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”.

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


Webinar of 30th April 2020
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).


Case law
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
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).