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# Beyond Gap-Filling: Four Functions of Principles of International Law Through the Lens of Due Diligence

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## ABSTRACT

This article challenges the International Law Commission's (ILC) characterisation of general principles as 'gap-fillers' invoked only when treaties and custom prove insufficient. Through systematic analysis of contemporary jurisprudence, it demonstrates that principles perform four essential functions simultaneously: (i) systemic integration across fragmented legal regimes, (ii) qualifying how other norms apply in specific contexts, (iii) autonomous regulation generating independent obligations and (iv) expression of fundamental systemic values.

Using due diligence as a case study, the analysis traces its evolution from nineteenth-century arbitral practice through recent applications across environmental law, human rights, cyberspace and corporate responsibility. The climate advisory opinions from the International Tribunal on the Law of the Sea and the Inter-American Court of Human Rights, characterising due diligence as 'stringent' and 'enhanced', provide compelling evidence of all four functions operating simultaneously. This evolution demonstrates how principles maintain conceptual coherence while adapting to challenges through 'structured flexibility'.

The four-function framework reveals principles as essential mechanisms enabling international law to address contemporary challenges without abandoning established frameworks. This functional understanding provides theoretical guidance for courts, strategic insights for legal advisors and suggests the ILC should recognise the broader structural role of principles. As international law confronts rapid global change, understanding how principles actually function becomes crucial for maintaining coherence while enabling adaptation.



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## 1. INTRODUCTION

The role of general principles in international law has long been a subject of spirited debate amongst scholars and practitioners. Recent discussions within the International Law Commission (ILC) have reignited fundamental questions about whether principles merely fill gaps left by treaties and custom, or whether they serve broader functions in the international legal order.[1] While the ILC's Draft Conclusions on General Principles of Law represent significant progress in clarifying their identification,[2] they adopt a notably cautious approach to the functions these principles perform. Draft Conclusion 10 suggests that general principles are 'mainly resorted to' when other rules do not resolve an issue,[3] reflecting a narrow understanding that has dominated scholarship since the drafting of article 38(1)(c) of the International Court of Justice (ICJ) Statute.[4]

As noted by recent scholarship, the functions of these principles is a 'fundamental point of controversy'.[5] This article challenges a restrictive view by showcasing that principles of international law perform at least four distinct functions that are essential to maintaining systemic coherence: (i) systemic integration of rules, (ii) qualifying the application of other norms, (iii) autonomous regulation of state conduct and (iv) expression of fundamental values. These functions extend far beyond gap-fillingand reveal principles as dynamic tools that enable international law to adapt to new challenges while maintaining stability.[6]

The capacity of principles to perform these multiple functions stems from their distinctive character as norms that are simultaneously foundational and abstract. In their foundational aspect, principles provide the bedrock upon which more specific rules are built, embodying core commitments of the international legal system. As abstract norms, they possess sufficient flexibility to apply across diverse contexts and evolve with changing circumstances. This dual nature distinguishes principles from both treaty provisions and customary rules, which typically operate at lower levels of abstraction (ie they are more specific).[7]

To illustrate this functional richness, this article examines due diligence, a principle that has recently been added to the ILC's long-term work programme.[8] Due diligence provides an ideal case study for several reasons. First, its evolution from nineteenth-century arbitral practice to contemporary applications across environmental law, human rights and cyberspace demonstrates how principles maintain their foundational character while adapting to new challenges.[9] Second, recent advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR) have characterised due diligence obligations as 'stringent' and 'enhanced' respectively in the context of climate change,[10] illustrating how the principle's abstract nature enables contextual refinement

1 See International Law Commission, 'Fourth Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (18 February 2025) UN Doc A/CN.4/785, paras 171–79 (documenting divergent state views on whether principles serve functions beyond gap-filling).

2 International Law Commission, 'Report of the International Law Commission on the Work of its Seventy-second Session' (2021) UN Doc A/76/10, ch VII.C (Draft Conclusions on General Principles of Law).

3 ibid Draft Conclusion 10(1): 'General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part'.

4 (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

5 Alice Ollino, 'Due Diligence Obligations in International Law: Towards a General Principle?' in Alice Ollino (ed), *Due Diligence Obligations in International Law* (CUP 2022) 50 https://doi.org/10.1017/9781009053082.

6 See Yilin Wang, 'The Origins and Operation of the General Principles of Law as Gap Fillers' (2022) 13 Journal of International Dispute Settlement 560 https://doi.org/10.1093/jnlids/idac018.

7 On the distinction between principles and rules in international law, see Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417 https://doi.org/10.1093/ejil/chv020; Eirik Bjorge, 'General Principles of Law Formed Within the International Legal System' (2023) 72 ICLQ 845, 847 https://doi.org/10.1017/S0020589323000362.

8 International Law Commission, 'Report of the International Law Commission on the Work of its Seventy-fifth Session' (2025) UN Doc A/79/10, Annex II; Penelope Ridings, 'Due Diligence in International Law'.

9 For comprehensive recent treatments, see Samantha Besson, 'Due Diligence in International Law' (2023) 409 Recueil des Cours 153; Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020).

10 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion of 21 May 2024) para 241 (describing due diligence as 'stringent'); IACtHR, *Advisory Opinion on the Climate Emergency and Human Rights* (Advisory Opinion OC-32/24 of 21 May 2024) para 233 (requiring 'enhanced due diligence'). The ICJ has recently qualified climate due diligence as 'stringent' in its Climate Change Advisory Opinion. See *Obligations of States in respect of Climate Change* (Advisory Opinion) (2025). This analysis, however, focuses on the ITLOS and IACtHR advisory pronouncements.

without abandoning its core content. Third, due diligence operates simultaneously across all four functional dimensions, making it particularly suitable for demonstrating the multifaceted role of principles in contemporary international law.

The analysis proceeds in five parts. Part II situates the discussion within contemporary debates about principles of international law, examining the ILC's framework and the crucial distinction between principles and customary rules. Part III develops the theoretical framework of four functions, drawing on examples beyond due diligence to demonstrate their general applicability. Part IV traces due diligence from its historical foundations through its contemporary applications across multiple legal regimes, showing how it exemplifies all four functions. Part V examines the recent evolution toward 'enhanced' and 'stringent' standards of due diligence, exploring how principles adapt to contemporary challenges. Part VI reflects on the broader implications for understanding principles as tools of legal development.

This functional approach offers both theoretical and practical benefits. Theoretically, it provides a more sophisticated understanding of how principles operate within the international legal system, moving beyond sterile debates about sources toward examining their actual role in legal reasoning and development. Practically, it offers guidance to courts, tribunals and legal advisors on how to identify and apply principles effectively. As international law confronts unprecedented challenges from climate change to digital transformation, understanding the full range of functions that principles perform becomes not merely an academic exercise but an urgent practical necessity.

## 2. THE CONTEMPORARY DEBATE ON PRINCIPLES OF INTERNATIONAL LAW

### 2.1. BEYOND THE ILC'S CAUTIOUS APPROACH

The ILC's work on general principles of law has reignited longstanding debates about their nature and function in the international legal system. While the Draft Conclusions adopted on first reading in 2023 provide valuable guidance on the identification of general principles,[11] they adopt a markedly conservative approach to their functions. This caution is particularly evident in Draft Conclusion 10, which states that general principles are 'mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part'.[12] This formulation suggests that principles serve primarily as gap-fillers, a residual source invoked only when treaties and custom prove insufficient.

