Alice Ollino. ***Due Diligence Obligations in International Law.*** Cambridge: Cambridge University Press, 2022. Pp. 336. £85.00. ISBN: 9781316511879.

Due diligence is on the rise in international law. That is an observation frequently made in the increasing amount of international legal scholarship on the topic. But what does due diligence exactly mean, and what are the implications of its rise for the international legal order? The answer to these questions depends on one's understanding of due diligence. However, there is no fixed meaning of due diligence in international law. It is, *inter alia*, presented as a notion, a concept, a standard or a principle; it has been discussed within the realm of primary as well as secondary rules of international law; and it can be understood either as an objective standard or as forming part of a subjective element of state responsibility.

In view of that fluidity, Alice Ollino's monograph provides for essential clarifications. Its main claim is that due diligence is best understood as 'a *qualifier* for a distinct typology of international obligations' (at 14; emphasis in original), 'an *identifier* of certain primary rules' (at 267; emphasis in original). Ollino unfolds that argument in five chapters: first, she presents the foundations of due diligence in international law with reflections on its historical origins as well as its current status and role within the international legal order (Chapter 1). She identifies the nature of due diligence as obligations of conduct and not of result (Chapter 2) and analyses their scope and content (Chapter 3). On that basis, she explores the interaction of due diligence obligations with the law of international responsibility (Chapter 4). In the last chapter, Ollino traces a 'proceduralization' of due diligence obligations and its effects on the nature and content of the concept (Chapter 5).

One of the book's many strengths is that it does not simply add another account of due diligence to the existing ones. Instead, in developing its own proposal, it clarifies what the possible understandings of due diligence are and where misunderstandings on the meaning of due diligence within international law stem from. First and foremost, that is true for the issue of whether the concept of due diligence pertains to the level of secondary rules of international responsibility or of primary (substantive) obligations of international law. Ollino proposes to approach due diligence from a perspective of primary obligations (at 10). In itself, that is not very innovative: as Ollino notes (at 7–8, 10–11), this understanding has already been put forward by Riccardo Pisillo-Mazzeschi[1] and underlies many studies of due diligence in different regimes of international law.[2] However, what is specific about this book is that it takes a more general perspective on due diligence that overarches specific areas of international law and, interrelatedly, carefully analyses the interrelationship between due diligence and secondary rules of international responsibility.

[1] Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *German Yearbook of International Law* (*GYIL*) (1992) 9, at 21–22 (underlining the need to focus on due diligence within substantive areas of primary obligations).

[2] For, *inter alia*, investigations into the role of due diligence in various fields of international law, see H. Krieger, A. Peters and L. Kreuzer (eds), *Due Diligence in the International Legal Order* (2020).

Ollino's reflections on the foundations of due diligence lay the groundwork for this perspective (Chapter 1). As she retraces, due diligence appeared as a standard in international law in the context of the protection of foreigners in the nineteenth and early twentieth centuries,[3] but had already been present in earlier doctrine of international law (at 19–32). Later on, as Ollino recounts in a nuanced manner, due diligence had a significant role to play in debates on the conditions for state responsibility (at 33–37). That is particularly true for the early work of the International Law Commission (ILC) on state responsibility under first Special Rapporteur Francisco V. García-Amador. Focused on responsibility in relation to injuries to aliens, due diligence featured in his reports as a prerequisite for responsibility of a state in relation to acts of third parties – in particular, private individuals.[4] But, as Ollino underlines (at 39), with the distinction of secondary and primary rules and the accompanying exclusion of substantive issues from the scope of the rules on international responsibility, considerations of due diligence were pushed to the level of primary obligations.[5] Nonetheless, as manifested by the spread of due diligence obligations throughout international law, overarching features of due diligence seem to continue to exist that merit an analysis transgressing distinct substantive areas of international law.

Against this background, for some – including myself – due diligence is best understood to be situated 'in-between the layers of secondary and primary rules'.[6] Ollino is opposed to such a view on due diligence (particularly at 267). However, as to my understanding, these positions might not be all that different. They both account for the fact that the role of due diligence in international law cannot be understood if merely considered in the concrete contexts of distinct primary obligations making use of that standard. Instead, due diligence obligations can serve as a separate basis for state responsibility, engaged by the harmful activities of third parties. In this way, they closely interact with issues of attribution and complicity – both forming part of the law of international responsibility. This place of due diligence may be described as being in between the layers of secondary and (concrete) primary rules. Others propose to formulate and apply due diligence as a secondary rule of international law.[7]

[3] On this evolution of due diligence, see also Bartolini, 'The Historical Roots of the Due Diligence Standard', in Krieger, Peters and Kreuzer, *supra* note 2, 23, at 25–26.

