

Oklahoma Law Review

Volume 73 | Number 4

2021

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Recommended Citation

Eric Talbot Jensen & Sean Watts, *Cyber Due Diligence*, 73 OKLA. L. REV. 645 (2021),
<https://digitalcommons.law.ou.edu/olr/vol73/iss4/3>

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CYBER DUE DILIGENCE

ERIC TALBOT JENSEN* & SEAN WATTS**

Abstract

Due diligence—the notion that international law includes a duty to cease and remedy damage that emanates from a State’s territory—has been proposed as an international legal measure to temper destabilizing effects of harm from cyber infrastructure. Yet the extent to which States, particularly the United States, accept due diligence as either a principle of general international law or as a rule of conduct applicable to the context of cyberspace is not clear. This Article examines past and present U.S. experience with due diligence, both as a principle and rule of conduct in general international law. In light of U.S. foreign relations history, a trend toward acceptance among allies and partners, and clear utility to State relations in cyberspace, we argue for renewed acceptance by the United States of the general principle of due diligence and its specific application to cyber operations.

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I. Introduction

At present, it is difficult to characterize the United States as an enthusiast of either international dispute resolution or broad international legal limits on State behavior, such as the duty of due diligence—the notion that international law includes a duty to cease and remedy damage that emanates from a State’s territory. Yet on two occasions the United States

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has been the beneficiary of favorable and momentous international arbitral awards on due diligence grounds. First, in the aftermath of the Civil War, an arbitral tribunal awarded the United States a significant recovery for damages from British failure of diligence with respect to armed ships provided to the Confederacy.¹ Second, in the first half of the twentieth century, the United States successfully resorted to the due diligence principle to secure damages from Canada for transboundary pollution from a privately owned iron and zinc smelter near their border.² Each of these U.S.-initiated due diligence claims inspired increasing acceptance of the doctrine by the larger international legal community.

Despite past diplomatic embrace and successful results with due diligence, current U.S. legal policy toward the principle is uncertain. After extensive research, including direct questioning, a Rapporteur recently concluded,

[P]rior public U.S. statements have not addressed the international legal status of due diligence directly. It is notable, however, that the United States has tended to describe any obligations to respond to requests for assistance in non-binding terms. The lack of any public U.S. endorsement of due diligence as a legal rule . . . may be indicative of U.S. doubts as to its legal status.³

Still, general trends in international law support due diligence. Judgments by the International Court of Justice,⁴ a decision of the United States Supreme Court,⁵ recent studies by the International Law Association,⁶ and draft articles prepared by the United Nations International Law Commission⁷ have embraced due diligence as a general principle of international law. The same bodies have also recognized sector-specific

1. *See infra* Section II.A.

2. *See infra* Section II.B.

3. DUNCAN B. HOLLIS, IMPROVING TRANSPARENCY: INTERNATIONAL LAW AND STATE CYBER OPERATIONS: FOURTH REPORT 21 (2020).

4. *See Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (Apr. 9).

5. *United States v. Arjona*, 120 U.S. 479, 484 (1887).

6. *See* DUNCAN FRENCH & TIM STEPHENS, INT'L LAW ASS'N, STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW: FIRST REPORT 1 (2014) [hereinafter ILA 2014 REPORT]; DUNCAN FRENCH & TIM STEPHENS, INT'L LAW ASS'N, STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW: SECOND REPORT 1 (2016) [hereinafter ILA 2016 REPORT].

7. *See* Int'l Law Comm'n, Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 153 (2001).

refinements to the doctrine in the form of detailed obligations and duties relating to State due diligence.

Meanwhile, due diligence has emerged as an increasingly prominent international legal proposal to temper highly destabilizing effects of harm from States' territorial cyber infrastructure.⁸ Due diligence enthusiasts have advocated not mere application of the principle as a matter of default or general international law; they have proposed adoption of cyber-specific notions of due diligence that incorporate refinements derived from other sector-specific schemes of due diligence, such as those applicable to neutrality, armed conflict, the natural environment, the high seas, and even municipal law. Still, States, including the United States, seem hesitant to apply the principle to cyber activities or to incorporate wholesale the doctrinal nuances of regime-specific notions of due diligence. In recent cyber statements, the United States failed to adopt (or in most cases even mention) the application of due diligence to cyber activities.⁹

This Article considers these past and present international legal policies with a view toward future U.S. approaches to international law due diligence. We begin with detailed accounts of the *Alabama* and *Trail Smelter* arbitrations, identifying key legal determinations made by the tribunals and, perhaps more significantly, by the parties themselves. We then outline the present state of the international law of due diligence, illustrating the lasting influence of the arbitrations while emphasizing the dual incarnations of due diligence as both a principle and as a sector-specific rule. We then examine due diligence as applied to emerging cyber activities, identifying simultaneously a trend toward general acceptance of baseline due diligence and a host of doctrinal ambiguities ripe for resolution by States. We encourage the United States to reclaim its place as an advocate of general due diligence and to develop and publicize a policy toward a cyber-specific doctrine of international law due diligence.

8. David Drissel, *Cyberspatial Transformations of Society: Applying Durkheimian and Weberian Perspectives to the Internet*, 8 INT'L J. TECH., KNOWLEDGE & SOC'Y 71, 78, 81 (2012) (describing destabilizing transformations of international society from cyber activities of States and non-State actors).

9. See, e.g., Rodney Hunter, Pol. Coordinator, U.S. Mission to the U.N., Remarks at a UN Security Council Arria-Formula Meeting on Cyber Attacks Against Critical Infrastructure (Aug. 26, 2020), <https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-cyber-attacks-against-critical-infrastructure-via-vtc/> (stating that the United States commits to "upholding the stability of cyberspace" without mentioning or alluding to due diligence).

II. Past Perspectives

A. The Alabama Claims

On May 13, 1861, just after its forces fired the opening salvoes of the American Civil War, the Southern Confederacy authorized letters of marque and reprisal for maritime privateers to attack and seize Union shipping.¹⁰ The same day, the British government controversially recognized the Confederates as a belligerency and declared neutrality in the conflict.¹¹ After the British declaration, Confederate naval agents set out to commission ships from Great Britain and France to attack Union shipping and to challenge the North's blockade of Southern ports.¹² Confederate agents soon managed to commission ships from several British builders eager to cash in on the conflict.

To dodge Great Britain's international obligations as a neutral State, private British shipyards disguised the delivery destinations and the warlike character of the Confederate-commissioned ships.¹³ The shipbuilders gave

10. THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA FROM THE INSTITUTION OF THE GOVERNMENT, FEBRUARY 8, 1861, TO ITS TERMINATION, FEBRUARY 18, 1862, INCLUSIVE 100 (James M. Matthews ed., 1864), <https://docsouth.unc.edu/imls/19conf/19conf.html#p100> (authorizing the Confederate President "to issue to private armed vessels commissions, or letters of marque and general reprisal, in such form as he shall think proper, under the seal of the Confederate States, against the vessels, goods and effects of the government of the United States").

11. BRITISH AND FOREIGN STATE PAPERS 1860–1861, at 165–69 (London, William Ridgway 1868); see also MOUNTAGUE BERNARD, A HISTORICAL ACCOUNT OF THE NEUTRALITY OF GREAT BRITAIN DURING THE AMERICAN CIVIL WAR 135–36 (London, Longmans, Green, Reader & Dyer 1870) (reproducing the Queen's neutrality proclamation in full). Classically, declarations of belligerency by States amounted to recognition that rebels or insurrectionists conducting hostilities had achieved a level of organization, violence, and control sufficient to warrant application of the international legal rights and obligations governing armed conflict between States. See Valentina Azarova & Ido Blum, *Belligerency*, MAX PLANCK ENCYCLOPEDIAS OF INT'L LAW ¶¶ 1, 2, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e249?rskey=Hul7F2&result=1&prd=MPIL#> (last updated Sept. 2015) (via subscription).

12. Tom Bingham, *The Alabama Claims Arbitration*, 54 INT'L & COMPAR. L.Q. 1, 3–4 (2005) (citing JAMES D. BULLOCH, THE SECRET SERVICE OF THE CONFEDERATE STATES IN EUROPE: OR, HOW THE CONFEDERATE CRUISERS WERE EQUIPPED 410 (London, Richard Bentley 1883)).

13. All told, Britain converted five merchant ships to Confederate warships and built three warships specifically for the Confederate navy. See JP van Niekerk, *The Story of the CSS ("Daar kom die ...") Alabama: Some Legal Aspects of Her Visit to the Cape of Good Hope, and Her Influence on the Historical Development of the Law of War and Neutrality, International Arbitration, Salvage, and Maritime Prize*, 13 FUNDAMINA 175, 177 (2007). In

the hulls generic numerical designations or misleading foreign pseudonyms while under construction.¹⁴ They then launched the ships unarmed and sailed them under British colors, sending their weapons and munitions separately to overseas ports for final delivery to the Confederates.¹⁵

Aware of these schemes and anxious to compel Great Britain to seize the ships, the U.S. Consul in Liverpool hired private investigators to collect evidence to confront the British government.¹⁶ The investigators easily detected and reported the military character of several vessels under construction to the U.S. Consul.¹⁷ Vigorous American protests and communications to the British Foreign Minister persuaded Great Britain to seize two ironclad steamships bound for the Confederate navy.¹⁸ Still,

Nassau, Bahamas, where she was to be fitted with guns, a British Navy Captain ordered the *Oreto* (later renamed *Florida*) seized prior to delivery assessing her a warship unsuited to merchant service. Bingham, *supra* note 12, at 5. However, an admiralty judge in Nassau overturned the order, deeming British domestic law lacking authority for the seizure. *See id.* The *Enrica*, later renamed *Alabama*, evaded a long-delayed and belatedly issued detention order from the Queen's Advocate, meeting her armaments and ammunition in the Azores. *See id.* at 6.

14. van Niekerk, *supra* note 13, at 186. The *Alabama* reportedly launched from its shipyard with "a large number of wives and well-wishers" to reinforce her disguise as a merchant ship. *Id.*

15. JAMES TERTIUS DEKAY, *THE REBEL RAIDERS: THE ASTONISHING HISTORY OF THE CONFEDERACY'S SECRET NAVY* 59, 71–76 (2002). A loophole in the British Foreign Enlistment Act of 1819 permitted British shipbuilders to construct warships for foreign powers at war without government consent, so long as arms were not fitted or furnished in the crown's jurisdiction. Bingham, *supra* note 12, at 9. In 1867, a Royal Commission redrafted the law to close the loophole, taking effect in 1870. *Id.* at 10–11.

16. *See* Douglas H. Maynard, *Union Efforts to Prevent the Escape of the Alabama*, 41 MISS. VALLEY HIST. REV. 41, 42–43 (1954).

17. *Id.*; *see also* BERNARD, *supra* note 11, at 337–38.

18. *The Alabama Claims, 1862-1872*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1861-1865/alabama> (last visited Apr. 19, 2021). Wary of its prospects before Liverpool courts thought sympathetic to the Confederacy, rather than litigate seizure of the ironclads, the British government purchased them for service in its Navy. Bingham, *supra* note 12, at 8. A secretary to the Senior Counsel for the American side in the arbitration recalled the United States "beheld in England, 'the dockyard and arsenal of the insurgents.'" FRANK WARREN HACKETT, *REMINISCENCES OF THE GENEVA TRIBUNAL OF ARBITRATION, 1872: THE ALABAMA CLAIMS* 21 (1911); CALEB CUSHING, *THE TREATY OF WASHINGTON: ITS NEGOTIATION, EXECUTION, AND THE DISCUSSIONS RELATING THERETO* 15 (New York, Harper & Brothers 1873) (noting the United States believed "Great Britain and her Colonies had been the arsenal, the navy-yard, and the treasury of the Confederates"); BERNARD, *supra* note 11, at 371–75 (reproducing letters between the American Consul, Charles Adams, and British Foreign Minister, Lord Earl Russell, concerning imminent launch of Confederate-commissioned ships).

several ships built in British ports entered Confederate service during this period, including a swift, screw-driven sloop designated “hull number 290,” which the Confederates later renamed the *C.S.A. Alabama*.¹⁹ All told, British-supplied ships, including most infamously the *Alabama*, sank more than 150 U.S. merchant vessels around the world before their capture or destruction.²⁰

The sinkings generated enormous U.S. hostility toward Great Britain. At one point, the United States alleged British support to the Confederates “afforded to the United States just and ample cause of war.”²¹ Along with British Government sympathy for the Confederacy throughout the war, the losses to merchant shipping stoked U.S. resentment that extended well after the Union’s victory in 1865.²² Still, on May 8, 1871, after years of intense diplomatic negotiations, the United States and Great Britain signed the

19. See *The Alabama Claims, 1862-1872*, *supra* note 18; van Niekerk, *supra* note 13, at 186.

20. *The Alabama Claims, 1862-1872*, *supra* note 18. The *Alabama* operated globally including off the coasts of Brazil, South Africa, Singapore, and Europe, sinking sixty-four U.S. ships. Bingham, *supra* note 12, at 6–7; see also HACKETT, *supra* note 18, at 46 (stating, while observing the effects of Confederate sea raids, “The commerce of the United States was almost totally wiped out of existence.”). To elude the raids, American shipowners reflagged 750 ships to foreign registry and merchants abandoned U.S. carriers for foreign shipping in droves. ADRIAN COOK, *THE ALABAMA CLAIMS: AMERICAN POLITICS AND ANGLO-AMERICAN RELATIONS, 1865-1872*, at 15 (1975).

21. CUSHING, *supra* note 18, at 16. Having served as a General in the U.S. Army during the Mexican American War, Cushing was U.S. Counsel at the *Alabama* arbitral tribunal. *Cushing, Caleb: 1800-1879*, BIOGRAPHICAL DIRECTORY U.S. CONG., <https://bioguide.congress.gov/search/bio/C001016> (last visited Apr. 19, 2021).

22. HACKETT, *supra* note 18, at 46–47 (noting a threat of impending war arising from the claims); CUSHING, *supra* note 18, at 15 (describing an “intense feeling of indignation against Great Britain” in the United States); BERNARD, *supra* note 11, at 493–94 n.1 (confirming a persistent sense of injury in the United States toward Great Britain even five years after the war). In a notorious speech delivered in Newcastle, Prime Minister Gladstone argued, “We may have our own opinions about slavery; we may be for or against the South; but there is no doubt that Jefferson Davis and other leaders of the South have made an Army. They are making, it appears, a navy; and they have made what is more than either—they have made a nation.” 1 PAPERS RELATING TO THE TREATY OF WASHINGTON 41 (Wash., Gov’t Printing Off. 1872) [hereinafter TREATY OF WASHINGTON PAPERS]. After the war, Gladstone apologized for the remarks as “an undoubted error, the most singular and palpable, I may add the least excusable, of them all.” HACKETT, *supra* note 18, at 24. A Secretary to the American delegation recorded “both capitals believed [the arbitration] might even decide a question of peace or war.” *Id.* at 235. But see COOK, *supra* note 20, at 245 (estimating no real danger of war erupting from the *Alabama* claims).

Treaty of Washington.²³ The Treaty created, *inter alia*, an international arbitral tribunal to resolve the dispute in what became known as the *Alabama* claims.²⁴

The first article of the Treaty of Washington did not bode well for British success. The Treaty opened with an admission of British fault, expressing “regret felt by Her Majesty’s Government for the escape . . . of the *Alabama* and other vessels from British ports.”²⁵ It then codified the arbitrators’ rules for decision, also highly unfavorable to the British side.²⁶ The rules provided, in relevant part:

A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

. . . .

23. The Treaty of Washington was a treaty between Great Britain and the United States for the “amicable settlement of all causes of difference between the two countries.” Treaty of Washington, Gr. Brit.-U.S., pmbl., May 8, 1871, 17 Stat. 863 [hereinafter 1871 Treaty of Washington]. Both sides ratified the treaty immediately, and it entered force on June 17, 1871. *Id.* at 863. The treaty marked the conclusion of several rounds of failed negotiations. CUSHING, *supra* note 18, at 10.

24. 1871 Treaty of Washington, *supra* note 23, 17 Stat. at 864. The tribunal consisted of five members including one from each of the parties to the treaty. *Id.* Italy, Switzerland, and Brazil supplied the remaining arbitrators. *Id.*

25. *Id.* A report of the diplomatic commission that produced the Washington Treaty indicates the British expression of regret was received “as very satisfactory to them as a token of kindness.” HACKETT, *supra* note 18, at 67 n.1; *see also* CUSHING, *supra* note 18, at 20 (indicating that the British Commissioners’ concession of regret stemmed from a friendly spirit); J.C. BANCROFT DAVIS, MR. FISH AND THE ALABAMA CLAIMS: A CHAPTER IN DIPLOMATIC HISTORY 148–58 (Boston & New York, Houghton, Mifflin, & Co. 1893) (reproducing the Protocol of Conference Between the High Commissioners on the Part of the United States of America and the High Commissioners on the Part of Great Britain, May 4, 1871).

26. Some attribute the rules article of the treaty to the highly uncertain state of the relevant international law, including the law of neutrality. Elizabeth Chadwick, *The British View of Neutrality in 1872*, in NOTIONS OF NEUTRALITIES 87, 87–88 (Pascal Lottaz & Herbert R. Reginbodin eds., 2019).

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.²⁷

A curious caveat accompanied the Treaty's rules clause. This stipulation indicated the British side did not regard the rules as "a statement of principles of international law which were in force at the time when the claims . . . arose."²⁸ Although seemingly contrary to the letter and sentiment of the Treaty of Washington, this savings clause resolved a persistent point of disagreement, reportedly rescuing the Treaty's prospects for ratification.²⁹ During negotiations, U.S. diplomatic representatives had insisted the Treaty's rules—including the duty of due diligence—reflected general international law applicable at the time of the delivery of the ships.³⁰ British negotiators ardently resisted, insisting the parties memorialize narrower, ad hoc legal grounds for the tribunal to resolve the dispute. The British preferred the tribunal avoid the question of general international legal duties, including due diligence. They insisted that existing custom and usage included no international legal obligation with respect to outfitting and equipping unarmed ships by a neutral State.³¹

In fact, the Treaty of Washington reference to due diligence was not at all unprecedented in international law. For that matter, it was not even unprecedented in relations between the United States and Great Britain. In the 1794 Jay Treaty, the United States agreed to refer to a mixed claims commission demands arising from British subjects' loss of vessels and cargo at the hands of private ships armed in neutral U.S. ports during Great

27. 1871 Treaty of Washington, *supra* note 23, 17 Stat. at 865.

