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To cite this version:

Samantha Besson. Due Diligence and Extraterritorial Human Rights Obligations - Mind the Gap!. ESIL Reflections, 2020. hal-02918960

HAL Id: hal-02918960

https://hal.science/hal-02918960v1

Submitted on 21 Aug 2020

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ESIL Reflections
Editorial Board: Federico Casolari, Patrycja Grzebyk, Ellen Hey, Guy Sinclair and Ramses Wessel (editor-in-chief)

28 April 2020 Volume 9, Issue 1

Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!

Image by Andrea Cutelli (cc)

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Introduction

International human rights bodies' practice pertaining to the extraterritorial application (or "extraterritoriality") of States' human rights duties or obligations has always been controversial. Over time, nevertheless, "jurisdiction" over potential right-holders has emerged as the condition for both the territorial and the extraterritorial application of human rights. A more or less consensual interpretation of that jurisdiction *qua* "effective control" has also consolidated in practice.

Since 2017, however, observers[1] have noted radical departures from that interpretation in the practice of certain international human rights bodies.[2] Those new interpretations expand the extraterritorial scope of international human rights to cases where the duty-bearing State exercises no effective control over the right-holder, but only has control over a potential cause of harm to that person.

Those new understandings of human rights jurisdiction abroad mostly pertain to positive human rights duties, i.e. duties to prevent, protect or remedy against harm (especially environmental harm) caused by external sources, and in particular by private persons (especially business or corporate entities). Even more importantly, the positive duties at stake are mostly "obligations of due diligence" under international human rights law, i.e. human rights duties that are qualified by the standard of due diligence and include a reasonable care requirement.

This Reflection contests the justification of those interpretations of human rights jurisdiction. What seems to be driving them is not a new type of jurisdiction, but the due diligence standard itself. They conflate "control" over the human right-holder (*qua* condition for human rights jurisdiction and hence for a given human rights duty to arise in the first place) with "control" over a third party or another source of harm to the right-holder (*qua* condition for due diligence to arise and to qualify the human rights duty in existence). Reducing human rights jurisdiction to a mere capacity to harm in this way risks diluting the relational specificity of human rights and, by extension, undermining the coherence of international human rights law as a whole.

My argument is four-pronged. I start with a few generalities about jurisdiction under international human rights law and the extraterritoriality of human rights (Section 1) followed by an account of the personal and geographic scope of due diligence in international law (Section 2). In the following section I present the recent departures in the interpretation of the human rights jurisdiction condition and critically analyse them (Section 3). I conclude with a few alternative considerations about how best to ground, under contemporary international law, extraterritorial obligations to prevent, protect against and remedy diligently the kind of harm at stake in those cases (Section 4).

1. Jurisdiction and the Extraterritoriality of Human Rights

Under contemporary international human rights law, a State's "jurisdiction" over potential right-holders is a condition for its human rights duties to arise towards those right-holders. It is also a condition for those persons' correlative human rights to arise vis-à-vis that State (e.g.

1 See e.g. Diane Desierto, "The ICESCR as a Legal Constraint on State Regulation of Business, Trade and Investment: Notes from CESCR General Comment No. 24 (August 2017)", EJILTalk!, 13 September 2017; Antal Berkes, "A New Extraterritorial Jurisdictional Link Recognised by the IACtHR (March 2018)", EJILTalk!, 28 March 2018; Daniel Møgster, "Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR (November 2018)", EJILTalk!, 27 November 2018; Alice Ollino, "Human Rights in Transboundary Contexts: Some Critical Remarks over the Emergence of an 'Effects Jurisdiction' Model in International Human Rights Law", *European Journal of International Law* (2020), forthcoming.

2 See e.g. HRC, *Basem Ahmed Issa Yassin v Canada*, 26 July 2017, CCPR/C/120/D/2285/2013, para. 6.5. ff.; CESCR, *General Comment 24*, 10 August 2017, E/C.12/GC/24, para. 15-16, 30-32; IACtHR, *Advisory Opinion 23/17*, 15 November 2017, para. 104.a-104.h; HRC, *General Comment 36*, 30 October 2018, CCPR/C/GC/36, para. 21-22.

