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ARTICLE

On Due Diligence and the Rights of Indigenous Peoples in International Law: What a Māori World View Can Offer

Medes Malaihollo[1]

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Abstract

Due diligence is on the rise in international law. However, its roots and historic narrative remain heavily Eurocentric in nature. This becomes problematic in the context of states' due diligence obligations relating to the rights of indigenous peoples. Meanwhile, due diligence can also be found in indigenous legal systems. An example is *tikanga*, which regulates the lives of the Māori in New Zealand. This paper attempts to investigate principles of *tikanga* reflecting features of a standard of care and compares this to the way due diligence is currently given meaning in international law. From this it follows that *tikanga* puts more emphasis on 'relationships and balance' than contemporary positive international law does. This paper argues for a culturally appropriate approach that integrates this feature with respect to states' due diligence obligations relating to the protection of the rights of indigenous peoples in the context of the Māori in New Zealand. In doing so, it will become clear that this approach leads to a situation where an indigenous people is being heard and taken seriously, which forms the anchor of the international legal framework protecting the rights of indigenous peoples. With that in mind, this paper offers a template on due diligence and the rights of indigenous peoples in international law.

Keywords Due diligence · Indigenous peoples · Māori · *Tikanga* · New Zealand

1 Introduction

Due diligence is a paramount concept in international law and can be found in numerous branches of contemporary international law.[1] Recent academic work shows us that the notion relates to an emerging issue in international law, namely

[1] Some examples are international environmental law, international human rights law and the international law of the sea. See for instance Voigt (2016); Viñuales (2020); Rajamani (2020); Papanicolopulu (2020); Baade (2020); Malaihollo (2021); Monnheimer (2021); Cabus (2021).

✉ Medes Malaihollo
a.malaihollo@rug.nl

[1] University of Groningen, Groningen, The Netherlands

risk management.[2] However, its roots and historic narrative are mainly Eurocentric in nature. Take, for instance, the element of reasonableness. Due diligence is often addressed with the help of *bonus pater familias*—a general principle that finds its roots in Roman law. This becomes problematic in the context of some particular international legal frameworks containing due diligence obligations for the state. A clear example is the international law on the rights of indigenous peoples. How can we use due diligence as a concept that is dominated by Eurocentric notions to protect the rights of indigenous peoples who live according to a completely different world view?

Remarkably, the idea of due diligence is no stranger to indigenous peoples. For example, the indigenous people of New Zealand, the Māori, live by *tikanga* (customary law), which has been recognised by the New Zealand judiciary as 'the first law' of New Zealand, which 'continues to shape and regulate the lives of Māori'.[3] *Tikanga* contains numerous principles that arguably reflect a standard of care and require the norm addressee to perform due diligence. Studying these indigenous principles becomes relevant when it comes to giving further meaning to the broad due diligence obligations of New Zealand in relation to the rights of its indigenous people. If these obligations would be given further meaning from a perspective that is solely based on Eurocentric notions, not taking into account how the Māori perceive due diligence, an inappropriate normative exercise would be conducted. Moreover, such an exercise could potentially lead to practical conflicts as the expectations of what is diligent behaviour by an indigenous people can be different from those of the state, while the latter adheres to a due diligence obligation under international law that is given meaning from a Eurocentric perspective. One may rightfully wonder whether international law properly protects indigenous peoples in such a manner.

The problem is clear. When we discuss the rights of indigenous peoples in international law, we need to find a way to give further meaning to the due diligence obligations of states from an indigenous perspective. Indeed, an exhaustive examination of the perspective of due diligence as perceived by 'all' indigenous peoples in the world would be a study that falls beyond the limits of one single paper. Nonetheless, we need to start somewhere. Therefore, this paper will discuss how due diligence is understood from the perspective of one particular indigenous people, namely the Māori in New Zealand. The choice for studying a Māori perspective on due diligence is a simple one: many relevant materials regarding the principles of *tikanga* are available in English and many studies have been conducted on these principles.[4]

Some elaboration on the methodological choices for this study is in order. An investigation of the traditional principles in *tikanga* lends itself perfectly to a legal

[2] See generally Krieger et al. (2020); Malaihollo (2021); Ollino (2022).

[3] *Ellis v. R* [2022] NZSC 114, paras. 22, 107, 110, 168–169, 172, 272. https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZSC-114.pdf. Accessed 13 Jan 2023. For criticism of the Supreme Court's decision, see also Jones (2022). For criticism of New Zealand's prevailing constitutional narrative and the essence of involving *tikanga* as a source of law with independent authority in a rather pluralist constitutional narrative, see also Charters (2019).

[4] Examples include Barlow (1994); New Zealand Ministry of Justice (2001); Wright (2007); Te Rito and Healy (2008); Jones (2014); Toki (2014).

anthropological research strategy.[5] Such an approach offers us the opportunity to do more than studying norms and standards that form a system of formal legal rules comprised of the sources of law. A legal anthropological approach instead focusses on 'the relevance that is attributed to law by actors in a particular practice'.[6] This makes it possible to assess legal norms according to the standards of their objectives in a particular society or local community. In the case of indigenous principles, such an approach offers us the possibility to form a deeper understanding of indigenous customs and relevant motivations.[7] When it comes to the study at hand, legal anthropological reports have been used to identify elements of a standard of care.[8] Being quick and cheap, this has its advantages but also comes with limitations. For example, the secondary analysis conducted does not get as close as possible to the original set of data.[9] However, the purpose of this study is not to analyse a set of empirical data in great detail, but to illustrate to the international lawyer the potential of indigenous principles to form a better understanding of due diligence in general. In that regard, a secondary analysis is sufficient. Notably, such analysis is also in conformity with an 'anthropological trend' within a bottom-up approach in international law.[10] Based on this investigation, mainly four elements have been identified which are discussed in Sects. 3–6 of this paper. Further, *tikanga* can be considered a legal system of its own.[11] With that in mind, an analysis of *tikanga* also lends itself to a classic doctrinal research study based on legal reports, contributions in legal literature by legal scholars and case law.[12] In that sense, this study contains some interdisciplinary elements in that it combines legal anthropology with classic doctrinal research as its overall research strategy. In addition, positive international law is examined and critically assessed. For this, classical doctrinal research has been used to analyse the sources of international law.[13]

Nonetheless, one important limitation of this study is that I am not of Māori descent, nor have I personally grown up with traditional world views followed by the Māori. Instead, I am trained, as a classic legal scholar in Europe, to examine positive international law. Against this backdrop, it is important to note that I can neither present myself as an expert on *tikanga* nor utilise a well-defined indigenous methodology for this study.[14] However, the purpose of this paper is to invite the reader to explore what an indigenous perspective on due diligence has to offer. This might form the basic tenet for critical assessments of contemporary international law on

[5] For an outline of the basic research methodology of legal anthropology see Van Aeken (2011).

