Statement by Mario Oyarzábal*

on the First Report on Due Diligence in International Law
by Madame Penelope Ridings, Special Rapporteur
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Thank you, Chair, and good morning to all.

Echoing colleagues who have taken the floor before me, allow me to thank and congratulate the Special Rapporteur (SR), Mme. Ridings, on a very elaborate and illuminating First Report on one of the most complex issues in contemporary international law, that of due diligence. The Report achieves three important things: it offers a succinct account of the historical evolution of the concept; it surveys its more recent development across environmental, human rights, humanitarian and cyberspace law; and it sets out the SR's own problematization and expectations for the work ahead.

Given that this is a First Report of an introductory nature, intended to set the stage for our discussions, my intervention will proceed in three parts: first, some preliminary methodological remarks; second, a number of specific issues of substantive interest; and third, some brief suggestions for the way forward. I will endeavor, throughout, to connect my remarks to the questions posed by the SR in Section V of her Report.

Mr. Chair,

Turning first to methodology, the intertemporal nature of due diligence deserves particular attention. One of the defining characteristics of due diligence in international law is the longevity of the notion and of the elements comprising it. Common terminology and legal characteristics were already identifiable at the notion's first appearance in the late nineteenth century, and elements such as reasonableness, State control, good government and foreseeability have accompanied the concept since that period. This intertemporal continuity matters methodologically for three reasons. First, examining how due diligence was formulated in the case law and doctrine of that early era is essential to determine the legal expectations underlying the notion and the lacunae it was designed to fill. Second, a rigorous temporal analysis can support a

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genuinely cross-cutting approach, revealing the continuities and ruptures that have shaped the concept over time. Third, such analysis allows the Commission to distinguish those elements tied to specific areas of international law from those that have remained substantively intact across the years. The terminology deployed today to explicate due diligence either as a standalone principle of international law or as a standard of conduct attached to a primary obligation corresponds closely to that used by courts and States in the late nineteenth and early twentieth centuries. Determining and further analyzing the conceptual and normative basis of due diligence should therefore be an integral exercise of the Commission in addressing this intertemporal term.

Second, on the cross-cutting and transposable character of due diligence, the Report makes clear that international environmental and climate change law have been the principal fields in which due diligence has been concretized, generating the most procedurally elaborate body of practice available to the Commission. The temptation to treat this body of practice as the template for draft principles of general application is understandable, yet it also reveals that the current discussion has largely been constructed within the confines of specific regimes, as the Commission's own past work confirms. It would be prudent for the Commission to acknowledge this reality explicitly as a methodological premise. Caution is required in referring to the Commission's own past work, given that it has itself adapted due diligence to particular subject matters; and a true comparative law exercise should be an immediate priority, to determine which elements are common across systems and eras and properly transposable to general international law, and which are too closely bound to a specific field to be generalized. Identifying the appropriate comparator is critical — whether comparison should proceed on the basis of legal character, sources, or commonly repeated elements, a task that proved genuinely difficult for the International Law Association, whose Study Group on the subject was discontinued for want of a workable cross-cutting methodology. Even should the Commission proceed by treating environmental law as its point of departure, it should remain explicit about its comparative method to avoid a final product whose transposition to general international law occurs only through distortion — a concern directly relevant to the question raised in paragraph 178 of the Report concerning the legal character, scope and content of due diligence obligations.

Related to this is the need to move from a mapping exercise to a prescriptive approach. The First Report succeeds admirably as a preliminary survey; the Second Report, however, will need to shift toward a more prescriptive framework addressing the conceptual ambiguities I will identify shortly. While the SR rightly identifies scope, content and legal character as the relevant pillars, these categories require sharper analytical differentiation, in particular to resolve what might be called the principled confusion between due diligence as a standard of conduct and the no-harm rule, while preserving sufficient flexibility to accommodate regime-specific particularities.

Global and regional approaches likewise merit sustained attention. Due diligence notions have been transplanted across legal systems, often originating in common law jurisprudence, yet each system has adapted the notion to its own legal culture, needs and traditions. As also mentioned by the SR herself, future reports should engage more deeply with the specific understandings and divergences found within different regions of the world. This is important for two reasons: it diversifies and deepens the Commission's analysis by incorporating a wider range of legal cultures, and it can furnish an extensive registry of due diligence practice and legislation useful to the Commission's later work, including where no general rule of customary international law or general principle is ultimately found to exist, but regional or specialized elements may still ground new categories of analysis.