28. *Id.* During negotiation of the treaty, a description of the international law principles applicable during the war divided the parties deeply. JOHN BASSETT MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 540–44 (Washington, Gov't Printing Off. 1898) [hereinafter MOORE 1898].

29. Protocol of Conference Between the High Commissioners on the Part of the United States of America and the High Commissioners on the Part of Great Britain (May 4, 1871), in DAVIS, *supra* note 25, at 153–55 [hereinafter Protocol of Conference]. This protocol reads as a legislative history or *travaux préparatoires* of the Treaty of Washington Conference. *See id.*

30. *Argument of Mr. Evarts, One of the Counsel of the United States, Addressed to the Tribunal of Arbitration at Geneva, on the 5th and 6th August 1872, in Reply to the Special Argument of the Counsel of Her Britannic Majesty*, in SUPPLEMENT TO THE LONDON GAZETTE: OCTOBER 4, 1872, at 4638, 4640 (London, Authority of Her Majesty 1872) [hereinafter *Argument of Mr. Evarts*] (arguing the due diligence standard was "wholly [an] international obligation antecedent to [the] agreement").

31. *Id.*

Britain's war with France.³² And in 1837, during a rebellion in Canada, insurgents hired a U.S.-flagged steamer, the *Caroline*, to ferry supplies across the Niagara River into Canada.³³ The U.S. government had maintained a neutral approach toward the rebellion.³⁴ After complaints of U.S. failure to stem the flow of supplies to the insurgents, Great Britain took matters into its own hands and destroyed the *Caroline*.³⁵

The incident generated vigorous, and now well-known, legal and diplomatic correspondence between the United States and Great Britain.³⁶ Although most often regarded as an exposition on the right of self-defense between States, the *Caroline* correspondence is also instructive as to due diligence.³⁷ In fact, the *Caroline* incident reflects more closely a failure of due diligence than a case of attack giving rise to self-defense in light of the fact that logistical support to the Canadian rebels was not attributed to the United States but rather constituted private acts. In their resolution of the *Caroline* dispute, the parties agreed, "[A]ll that can be expected from either government in these cases is good faith, a sincere desire to preserve peace and do justice, [and] the use of *all proper means of prevention*"³⁸ Thus at least with respect to these two episodes, the Treaty of Washington represented an extension, rather than innovation, of notions of due diligence owed between States.

32. Treaty of Amity, Commerce and Navigation (Jay Treaty), Britannic Majesty-U.S., art. VII, Nov. 19, 1794, 8 Stat. 116; JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 998–99 (Washington, Gov't Printing Off. 1906) [hereinafter MOORE 1906]. Moore asserts the Jay Treaty arrangement served as an example to the later *Alabama* arbitration. *Id.* at 999.

33. KENNETH R. STEVENS, BORDER DIPLOMACY: THE *CAROLINE* AND MCLEOD AFFAIRS IN ANGLO-AMERICAN-CANADIAN RELATIONS, 1837-1842, at 12 (1989).

34. *Id.*

35. See MOORE 1906, *supra* note 32, at 919 (describing U.S. Secretary of State instructions to district attorneys in Northern states to abstain from involvement in the rebellion); see also MAURICE G. BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 321 (1984) (explaining President Van Buren's strict policy of neutrality in the rebellion, even after the *Caroline* was destroyed).

36. Matthew Waxman, *The 'Caroline' Affair in the Evolving International Law of Self-Defense*, LAWFARE (Aug. 28, 2018, 2:26 PM), <https://www.lawfareblog.com/caroline-affair> (relating historical details of the destruction of the *Caroline* and diplomatic and legal correspondence that followed).

37. Chadwick, *supra* note 26, at 92–94.

38. *Id.* at 93 (emphasis added). In response to the incident, the United States amended its domestic neutrality laws to better authorize federal interventions and seizures. See *id.* (citing Act of Mar. 10, 1838, ch. 31, 5 Stat. 212); see also MOORE 1906, *supra* note 32, at 920 (describing events leading to amendment of U.S. neutrality laws).

At the *Alabama* arbitration, Great Britain ultimately agreed to the U.S.-proposed rules, including the recitation of due diligence. The British side conceded, evidently, “to evince its desire of strengthening the friendly relations between the two countries.”³⁹ More importantly in terms of legal legacy, the Treaty of Washington’s due diligence obligation was not merely an ad hoc rule of decision. The States understood the rule, on the face of the treaty, to have a prospective and potentially multilateral effect as well. They explicitly agreed the rules of Article VI would govern their future relations and invited other maritime powers to accede to them.⁴⁰

With the Treaty in place, the *Alabama* arbitral tribunal met in Geneva in a room of the Hôtel de Ville that has since been preserved as a shrine of sorts to international law.⁴¹ Each side submitted a lengthy printed brief of its case and respective counter-case.⁴² Yet the most significant exchanges of views on due diligence actually took place later during a second merits stage of the arbitration. The supplemental session was arranged through persistent British maneuvering but facilitated in large part by Alexander Cockburn, the British member of the tribunal.⁴³ In this supplemental session, the tribunal agreed to hear arguments “on the question of ‘due diligence generally considered.’”⁴⁴

The British side immediately seized the added session as an opportunity to backpedal its commitment to the Treaty of Washington. The British advocates contended international law, as it stood at the time of the American Civil War, did not prohibit State conduct “in which no active interference in war is imputed to a neutral State.”⁴⁵ A lengthy British

39. Protocol of Conference, *supra* note 29, at 155.

40. 1871 Treaty of Washington, *supra* note 23, 17 Stat. at 865–66.

41. *Hall of the Alabama*, N.Y. TIMES, Mar. 23, 1924, at 15 (describing the preserved room of arbitration). The same room had recently hosted the Society for the Succor of the Wounded related to the Red Cross movement. CUSHING, *supra* note 18, at 76–77.

42. The U.S. case runs to 5,442 pages, and the British case to 2,823 pages as reprinted by the U.S. Printing Office. See 1-6 PAPERS RELATING TO THE TREATY OF WASHINGTON—GENEVA ARBITRATION (Wash., Gov’t Printing Off. 1872).

43. CUSHING, *supra* note 18, at 102–06, 111–13, 117–18, 121–23.

44. HACKETT, *supra* note 18, at 266–70, 292–93. Hackett was a secretary to Caleb Cushing, the senior U.S. counsel at the arbitration. *Id.* at vii. He estimates the British counsel had assumed their government would thwart the proceedings at an earlier stage. *Id.* at 266. When their government did not, they mustered only summary arguments which their member of the tribunal later arranged for them to augment in this supplementary stage. *Id.* at 270.

45. *Argument of Her Britannic Majesty’s Counsel on the Points Mentioned in the Resolution of the Arbitrators of July 25, 1872*, in SUPPLEMENT TO THE LONDON GAZETTE:

supplemental brief argued neither the law of neutrality *nor international principles of law* recognized a duty of diligence in the form of omission.⁴⁶ Instead, to constitute breaches of due diligence and neutrality, “some act must have been done by, or in aid of a belligerent, for the purposes of the war.”⁴⁷ Turning to the facts of the arbitration, Great Britain’s advocates emphasized that each ship involved in the dispute left British territory unarmed and in this respect was no different than other peaceful commercial trade by neutrals.⁴⁸

The British arguments faced a difficult passage from an influential international law treatise by former Britannic Majesty’s Advocate Robert Phillimore. Writing in 1871, just one year before the arbitrators met, Phillimore offered strong support for an international duty of due diligence between States. He observed, “[a] Government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign State.”⁴⁹ When considering a neutral States’ duties in the delivery of ships, Phillimore carefully distinguished the character of specific obligations of conduct with respect to arms and munitions from general duties with respect to due diligence.⁵⁰ Still, nothing in Phillimore’s treatise or reasoning significantly undermined his preceding observation that a general obligation of due diligence attached, even with respect to omissions by States. Acknowledging the relatively recent vintage of due diligence, and perhaps with the Treaty of Washington in mind, Phillimore reminded readers, “International Law is not stationary . . . [and] precedents of history . . . cannot be considered as decisive on the point at issue.”⁵¹

The British advocates’ account of Phillimore first lodged a descriptive rebuttal. They characterized his treatise as legally prospective in nature—an observation by a publicist not assumed, even by its author, to bind

OCTOBER 4, 1872, at 4595 (London, Authority of Her Majesty 1872) [hereinafter *Majesty’s Counsel Argument*].

46. *Id.*

47. *Id.*

48. *Id.* at 4596.

49. ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW xxi (Dublin, Hodges, Foster, & Co., 2d ed. 1871). Elaborating later, however, Phillimore explained that sales of contraband goods in a State’s own territory and even their delivery are consistent with neutrality. *Id.* at xxiii (citing *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 340 (1822)).

50. *Id.* at xxiii.

51. *Id.* at xxvii–xxviii.

sovereign States.⁵² Second, the British argued that Phillimore's thoughts on "*knowledge and sufferance*" were, by the usage of States, limited to the context of "hostile expeditions" into foreign territory.⁵³ The British side argued that omissions by States concerning the construction and sale of unarmed ships of war by private shipbuilders were not included by State practice within Phillimore's notion of breaches of due diligence.⁵⁴ Concluding, and perhaps in anticipation of losing on the question of due diligence generally, the British advocates emphasized that failure to prevent harm did not in every case amount to a failure of due diligence.⁵⁵ A duty of diligence is owed to a foreign government only when "timely information and evidence of a legal kind" gives rise to a "reasonable ground of belief" that harm would result.⁵⁶ With respect to the Confederate ships, the brief argued, no such duty arose nor was any such duty breached.⁵⁷

Predictably, the American reply moved past the question whether due diligence reflected a principle of international law, relying squarely on its incorporation into the Treaty of Washington by the parties.⁵⁸ The Treaty, they insisted, definitively settled any debate on due diligence "as the law of this Tribunal."⁵⁹ The United States reemphasized that the Treaty stated the obligation clearly, requiring no interpretation by the tribunal, but merely application to the facts of the arbitration.⁶⁰ Accordingly, the Americans directed the tribunal's attention to "whether the required due diligence [had] been applied in the actual conduct of affairs by Great Britain."⁶¹

Like the Treaty of Washington and Phillimore's treatise, U.S. arguments incorporated requirements of reasonableness and awareness or knowledge.⁶² The American advocates insisted a "'reasonable ground' . . . is an element of the question of *due diligence* always fairly to be

52. *Majesty's Counsel Argument*, *supra* note 45, at 4599.

53. *Id.* at 4600.

54. *Id.*

55. *Id.* at 4623.

56. *Id.*

57. *Id.*

58. *Argument of Mr. Evarts*, *supra* note 30, at 4638–39.

59. *Id.* at 4639.

60. *Id.* at 4641–42. The British brief on due diligence had invoked the Swiss jurist Emer de Vattel's canons of treaty interpretation to the exclusion, the American brief noted, of his most important, "it is not allowable to interpret what has no need of interpretation." *Id.* at 4641 (quoting without citation EMER DE VATTEL, *THE LAW OF NATIONS*, bk. II, ch. XVII, § 263 (Béla Kapossy & Richard Whatmore eds., 2008) (1758)).

61. *Id.* at 4639.

62. *Id.* at 4643.

considered” in judging the conduct of States and the extent of their knowledge of harm emanating from their territory.⁶³ With respect to the case of the British-supplied ships, the United States concluded,

It is made the clear and absolute duty of a nation to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a Power with which it is at peace, such vessel *having been* specially adapted in whole or in part within such jurisdiction to warlike use.⁶⁴

One month later, the arbitrators held that Great Britain had violated its duty of diligence as a neutral State by a unanimous decision as to the *Alabama* and a four-to-one decision as to the *C.S.A. Florida*, another British-built Confederate cruiser.⁶⁵ The tribunal based its legal conclusions on the Treaty of Washington but also cited “principles of international law.”⁶⁶ Importantly, the tribunal did not attribute construction or transfer of the ships to the British government as acts of State.⁶⁷ However, it found Great Britain had “failed, by omission, to fulfil the duties” of a neutral State.⁶⁸ By permitting the *Alabama* and other ships to launch, to the serious detriment of the United States, Britain failed to exercise the duty of diligence owed to a belligerent State by a neutral power.⁶⁹ Specifically, the tribunal observed, Great Britain failed to take “effective measures of prevention” regarding the ships’ deployment and later wrongfully admitted these ships to its colonial ports.⁷⁰ The tribunal awarded the United States \$15.5 million for its claims related to direct damage caused by the ships.⁷¹

Although frequently regarded as a ruling on the obligations of neutral States during armed conflict, the *Alabama* arbitration also presents an early

63. *Id.*

64. *Id.* at 4644.

65. Alabama Claims of the United States of America Against Great Britain (Gr. Brit. v. U.S.), 29 R.I.A.A. 125, 130–31 (Treaty of Wash. Arb. Trib. 1872).

66. *Id.* at 132.

67. *See id.*

68. *Id.* at 131.

69. *See id.* at 130–31.

70. *Id.* at 130.

71. *Id.* at 134. Though small in present terms, at the time of the arbitration the award amounted to nearly five percent of the British overall budget. Bingham, *supra* note 12, at 1. However, the tribunal rejected U.S. claims for costs incurred pursuing the ships, classifying them as “general expenses of the war” rather than compensable damages. Similarly, it rejected other indirect, or as the United States had termed them, “national” expenses such as lost prospective earnings due to their contingent and uncertain nature. *Alabama Claims of the United States of America Against Great Britain*, 29 R.I.A.A. at 133.

picture of States' general international obligations with respect to due diligence. Guided by the parties' own consensus statements of law codified in a treaty, the tribunal clearly framed British conduct as both a breach of its duty of due diligence to safeguard a State against harm emanating from its territory as well as a failing of neutrality. In a qualitative sense, the tribunal affirmed due diligence as a primary rule of conduct in international law. The tribunal found States owed to one another a free-standing obligation of due diligence that accompanied supporting legal duties in the then-burgeoning international legal system. The British duty of diligence arose both with respect to the free-standing obligations of Great Britain as a neutral State as well as under an independent and general duty of diligence to other sovereigns.

To be sure, the tribunal left aspects of the due diligence obligation underdeveloped. It is unclear, for instance, whether the parties or tribunal would have detected or applied a generalized or free-standing obligation of due diligence with respect to harm that did not involve extensive physical destruction and massive economic loss. But a baseline obligation of due diligence, as a matter of general international law, was clear from both the Treaty of Washington and the tribunal's decision. Moreover, rather than a failing or oversight, the tribunal's decision not to develop or detect the lower end of a damage spectrum seems entirely appropriate in light of its limited adjudicative rather than legislative function.⁷²

The motives behind the parties' legal positions during the dispute remain uncertain, particularly on the British side. The Treaty of Washington bears evidence of a certain legal magnanimity on the part of Great Britain. Perhaps under the facts, but almost certainly according to the law described in the Treaty, Great Britain was likely to lose the arbitration all along.⁷³ Chief Justice Bingham observed the arbitration was, "one of the very few instances in history when the world's leading nation, in the plenitude of its power, has agreed to submit an issue of great national moment to the decision of a body in which it could be, as it was, heavily outvoted."⁷⁴

72. See *Alabama Claims of the United States of America Against Great Britain*, 29 R.I.A.A. at 128–29.

73. HACKETT, *supra* note 18, at 44 (quoting 2 EDMOND FITZMAURICE, *THE LIFE OF GRANVILLE GEORGE LEVESON GOWER SECOND EARL GRANVILLE* 107 (New York, Longmans, Green, & Co. 1906)). Fitzmaurice observed, "A proud nation . . . consented but unwillingly to be dragged before an international tribunal without precedent in the history of nations, and under circumstance in which, on the main issue at least, the judgment was certain to be adverse." FITZMAURICE, *supra*, at 107.

74. Bingham, *supra* note 12, at 24.

Prime Minister Gladstone confirmed as much, characterizing the British loss in the arbitration “‘as dust in the balance compared with the moral example set’ of two proud nations going ‘in peace and concord before a judicial tribunal’ rather than ‘resorting to the arbitrament of the sword.’”⁷⁵

Personalities, as ever, surely influenced the peaceful resolution of the *Alabama* claims as well. Reflecting later, Caleb Cushing, the U.S. Counsel at the arbitration, observed that replacement of the unfailingly recalcitrant Lord Russell by the more conciliatory Lord Stanley as British Minister of Foreign Affairs, as much as any factor, explained the successful negotiation and ratification of the Treaty of Washington.⁷⁶ Frank Hackett, a legal advisor to Cushing, praised the eventual British embrace of a “more generous sense of international duty.”⁷⁷

On the American side, Massachusetts Senator Charles Sumner had secured defeat in the U.S. Senate of a draft treaty on the *Alabama* claims, which was named the Clarendon-Johnson Treaty.⁷⁸ His campaign against U.S. concessions, which included a fiery and widely published speech intended to stoke U.S. anger over the situation, significantly irritated Great Britain, served as a compelling demonstration of American resolve, and likely informed British concessions as well.⁷⁹

British legislative records also suggest a strategic motive for the British allowances, related to brewing turmoil in Europe. Concern for renewed war with Russia over Black Sea claims grew in light of France’s defeat at the hands of Prussia in 1871.⁸⁰ A communication to the House of Lords explained the British decision to dispatch the diplomatic delegation in 1871 to negotiate the Treaty of Washington “in view of the possibility of further European complications, to look at the international relations of Great Britain with foreign states from a new standpoint.”⁸¹ In late 1870, the First Lord of the Admiralty, Hugh Childers, had advised the Foreign Secretary Lord Granville, in light of potential war with Russia, “all cause of difference with the United States should if possible be got out of the way.”⁸²

75. *Id.* (quoting RICHARD SHANNON, GLADSTONE: HEROIC MINISTER, 1865-1898, at 114 (1999)).

76. CUSHING, *supra* note 18, at 17–18.

77. HACKETT, *supra* note 18, at 376.

78. CUSHING, *supra* note 18, at 18, 39.

79. *Id.* at 18.

80. HACKETT, *supra* note 18, at 175–76.

81. *Id.* at 175 (quoting FITZMAURICE, *supra* note 73, at 81).

82. *Id.* at 176 n.1 (quoting 1 SPENCER CHILDERS, LIFE AND CORRESPONDENCE OF THE RIGHT HONOURABLE HUGH E. CHILDERS 173–74 (1901)).