Article 1 of the European Convention on Human Rights [ECHR]; Article 2(1) of the International Covenant on Civil and Political Rights [ICCPR]).[3]

Human rights jurisdiction ought not to be confused with other types of "jurisdiction" under international law. In particular, it is distinct from a State's jurisdiction *stricto sensu*, that is its (e.g. personal, territorial, protection or universal) competence or rights under international law. Human rights jurisdiction does not actually depend on the existence of a State's legal rights. It also applies outside the scope of that State's competences under international law, including its territorial or personal competences.[4] Thus, a State may have no right to do, or to not do, something under international law, but may owe human rights duties to do, or to not do, it all the same. The fact, however, that a State owes human rights duties to do, or to not do so, does not, on its own, ground its competences to do it under international law.[5] Of course, a State's jurisdiction under international law may trigger its human rights jurisdiction, but only if it has brought the State to acquire some form of effective control over the right-holder. It may even lead to a presumption of human rights jurisdiction in certain cases, as with territorial jurisdiction.

Under international human rights law, human rights jurisdiction can be both territorial and extraterritorial. Territorial human rights jurisdiction, i.e. a State's jurisdiction over its territory, is presumed, whereas extraterritorial human rights jurisdiction, i.e. a State's jurisdiction outside its territory, is exceptional and has to be established. Of course, territorial human rights jurisdiction may be rebutted if its conditions are not fulfilled, and especially if effective control has been lost. The State that has lost territorial jurisdiction incurs positive duties of due diligence to regain it, however.[6]

Human rights jurisdiction is interpreted, to date, as requiring "effective control" by the human rights duty-bearing State over the human right-holder.[7] That effective control is usually qualified further as also having to be "regular", as opposed to singular, and sometimes as having to be government-like or "normative", and hence akin to an exercise of legal authority even when it is not.

Importantly, one should not confuse a State's effective control over a private person required for human rights jurisdiction over the right-holder, which is at stake here, with its "effective control" over a private person who is causing the human rights violation. This second kind of effective control is used for the purpose of attribution of private conduct to a State under the law on international responsibility of States (Article 8 of the Articles on the Responsibility of States for Internationally Wrongful Acts [ARSIWA]). In international human rights law, it may

3 See e.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); Samantha Besson, "The Extra-territoriality of the European Convention on Human Rights. Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", *Leiden Journal of International Law* 25 (2012): 857.

4 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion on the Wall)*, 9 July 2004, Advisory Opinion, ICJ Reports 2004, p. 136, para. 108 ff.; ECtHR, *Loizidou v Turkey*, App. No. 15318/89, 18 December 1996, para. 52.

5 See e.g. CESCR, *GC 24 (2017)*, para. 30-33.

6 See e.g. ECtHR, *Chiragov and Others v Armenia*, App. No. 13216/05, 16 June 2015.

7 See e.g. ICJ, *Advisory Opinion on the Wall*, para. 111; ECtHR, *Al-Skeini and Others v UK*, App. No. 55721/07, 7 July 2011, para. 133 ff. and 138; ECtHR, *Catan and Others v the Republic of Moldavia and Russia*, App. Nos. 43370/04, 18454/06. 8252/05, 19 October 2012, para. 106 ff.; ECtHR, *Jaloud v the Netherlands*, App. No 47708/08, 20 November 2014, para. 139.

be applied in order to establish a State's direct responsibility for a breach of human rights duties caused by a private person.[8] Of course, and I will come back to this later, the effective control by a State over a private person (including outside its territory) for the purpose of attribution of conduct, and hence of responsibility, could also be used, under certain conditions, to establish that State's extraterritorial human rights jurisdiction over the right-holder situated under that private person's control.[9]

In terms of types, effective control over the right-holder is, by definition, of a "personal" kind. However, it can also be "spatial" to the extent that control over a certain territory may be considered as implying personal control over people situated on that territory. This applies whether the territory under spatial control is the official territory of the duty-bearing State or not–referring to extraterritorial "spatial" control here avoids speaking of extraterritorial "territorial" control. In recent case-law of the European Court of Human Rights (ECtHR), a third type of effective control has emerged, that may be coined "procedural".[10] In short, a State may be considered to exercise effective control over people merely through procedural or legal means. This is the case, for instance, in the context of judicial proceedings in which the right-holder is a party, or of a transnational arrest warrant pertaining to a crime where the right-holder is a victim.