Finally, on methodology, the sources of due diligence in international law require clarification. As the SR notes, and as other colleagues, such as Mr. Forteau, Mr. Galindo and Mme. Oral, among others, have identified, the term does not appear explicitly in treaty texts, though related characterizations are pervasive, and the International Court of Justice has not engaged thoroughly with the doctrinal origins of the notion. This raises two implications: first, whether the Commission's work will be confined to sources explicitly invoking "due diligence" or extend to instruments that, without using the term, allude to its content — a determination that will significantly affect the scope of available material; and second, whether soft law instruments, which frequently articulate due diligence obligations in considerable detail, might be engaged more closely, not least in light of the Court's evolving approach to the legal weight of decisions of Conferences of the Parties.

Mr. Chair,

Turning to specific issues of substantive interest, the relationship between due diligence and international environmental law calls for further doctrinal clarification. Due diligence has been used interchangeably with the prevention of transboundary harm since the *Island of Palmas arbitration*, and both the Permanent Court and the International Court of Justice have, at times, elided the two notions, as became apparent in the *Corfu Channel* case and, more recently, in the submissions of numerous States during the Climate Change Advisory Opinion proceedings. For the Commission's future work, the relationship between due diligence as the standard of conduct, the prevention principle as the primary rule governing conduct in the face of risk of significant transboundary harm, and the no-harm rule as the underlying obligation not to allow harmful activities within one's jurisdiction or control, requires careful disentanglement. Collapsing these notions risks reducing due diligence to the law already codified in the 2001 Articles on Prevention of Transboundary Harm. Conversely, if due diligence possesses a broader scope, a lower threshold and independent normative character, as several States argued in the advisory proceedings — dispensing with a de minimis significance threshold, extending beyond purely environmental harm, and subsuming rather than merely coinciding with the prevention principle — the Commission must explain how its output relates to and builds upon the 2001 Articles without undermining their authority. One workable framing would treat the no-harm rule as the broad normative foundation, the prevention principle as its field-specific elaboration in environmental law (carrying the significance threshold and the requirement of environmental impact assessment), and due diligence as the standard of conduct by which compliance with the prevention principle is assessed. Such a framing would reduce the terminological confusion evident in the case law and speaks directly to the question in paragraph 178 concerning the coherence of general and specific conceptions of due diligence within a single topic.

Closely related is the transboundary and territorial character of due diligence. In the *Island of Palmas arbitration*, Max Huber tied the obligation to prevent transboundary harm to sovereignty itself, a territoriality later echoed in *Corfu Channel* and *Pulp Mills*. Yet a strictly territorial conception may sit uneasily with contemporary challenges that are diffuse or wholly deterritorialized, from cyberspace to the global commons. The Commission should therefore address whether due diligence, as a corollary of sovereignty, is fundamentally a matter of territory and neighborly relations, or a broader question of expected State conduct on the international plane — a question left largely untouched in the First Report, notwithstanding developments such as the Inter-American Court's expanded notion of effective control and the African Court's "effectiveness standard", as well as the 2025 Resolution of the *Institut de Droit International*, which addressed the relationship between due diligence and sovereignty without reference to territory or boundaries.

On the intertemporal continuity of knowledge, control and reasonableness, the Commission should undertake a more robust analysis of the "ought to have known" standard. Due diligence has historically been tied not merely to actual notice but to the vigilance expected of good government in identifying potential risks, a standard of particular relevance to shared contemporary risks such as climate change and cyberspace, where technological capability raises the objective threshold of what a State should know. Reasonableness, similarly, remains a crucial but indeterminate element, tied to the specific circumstances, control and capacities of each State, bearing in mind, as the practice of Latin American and Caribbean States illustrates in the investment law context, that due diligence must remain contextual and objective and should not be transformed into a privileged standard of protection exceeding that available to nationals. Further reports might also usefully examine whether the semantic variation across formulations — reasonableness, the degree of care of a good government, reasonable and appropriate measures, best efforts — reflects incoherence or, alternatively, the resilience of a standard capable of functioning across differing legal cultures and instruments. In this regard, the notion of Common but Differentiated Responsibilities and Respective Capacities (CBDR-RC) could and should play a crucial role in our discussions. While trying to avoid a complete relativization of due diligence, the ability of each State should be taken into account when determining whether it has fulfilled its due diligence obligations, as eloquently raised by Mr. Nguyen, Mr. Sall and Mr. Fathalla. This would also bring another important issue to the forefront, namely the role of international cooperation in order to enable States to fulfill their due diligence obligations, where this is not possible on the basis of their own capacities. All of these are issues that will need to be examined in the Commission's work in its coming sessions.