[6] Köhne (2011), p. 289.

[7] Van Aeken (2011), pp. 59–61.

[8] See for instance Barlow (1994); New Zealand Ministry of Justice (2001); Te Rito and Healy (2008).

[9] Van Aeken (2011), p. 77.

[10] Rajagopal (2003); Levit (2005); Anghie (2012); Stark (2018). See also Sect. 2 of this paper for a further explanation of a 'bottom-up approach'.

[11] *Ellis v. R* (n. 3), para. 22.

[12] Examples are Toki (2014); Jones (2014); *Paki v. Attorney-General*, NZCA 2009, 584; *Ellis v. R* (n. 3).

[13] According to Vranken, this concerns the interpretation of positive law and the critical assessment of existing interpretations of the law; Vranken (2012), p. 43.

[14] However, an interesting contribution on using an indigenous methodology is Waboose (2021).

the rights of indigenous peoples and further (socio-legal and legal anthropological) research.

That said, the structure of this paper is as follows. Section 2 will discuss how due diligence is commonly understood in international law and why it is problematic to apply such an interpretation of due diligence with respect to the rights of indigenous peoples in international law. Here, the paper suggests using a culturally appropriate approach towards the application of due diligence obligations that are related to the rights of indigenous peoples. With that in mind, the subsequent Sections take such an approach by contrasting relevant features of due diligence in positive international law and *tikanga*. Section 3 will discuss the notion of reasonableness. First, a perspective of what positive international law affirms as 'reasonableness' will be outlined, followed by an examination of how *tikanga* perceives the notion. Section 4 will analyse another important feature in the context of due diligence, namely 'capacity'. Again, positive international law will be discussed first, followed by an investigation from a Māori perspective. Another relevant factor to be discussed is the 'interest or right at stake'. Both positive international law and *tikanga* contain this element in the context of due diligence. This will be considered in Sect. 5. Subsequently, Sect. 6 will discuss a rather unique feature of due diligence that has hardly been explored in international law but has a cardinal function in traditional Māori life, namely 'relationships and balance'. This is strongly emphasised in their approach to a standard of care. At the end of this study, Sect. 7 will conclude and reflect on the implications of this paper.

2 Due Diligence in International Law and the Problem of Applying It to the Rights of Indigenous Peoples

Due diligence is not a new phenomenon for the international lawyer, as the notion already began to take shape in early judicial practice in the nineteenth century.[15] However, as some legal scholars have famously stated, the notion remains 'a familiar stranger' in international law.[16] In that respect, legal scholars have attempted to further examine the notion, leading to different interpretations and applications.[17] In any event, due diligence generally concerns a qualifier of behaviour, which is triggered by a due diligence obligation that is particularly relevant 'when a risk has to be controlled or contained, in order to prevent harm and damage done to another actor or to a public interest'.[18] In that way, due diligence is inherently connected to the idea of risk management.[19]

[15] For a historic overview of judicial practice on due diligence in international law, see Bartolini (2020).

[16] Peters et al. (2020), p. 1.

[17] Peters et al. (2020), pp. 8–9. For various understandings of due diligence see *inter alia* Pisillo-Mazzeschi (1992); Barnidge Jr. (2006), pp. 81–82; Barnidge Jr. (2008), p. 69; International Law Association Study Group on Due Diligence in International Law, Second Report, 12 July 2016, https://www.ila-hq.org/index.php/study-groups?study-groupsID=63, pp. 12 and 47; Kulesza (2016).

[18] Peters et al. (2020), p. 2.

[19] Ibid; Ollino (2022) pp. 98–105.

From that perspective, due diligence is remarkably relevant in the context of the rights of indigenous peoples, especially within the legal framework provided by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[20] This is the most important international legal instrument for indigenous peoples because it is one of the most advanced legal instruments dealing with the rights of indigenous peoples. Although the Declaration is a resolution adopted by the United Nations General Assembly, and hence not legally binding, the UNDRIP is still significantly relevant when it comes to already existing positive international law. Key provisions of the Declaration, after all, elaborate on already existing legal standards under positive international law.[21]

At first sight, the UNDRIP does not contain explicit references to 'due diligence'. However, even when international legal instruments do not employ explicit references to the notion, provisions within such an instrument can still require the norm addressee to conduct a due diligence exercise with respect to the affirmative action that is to be taken.[22] For example, Article 14(3) UNDRIP contains a positive obligation for the state to take 'effective measures' to realise that persons belonging to an indigenous people have access to indigenous education that is provided in their own language.[23] Other than a reference to a positive obligation, the provision does not contain any indicator of a normative evaluation that requires due diligence to be performed. The only requirement is that the measure needs to be 'effective'. However, in order to effectively realise the goal of indigenous education, a state cannot act in such a way that it only takes action by 'trying to do something', but instead it needs to realise to the widest extent possible the successful exercise of the rights of indigenous peoples.[24] In that sense, the state is required to control and contain the risks of harm to an indigenous people, linking the affirmative action that a state needs to take to risk management, and making due diligence relevant to be applied in the context of the UNDRIP.