2. Control and the Scope of Due Diligence in International Law

From early pronouncements in late 19th century arbitral awards to the International Court of Justice (ICJ)'s most recent case-law, due diligence has gone from a standard qualifying interstate obligations of good neighbourliness to also qualifying State obligations owed to individuals within its territory. Key to this development has been the rise of obligations of due diligence under international human rights law. Nowadays, due diligence continues to play an important role in the human rights regime, especially in the qualification of positive duties of conduct such as human rights duties to prevent, protect or remedy.[11]

In short, due diligence may be defined as a standard of conduct of States (primarily).[12] It is mostly attached to an obligation of conduct, which is usually, but not only, a positive obligation to prevent, protect or remedy (often called, for convenience reasons, "obligation of due diligence" or "due diligence obligation"). Due diligence requires the State that bears that obligation to exercise care (*duty of care*), and thus also, conversely, to do no harm carelessly (*duty not to harm*). This implies adopting reasonable measures in order to protect the interests

8 See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, Judgment, ICJ Reports 2007, p. 43, para. 401-7.

9 See e.g. ECtHR, *Ilaşcu and Others v Moldova and Russia*, App. No. 48787/99, 8 July 2004, para. 314-6; ECtHR, *Jaloud v the Netherlands*, para. 138.

10 See e.g. ECtHR, *Romeo Castaño v Belgium*, App. No. 8351/17, 9 July 2019, para. 36-43. See also ECtHR, *Markovic and Others v Italy*, App. No. 1398/03, 14 December 2006, para. 54-56; ECtHR, *Güzelyurtlu and Others v Cyprus and Turkey*, App. No. 36925/07, 29 January 2019 para. 187 ff.

11 See e.g. IACtHR, *Velasquez Rodriguez v Honduras*, Judgment, 29 June 1988, Series C No. 4, para. 172; ECtHR, *Opuz v Turkey*, App. No. 33401/02, 9 June 2009, para. 129-130; ECtHR, *Talpis v Italy*, App. No. 41237/14, 2 March 2017, para. 98-99, 129.

12 See e.g. Joanna Kulesza, *Due Diligence in International Law* (Brill|Nijhoff, 2016); Société française du droit international (ed), *Le standard de* due diligence *et la responsabilité internationale: Journée d'études franco-italienne du Mans* (Pedone, 2018); Samantha Besson, *La* Due Diligence *en droit international*, Collected Courses of The Hague Academy of International Law (Brill|Nijhoff, 2020, forthcoming).

or rights of other subjects against (risks of) (usually significant) harm caused by third parties or other causes situated on the territory or, at least, under the jurisdiction *stricto sensu* or under the control of the duty-bearing State. The two conditions for due diligence to apply are that the duty-bearing State had foreseen or ought to have (reasonably) foreseen the (risk of) harm and had the (reasonable) capacity to intervene.

A few elements with respect to the scope of due diligence under international law need to be developed further.

As to their personal scope, first of all, due diligence obligations usually arise within a personal triangle constituted of the duty-bearer, the beneficiary and a third party that is the source of harm. Importantly, the beneficiary of an obligation of due diligence is not necessarily a right-holder. This will depend on the nature of the international law obligations to which the standard of due diligence is attached and especially on whether they are "directed" obligations, i.e. owed to a person or not.

As I explained previously, "control" is a dimension of the reasonable capacity of the duty-bearing State to intervene and hence one of the conditions of due diligence (*ought implies can*). What matters for due diligence to arise, however, is control over the third party, i.e. the source of the harm, and not over the beneficiary of due diligence, i.e. the human right-holder. This is what distinguishes it from the kind of control needed to establish jurisdiction under international human rights law. Moreover, control in the context of due diligence refers to any personal "link" to that third party which gives the duty-bearer some control over the source of harm.[13] It does not need to be "effective" control. This is what distinguishes it from the effective control required, under international responsibility law, for the purpose of attribution of the conduct of the private actor to the duty-bearing State. Finally, the control required for due diligence purposes may match a State's "jurisdiction" *stricto sensu* under general international law, and especially its territorial jurisdiction, but it does not need to.