[4] F.V. García-Amador, Second Report on State Responsibility, Doc. A/CN.4/106, 15 February 1957, at 104–130, 121–123; see also Aust and Feihle, 'Due Diligence in the History of the Codification of the Law of State Responsibility', in Krieger, Peters and Kreuzer, *supra* note 2, 42, at 44–47.

[5] See, explicitly, 'State Responsibility, General Commentary' (ARSIWA Commentary), 2(2) *ILC Yearbook* (2001) 31, art. 2, para. 3.

[6] Aust and Feihle, *supra* note 4, at 51. For due diligence transgressing the primary/secondary rules distinction, see also Cassella, 'Les travaux de la Commission du Droit International sur la Responsabilité Internationale et le standard de due diligence', in French Society for International Law and S. Cassella (eds), *Le standard de due diligence et la responsabilité internationale* (2018) 11, at 14–18; Besson, 'La *Due Diligence* en Droit International', 409 *Recueil des Cours* (2020) 153, at 370–371 ('place intermédiaire').

[7] Mackenzie-Gray Scott, 'Due Diligence as a Secondary Rule of General International Law', 34 *Leiden Journal of International Law* (2021) 343; R. Mackenzie-Gray Scott, *State Responsibility for Non-State Actors: Past, Present and Prospects for the Future* (2022), at 184–205.

Alternatively, as Ollino suggests, due diligence can be assigned to the level of primary obligations but still be positioned on a more abstract level that transgresses concrete fields of primary rules.

For Ollino, this specific perspective means that her study situates due diligence 'within the theory of international obligations' (*inter alia*, at 13, 17, 268). According to her, this implies that 'due diligence identifies a particular typology of international obligations, which are placed side by side with other categories, like obligations of result, obligations of conduct, and obligations to prevent. This also means that much of the theoretical framework behind this study is public international law obligations and state responsibility' (at 13–14). The problem with describing her study of due diligence as making use of 'the theory of international obligations' is that there is no such theory one could simply refer to – as Ollino subtly remarks herself (at 2, 65–66, n. 5). Indeed, there was much debate in the ILC's work on state responsibility on the dichotomy between obligations of result and of conduct, which Ollino's book traces in a very instructive manner (in Chapter 2). But, eventually, this classification did not enter the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[8] Furthermore, voices in international legal scholarship have appealed to the development of a 'theory' or a more substantive consideration of international obligations.[9] However, aside from recurring reflections on different types of obligations,[10] these appeals have apparently not given rise to comprehensive studies into international obligations on an abstract level, much less a separate field of study in international law.

So, while 'the theory of international obligations' might not be a very instructive frame of reference, the perspective that Ollino implies with that denominator for her study of due diligence obligations – and international obligations more generally – is most promising. Analysing types of international obligations on the level of primary rules, but in a manner overarching specific substantive areas of international law, allows one to close a certain gap brought about by the introduction of the secondary/primary rules distinction. Such a perspective may serve as a connecting piece between secondary rules of international responsibility and the variable content of obligations within diverse fields of primary rules. According to Ollino, it can allow for a better understanding of how states are obliged under international law. Interrelatedly, on the (more) normative level, it promises to elucidate the respective consequences that different forms of obligations have, such as for questions of international responsibility

[8] ILC, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/56/83, 3 August 2001.

[9] Combacau, 'Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse', in *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (1981) 181 referred to by Ollino in the introduction to her book (at 1); see also Philip Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard International Law Journal* (1988) 1, at 16 (in his harsh critique of the ILC's work on state responsibility).

[10] See, e.g., Wolfrum, 'Obligation of Result versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations', in M.H. Arsanjani *et al.* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 363.

(at 2–3). With its focus on due diligence obligations, Ollino's book demonstrates the values of a more systematic approach to international obligations and how to navigate around the difficulties that are intrinsic to it.[11]

When adopting such a perspective, it is plausible to understand due diligence as a principle of international law, but, as Ollino most persuasively suggests, only in a certain sense: not as a free-standing source of obligations for states in the form of a general principle of international law but, rather, as a 'tool for assisting the identification, … interpretation, and … operation' of certain primary rules (at 57). Thus, primary rules make use of due diligence as a standard and may specify it in different ways. Nonetheless, the due diligence character of these obligations points to certain features that they share. Identifying these common features is exactly what a more systematic study of international obligations should be about. As Ollino carefully outlines, one of the defining features of due diligence obligations is their nature as obligations of conduct that demand states to make use of best efforts, not to guarantee a certain result (Chapter 2).