However, the problem is that the application of due diligence—as it is applied in general international law—is inappropriate in the context of the rights of indigenous peoples. This has to do with the nature and origins of due diligence obligations in international law. Due diligence obligations in international law are often qualified as obligations of conduct, and not of result.[25] The origins of this dichotomy can be

[20] United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/61/295.

[21] As noted by Anaya, these provisions neither have a *sui generis* status nor introduce new rights in international law. See also United Nations Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, 11 August 2008, A/HRC/9/9; This is also known as the 'no new rights' narrative. For a critical commentary on this, see specifically Esterling (2021).

[22] Peters et al. (2020), p. 10.

[23] UNDRIP (n. 20), Art. 14(3). Other provisions in the UNDRIP containing similar language are Arts. 13(2), 15(2), 16(2), 17(2), 21(2), 22(2), 29(2)(3), 31(2), 32(3), 36(2) and 38.

[24] Graham and Van Zyl-Chavarro (2018), p. 366; Committee on Economic, Social and Cultural Rights, General Comment 3, 14 December 1990, E/1991/23, paras. 10–11.

[25] For a comprehensive discussion on the perspectives of obligations of conduct and obligations of result in international law, see Malaihollo (2021), pp. 128–135.

traced back to Roman law as further developed in French law.[26] As general international law applies this dichotomy, the nature of due diligence in international law is heavily Eurocentric. This is problematic when due diligence is to be applied in the context of the rights of indigenous peoples. There are mainly two reasons for this.

Firstly, due diligence is not a notion that only developed in European legal systems. Indigenous peoples, being constituted through their own historical process and not by a conscious legal decision by states,[27] have their own legal systems that also contain due diligence obligations.[28] Due to the fact that these obligations developed in a different social and cultural environment (that is to say, a non-European one), the operation of these norms arguably differs.[29] This may lead to different expectations of due diligence by an indigenous people. An indigenous people might expect a state to behave diligently in one way, while the latter applies mainstream due diligence in international law, leading to diligent behaviour in another way. In other words, the expectations of the way in which due diligence on the ground is exercised could be different from the application of due diligence as prescribed by international law.[30]

Secondly, the application of Eurocentric ideas within an international legal framework that aims to protect indigenous peoples does not contribute to that which lies at the heart of that framework, namely taking indigenous peoples seriously.[31] As illustrated by Anaya, international law used to be hostile towards indigenous peoples by suppressing their cultures and institutions.[32] However, modern international law—especially international human rights law—aims to protect indigenous peoples.[33] Taking them seriously and listening to them is in that sense important, but it is not so difficult to understand that the application of a Eurocentric understanding of due diligence is inconsistent with such aims. Such an application could in fact lead to biased outcomes.

The solution to this problem could be an attempt to rewrite or rethink due diligence in international law from the perspective of those being marginalised and disadvantaged, in this case indigenous peoples. This approach would comply with the trend of a bottom-up perspective in international law. That is to say, approaching 'international law from below'.[34] Such a perspective is not new and suggests 'that dominant approaches to international law are deficient because they neither take development discourse to be important for the very formation of international law

[26] See for instance Parisi (1994), p. 322; Zimmerman (1996), pp. 1007–1009; Gałuskina (2017); Bartolini (2020), p. 35.

[27] Worster (2016), p. 228–229.

[28] See for instance the analyses of *tikanga* in Sects. 3–6 of this paper.

[29] See in particular Sect. 6 of this paper.

[30] One important difference in terms of the operation of due diligence in international law and due diligence as perceived by indigenous peoples is arguably the feature 'relationships and balance'. See for this, Sect. 6 of this paper.

[31] Klabbers has also qualified this as the right to self-determination of peoples; Klabbers (2006).

[32] Anaya (2004) pp. 15–48.

[33] Ibid., pp. 49–94.

[34] Rajagopal (2003).

and institutions, nor do they adopt a subaltern perspective that enables a real appreciation of the role of social movements in the evolution of international law'.[35] A good example of this perspective in international law is a Third World Approach to International Law (TWAIL).[36] Another example would be Charters' proposed methodology to balance indigenous peoples' rights and human rights.[37] Theoretically addressing TWAIL as a whole or Charters' proposed methodology, even in fast motion, would go beyond the limits of this paper. It is nevertheless important that within the *bottom-up* trend in international law there is a certain value in applying due diligence in international law to the rights of indigenous peoples that takes into account the culture of the latter, thereby making it culturally appropriate. Such an approach contributes to a broader understanding of due diligence by bringing in perceptions and practices of other actors with novel ways of perceiving due diligence.

But what would such a culturally sensitive approach to due diligence in the context of the rights of indigenous peoples look like? Such an approach requires a cultural interpretation of due diligence. That is to say, seeing the impact that an indigenous culture can have on due diligence in international law and seeing how the latter needs to be in line with that culture.[38] After all, the law can impact cultural practices, but at the same time culture can impact law, as the latter 'does not operate in a vacuum' but 'is realised within the culture of society'.[39] Culture could therefore serve as a driving force of normative validity.[40]

That being said, this paper suggests a culturally appropriate approach to due diligence obligations in international law when such obligations are applied to the rights of indigenous peoples. Such an approach is more sensitive to an indigenous culture and takes into consideration what happens on the ground. A culturally appropriate approach might not drastically differ from the application of due diligence in general international law, given that similar features of due diligence can be identified in positive international law and indigenous legal systems. However, one should take into consideration that there might be some subtle, yet important differences in the application of due diligence. To illustrate this, the following Sections will analyse some features of due diligence from the perspective of both positive international law and an indigenous legal system containing duties of care, namely *tikanga*. These features concern 'reasonableness', 'capacity', the 'interest at stake' and 'relationship and balance'.

[35] Ibid., p. 1. In that regard, but specifically in the context of the Third World or Global South, Rajagopal suggests that 'international law needs to be fundamentally rethought if it is to take the disparate forms of Third World resistance seriously'.

[36] See for instance Mutua (2000); Chimni (2003); Gathii (2011); Anghie (2016).

[37] Charters (2017).

