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ARTICLES

The Risks of International Law

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The past few decades have witnessed a proliferation in the writings on risk and uncertainty. Led by the work of writers such as Beck, Luhmann, Ewald, and Giddens, scholars across the humanities and social sciences have been engaged in reflections on the ways in which our understanding of risk structure informs decision-making and the attribution of responsibility. One of the central topics in this body of literature is the transformation of the concept of risk in postmodern societies.

Traditionally, the concept of risk is contrasted with the concept of uncertainty. While the latter refers to a situation where it is not possible to determine the outcome in a group of instances (e.g. because we are dealing with unique situations), 'risk' refers to a situation where the general outcome in a group of instances is knowable – although it remains uncertain just who is to 'draw one of existence's unlucky numbers'.[1] Risk management, in other words, made it possible to master time and discipline the future, based on verifiable, scientific knowledge. In this sense it is not surprising that the turn to 'risk' is traditionally considered to be one of the hallmarks of modernity.[2] The discovery of the laws of probability and risk had profound implications for social order and the attribution of responsibility. It became possible to define accidents as calculable risks that occur in larger populations and to organize solidarity among risk bearers in the form of private insurance or public welfare schemes.[3] Moreover, it became possible to make persons responsible for events that could occur in the future. An increase in scientific knowledge, it was believed, would also bring an increase in social and legal responsibilities, especially the responsibility to prevent possible future harm.[4]

In the second half of the twentieth century, however, this understanding of the relation between uncertainty, knowledge, and risk has been put under strain. Societies, especially in the West, were increasingly confronted with uncertainties that

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1 F. Ewald, 'Insurance and Risk', in G. Burchell, C. Gordon, and P. Miller, *The Foucault Effect: Studies in Governmentality* (1991), 203.

2 See, e.g., Peter L. Bernstein, *Against the Gods, The Remarkable Story of Risk* (1996).

3 See especially F. Ewald, *L'Etat Providence* (1986). See also the remark by Hacking, who argued, 'It is a glib but true generalization that proletarian revolutions have never occurred in any state whose assurantial technology was working properly'. I. Hacking, 'How Should We Do the History of Statistics?', in Burchell, Gordon, and Miller, *supra* note 1.

4 U. Beck, *Risk Society: Towards a New Modernity* (2005).

resulted, not from an *under*production of scientific knowledge and technology, but from an *over*production thereof. This seriously questioned the modernist assumption that the more we know about the world, the more we are able to direct it to our purposes. One of the characteristic features of late modern societies is that possible hazards follow from the development and application of scientific knowledge and at the same time they are perceived as relatively incalculable. An example is what Ewald has called the 'two infinites of risk': the infinitely small-scale risks (biological, natural, food-related risks) and the infinitely large-scale (major technological risks or technological catastrophes).[5] Moreover, some dangers that are produced through the process of modernization are associated with catastrophic events and irreparable damage. In this context, Beck has contrasted the archetypical risk in industrial society (the accident – at work, in traffic, etc.) with what he calls the 'icons of destruction': nuclear power, environmental despoliation, and genetic technology.[6] The dangers associated with these icons transcend temporal, spatial, and social boundaries and have the potential to fundamentally change or even annihilate human life, at least as we know it.

In such a (world) risk society, science assumes a different role from before. On the one hand, science remains pivotal in understanding and assessing risks. Many threats in contemporary life appear to be almost virtual to the layperson: they cannot be detected by the ordinary human senses, but require the 'sensory organs of science (theories, experiments, measuring instruments) to become visible and interpretable as threats at all'.[7] Risks are thus in a very basic sense 'constituted' by scientific methods. On the other hand, however, the capacity of science to deliver socially binding definitions of truth has declined. There is a growing awareness that scientific statements are subject to recall and are radically contextual, while scientific experts more and more publicly disagree.

