Makane Moïse Mbengue, *Essai sur une théorie du risque en droit international public: L'anticipation du risque environnemental et sanitaire*, Paris, Pedone, 2009, 373pp., ISBN 978-2-233-00557-1, €44.00.
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The sheer tragedy of it all. As I finished these lines, the Japanese coast was hit by an earthquake, which, in turn, triggered an emergency situation in the Fukushima Daiichi nuclear power plant. Just a few months earlier, it was Christchurch in New Zealand and, a few months before that, Biobio in Chile, Qinghai Province in China, and, of course, Haiti. *La Niña*, in turn, is responsible for massive floods in Australia and Latin America. I look at the faces of flood victims here in Colombia; I think of victims elsewhere. They all seem startled, as if they did not know what hit them. But it is not the same look in their eyes; I am then reminded of the opening lines of Anna Karenina: 'Happy families are all alike; every unhappy family is unhappy in its own way.'

To be sure, natural disasters are nothing new. And yet, these events do seem to underpin a zeitgeist of uncertainty and anxiety that has gained momentum since the 1990s, finding its zenith in the early twenty-first century. From terrorism, to systemic financial meltdown, to climate change, we seem to be stalked by an array of unknown hazards that increasingly affect our lives. When the highly improbable becomes likely, the proverbial black swan looks less like an exception, and more like the rule.[1] How to make sense of this reality? International law, for one, seems ill-equipped to do the deed. Radical uncertainty regarding the causes and the effects of global events seems to undermine international law's role as a reliable map of global power. Ultimately, speaking 'law to power' is an awkward fit for the risk-management mindset. In a world era when Donald Rumsfeld's infamous 'unknown unknowns'[2] grow in importance, some radical rethinking is required by international legal scholarship. How to integrate the risk mindset into international legal argumentation? What role is there for science in legal decision-making? What standard of causation (if any) should be adopted by international law? All these are questions that need to be tackled by a new body of scholarship that connects risk, international law, and global governance.

Essai sur une théorie du risque en droit international public: L'anticipation du risque environnemental et sanitaire is one such effort. Penned by Makane Moïse Mbengue (now lecturer at the University of Geneva), this *Essai* ultimately aims to set the ground for a veritable theory of risk in international law. And, ambitious as it

[1] See N. Taleb, *The Black Swan: The Impact of the Highly Improbable* (2010).

[2] When assessing the once-called War on Terror, US ex-Secretary of Defence Donald Rumsfeld famously said: 'Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones'; see DoD News Briefing – Secretary Rumsfeld and Gen. Myers, 12 February 2002, available online at www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636.

is, Dr Mbengue does manage to follow through with his endeavour: the book is an original and well-researched work, which uses a sophisticated methodology to frame the author's own take on the risk–international-law nexus. Just for these reasons, and in spite of its sometimes intricate style, the book is well worth reading and perhaps even translating – if only to allow a wider discussion that includes non-French-speaking students and scholars.

Far from narrowly focusing on the procedural problem of risk assessments, the text adopts as its basic analytical unit the notion of 'anticipation', understood as the projection of oneself into the future, in order to conceive the risks that may derive from an action, and the strategies that can be adopted to reduce or eliminate them. Using such a notion as its cornerstone, the book's exploration is divided into two parts: the first attempts to draw a phenomenology of anticipation, while the second focuses in turn on an epistemology of the same process.

In Part One (the 'phenomenology'), the *Essai* seeks to develop a toolkit that permits a somehow objective assessment of the inherently subjective experience of risk. To do so, it makes a distinction, the specific analytical contours of which are not always clear in the text, drawing a line between an intrinsic and an extrinsic phenomenology. Intrinsic phenomenology, the author argues, refers to the *how* of anticipation (i.e., its manifestations in the international legal order) (at p. 29). This *how* is then made sizable in reference to its temporal aspect: there is a moment of ignorance, followed by a moment of knowledge, and then by a moment of uncertainty. Extrinsic phenomenology, in turn, is concerned with the *when* of the event that requires anticipation. Thus, it distinguishes between anticipation of risk in the past, the present, and the future. Each of these moments is explored in detail, using an impressive wealth of international legal materials, the relevance of which, though, is not always evident to the reader.

The first part of the argument draws an interesting map of the different models of anticipation, and concludes that such a process can only find true traction not only in understanding the mere content of specific harm (called, somewhat confusingly, the 'structural' dimension of hazard), but also in understanding its systemic aspects that connect specific harm with its general environment. Such a general environment is, for the author, the determinant factor of risk. In an original contribution to existing scholarship, this part concludes that it is not harm that triggers risk, but rather the existence of risk that frames the harm that may be caused. As such, then, the traditional focus on harm to understand risk seems to be misplaced.