[38] Mezey (2001); Nafziger et al. (2010); Reimer (2017); Fraser (2021).

[39] Nwanko et al. (2018), p. 263.

[40] Ibid; Gephart (2015).

3 Reasonableness as a Core Element of Due Diligence

Reasonableness is no new phenomenon in international law and has been echoed in widespread practice on due diligence.[41] For instance, arbitral awards concerning the protection of aliens and their property, human rights courts and treaty bodies, investment tribunals and the ILC make use of 'reasonableness' to define a state's due diligence obligation.[42] According to the ILA Study Group on Due Diligence in International Law, it is even 'a golden thread' in defining the measures that should be taken in the context of best efforts.[43] The concept nonetheless remains very broad and vague in international law. As noted by Monnheimer, some might view something as reasonable while others might disagree under the very same circumstances.[44]

Although it remains a challenge to define what is reasonable, this does not entail that it is a meaningless notion in the context of due diligence. In fact, reasonableness plays an essential role for two reasons. First, the assessment of each individual factor that influences the 'efforts' that are to be made is determined by the reasonableness standard. An example is the issue of 'foreseeability'.[45] This refers to 'constructive knowledge', and not actual knowledge. What is important is that a state should have known about the risk. This 'constructive knowledge' element operates in a non-binary manner and on a sliding-scale assessment of what a state should have reasonably known.[46] In that way, the reasonableness standard guides us on what a state should have known in relation to risk management. Secondly, reasonableness concerns an overarching standard to fairly balance all factors influencing the due diligence performance collectively against each other.[47] For instance, a relatively small degree of the foreseeability of a risk may be counterbalanced by other factors, such as a grave and imminent risk of harm affecting a significant interest or right. In such a case, a state would most likely fail its due diligence if it did not take sufficient action. As regards human rights protection, Baade has also identified such a balancing exercise.[48] The International Tribunal for the Law of the Sea (ITLOS) also supports such an approach in that it engages in a balancing act which is used as a 'guiding criterion' in the assessment of reasonableness.[49]

Strikingly, *tikanga* reflects a reasonableness standard as well, namely in the principle of *kaitiakitanga*. This Māori principle has been incorporated into statutory

[41] Bartolini (2020), p. 35; Malaihollo (2021), p. 141; Ollino (2022), p. 168.

[42] For a brief overview of relevant practice, see also Ollino (2022), p. 168.

[43] Second Report (n. 17), p. 8.

[44] Monnheimer (2021), p. 129.

[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep 2007, p. 43, para. 432; Second Report (n. 17), pp. 12–13. See also Bartolini (2020), pp. 38–39; Baade (2020), p. 98; Monnheimer (2021), pp. 117–121; Ollino (2022), pp. 156–163.

[46] Baade (2020), p. 98.

[47] See for instance Monnheimer (2021), pp. 134–135; Baade (2020), p. 101.

[48] Baade (2020), pp. 97–101.

[49] *Monte Confurco (Seychelles v. France)*, ITLOS Reports 2000, Prompt Release, Judgement of 27 August 1999, para. 72.

law in New Zealand.[50] Section 7(a) of the Resource Management Act 1991 (RMA) states that all persons exercising functions and powers under the Act 'shall have particular regard to *kaitiakitanga*' when it comes to 'managing the use, development, and protection of natural and physical resources'.[51] A definition of *kaitiakitanga* is also provided in the RMA. Section 2(1) RMA defines it as.

> the exercise of guardianship by the *tangata whenua* of an area in accordance with *tikanga* Māori in relation to natural and physical resources; and includes the ethic of stewardship.[52]

A detailed analysis of this legal definition would go beyond the limits of this paper, but a cursory examination thereof illustrates two important features. First of all, the RMA refers to 'in accordance with *tikanga* Māori' which appears to open the door for a Māori understanding of *kaitiakitanga,* rather than simply translating the complex concept into English.[53] However, the RMA fails to fully capture *kaitiakitanga* here*,* which brings us to the second feature. The reference to 'and includes the ethic of stewardship' appears to distinguish 'guardianship' from 'stewardship' as two components of *kaitiakitanga*.[54] 'Guardianship' and 'stewardship' in terms of managing natural and physical resources are arguably rather literal translations of *kaitiakitanga* in the Crown's attempt to comprehend the term in words that are understandable for them.[55] Nonetheless, *kaitiakitanga* has a broader meaning that embraces a wider belief system applied across all dimensions of Māori life.[56] It is not simply limited to 'guardianship' and 'stewardship' in relation to natural and physical resources; it also applies in social spheres.[57]

In essence, *kaitiakitanga* is about the management of the environment and of people 'by keeping them in balance, both in time and space'.[58] The key theme here is 'balancing' factors in a fair manner, which links the principle of *kaitiakitanga* with 'reasonableness'. What matters is that the duty bearer is constantly acknowledged to take appropriate steps. How this is to be realised is done by posing questions about the purpose and measures that are to be taken.[59] For example, questions like 'what should be respected', 'why is this important' and 'how would one construct and respect this' make the abstract *kaitiakitanga* more concrete and drive the duty bearer to make their best effort. In that way, one undergoes 'a process of becoming

[50] Iorns Magallanes (2019), p. 553.

[51] Resource and Management Act 1991 (RMA), Sec. 7(a).

[52] Ibid., Sec. 2(1).

[53] Beverley (1998), p. 152. For a critique of the inherent danger of translating *kaitiakitanga* into English, see also Tomas (1994).

[54] Beverley (1998), p. 152.

[55] Kawharu (2000), p. 351. For criticism, see also Hayes (1998).

[56] Kawharu (2000), p. 351. See also Marsden and Henare (1992); Ministry of Maori Development (1993), p. 10.

[57] Kawharu (2000), p. 352. For the broad scope of *kaitiakitanga*, see also Iorns Magallanes (2015), p. 280.

[58] Ibid., p. 366.