State reactions to the ILC's work reveal significant dissatisfaction with this restrictive view. In comments on the Draft Conclusions, several States explicitly rejected the limitation of principles to a gap-filling role. Slovenia, for example, emphasised that general principles are 'parallel to the other sources of international law' and that their functions extend beyond filling lacunae.[13] Portugal and the State of Palestine similarly observed that principles serve broader purposes in the international legal system.[14] Most significantly, numerous States highlighted what they perceived as an inherent tension between the emphasis of Draft Conclusion 10 on gap-filling and Draft Conclusion 11's assertion that principles exist in a non-hierarchical relationship with treaties and custom.[15]

This tension points to a fundamental conceptual issue that the ILC has not fully resolved. If principles truly stand on equal footing with other sources of international law, as Draft Conclusion 11 suggests, then limiting them to a subsidiary, gap-filling function appears contradictory. The Holy See captured this concern by noting that certain principles of an 'almost constitutional nature' underpin the entire application of international law, rather than merely filling gaps left by other sources.[16] Such principles, including sovereign equality and good faith, clearly perform functions that transcend the resolution of normative lacunae.

11 ILC, 'Draft Conclusions on General Principles of Law' (n 2).

12 ibid Draft Conclusion 10(1).

13 ILC, 'Fourth Report' (n 1) para 176 (citing Slovenia's statement).

14 ibid.

15 ibid para 175 (noting comments by Colombia, Mexico and others on this apparent conflict).

16 ibid para 174.

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The ILC's cautious approach reflects deeper anxieties about the role of principles in international law. Some members of the Commission expressed concern that recognising broader functions for principles might undermine legal certainty or provide excessive discretion to international courts and tribunals.[17] Yet this concern overlooks the reality that courts already rely on principles for multiple purposes beyond gap-filling, including interpreting treaties, resolving conflicts between norms and articulating fundamental values of the international community.[18] The International Court of Justice's jurisprudence provides numerous examples of principles operating in these diverse capacities, from the principle of good faith informing treaty interpretation to the principle of self-determination shaping the content of other obligations.[19]

## 2.2. DISTINGUISHING PRINCIPLES FROM CUSTOMARY RULES

A crucial preliminary issue involves clarifying the relationship between principles of international law and customary international law. This distinction has generated considerable confusion in both scholarship and practice, with some arguing that principles formed within the international legal system are merely another form of customary law.[20] Understanding this relationship is essential for appreciating how principles perform their distinctive functions.

The confusion stems partly from the fact that principles and custom can share substantive content. The principle of non-intervention, for example, finds expression in customary rules prohibiting specific forms of interference in domestic affairs.[21] Similarly, the principle of permanent sovereignty over natural resources corresponds to customary rules regarding States' rights over their natural wealth.[22] This overlap has led some scholars to question whether principles formed within the international legal system constitute a distinct category or merely represent customary rules by another name.[23]

However, several key differences distinguish principles from customary rules. First, the methods of identification differ significantly. While customary rules require evidence of both State practice and *opinio juris*, principles may be identified through a more varied set of indicators, including their recognition in treaties, judicial decisions and other international instruments.[24] As Talmon has demonstrated, the ICJ's methodology for identifying customary law – however inconsistent it may be – differs markedly from its approach to recognising principles.[25] The Court often identifies principles through deductive reasoning from the structure of the international legal system, rather than through inductive analysis of State practice.[26]

Second, principles operate at a higher level of abstraction than customary rules. While a customary rule typically prescribes specific conduct – such as the obligation to provide prompt notification of environmental hazards – a principle embodies a more general norm that can generate multiple specific obligations.[27] The principle of due diligence, for instance, does not dictate particular measures but rather establishes a standard of conduct that varies according to context, capacity and the nature of the risk involved.[28] This abstraction enables principles to adapt to new situations without requiring evidence of evolved State practice.

17 See ILC, 'Report of the International Law Commission on the Work of its Seventy-second Session' (2021) UN Doc A/76/10, ch VII, paras 234–40 (summarising debate among Commission members).

18 Catherine Redgwell, 'General Principles of International Law' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 5, 7–12.

19 See, eg *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, paras 144–74 (applying principle of self-determination).

20 For discussion of this debate, see 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (2021) UN Doc A/CN.4/741, paras 159–71.

21 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 202.

22 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 244.

23 See, eg Mendelson's view discussed in Vázquez-Bermúdez, 'Second Report' (n 20) para 140; Ollino (n 5) 48–51.

24 ILC, 'Draft Conclusions on General Principles of Law' (n 2) Draft Conclusion 7.

25 Talmon (n 7) 427–30.

26 ibid 434–37.

27 Ollino (n 5) 47–48.

28 ILA Study Group on Due Diligence in International Law, 'Second Report' (2016) 5–6.

Third, the functions performed by principles and customary rules differ in important ways. Customary rules primarily regulate specific aspects of State behaviour, creating discrete rights and obligations. Principles, by contrast, serve systemic functions that go beyond direct regulation, including providing coherence across different areas of law, informing the interpretation of other norms and expressing fundamental values.[29] When the ICJ invokes the principle of good faith, it is not merely applying a customary rule but drawing on a foundational norm that permeates the entire international legal system.[30]

The ILC's Draft Conclusions acknowledge this distinction, recognising in Draft Conclusion 7 that general principles may be formed within the international legal system.[31] However, the Commentary reveals ongoing disagreement about the precise relationship between such principles and customary law.[32] This article adopts the view that principles formed within the international legal system constitute a distinct category of norms, characterised by their higher level of abstraction, their systemic functions and their capacity to evolve through methods other than changes in State practice.

Understanding principles as distinct from, though potentially overlapping with, customary rules is crucial for appreciating their functional versatility. Because principles operate at a higher level of abstraction, they can perform integrative and interpretive functions that more specific customary rules cannot. Because they embody fundamental commitments of the international legal system, they can express values and guide legal development in ways that exceed the regulatory function of custom. These distinctive characteristics enable principles to serve as both foundation and abstraction – providing stability while enabling adaptation.

## 3. FOUR FUNCTIONS OF PRINCIPLES OF INTERNATIONAL LAW

The analysis of international jurisprudence and State practice reveals that principles of international law perform at least four distinct functions that extend well beyond the traditional understanding of gap-filling. These functions – systemic integration, qualifying application of rules, autonomous regulation and value expression – often operate simultaneously and reinforce each other. Understanding these functions provides crucial insight into how principles contribute to the coherence, adaptability and progressive development of international law.

### 3.1. SYSTEMIC INTEGRATION

The first and perhaps most fundamental function of principles is to promote systemic integration within international law. This function responds directly to concerns about fragmentation, enabling coherent interpretation across different treaty regimes and areas of customary law.[33] Systemic integration through principles goes beyond the specific mandate of article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires taking into account 'relevant rules of international law applicable in the relations between the parties'.[34] Principles serve as conceptual bridges that connect disparate rules and regimes into a coherent whole, ie they are a 'point of reference'[35] in the interpretation or application of more specific obligations and as a 'lightning rod'[36] for more defined legal rules.

