determine if such risks are manageable.²³⁶ The IFC eventually decides on a provisional risk categorization of the project that is commensurate to the amount of environmental and social risk identified by the client.²³⁷ This provisional categorization determines the level of diligence the IFC must later conduct to collect information through site visits and client risk assessments, which will impact the final risk categorization, the conditions in the contract, who measures “broad community support” (BCS), and

233. *IFC Sustainability Policy*, *supra* note 188, ¶ 26.

234. *Id.* ¶¶ 34–35.

235. The IFC decides on a provisional risk categorization of the project during the pre-investment review phase that is commensurate to the amount of environmental and social risk identified. *ESRP MANUAL*, *supra* note 202, at 22.

236. *IFC Sustainability Policy*, *supra* note 188, ¶¶ 19, 23.

237. Category A applies to business activities with significant potential adverse environmental and social risks; Category B applies to activities with limited potential adverse risk; and Category C applies to activities with minimal or no adverse risk. *Id.* ¶ 40. Category C projects do not have disclosure requirements and do not require a robust environmental and social risk assessment. *Id.* ¶ 45 n.10. For general risk categorization descriptions, see *id.* ¶ 40.

public disclosure requirements.²³⁸ Proposed investments with moderate to high levels of environmental and social risk, or the potential for adverse impacts, are then carried out in accordance with the Performance Standards requirements.²³⁹

Although categorizing by risk severity is in principle an acceptable method to determine how much due diligence to conduct, it appears that the client is the predominant source of the information considered by the IFC when categorizing the risks inherent in the project, even though the client-borrower may ultimately be the source of or implicated in the failures or abuses which occur.²⁴⁰ Placement of too much trust in the client's risk assessment information may well fail a "reasonableness" standard. Two specific weaknesses in the IFC's current compliance with the reasonableness requirement of due diligence under international law are examined below and a number of changes are proposed.

1. *The IFC Should Adopt a Rights-Based Approach to Obtain More Risk Information*

It is important for the IFC to consider what is legally imputable to it by the "known or ought to have known" standard.²⁴¹ In order to comply with its international legal obligations, the IFC could begin by consulting available sources beyond those provided by the client (i.e., client-produced environmental and social impact assessments). While environmental and social impact assessments may at times or incidentally capture some human rights issues,²⁴² it is likely that a significant amount of relevant human rights risk information

238. *Id.* ¶ 30. The outcome of the environmental and social risk assessment is relevant for determining the scope of the conditions of IFC financing and investment disbursements. *Id.* ¶ 21.

239. *Id.* ¶¶ 3, 6.

240. *See Amnesty International Submission, supra* note 221, at 2.

241. *See supra* note 116, which mentions several cases where a "know or ought to have known" standard was employed by human rights tribunals. Note that under international investment law, an investor can fail the legitimate expectations test if information was reasonably available to contradict an expectation, but he or she failed to look for it. *See DOLZER & SCHREUER, supra* note 91.

242. *See Amnesty International Submission, supra* note 221, at 2. ("Most of the social and many of the environmental risks identified in the IFC's Sustainability Framework have human rights implications While some human rights impacts may be captured within social and environmental im-

may be overlooked at the early stages of a project if the IFC does not explicitly have recourse to sources on relevant sector-specific and context-specific risks when implementing the Performance Standards, and if the IFC is not explicitly considering how best to comply with international human rights standards.

Considering that information on regional, national, and sectoral human rights risks is publicly available from a range of authoritative sources, it is reasonable for the IFC to consult human rights institutions and networks to supplement the client's assessments. By explicitly considering human rights, the IFC would measure the extent to which a project is likely to respect human rights both in terms of substance and process by drawing on the expertise and information provided by human rights institutions and networks in the assessment.²⁴³ This would also be likely to counteract the risk of some client impact assessments being little more than box-ticking exercises. It is common to build on research conducted by other assessments and studies using a human rights framework, and reasonable to expect a financial institution in the position of the IFC to do so.²⁴⁴ A methodology for considering human rights risk information during the IFC's due diligence process is detailed in Part II above.

