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Due diligence in international law

Interview with **Professor Samantha Besson**





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! . The course is now published by Brill in the *Collected Courses of The Hague Academy of International Law - Recueil des cours*.

Interview with Samantha Besson, who holds the chair in "International Institutional Law" at the Collège de France, Paris, and is a Professor of Public International Law and European Law at the University of Fribourg in Switzerland.

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It is a standard, or a behavioural norm, which qualifies diverse obligations in international law. In certain circumstances, it requires us to provide evidence of diligence or reasonable vigilance or, conversely, that we have refrained from causing harm through negligence to various rights or interests protected by international obligations. To do this, we must be able to foresee the risks of harm which threaten these rights or interests and have the ability to protect against this harm. *Due diligence* therefore plays a central role in identifying and specifying numerous new obligations to prevent and protect against certain risks in terms of health, the environment, security, etc.

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Due diligence is coming into its own at a time when global threats to rights and interests protected by international law are increasing. Nevertheless, the nature, sources and regime of due diligence remain largely undetermined. This course offers a critical review of the practice of this standard within general international law and offers an interpretation of its normative structure and its regime. In addition, I outline the ways in which international liability can be implemented for negligence and its specific applications in international law for the environment, cybersecurity and human rights. Generally speaking, this course highlights the profound changes to the international institutional order, the development of common human interests, and the reinforcement of the expectations for security within a "vigilant" society.

Can you give a key example?

I would mention the *due diligence* obligations linked to cyberattacks as these are a good illustration of how topical the standard is, and of its potential, and the importance of clarifying it in international law. These attacks, generally secret and diffuse, are perpetrated by "hackers", whose behaviour can rarely be linked to any State in order to establish its international liability. On the other hand, this State's liability can more easily be invoked for a breach of its obligations under *due diligence*, because it knew - or should have known - that a cybersecurity threat which affects another State came from its territory, and that it had the technical means to prevent it. In this scenario, the State is not answerable for the cyberattack itself, but for its negligent failure to prevent or protect against this attack. It is a topical and controversial debate as certain States, those that like to grant more leeway, are violently opposed to the applicability of international law, including *due diligence*, to cyberspace.

What, to you, is the most interesting aspect of the concept of due diligence

Although it has been constantly evolving over time, the standard for *due diligence* is an old one, and something which has been remarkably consistent. This dimension of being both fundamental and highly dynamic is central to my analysis of the general *due diligence* regime in international law. It allows us to remain optimistic about its capacity to adapt to new threats and to the major institutional upheavals to come.

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