The principle of sustainable development exemplifies this integrative function. Rather than existing as a discrete rule, it operates as an 'interstitial norm', reconciling potentially

29 Mads Andenas and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' in Jan Wouters and others (eds), *General Principles and the Coherence of International Law* (Brill 2019) 10 https://doi.org/10.1163/9789004390935_003.

30 *Nuclear Tests* (Australia v France) [1974] ICJ Rep 253, para 46.

31 ILC, 'Draft Conclusions on General Principles of Law' (n 2) Draft Conclusion 7.

32 ibid 67–73 (Commentary to Draft Conclusion 7).

33 ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/CN.4/L.682, para 493.

34 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c).

35 Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP 2024) 403, 9.108 https://doi.org/10.1093/law/9780192893741.001.0001.

36 ibid 403, 9.109.

conflicting obligations in environmental protection and economic development.[37] In the *Gabčíkovo-Nagymaros* case, the ICJ invoked sustainable development to harmonise Hungary's environmental concerns with Slovakia's developmental interests, demonstrating how principles can mediate between different legal regimes.[38] Similarly, in the *Pulp Mills* case, the ICJ used sustainable development to integrate procedural obligations of consultation with substantive environmental standards.[39]

Good faith represents perhaps the most pervasive integrative principle in international law. Beyond its specific manifestations in treaty law through *pacta sunt servanda,* good faith operates as a 'constitutional principle' that ensures coherent interpretation across all areas of international law.[40] The ICJ has invoked good faith to integrate obligations arising from different sources, to prevent abuse of rights and to ensure that formal compliance with rules does not defeat their underlying purposes.[41]

This integrative function differs qualitatively from gap-filling. Rather than addressing normative lacunae, systemic integration through principles ensures that existing rules from different sources and regimes operate harmoniously. As the ILC's Fragmentation Study recognised, principles serve as 'systemic integration devices' that maintain the unity of international law despite its increasing specialisation.[42]

### 3.2. QUALIFYING THE APPLICATION OF RULES

The second function involves principles qualifying or modulating how other rules apply in specific contexts. This could generate questions as to whether this represents a distinct role or merely a form of interpretation. However, careful analysis reveals that principles can transform the nature and scope of obligations without changing their formal content – a function that goes beyond conventional treaty interpretation.

One example is the principle of proportionality, which illustrates this qualifying function across multiple areas of international law. In international investment law, proportionality qualifies the application of fair and equitable treatment standards, determining when regulatory measures become compensable expropriations.[43]

Particularly, due diligence operates as a qualifying principle *par excellence.* When attached to a primary obligation – whether environmental protection, human rights or cybersecurity – due diligence transforms it from an obligation of result into an obligation of conduct.[44] This transformation is not merely interpretive but changes the fundamental nature of the obligation, shifting focus from outcomes to the reasonableness of measures taken. As ITLOS explained in its *Seabed Mining* Advisory Opinion, due diligence 'is a variable concept' that may change over time and depends on the specific context and capabilities of the State.[45]

This qualifying function addresses concerns raised in the literature about the relationship between principles and rules. Unlike Dworkin's conception in domestic law, where principles provide reasons that incline toward particular decisions without necessitating them,[46] international legal principles can actively determine how rules apply in specific contexts.

37 Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford Academic 2012) https://doi.org/10.1093/acprof:oso/9780198298076.003.0002.

38 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 140.

39 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, paras 177–80.

40 See Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017).

41 See, eg, *Rights of Nationals of the United States of America in Morocco* (France v United States) [1952] ICJ Rep 176, 212.

42 ILC, 'Fragmentation of International Law' (n 33) para 493.

43 See Eric De Brabandere and Paula Baldini Miranda da Cruz, 'The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective' (2020) 89 Nordic Journal of International Law 471 https://doi.org/10.1163/15718107-89030012.

44 Besson (n 9) 234–40.

45 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, para 117.

46 Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1977) 22–28.

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When proportionality applies in armed conflict, it does not merely 'incline' toward restraint but establishes binding parameters for lawful action. This distinction reflects the different institutional contexts of international and domestic law, where the absence of centralised enforcement makes clear qualification of obligations essential.

### 3.3. AUTONOMOUS REGULATION

The third function involves principles operating as autonomous sources of rights and obligations, independent of their role in interpreting or qualifying other norms. This function remains controversial, with some arguing that it collapses the distinction between principles and customary rules.[47] However, several principles clearly generate specific obligations without requiring mediation through other sources.

The principle of *uti possidetis juris* provides a clear example of autonomous regulation. As the ICJ explained in the *Frontier Dispute* case, this principle operates independently to determine territorial boundaries at the moment of decolonisation, creating legal consequences without reference to other rules.[48] The Court emphasised that *uti possidetis* is 'a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.[49] Its application generates specific territorial delimitations that bind States regardless of subsequent practice or agreement.

Recent ICJ practice also demonstrates autonomous regulation through the 2024 advisory opinion on *Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory*. The Court applied two principles as independent sources of obligations: permanent sovereignty over natural resources and the prohibition of territorial acquisition through force. Regarding natural resources, the ICJ determined Israel's exploitation policies were 'inconsistent with its obligation to respect the Palestinian people's right to permanent sovereignty over natural resources', framing this as a violation of 'the principle of permanent sovereignty over natural resources', rather than specific treaty provisions.[50] Similarly, the Court reaffirmed that 'the prohibition of territorial acquisition resulting from the threat or use of force … is a principle of customary international law' and applied it directly to evaluate Israeli territorial policies.[51] Both principles operated autonomously to generate specific legal obligations and provide standards for assessing State conduct, independent of other legal sources.

The principle establishing the obligation to make reparation for international wrongs, articulated by the Permanent Court of International Justice in the *Chorzów Factory* case, similarly operates autonomously.[52] While now partially codified in the ILC's Articles on State Responsibility, the principle continues to generate specific obligations regarding the form and extent of reparation independent of treaty or custom.[53] The ICJ regularly invokes this principle to determine remedies without needing to identify specific rules on reparation.[54]

The relationship between autonomous regulation and gap-filling requires careful analysis. While both functions involve principles generating obligations, they differ in important ways. Gap-filling addresses situations where no other rules apply, while autonomous regulation involves principles operating alongside and independent of other sources. The principle of reparation, for instance, does not fill a gap but rather establishes a general framework that applies whenever an international wrong occurs, regardless of whether specific rules address remedies.

47 See the debate summarised in Vázquez-Bermúdez, 'Second Report' (n 20) paras 140–45.

48 *Frontier Dispute (Burkina Faso/Mali)* [1986] ICJ Rep 554, para 20.

49 ibid para 23.

50 *Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (19 July 2024) 133.

51 ibid 125.

52 *Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Series A No 17, 47.

53 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/83, arts 31–39.

54 See, eg *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations) [2022] ICJ Rep 13, paras 69–75.

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### 3.4. VALUE EXPRESSION AND LEGAL DEVELOPMENT

The fourth function analysed here involves principles articulating and developing fundamental values of the international community.[55] This expressive function goes beyond direct regulation or interpretation, instead shaping the evolution of international law by crystallising emerging consensus and guiding progressive development.[56] While some might dismiss this as merely aspirational, value expression through principles produces concrete legal effects as an 'enduring ideal'.[57]

For instance, the principle of common heritage of mankind exemplifies this value-expressive function. Emerging in the 1960s to challenge traditional approaches to resource exploitation, the principle articulated a new vision of shared stewardship over certain global commons.[58] While its specific application to the deep seabed is now codified in the UN Convention on the Law of the Sea (UNCLOS), the principle continues to influence debates about biodiversity, Antarctica and even outer space resources.[59] It expresses values of intergenerational equity and global cooperation that shape how new legal regimes develop.