The geographic scope of due diligence, secondly, may be territorial or extraterritorial depending on whether the harm is transboundary or not. As a matter of fact, due diligence also applies to circumstances where the harm does not originate from within any territory at all (e.g. under the international law of the sea).[14] This in turn explains why the control that ought to be exercised over the source of harm for due diligence to arise may be territorial in kind, but not necessarily so.

3. Extraterritorial Human Rights Obligations in the Recent Practice of International Human Rights Law

Since 2017, various international human rights bodies, mostly of a non-judicial character, have proposed expansive interpretations of extraterritorial human rights "jurisdiction".[15]

It has been the case of both universal and regional international human rights bodies, and in particular the UN Committee on Economic, Social and Cultural Rights (CESCR), the UN Human Rights Committee (HRC) and the Inter-American Court of Human Rights (IACtHR).

[13] See ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, para. 430.

[14] See ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion on Nuclear Weapons)*, 8 July 1996, Advisory Opinion, ICJ Reports 1996, p. 226, para. 29.

[15] See e.g. HRC, *Basem Ahmed Issa Yassin v Canada*, para. 6.5. ff.; CESCR, *GC 24 (2017)*, para. 15-16, 30-32; IACtHR, *Advisory Opinion 23/17*, para. 104.a-104.h; HRC, *GC 36 (2018)*, para. 21-22.

The ECtHR has not yet followed this trend, however. Nor have domestic courts active within the ECHR system.[16]

In short, and although the formulations still vary from one interpretation to the other, the gist of those new readings of human rights jurisdiction is the following. A human rights duty-bearing State is considered to have extraterritorial jurisdiction over a potential right-holder outside of the two common types of effective control, i.e. personal or spatial control, provided it exercises some form of control over a potential source of harm to that right-holder. The key seems to lie in the duty-bearing State's "control" over the source of harm, and in it being "causally" related to that harm or "connected" somehow to its "impact" on the right-holder.

Those new interpretations of human rights jurisdiction pertain mostly to the extraterritoriality of human rights in the context of transnational business operations. Addressing the question of the scope of either States' or transnational corporations' (TNCs) human rights duties under international law, including their respective due diligence duties, is beyond the scope of this Reflection. I will restrict myself to assessing the way in which the conditions for the extraterritorial application of States' human rights duties, and especially the notion of human rights jurisdiction, have been re-interpreted in the light of the standard of due diligence in this new line of practice. There are at least three difficulties with it.

The first, and most important, objection pertains to their normative confusion. They conflate the conditions for the standard of due diligence to apply (and hence for it to qualify the content of human rights duties), on the one hand, with the conditions of jurisdiction itself (and hence for those qualified human rights duties to arise in the first place), on the other.[17]

Of course, as I explained earlier, due diligence and jurisdiction both rely on some form of "control". However, due diligence requires "control" over the cause of harm and a control that need not be effective, whereas jurisdiction requires "control" over the right-holder and one that has to be effective. The standard of due diligence, even if it may be grounded in those cases as a standard independent from the obligation it is qualifying (in this case a human rights duty), cannot ground that obligation itself, and hence cannot give rise to a human rights duty in the first place. The conditions for that duty to arise have to be met independently. The existence of a jurisdictional relationship between a duty-bearing State and a potential right-holder is one of the grounds for human rights duties to arise besides the existence of fundamental and equal interests to protect. Any other approach would turn a mere capacity to harm someone (in this case, control over the source of harm and contribution to the causation of the harm) into a duty not to harm that person and into a right of that person not to be harmed under international human rights law.

A second objection pertains to the criteria used by those various international human rights bodies in order to assess the existence of effective control over the alleged human right-holder. Those criteria have sometimes been conflated with the two conditions of due diligence

16 See e.g. Dutch Supreme Court, *State of the Netherlands v Stichting Urgenda* (19 December 2019, 19/00135). See also André Nollkaemper and Laura Burgers, "A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the *Urgenda* Case (January 2020)", EJILTalk!, 6 January 2020.