In Chapter 3, the book analyses the scope and content of obligations of conduct that qualify as due diligence obligations. There is an underlying risk that such an investigation on an abstract level becomes circular. After all, it will always be the specific primary rule in question that determines how states are exactly obliged by international law. Indeed, it is here that the book frequently observes that much depends on the exact content of the specific primary obligation. However, despite this difficulty, the chapter outlines the defining features of due diligence in a way that elucidates what due diligence obligations are about in principle. According to Ollino's analysis, for a due diligence obligation to arise, there has to be inaction on the side of a state, despite its power over a source of risk and knowledge of such a risk. What exact steps a state is supposed to take is defined by the vague standard or 'overarching parameter' of reasonableness, which is rendered more concrete through expectations of 'good governmentality' and common variables identifiable in international practice (at 168).

These findings resemble other works identifying the components of due diligence obligations, with slight differences.[12] However, there seems to be no consensus on how to distinguish between the conditions for a due diligence obligation to arise and the defining features for its content. For example, Ollino presents power over the source of risk and knowledge of the risk as the two conditions for a due diligence obligation to arise, while its substance is determined by the standard of reasonableness. By contrast, for Maria Monnheimer, it is merely the

[11] For a parallel perspective but focused on different types of shared obligations in international law, see N. Nedeski, *Shared Obligations in International Law* (2022), at 21–22, 219 (also calling for furthering a more systematic approach to international obligations).

[12] See, *inter alia*, M. Monnheimer, *Due Diligence Obligations in International Human Rights Law* (2021), at 116–141 (referring to knowledge, capacities and reasonableness); Besson, *supra* note 6, at 272–279 (with a more extensive list of parameters determining due diligence).

knowledge requirement that determines whether a due diligence obligation comes into play, while the (in)capacity of a state – together with reasonableness – shapes the standard of care required.[13] These variations do not prove the one or the other account right or wrong. Instead, on the one hand, they point to the limitation of the abstract perspective on obligations that are defined precisely by their flexibility and context specificity. On the other hand, they also illustrate that the scope and content of the flexible due diligence obligations closely interact: similar considerations can guide both the definition of the scope of application of obligations as well as their exact content. That is illustrated, *inter alia*, by Ollino's analysis identifying 'power over the source of risk' as a prerequisite for due diligence obligations to arise in the first place (at 133–149) and 'control over the source of risk' as a variable defining its content (at 184–185).

Following the analysis of the scope and content of due diligence obligations, Ollino focuses on the relationship between due diligence and the law of international responsibility. This inquiry forms the specific subject matter of Chapter 4, while an acute awareness of the close interaction between primary and secondary rules constitutes a general thread throughout the entire book. The chapter provides valuable insights into the conditions of responsibility when due diligence obligations are concerned as much as it clarifies certain aspects of the law of international responsibility. In particular, Ollino's careful analysis of the contentious category of 'obligations of prevention' embedded in Article 14(3) ARSIWA illuminates how it is distinguished from due diligence obligations: while the former requires that a result that ought to be prevented materializes, due diligence obligations are not premised on the realization of relevant risks. That is also where the book most explicitly criticizes the ARSIWA and convincingly suggests that obligations of prevention could be conceptualized in such a way that a lack of adequate efforts suffices for their violation (particularly at 208–213, 231).

However, two minor points of criticism can be made in regard to this chapter. The first point concerns the issue of attribution. Ollino describes how due diligence serves as an alternative basis for state responsibility in relation to the acts of a non-state actor if the high thresholds for attribution are not met. That is very much accurate. However, she voices the concern that this might risk 'conflating issues of secondary rules with questions on the substance of international obligations' (at 197). In my view, this risk is overstated. The strength of due diligence lies precisely in its flexibility, which may allow for recognition of instances of states exercising decisive influence over third-party acts below the level of attribution. An awareness of that back-up function of due diligence does not necessarily conflate issues of attribution and the substance of obligations. Rather, to the contrary, it is the consequence of a – potentially fruitful – interaction between the primary and secondary rules. After all, due diligence obligations will not replace rules on attribution. Instead, they form part of