[59] Pohatu (2008), p. 245.

consciously vigilant and attentive to how and why' one is required to do things in accordance with *kaitiakitanga*. Thus, reasonableness—from a perspective of *tikanga*—appears to be determined by the state of being constantly aware where '[t]ime, critical reflection, constant discussion, dialogue and opportunity to implement, reflect and re-implement (praxis) are key elements in such a process'.[60]

Another relevant principle is *aroha*, which refers to 'love', 'sympathy' and 'charity'.[61] *Aroha* embraces the comprehensive quality of goodness and requires people to act in good faith and with genuine concern towards others.[62] This requires a balancing act from a person to behave fairly, with compassion and without discrimination. These remarks are echoed by Barlow who stresses that there are some Māori who actively participate during funerals and assist the bereaved family, but only do so when people of high status die. According to him, those people who are unwilling to do the same for those relatives of deceased people of lesser status do not possess *aroha*.[63] Strikingly, the term *aroha* also takes a central role in the expression '*he aroha whāea, he pōtiki piripoho*'. This essentially describes good parenting: if the parent shows love and care towards his or her children, they will be good children.[64] It follows that those with authority, power and prestige have a responsibility to give attention and listen fairly to others. Otherwise, the latter are more likely to depart from the values, standards and norms set by the former, which could lead to embarrassment and perhaps conflict.

4 Capacity Influencing a Due Diligence Performance

Another important factor influencing the due diligence performance by a state is the level of capacities. Without a doubt, those states with more financial abilities, resources and effective institutions are in a better position to take action rather than those which have less capacity to do so.[65] Some early treaties from the twentieth century included this feature, like the 1907 Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War[66] and the 1928 Havana Convention on Maritime Neutrality.[67] Environmental treaties also refer to the capacities of the state as a feature influencing the efforts that a state needs to make. Examples

[60] Ibid., p. 246.

[61] Barlow (1994), p. 8. See also Rawiri (2022), p. 437.

[62] New Zealand Ministry of Justice (2001), p. 151.

[63] Barlow (1994), p. 8.

[64] New Zealand Ministry of Justice (2001), p. 153.

[65] Bartolini (2020), pp. 36–37; Ollino (2022), p. 180.

[66] Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 16 January 1910), 205 CTS 395 (1907 Hague Convention), Arts. 8 and 25.

[67] Havana Convention on Maritime Neutrality (adopted 20 February 1928, entered into force 12 January 1931), 135 LNTS 188 (1928 Havana Convention), Art. 26.

are the Convention on Biological Diversity[68] and the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters.[69] Under international human rights law, the economic and financial means available to the state also influence the due diligence standard required by a state. When it comes to human rights, the capacities of the state are vital.[70] This is especially the case for human rights obligations relating to economic, social and cultural rights. The human rights obligations of 'progressive development', for instance, are commonly characterized as having the feature of capacity. After all, states are required to take steps to achieve the realization of economic, social and cultural rights 'to the maximum of their available resources'.[71]

However, putting too much emphasis on the capacity of a state could lead to unreasonable limitations on the scope of a due diligence obligation.[72] A state cannot always shield itself behind its capacity, but instead must establish a state apparatus to provide sufficient facilitation to realise its efforts.[73] Under contemporary international human rights law, this is also known as the 'minimum core obligations'. These obligations 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' regardless of the means available to a state.[74] Earlier arbitral awards on the protection of aliens and the law of neutrality also illustrate that states are required to establish some basic capacities to perform their expected efforts. For example, the *Monjito* case demonstrates that states are required to provide the means necessary to realise effective protection if they promise protection.[75] Further, in 1925 Max Huber famously highlighted, by applying the Roman law term of *diligentia quam in suis,* that protection should not be below a particular level.[76] The issue here, nonetheless, is that the application of a Roman standard to a feature of due diligence in international law is not always appropriate. For example, the application of such a standard to the due diligence obligations of states relating to the rights of indigenous peoples leads to a situation that is not culturally appropriate. Understanding how capacity is viewed by the indigenous people, in fact, is crucial for assessing whether a state has failed its due diligence obligation relating to the rights of an indigenous people. Instead of referring to Roman standards, it would be more appropriate to find an indigenous principle and link this to 'capacity' as a

[68] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993), 1760 UNTS 79 (CBD), Art. 6.

[69] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (adopted 29 December 1972, entered into force 30 August 1975), 1046 UNTS 120 (London Convention), Art. 2.

[70] Monnheimer (2021), p. 220.

[71] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (ICESCR), Art. 2; General Comment 3 (n. 24), para 10; Ollino (2022), p. 182.

[72] Bartolini (2020), p. 36.

[73] See for instance Second Report (n. 17), pp. 10–11; Bartolini (2020), pp. 36–37; Baade (2020), p. 99; Malaihollo (2021), p. 137.

[74] General Comment 3 (n. 24), para. 10; Monnheimer (2021), pp. 241–243.

[75] *Montijo* case *(Colombia v. USA)*, 26 July 1875, 3 Recueil des arbitrages internationaux 675, p. 678. See also Bartolini (2020), pp. 36–37.

[76] *Affaire des biens britanniques au Maroc espagnol (Spain v. UK)*, 1 May 1925, 2 RIAA 617.

feature of the due diligence obligations of the state. In the case of New Zealand it would be relevant to consider the principle of *mana*.

Tikanga Māori interestingly includes the notion of capacity in the foundational principle of *mana*. The spirit of this principle embraces 'authority', 'prestige' and 'power'. These features have an important role in Māori culture as everything and everyone has *mana* taking numerous forms.[77] Firstly, there is *mana atua,* which is the sacred power given by the gods to those who practise sacred rituals and live according to sacred principles.[78] Secondly, *mana* could be attained through chiefly lineage. This is also known as *mana tūpuna*.[79] Thirdly, *mana whenua* embodies the *mana* of Mother Earth. This means that the greater the *mana whenua* is, the better the ability of the land to produce the fruits of nature. Those living on these lands, after all, have the power to produce a wealthy livelihood for their community.[80] Similarly, *mana moana* applies to the sea and its resources.[81] Finally, *mana tangata* could be acquired by persons by developing skills or gaining knowledge.