Human dignity operates as a value-expressive principle that has profoundly influenced the development of international law since 1945. While not directly enforceable as an independent right, dignity shapes the interpretation and evolution of human rights law, international humanitarian law and international criminal law.[60] The principle provides what Christopher McCrudden calls an 'ontological claim' about human worth that guides legal development across multiple fields.[61]

The principle of intergenerational equity increasingly influences international environmental law by expressing values about responsibilities to future generations. While not yet crystallised into specific rules, the principle shapes how courts interpret environmental obligations and how States negotiate new instruments. The ICJ's recent recognition of the rights of future generations in the *Climate Change* advisory opinion signals how value-expressive principles can influence legal reasoning even before generating specific obligations.[62]

Self-determination demonstrates how value expression can transform into more concrete legal effects over time. Initially articulated as a political principle in the UN Charter, self-determination expressed values about peoples' rights to determine their political status.[63] Through consistent invocation and gradual acceptance, it evolved into a principle generating specific legal consequences, as the ICJ confirmed in its *Kosovo* and *Chagos* advisory opinions.[64] This evolution illustrates how the value-expressive function can catalyse normative development.

The value-expressive function differs from the other three in its temporal orientation. While systemic integration, qualification and autonomous regulation primarily address current legal relationships, value expression shapes future legal development. Principles performing this function are not filling gaps but rather directing the growth of the legal system. In other words, they articulate current, but also emerging values that may eventually crystallise into more specific rules while immediately influencing how existing law is understood and applied.

55 Ollino (n 5) 51.

56 Jorge Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP 2020) 8–9.

57 ibid 1–11.

58 Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff 1998) 89–95 https://doi.org/10.1163/9789004635227_008.

59 Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (UNCLOS), art 11.

60 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 678–80 https://doi.org/10.1093/ejil/chn043.

61 ibid 679.

62 ICJ Climate Change Advisory Opinion (n 10) paras 156–57.

63 United Nations Charter (adopted 24 October 1945) 1 UNTS XVI (UN Charter), art 1(2).

64 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

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## 3.5. BEYOND SEQUENTIAL APPLICATION: THE SIMULTANEITY THESIS

The conventional understanding of how principles operate in international law assumes a hierarchical, sequential model: courts and tribunals first exhaust treaty and custom sources, then turn to principles as residual gap-fillers when other sources prove insufficient. This sequential approach underlies the ILC's cautious formulation in Draft Conclusion 10, which suggests principles are 'mainly resorted to when other rules of international law do not resolve a particular issue'.[65] However, careful analysis of contemporary jurisprudence reveals that principles regularly operate *simultaneously* with other sources rather than sequentially after them.

### 3.5.1. Challenging the Traditional Sequential Model

The sequential model rests on three problematic assumptions that contemporary practice contradicts. First, it assumes that legal reasoning operates through source hierarchy, with principles providing fallback options when primary sources fail. Second, it presumes that normative abundance – situations where multiple sources address the same issue –eliminates any role for principles. Third, it treats principles as subordinate supplements rather than equal participants in legal reasoning.

Recent jurisprudence systematically contradicts these assumptions. When ITLOS applied stringent due diligence to climate obligations, it was not filling a gap – article 94 UNCLOS explicitly addresses marine pollution prevention.[66] Rather, the Tribunal used due diligence to integrate UNCLOS obligations with climate treaty commitments, creating coherent obligations across treaty systems.[67] This demonstrates systemic integration rather than gap-filling, occurring in conditions of normative abundance rather than scarcity.

Similarly, the IACtHR's application of enhanced due diligence to climate-related human rights did not address normative lacunae. The American Convention on Human Rights (ACHR) already contained general human rights obligations, and specific environmental treaties provided additional frameworks.[68] The Court used enhanced due diligence to qualify how these existing obligations apply in climate contexts, transforming their scope and intensity without replacing their content.[69]

### 3.5.2. The Institutional Reality of Simultaneous Application

Contemporary international courts routinely apply principles alongside rather than instead of other sources, suggesting that simultaneity represents normal rather than exceptional practice. The ICJ's reasoning in recent cases demonstrates this pattern consistently. In the *Chagos* advisory opinion, the Court simultaneously applied treaty provisions (UN Charter, the International Covenant on Civil and Political Rights[70]), customary rules (on decolonisation) and principles (self-determination) without suggesting hierarchical relationship or sequential application.[71]

This simultaneous application serves distinct functional purposes that sequential models cannot capture. Principles often operate as interpretive frameworks that guide construction of treaty terms, systemic bridges that connect obligations from different sources and constitutional foundations that ground legal reasoning in fundamental values. These functions complement rather than substitute for the direct regulatory effects of treaties and custom.

The ILC's own work inadvertently supports simultaneity over sequence. Draft Conclusion 11(2) recognises that general principles can exist 'in parallel with rules of the same or similar content arising from other sources of international law'.[72] This formulation necessarily implies

65 ILC, Draft Conclusions on General Principles of Law (n 2) Draft Conclusion 10(1).

66 UNCLOS, art 194.

67 ITLOS Climate Advisory Opinion (n 10) para 208.

68 American Convention on Human Rights, arts 1, 4 and 5.

69 IACtHR Climate Advisory Opinion (n 10) para 232.

70 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

71 Chagos Advisory Opinion, paras 144–74.

72 ILC, Draft Conclusions on General Principles of Law (n 2) Draft Conclusion 11(2).

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simultaneous rather than sequential operation – if principles operate 'in parallel' with other sources, they must function alongside rather than after them.

### 3.5.3. Functional Explanation for Simultaneity

The four functions identified in Part III provide theoretical explanation for why simultaneity occurs. Unlike the regulatory function typically served by treaty provisions and customary rules, principles perform systemic functions that complement direct regulation. When due diligence serves as an interpretive qualifier, it shapes how existing rules apply without negating their direct effects. When it expresses constitutional values, it provides a normative foundation for legal reasoning without supplanting specific obligations.

A functional complementarity approach explains why courts naturally apply principles simultaneously with other sources rather than sequentially after them. Principles serve different purposes than treaties and custom, making their application additive rather than substitutional. The ITLOS climate opinion illustrates this perfectly: the Tribunal applied article 194 UNCLOS (treaty), customary marine pollution rules (custom) and stringent due diligence (principle) to create comprehensive State obligations that no single source could provide.[73]

This functional explanation helps to understand that principles operate alongside, rather than instead of, more specific rules, systemically integrating different types of international legal norms.