A later study of the arbitration suggests economic motives for the British settlement as well. British financiers and banks had invested heavily in U.S. industry, transport, natural resources, and agriculture.⁸³ Failure to peaceably settle the *Alabama* claims would have wrought severe interruptions to profitable trade and investments.⁸⁴ Additionally, the possibility of U.S. debt cancelations weighed heavily in British diplomatic calculations.⁸⁵ Although the sums involved in the arbitration were staggering at the time, war over the *Alabama* claims would not have proved economically efficient by any measure.⁸⁶ These British financial interests almost certainly informed the government's conciliatory instructions to its diplomatic delegation and the seemingly altruistic international legal positions it conceded to secure the Treaty.⁸⁷

As vindication of British magnanimity (or grand strategy), the Treaty of Washington and the *Alabama* arbitration soon earned high praise both for their "enlightened statesmanship" toward peace as well as for their expositions of States' international legal duties.⁸⁸ The British statesman Viscount John Morley considered the arbitration "the most notable victory in the nineteenth century of the noble art of preventive diplomacy."⁸⁹ Prior to the *Alabama* claims, relations between the United States and Great Britain had been at their lowest point since the War of 1812.⁹⁰

Ill feelings had extended to popular sentiment in the United States as well. The American jurist John Bassett Moore noted a "deep and pent-up feeling of national injury [among] the mass of the people of the United States."⁹¹ The arbitration occasioned the end of nearly a century of

83. COOK, *supra* note 20, at 241.

84. *See id.*

85. *Id.*

86. *See id.*

87. *Id.* Cook estimates, however, that the United States, starved of foreign capital, needed Great Britain in an economic sense and stood to suffer a greater investment loss in case of war. *Id.* He estimates financial considerations hampered the American negotiators more than their counterparts. *Id.*

88. MOORE 1898, *supra* note 28, at 652–53; HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 216 (1927) (noting the arbitration was "the first instance of settling a dispute which raised high national feeling on both sides").

89. HACKETT, *supra* note 18, at 376 (quoting 3 JOHN MORLEY, THE LIFE OF WILLIAM EWERT GLADSTONE 413 (1903)).

90. MOORE 1898, *supra* note 28, at 495.

91. Bingham, *supra* note 12, at 2 (quoting MOORE 1898, *supra* note 28, at 495). An inflammatory Anglophobic speech by the Massachusetts Senator Charles Sumner whipped up antagonism and advocated an outrageous escalation of reparation demands including cession of Canada to the United States. CHARLES SUMNER, THE ALABAMA CLAIMS, SPEECH

intermittent war between the U.S. and U.K. and the beginning of decades of “close and successful Anglo-American cooperation.”⁹²

Adulations aside, it is worth entertaining the argument by at least one modern estimate that the Treaty of Washington and the *Alabama* decision did not fulfill their lofty mandate as legal precedent.⁹³ The Treaty and arbitration certainly did not usher an international legal revolution of the sort hoped for by international law and arbitral enthusiasts of the day.⁹⁴ The critical assessment is likely accurate when considered from the perspective of international arbitration as a pervasive means of peaceful settlement of disputes between powerful States. The critique does not account, however, for the extensive and enduring precedents set for due diligence specifically. The parties’ commitment to due diligence as a standard for their future and relations, as well as their call for the community of States to do similarly, stands as a prominent portent of future resorts to due diligence as a means of settling differences borne out in the work of States, publicists, and courts.

The work of the *Alabama* tribunal quickly found significant support from domestic courts and, later, international courts. In 1887, the U.S. Supreme Court heard a challenge to a federal law prohibiting counterfeits of foreign government-issued notes, bonds, and securities in *United States v. Arjona*.⁹⁵ Although the defendant demurred on an indictment for possession of engraved plates capable of producing bank notes of “the state of Bolivar. . . [in] the United States of Columbia [sic],” he challenged the sufficiency of the indictment, arguing *inter alia*, the statutes exceeded Congress’s power to “define and punish . . . offences against the law of nations.”⁹⁶ Upholding the statute, the Court turned to de Vattel’s *Law of Nations* and easily found support for both a specific international law prohibition on condoning or tolerating counterfeiters as well as a general international law duty of diligence to cease and redress harm to other States.⁹⁷ The Court observed,

OF THE HONOURABLE CHARLES SUMNER, DELIVERED IN EXECUTIVE SESSION OF THE UNITED STATES SENATE 19 (London, Savill, Edwards & Co. 1869). In the speech’s aftermath, an American consul reported from London widespread fear of war with the United States. See COOK, *supra* note 20, at 84 (citing Letter from Freeman H. Morse to William Pitt Fessenden, May 17, 1869, in FESSENDEN PAPERS (1908)).

92. Bingham, *supra* note 12, at 1 (citing ROY JENKINS, GLADSTONE 359 (1995)).

93. COOK, *supra* note 20, at 244.

94. *Id.*

95. 120 U.S. 479, 481–82 (1887).

96. *Id.* at 482, 484; U.S. CONST. art. I, § 8, cl. 10.

97. *Arjona*, 120 U.S. at 484 (quoting EMER DE VATTEL, THE LAW OF NATIONS § 108 (Joseph Chitty trans., 7th ed. 1849) (1760)).

“The law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof.”⁹⁸ A breach of due diligence, the Court noted, “may not, perhaps, furnish sufficient cause for war, but it would certainly give just ground of complaint.”⁹⁹

Although under altered nomenclature, other States also eagerly codified notions of due diligence identified in the *Alabama* claims into early twentieth century multilateral treaties. For example, as part of the 1907 Hague Peace Conference effort to convert burgeoning customs and usages in the international law of conflict management to treaty form, States addressed the law of maritime neutrality.¹⁰⁰ Conflicts including the Spanish-American War, the Anglo-Boer War, and most immediately the Russo-Japanese War, resurrected questions concerning the extent and nature of duties of neutral States.¹⁰¹ The rules of the Treaty of Washington figured prominently in Hague Peace Conference debates on the subject.¹⁰² Despite its earlier reticence, Great Britain fully reproduced the Treaty of Washington’s due diligence rules in the draft rules it submitted to the Conference.¹⁰³ Noting some “obscurity” associated with the phrase due diligence, State delegates at The Hague substituted descriptive passages indicating a neutral State is “bound to employ the means at its disposal” and to “employ the same vigilance” in its international legal duties into the treaty.¹⁰⁴ But both the rule and spirit of due diligence described in the Treaty of Washington and the *Alabama* decision were fully incorporated by The Hague Conference’s work.¹⁰⁵

Criticizing the Treaty of Washington and the *Alabama* arbitration as inconsequential also disregards weighty acknowledgments of due diligence as a principle and baseline rule of international law by publicists. Prominent publicists soon confirmed the concept of due diligence as an aspect of

98. *Id.* at 484.

99. *Id.* at 487.

100. See generally A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES (1909).

101. See *id.* at 458.

102. See *id.* at 458–59. A questionnaire disseminated to the participating States and used to survey States’ initial views included copies of the rules of the Treaty of Washington. *Id.*

103. See *id.* at 465.

104. See *id.* (citing M. Renault, *Projet d’une Convention Concernant les Droits et les Devoirs des Puissances Neutres en cas de Guerre Maritime*, in 1 DEUXIÈME CONFÉRENCE INTERNATIONALE DE LA PAIX 295, 302 (1907)); see also Convention Concerning the Rights and Duties of Neutral Powers in Naval War art. 8, Oct. 18, 1907, 36 Stat. 2415.

105. See HIGGINS, *supra* note 100, at 387, 459, 464–65.

general international law. In 1905, Professor John B. Moore's survey of State practice in international law offered firm support for the role of due diligence between States to address transboundary harm.¹⁰⁶ He curated a succession of communications from various U.S. State Department officials reciting obligations of diligence owed by foreign States.¹⁰⁷ A representative U.S. communication asserted a State was liable, "not only for any injury done by it, or with its permission . . . but for *any such injury* which by the exercise of reasonable care it could have averted."¹⁰⁸

German jurist Lassa Oppenheim similarly acknowledged "international delinquency," including acts of "culpable negligence" resulting in injury to another State, as a matter of general international law.¹⁰⁹ Addressing the context of neutrality specifically, he concluded responsibility attached to a neutral State for injury to a belligerent State "as he could by due diligence have prevented, and which by culpable negligence he failed to prevent."¹¹⁰ Oppenheim quibbled with the precise formulation of duty articulated by the *Alabama* tribunal. Although he surmised that the *Alabama* tribunal's formulation of the due diligence obligation was not part of the "universal rules of International Law," he based that rejection specifically on its conclusion that due diligence involved weighing risks of injury to other States and the cost of action by the neutral.¹¹¹ He ultimately concluded due diligence was reflected in general international law principles but merely required reasonable conduct in light of attending circumstances and conditions.¹¹²

For his part, Hersch Lauterpacht, a judge on the International Court of Justice, later characterized the *Alabama* tribunal's notion of due diligence as imported from private law concepts. But he strongly supported their inclusion in general international law.¹¹³ The *Alabama* parties' arguments, he noted, drew heavily on references to negligence in Roman and

106. See MOORE 1906, *supra* note 32, at 791.

107. It is worth acknowledging that Moore's assessments of international law were influenced heavily by his personal involvement in the practices of the U.S. State Department. See W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255, 256 (1994).

108. MOORE 1906, *supra* note 32, at 791 (citing Report of Francis Wharton, Solicitor of U.S. Dep't of State, to Mr. Scruggs, Minister to Colombia (May 19, 1885)).

109. 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 156 (Ronald F. Roxburgh ed., 3d ed. 1920).

110. 2 *id.* § 363 (2d ed. 1912).

111. *Id.* § 335.

112. *Id.* § 363.

113. See LAUTERPACHT, *supra* note 88, at 219.

continental law as applied by domestic courts in private disputes.¹¹⁴ Lauterpacht enthusiastically reconciled the *Alabama* tribunal's notion of due diligence with settled objective standards of reasonable behavior by emphasizing the tribunal's consideration of a "reasonable estimate on the part of the defaulting State of the possible consequences of its negligence."¹¹⁵

Due diligence soon found support at the International Court of Justice (ICJ) as well in the *Corfu Channel* case. In October 1946, two British Navy destroyers lawfully present in Albanian territorial waters struck hidden mines.¹¹⁶ After its claims stalled at the United Nations Security Council, the United Kingdom (U.K.) filed at the ICJ, alleging Albania had, *inter alia*, failed its duty to warn the ships of the mines in breach of treaty law and "general principles of international law."¹¹⁷ After concluding Albania must have been aware of the mines, the Court affirmed the second U.K. claim, reciting, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."¹¹⁸ The Court's endorsement of due diligence has been criticized as *obiter dictum*.¹¹⁹ Yet the observation does not seem an entirely inappropriate statement of law in the case when viewed as an expression of an underlying principle operating contemporaneously with a narrower rule for decision and made in direct response to a State litigant's claim. Further, the Court held that the 1907 Hague Convention VIII—the primary source of the U.K. treaty claim—applied only during war and was not relevant to the case in a formal sense.¹²⁰ As a result, the U.K. resort to the international law principle of due diligence seems justified. Nor was Albania a State party to the Hague Convention, surely explaining, if not excusing, the Court's resort to the ambiguity of a by-then widely accepted principle over sector specific rules

114. *Id.* The passages Lauterpacht cites for this proposition are available in a compilation of diplomatic papers on the Treaty of Washington. TREATY OF WASHINGTON PAPERS, *supra* note 22, at 64–68.

115. LAUTERPACHT, *supra* note 88, at 218.

116. Memorial of United Kingdom, *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. Pleadings 19, 20–21 (Sept. 30, 1947).

117. *Id.* at 21.

118. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9).

119. See, e.g., Jörg Schildknecht, *Belligerent Rights and Obligations in International Straits*, in OPERATIONAL LAW IN INTERNATIONAL STRAITS AND CURRENT MARITIME SECURITY CHALLENGES 67, 78 (Jörg Schildknecht et al. eds., 2018); Greg Lynham, *The Sic Utere Principle as Customary International Law: A Case of Wishful Thinking?*, 2 JAMES COOK U. L. REV. 172, 184 (1995).

120. *Corfu Channel*, 1949 I.C.J. at 22.

relating to mines at sea.¹²¹ Even Judge Azevedo's dissenting opinion agreed: the U.K. pleadings expressly invoked general principles of international law, clearly inviting the Court to rule in that respect.¹²²

In sum, the Treaty of Washington and the resulting *Alabama* claims decision illustrate that nineteenth-century U.S. and British foreign relations practices clearly acknowledged a duty of due diligence owed to and from other States as a matter of general international law. These early expressions emerged earliest in contexts of dispute settlement, particularly arising with respect to duties of neutrality such as the Jay Treaty and the Treaty of Washington, and by analogy in the *Caroline* correspondence. But they found clearest expression in the Treaty of Washington and at States' positions at later treaty conferences. The U.S. and other States' motives for conceding duties of diligence were varied but found form in binding legal terms, confirmed by a high-profile international treaty conference. Due diligence proved particularly useful in contexts such as those involving the *Alabama* and the *Caroline* where private parties were the proximate source of harm or in the *Corfu Channel* case, where the true source of harm could not be discerned. Due diligence operated as a convenient middle ground, permitting an offending State to disclaim attribution of harm while conceding an omission to the satisfaction of an injured State. Publicists and international tribunals soon seized on these concessions of sovereignty to law both as effective tools of peaceful settlements of disputes and also as doctrinal aspects of States' general international legal obligations toward one another.

B. The Trail Smelter Arbitration

Established in 1896 in British Columbia, Canada along the Columbia River, the Trail smelter processed locally mined ore to produce zinc and lead.¹²³ Originally built under U.S. auspices, the smelter was acquired in 1906 by the Consolidated Mining and Smelting Company of Canada (Consolidated), a subsidiary of the Canadian Pacific Railway.¹²⁴ Consolidated grew the facility into the largest and best equipped smelter in

121. *See id.*

122. *Id.* at 84 (Azevedo, J., dissenting); *see* Memorial of United Kingdom, *supra* note 116, at 21.

123. *See* R.S. DEAN & R.E. SWAIN, U.S. DEP'T OF THE INTERIOR, REPORT SUBMITTED TO THE TRAIL SMELTER ARBITRAL TRIBUNAL 6-7 (1944).

124. Kenneth B. Hoffman, *State Responsibility in International Law and Transboundary Pollution Injuries*, 25 INT'L & COMPAR. L.Q. 509, 521 (1976) (stating the Canadian Pacific Railway was "the most powerful commercial activity in the Dominion").

North America.¹²⁵ By 1927, construction of twin 400-foot exhaust stacks further increased the smelter's production capacity.¹²⁶

The Trail smelter sat approximately seven miles from Canada's border with the United States (eleven miles by the course of the Columbia River).¹²⁷ Winds in the region generally moved southwest along the river valley.¹²⁸ On the U.S. side, the downwind region was devoted chiefly to agriculture and logging.¹²⁹ Several small towns in the state of Washington sat within fifty miles of the Trail smelter.¹³⁰ A U.S.-owned copper smelter had operated in the U.S. town closest to the border but was dismantled by 1921.¹³¹ However, sulfur dioxide recorders detected strong accumulations even after the U.S. smelter closed.¹³² Complaints by landowners and farmers of crop and timber damage mounted through the 1920s. They alleged the increased height of the Trail smelter's new stacks widened the downwind area affected, including U.S. territory.¹³³ Smoke from the smelter was reportedly visible as far as thirty miles downwind.¹³⁴

In late 1927, after Consolidated had sporadically concluded private damages settlements with several landowners in Washington state, the U.S. government proposed the issue be dealt with diplomatically.¹³⁵ Negotiations

125. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1917 (Convention of Ottawa Tribunal 1938 & 1941); see also Statement of Facts Submitted by the Agent for the Gov't of Can., Trail Smelter (U.S. v. Can.), 3 R.I.A.A. Pleadings 3, 3 (May 3, 1936).

126. Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 260 (1971).

127. See Statement of Facts Submitted by the Agent for the Gov't of Can., *supra* note 125, at 3.

128. *Id.*

129. *Id.*

130. Trail Smelter, 3 R.I.A.A. at 1913–14.

131. See Statement of Facts Submitted by the Agent for the Gov't of Can., *supra* note 125, at 3 (describing the Breen Copper Smelter at Northport, Washington).

132. See *id.* at 14.

133. Trail Smelter, 3 R.I.A.A. at 1917.

134. D.H. Dinwoodie, *The Politics of International Pollution Control: The Trail Smelter Case*, 27 INT'L J. 219, 221 (1972).

135. Trail Smelter, 3 R.I.A.A. at 1918; Letter from W.R. Castle, U.S. Sec'y of State, to William Phillips, U.S. Minister in Can. (Dec. 20, 1927), <https://history.state.gov/historicaldocuments/frus1928v02/d36>. Commentators have remarked that the arbitration reflected not only a surprising result in international law but also a peculiar conversion of essentially private parties' disputes, more suited to private domestic litigation, into a matter of international law for a transnational tribunal. See, e.g., Martijn van de Kerkof, *The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute*, 27 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 68, 69–70 (2011).

quickly stalled and by July 1928, the United States and Canada referred the dispute to the standing International Joint Commission, created previously to address border-related issues.¹³⁶ After collecting evidence in the affected region, the Commission issued a non-binding report dated February 28, 1931. The Commission unanimously recommended Canada pay the United States \$350,000 (U.S.) in damages.¹³⁷

Initial U.S. government enthusiasm for the Commission's recommendation soon waned.¹³⁸ Affected towns and farms in Washington State received the Commission's report poorly, deeming reparations inadequate and promises to mitigate future pollution unreliable.¹³⁹ The Commission had limited its recommendation to damage inflicted prior to 1932 and had surmised pollution would soon cease by the end of 1931.¹⁴⁰ The landowners' skepticism proved warranted; extensive pollution persisted from 1932 at least through 1937.¹⁴¹

After intense diplomatic wrangling, Canada and the United States finally agreed to resolve the dispute through binding international arbitration,

136. The Commission was drawn under the auspices of a preexisting treaty between Canada and the United States. *See* Boundary Waters Treaty of 1909, Gr. Brit.-U.S., art. IX, Jan. 11, 1909, 36 Stat. 2448.

137. Rep. and Recommendations of the Int'l Joint Comm'n Established by the Treaty Concluded Between the U.S. & Can. on 11 Jan. 1909, Signed at Toronto on 28 Feb. 1931, 29 R.I.A.A. 365, 368.

138. Dinwoodie, *supra* note 134, at 227–28 (citing Memorandum of Stimson's Press Conference, U.S. Dep't of State (Mar. 5, 1931)). Professor Dinwoodie attributes initial U.S. support to President Herbert Hoover and Secretary of State Henry Stimson's ambitions for international law as a means for securing international peace. *Id.*

139. Hoffman, *supra* note 124, at 515.

140. The General Manager of the smelter indicated that imminent installation of sulfuric acid units would significantly reduce the amount of sulfur emissions. *Trail Smelter*, 3 R.I.A.A. at 1919.