The IFC's Sustainability Policy places the onus mainly on the client to initially assess risk.²⁴⁵ While the IFC has made progress by providing some information on projects for thirty or sixty days before a project begins,²⁴⁶ this information and the time period for which it is provided is determined by the previous risk assessment. This makes it all the more important for outside actors to understand how the IFC assesses risk and what sources it uses to do so, above and beyond its reliance on client-sourced material. Given the importance of the IFC's initial risk categorization to its future monitoring, contract negotiation, and even the amount of information disclosed, the IFC

pact assessment processes, these processes are not adequate to ensure all of the human rights impacts are identified and considered.”).

243. See NORDIC TRUST FUND-COMMISSIONED HRIA REPORT, *supra* note 145, at x.

244. See *id.* at xi–xii.

245. See generally *Amnesty International Submission*, *supra* note 221, at 5 (noting over-reliance on information provided by the client).

246. See *Access to Information Policy*, *supra* note 225, ¶ 34.

should publicize in greater detail what its methodology is for conducting this crucial initial risk assessment.

Additionally, the policy that exists is not always enforced in practice. Requests from NGOs for information that, according to the IFC's policies should be made available, have nonetheless been refused by the IFC on grounds of confidentiality but without providing the required explanation of the need for such confidentiality.²⁴⁷ While client confidentiality concerns may clearly at times be valid, the guidance to be found in principle 10 of the Guidelines for Responsible Contracts—adopted by the U.N. Human Rights Council as an addendum to the Guiding Principles on Business and Human Rights, discussed above—should be applied in such cases: namely, confidentiality should be granted to clients when there are “compelling justifications,” and confidentiality protection should endure only for a limited time.²⁴⁸

The ex ante negotiation of transparency conditions—based on ex ante research—to allow ex post enforcement is particularly necessary in the growing area of financial intermediary lending. The IFC Compliance Advisor/Ombudsman has noted that “the end-use of the majority of IFC financial intermediary financing remains undisclosed, even where the business activity financed has significant potential [environmental and social] impacts.”²⁴⁹ The IFC at a minimum should publicly disclose the known end-use of finance, which could aid in de-

247. Mathieu Vervynckt, *An Assessment of Transparency and Accountability Mechanisms at the European Investment Bank and the International Finance Corporation*, EUROPEAN NETWORK ON DEBT & DEV. 5 (Sept. 2015), <http://www.eurodad.org/files/pdf/1546480-an-assessment-of-transparency-and-accountability-mechanisms-at-the-european-investment-bank-and-the-international-finance-corporation.pdf> (“The request referred to documents listed in the IFC’s Environmental and Social Review Summary for the project, as well as in the Social and Environmental Action Plan . . . developed by the IFC’s client, Eurasian Minerals Inc. (EMX). However, the IFC argued that such information had to be requested from EMX . . . This decision contrasts with the IFC’s Disclosure of Information Policy from 2006, . . . [which] states that the IFC is required to disclose ‘project-level information regarding investments and advisory services supported by IFC’ and ‘any relevant social and environmental impact assessment documents prepared by or on behalf of the client.’”).

248. See PRINCIPLES FOR RESPONSIBLE CONTRACTS, *supra* note 136, at 32 (discussing transparency and disclosure of contract terms).

249. Compliance Advisor Ombudsman for the Int’l Fin. Corp., *CAO Compliance Audit of IFC’s Financial Sector Investments*, COMPLIANCE ADVISOR

veloping a methodology to enforce environmental and social standards in relation to the sub-debtors.²⁵⁰

The basic requirement of transparency requires that affected people and other stakeholders should not be excluded from access to information until the stage at which IFC projects have already been designed and posted. At present, by the time enough information is available for its release to be meaningful, enough resources are likely to have already been expended by the IFC and the client to ensure that they are effectively committed, thereby disincentivizing any change of course despite the risks of harm revealed.²⁵¹ Providing such information to civil society and affected communities would enhance IFC consultation with relevant local community groups, human rights actors, or NGOs who are concerned by a proposed project in order to raise awareness of any potential risks the project might pose. Furthermore, since the IFC is increasingly considering investing in fragile and conflict-affected areas,²⁵² disclosure of the sources used by the IFC to assess risk will allow civil society and affected groups to play a role in gathering information that the IFC ought reasonably to know about the new investment region.