### 3.5.4. Implications for Understanding Principles

Recognising simultaneity transforms the understanding of principles in international law. Rather than residual sources invoked when other options fail, principles emerge as essential participants in legal reasoning that contribute distinctive systemic functions. This recognition aligns with state reactions to the ILC's work, where numerous governments explicitly rejected limiting principles to gap-filling roles.[74]

The simultaneity thesis also resolves the apparent tension between Draft Conclusions 10 and 11, which several states identified as contradictory.[75] If principles operate simultaneously with other sources rather than sequentially after them, their 'non-hierarchical relationship' with treaties and custom (Draft Conclusion 11) becomes perfectly compatible with their regular application in legal reasoning (Draft Conclusion 10, properly understood).

Most importantly, simultaneity reveals principles as dynamic tools that enable international law's adaptation to new challenges while maintaining systemic coherence. The climate jurisprudence analysed in Parts IV and V demonstrates this adaptive capacity: courts use principles to address unprecedented global challenges through principled development rather than awaiting formal treaty amendment or custom evolution.

This understanding positions principles not as technical legal afterthoughts but as essential mechanisms for maintaining international law's relevance and effectiveness in rapidly changing circumstances. The four-function framework provides analytical tools for understanding how this adaptive capacity operates, demonstrating that principles serve as both foundation and abstraction – grounding the legal system while enabling its continued evolution.

## 4. DUE DILIGENCE: A PRINCIPLE IN MOTION

Due diligence exemplifies how principles of international law maintain their foundational character while adapting to new challenges through their abstract nature.[76] Its evolution from nineteenth-century arbitral practice to contemporary applications across environmental law, human rights, cyberspace and corporate responsibility demonstrates all four functions operating simultaneously. Recent characterisations of due diligence as 'stringent' and 'enhanced' in climate-related contexts further illustrate how principles evolve without losing their core identity.

73 ITLOS Climate Advisory Opinion (n 10) paras 193–243.

74 See comments by Slovenia, Portugal and State of Palestine in ILC Fourth Report (n 1) paras 174–76.

75 ibid para 175.

76 Ridings (n 8) para 3.

### 4.1. HISTORICAL DEVELOPMENT: ESTABLISHING THE FOUNDATION

The principle of due diligence emerged in international law through early arbitral practice concerning State responsibility for harm originating from national territory. The *Alabama Claims* arbitration of 1872 established the foundational understanding that States must employ 'due diligence' to prevent their territory from being used for acts contrary to the rights of other States.[77] The tribunal articulated a standard that was neither absolute prevention nor mere good faith effort, but rather required measures proportionate to the magnitude of risk and the State's capabilities.[78]

This early formulation contained the essential elements that continue to characterise due diligence today: (i) an obligation of conduct rather than result, (ii) variability according to context and capacity, and (iii) reasonableness as the governing standard.[79] In *Island of Palmas*, Max Huber linked due diligence with the sovereignty of States as members of the international community.[80] The *Spanish Zone of Morocco* Claims confirmed these elements, establishing that due diligence requires a reasonable degree of vigilance appropriate to the circumstances.[81] These arbitral decisions laid the foundation for a principle that would transcend its origins in neutrality law to become a general feature of international legal obligations.

The transition from specific applications to general principle occurred through environmental law. The *Trail Smelter* arbitration of 1941 transformed due diligence from a principle governing wartime neutrality into a broader norm of international environmental responsibility.[82] The tribunal's classic dictum that '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' established due diligence as the standard for transboundary environmental harm.[83] Crucially, the tribunal emphasised that the required measures depend on the consequences involved and the state of scientific knowledge.[84]

The *Corfu Channel* case solidified due diligence as a general principle applicable across international law. The ICJ declared that every State has an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[85] This formulation, while echoing *Alabama Claims* and *Island of Palmas,* broadened the principle beyond specific treaty obligations to encompass a general duty derived from territorial sovereignty itself. The Court's reasoning demonstrated how due diligence had evolved from a treaty-based standard to a foundational principle of international law.

### 4.2. DUE DILIGENCE ACROSS LEGAL REGIMES: DEMONSTRATING FUNCTIONAL MULTIPLICITY

The evolution of due diligence across environmental law, human rights, cyberspace and business contexts provides compelling evidence for the four-function framework. This cross-regime analysis demonstrates how due diligence simultaneously performs multiple functions within each regime while maintaining conceptual coherence across domains.[86]

#### 4.2.1. Environmental Law: Integrative Foundation and Autonomous Standards

Environmental law demonstrates due diligence performing all four functions simultaneously. The ICJ's *Pulp Mills* judgment established due diligence as requiring specific obligations

77 *Alabama Claims Arbitration (United States v Great Britain)* (1872) 29 RIAA 125, 129–32.

78 Jorge E Viñuales, 'Due Diligence in International Environmental Law: A Fine-Grained Cartography' in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 112 https://doi.org/10.1093/oso/9780198869900.003.0007.

79 ILA Study Group on Due Diligence in International Law, 'First Report' (7 March 2014) 2–3.

80 *Island of Palmas Arbitration (The Netherlands v United States of America)* Award (4 April 1928) 2 RIAA 829, 839.

81 *Spanish Zone of Morocco Claims (Great Britain v Spain)* (1925) 2 RIAA 615, 644.

82 *Trail Smelter Arbitration (United States v Canada)* (1941) 3 RIAA 1905.

83 ibid 1965.

84 ibid 1966.

85 *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 22.

86 Ridings (n 8) para 18.

(vigilance, enforcement, administrative control) directly from the principle rather than explicit treaty provisions, illustrating autonomous regulation.[87]

Environmental due diligence serves systemic integration by bridging different treaty regimes. ITLOS's climate advisory opinion uses due diligence to create 'mutually supportive' interpretation connecting marine pollution prevention with climate commitments.[88] The evolution toward 'stringent due diligence' demonstrates the qualifying function by transforming general prevention obligations into demanding climate-specific requirements.

Finally, environmental due diligence expresses constitutional values of intergenerational equity. ITLOS explicitly connects stringent due diligence to responsibilities to future generations.[89]

### 4.2.2. Human Rights Law: Protective Enhancement and Vulnerability Integration

The IACtHR's enhanced due diligence (*debida diligencia reforzada*) demonstrates sophisticated functional multiplicity.[90] As an autonomous regulator, it generates specific procedural obligations including risk assessment, community participation and effective remedies.[91] The qualifying function transforms general human rights obligations into vulnerability-responsive duties requiring special attention to vulnerable groups.[92]

Enhanced due diligence achieves systemic integration by bridging human rights and environmental law, creating unified State obligations across traditionally separate domains.[93] It expresses values of climate justice and differential responsibilities, articulating evolving international values about equitable climate action.

### 4.2.3. Cyberspace: Adaptive Application and Normative Development

Cyberspace applications demonstrate due diligence's capacity to address novel challenges while maintaining foundational coherence. The Tallinn Manual's formulation builds on *Corfu Channel* while adapting to cyberspace's unique characteristics.[94] This illustrates the qualifying function by modulating traditional territorial sovereignty obligations for cyber threats.[95]

Cyber due diligence generates autonomous obligations including notification duties and cybersecurity measures.[96] It achieves systemic integration by connecting traditional sovereignty principles with emerging cyber governance frameworks, maintaining coherence across technological divides.

### 4.2.4. Business and Human Rights: Expanding Scope and Corporate Responsibility

Business and human rights contexts reveal due diligence's expansion beyond state-centred obligations while maintaining conceptual integrity. The UN Guiding Principles establish that businesses should conduct 'human rights due diligence' to 'identify, prevent, and mitigate adverse impacts'.[97] This corporate application demonstrates the principle's adaptability across different actor types.