[13] Monnheimer, *supra* note 12, at 121.

complementary tiers of responsibility for different forms of more or less direct state involvement in the acts of third parties.[14]

As a second point of criticism, the book, in my view, discards the differences between due diligence and complicity too quickly. The complicity rule in Article 16 ARSIWA foresees that – under certain conditions – a state is responsible for aiding or assisting another state in an internationally wrongful act. Hence, both complicity and due diligence obligations extend a state's responsibility in relation to third-party acts beyond their attribution according to rather demanding standards (see, in particular, Articles 6 and 8 ARSIWA). However, how this responsibility is conceptualized under complicity rules is distinct from a breach of due diligence obligations.

For Ollino, the main difference lies in the 'greater "social disvalue"' that complicity expresses rather than 'structural discrepancies' between the two forms of responsibility (at 217). However, such 'structural discrepancies' can still be identified: certain features of complicity, in the sense of Article 16 ARSIWA, distinguish derivative responsibility for more direct state involvement in the acts of another state from the demands of due diligence obligations. First, the objective element of aid and assistance requires a closer connection or even contribution to the internationally wrongful act of another state. Second, in contrast to the accepted prerequisites for due diligence obligations to arise, no consensus that constructive knowledge suffices has emerged from the debates on the subjective element required for complicity so far.[15] Ollino's brief argumentation to the contrary does not suffice to refute that finding (at 216).[16] Moreover, in my view, it remains crucial not to conflate the categories of due diligence and complicity because it is exactly through their distinction that they could complement each other: under more rigid requirements, the general rule on complicity that is embedded in Article 16 ARSIWA and forms part of customary international law clearly prohibits states from directly supporting other states in their internationally wrongful acts. By contrast, with their flexibility as to their exact scope and content, due diligence obligations have the potential to fill accountability gaps in a context-specific – but, possibly, also less foreseeable – manner.[17]

[14] For a proposition of a framework encompassing different tiers of responsibility for direct involvement, complicity and more indirect forms of participation under due diligence obligations, see Seibert-Fohr, 'From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?', 60 *GYIL* (2017) 667, at 698–704.

[15] For a short overview of different positions and a suggestion to lower the subjective requirements for complicity in certain constellations, see Aust and Feihle, *supra* note 4, at 54–57.

[16] Next to pointing to the openness of the text of Article 16 ARSIWA, she refers, *inter alia*, to judgments by the European Court of Human Rights such as ECtHR, *El-Masri v. "the former Yugoslav Republic of Macedonia"* (GC), Appl. no 39630/09 (13 December 2012) (in which constructive knowledge sufficed for states to become responsible for human rights violations occurring in the context of the Central Intelligence Agency-led 'extraordinary renditions'. However, in these judgments, the ECtHR does not make direct use of Article 16 ARSIWA. Instead, it is rather the 'framing' of complicity that impacts upon the court's interpretation of positive obligations under the European Convention on Human Rights. On this point, see Nollkaemper, 'Complicity in International Law: Some Lessons from the U.S. Rendition Program', 109 *Proceedings of the American Society of International Law* (2015) 177, at 178.

[17] Peters, Krieger and Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates', in Krieger, Peters and Kreuzer, *supra* note 2, 1, at 2–3.

This flexibility characterizing due diligence obligations and the processes of rendering them more specific forms the subject matter of Chapter 5. In this regard, the chapter title 'The Proceduralisation of Due Diligence Obligations' is a bit misleading. Indeed, a rise of due diligence can be associated with a certain proceduralization of international law.[18] Proceduralization can be defined in different ways. It is usually understood to denote the turn of international institutions to a more process-based review or the reliance on, and development of, procedural rather than substantive rules. What is clear is that it will always imply a focus on procedures. In that sense, due diligence obligations can be understood to lead to a certain proceduralization of the demands of international law through the procedural steps they oblige states to take. However, Ollino's book addresses 'the proceduralisation of due diligence obligations' in Chapter 5 with a slightly different take. Here, the reader is left with the impression that the chapter is about something other than the title suggests: not proceduralization, but the concretization of due diligence obligations into more specific – including, but not limited to, procedural – obligations. This is illustrated by formulations throughout Chapter 5.[19]