17 See IACtHR, *Advisory Opinion 23/17*, para. 104.e and 104.h. See also CESCR, *GC 24 (2017)*, para. 30-32.

itself, i.e. the reasonable foreseeability of the (risk of) harm and the reasonable capacity to intervene.[18]

A third confusion in those interpretations is the identification of "effective control" for the purpose of attribution of the conduct of a private corporate entity to a human rights duty-bearing State with "effective control" over the alleged right-holders themselves.[19] While it may be possible in certain cases to rely on the former to establish the latter, the link is not straightforward. Even more so when a State's control over a corporate entity is legal or institutional, rather than a more "hands-on" type, as in the command of military operations. Unless a State exercises direct control over the business operations of a corporate entity, including over its subsidiary companies abroad, it is difficult to consider it to be in effective control thereof and subsequently to attribute that actor's wrongful acts to that State on that basis.

A rejoinder may be that what is really at stake in those new cases is the third type of effective control over the right-holders entertained in the ECtHR's recent case-law, and which I mentioned earlier, i.e. "procedural" control. The problem, however, is that the right-holders in the cases at hand are not legally or procedurally tied in any way to the duty-bearing State (whether in terms of rights or in terms of duties). The only legal relationship to that State lies on the involved TNCs' side: they have been incorporated under its domestic law or benefit from domestic authorizations to export.

4. Alternative Grounds for Extraterritorial Obligations of Due Diligence under International Law

There is no question that States' obligations of due diligence can and should arise under international law in the kind of extraterritorial circumstances discussed in this Reflection.

For those obligations to qualify as human rights obligations of due diligence, however, they need to be grounded in the first place so that one can move from protected interests to human rights duties *stricto sensu*. For this to be the case, a relation of jurisdiction between the alleged duty-bearing State and the right-holder needs to be established. This requires securing the existence of some form of effective control of the State over the right-holder, and not merely of a causal connection between the State and the source of harm to that person. Reducing jurisdiction to a mere capacity to harm risks diluting the relational specificity of human rights and of their correlative duties, and eventually undermining international human rights law's capacity to protect.

Importantly, there are ways of interpreting the current regime of jurisdiction in international human rights law in order to broaden the types of effective control considered, albeit without

[18] See Individual Opinion of Olivier de Frouville and Yadh Ben Achour in HRC, *Basem Ahmed Issa Yassin v Canada*, para. 10-11. See also HRC, *GC 36 (2018)*, para. 21-2.

[19] See HRC, *Basem Ahmed Issa Yassin v Canada*, para. 6.5. See also Individual Opinion of O de Frouville and Y Ben Achour in HRC, *Basem Ahmed Issa Yassin v Canada*, para. 8.

conflating a State's effective control over a right-holder with the mere capacity to harm that person.[20] I will briefly mention two here.

First of all, and as already mentioned, the "procedural" or legal type of effective control over an alleged right-holder may apply to some of the cases at hand. For instance, if the victim of a TNC abroad decides to sue that corporation before the tribunals of its State of incorporation, that State may be exercising procedural effective control over them. It could then be considered to owe them human rights that can be grounded in that kind of procedural jurisdiction, i.e. procedural rights and non-discrimination rights in particular. The material scope and content of those rights are limited, however, as they are grounded in a separate jurisdictional relationship between that State and the right-holder.

Secondly, one could also approach the issue from the perspective of the "responsibilities" for human rights protection that all States, and not only the State of jurisdiction, share equally under international human rights law.[21] Those responsibilities include responsibilities to assist and cooperate with human rights duty-bearing States, but also duties not to recognise grave human rights violations by the latter (e.g. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights [ICESCR]; Articles 40-41 of the ARSIWA). Unlike human rights "duties" owed to the right-holders by the State of jurisdiction, however, responsibilities for human rights of other States are not directed or owed to those right-holders and may not be claimed by them either.