Like many, if not all, of the colleagues who have spoken before me, I firmly believe that the relationship between due diligence and the law of State responsibility likewise requires more thorough treatment. The Report rightly identifies a paradox whereby due diligence appears result-oriented yet operates as a conduct standard. The Second Report could focus more deeply on clarifying whether due diligence sits purely within primary obligations or bears upon attribution and derivative responsibility, in particular in relation to aid or assistance under Article 16 of the Articles on State Responsibility — a question with direct relevance to State practice concerning arms transfers and to obligations under Common Article 1 and Article I of the Genocide Convention. In my view, the apparent paradox dissolves once it is recalled that, where the primary rule establishes what due diligence requires in a given context, a State's performance of that conduct becomes the relevant result: conduct and result converge in the assessment, and in asking whether a State met the applicable standard, courts resolve both questions simultaneously. While this is a particular issue within international law, it is perhaps one of the most pertinent ones where primary and secondary obligations seem either to coexist or to be applied in a rather sequential manner and, for this reason, could provide an impetus for determining some basic characteristics of a possible relationship between primary and secondary rules in relation to due diligence.

Finally, among the specific issues, the role of private actors warrants closer methodological attention. While the SR has properly confined the scope of her mandate to the due diligence obligations of States, no clear methodological line has yet been drawn, nor is it certain whether such a line can in fact be drawn, between State and non-State due diligence obligations, as also mentioned by Mr. Forteau in his statement, notwithstanding that States may bear international responsibility, or in some instances liability, for the conduct of private entities not attributable to them. The Commission's own past work demonstrates the centrality of private actors, natural and legal persons, global value chains, to particular areas of international law, and future reports should examine how the specific regulatory regimes governing such actors interact with the general due diligence obligations of States, including the possibility, to be approached with due care, of transposing principles developed in relation to private entities into the general discussion of State due diligence. This is especially pertinent in international human rights law, where human rights bodies increasingly hold that States must regulate business enterprises to prevent extraterritorial violations, raising the doctrinal question of whether such regulatory obligations constitute a primary due diligence obligation of the State itself or could potentially engage the application of secondary rules, such as those on aid or assistance under Article 16 of ARSIWA.

Mr. Chair,

By way of conclusion, and looking to the future work of the Commission, I wish to highlight two points among those I have already touched upon.

First, as to whether due diligence constitutes a primary obligation or a secondary rule of responsibility, I agree with the SR that it would be premature, at this introductory stage, to adopt a categorical position, although due diligence emerged historically from notions of fault and negligence drawn from common law traditions that this very Commission subsequently discarded from the secondary rules of responsibility, and the majority of States in their submissions during the Climate Change Advisory Opinion proceedings associated due diligence, in one manner or another, with primary obligations. I would nonetheless raise two points for the SR's consideration. The next Report should provide the Commission with a holistic and geographically diverse account of the existing debate in case law, doctrine and State practice, with particular emphasis on fields such as environmental degradation, climate change, cyberspace and the global commons, where the boundary between primary and secondary rules is tested most acutely. Equally, our work must remain integrally connected to the Commission's own prior output, not only on State responsibility, but on transboundary harm, the non-navigational uses of international watercourses and the protection of transboundary aquifers, together with the corresponding commentaries, so that our present efforts are properly situated within that body of work.

Second, the Commission's work must strike a careful balance between the flexibility that has characterized due diligence since its inception and the legal certainty our output is intended to provide. From the 1899 Hague Regulations, requiring neutral States to exercise diligence "as far as possible", to the 1928 Havana Convention and more recent instruments demanding "all necessary or available or appropriate measures", flexibility has performed several functions: it enables the *in concreto* assessment of compliance rather than a rigid, uniform formula; it helps close accountability gaps in open-ended or framework regimes, as illustrated by the continuing contestation of due diligence obligations in cyberspace; and it renders due diligence, in an era of international cooperation, what has aptly been termed a privileged tool of the international law of coexistence. At the same time, the Commission's mandate is to enhance legal certainty and predictability, providing States, courts and tribunals with clear guidance as to the threshold of accepted conduct. The necessary balance between these objectives must be struck with care: our output should not establish so rigid a framework as to trap States and stall international cooperation, while nonetheless offering the guidance that predictability requires.

I thank the SR once again for her most valuable First Report, and thank you, Chair, and the members of the Commission for your attention.

Thank you very much.