Nonetheless, Ollino offers an insightful analysis of the processes rendering vague due diligence obligations more specific. In that context, due diligence obligations could be understood to serve as an 'interstitial norm' or 'meta-principle'[20] and to take on a 'transitory function towards the creation and emergence of denser and more specific rules'.[21] On the one hand, such processes of specification would be particularly welcomed under due diligence obligations. It could increase legal certainty and clarify what is demanded of states despite the flexibility embedded in the due diligence standard. On the other hand, as Ollino highlights, contentious issues attach to such processes. In some cases, treaties already specify due diligence obligations through more specific duties. In other instances, it is international courts and institutions that render vague due diligence obligations more concrete. It is in this regard that Ollino turns to legitimacy issues raised by these processes (at 233–242). Furthermore, as Ollino carves out, the question arises whether more general due diligence obligations retain their self-standing character or whether – at least as to their significance – they are replaced by the more specific duties developed. Hence, the process of concretization

[18] Krieger and Peters, 'Due Diligence and Structural Change in the International Legal Order', in Krieger, Peters and Kreuzer, *supra* note 2, 351, at 382–384.

[19] See, *inter alia*: the working definition of 'proceduralization' (at 232); 'substance of due diligence is concretised in procedural and substantive duties' (at 243); 'progressive replacement of the concept of reasonableness linked to due diligence obligations with substantive and procedural duties' (at 253); and proceduralization to be understood as the 'process of progressively concretising due diligence by replacing reasonableness and the flexible variables traditionally linked to due diligence with legal parameters' (at 263–264).

[20] For 'interstitial norms' understood as 'normative concepts operating in the interstices between those primary norms', see Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 213.

[21] Peters, Krieger and Kreuzer, *supra* note 16, at 3. On the development of new obligations through the concretisation of due diligence, see also Kerbrat, 'Le standard de due diligence, catalyseur d'obligations conventionnelles et coutumières pour les Etats', in French Society for International Law and Cassella, *supra* note 6, 27.

might risk diminishing the very flexibility that allows due diligence obligations to adapt their demands on states in a context-specific manner.

In conclusion, Ollino's book offers an insightful account of how to make sense of due diligence obligations in international law. According to her, due diligence qualifies as a specific type of obligation – namely, of conduct – in international law. Thus, for Ollino, due diligence obligations are to be found on the level of primary obligations. But, nonetheless, she underlines that the relevance of due diligence is not limited to specific fields of international law and their respective substantive rules making use of the due diligence standard. In that sense, Ollino's perspective complements analyses of due diligence within particular substantive areas of international law.[22] She suggests an overarching perspective transgressing these specific fields of primary obligations, which forms the basis for identifying certain features that due diligence obligations share, especially their character of obligations of conduct instead of result or their components. But Ollino is very clear that this general relevance of due diligence does not mean that it forms part of the secondary rules on international responsibility.[23]

Nonetheless, throughout her study on due diligence obligations, the ILC debates on state responsibility that had touched upon due diligence remain crucial for understanding what due diligence obligations in international law are about. This combination of reflections on the development of due diligence obligations in specific substantive areas of international law with cross-cutting analyses of their general relationship to secondary rules of international responsibility is most useful for clarifying the 'elusive' notion of due diligence.[24] Hence, although many of the issues discussed in the book have been touched upon before, Ollino makes a valuable contribution to the existing literature in that she renders explicit the different ways in which due diligence has been and could be understood and where it is to be situated in the international legal order.

In general, it can be expected that due diligence will remain as 'janus-faced as current international law as a whole', exactly due to its fluidity.[25] Hence, whether a rise in due diligence – or its specification through more concrete duties – implies an increase in legal accountability or the diminution of protection standards will always depend on the concrete context in which it is set. Nonetheless, Ollino's book and the perspective adopted herein will hopefully serve both as a theoretical foundation and as helpful guidance for any future investigation into the role of due diligence obligations in international law.

Prisca Feihle

Postdoctoral Research Fellow
Department of Law, Freie Universität Berlin, Germany
Email: prisca.feihle@fu-berlin.de

https://doi.org/10.1093/ejil/chad052

[22] See, *inter alia*, the chapters on due diligence in various fields of international law in Krieger, Peters and Kreuzer, *supra* note 2, or, with a focus on due diligence obligations in human rights law, Monnheimer, *supra* note 12.

[23] For suggestions to understand due diligence as sitting in between primary and secondary rules or to develop a secondary due diligence rule, see notes 6 and 7 above.

[24] For such a combination, see also Besson, *supra* note 6.

[25] Krieger and Peters, *supra* note 18, at 390.