141. Letter from Henry L. Stimson, U.S. Sec'y of State, to Pierre de L. Boal, U.S. Chargé in Canada (Feb. 10, 1933), <https://history.state.gov/historicaldocuments/frus1933v02/d37>. President Roosevelt suggested the United States and Canada submit the dispute to the Permanent Court of International Justice, or as he called it, "the World Court at [T]he Hague." Letter from Franklin D. Roosevelt, President of the U.S., to William Phillips, U.S. Under Sec'y of State (Dec. 6, 1934), <https://history.state.gov/historicaldocuments/frus1934v01/d719>. The U.S. Under Secretary of State, William Phillips, raised the possibility of international litigation at the PCIJ in a discussion with Canadian representatives. Memorandum by William Phillips, U.S. Under Sec'y of State (Dec. 13, 1934), <https://history.state.gov/historicaldocuments/frus1934v01/d720>. Canada did not respond favorably. *Id.*

memorializing their agreement in a bilateral treaty.¹⁴² Under the treaty, Canada agreed in advance to pay the United States \$350,000 for all damage prior to January 1932.¹⁴³ The remainder of the treaty outlined procedures for the arbitration of damages from 1932 forward. The treaty framed four questions, including the legal questions of Canadian liability for further damages and whether Canada owed a duty to cease the operations of the Trail smelter.¹⁴⁴ The parties' choice of law incorporated U.S. law and practice, "International Law and Practice," and, in a seeming nod to equity, consideration of "a solution just to all parties concerned."¹⁴⁵ Some sources trace the parties' resort to U.S. law as an effort to simplify the tribunal's effort to address the meaning and scope of the term "damage" during the arbitration.¹⁴⁶ However, writing after the dispute, the Canadian Legal Adviser to the Minister of Foreign Affairs explained the Canadian side regarded U.S. tort law as far more favorable to Consolidated and the Government of Canada. He indicated that incorporation of Canadian tort law would have been "disastrous to the Smelter and to the economy of an important part of British Columbia."¹⁴⁷

The Trail Smelter tribunal, comprised of three members, including a member from each party and a neutral chairman,¹⁴⁸ issued its decision in two phases beginning on April 16, 1938.¹⁴⁹ In light of the treaty's concession of Canadian indemnity for damages prior to 1932, the arbitral tribunal limited its consideration to liability and damage from 1932 forward.¹⁵⁰ At the outset of its decision, the tribunal noted the difficulty, even the impossibility, of determining the precise amount of economic damage caused by the Trail smelter.¹⁵¹ Turning to U.S. tort law, including U.S. Supreme Court opinions, the tribunal determined that an

142. Convention for Settlement of the Damages Resulting from Operation of Smelter at Trail, British Columbia, Can.-U.S., Apr. 15, 1935, 49 Stat. 3245 [hereinafter Can.-U.S. Smelter Convention].

143. *Id.* art. I.

144. *Id.* art. III.

145. *Id.* art. IV.

146. *See, e.g.,* Rubin, *supra* note 126, at 263.

147. John E. Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. INT'L L. 213, 227 (1963); *see also* Rubin, *supra* note 126, at 263.

148. Can.-U.S. Smelter Convention, *supra* note 142, art. II. The Belgian jurist Jan Fans Hostie of Belgium served as Chairman. *See* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1911 (Convention of Ottawa Tribunal 1938 & 1941).

149. *Trail Smelter*, 3 R.I.A.A. at 1905.

150. *Id.* at 1920.

151. *See id.*

approximation would be legally sufficient to avoid “a perversion of fundamental principles of justice.”¹⁵² On this basis, the tribunal moved to the question of causation.

In its submissions, the Canadian government insisted the Trail smelter caused no damage after January 1, 1932.¹⁵³ Readings from sulfur dioxide detectors and measurements of prevailing upper air currents along the Columbia River valley ultimately convinced the tribunal otherwise.¹⁵⁴ Inspections identified an area of damage from the Trail smelter extending approximately six miles into U.S. territory.¹⁵⁵ The tribunal turned again to U.S. tort law to determine indemnity amounts for various categories of damage.¹⁵⁶ Although it rejected or declined to address several U.S. claims, including “damages in respect of the wrong done the United States in violation of sovereignty,” the tribunal awarded an additional \$78,000 for damages relating to loss of land use, reduced value of timber, and crop damage after 1931.¹⁵⁷

The tribunal then considered the legal questions of whether Canada must cease further damage by the smelter and what measures must be adopted. On the former issue, and in its most important finding as a matter of international law, the tribunal determined Canada owed a duty to refrain from permitting future damage.¹⁵⁸ To be clear, the tribunal did not attribute pollution from the Trail smelter to the Government of Canada. Rather the decision faulted Canada’s omission or failure to cease, as territorial sovereign, particulate emissions into the United States.

The international legal support for this determination was unclear. The 1938 tribunal decision cited no legal authority for the question of a Canadian due diligence in this respect. On the issue of future measures of prevention, the tribunal delayed, requesting further information on available

152. *Id.* (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

153. *Id.* at 1922.

154. Curiously, the tribunal rejected a theory presented by witnesses from both parties that surface winds, rather than upper air currents, were responsible for carrying smelter emissions from the smelter to the affected areas of the United States. *Id.* at 1922–23.

155. *Id.* at 1924.

156. *Id.* at 1925, 1928–29 (first citing *Ralston v. United Verde Copper Co.*, 37 F.2d 180, 183–84 (D. Ariz. 1929); and then citing 3 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 937a (9th ed. 1920)).

157. *Id.* at 1932–33. The tribunal did not rule on the U.S. sovereignty claim after determining it was not anticipated in the scope the Convention. *Id.* at 1932.

158. *Id.* at 1934.

technology.¹⁵⁹ The tribunal did, however, order installation of detection equipment at the Trail smelter to record emissions and to report back to the tribunal pending resolution of the preceding technical questions.¹⁶⁰ The tribunal also capped emissions to levels it determined would not result in further damage to U.S. territory.¹⁶¹

In 1941, after receiving updated data from the polluted region, the tribunal issued its final decision. A U.S. petition to revisit and recalculate the damages awarded in the 1938 decision led the tribunal to consider again the question of choice of law it had evaded in its prior decision.¹⁶² The tribunal rejected the U.S. petition, determining that the 1938 award amounted to *res judicata* as a matter of international law.¹⁶³ The tribunal conceded that it had applied national law on some questions, as anticipated by the Convention that formed it.¹⁶⁴ However, it emphasized an international tribunal could not “depart from the rules of international law in favor of divergent rules of national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based.”¹⁶⁵ The tribunal noted the Convention limited application of U.S. law to “cognate” questions and reserved the main legal issues, or as the tribunal termed them “general questions of law,” to resolution by international law.¹⁶⁶

Returning to the international legal question of a Canadian duty to cease further damage, the tribunal’s 1941 decision again noted debate regarding whether these questions should be addressed under U.S. tort law or international law. The tribunal resolved the question by noting sufficient conformity of U.S. law with general international law on the subject of cross-border harm.¹⁶⁷ In particular, the tribunal cited ongoing work on State responsibility, stating, “A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.”¹⁶⁸ The tribunal also cited the *Alabama* arbitration and other resorts to a

159. *Id.*

160. *Id.* at 1934–35.

161. *Id.* at 1936.

162. *Id.* at 1948.

163. *Id.* at 1952.

164. *See id.* at 1949–50.

165. *Id.*

166. *Id.* at 1950.

167. *Id.* at 1963.

168. *Id.* (quoting CLYDE EAGLETON, RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928)).

diligence principle between States, noting Canada had not questioned any such precedent at any stage of the proceeding.¹⁶⁹

The only serious question concerning the state of international law, the tribunal noted, was what constituted an injury for purposes of the due diligence principle.¹⁷⁰ On this question the tribunal, as it had previously done in calculating damages, turned to U.S. national law.¹⁷¹ On these bases, the tribunal held that both U.S. law and principles of international law identified “serious consequence . . . established by clear and convincing evidence” as the relevant injury threshold for purposes of diligence.¹⁷²

The tribunal then announced its formulation of due diligence, indicating “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another.”¹⁷³ Applying the U.S. and international standards to ongoing and predicted emissions by the smelter, the tribunal held, “the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter.”¹⁷⁴ Accordingly, the tribunal devised a series of detailed operating conditions and regulations for its continued operation estimated to keep harm below the threshold required as a matter of international diligence.¹⁷⁵

Like the *Alabama* arbitral decision, the *Trail Smelter* decision attracted significant private commentary and produced a lasting and influential legal legacy. An early scholarly—though it must be emphasized, neither detached nor neutral—treatment of the *Trail Smelter* decision characterized the case as based on private nuisance rather than the classic fare of international law.¹⁷⁶ International law, it was estimated, operated exclusively with respect to inter-State conduct and duties.¹⁷⁷ The critique argued the decision only overcame these difficulties by “transmuting the claims by individuals against the Trail Smelter into claims sounding in

169. *Id.*

170. *Id.*

171. *Id.* at 1964–65 (surveying U.S. Supreme Court cases on air and water pollution between states).

172. *Id.* at 1965.

173. *Id.*

174. *Id.*

175. *Id.* at 1974–78. The capital cost of the tribunal’s mitigation regime reportedly ran to \$20 million. Read, *supra* note 147, at 221.

176. See Read, *supra* note 147, at 222. Read, a former Justice of the International Court of Justice, may not have provided an entirely objective analysis in his article. He had served as Legal Adviser to the Minister of Foreign Affairs of Canada for the duration of the *Trail Smelter* dispute. See *id.* at 213, 225.

177. See *id.* at 223.

international tort by the United States against Canada.”¹⁷⁸ In this respect, the critique claimed the decision represented a departure from, rather than an application of, the usual convention for international legal claims.¹⁷⁹

The same account also suggested that benevolence on the part of Canada rather than correct application of international law explained the arbitral result. Neither of the prime ministers that held office during the dispute approached the negotiations with the United States as “horse-trading” or zero-sum prospects.¹⁸⁰ Both Canadian leaders reportedly instructed their representatives to pursue an outcome that would profit both sides.¹⁸¹ The dispute also coincided with a reduction in Canada’s imperial ties to the United Kingdom, perhaps reflecting a turn toward closer relations with the United States.¹⁸² The Canadians’ concessions have also been explained as inducements for the United States to reduce or eliminate trade tariffs.¹⁸³ By this explanation, the Convention that established the arbitral tribunal reflected a combination of Canadian goodwill and perceived opportunity as much as, or more than, prevailing international law.¹⁸⁴

A later academic examination of the decision also criticized the tribunal’s resort to international law as both selective and overreaching.¹⁸⁵ According to Professor Rubin, the *Trail Smelter* tribunal exceeded the parties’ mandate by resorting to international law to resolve questions answerable under U.S. law, such as whether its 1938 decision amounted to *res judicata*.¹⁸⁶ Examining the *travaux* that produced the parties’ instructions to the tribunal on law, Professor Rubin argued the United States and Canada had determined there was “not much international law available dealing with international nuisance.”¹⁸⁷ He explained that the need to supplement international law with domestic precedent was essential to providing the tribunal an effective rule for decision and was one of the few

178. *Id.*

179. *See id.* at 225. Others have questioned the decision’s precedential value despite its prominent place in the legal canon. Karin Michelson, *Rereading Trail Smelter*, 31 CAN. Y.B. INT’L L. 219, 219–20 (1993) (regarding the decision as “more an object of reverence than a subject of analysis”).

180. Read, *supra* note 147, at 225.

181. *Id.*

182. Dinwoodie, *supra* note 134, at 224.

183. *Id.* at 230.

184. *See* Read, *supra* note 147, at 225.

185. *See generally* Rubin, *supra* note 126.

186. *Id.* at 262–63.

187. *Id.* at 263 (quoting Read, *supra* note 147, at 227).

points on which the United States and Canada agreed.¹⁸⁸ He further emphasized both sides reportedly entered the Convention negotiations “determined to avoid the possibility of finding a *non liquet*.”¹⁸⁹ Thus, the tribunal’s unequivocal resort to international law, particularly to announce Canada’s duty to refrain from permitting damage, Rubin argued, represented both a dramatic departure from the parties’ intention to form a tribunal of limited jurisdiction and an unwarranted assumption of the duties of an international court.¹⁹⁰

Professor Rubin was similarly unimpressed by the tribunal’s substantive interpretations of international law. He accused the tribunal of “applying United States constitutional law precedents to the international law field by analogy.”¹⁹¹ Professor Rubin’s critique should not, however, be overstated. His dissatisfaction with the tribunal’s alleged interpretive overreach applied specifically to the questions of recovery of damages and the question of air pollution between sovereigns rather than to the general issue of due diligence between States.¹⁹² His critique is better understood as dissatisfaction with the tribunal’s resolution of cognate legal questions relating to context, application, damage thresholds, and remedies rather than with the foundational question of international responsibility for harm or an obligation of due diligence between States.

Most academic attention to the *Trail Smelter* decision, however, investigates its status as a basis for international environmental law, specifically whether harm to the natural environment is cognizable in international law.¹⁹³ The tribunal’s veiled, 1941 observations on the general international law duty of due diligence are often overlooked. Along with the

188. *Id.*

189. Read, *supra* note 147, at 227. *Non liquet* refers to judicial notice of an absence of law or failure to identify a rule of decision. See, e.g., Daniel Bodansky, *Non Liquet*, OXFORD PUB. INT’L L., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1669> (last visited Apr. 24, 2021).

190. Rubin, *supra* note 126, at 264. Professor Rubin observed, “[T]he tribunal seems to have acted as an authoritative arbiter of international law, notwithstanding the more restrictive language of the *compromis*.” *Id.* at 268.

191. *Id.* at 268.

192. See *id.* at 266–68.

193. Hoffman, *supra* note 124, at 509 (judging the *Trail Smelter* decision, “the most widely quoted arbitral authority in the area of international pollution” (citing Samuel A. Bleicher, *An Overview of International Environmental Regulation*, 2 ECOLOGY L.Q. 1, 25 (1972))).

Corfu Channel judgment and the *Lake Lanoux* arbitration,¹⁹⁴ *Trail Smelter* has been characterized as a “disjointed trilogy” of international environmental law.¹⁹⁵ Dismissive analyses note that only the latter concerned cross-border pollution lying clearly in international environmental law.¹⁹⁶ The *Trail Smelter* tribunal’s decision has been explained as peculiar to its circumstances and therefore of limited precedential value, an inexorably contextualized decision.¹⁹⁷ The source of damage was indisputable, the case involved significant economic interests of both sides, each faced similar risk of liability as both a potential polluter and victim, and the States in question enjoyed a history of cooperation as evidenced by the preexisting Boundary Water treaty.¹⁹⁸ Absent any such condition, it is argued, neither side would have committed the question of liability to a mechanism of international law.¹⁹⁹

While perhaps effective to critique environmental obligations, it must be conceded each decision of the *Corfu-Trail-Lanoux* trilogy expresses clear international law support for the Latin maxim *sic utere tuo ut alienum non laeda* or *sic utero tuo*, a command to use property so as not to harm another.²⁰⁰ Whatever allegations might attach to the *Trail Smelter* arbitration with respect to innovating international environmental law, the episode reflects both the tribunal and States’ parties’ sound confirmation of a general notion of due diligence to cease harm. In fact, the nascent or even non-existent precedent for recognition of environmental claims in *Trail Smelter* bolsters the independent and freestanding character of the due diligence obligation. That is, had international law unequivocally included a duty to prevent environmental harm, the *Trail Smelter* decision might be dismissed as a mere elaboration of a context-specific duty of diligence. But

194. See generally *Lake Lanoux Arbitration* (Fr. v. Spain), 12 R.I.A.A. 281 (Fr.-Spain Arb. Trib. 1957); Brunson MacChesney, *Judicial Decisions*, 53 AM. J. INT’L L. 156, 156–71 (1959).

195. Michelson, *supra* note 179, at 221.

196. See *id.* at 222–23. Professor Brownlie referred to the *Trail Smelter* decision as “overworked.” Ian Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RES. J. 179, 180 (1973).

197. Michelson, *supra* note 179, at 230–31 (observing that under misguided political interpretations *Trail Smelter* “dwindles into insignificance, an object of little more than historical interest”).

198. *Id.* at 227–29.

199. See *id.* at 229–30.

200. The *Corfu Channel* Court’s reference to an obligation not to allow territory to be used to harm the rights of other States has been equated with the *sic utero tuo* principle. See *id.* at 221.

rather than a secondary duty with respect to environmental obligations, the parties' arguments and concessions and the tribunal's ruling on due diligence reflect application of a default or baseline duty of due diligence irrespective of particular context or setting.

Assessing the legal significance of the decision, parallels between the *Alabama* claims arbitration decision and *Trail Smelter* are noteworthy. Both arbitrations addressed harm to another State not directly attributable to the offending State as such. Neither decision attributed the proximate cause of harm to the territorial sovereign of its source; in both cases, the harm alleged was directly traceable to acts of private parties. In both arbitrations, the offending State initially asserted, but ultimately abandoned, arguments that a State cannot be held responsible under international law for harm caused by the acts of private parties.²⁰¹ In this sense, both arbitrations addressed omissions on the part of the offending State rather than positive acts. Both the *Alabama* and *Trail Smelter* arbitrations saw the United States advocate due diligence as both a principle and baseline rule of general international law, as well as a rule of conduct applicable to a specific context of international interaction, neutrality in armed conflict and environmental law respectively. The members of both arbitral tribunals accepted these arguments with respect to a general international law duty on the part of States to cease harm emanating from their borders into the territory of another sovereign. Finally, both arbitrations successfully resolved highly contentious disputes between otherwise close allies.

III. Present Perspectives

Based in significant part on the *Alabama* and *Trail Smelter* arbitral decisions and their progeny, current international law sources consistently recognize due diligence as a fundamental principle. Meanwhile, private commentators and organizations cite due diligence as relevant to emerging issues in international relations, such as harmful transboundary cyber activities. Two recent ICJ judgments, based in significant part on due diligence as a rule of international environmental law, have confirmed in broad terms States' general duty to cease harm that emanates from their territory. Additionally, the International Law Association has formed two study groups to address due diligence specifically. States and private

201. See, e.g., Letter from R.B. Bennett, Canadian Sec'y of State for External Affs., to Warren D. Robbins, U.S. Minister in Can. (Feb. 17, 1934), <https://history.state.gov/historicaldocuments/frus1934v01/d694> (asserting "the alleged facts complained of were civil and not international wrongs").

parties, through international organizations and, with respect to the former in increasingly common expressions of *opinio juris*, offer increasingly clear positions on the fit between cyberspace and international law generally as well as specific notions of due diligence in cyber contexts. Their work highlights a number of doctrinal considerations worthy of attention from the United States and other States.

