



“The rise of due diligence as a structural change of the international legal order”

Ninth Annual Cambridge International Law Conference: International Law and Global Risks: Current Challenges in Theory and Practice

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I. Concept and key questions

A “bridge principle” between law and other spheres of normativity.

Where in international law?

Risk management in the face of lacking knowledge and evidence, in the face of unclear causalities, and in the face of numerous contributing factors and actors.

II. (Legal) functions

A companion of the precautionary principle.

1. Traditional function: to restrict or mitigate the responsibility or accountability of states.

No harm/*neminem laedere* rule: Breached, when negligent conduct + unwanted result.

Cf. Art. 14(3) ARSIWA.

2. Same where humans are construed as risk.

Protection of diplomatic premises, anti-terrorism law, other.

3. Due diligence can create responsibility.

Detachment of the procedural due diligence obligation from any result?

For example in anti-corruption law and progressive human rights obligations.

III. Legal “structure” and qualification

1. Obligation of conduct as opposed to obligation of result?

2. In between primary and secondary norms?

With regard to responsibility:

a) Full attribution of behaviour of *non-state actor* (e.g. effective control, Art. 8 ARSIWA) → behaviour of X counts as *own* wrongful act of state; state responsibility follows.

b) Complicity with other *state* (Art. 16 ARSIWA): Distinct contributing behaviour of state with knowledge (lit a) and “parallelism” (lit b) → ancillary wrongful act and ensuing state responsibility.

c) Due diligence: Focus only on own action or inaction of state: Harm may come from another actor (state or non-state) or from force of nature. No exact knowledge required, no parallelism required; and sometimes no materialisation of risk (= occurrence of harm) required.

IV. No general principle of law

1. Widely diverging functions

In between law and pure business practices “acting with diligence” ↔ “doing due diligence”.

Dependence on the substantive standards of the specific regime.

2. Not normatively appropriate as a fall-back rule.

V. The policy benefits

1. A compensation for curtailing sovereign freedoms.
2. A tool to manage risk and uncertainty in face of connectivity and diversity of international actors.
3. A tool for progressive interpretation in times of contestation.
4. Stabilising the international order through proceduralisation.

VI. The dark side of due diligence

1. Undermining the governance capacity of the law by dilution of substantive obligations.
2. Private actors, non-state standard setting, and technocracy.

VII. Indicator of structural change in or even of the international legal order?

Documents

Explicit due diligence obligations:

- “Istanbul Convention” on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011 (CETS 2010), art. 5(1), (2).
- OEIGWG on business and human rights, Revised Draft of 16 July 2019, art. 5(2).

Implicit due diligence obligations: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972); the Vienna Convention for the Protection of the Ozone Layer (1985); Convention on Environmental Impact Assessment in a Transboundary Context (1991); Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992); Convention on the Law of Non-Navigational Uses of International Watercourses (1997), and many more.

Case law

ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, 14.

ICJ, *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Judgment of 16 December 2015, ICJ Reports 2015, 665.

ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), ITLOS Case No. 17, 1 February 2011.

Key literature

Heike Krieger/Anne Peters/Leonhard Kreuzer (eds.), *Due Diligence and Structural Change in the International Legal Order* (Oxford: OUP 2020 forthcoming).

Neil McDonald, ‘The Role of Due Diligence in International Law’, *International and Comparative Law Quarterly* 68 (2019), 1041-1054.

Société Française pour le Droit International (S.F.D.I.)/Sarah Cassella (eds.), *Le standard de due diligence et la responsabilité internationale* (Paris: Pedone 2018).

Anja Seibert-Fohr, ‘From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?’, *German Yearbook of International Law* 60 (2017), 667-708.

Joanna Kulesza, *Due Diligence in International Law* (Leiden: Brill 2016).

ILA Study Group on Due Diligence in International Law, First Report (March 2014), Second Report (July 2016).