Part Two of the book is concerned with the epistemology of anticipation, meaning an exploration of how risk comes to be known and thought of, and the limits of this process. The task is undertaken by exploring two issues: the precautionary principle, on the one hand, and the procedural mechanisms through which anticipation of risk is factored into adjudication, on the other. With this move, the *Essai* takes an unexpected turn. It understands the epistemology of risk as a function of its objectivization, and then uses to two proxies (precaution and procedures) to understand such a process. The book therefore transforms its exploration of the epistemology of risk

into the question: how does risk become apparent and seizable? It then answers that question via the two proxies mentioned above.

This move, though, seems to undermine the philosophical ambitions of the book, and undersells its argument. Indeed, the most pressing problem of the epistemology of risk is that radical uncertainty permeates our every effort to comprehend risk; that is, uncertainty limits our knowledge of the very building blocks that would constitute our knowledge of risk. This problem rises from the difference between external risk and manufactured risk.[3] Although both are expressions of hazard, the former may be 'managed' through observation and rational calculation (hence actuarial science, the insurance industry, etc.).[4] On the contrary, manufactured risk (which is the cornerstone of Beck's *Risk Society*[5]) cannot be subject to such calculations: there is no objective reference to be trusted; here, uncertainty becomes the central aspect of knowledge, which makes the epistemological problem of manufactured risk essentially distinct from that of its external equivalent. Manufactured risk is *ontologically subjective*, as its mode of existence depends on its being perceived by subjects.[6] Thus, when the *Essai* deploys precaution and procedures in order to objectify risk, it tries to transform manufactured into external risk. As a result, it ends up applying to the former an epistemological framework that is designed for the latter, and therefore fails to consider the most challenging aspect of the international-law–risk connection. Such a move, of course, is not *incorrect*; but it does undersell the book's argument, as the *Essai*'s best moments appear when Dr Mbengue theorizes on the role of anticipation in the context of uncertainty, and not in the more mundane connection of law with external risk, whose doctrinal dimensions are best left to insurance lawyers and actuaries.

By deploying precaution and legal procedures as platforms to objectivize risk, the argument fails to take into account that such proxies are not answers to the challenges posed by the epistemology of (manufactured) risk. Quite on the contrary, they are two (very elaborate) ways of *not* answering that question. Precaution, to begin with, merely shifts the focus of the debate. It justifies action in the face of uncertainty, but leaves our knowledge of risk untouched. Question: does a precautionary ban of, say, genetically modified organisms, help us to better know the risks derived thereof? Answer: it does not – it merely shuts out the discussion. Moreover, precaution is not helpful to frame the epistemology of risk, because precaution may be, in itself, a manufactured risk. To follow up on the example: does a precautionary ban on genetically modified organisms entail higher risks than the lack thereof? Could it trigger unintended consequences that would, in turn, increase rather than reduce uncertainty?

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3 See A. Giddens, 'Affluence, Poverty and the Idea of a Post-Scarcity Society', (1996) 27(2) *Development and Change* 365–77.

4 See F. Ewald, 'Risk in Contemporary Society', (2000) 6 *Connecticut Insurance Law Journal* 365; this view is also implicit in most others' accounts of risk outside Ulrich Beck's Risk Society; for an eminently readable example, see P. L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996).

5 While the notion of 'manufactured risk' underlies the whole construct of the Risk Society, the expression is not included as such in Beck's 1992 book; perhaps the most explicit elaboration may be found in U. Beck, 'World Risk Society and Manufactured Uncertainties', (2009) 1 *Iris* 297.

6 See J. R. Searle, *The Construction of Social Reality* (1995), 8.

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A similar limitation can be found it the *Essai*'s use of legal procedures as a proxy for seizing the epistemology of risk. Although much in line with recent scholarship that frames risk decision-making in terms of transparency and notice-and-comment procedures,[7] this strategy is also of limited use in epistemological terms. While appropriate procedural arrangements may be useful to increase accountability of decision-makers, or perhaps even bring better information to the process, it is quite a leap of faith to argue that such procedural layout can be instrumental in understanding the way we comprehend manufactured risk. Ultimately, focusing on procedural arrangements seems more conducive to assessing external risk and, by doing precisely that, the book seems to once again undersell its ambitious agenda: would the challenges posed by anticipation of risk in a context of radical uncertainty be met by adopting a procedural reform here, a judicial review there? Hardly so – and the general structure of the book's argument seems to suggest as much. A more fundamental discussion seems to be required.

These are, though, the sort of debates that *Essai sur une théorie du risque en droit international public* is able to trigger – a remarkable feature in its own right. Thus, while the book is heavy with philosophical jargon that seems gratuitous at times, it is a challenging read that does not shrink from the fundamental matters it raises. An original and systematic piece of scholarship, bound to become mandatory reference in further work on the role of risk in international law.

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[7] In the context of the Global Administrative Law project, see, e.g., A. Albanesi, 'The WTO "Science-Fest": Japanese Measures Affecting the Importation of Apples', in B. C. S. Cassese et al. (eds.), *Global Administrative Law: Cases, Materials, Issues* (2008), 178.

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