A. Due Diligence in International Law

Two recent ICJ judgments discuss the principle of due diligence in some detail. Both cases arose in the context of international environmental law but lend insight into the application of due diligence as a principle under general international law. Both cases unquestioningly embrace and apply due diligence as both a principle of international law and a regime-specific rule.

On May 4, 2006, Argentina instituted proceedings against Uruguay at the ICJ, alleging breaches the 1975 Statute of the River Uruguay.²⁰² Argentina's claims concerned Uruguay's approval of construction of two pulp mills along the River Uruguay.²⁰³ Argentina argued the mills required notification and consultation under Articles 7 to 12 of the treaty.²⁰⁴ Specifically, Argentina alleged a failure of due diligence with respect to Uruguay's construction and operation of the mills.²⁰⁵ Construction had caused and would continue to cause significant damage to the water quality of the river, resulting in significant transboundary harm to Argentina.²⁰⁶ Argentina argued,

Uruguay should have taken three steps to comply with the requirements of due diligence and its obligation to prevent damage to the environment, namely: (1) establish the initial quality of the waters receiving the pollutants, (2) identify as clearly as possible the volume and characteristics of the pollutants which the mill will have to discharge into the river and (3) establish that the waters receiving the anticipated polluting

202. Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 1 (Apr. 20).

203. *Id.*

204. *Id.* ¶ 67.

205. Memorial of Argentina, Pulp Mills on River Uruguay (Arg. v. Uru.), 2007 I.C.J. Pleadings 1, ¶ 5.3 (Jan. 15, 2007).

206. *Id.*

discharges are able to receive them and then disperse them in such a way as to prevent any harm.²⁰⁷

The Court responded favorably to Argentina's legal formulation, invoking the *Corfu Channel* case definition of due diligence while also endorsing a duty of prevention.²⁰⁸ The Court observed in relevant part, "[T]he 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.'"²⁰⁹ The Court then translated the due diligence principle of general international law into a specific rule applied to the context of international environmental law. Referring to its decision in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the Court stated:

A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment."²¹⁰

Discerning further nuance to the rule of due diligence in international environmental law, the Court observed:

Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.²¹¹

207. *Id.* ¶ 5.31.

208. *Pulp Mills on River Uruguay*, 2010 I.C.J. 14, ¶ 101. Though the Court engaged in a detailed review of the environmental effects alleged in the case, in the end, it determined that "there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence." *Id.* ¶ 265.

209. *Id.* ¶ 101 (quoting *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, at 22 (Apr. 9)).

210. *Id.* (quoting *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Reports 226, ¶ 29 (July 8)).

211. *Id.* ¶ 204.

The same year the ICJ issued its *Pulp Mills* judgment, the Court began proceedings in the *Border Area* case that returned to the principle of due diligence. Like the *Pulp Mills* case, this case arose in the context of international environmental law, but again presented the Court an opportunity to address due diligence as a general international law principle.²¹² The *Border Area* case arose from Costa Rican allegations that Nicaragua had occupied Costa Rican territory and impermissibly carried out dredging operations in a channel of the San Juan River.²¹³ Costa Rica alleged the operations were “in violation of [Nicaragua’s] international obligations.”²¹⁴ After Costa Rica filed its case in 2011, Nicaragua instituted proceedings against Costa Rica, alleging “violations of Nicaraguan sovereignty and major environmental damages on its territory” by means of road construction beside the San Juan River along the border between the two countries.²¹⁵ Both sides’ claims cited the international law principle of due diligence.²¹⁶

In a 2015 judgment, the *Border Area* Court reiterated its conclusions of law from the *Pulp Mills* case, restating the due diligence obligation and reemphasizing the preventative aspects of diligence with respect to environmental harm. The Court stated, in relevant part:

to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.²¹⁷

The Court then reemphasized its decision concerning the application of the due diligence principle to international environmental law, concluding:

if the environmental impact assessment confirms that there is a risk of significant transboundary harm, a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant

212. See *Certain Activities Carried Out by Nicaragua in Border Area* (Costa Rica v. Nicar.) and *Construction of Road in Costa Rica Along San Juan River* (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16).

213. *Id.* ¶ 1.

214. *Id.*

215. *Id.* ¶ 9.

216. *Id.* ¶¶ 101–103.

217. *Id.* ¶ 104.

transboundary harm, to notify, and consult with, the potentially affected State in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.²¹⁸

Two important points concerning the present state of due diligence can be drawn from these ICJ cases. First, the filings of the several States party to the litigation evince clear support for the notion of due diligence both in a general international legal sense and in specific contexts of international relations involving transboundary environmental harm. No State party to either case unequivocally rejected due diligence as either an international legal principle or as a regime-specific rule of conduct in its submissions to the Court. Second, the Court not only reaffirmed its earlier *Corfu Channel* observations concerning a general duty of due diligence, it also discerned refinements to the duty, most obviously in the form of a duty to prevent harm. Though the Court's conclusions most clearly apply to a context-specific application of the due diligence principle, as discussed immediately below, they may provide interesting considerations for the further development of due diligence in other areas, such as transboundary cyber activities.

Private commentators have seized similar observations. On the issue of prevention, the International Law Commission proposed draft articles on "Prevention of Transboundary Harm from Hazardous Activities" in 2001.²¹⁹ Article 3 states "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."²²⁰ As noted in the Commission's commentary to the Article, the focus of the articles and the duty they purport to assign "deals with the phase prior to the situation where significant harm or damage might actually occur."²²¹ Though focused largely on transboundary environmental harm, these draft articles would potentially impact a much broader set of activities if extrapolated to a general duty of due diligence.

At the time of the Draft Articles' referral to the UN General Assembly, many States commented on their virtue, some referring to them as reflective of customary international law.²²² The United States, however, rejected that notion. In its statement, the United States commented:

218. *Id.* ¶ 168.

219. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 146–48 (2001).

220. *Id.* at 153.

221. *Id.* at 148.

222. Press Release, Sixth Comm., Sixth Committee Hears of Proposed Treaty on Transboundary Harm Resulting from Hazardous Activities: Law Commission Chairman

We continue to believe it is most appropriate for the draft articles to be treated as non-binding standards to guide the conduct and practice of states, and for the work on prevention of transboundary harm to remain formulated as draft articles. Retaining the current, recommendatory form of these draft articles and principles increases the likelihood that they will gain widespread consideration and fulfill their intended purposes of providing a valuable resource for States in this area. With respect to this agenda item, the United States position has not changed since our last statement.

As we have previously noted, both the draft articles and draft principles go beyond the present state of international law and practice, and are clearly innovative and aspirational in character rather than descriptive of current law or state practice.²²³

The articles have never progressed beyond the “draft” stage, though they continue to be influential in State interactions, particularly with respect to international environmental law as discussed above.

Meanwhile, in related private work and in response to growing academic and diplomatic attention to the principle of due diligence, the International Law Association (ILA) commissioned a study group “to consider the extent to which there is a commonality of understanding between the distinctive areas of international law in which the concept of due diligence is applied.”²²⁴ The group issued its First Report in 2014; a second study group revisited the issue in a 2016 Report.²²⁵ The First Report summarized the history and development of due diligence in international law “to stimulate further discussion” at a conference to develop a Second Report.²²⁶ The Second Report, informed by the background material collected by the First, employed a “thematic and analytical, rather than sectoral, approach” to due diligence.²²⁷ The study group concerned itself “less with *how* due diligence

Sees Prevention as Primary Aim, with Likely Impact on International Environmental Rules, U.N. Press Release GA/L/3191 (Nov. 2, 2001).

223. David Bigge, *Statement at the 74th General Assembly Sixth Committee Agenda Item 81: Consideration of Prevention of Transboundary Harm from Hazardous Activities*, U.S. MISSION TO THE U.N. (Oct. 22, 2019), <https://usun.usmission.gov/statement-at-the-74th-general-assembly-sixth-committee-agenda-item-81-consideration-of-prevention-of-transboundary-harm-from-hazardous-activities/>.

224. ILA 2014 REPORT, *supra* note 6, at 1.

225. *Id.*; ILA 2016 REPORT, *supra* note 6, at 1.

226. ILA 2014 REPORT, *supra* note 6, at 1.

227. ILA 2016 REPORT, *supra* note 6, at 1.

is used in specific fields and more with broader, analytical questions, concerning *what* functions due diligence serves, and *why* it is employed as a standard of conduct in many and varied areas of international law.”²²⁸

Several useful considerations emerge from the ILA reports. First, the Group conceded that “[p]recisely how the due diligence standard is applied is still subject to considerable discussion and debate.”²²⁹ Both Reports concluded that, though the existence of the principle receives wide acceptance and general support, the details of the application of the principle vary widely. In fact, the Reports describe due diligence as an “open-ended standard or principle”²³⁰ and as a “flexible concept, the content of which varied depending on the circumstances of the case.”²³¹

These observations led the Second Report to assert, “[t]his broad principle of due diligence can be understood as underlying more specific rules of due diligence. Hence, it can be viewed as a default standard that is triggered in operation if no more specific elaboration of due diligence or stricter standard is in existence.”²³² The Second Report described due diligence as an “expansive, sectorally-specific yet overarching concept of increasingly [sic] relevance in international law.”²³³ In other words, due diligence is an accepted general baseline standard of care in States’ dealings with one another that has also developed in specific sectors—such as international environmental law—into more well-defined “specific primary rules.”²³⁴ The ILA Group’s conclusions make an important point with respect to emerging domains of State interaction such as cyberspace, suggesting that cyber activities are governed by the more general principle of due diligence, but that no sector-specific rules have yet been agreed upon by States.

A second important point from the Reports concerns the prevailing default or baseline standard of care attendant to due diligence. The Reports note general agreement that the principle of due diligence operates as a standard of conduct and not of result or outcomes.²³⁵ And in qualitative

228. *Id.*

229. *Id.* at 7.

230. *Id.* at 3.

231. ILA 2014 REPORT, *supra* note 6, at 2.

232. ILA 2016 REPORT, *supra* note 6, at 6.

233. *Id.* at 47.

234. *Id.* at 6.

235. ILA 2014 REPORT, *supra* note 6, at 17; ILA 2016 REPORT, *supra* note 6, at 2. See generally Antal Berkes, *The Standard of ‘Due Diligence’ as a Result of Interchange Between the Law of Armed Conflict and General International Law*, 3 J. CONFLICT SEC. L. 433 (2018) (describing due diligence as an obligation of conduct rather than of result).

terms, the Second Report identified the standard of conduct by States as one of “reasonableness,” consistent with conceptions of due diligence dating back at least to the *Alabama* arbitration and publicists’ reactions thereto.²³⁶ Further, the Report found application of a State’s reasonableness “will tend to be assessed on an *ex post facto* basis to determine compliance and responsibility.”²³⁷ The retroactive nature of the principle led the Report to question the ability of States to “ascertain clearly, and in advance, that they are satisfactorily meeting – and continuing to meet – their obligations of conduct.”²³⁸

A final important point from the ILA Reports with respect to the impending application of due diligence to cyber activities concerns application of the principle of due diligence to non-state actors. The Reports fell short of applying due diligence per se to non-state actors but noted a duty on the part of States “to prevent and punish the unlawful acts of armed groups even when those armed groups are not controlled by the government.”²³⁹

While the work of the ILA Study Groups identified important issues related to the principle of due diligence, the Second Report admitted “further work on due diligence [was] deemed appropriate.”²⁴⁰ The ILA Study Group recommended the ILA “undertake further study and . . . propose a resolution identifying the material factors and underlying principles helpful in the identification and operation of due diligence as a standard of conduct in international law.”²⁴¹ All things considered, the ILA reports reflect a careful and conservative effort to restate the principle of due diligence. The ILA Study Groups appear to have resisted the temptation to develop the principle themselves or to subsume a lawmaking function. But, as the Reports concede, the present state of the due diligence principle remains underdeveloped in many respects and subject to substantial contextual variance.

The uncertain state of due diligence identified by the ILA is confirmed by the present U.S. position—or perhaps more descriptively, the lack of a

236. ILA 2016 REPORT, *supra* note 6, at 10.

237. *Id.* at 7.

238. *Id.*

239. ILA 2014 REPORT, *supra* note 6, at 13–14 (citing *British Claims in Spanish Zone of Morocco (Spain v. U.K.)*, 2 R.I.A.A. 615 (1924)); ILA 2016 REPORT, *supra* note 6, at 29 (citing *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988)).

240. ILA 2016 REPORT, *supra* note 6, at 47.

241. *Id.*

position—with respect to due diligence. There does not appear to be a current or updated official position from the U.S. government on the international law principle of due diligence. This is true despite the two previously analyzed historical incidents wherein the United States clearly advocated the principle and prevailed on the merits of its application. Silence on the part of the U.S. government might be taken to indicate the United States has not changed its views from the positions taken in the *Alabama* and *Trail Smelter* arbitrations, but even that much cannot be confirmed with certainty. Lack of support for the principle of due diligence when the opportunity presented itself, such as in the United Nations Group of Governmental Experts (UN GGE) discussed below, has led to assumed skepticism in some quarters.²⁴²

ICJ recognition of due diligence as both a general principle and a sector-specific duty and the confirmation of this approach by the ILA study groups confirm the dual incarnations of due diligence. Hesitance on the part of the United States to endorse a specific rule in the context of the UN GGE on cyber activities, in contrast with prior advocacy of the general principle in the *Alabama* and *Trail Smelter* arbitrations, may suggest a similar bifurcation with respect to due diligence. However, the ubiquity of cyber activities and their potential to inflict significant transboundary harm may encourage States to look to sector-specific rule applications of due diligence as analogies in the cyber context.

B. International Law and Cyberspace

Renewed interest in the principle of due diligence, as evidenced by State filings at the ICJ and the ILA's study groups, has coincided with an escalation in the number of transnational cyber incidents resulting in significant harm. Over the past decade in particular, the number and severity of cyber operations resulting in damage have dramatically increased.²⁴³ Many of these cyber activities have been attributed to States or State proxies,²⁴⁴ causing some to argue for clear statements on the applicability of international law to cyber activities.²⁴⁵

242. See, e.g., HOLLIS, *supra* note 3, at 21.

243. *How Cyber Attacks Have Grown in Scale over the Past 10 Years*, SBS NEWS (June 28, 2017), <https://www.sbs.com.au/news/how-cyber-attacks-have-grown-in-scale-over-the-past-10-years>.

244. Julie Hirschfield Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html> (describing the hacking of the Department of Defense's Classified network and OPM); Andy Greenberg, *The Untold Story*

In response to the dramatic increase in cyber activities with transboundary impacts, States convened a Group of Governmental Experts (GGE) through the United Nations General Assembly to discuss “Developments in the Field of Information and Telecommunications in the Context of International Security.”²⁴⁶ The process began in the late 1990s and has perhaps enjoyed pride of place as the leading forum for States to debate and develop or confirm international regulations and norms of conduct in cyberspace.²⁴⁷ At present, the UN GGE has convened five times. The third meeting, in 2013, generated a consensus report, as did the fourth meeting in 2015. The most recently completed UN GGE meeting, in 2017, however, was unable to achieve consensus on a final report.²⁴⁸ Yet the contents of the 2013 and 2015 reports still stand as prominent, if ambiguous, expressions of States’ present views on international law and cyberspace. They are worth examining briefly for clues to States’

of NotPetya, the Most Devastating Cyberattack in History, WIRED (Aug. 22, 2018), <https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/> (expounding Russia’s NotPetya attack that was intended for Ukraine but spread around the world causing more than \$10 billion worth of damages); John Leyden, *Hack on Saudi Aramco Hit 30,000 Workstations, Oil Firm Admits*, REGISTER (Aug. 29, 2012), https://www.theregister.co.uk/2012/08/29/saudi_aramco_malware_attack_analysis/ (describing Iran’s malware attack that turned 30,000 of Saudi Aramco’s computers useless); Ellen Nakashima & Joby Warrick, *Stuxnet Was Work of U.S. and Israeli Experts, Officials Say*, WASH. POST (June 2, 2012), https://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gIQAInEy6U_story.html (explaining the United States’ use of Stuxnet to destroy nuclear centrifuges in Iran); David E. Sanger & Nicole Perlroth, *U.S. Escalates Online Attacks on Russia’s Power Grid*, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/06/15/us/politics/trump-cyber-russia-grid.html> (discussing the United States’ hacking into Russia’s power grid for its sabotaging of U.S. power plants, water supplies, and other public necessities); Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story So Far*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> (reviewing Russia’s known meddling in U.S. elections).

245. See, e.g., Catherine Lotrionte, *State Sovereignty and Self-Defense in Cyberspace: A Normative Framework for Balancing Legal Rights*, 26 EMORY INT’L L. REV. 825, 831–32 (2012).

246. Anders Henriksen, *The End of the Road for the UN GGE Process: The Future Regulation of Cyberspace*, 5 J. CYBERSECURITY, no. 1, 2019, at 1–2.

247. *Id.*

248. Arun M. Sukumar, *The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?*, LAWFARE: BLOG (July 4, 2017, 1:51 PM), <https://www.lawfareblog.com/un-gge-failed-international-law-cyberspace-doomed-well>.

perspectives on the fit between international law and cyberspace generally, as well as for clues to views on due diligence.

The 2012-2013 iteration of the UN GGE, consisting of fifteen States,²⁴⁹ issued a landmark consensus report at the conclusion of its meetings.²⁵⁰ The report recognized, “[t]here has been a noticeable increase in risk in recent years as [Information and Communication Technologies (ICTs)] are used for crime and the conduct of disruptive activities.”²⁵¹ The Report concluded, “[i]nternational cooperation is essential to reduce risk and enhance security.”²⁵² Participating States agreed to three important statements concerning international law and cyber activities.

The first deals with the application of international law. The Report states “[i]nternational law, and in particular the Charter of the United Nations, is applicable and is essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment.”²⁵³ Though useful, the UN GGE statement is watered down by comparison with a statement offered by the United States during deliberations. In its submission to the Group, the United States argued that “existing international law serves as the appropriate framework applicable to activity in cyberspace in a variety of contexts, including in connection with hostilities.”²⁵⁴ The U.S. submission offered specifics regarding how both the *ius ad bellum* (the right to resort to armed conflict) and the *ius in bello* (the conduct of the parties engaged in armed conflict) applied to cyber actions,²⁵⁵ arguing, “the difficulty of reaching a definitive legal conclusion or consensus among States on when and under what circumstances a hostile cyber action would constitute an armed attack does not automatically

249. The States involved were Argentina, Australia, Belarus, Canada, China, Egypt, Estonia, France, Germany, India, Indonesia, Japan, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Rep. of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, transmitted by Letter dated 7 June 2013 from the Chair of the Grp. of Governmental Experts on Devs. in the Field of Info. and Telecomm. in the Context of Int’l Sec., U.N. Doc. A/68/98, annex (June 24, 2013) [hereinafter 2013 UN GGE Report].