As a matter of fact, some of those responsibilities for human rights are also responsibilities of due diligence provided the conditions of due diligence are fulfilled. Interestingly, they also include due diligence responsibilities of all States to regulate TNCs under their control so as to prevent them from harming the human rights of people under the (human rights) jurisdiction of other States.[22] This way human rights responsibility-bearing States could and should assist States of jurisdiction in abiding by their human rights duties towards those people. Such domestic regulation may, of course, take the shape of private or criminal law provisions. It may actually include the prescription of "due diligence" obligations[23] on the part of TNCs under domestic law. Eventually, the adoption of domestic regulation of that kind may even become compulsory under international law[24] and be considered the way to implement States' own due diligence responsibilities for human rights.

20 See for a more general discussion, Sigrun Skogly and Philippa Osim, "Jurisdiction – A Barrier to Compliance with Extraterritorial Obligations to Protect against Human Rights Abuses by Non-State Actors?", *Human Rights & International Discourse* 13:2 (2020).

21 See Samantha Besson, "The Bearers of Human Rights Duties and Responsibilities for Human Rights – A Quiet (R)Evolution", *Social Philosophy & Policy* 32 (2015): 244.

22 Such "responsibilities" for human rights as opposed to human rights "duties" *stricto sensu* may be the ones at stake in CESCR, *GC 24 (2017)*, para. 30-33; and HRC, *GC 36 (2018)*, para. 21-22.

23 See e.g. John Gerard Ruggie and John F Sherman, III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", *European Journal of International Law* 28 (2017): 921.

24 See the HRC, OEIGWG, Revised draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*, 16 July 2019. See also Olivier de Schutter, "Towards a New Treaty on Business and Human Rights", *Business and Human Rights Journal* 1 (2015): 41.

More generally, if one is looking to expand the extraterritorial scope of States' obligations of due diligence under international law, and thereby to protect against environmental harm caused by TNCs abroad, there are alternatives to international human rights law itself.

The fact is, of course, that international human rights law took over, by the middle of the 20th century, from international diplomatic protection law as the main source of States' due diligence obligations for the benefit of physical persons. It has been key not only to the process of universalizing and generalizing obligations of due diligence by ensuring not only that they are owed by all States outside of bilateral transboundary relations, but also to beneficiaries (turned into right-holders) irrespective of their nationality.[25] All the same, nothing prevents obligations of due diligence from evolving again, and by doing so beyond the confines of international human rights law.

To start with, one may think of States' obligations of due diligence under international environmental law. The fact is, however, that many international environmental lawyers have turned to international human rights law to ground those obligations.[26] By grounding them in international human rights law, those scholars endeavour to transform obligations not to harm the environment into directed duties, i.e. duties owed to a right-holder who can then invoke them before domestic or international courts. As I have explained earlier, however, while this may sound like an attractive move from the perspective of international environmental law, it is not from that of international human rights law. It may be better to focus on non-directed obligations of due diligence within international environmental law, albeit without reducing them to procedural obligations.[27]

Another way forward would be to prescribe international (human rights or environmental) obligations of due diligence directly to TNCs. Although they may coexist with certain States' extraterritorial responsibilities for human rights protection, those obligations would be distinct from those States' responsibilities, including their responsibilities (as opposed to their duties) to prevent, with all due diligence, the human rights violations caused abroad by TNCs under their control. Regrettably, however, this is not the direction taken by the current negotiations on an international "Legally binding instrument on business activities and human rights". That instrument only focuses on States' international law responsibilities to adopt domestic law, including to prescribe minimal due diligence obligations to TNCs under domestic law. Nevertheless, prescribing direct international law obligations to TNCs would amount to the best way to not only mind, but also bridge the gap between States' obligations of due diligence and their extraterritorial human rights obligations.

Cite as: Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!', ESIL Reflections 9:1 (2020).

[25] See Monica Hakimi, "State Bystander Responsibility", *European Journal of International Law* 21 (2010): 341.

[26] See e.g. Jorge E Viñuales, "A Human Rights Approach to Extraterritorial Environmental Protection – An Assessment", in N Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016), 177.

[27] See Jutta Brunnée, *Procedure and Substance in International Environmental Law*, Collected Courses of The Hague Academy of International Law (Brill|Nijhoff, 2020, forthcoming).