The relativity of scientific knowledge sets limits to the possibility of transforming uncertainty into manageable risks. This, in its turn, has important implications for decision-making, the role of law in political communities, and issues of responsibility. An example is the emergence of the precautionary principle (or 'approach') in the area of environmental protection and human health, food safety, and plant and animal health protection. The precautionary principle aims to guide decision-making while recognizing the existence of sometimes radical uncertainty and ambiguous and contestable scientific knowledge. The core of the principle states that in cases of possible serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing preventative measures. The precautionary principle thus typically operates in situations characterized by (i) uncertainty, and (ii) existential damage to a valued good. Although the precautionary principle has not evolved into a legal principle in the area of conflict and security law, its underlying logic also figures prominently in contemporary security policies. It is visible in a wide variety of measures and policies, such as the anticipatory use of force, the blacklisting of

5 F. Ewald, 'Two Infinities of Risk', in B. Massumi (ed.), *The Politics of Everyday Fear* (1993), 221–8.
6 See Beck, *supra* note 4; U. Beck, *Ecological Politics in an Age of Risk* (2002); U. Beck, *World Risk Society* (1999).
7 Beck, *supra* note 4, at 162.

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individuals, targeted killings, profiling and surveillance, and preventative detention. In this way the invocation of this precautionary logic in security matters has revived age-old questions regarding the relation between law and violence, the rule of law, and the question of public responsibility.

This issue addresses the question of how international law deals – or fails to deal – with risk, knowledge, uncertainty, and responsibility in late modern societies. How has the breakdown of authoritative expert knowledge affected basic categories of international law? What is left of international law's liberal aspirations in the face of a turn to precaution in matters of security? Who should bear the responsibility for dealing with risk and uncertainty?

In the first article, 'Risk and Randomness in International Legal Argumentation', René Urueña examines whether international law is up to the task of handling one of the key features of late modernity: the return of radical uncertainty. Based on an analysis of the regime of state responsibility and the legal reasoning in World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) disputes, Urueña gives a negative answer to this question. The concept of causation that dominates international legal reasoning, Urueña argues, hampers adequate dealing with uncertainty and randomness. Faced with uncertain events, international law has to appeal to non-legal sources, thus becoming a broker of expert knowledge. Considering the often contested nature of such knowledge, this raises the question of how international law can retain its independent authority. This question figures prominently in the second article, by Alexia Herwig, 'Whither Science in WTO Dispute Settlement?' It contains a critical analysis of the concept of risk employed by the WTO panel in *EC – Biotech*. The panel's approach, Herwig argues, reflects an overtly deterministic conceptualization of risk and shows insufficient awareness of the relativity of scientific knowledge. Herwig advocates a richer understanding of risk that allows law to recognize the contested nature of scientific knowledge, the political nature of risk management and the inherently indeterminate character of solutions to legal conflicts.

The other two articles are concerned with the turn to risk and precaution in the area of security policies. Both study the relation between 'risk' and 'legal norms' as modes of governance and examine the consequences for established legal categories of the turn to risk management in recent security policies. Olivier Kessler examines the consequences of this turn for the jurisprudence of the courts in Luxembourg and Strasbourg. His article 'Is Risk Changing the Politics of Legal Argumentation?' is based on a fundamental difference between 'norms' and 'risk'. Where the focus of norms is primarily on the past and the present, Kessler argues, risk links the present to an unknown future. The turn to risk and precaution has thus put pressure on the European courts, whose main task is the application of existing legal rules and norms. Kessler argues that the Luxembourg courts have proved to be more accommodating to the turn to risk and precaution in security matters than their Strasbourg counterpart. The ambivalent relation between law and risk management is also the central topic of Louise Amoore's article 'Risk before Justice: When the Law Contests Its Own Suspension'. Amoore studies the way in which risk management, in the

form of data-mining, profiling, blacklisting, and so on, has come to supplement and supplant traditional juridical interventions based on the presumption of innocence. In the 'risk–norm complex' that has evolved in the current fight against terrorism, law has come to authorize specific modes of risk management. At the same time, law contains a critical potential that enables a fundamental critique of the extension of powers over the lives of individuals. Amoore's article lays bare this paradox and examines the way in which law is increasingly confronted with the fragility of its own essence.

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