250. *See id.* ¶ 34.

251. *Id.* ¶ 1.

252. *Id.* ¶ 2.

253. *Id.* ¶ 19.

254. U.S. Delegation Remarks at U.N. General Assembly Sixty-Seventh Session, in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 600 (Carrie Lyn D. Guymon ed., 2012) [hereinafter U.S. Delegation Remarks].

255. *Id.*; PARRY & GRANT ENCYCLOPÆDIC DICTIONARY OF INTERNATIONAL LAW 322–23 (John P. Grant & J. Craig Barker eds., 3d ed. 2009).

suggest that we need an entirely new legal framework specific to cyberspace.”²⁵⁶ The view that the existing legal paradigm is applicable, sufficient, and can be used by analogy in dealing with the “challenges” presented by cyber operations is a consistent theme throughout the U.S. submission.²⁵⁷

The second important UN GGE statement concerning international law and cyber activities indicates “State sovereignty and international norms and principles that flow from sovereignty apply to State conduct of ICT-related activities, and to their jurisdiction over ICT infrastructure within their territory.”²⁵⁸ Though there is general agreement that the international law principle of sovereignty applies to state-sponsored cyber activities, *how* sovereignty applies has become one of the most contentious discussions amongst both States²⁵⁹ and academics.²⁶⁰ While the U.S. position on sovereignty in cyberspace is not entirely clear,²⁶¹ the U.S. submission to the 2013 UN GGE stated simply, “State sovereignty, among other long-standing international legal principles, must be taken into account in the

256. Harold Koh, U.S. State Dep’t Legal Advisor, Remarks at USCYBERCOM (Sept. 18, 2012), in *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 597 (Carrie Lyn D. Guymon ed., 2012).

257. U.S. Delegation Remarks, *supra* note 254, at 600–02.

258. 2013 UN GGE Report, *supra* note 249, ¶ 20.

259. *See infra* Section III.C.

260. *See generally* Michael N. Schmitt & Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEX. L. REV. 1639 (2017); Sean Watts & Theodore Richard, *Baseline Territorial Sovereignty and Cyberspace*, 22 LEWIS & CLARK L. REV. 771 (2018); Gary Corn, *Punching on the Edges of the Grey Zone: Iranian Cyber Threats and State Cyber Responses*, JUST SEC. (Feb. 11, 2020), <https://www.justsecurity.org/68622/punching-on-the-edges-of-the-grey-zone-iranian-cyber-threats-and-state-cyber-responses/>; Todd C. Huntley, *Controlling the Use of Force in Cyber Space: The Application of the Law of Armed Conflict During a Time of Fundamental Change in the Nature of Warfare*, 60 NAVAL L. REV. 1 (2010).

261. Paul Ney, the Department of Defense General Counsel, recently stated, As a threshold matter, in analyzing proposed cyber operations, DoD lawyers take into account the principle of State sovereignty. States have sovereignty over the information and communications technology infrastructure within their territory. The implications of sovereignty for cyberspace are complex, and we continue to study this issue and how State practice evolves in this area, even if it does not appear that there exists a rule that all infringements on sovereignty in cyberspace necessarily involve violations of international law.

Paul C. Ney, Dep’t of Def. Gen. Counsel, Remarks at U.S. Cyber Command Legal Conference (Mar. 2, 2020), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/> [hereinafter Ney Remarks].

conduct of activities in cyberspace, including outside of the context of armed conflict.”²⁶²

Finally, the 2013 UN GGE Report confirms, “States must meet their international obligations regarding internationally wrongful acts attributable to them. States must not use proxies to commit internationally wrongful acts. States should seek to ensure that their territories are not used by non-State actors for unlawful use of ICTs.”²⁶³ The United States unequivocally supported this strong statement on the use of proxies. In its 2013 submission, the United States identified the enticing nature of and increasing use of proxies by States.²⁶⁴ The United States argued that “a State is legally responsible for cyber activities undertaken through ‘proxy actors’ who act on the State’s instructions or under its direction or control.”²⁶⁵

The consensus statements concerning the applicability of international law to cyber activities in the 2013 UN GGE Report are significant because they are the first multinational statements of their kind. They provide a vital starting point for the application of international law to cyber activities. However, they are almost as important for their lack of consensus on other fundamental issues, including some strongly advocated for by the United States such as the applicability of the law of armed conflict (LOAC) to cyber operations during hostilities.²⁶⁶ Many of these issues were considered again when an expanded group of States met in 2015.

The 2015 UN GGE expanded from fifteen States to twenty.²⁶⁷ Building on its predecessor, the 2015 Report added several key points. Two key points agreed upon by the 2015 group of States reflect directly on the application of international law to cyber activities. First, all participants agreed that “States should not knowingly allow their territory to be used for internationally wrongful acts using ICTs.”²⁶⁸ Second, the group agreed on a more detailed application of this obligation with respect to critical

262. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 737 (Carrie Lyn D. Guymon ed., 2014) [hereinafter 2014 U.S. PRACTICE DIGEST] (recounting the U.S. position taken in its statement to the UN GGE).

263. 2013 UN GGE Report, *supra* note 249, ¶ 23.

264. See 2014 U.S. PRACTICE DIGEST, *supra* note 262, at 738.

265. *Id.*

266. See *id.* at 736.

267. Rep. of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, U.N. Doc. A/70/174, annex (July 22, 2015) [hereinafter 2015 UN GGE Report].

268. *Id.* ¶ 13(c).

infrastructure²⁶⁹ and cyber emergency response teams.²⁷⁰ This obligation to prevent transboundary harm, and its relation to the principle of due diligence, will be discussed more fully below.

As with the 2013 Report, the 2015 Report called for future meetings, including “regular institutional dialogue with broad participation under the auspices of the United Nations, as well as regular dialogue through bilateral, regional and multilateral forums and other international organizations.”²⁷¹ The most recent meeting was similarly expected to issue a report but was unable to reach consensus and disbanded in June 2017.²⁷² It appears Cuba, China, and Russia finally refused to sign the proposed draft,²⁷³ at least in part based on the United States and others continuing desire to state that the LOAC regulated cyber activities in armed conflict.²⁷⁴ A commentator observed:

In reaction to the June 2017 UN GGE disappointment, the American representative noted that the US had come to the “unfortunate conclusion that those who are unwilling to affirm the applicability of these international legal rules and principles believe their states are free to act in or through cyberspace to achieve their political ends with no limit on their actions” and that this is “a dangerous and unsupportable view”. Although the US representative did not name states like China and Russia, the insinuation was quite clear. Frustration with what appears to be intentional obstruction by at least certain states was also noticeable in remarks delivered in the First Committee’s discussions of the lack of a fifth UN GGE consensus report in October 2017 by the German Representative.²⁷⁵

After the failure of the 2017 GGE, commentators seemed skeptical that future meetings would occur.²⁷⁶ However, the UN GGE process has recently resumed, with twenty-five member States and a schedule to

269. *Id.* ¶ 13(f).

270. *Id.* ¶ 13(k).

271. *Id.* ¶ 18.

272. Henriksen, *supra* note 246, at 3.

273. *Id.*

274. *Id.* (quoting Miguel Rodríguez, Representative of Cuba, Declaration at the Final Session of Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (June 23, 2017), <https://www.justsecurity.org/wp-content/uploads/2017/06/Cuban-Expert-Declaration.pdf>).

275. *Id.* at 5.

276. *See id.* at 6.

complete their work in May 2021.²⁷⁷ In addition, the General Assembly also initiated an Open-Ended Working Group which is open to all Member States and which is charged with consulting industry, civil society, and academia.²⁷⁸ Despite the failure of the 2016-17 UN GGE, the General Assembly appears committed to continue pushing toward the development of norms and increased statements on practice to facilitate a clearer understanding of the application of international law to cyber activities.

In addition to the United Nations GGE, other multinational organizations, and many States have separately expressed their views on the applicability of international law to cyber operations. This includes statements by Australia,²⁷⁹ Bolivia,²⁸⁰ Ecuador,²⁸¹ Estonia,²⁸² France,²⁸³ Guatemala,²⁸⁴ Guyana,²⁸⁵ Netherlands,²⁸⁶ Peru,²⁸⁷ United Kingdom,²⁸⁸ and

277. *Developments in the Field of Information and Telecommunications in the Context of International Security*, U.N. OFF. FOR DISARMAMENT AFFS., <https://www.un.org/disarmament/ict-security/> (last visited Apr. 25, 2021); *Group of Governmental Experts*, U.N. OFF. FOR DISARMAMENT AFFS., <https://www.un.org/disarmament/group-of-governmental-experts/> (last visited Apr. 25, 2021).

278. U.N. OFF. FOR DISARMAMENT AFFS., FACT SHEET: DEVELOPMENTS IN THE FIELD OF INFORMATION AND TELECOMMUNICATIONS IN THE CONTEXT OF INTERNATIONAL SECURITY 2 (July 2019), <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2019/07/Information-Security-Fact-Sheet-July-2019.pdf>.

279. AUSTRALIAN MISSION TO THE U.N., AUSTRALIAN PAPER — OPEN ENDED WORKING GROUP ON DEVELOPMENTS IN THE FIELD OF INFORMATION AND TELECOMMUNICATIONS IN THE CONTEXT OF INTERNATIONAL SECURITY (Sept. 2019), <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2019/09/fin-australian-oewg-national-paper-Sept-2019.pdf>.

280. HOLLIS, *supra* note 3, at 7–8.

281. *Id.* at 7.

282. Kersti Kaljulaid, President of Estonia, Keynote Address at the Opening of CyCon 2019 (May 29, 2019), <https://www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html> [hereinafter Estonia Cyber Statement].

283. RÉPUBLIQUE FRANÇAISE, MINISTÈRE DES ARMÉES, INTERNATIONAL LAW APPLIED TO OPERATIONS IN CYBERSPACE (2019) [hereinafter France Cyber Statement]. We have not labeled these as “French views” because at least one scholar has pointed out that the document is authored by the French Ministry of Defense, and its contents may not be attributable to the French State as a whole. *See* Corn, *supra* note 260 (“[I]t should be noted that despite numerous assertions to the contrary, the French document does not claim to be the official position of the French government. It was written and published by the French Ministère des Armées (MdA), in the same vain as the DoD Law of War Manual which does not necessarily reflect the views of the U.S. Government as a whole.”).

284. Hollis, *supra* note 3, at 8.

285. *Id.*

286. Letter from the Minister of Foreign Affs. to the President of the House of Representatives on the Int’l Legal Order in Cyberspace (July 5, 2019), <https://www.>

the United States.²⁸⁹ Despite the fact that many of these separate statements reinforce the application of international law to cyber activities, the breakdown of the UN GGE clearly indicates that this is not a consensus view.

Meanwhile, simultaneous to the UN GGE process, private commentators increasingly offered views on the application of international law to States' activities in cyberspace. In the aftermath of a 2007 cyber incident that crippled Estonian public and private cyber capabilities,²⁹⁰ the NATO Cooperative Cyber Defense Center of Excellence convened a group of experts²⁹¹ to draft a manual applying the law of war to cyber operations. In 2013, the group published the *Tallinn Manual on the International Law Applicable to Cyber Warfare (The Tallinn Manual)*.²⁹² In response to subsequent comments, a similar group of experts convened to study the operation of public international law generally to States' cyber activities. In 2017, the group published the *Tallinn Manual 2.0 on the International Law*

government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace [hereinafter Netherlands Cyber Statement].

287. Hollis, *supra* note 3, at 8.

288. Jeremy Wright, Att'y Gen., Speech on Cyber and International Law in the 21st Century (May 23, 2018), <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> [hereinafter U.K. Cyber Statement].

289. See, e.g., Harold Hongju Koh, *International Law in Cyberspace*, 54 HARV. INT'L L.J. 1 (2012); Ney Remarks, *supra* note 261; Brian J. Egan, Legal Adviser, Dep't of State, Remarks on International Law and Stability in Cyberspace at Berkeley Law School (Nov. 10, 2016), <https://2009-2017.state.gov/s/l/releases/remarks/264303.htm>; DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 823–26 (Carrie Lyn D. Guymon ed., 2016) (referencing the U.S. Submission report to the 2016-17 Group of Governmental Experts on Developments in the Field of Information and Telecommunications); 2014 U.S. PRACTICE DIGEST, *supra* note 262, at 732 (referencing the U.S. Submission report to the 2014-15 Group of Governmental Experts on Developments in the Field of Information and Telecommunications); Koh, *supra* note 256, at 597.

290. Joshua Davis, *Hackers Take Down the Most Wired Country in Europe*, WIRED (Aug. 21, 2007, 12:00 PM), <https://www.wired.com/2007/08/ff-estonia/>.

291. Both authors of this Article were members of the group of experts on the 2013 and 2017 Tallinn Manuals. See Sean D. Carberry, *Tallinn 2.0 Refines the Law of Cyberattacks*, FED. COMPUT. WK. (Feb. 9, 2017), <https://fcw.com/articles/2017/02/09/tallinn-revise-cyber-attacks.aspx?m=1>.

292. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013).

Applicable to Cyber Operations (Tallinn Manual 2.0).²⁹³ Though merely the personal views of the respective groups of experts, both manuals (and particularly *Tallinn Manual 2.0*) benefitted from States' and peer reviewers' comments prior to publication.²⁹⁴ While in no sense sources of international law themselves, the manuals offer helpful baselines for States to consider the applicability of international law to cyber operations.

In this vein, the work of *Tallinn Manual 2.0* tracks the work by States at the GGE in many respects. Much like the UN GGE Groups, the Tallinn group had little difficulty agreeing that general international law, including both its guiding principles and rules of conduct, applied, if only by default, to States' activities in cyberspace.²⁹⁵ As ever, the devil proved to be in the details. That is, precisely how the principles of rules of general international law would operate (so-called mixed questions of fact and law) and the extent to which any cyber-specific rules of conduct or understandings had developed repeatedly split the group into majority, minority factions and even further into isolated views of single members. Far from a failing of the group, this fragmentation merely reflected the simultaneous ambiguity attendant to many of the principles considered and the nascent condition of State practice in cyberspace. As much as anything, the manuals' equivocations and fragmentation highlight opportunities for States to develop firmer notions of how, if at all, international law baselines should adjust in their application and operation in cyberspace.

Despite the inability of the UN GGE and private commentators to produce a consensus statement with respect to operation of international law in all its aspects to cyber activities, the significant weight of evidence lies in favor of its application. Most States and commentators, both when acting alone and when acting with others, have accepted this view. It is also the predominant view among scholars and scholarly organizations. The question to be discussed below is how the specific international law principle of due diligence applies to cyber activities.

C. Due Diligence in Cyberspace

Recalling that the principle of due diligence requires States to not knowingly allow their territory be a source of transboundary harm, cyber activities over the past two decades have clearly implicated the principle of

293. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt & Liis Vihul eds., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0].

294. *See id.* at 6.

295. *See id.* at 3–4.

due diligence.²⁹⁶ Having situated the principle of due diligence in international law and then reviewed the acceptance of international law as governing cyber operations, it is now important to analyze the international law principle of due diligence as applied to cyber operations. In light of the firm and broadly accepted historical roots of due diligence by States, courts, and commentators, along with the growing consensus that due diligence has expanded to include context or regime-specific nuances,²⁹⁷ the time is ripe to survey States' and others' views with respect to international cyber due diligence. Already, present perspectives include a menu of views. At one end of the spectrum, some are enthusiastic toward broadminded development of cyber-specific notions of due diligence. At the other end are skeptical or regressive approaches, which either reject cyber-specific applications or even advocate rollbacks of baseline due diligence as general international law. As ever, primacy belongs to the views of States in this respect.

In 2015, the last report of the UN GGE adopted "recommendations for consideration by States for voluntary, non-binding norms, rules or principles of responsible behaviour of States aimed at promoting an open, secure, stable, accessible and peaceful ICT environment."²⁹⁸ Among those "voluntary, non-binding" recommendations was the observation that "States should not knowingly allow their territory to be used for internationally wrongful acts using ICTs."²⁹⁹ However, failure to secure consensus on the application of due diligence to cyber operations in 2017 seems less catastrophic given the other basic failures of agreement on other seemingly less controversial topics. Further, one might argue that the appearance of cyber due diligence in the 2015 Report at all—even as a recommendation for consideration—is still an acknowledgment that it is a point of discussion among States. It is, as yet, unclear whether the 2019 UN GGE will produce a consensus document and if such a document will include a statement on due diligence.

The European Council (EC), through Josep Borrell, has also recently published a statement with respect to cyber due diligence and "malicious cyber activities exploiting the coronavirus pandemic."³⁰⁰ In the statement,

296. *See supra* Section III.A.

297. *See supra* Section III.A.

298. 2015 UN GGE Report, *supra* note 267, ¶ 13.

299. *Id.* ¶ 13(c).

300. Press Release, Josep Borrell, High Representative of the European Union, Declaration on Malicious Cyber Activities Exploiting the Coronavirus Pandemic (Apr. 30, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/04/30/declaration-by->

the “European Union and its Member States call upon every country to exercise due diligence and take appropriate actions against actors conducting such activities from its territory, consistent with international law and the 2010, 2013 and 2015 consensus reports of the United Nations Groups of Governmental Experts.”³⁰¹ The endorsement of cyber due diligence as a justification for “tak[ing] appropriate actions against actors conducting [malicious] activities” from within a State’s territory by the members of the European Council is a strong statement with respect to its perceived legitimacy.³⁰²

Meanwhile, a limited number of States has addressed cyber due diligence directly, providing additional clarity the UN GGE was unable to secure. Many of these statements were offered in response to inquiries posed by Professor Hollis under the auspices of the Organization of American States (OAS).³⁰³ For example, in response to the question, “Does due diligence qualify as a rule of international law that States must follow in exercising sovereignty over the information and communication technologies in their territory or under the control of their nationals?,” Chile, Ecuador, Guatemala, Guyana, and Peru each agreed due diligence applied to cyber operations.³⁰⁴ According to Professor Hollis, “Bolivia offered a more equivocal response,” arguing “a State may not be held responsible for a cyber-attack when it lacks technological infrastructure to control a non-State actor.”³⁰⁵

By contrast, the United States did not respond to the question, leading Professor Hollis to argue that “prior public U.S. statements have not addressed the international legal status of due diligence directly. It is notable, however, that the United States has tended to describe any obligations to respond to requests for assistance in non-binding terms.”³⁰⁶ Professor Hollis then concluded, “The lack of any public U.S. endorsement of due diligence as a legal rule in either the GGE context or elsewhere may be indicative of U.S. doubts as to its legal status.”³⁰⁷

the-high-representative-josep-borrell-on-behalf-of-the-european-union-on-malicious-cyber-activities-exploiting-the-coronavirus-pandemic/.