Mana can have different degrees and because persons can acquire, increase or lose it through their actions, it strongly influences the behaviour of individuals and groups. Accordingly, *mana* functions as a reflection of accomplishments and success.[82] With that in mind, it is not so difficult to grasp that acting with kindness and generosity influences a person's *mana,* according to Māori culture. For example, an elder is responsible for taking care of a community based on their knowledge and experience, which may imply a significant amount of *mana.* At the same time, the more *mana* a person has, the higher the standard of care will be because the idea is 'to give' so that *mana* can be maintained or established.[83] It should be stressed that this concerns the principle of *manaakitanga,* which embodies the notion of 'hospitality'.[84] This embraces generosity, taking care of others and looking after each other.[85] It follows that those with *mana* have more capacity, which should not be exploited but managed with generosity. At the same time, one has to make efforts within the reasonable limits set by the degree of *mana* one has, but the lack of a high degree of *mana* does not imply that one can idly stand by and do nothing. In fact, this will decrease their *mana* even more.

[77] New Zealand Ministry of Justice (2001), pp. 35 and 52. See also Udy (2021), p. 20; Dempsey (2021), p. 72; Jones (2021) p. 167.

[78] Barlow (1994), p. 61; Jones (2014), p. 194. See also Matiu and Mutu (2003), pp. 156–157.

[79] Barlow (1994), p. 61; Jones (2014), p. 194; Matiu and Mutu (2003), pp. 156–157.

[80] Barlow (1994), pp. 61–62; Jones (2014), p. 194; Matiu and Mutu (2003), pp. 156–157.

[81] Jones (2014), p. 194; Matiu and Mutu (2003), pp. 156–157.

[82] New Zealand Ministry of Justice (2001), p. 51.

[83] Kawharu (2000), p. 360.

[84] New Zealand Ministry of Justice (2001), p. 166; Barlow (1994), p. 163.

[85] New Zealand Ministry of Justice (2001), p. 166. See also Jones (2021) pp. 168–169.

5 Interest or Right at Stake That Is to Be Protected

A further factor influencing a state's due diligence performance concerns the interest or right at stake. From a perspective of risk management, the whole purpose of due diligence is to prevent, halt or redress harm or the risk thereof and, therefore, to protect a particular interest or right from this. Often, the right holder concerns the beneficiary of the due diligence obligations. An example can be found in early practice on the protection of foreigners and their property. In terms of due diligence, states were required to show more serious efforts to protect foreigners against, for instance, public ministers.[86] Likewise, some human rights obligations require a higher level of due diligence when it comes to protecting those who are vulnerable, such as children, women and indigenous peoples.[87]

The status and nature of the interest or right also matter. The more foundational the interest or right is, the more serious action needs to be taken.[88] This is especially the case when the interest concerns the international community as a whole. Nevertheless, it is important to bear in mind that the status of the due diligence obligation needs to be distinguished from the status of the interest or right that is at stake. For instance, the normative status of the prohibition of genocide concerns one of *jus cogens*. However, opinions remain divided about whether the same can be said when it comes to the prevention of genocide. In *Bosnia Genocide*, the International Court of Justice (ICJ) did not qualify the obligation to prevent genocide as *jus cogens* and the debate here remains two-sided. On the one hand, it could be argued that the former is meaningless without the latter being *jus cogens*.[89] On the other hand, the status of the prohibition of genocide arguably does not apply to the ancillary obligation to prevent genocide.[90] Although this continues to be unclear, some commentators note that 'the argument can be made that at the very least the ius cogens character of the preventive obligation or even only of the primary prohibition to which it attached more forcefully obliges states to publicly explain how they took this obligation into account as part of their broader foreign policy decision-making vis-à-vis a certain situation of risk'.[91]

In other words, the more fundamental the protected interest or right is, the more a state is persuaded not to idly stand by and do nothing. In relation to human rights obligations, this is particularly important because a narrow margin is then granted to the insufficient capacities of the state. In that way, a state is expected to be vigilant by taking wide protective measures and not disregarding serious indicators of potential risks of human rights violations. This does not mean, however, that one human right prevails over any other. It simply means that the status of the interest or right requires a higher level of due diligence. As noted by Monnheimer, it requires

[86] Ollino (2022), p. 178.

[87] Ibid., p. 178.

[88] Ibid., p. 178.

[89] See for instance Ben-Naftali (2009), p. 36.

[90] Van den Herik and Irving (2020), p. 205. See also Ventura and Akande (2013).

[91] Van den Herik and Irving (2020), p. 205.

'a special form of protection that pays due regard to [the] fundamental importance [of the interest or right at stake] without neglecting other factors'.[92]

The element of the interest or right at stake can also be found in *tikanga*, namely in the principle of *tapu.* At first sight, this principle resembles the notion of 'taboo', but the English term 'taboo' in fact finds its origins in *tapu.* The word, after all, was first noted by Captain James Cook, who then introduced it into the English language.[93] Currently, *tapu* concerns a foundational principle that governs all levels of Māori society and functions as a protective device.[94] One commentator even noted that the principle is so paramount that it forms the basis for the Māori system of law.[95] *Tapu* is commonly understood as 'sacred', 'holy' or 'untouchable', and is used to illustrate conditions of restriction and prohibition.[96] A violation of *tapu* is so sacred that it results in retribution, often including the death of those who violate it.[97] Clearly, *tapu* includes a negative obligation requiring the duty bearer to refrain from particular actions, but one could argue that *tapu* embraces more than only negative obligations. Arguably, it also extends to positive obligations. The recognition of something or someone as having *tapu,* after all, requires one to act in a certain way that is not in conflict with that *tapu*.[98] It could even be argued that one has to show sincere efforts to protect something or someone having *tapu.* From a risk management perspective this makes sense, as a person or thing having *tapu* can be perceived as 'special', which requires a 'special process or preparation to engage with'.[99] This then calls for a standard of conduct encompassing serious action and a high degree of care.[100]

6 Relationships and Balance as an Integral Aspect of Due Diligence

Let us now turn to one particular element that contemporary international law hardly takes into account when examining a state's due diligence obligation, while this is in fact taken very seriously from an indigenous perspective, namely relationships between the duty bearer and the beneficiary. It remains difficult to claim that this is a factor of due diligence according to the sources of positive international law, but arguably this is an integral element of due diligence. Consider the classic example

[92] Monnheimer (2021), p. 250.