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87 *Pulp Mills* (n 39) para 197.

88 ITLOS Climate Advisory Opinion (n 10) para 208.

89 ibid para 67.

90 IACtHR Climate Advisory Opinion (n 10) para 244.

91 ibid paras 290–310.

92 *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No 4 (29 July 1988) para 166; *González et al* ('Cotton Field') v Mexico Inter-American Court of Human Rights Series C No 205 (16 November 2009) paras 252–86.

93 IACtHR Climate Advisory Opinion (n 10) paras 115–25.

94 Tallinn Manual 2.0, Rule 6.

95 Antonio Coco and Talita de Souza Dias, '"Cyber Due Diligence": A Patchwork of Protective Obligations in International Law' (2021) 32 EJIL 3 https://doi.org/10.1093/ejil/chab056.

96 UN GGE Report 2015, para 13(c); Jack Kenny, 'Cyber Operations and the Status of Due Diligence Obligations in International Law' (2024) 73 ICLQ 135, 137, 149 and 154 doi:10.1017/S0020589323000489; Przemysław Roguski, 'Violation of Territorial Sovereignty in Cyberspace' in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (2nd edn, Edward Elgar 2021) 265–68 doi:10.5040/9798881810733.ch-004.

97 UN Guiding Principles, Principle 17.

As an autonomous regulator, corporate due diligence generates specific procedural obligations including impact assessments, integration processes, tracking mechanisms and communication requirements.[98] These duties flow from the principle's application to corporate contexts rather than binding legal instruments, demonstrating regulatory capacity beyond traditional state obligations.

The qualifying function appears through human rights due diligence's transformation of general corporate social responsibility into specific risk-based obligations. Recent legislative developments, including the EU Corporate Sustainability Due Diligence Directive, use the principle to qualify corporate obligations by requiring enhanced measures for high-risk activities and relationships.[99]

Systemic integration occurs through business due diligence's bridging of human rights law, corporate law and economic governance. The principle connects human rights protection with commercial activity, creating coherent obligations across traditionally separate regulatory domains.

Value expression emerges through business due diligence's articulation of corporate responsibility for human rights impacts, expressing evolving international consensus about business obligations to respect human rights.[100]

#### 4.2.5. Cross-Regime Synthesis: Demonstrating Functional Consistency

This cross-regime analysis reveals due diligence's remarkable functional consistency despite contextual variation. In each domain – environmental, human rights, cyber, business – the principle simultaneously serves as autonomous regulator (creating specific obligations), interpretive qualifier (transforming existing duties), systemic integrator (connecting legal domains) and value expression mechanism (articulating fundamental principles).

This functional multiplicity operates across institutional boundaries and actor types while maintaining conceptual coherence through due diligence's foundational elements: obligations of conduct, contextual variability and reasonableness standards. The principle thus provides what this article terms 'structured flexibility' – stable conceptual grounding combined with adaptive application capacity.

Recent judicial recognition of 'stringent' and 'enhanced' standards across different regimes further demonstrates this adaptive consistency. Environmental tribunals emphasise scientific rigor and technological requirements, while human rights courts stress vulnerability protection and social justice. Yet both maintain due diligence's core character while responding to domain-specific challenges.

This functional consistency across regimes validates three key insights about principles in international law. First, principles maintain conceptual coherence precisely through their abstract nature – due diligence's core elements (reasonableness, proportionality, capacity-based obligations) provide stable meaning while enabling contextual adaptation. Second, institutional variation enriches rather than fragments principled development – environmental tribunals' emphasis on scientific rigor complements human rights courts' focus on vulnerability protection, creating comprehensive guidance for States. Third, cross-regime functionality demonstrates that principles serve as transmission mechanisms for legal evolution, enabling international law to address unprecedented challenges through principled development rather than awaiting formal treaty amendment or custom formation.

### 4.3. FOUR FUNCTIONS IN DUE DILIGENCE PRACTICE

Analysis of recent jurisprudence, particularly the ITLOS and IACtHR climate change advisory opinions, reveals how due diligence simultaneously performs all four functions identified in Part III. These opinions provide concrete examples of how a single principle can operate across multiple functional dimensions.

98 ibid Principles 17–21.

99 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance) [2024] OJ L1760/1.

100 See OEIGWG Third Revised Draft, art 6.

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### 4.3.1. Systemic Integration through Due Diligence

The ITLOS Climate Advisory Opinion demonstrates due diligence functioning as a systemic integration tool par excellence. The Tribunal used due diligence to bridge different legal regimes, interpreting States' obligations under article 194 UNCLOS in light of climate treaties including the UNFCCC and Paris Agreement.[101] The Tribunal stated that 'the Paris Agreement, and the temperature goal and the timeline for emission pathways set out therein, inform the content of the due diligence obligations of States Parties under article 194, paragraph 1'.[102]

This integration went beyond mere reference to other treaties. The Tribunal used due diligence as the conceptual framework for harmonising marine pollution prevention obligations with climate commitments, creating what it called 'mutually supportive' interpretation.[103] Due diligence thus served as the principle enabling coherent application of obligations arising from different treaty systems, preventing fragmentation between ocean and climate governance.

The IACtHR similarly employed due diligence to integrate human rights obligations with environmental and climate commitments. The Court interpreted the ACHR through the lens of environmental treaties, using due diligence to create a unified framework of State obligations.[104] This systemic integration through due diligence ensures that human rights protections evolve with environmental challenges rather than operating in isolation.

### 4.3.2. Qualifying Rules: 'Stringent' and 'Enhanced' Standards

Both tribunals used due diligence to qualify how existing obligations apply in the climate context. ITLOS characterised the standard of due diligence for climate-related marine pollution as 'stringent', transforming general pollution prevention obligations into more demanding requirements.[105] The Tribunal explained that this stringency derives from: (i) the high risks of serious and irreversible harm, (ii) scientific evidence of impacts and (iii) the urgency of action required.[106]

The IACtHR went further, requiring 'enhanced due diligence' (*debida diligencia reforzada*) for climate-related human rights protection.[107] This enhancement qualifies existing obligations by requiring: (i) proactive identification of climate risks, (ii) adoption of ambitious preventive measures, (iii) use of best available science, (iv) integration of human rights perspectives in climate action and (v) special attention to vulnerable groups.[108] The Court thus used due diligence to transform general human rights obligations into specific, heightened duties in the climate context.

This qualifying function demonstrates how principles adapt existing rules to new challenges without formal amendment. Neither tribunal created new treaty obligations; instead, they used due diligence to modulate how existing obligations apply given the exceptional nature of climate change.

### 4.3.3. Autonomous Obligations from Due Diligence

Both opinions recognise due diligence as generating autonomous obligations beyond specific treaty provisions. ITLOS held that the due diligence obligation under article 194 requires States to regulate private actors, implement enforcement mechanisms and continuously monitor effectiveness – obligations not explicitly stated in UNCLOS.[109] The Tribunal derived these requirements from the principle itself, stating that due diligence 'necessarily implies' such measures.[110]

101 ITLOS Climate Advisory Opinion (n 10) paras 207–23.

102 ibid para 220.

103 ibid para 208.