301. *Id.*

302. *See id.*

303. *See* HOLLIS, *supra* note 3, at 22.

304. *Id.* at 19–20.

305. *Id.* at 21.

306. *Id.*

307. *Id.*

States have offered comments outside the UN GGE, the EC, and the OAS. Estonia, for example, has argued that States must assume a certain level of responsibility:

[S]tates have to make reasonable efforts to ensure that their territory is not used to adversely affect the rights of other states. They should strive to develop means to offer support when requested by the injured state in order to identify, attribute or investigate malicious cyber operations. This expectation depends on national capacity as well as availability, and accessibility of information.³⁰⁸

France argued for a strong view of due diligence, positing:

Under the due diligence obligation, States should ensure that their sovereign domain in cyberspace is not used to commit internationally unlawful acts. A State's failure to comply with this obligation is not a ground for an exception to the prohibition of the use of force, contrary to the opinion of the majority of the Tallinn Manual Group of Experts.³⁰⁹

The Netherlands, while acknowledging “not all countries agree that the due diligence principle constitutes an obligation in its own right under international law,”³¹⁰ expressed the view that

the due diligence principle requires that states take action in respect of cyber activities:

- carried out by persons in their territory or where use is made of items or networks that are in their territory or which they otherwise control;
- that violate a right of another state; and
- whose existence they are, or should be, aware of.³¹¹

On the other hand, despite allegations that non-state actors—as well as coordinated transnational cyber actors such as Anonymous³¹²—have engaged in major cyber operations from within States such as the United

308. Estonia Cyber Statement, *supra* note 282.

309. France Cyber Statement, *supra* note 283, at 10.

310. Netherlands Cyber Statement, *supra* note 286, app. at 4.

311. *Id.*

312. See Katie Bo Williams, *Anonymous Declares War on ISIS*, HILL (Nov. 16, 2015, 9:39 AM), <https://thehill.com/policy/cybersecurity/260245-anonymous-declares-war-on-isis>.

States,³¹³ Russia,³¹⁴ China,³¹⁵ Israel,³¹⁶ Syria,³¹⁷ and North Korea,³¹⁸ none of these governments has clearly indicated a responsibility to exercise due diligence in order to prevent transboundary cyber harm originating from within its territory outside the UN GGE Reports. And no State has claimed that a host State violates its “cyber due diligence” obligation by failing to prevent such transboundary harm.³¹⁹

Thus, Professor Hollis was unable to find general acceptance of a cyber due diligence principle. He instead concluded “there are competing views on whether due diligence is a requirement of international law in cyberspace.”³²⁰ As yet, there is apparently no consensus on how the due diligence principle will apply in the sector-specific area of cyber operations, at least according to select States. Others take different views.

The Tallinn group, for example, carefully considered the principle of due diligence and its application to cyber operations. The group acknowledged the UN GGE was unable to accept a rule applying due diligence to cyber operations but emphasized the participating States “do not definitively refute the existence of such a principle.”³²¹ The Tallinn group noted, “the due diligence principle has long been reflected in jurisprudence [and] it is a

313. *Iran Hit by Global Cyber Attack that Left U.S. Flag on Screens*, REUTERS (Apr. 7, 2018, 12:15 PM EST), <https://www.reuters.com/article/us-iran-cyber-hackers/iran-hit-by-global-cyber-attack-that-left-u-s-flag-on-screens-idUSKBN1HE0MH>.

314. For a discussion of the cyber-attacks on Estonia and its defensive response, see Kertu Ruus, *Cyber War I: Estonia Attacked from Russia*, EUR. INST., <https://www.europeaninstitute.org/index.php/archive/sort-by-date-2/42-winterspring-2008/67-cyber-war-i-estonia-attacked-from-russia> (last visited Apr. 26, 2021).

315. Arjun Kharpal, *Is China Still Hacking US? This Cyber Firm Says Yes*, CNBC (Oct. 19, 2015, 6:40 AM EDT), <https://www.cnbc.com/2015/10/19/china-hacking-us-companies-for-secrets-despite-cyber-pact-.html>.

316. Alex Hern & Peter Beaumont, *Israel Hack Uncovered Russian Spies' Use of Kaspersky in 2015, Report Says*, GUARDIAN (Oct. 11, 2017, 7:05 AM EDT), <https://www.theguardian.com/technology/2017/oct/11/israel-hack-uncovered-russian-spies-use-kaspersky-lab-2015-report-us-software-federal-government>.

317. See Heather Kelly, *Syrian Group Cited as New York Times Outage Continues*, CNN (Aug. 29, 2013), <https://edition.cnn.com/2013/08/27/tech/web/new-york-times-website-attack/index.html> (discussing the attack that temporarily shut down the New York Times website).

318. Gordon Corera, *NHS Cyber-Attack Was “Launched from North Korea”*, BBC NEWS (June 16, 2017), <https://www.bbc.com/news/technology-40297493>.

319. ERIC TALBOT JENSEN & SEAN WATTS, HOOVER INST., *DUE DILIGENCE AND THE US DEFEND FORWARD CYBER STRATEGY 1–2* (2020), https://www.hoover.org/sites/default/files/research/docs/jensen_and_watts_webready.pdf.

320. Hollis, *supra* note 3, at 20.

321. TALLINN MANUAL 2.0, *supra* note 293, at 31, para. 3.

general principle that has been particularised in specialised regimes of international law.”³²² Accordingly, the group confirmed two observations concerning due diligence. First the group agreed, “A State must exercise due diligence in not allowing its territory or cyber infrastructure under its governmental control, to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other States.”³²³ Commentary to this first observation clarified an “obligation of vigilance” rather than an “obligation of prevention.”³²⁴ Despite historical evidence to the contrary—including advocacy by States and findings of international tribunals such as in the *Alabama* and *Trail Smelter* arbitrations—the group discerned no duty to take preventive measures. The group stated that “this Rule is not to be interpreted as including a requirement of monitoring or taking other steps designed to alert authorities to misuse of cyber infrastructure located on the State’s territory.”³²⁵

Second, the Tallinn group concluded the duty of due diligence as applied to a cyber context operates only with respect to “serious adverse consequences.”³²⁶ Though the exact meaning of that phrase is admittedly unsettled in international law, the group resisted calls to clarify the term beyond its present state.³²⁷ The group also acknowledged that the situation of a transit State—a State through which harm transited but did not originate—deserved specific analysis and provided additional commentary with respect to the situation.³²⁸

Finally, the group discerned, “[k]nowledge is a constitutive element in the application” of due diligence to cyber operations.³²⁹ The group identified no State practice supporting any alteration from the baseline principle of due diligence with respect to the cyber context and knowledge. The group concluded, as the Court in *Corfu Channel* had, that requisite knowledge could be actual or constructive.³³⁰ In other words, for a State to have a due diligence obligation, it must have knowledge of the transboundary harm emanating from within its territory or from cyber infrastructure which the governmental controls.

322. *Id.* at 31, para. 4.

323. *Id.* at 30, r. 6.

324. *Id.* at 31–32, para. 5; *see also id.* at 43, r. 7.

325. *Id.* at 42, para. 42.

326. *See id.* at 43, r. 7.

327. *See id.* at 34, para. 15; *id.* at 36–39, paras. 25–32.

328. *See id.* at 33, para. 13.

329. *Id.* at 40, para. 37.

330. *Id.* at 40–41, paras. 37–39.

The group achieved consensus with respect to still another limit on the due diligence principle in cyber operations. The group agreed, “The principle of due diligence requires a State to take all measures that are feasible in the circumstances to put an end to cyber operations that affect a right of, and produce serious adverse consequences for, other States.”³³¹ In interpreting this rule, “[t]he Experts agreed that the territorial State must act to terminate the wrongful operation, but that it is at that State’s discretion to choose the means to comply with this Rule.”³³²

All told, while the Tallinn group achieved consensus on an international law obligation of cyber due diligence, it recognized a more limited duty than that which has arguably developed in other sectors, such as international environmental law. The lack of a duty to prevent or even monitor, coupled with high threshold of harm and absolute requirement of knowledge, suggests a minimally intrusive notion of due diligence applicable to cyberspace.

In addition to those States and collective private efforts convened by organizations mentioned above, individual commentators have variously advocated for the application of due diligence to cyber operations, while acknowledging States’ seeming skepticism of such an application.

Professor Schmitt, who led both Tallinn manual projects, wrote separately in support of due diligence during his work on *Tallinn Manual 2.0*. He identified a pressing dilemma States face with respect to the due diligence principle between “the burden they fear the principle may impose” and their desire to “ensure that other states take every feasible step to put an end to harmful cyber activities launched from—or through—their own territory.”³³³ He argued due diligence is a “general principle” of international law, meaning that “the presumption is that the principle applies unless state practice or *opinio juris* excludes it.”³³⁴ Professor Schmitt posited that, if applied correctly, States need not worry about due diligence overreach.³³⁵ Rather, he argued, “the obligation is highly sensitive to the capabilities of the states concerned,” thus relieving the expectation of an onerous application.³³⁶ Further, the application of due diligence is bounded by what is reasonable under the circumstances, meaning that “if

331. *Id.* at 43, r. 7.

332. *Id.* at 44, para. 6.

333. Michael N. Schmitt, *In Defense of Due Diligence in Cyberspace*, 125 YALE L.J. F. 68, 69 (2015).

334. *Id.* at 73.

335. *Id.* at 74–75.

336. *Id.* at 75.

the burden on the territorial state in taking remedial actions is so onerous as to be unreasonable under the circumstances, inaction will not constitute a breach.”³³⁷ Professor Schmitt also echoed the *Tallinn Manual 2.0* conclusion that due diligence applies only with respect to “ongoing cyber activities that are generating serious adverse effects in another country,” and when the State has knowledge of the actions.³³⁸ In summary, Professor Schmitt argued that the “right of sovereignty and the corresponding duty of due diligence must be in equilibrium.”³³⁹ Recognizing this equilibrium, Schmitt concludes that:

A state need not undertake onerous measures to prevent its cyber infrastructure from being used maliciously, such as monitoring all cyber activity. And only when a state learns of ongoing activities—such as when the victim state brings it to light—does the duty mature. Most importantly, the principle of sovereign equality means that other states bear the same obligation. Thus, they have a legal incentive to ensure that harmful cyber operations are not conducted from their territories. If they fail to comply with their due diligence responsibility, the injured state may respond either directly against them or indirectly by conducting operations against the non-state actors involved.³⁴⁰

Where Professor Schmitt offers a limited notion of due diligence, Professors Shackelford, Russell, and Kuehn depart and advocate “a proactive regime that takes into account the common but differentiated responsibilities of various stakeholders in cyberspace.”³⁴¹ They translate due diligence requirements into specific State responsibilities, comparing the American, German, and Chinese “domestic policy regimes including laws, frameworks, . . . and initiatives that incentivize private actors under their jurisdiction to behave in accordance with prevailing legal obligations.”³⁴² The authors divide their analysis “into three general activity categories: (1) Establish and Maintain, (2) Control and Enforce, and (3)

337. *Id.*

338. *Id.* at 75–76.

339. *Id.* at 80.

340. *Id.*

341. Scott J. Shackelford, Scott Russell & Andreas Kuehn, *Unpacking the International Law on Cybersecurity Due Diligence: Lessons from the Public and Private Sectors*, 17 CHI. J. INT’L L. 1, 3 (2016).

342. *Id.* at 34–35.

Monitor and Assess.”³⁴³ They then rate each country on their success in these areas.³⁴⁴ Ultimately, the authors attempt “to provide illustrative examples of various domestic responsibilities and approaches to meeting them in the due diligence context.”³⁴⁵

The authors then examine how those domestic regulations translate into the private sector in the United States, with respect to encouraging private sector cybersecurity due diligence. They conclude, “Despite some progress, there is still a long way to go.”³⁴⁶ A proposed solution is their “polycentric approach,” which “recognizes that diverse organizations working at multiple levels can create different types of policies that can increase levels of cooperation and compliance, enhancing ‘flexibility across issues and adaptability over time.’”³⁴⁷ Application of due diligence in this polycentric approach, they argue, will allow the international community to “mitigate the risk of cyber war by laying the groundwork for a positive cyber peace that respects human rights, spreads Internet access along with best practices, and strengthens governance mechanisms by fostering multi-stakeholder collaboration.”³⁴⁸

343. *Id.* at 35.

344. *See id.* at 37–41.

345. *Id.* at 41–42.

346. *Id.* at 44.

347. *Id.* at 46 (quoting Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 15 (2011)).

348. *Id.* at 48–49. *See generally* Oliver Dörr, *Obligations of the State of Origin of a Cyber Security Incident*, 58 GERMAN Y.B. INT’L L. 87, 87 (2015) (“[T]he obligation to prevent [transboundary] harm is a general obligation of due diligence and, as such, provides a flexible regulatory framework to define substantive and procedural duties of conduct and to accommodate the public and private interests involved.”); Matthias Herdegen, *Possible Legal Framework and Regulatory Models for Cyberspace: Due Diligence Obligations and Institutional Models for Enhanced Inter-State Cooperation*, 58 GERMAN Y.B. INT’L L. 169, 184 (2015) (“States must apply due diligences in supervising threats to cyber-security which may affect other States and prevent substantial harm by transboundary activities.”); Matthias C. Kettemann, *Ensuring Cybersecurity Through International Law*, 69 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 281, 288 (2017) (discussing the role of non-governmental stakeholders in effectively applying the principle of due diligence to cyber operations); Robert Kolb, *Reflections on Due Diligence Duties and Cyberspace*, 58 GERMAN Y.B. INT’L L. 113, 127 (2015) (raising several questions about the application of due diligence to cyber activities but concluding nonetheless that “[d]ue diligence is a concept flexible enough to accommodate such particular needs”); Joanna Kulesza, *State Responsibility for Cyber-Attacks on International Peace and Security*, 29 POLISH Y.B. INT’L L. 139, 151 (2009) (“[T]here is a need for an international consensus on the criteria which have to be fulfilled by a state in order to avoid international responsibility for failing to show due diligence in protecting other sovereigns from cyber-attacks.”); Ian Yuying Liu, *State Responsibility and*

While Professor Schmitt clearly, and understandably, advocated the *Tallinn Manual 2.0* approach to due diligence, a critique of this approach alleged several flaws in the analysis.³⁴⁹ The critique accepted “[d]ue diligence is customary international law,”³⁵⁰ but argued the Tallinn group should have accepted a “theory of aggregation when determining the character of the triggering harm fails to cover Botnet operations.”³⁵¹ The critique argued the nature of botnet operations, in particular, would rarely reach the threshold of harm required by the due diligence principle, leaving the victim State without a claim and the generating State without an obligation.³⁵² The critique also claimed the *Tallinn Manual 2.0* rejection of preventative measures with respect to the exercise of due diligence allows States to “implement[] a policy of plausible deniability when it comes to cyber operations in their territory.”³⁵³ The critique predicted States would adopt the theory of aggregation of attacks and take an obligation to preventatively gather knowledge about cyber activities in a State’s territory.³⁵⁴ This knowledge would then permit the due diligence principle to become “an indispensable tool in maintaining international peace and security” with respect to cyber operations.³⁵⁵

Alongside support for cyber due diligence as an international legal approach to transboundary cyber harms, there is limited skepticism concerning State acceptance of the duty of due diligence and its application to cyber activities by States. For example, Professor Schmitt himself acknowledges “nascent state opposition” to the application of a general rule of cyber due diligence.³⁵⁶ Similarly, Professor Hollis argues that “[t]he lack of any public U.S. endorsement of due diligence as a legal rule in either the GGE context or elsewhere may be indicative of U.S. doubts as to its legal

Cyberattacks: Defining Due Diligence Obligations, 4 *INDONESIAN J. INT’L & COMPAR. L.* 191, 193 (2017) (“A due diligence obligation in cyberspace (‘cyberdiligence’), if established, would offer victim States alternative legal recourse for a territorial State’s breach of a primary obligation.”).

349. See Colin Patrick, Comment, *Debugging the Tallinn Manual 2.0’s Application of the Due Diligence Principle to Cyber Operations*, 28 *WASH. INT’L L.J.* 581 (2019).

350. *Id.* at 583.

351. *Id.* at 596. A Botnet operation occurs when a “malicious party takes control of Internet of Things (IoT) devices” then uses them to “launch large-scale Distributed Denial of Service (DDos) attacks.” *Id.*

352. *Id.* at 597–98.

353. *Id.* at 600.

354. See *id.* at 600–01.

355. *Id.* at 603.

356. Schmitt, *supra* note 333, at 69.

status.”³⁵⁷ Others have also used caution with respect to various applications of cyber due diligence. Professors Reinisch and Beham conclude, “the obligations of transit States remain largely unclear.”³⁵⁸

Finally, in a previous work, we raised a warning concerning the potential unanticipated consequences of a strong due diligence obligation that may lead to failures equating to a violation of international law, allowing a resort to countermeasures as a remedy. We observed previously,

[B]y presenting more opportunities for more States to allege more breaches of international law, due diligence potentially increases the frequency of States’ resort to countermeasures and their accompanying potentially destabilizing effects. Before fully embracing a more refined notion of cyber due diligence and the consequent increased opportunities to allege breach, States are well advised to consider carefully both practical limitations of the international regime of self-help and associated costs to international stability.³⁵⁹

In summary, it appears there is widespread acceptance of due diligence as a fundamental principle that may facilitate the resolution of emerging issues, such as harmful transboundary cyber activities. The advocacy and outcomes of the U.S. claims in *Alabama* and *Trail Smelter* suggest a diplomatic custom of support as well. More recently, the ICJ has unabashedly issued decisions based on the specific application of a general due diligence principle, while the International Law Commission and International Law Association have both produced documents which also endorse such a position.