[93] Shirres (1982), p. 29. See also Rainbird (2003), p. 239; Gilmore et al. (2013), p. 335.

[94] New Zealand Ministry of Justice (2001), p. 59; Patterson (1992), p. 108; Tohe (1998), p. 888.

[95] Tohe (1998), p. 892.

[96] Jones also qualifies *tapu* as 'special'. According to him, '[p]eople, places, objects, or processes that are tapu are set aside in some way and should not be interacted with unless appropriate processes have been undertaken. See also Jones (2021), p. 168.

[97] Toki (2014), p. 36. Importantly, *tapu* corresponds with and is closely connected to *mana*. Something or someone with a significant amount of *tapu* also has a significant amount of *mana*. See also New Zealand Ministry of Justice (2001), p. 52; Udy (2021), p. 20.

[98] Tohe (1998), p. 888. See also Jackson (1988); Jackson (1990), p. 25.

[99] Jones (2021), p 168.

[100] As noted by Stephens, *tapu* also functions as 'a form of social control, regulating behaviour and setting behaviour standards'. See also Stephens (2022), p. 476.

of a doctor who has to take care of patients and not necessarily heal them all the time.[101] The doctor always has a relationship with his or her patient and he or she is expected to manage risks within the context of that relationship. After all, the doctor is not expected to heal everyone, but only those who are his or her patients. At the same time, the relationship also affects the due diligence performance of the doctor. The closer and more established the relation is, the more knowledge the doctor ought to have about particular issues relating to his or her patient. Western national legal systems are not unfamiliar with this aspect. English tort law, for instance, recognises that the parties must be in a 'relationship of proximity'.[102] This refers to a special relationship between the norm addressee of the duty of care and the right holder of the right that is to be protected or realised. The more this relationship is 'equivalent to contract'[103] or 'only falls short of a direct contractual relationship',[104] the more efforts can be expected by the duty bearer. In Dutch civil law, a 'special relationship' could also lead to accountability due to negligence in harmful situations.[105] Although Western legal systems are familiar with this factor influencing a due diligence standard, it appears that this has not yet been further crystallised in terms of the primary rules on due diligence in international law.

Strikingly, the feature of relationships is also a matter that can be found in *tikanga*, but contrary to Western legal systems, it has arguably a more exceptional and pivotal function for the Māori. The reason for this is that indigenous peoples, like the Māori, have a special relationship with their ancestral lands.[106] From this it follows that everything and everyone has (spiritual) value, creating interconnectedness between the people and their environment.[107] On top of that, relationships and connectedness have an important role in their traditional way of life. For instance, close relationships and connectedness are reflected in *tikanga* by way of the principle of *whānaungatanga.* This foundational principle establishes that each person is a representative of his or her community and, with that in mind, it creates rights and obligations to hold a Māori community together.[108] The basic point is that an individual must maintain the values of the group and that the actions of an individual are a reflection of the community. The relationships between individuals and kin groups, and corresponding obligations, are then regulated by the principle of *whakapapa,* which means 'to lay one thing upon another'.[109] It 'confirms an individual's membership within the kin groups that constitute Māori society and provides the

[101] Dupuy (1999), p. 375. See also Malaihollo (2021), pp. 128–129.

[102] *Caparo Industries Plc v. Dickman* [1990] 2 AC 605. https://www.bailii.org/uk/cases/UKHL/1990/2.html. Accessed 13 Jan 2023.

[103] *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.* [1964] AC 465. https://www.bailii.org/uk/cases/UKHL/1963/4.html. Accessed 13 Jan 2023.

[104] *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 AC 520. https://www.bailii.org/uk/cases/UKHL/1982/4.html. Accessed 13 Jan 2023.

[105] Verheij (2015) pp. 94–99.

[106] Renglet (2022), pp. 723–726.

[107] See also Iorns Magallanes (2015), pp. 279–280.

[108] New Zealand Ministry of Justice (2001), pp. 32 and 83. See also Dempsey (2021), pp. 76–77.

[109] Barlow (1994), p. 173. See also Jones (2021) p. 167.

means for learning about the history of their [ancestors]'.[110] *Whakapapa* embraces the idea of descent, connecting one with a Māori community and establishing close relationships with others. Notably, *whakapapa* also has an important role in terms of the environment, since the relationship between the Māori and their land is based on *whakapapa.*[111] Everything has *whakapapa*: flora, fauna and every living thing around us.[112]

Another important principle that regulates relationships is *utu*. As described by one commentator, it concerns 'one of the most important ordering principles in traditional Māori society'.[113] *Utu* is sometimes perceived as the equivalent of the concept of 'an eye for an eye' or 'punishment', but it is far more than that.[114] In essence, the principle of *utu* embraces 'reciprocity' and 'balance'.[115] Strikingly, the operationalisation of the action that is necessary to restore balance in relationships is influenced by a balancing act of various factors. These include the nature of the relationship, the *mana* involved, the seriousness of the breach of *tapu* and past practice.[116]

All in all, *tikanga*—in contrast to international law—puts significant emphasis on relations and balance when it comes to due diligence. This means that the standard of care used by the Māori is based on balanced relationships, taking a vital role in the operation of a standard of care. Valuing someone or something else appears to be significantly important and the stronger the relation to someone or something is, the more this sophisticated standard of care takes its form. In New Zealand, such a relational approach has been interestingly addressed in case law, namely in *Paki v. Attorney-General*, which illustrates that the Crown owes a clear duty of good faith to the Māori.[117] The reason for this can be found in New Zealand's history, in particular the signing of the Treaty of Waitangi, which signifies the foundation for a 'partnership' between the Crown and the Māori.[118] After all, to borrow the words of Pita Sharples,

> Māori hold a distinct and special status as the indigenous people, or *tangata whenua*, of New Zealand. Indigenous rights and indigenous culture are of profound importance to New Zealand and fundamental to our identity as a nation. A unique feature of our constitutional arrangements is the Treaty of Waitangi, signed by representatives of the Crown and Māori in 1840. It is a founding document of New Zealand and marks the beginning of our rich cultural herit-

[110] New Zealand Ministry of Justice (2001), p. 27.