104 IACtHR Climate Advisory Opinion (n 10) paras 115–25.

105 ITLOS Climate Advisory Opinion (n 10) para 243.

106 ibid paras 242–43.

107 IACtHR Climate Advisory Opinion (n 10) para 244.

108 ibid para 245.

109 ITLOS Climate Advisory Opinion (n 10) paras 236–40.

110 ibid para 237.

DOI: 10.36633/ulr.1173

The IACtHR similarly found that enhanced due diligence creates autonomous procedural obligations including: (i) conducting climate vulnerability assessments, (ii) ensuring meaningful participation of affected communities, (iii) providing access to climate information and (iv) guaranteeing effective remedies for climate harms.[111] These obligations flow from the principle of due diligence rather than specific treaty provisions, demonstrating its autonomous regulatory capacity.

#### 4.3.4. Value Expression through Due Diligence Evolution

The evolution toward 'stringent' and 'enhanced' standards expresses fundamental value shifts in international law. ITLOS explicitly linked stringent due diligence to intergenerational equity, stating that climate change 'poses an existential threat and raises issues of intergenerational equity and fairness'.[112] The Tribunal thus used due diligence to express values about responsibilities to future generations.

The IACtHR's enhanced due diligence expresses values of climate justice and differential responsibilities. By requiring special attention to vulnerable groups and emphasising States' common but differentiated responsibilities, the Court used due diligence to articulate values about equitable climate action.[113] This value-expressive function shapes how climate obligations are understood and implemented, influencing future legal development.

## 5. FROM 'STRINGENT' TO 'ENHANCED'

The recent characterisations of due diligence as 'stringent' by ITLOS and 'enhanced' by the IACtHR in their climate change advisory opinions mark a significant evolution in the principle's application. These qualifiers raise fundamental questions: Do they represent substantively different standards or rhetorical variations? What does this evolution reveal about how principles adapt to unprecedented challenges? Analysis suggests that while both standards respond to the climate emergency's exceptional nature, they reflect different institutional perspectives and legal traditions that enrich our understanding of how principles evolve.

The ITLOS and IACtHR opinions offer a unique opportunity to compare how different international tribunals adapt the same principle to similar challenges. While both respond to the climate crisis by heightening due diligence obligations, their approaches reveal important differences in conceptualisation and application.

### 5.1. THE ITLOS 'STRINGENT' STANDARD

ITLOS characterised due diligence for climate-related marine pollution as 'stringent' based on three factors: the severity of harm, scientific certainty and temporal urgency.[114] The Tribunal emphasised that 'given the high risks of serious and irreversible harm to the marine environment from anthropogenic GHG emissions, the standard of due diligence is stringent'.[115] This stringency manifests in several specific requirements.

First, States must adopt measures necessary to achieve global temperature goals, with the Paris Agreement's 1.5°C target serving as the benchmark for assessing due diligence compliance.[116] This creates an objective standard against which State conduct is measured, reducing the traditional discretion associated with due diligence obligations.

Second, stringent due diligence requires the use of 'best available science' and 'best available technologies', elevating the standard from reasonable measures to optimal ones.[117] The Tribunal explicitly rejected arguments that developing States could apply lower standards, though it acknowledged that capabilities affect the specific measures required.[118]

111 IACtHR Climate Advisory Opinion (n 10) paras 290–310.

112 ITLOS Climate Advisory Opinion (n 10) para 67.

113 IACtHR Climate Advisory Opinion (n 10) paras 195–210.

114 ITLOS Climate Advisory Opinion (n 10) para 242.

115 ibid para 243.

116 ibid para 223.

117 ibid para 233.

118 ibid paras 394–96.

Third, the precautionary approach becomes 'an integral part' of stringent due diligence, requiring preventive action despite any remaining scientific uncertainties.[119] This integration transforms precaution from a separate principle into a component of due diligence itself, strengthening obligations to act preventively.

### 5.2. THE IACtHR 'ENHANCED' STANDARD

The IACtHR's 'enhanced due diligence' (*debida diligencia reforzada*) takes a different approach, focusing on the human rights dimensions of climate action. While also responding to the climate emergency, the Court's enhancement emphasises procedural safeguards, vulnerability considerations and distributive justice.[120]

Enhanced due diligence requires 'proactive and preventive' measures that go beyond reactive responses to climate impacts.[121] The Court specified six key elements: (i) comprehensive risk assessment considering differential impacts, (ii) ambitious mitigation and adaptation measures, (iii) maximum available resources deployment, (iv) international cooperation, (v) corporate regulation and (vi) continuous monitoring and adjustment.[122]

Significantly, the IACtHR's enhanced standard explicitly incorporates equity considerations absent from ITLOS's formulation. States must pay 'special attention' to groups in vulnerable situations, with measures tailored to address historical inequalities and differential climate impacts.[123] This transforms due diligence from a uniform standard into a differentiated obligation responsive to social context.

The Court also emphasised that enhanced due diligence requires addressing 'structural causes' of vulnerability, not merely immediate climate impacts.[124] This systemic dimension distinguishes the IACtHR's approach, linking climate due diligence to broader human rights obligations regarding poverty, discrimination and inequality.

### 5.3. SUBSTANTIVE DIFFERENCES OR COMPLEMENTARY APPROACHES?

While both standards heighten due diligence obligations, they reflect different institutional mandates and legal frameworks. ITLOS's stringency focuses on environmental effectiveness – ensuring measures sufficient to prevent marine pollution regardless of development status. The IACtHR's enhancement prioritises human rights protection, requiring measures that account for differential vulnerabilities and capabilities.

These approaches are complementary rather than contradictory. ITLOS provides objective environmental benchmarks (temperature targets, best available science) while the IACtHR adds social dimensions (vulnerability assessment, participatory processes). Together, they demonstrate how the same principle can evolve differently across legal regimes while maintaining coherence.

The linguistic difference – 'stringent' versus 'enhanced' – may also reflect legal traditions. ITLOS's 'stringent' echoes environmental law's emphasis on strict standards, while the IACtHR's 'enhanced' aligns with human rights law's progressive realisation approach.[125] Both elevate obligations beyond traditional due diligence without creating impossible standards.

### 5.4. IMPLICATIONS FOR UNDERSTANDING PRINCIPLES

The evolution toward stringent/enhanced due diligence reveals important insights about how principles of international law develop and adapt. This evolution demonstrates key characteristics of principles that distinguish them from static rules.

119 ibid para 206.

120 IACtHR Climate Advisory Opinion (n 10) paras 230–45.

121 ibid para 232.

122 ibid para 245.

123 ibid paras 316–20.

124 ibid para 318.

125 On linguistic analysis in comparative international law, see Mathias Forteau, 'Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission' (2015) 109 AJIL 498, 502–04 doi:10.5305/amerjintelaw.109.3.0498.

### 5.4.1. Context-Driven Evolution

The simultaneous emergence of heightened standards across different tribunals shows how principles respond to contextual pressures. Climate change's existential threat triggered evolution in due diligence standards without formal treaty amendment or evidence of changed State practice. This demonstrates the responsive capacity that makes principles valuable in addressing emerging challenges.

The evolution also shows that principles can develop different variants while maintaining core identity. Both stringent and enhanced due diligence preserve the essential features identified here – obligations of conduct, contextual variability and reasonableness standards. The heightening affects application rather than fundamental nature, like a musical theme played in different keys.