C. *Due Diligence as an Ongoing Duty to Prevent and Mitigate*

The requirement of due diligence generally operates over time and is a continuing obligation of conduct. The IFC's Sustainability Policy includes certain temporal aspects of due diligence. The IFC's ex ante due diligence responsibilities occur during the project assessment phase, while its ex post due dili-

OMBUDSMAN, <http://www.cao-ombudsman.org/newsroom/documents/FIAUDIT.htm> (last visited Oct. 15, 2017).

250. *Id.* In this regard, the Equator Principles could be consulted, as the third version requires private sector banks to provide consent-based disclosure of names and locations of their project finance investments. EQUATOR PRINCIPLES FINANCIAL INSTITUTIONS, THE EQUATOR PRINCIPLES 14 (June 2013), http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf.

251. Shalanda H. Baker, *Why the IFC's Free, Prior, & Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 WIS. INT'L L.J. 668, 692 (2012).

252. See INT'L FIN. CORP., FRAGILE AND CONFLICT-AFFECTED COUNTRIES: UNLOCKING THE POTENTIAL OF THE PRIVATE SECTOR—FOR PEACE, STABILITY AND PROSPERITY (2014), <https://www.ifc.org/wps/wcm/connect/9faca7004c670b0aa150a9d4c83f5107/IFC+FCS+Brochure.pdf?MOD=AJPERES>.

gence responsibilities occur upon signing of the legal agreement.

Upon signing the legal agreement, the IFC's due diligence responsibilities appear in the form of supervision and monitoring to ensure the client is adhering to Performance Standards and conditions set out by the IFC. The IFC is required to monitor the project's compliance with the Performance Standards by reviewing periodic reports submitted by the client and by conducting site visits.²⁵³ This "Annual Monitoring Report" provides information on the client's progress in meeting the environmental and social terms of the investment agreement as well as information on factors that might materially affect the enterprise.²⁵⁴ The IFC is then supposed to disclose the client's progress as laid out in the action plan.²⁵⁵

Where the client fails to comply with its social or environmental commitments, the Sustainability Policy requires the IFC to "work with the client to bring it back into compliance to the extent feasible, and if the client fails to reestablish compliance, exercise remedies when appropriate."²⁵⁶ The IFC notes that "the Performance Standards . . . and other applicable environmental and social obligations of the client are covenanted in loan agreements,"²⁵⁷ making them legally enforceable. However, this may not be sufficient to satisfy the legal obligations of the IFC and in particular its obligations of due diligence under international law. In situations in which the potential harm feared is irreparable—as would be the case for violations of the right to life, sexual violence, torture, etc.—the precautionary principle would require a more timely response than the legal enforcement of covenants in a loan agreement. Further, timely remedial measures by the client might need to be negotiated.

Despite the robust articulation of its *ex ante* and *ex post* responsibilities, the IFC's "ongoing duty" of due diligence re-

253. *IFC Sustainability Policy*, *supra* note 188, ¶ 7.

254. *Id.* ¶¶ 7, 45.

255. *Id.* ¶ 14; *see generally* *Access to Information Policy*, *supra* note 225.

256. *IFC Sustainability Policy*, *supra* note 188, ¶¶ 24, 45.

257. *See* ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS 211–12 (2010) (citing Letter from Rachel Kyte, Dir. Env't & Soc. Dev., Int'l Fin. Corp., to Halifax Initiative Coal. (Sept. 29, 2006), http://www.halifaxinitiative.org/index.php/Reports_Analysis/Letter_from_the_IFC_).

quirement is futile if it is not used to create prevention strategies before the signing of a loan agreement and to facilitate a timely response when mitigation strategies are needed after the agreement has been signed. The recent human rights shortcomings in IFC-supported projects—including in cases of financial intermediary lending—highlight clearly that it is not enough to check the boxes for environmental and social due diligence; the IFC must use its leverage to induce clients to meet all the requirements under the Sustainability Framework so that projects really “do no harm.”²⁵⁸ The enhancement of transparency—which is currently lacking—about the conditions imposed by the IFC would help to clarify whether the IFC actually achieves thoughtful prevention and mitigation strategies.