[111] Ibid., pp. 43–50.

[112] Barlow (1994), p. 173.

[113] Metge (2010), p. 19.

[114] See also Patterson (1992), pp. 134–135.

[115] See also Dempsey (2021), p. 75; Jones (2021), p. 168.

[116] Jones (2014), p. 201.

[117] *Paki v. Attorney-General* (n. 12), para. 96.

[118] Treaty of Cession between Great Britain and New Zealand (signed 5/6 February 1840), 89 CTS 473 (Treaty of Waitangi). See generally Ross (1972); Kawharu (1989); Orange (1997). See also Crawford (2006), pp. 263, 265 and 272.

> age. The Treaty establishes a foundation of partnership, mutual respect, co-operation, and good faith between Māori and the Crown. It holds great importance in our laws, constitutional arrangements and the work of successive governments.[119]

With this in mind, it can be argued that the Crown has a relational obligation towards the Māori as the indigenous people of New Zealand, requiring a 'co-operative element' and an 'honest standard of conduct' which 'must be reasonable having regard to the proper interests of the parties'.[120] These elements reflect how a standard of care is perceived from a Māori perspective, which includes the elements of 'reasonableness', 'capacity' and the 'interest or right at stake'. In addition, it allows for flexibility by highlighting 'relationships and balance'. After all, it requires a 'dialogue to identify where Māori interests are particularly at stake'.[121] By communicating and negotiating with the Māori, such a relational approach arguably leads to the mutual satisfaction of both the Crown and the Māori, and healthy relations between the two. In terms of *tikanga*, this also helps to restore New Zealand's *mana* in addressing the rights of its indigenous people.[122] In addition, it leads to the fulfilment of and respect for multiple Māori principles discussed earlier in this paper.

A relational obligation towards the Māori as the indigenous people of New Zealand is in accordance with international law, in particular with the right to self-determination of indigenous peoples. The underlying idea of this foundational norm, after all, embraces the nuanced creation of institutional procedures and processes which make it possible for an indigenous people to maintain and control their destinies.[123] This understanding of the right to self-determination is also reflected in the UNDRIP.[124] In essence, the UNDRIP emphasises self-determination as a matter of relation by highlighting autonomy and self-government, but also participatory elements. For instance, Article 19 UNDRIP adds an essential participatory element in that it requires states to consult with indigenous peoples in order to obtain their free, prior and informed consent (FPIC) relating to legislative or administrative measures that may affect them.[125] It is, particularly but not exclusively, this feature of self-determination under the UNDRIP that allows a relational approach requiring the state to make its best efforts in hearing and taking an indigenous people seriously.[126]

[119] New Zealand Parliament (2010).

[120] *Paki v. Attorney-General* (n. 12), para. 110.

[121] Yan Pang (2011), p. 260.

[122] Sharples (2010).

[123] Anaya (2009), p. 196. As such, the purpose of the right to self-determination is to protect, preserve, strengthen and further develop a people's collective identity. See also Raič (2002), p. 223; Van den Driest (2013), p. 51.

[124] United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/61/295 (UNDRIP).

[125] For a comprehensive overview of FPIC and its operation under the UNDRIP, see Barelli (2018).

[126] Klabbers also defines the right to self-determination as the right to be heard and to be taken seriously; Klabbers (2006).

7 Concluding Remarks

When it comes to due diligence, the elements of 'reasonableness', 'capacity' and the 'interest or right at stake' can be identified in both positive international law and *tikanga.* However, this paper has shown that *tikanga* includes another feature that strongly influences the performance of due diligence, due to its significant value in Māori culture, namely 'relationships and balance'. In contrast, this has rather been unexplored in international legal doctrine on due diligence. Although it is noteworthy that Western legal systems are familiar with the issue of 'relationships' in the context of due diligence, from a Māori perspective relationships and achieving balance appear to occupy a more central role for standards of care. From this follows the premise that the stronger a relation to someone or something is, the more this standard of care takes its form. Such an understanding of due diligence is culturally appropriate to be applied in the context of New Zealand's diligence obligation relating to the rights of the Māori in international law. After all, this leads to the indigenous people being heard and taken seriously. Such an approach is in accordance with the right to self-determination of indigenous peoples in international law.

Nonetheless, it should be noted that the culturally appropriate approach towards due diligence with respect to the rights of indigenous peoples examined in this study is legitimate in the context of New Zealand and the Māori, but not for other states and other indigenous peoples per se. It would be most appropriate that the due diligence obligation of a particular state aiming to protect its indigenous people is given further meaning by integrating the perspective of the standard of care of that indigenous people. Every relationship between a state and its indigenous people is after all unique. Using *tikanga* to give further meaning to the due diligence obligations of other states would not be appropriate. Nevertheless, this study could be used as a template to identify and examine elements of a standard of care as followed by other indigenous peoples. It is recommended, against that backdrop, to study the traditional principles of other indigenous peoples, too, and to look for elements of a standard of care so that we can give further meaning to the due diligence obligations of states in the context of the rights of indigenous peoples in international law. Listening to the voices of indigenous peoples could help us to better understand due diligence, especially for the international lawyer attempting to understand this familiar, yet further to be explored, notion in international law.[127]

[127] Krieger, Peters and Kreuzer also refer to due diligence as a 'familiar stranger' in international law; Peters et al. (2020), p. 1.

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