### 5.4.2. Institutional Influence on Principled Development

The differences between ITLOS and IACtHR approaches highlight how institutional context shapes principled evolution. ITLOS, primarily an environmental tribunal, developed stringency through scientific and technical requirements. The IACtHR, as a human rights court, enhanced due diligence through social justice considerations. This institutional influence enriches rather than fragments the principle, creating what might be termed 'productive pluralism' in principle development.

This pluralism contrasts with fears about fragmentation in international law. Rather than creating incompatible obligations, different institutional elaborations of due diligence provide complementary perspectives that States can integrate. A State implementing climate measures must consider both environmental stringency and human rights enhancement, leading to more comprehensive responses.

### 5.4.3. Maintaining Coherence Through Abstraction

The capacity for varied evolution while maintaining coherence demonstrates the value of principles' abstract nature. Due diligence's core concept – reasonable measures to prevent harm – remains constant even as applications become more demanding. This abstraction enables a positive 'open texture',[126] allowing adaptation without abandonment of established meaning.

The evolution also demonstrates how principles mediate between stability and change in international law. While treaty amendment requires formal consent and custom evolution demands new State practice, principles can adapt through judicial interpretation and institutional practice. This provides international law with needed flexibility while maintaining predictability through core conceptual stability.

### 5.4.4. Fostering Broader Legal Development

Perhaps most significantly, the evolution toward stringent/enhanced standards may catalyse broader changes in how due diligence is understood across international law. If climate change justifies heightened standards, similar logic might apply to other existential challenges – pandemics, biodiversity collapse or nuclear risks. The principled basis for enhancement (severity, irreversibility, scientific evidence) could transfer to other contexts.

Early evidence suggests such spillover effects. For instance, human rights bodies increasingly invoke enhanced due diligence for business activities affecting indigenous peoples and environmental activists.[127] The evolution in one area thus influences the principle's application elsewhere.

This catalytic effect exemplifies the value-expressive function discussed above; by articulating heightened standards for existential challenges, tribunals express values about precaution, intergenerational equity and differential responsibilities that shape broader legal development. The principle thus serves as a transmission mechanism for evolving international values.

126 HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 124–36.

127 UN Working Group on Business and Human Rights, 'Environmental Human Rights Defenders and Due Diligence' (2024) UN Doc A/HRC/55/43, paras 45–52. See also, regarding investment law, ICJ Climate Change Advisory Opinion (n 10) Declaration of Judge Cleveland, paras 21–22.

## 6. TOWARDS A FUNCTIONAL UNDERSTANDING OF PRINCIPLES

The analysis of due diligence across its historical development and contemporary applications provides broader insights into how principles of international law operate as tools of legal development. This functional understanding moves beyond sterile debates about sources to examine how principles actually work in maintaining systemic coherence while enabling adaptation.

### 6.1. THEORETICAL IMPLICATIONS

The four functions identified in this article demonstrate that principles operate as essential tools for maintaining international law's coherence and adaptability rather than merely residual gap-fillers. The evolution of due diligence toward stringent/enhanced standards illustrates how principles serve as adaptive mechanisms within international law. Unlike treaty provisions that require formal amendment or customary rules demanding new State practice, principles can evolve through interpretation and application while maintaining conceptual stability.[128]

Throughout this analysis, the dual character of principles as both foundational and abstract has emerged as key to understanding their functional versatility. As foundational norms, principles like due diligence provide stable reference points that ground more specific obligations. As abstract norms, they possess sufficient flexibility to apply across contexts and evolve with circumstances. This duality enables principles to achieve certainty through foundational concepts while enabling equity through abstract application.

### 6.2. PRACTICAL APPLICATIONS

This functional understanding provides practical guidance for courts, legal advisors and advocates. For courts and tribunals, recognising multiple functions encourages sophisticated use of principles for integration, qualification and value articulation rather than merely gap-filling. The ITLOS and IACtHR climate opinions demonstrate such sophisticated usage.

For legal advisors, understanding functions helps predict how principles might apply in novel situations. When advising on emerging technology governance, advisors can anticipate that due diligence will likely qualify regulatory obligations, integrate sectoral rules, generate autonomous compliance duties and express evolving values about responsible innovation. Similarly, in pandemic preparedness contexts, the framework suggests examining how principles might bridge health, trade and human rights obligations while creating specific State duties beyond treaty text.[129]

The functional understanding of principles also illuminates how international law develops beyond formal amendment and custom formation. Principles serve as transmission mechanisms for evolving values and knowledge, enabling legal adaptation without abandoning established frameworks. Climate change exemplifies such challenges, and the evolution of due diligence demonstrates how principles enable response through principled interpretation rather than awaiting formal consensus that may come too late.

## 7. CONCLUSION

This article has demonstrated that principles of international law perform four distinct functions that extend far beyond gap-filling: systemic integration, qualification of how norms apply, autonomous regulation and expression of fundamental values. Through analysis of due diligence – from nineteenth-century origins to contemporary 'stringent' and 'enhanced' characterisations in climate contexts – these functions operate both independently and synergistically to maintain legal coherence while enabling adaptation.

The theoretical framework challenges the ILC's restrictive view in Draft Conclusion 10. State reactions and extensive judicial practice confirm that principles regularly operate alongside

128 On structured flexibility in legal systems, see Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3 CMLJ 425, 430–35 https://doi.org/10.1093/cmlj/kmn026.

129 See Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (Grantham Research Institute 2024) 45–52 (documenting increased reliance on due diligence arguments).

treaties and custom rather than merely in their absence. The four functions provide a more accurate account of how principles actually work in contemporary international law.

Due diligence exemplifies how principles maintain identity while evolving to meet new challenges. Its core elements – reasonable measures, contextual variation, obligations of conduct – remain constant from *Alabama Claims* to climate advisory opinions, yet applications have evolved dramatically. The comparative analysis of ITLOS and IACtHR approaches reveals how institutional contexts shape principled development without fragmenting core obligations, providing complementary perspectives that enrich rather than fragment the principle's application.

The functional understanding developed here offers several contributions. For the ILC's work, it demonstrates the importance of examining functions alongside identification. For courts and tribunals, it encourages sophisticated use of principles across multiple dimensions. For practitioners, it provides strategic insights into how principles might apply in novel situations. For scholars, it offers a framework for understanding how international law develops beyond formal treaty-making and custom formation.

Most significantly, this analysis illuminates how international law maintains relevance in rapidly changing circumstances. Principles serve as adaptive mechanisms that enable legal evolution within established frameworks, providing 'structured flexibility' – maintaining conceptual stability while enabling contextual innovation. The climate crisis exemplifies such challenges, and the evolution of due diligence demonstrates how principles enable response through principled interpretation across multiple regimes.

The four functions – systemic integration, qualification, autonomous regulation and value expression – provide a framework for understanding principles' multiple roles. As international law faces unprecedented challenges requiring both urgent action and sustained cooperation, understanding how principles function becomes essential for effective global governance. By recognising that principles integrate, qualify, regulate and express evolving values, we better equip international law to serve essential purposes of managing interdependence and promoting common interests while enabling continued relevance in a rapidly changing world.

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## COMPETING INTERESTS

The author has no competing interests to declare.

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