While much of the stronger language has reflected the sector specific area of international environmental law, these works and statements by States have confirmed in broad terms States’ general duty to cease harm that emanates from their territory. However, the sector specific application of due diligence to cyber activities is less clear. The inability of the UN GGE to make a strong statement in this area continues to feed skepticism sufficient to overcome the embrace of the principle by a majority of academics. Statements such as the recent EC statement will continue to

357. HOLLIS, *supra* note 3, at 21.

358. August Reinisch & Markus Beham, *Mitigating Risks: Inter-State Due Diligence Obligations in Case of Harmful Cyber Incidents and Malicious Cyber Activity – Obligations of the Transit State*, 58 GERMAN Y.B. INT’L L. 101, 111 (2015).

359. Eric Talbot Jensen & Sean Watts, *A Cyber Duty of Due Diligence: Gentle Civilizer or Crude Destabilizer?*, 95 TEX. L. REV. 1555, 1577 (2017).

increase the pressure on States, including the United States, to accept the notion of cyber due diligence.

IV. Potential Future Perspectives

Review of past and present perspectives suggests due diligence has lived two distinct, though interconnected lives in international law. First, it is abundantly clear due diligence has been a widely recognized and applied principle of international law since the late nineteenth century or earlier.³⁶⁰ In the absence of a fully developed regime of tort, as found in municipal systems of law, States have resorted to due diligence to express general expectations of reasonable care and regard for harms to sovereignty between States.³⁶¹ More than an abstract norm or guiding sentiment, the principle of due diligence has enjoyed doctrinal acknowledgement from tribunals, publicists, and States.³⁶² Indeed, due diligence is viewed as a general, though ambiguously framed, duty to cease harm that emanates from sovereign territory and causes serious adverse consequences in the territory of another State.³⁶³ The precise standards of conduct and result that follow from the principle and its doctrine remain unclear. But at a minimum, responsibility for serious harm from activity in a State's territory has formed an important baseline to regulate relations between States generally.³⁶⁴

Second, the same sources have simultaneously acknowledged and have gradually refined regime-specific notions of due diligence that operate as or supplement rules of conduct. Early periods featured obligations of due diligence by States specific to neutrality and to maritime affairs.³⁶⁵ Later, other specific fields and conditions of international relations including armed conflict, the natural environment, outer space, human rights, and perhaps now global health have developed or are developing an increasingly refined doctrinal conceptions of due diligence through treaty, custom, and, in a subsidiary sense, through decisions of tribunals.³⁶⁶ Many specialized international regimes now include detailed standards of conduct or results, thresholds of harm, and obligations of reparation as matters of

360. See discussion *supra* Section II.A.

361. See discussion *supra* Parts II–III.

362. See discussion *supra* Part II, Sections III.A–B.

363. See discussion *supra* Part II, Sections III.A–B.

364. See discussion *supra* Part II, Sections III.A–B.

365. See discussion *supra* Section II.A.

366. See discussion *supra* Section II.B, Part III.

due diligence.³⁶⁷ As the preceding Part illustrated, these regime-specific notions of due diligence feature extensively in treaties, international litigation, and private sector work on international law and point to the likely path of development of due diligence in emerging domains of international relations.

Third, although distinct in important doctrinal respects, the two lives of due diligence have been interrelated. Each has clearly influenced or inspired developments and refinements in the other. Acknowledgement and development of the principle of due diligence has inspired or spawned regime-specific notions of due diligence. In nearly every context of international relations, States and tribunals have resorted to the principle of due diligence as a baseline or starting point to discern or develop further rules of conduct and result arising from State failures with respect to a wide range of harm.³⁶⁸ Likewise, regime-specific doctrines have influenced or purport to influence the doctrinal content of the principle of due diligence.³⁶⁹ The quite detailed standards of conduct or result, thresholds of harm, and reparation schemes developed for specific domains of international relations have been proposed for incorporation into the general scheme of international due diligence with varying degrees of success.³⁷⁰

Thus, it is clear due diligence in each incarnation, and through the interaction of these incarnations, plays an increasingly important role in the international legal regulation of State interactions. In light of these two lives, their future importance, and in recognition of positive history with due diligence broadly, the United States may wish to revisit its position on both due diligence and cyber due diligence. At the very least, the United States should consider embracing a neutral view on both applications, but more positively embracing a tailored approach to both due diligence and cyber due diligence.

As the previous Part illustrated, it is difficult to identify a current U.S. view on the principle of due diligence. Present U.S. practice generally avoids the question of due diligence altogether or frames comments on due diligence as reflections on desirable norms of State behavior rather than reflections on a legally binding duty.³⁷¹ To date, the most unequivocal U.S. statements on the principle are found in submissions to late nineteenth and mid-twentieth century international arbitrations in which the United States

367. See discussion *supra* Part III.

368. See discussion *supra* Parts II–III.

369. See discussion *supra* Section II.B, Part III.

370. See discussion *supra* Section II.B, Part III.

371. See discussion *supra* Sections III.B–C.

was a victim State.³⁷² The extent to which these statements curtail or should curtail a future U.S. position deserves consideration.

As a preliminary matter, U.S. legal policymakers may wish to refine and express U.S. views on the status of due diligence as a principle of international law. Historical U.S. legal statements could guide the limits of a plausible and coherent U.S. future perspective on due diligence. At a minimum, the United States might publicly acknowledge its customary support for due diligence in its foreign relations and diplomatic practices. Additionally, favorable outcomes and practical diplomatic concerns seem to counsel in favor of maintaining a status quo U.S. approach to due diligence. Still, substantial doctrinal flexibility remains for U.S. legal policy to account for extant and anticipated demands of international relations. A U.S. statement on a principle of due diligence might admit its existence but simultaneously identify and advocate limits on doctrinal details, including a duty to prevent harm and on the threshold of harm itself.

It is worth recalling the United States zealously embraced and advocated a general duty of diligence between States as a principle of international law at the Treaty of Washington negotiations with Great Britain, and in two legal episodes that preceded those negotiations.³⁷³ Recall, the United States aggressively advocated for and largely succeeded at codifying the principle of due diligence into the Treaty of Washington as both an ad hoc rule of adjudication and as a prospective limit on future relations with Great Britain and potentially with other States.³⁷⁴ Then, at all stages of the *Alabama* arbitration that followed—and in the face of British backpedaling on the principle—the United States maintained steadfast support for a general duty of due diligence between States.³⁷⁵ As related above, the *Alabama* tribunal clearly adopted the U.S. view to the substantial benefit of the United States and ultimately to its relations with Great Britain.

More than sixty years later and on the eve of its emergence as a superpower, through a decades-long series of diplomatic negotiations and a protracted international legal arbitration with Canada, the United States similarly endorsed and advocated a general duty of due diligence in international law. From 1927 through 1941, the *Trail Smelter* episode provoked clear and unwavering U.S. assertions of a duty of diligence for Canada to cease emanation of privately generated transboundary harm as a

372. See discussion *supra* Part II.

373. See discussion *supra* Section II.A.

374. See discussion *supra* Section II.A.

375. See discussion *supra* Sections II.A–B.

matter of international law.³⁷⁶ And like its predecessor, the *Alabama* tribunal, the *Trail Smelter* tribunal largely adopted U.S. arguments, again, to the substantial benefit of U.S. interests and, ultimately, to U.S.-Canada relations.

Some commentators have cabined the *Trail Smelter* opinion's legal outputs and precedential value, particularly its observations concerning due diligence, to the context of transboundary environmental pollution. It is true, at the time of *Trail Smelter* arbitration, litigation of transnational environmental harm was novel to international law. Yet a more adept reading of the *Trail Smelter* decision and of the involved States' submissions to the tribunal restricts allegations of legal innovation to the arbitration's and the parties' *application* of due diligence rather than to the *existence* of a duty of due diligence. On the mixed question of fact and law regarding whether States owed a duty to cease environmental pollution by private parties' operations within their territory, the tribunal and parties' filings may have broken new ground. However, any regime-specific doctrines of due diligence that emerged from the *Trail Smelter* tribunal's decision and the parties' submissions surely reflect, in substantial part, application of the preexisting and general duty of due diligence offered by the United States at each stage of negotiation and arbitration and embraced by the tribunal—and for that matter by Canada—as a baseline principle of international law.

As Professor Hollis has indicated, more recent U.S. perspectives on due diligence present a less clear case for a future perspective.³⁷⁷ But, on balance, U.S. practice seems to support recognition of due diligence as a principle of international law. In the face of consistent and repeated expressions of the principle in high-profile litigation at the ICJ, the United States has expressed no public or notorious objection to due diligence conceived broadly. From its very general confirmation of U.K. due diligence claims in the *Corfu Channel* case through its direct and unequivocal confirmation and application of the principle to modern contexts of State interaction, the ICJ has served up a consistent and progressively refined vision of the principle of due diligence to the international community. The United States has not expressed publicly any of the sort of criticism or censure of the Court that might be expected if due diligence were not in its view a principle of general international law.

376. See discussion *supra* Section II.B.

377. See discussion *supra* Section III.C.

Admittedly, judgments, even grossly incorrect ones, or statements of law by international tribunals do not require State rejoinders. And despite treaty provisions suggesting the contrary, there is strong evidence, also based in treaty, for a purely adjudicative rather than law-making understanding of international litigation.³⁷⁸ Yet, such persistent and prominent judicial confirmation of the principle of due diligence, such as those offered by ad hoc and standing tribunals, would seem to have provoked some adverse U.S. reaction if in fact the United States regarded them as made in error. Moreover, these tribunals' judgments align closely with positions taken by the United States in its litigation over due diligence claims. These positions thus render the conclusion the United States has generally, though quietly, since the 1940s supported due diligence at least reasonable. Thus, although not entirely untenable, a U.S. legal position rejecting due diligence as a principle of international law would be extraordinarily difficult to peddle at this late stage of development.

Beyond past or present U.S. legal positions, other practical considerations derived from U.S. experience with the principle of due diligence bear mention in the formation of a future U.S. perspective. First, on two legally historic occasions, embrace and assertion of due diligence served the United States extraordinarily well in its international relations. The *Alabama* and *Trail Smelter* arbitrations not only secured meaningful compensation from other States for harm to U.S. citizens, both episodes ended with significant vindications of U.S. foreign policy.³⁷⁹ The United States emerged from each episode as a State unwilling to compromise its citizens' interests yet committed to peaceful and independent evaluation of its claims.³⁸⁰ Further, each episode played a significant part in securing a peaceful and prosperous future relationship with an important ally.

In a related sense, both the *Alabama* and *Trail Smelter* results illustrate the role due diligence might play as a relief valve of sorts in international relations. The *Alabama* claims arose in the highly charged context of recognition of belligerency by Great Britain. Paired with this diplomatic and international legal insult, the harm resulting from British-built ships to U.S. merchant fleets nearly brought the parties to war.³⁸¹

378. Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055 (identifying judicial decisions as "subsidiary means for the determination of rules of [international] law"). *But see id.* art. 59 (stating a "decision of the Court has no binding force except between the parties and in respect of that particular case").

379. *See* discussion *supra* Sections II.A–B.

380. *See* discussion *supra* Sections II.A–B.

381. *See* discussion *supra* Section II.A.

As related above, broader political and economic considerations perhaps best explain how the United States and Great Britain avoided war. Yet the nature of the due diligence principle as an internationally wrongful act may also have played a part in the peaceful and successful resolution of the *Alabama* claims. That is, casting British conduct as a failure of due diligence permitted the United States to raise the issue early, in a way, freezing the facts of the dispute and reducing the likelihood of escalatory exchanges of retorsions or even reprisals.

Similarly, although damage from the *Trail Smelter* significantly soured U.S.-Canada relations for more than a decade, the U.S. claims alleged a lapse of diligence.³⁸² Arguably, it was an omission—rather than direct responsibility for or an affirmative act resulting in harm—which explains their successful and peaceful resolution. Again, the nature of the due diligence principle as an allegation of omission rather than of action or even of imputed responsibility may have played a part in the peaceful and successful resolution of the claims.

Although developed as a facet of international legal responsibility between States, due diligence is peculiar in that it does not require that the harm involved be traced directly to or attributed to the offending State. Nor, for that matter, does due diligence operate as a theory of liability requiring a predicate or underlying international wrong; the lapse of diligence is itself a wrongful act.

A breach of due diligence simply involves a failure on the part of the offending State to act reasonably to cease harm regardless of attribution and regardless of the wrongfulness of acts that caused harm. Fault and recompense in due diligence are not based on highly nefarious attributions or commissions of underlying internationally wrongful acts in every case as with other international causes of action. Rather they are based on mere omission or even oversight by the offending State.³⁸³

In this sense, breaches of due diligence may reflect comparatively less damning or threatening delicts than other allegations in international law. Allegations grounded in due diligence permit both victim and offending States to address and resolve claims arising from harm somewhat indirectly. The victim State is able to assert and protect its interests against a peer international legal personality, while the offending State is able either to deny or at least elude direct responsibility for the harm, perhaps to save face

382. See discussion *supra* Section II.B.

383. See discussion *supra* Part II, Sections III.A–B.

or satisfy domestic interests, while offering a de-escalatory concession of omission to the victim State.

Although the apparently magnanimous concessions of both Great Britain and Canada respectively in the *Alabama* and *Trail Smelter* episodes have been explained by larger political and economic conditions, the comparatively benign brand of culpability associated with due diligence surely made magnanimity in these episodes all the more feasible than more direct or damning allegations of fault might have. These de-escalatory or face-saving experiences, associated at least in part with due diligence, might further counsel the United States not abandon support for the principle as a relief valve of this sort in international relations.

Finally, if U.S. rejection of a principle of due diligence generally would be difficult, the United States might nonetheless tend to misgivings over evolving expressions of the principle through an updated expression on the subject. As noted previously, although legally distinct, the international law principle of due diligence and various regime-specific expressions of due diligence have experienced a developmental cross pollination of sorts.³⁸⁴ Clearly the principle of due diligence has inspired and informed regime-specific notions of the concept. Meanwhile, doctrinal elaborations originally developed for specific contexts of international interaction have found their way into academic, and even judicial, descriptions of the principle of due diligence. For instance, although the regime-specific notion of prevention of harm presents most clearly in international environmental law, it has featured in a number of prominent articulations of the general principle of due diligence. That is, accounts of the due diligence principle recite a general—as opposed to a merely regime-specific—duty on the part of States to prevent, rather than merely respond to and cease, transboundary harm. To preserve the traditional flexibility and adaptability of the principle of due diligence, the United States might reject refinements such as a duty of prevention or a lower threshold of harm reserving such questions for regime-specific incarnations of the principle.

Given the two lives of due diligence discussed above, the U.S. determination on how to treat due diligence in the future is not necessarily dispositive of how it will treat cyber due diligence. While it would be legally inconsistent to reject a general principle of due diligence and embrace cyber due diligence, the same is not true if the United States decides to accept the general principle and reject the sector-specific application. It is not certain the United States will embrace cyber due

384. See discussion *supra* Section III.A.

diligence as a matter of international law. The recent Cyber Solarium Report presented an opportunity to endorse due diligence as one method of placing legal responsibility upon violators who are attacking U.S. interests both at home and abroad but did not.³⁸⁵

On the other hand, the U.S.'s historical advocacy of due diligence and the general trends among the international community toward a sector specific application of cyber due diligence should be sufficient to cause serious reflection on the part of the United States of potential benefits from endorsing such a view. In an age where harmful transboundary activities are increasing at an alarming rate, cyber due diligence offers one legal methodology to assign accountability and provide possible options for redress.

Additionally, if the United States embraced a duty of cyber due diligence, many of the potential concerns with overreach would be minimized. Rejecting, as the Tallinn group did, the duty of prevention and monitoring would remove potential human rights concerns as well as limit the scope of the requirement to a much more plausible requirement. Further, by reinforcing the requirement for actual or constructive knowledge prior to the duty to take action and then limiting that action to what is feasible, the United States and other like-minded States can endorse a view of due diligence that provides a remedy to the increasing risks associated with transboundary cyber harm without creating a duty that is too onerous to apply or enforce. Such a tailored duty of cyber due diligence deserves not only consideration, but adoption by the United States and, indeed, the entire international community.

V. Conclusion

The idea that a State advocate and beneficiary of two of the earliest and most prominent due diligence claims in international law would abandon the principle involves no small irony. On two occasions in its international legal history, the United States championed due diligence to its great diplomatic advantage. Both episodes featured not only ardent U.S. resort to

385. ANGUS KING & MIKE GALLAGHER, U.S. CYBERSPACE SOLARIUM COMM'N, FINAL REPORT (Mar. 2020). This report was ordered by Congress in the 2019 National Defense Authorization Act in order to "develop a consensus on a strategic approach to defending the United States in cyberspace against cyber attacks of significant consequences." John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1652, 132 Stat. 1636, 2141 (2018).

international legal process and regulation but also illustrated the potential for international law to contribute to peaceful resolution of disputes.

Greatly influenced by U.S. arguments and experience, a wide range of international law sources, including States, courts, and publicists has embraced two incarnations of due diligence. Due diligence clearly operates as a free-standing, baseline duty of conduct by States to cease serious harm that emanates from their territory. In the absence of more specific rules of conduct, this general incarnation of due diligence reflects a minimum standard of care in international relations. Separately, but similarly influenced by early U.S. diplomatic practice, due diligence has developed in sector-specific legal regimes as a rule of conduct and as a supplement to understandings of other duties. Legal regimes including neutrality, law of the sea, law of war, and, most notably of late, environmental law have developed increasingly refined notions and doctrines of due diligence to regulate State conduct in volatile domains of international relations. While the United States played an active role in the early development of both incarnations of due diligence, there are signs of U.S. reticence or even recalcitrance with respect to due diligence generally and as applied to emerging domains of such as cyberspace.

A survey of past U.S. experience, growing international support, as well as the merits and limitations of due diligence itself, suggests the United States should adopt an active and clear legal policy toward both incarnations of due diligence. With respect to general or baseline due diligence, the United States might express support while emphasizing the doctrinal limits of international consensus. The United States might embrace core elements including a duty to cease known and serious adverse consequences while characterizing efforts to further refine duties of prevention or to lower thresholds of harm as unsupported by custom and practice. At the same time, the United States might clarify views on sector-specific notions of due diligence, including cyberspace. A duty of due diligence in cyberspace offers significant potential to mitigate harm to critical information infrastructure. Yet the peculiar technical, economic, and diplomatic features of cyberspace suggest clear and perhaps idiosyncratic limits on how due diligence can and should operate in this unique realm. A clearly defined U.S. legal policy toward due diligence, accounting for U.S. diplomatic practice, intervening international legal developments, and the peculiarities of cyberspace as a domain of state interaction and competition will both support vital U.S. security interests and reassert influence on a critical component of the regulation of modern international relations.