The ex post requirement of ongoing supervision—which includes site visits and annual reporting—requires the IFC to use its relationship with the client and any information it has obtained in order to induce compliance. This may require finding ways to build greater leverage and following best practices in the banking sector.²⁵⁹ The IFC’s greatest leverage happens at the moment before the contract is signed. Prior to the signing, confidential third-party consultants may be used to help identify and negotiate to prevent the most egregious risks. Financial institutions besides the IFC have noted that they may lack leverage in inducing ex post compliance, partic-

258. See generally Office of the Compliance Advisor Ombudsman for the Int’l Fin. Corp., *Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries*, CAO Ref. C-I-R9-Y10-F135 (2012).

259. It is worth noting that in the *Dutch Banking Sector Agreement on International Responsible Business Conduct Regarding Human Rights*, the parties and the adhering banks agreed to work together and committed themselves to conducting and publishing a study, by the end of 2017, on good practices of how to increase leverage when supporting companies to improve responsible business conduct regarding human rights. See Soc. & Econ. Council of the Neth., *supra* note 121, at 28. The Dutch banks’ work on due diligence best practices, the definition of key terms, and reports on increasing leverage will inform the OECD’s Working Party on Responsible Business Conduct in the Financial Sector. See Ryan Brightwell, *Going Dutch: What’s in the New Dutch Banks and Human Rights Covenant?*, BANKTRACK (Nov. 10, 2016), http://www.banktrack.org/blog/going_dutch_what_s_in_the_new_dutch_banks_and_human_rights_covenant.

ularly in the case of financial intermediary lending,²⁶⁰ and that the question becomes: what level of violation justifies exit from the project? This is an excessively defeatist response. Even if the IFC has not negotiated covenants or other leverage to align incentives *ex ante*, the IFC should consider U.N. Guiding Principle 19,²⁶¹ which suggests that instead of giving up efforts to mitigate a violation because the IFC has negotiated insufficient leverage *ex ante*, the IFC should attempt to create more leverage *ex post*.²⁶²

D. *Conclusion: The IFC and Other International Organizations Should Align Their Due Diligence Efforts with Obligations Under International Law*

In conclusion, international organizations owe duties under international human rights law and must fulfill them—the question is how. This paper has explored and attempted to flesh out an emerging principle of due diligence from various areas of international and domestic law, as well as non-binding private agreements. Where the legally binding line will be drawn is yet to be seen, particularly given questions of international organization immunity.²⁶³ However, international organizations should learn from the legal applications of a due diligence requirement in other areas of international and domestic law, in order not only to protect vulnerable communities but also to protect themselves against a legal claim that may someday manage to overcome the immunity barricade.

260. See Thun Grp. Rpt, *supra* note 125, at 5, 19 (noting that ongoing due diligence can be challenging if leverage and access to documentation are limited).

261. *Guiding Principles on Business and Human Rights*, *supra* note 126, at 18 (discussing Principle 19).

262. Commentary to Guiding Principle 19 suggests that this is to be done by “offering capacity-building or other incentives to the related entity,” which long-term could create other incentive problems if clients perceived that violating the Performance Standards allowed them to negotiate and receive additional assistance. See *id.* Even if the IFC rejects this, “collaborating with other actors” remains a functional method. See *id.*

263. International organizations are often functionally immune from domestic legal suits. See, e.g., 22 U.S.C. §§ 288–288I (2006); Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16; *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998); Aaron I. Young, Note, *Deconstructing International Organization Immunity*, 44 GEO. J. INT’L L. 312 (2012).

Using the IFC as a case study, this paper provides several substantive suggestions for how better application of the general principle of due diligence might help international organizations improve their compliance with international human rights law and further protect themselves against possible future legal claims. While the IFC's Sustainability Framework incorporates a process of social and environmental due diligence, the policies at present inadequately meet the IFC's due diligence responsibilities under international law, particularly its human rights due diligence responsibilities. The IFC's due diligence policies could be improved in three respects: (1) a policy commitment that reflects its human rights obligations as a duty bearer should be clearly articulated and adopted; (2) the IFC could consult with appropriate human rights institutions and networks to gather risk information that it "should reasonably know"; and (3) it could use information obtained in the *ex ante* and *ex post* phases of due diligence effectively so as to enhance project outcomes and build leverage to induce compliance. In all these areas, greater transparency is needed.