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REVIEW ESSAY

DISASTROUS LAW: INTERNATIONAL LAW AND THE SHOCK-ABSORPTION OF DISASTER

*By Fleur Johns**

I. INTRODUCTION

International Law in Disaster Scenarios: Applicable Rules and Principles. By Flavia Zorzi Giustiniani. Cham, Switzerland: Springer, 2021. Pp. xiv, 209. Index.

Law and Disaster: Earthquake, Tsunami and Nuclear Meltdown in Japan. By Shigenori Matsui. New York, NY: Routledge, 2019. Pp. xi, 284. Index.

All is Well: Catastrophe and the Making of the Normal State. By Saptarishi Bandopadhyay. New York, NY: Oxford University Press, 2022. Pp. xiv, 306. Index.

Source: Wikimedia, *at* https://upload.wikimedia.org/wikipedia/commons/a/a9/1927_Kita-Tango_Earthquake_damage_at_Mineyama.jpg.

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International disaster law is disastrous. Like a sound-proof room, international law and policy concerned with disaster—a motley collection of regional and soft law instruments—absorb the shock that disaster poses, muffling and palliating perceptions of urgency and complicity. Whereas disaster once provoked widespread anguish among social and legal thinkers concerned with humans' standing and agency in the world, it has, in recent decades, been assimilated into international legal order through the vectors of national law, regional agreement, and expert analysis and guidance. Disasters still provoke widespread alarm, of course, and social and legal thinkers today still grapple with humans' collective precarity—arguably more so than ever. Nonetheless, the regulatory, preventative, predictive, and ameliorative activity around disaster documented in recent legal scholarship remains politically abstemious and limited in redistributive ambition.

Influentially, the International Law Commission (ILC) has promulgated non-binding Draft Articles on the Protection of Persons in the Event of Disasters (ILC Draft Articles or ILDAs) and recommended to the UN General Assembly that they be the basis for an international convention.[1] These define disaster as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society." The ILC has noted, further, that disaster's causes may be "natural or human-made" or combinations thereof and that the term applies equally to "sudden-onset events," "slow-onset events (such as drought or sea-level rise)," and the cumulative effect of "small-scale events," while excluding "serious political or economic crises" and situations of armed conflict.[2] So defined, the shape-shifting phenomenon of disaster has become something for states to risk-assess, cost, and anticipate financially and organizationally, often by creating a cache of reserved legal powers under domestic law, but not something for which to take collective responsibility under international law. This Review Essay suggests that international disaster law and policy themselves have helped to foster that reticence.

Some forms of global redistribution flourish on the international legal plane—those associated with maintaining collective military self-defense capacities, for instance.[3] However, considerable resistance remains to global redistribution for disaster prevention and mitigation,[4] to accelerate global decarbonization,[5] or to address unequal exposure to the impacts

the Australian government. However, the views expressed here are those of the author and are not necessarily those of the Australian government or the Australian Research Council. Thanks are due to Bronwen Morgan, Sarah Williams, and anonymous reviewers of the *American Journal of International Law* for valuable input and to Erol Gorur for research assistance.

[1] Report of the International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries, para. 48, UN Doc. A/71/10 (2016) [hereinafter ILC Draft Articles].

[2] *Id.* Art. 3(a), Commentary paras. 4, 10.

[3] Diego Lopes da Silva, Nan Tian, Lucie Béraud-Sudreau, Alexandra Marksteiner & Xiao Liang, *Trends in World Military Expenditure 2021*, SIPRI (2022), *at* https://www.sipri.org/publications/2022/sipri-fact-sheets/trends-world-military-expenditure-2021.

[4] Development Initiatives, *Global Humanitarian Assistance Report 2022*, ch. 3 (2022), *at* https://devinit.org/resources/global-humanitarian-assistance-report-2022 (reporting a significant rise in the proportion of cross-border humanitarian and development assistance aimed at disaster risk reduction between 2018 and 2020, but at aggregate levels that represent less than 8% of international humanitarian relief and development assistance funding overall, with many countries at highest risk receiving the least).

[5] *IPCC, 2022: Summary for Policymakers*, *in* CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY. WORKING GROUP II CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON

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of climate change.[6] That is the case even though considerable effort has been devoted, under the UN Warsaw International Mechanism for Loss and Damage, the Paris Agreement, and otherwise, to understanding loss and damage exposure that particular countries experience due to anthropogenic climate change.[7] Adaptation finance mechanisms and laws have likewise created redistributive opportunities in this context.[8] Nonetheless, these laws "focus on voluntary action . . . and [make allowances for] a refusal by wealthy States to define commitments in relation to responsibility, developing country needs, liability, or historical debt."[9] Perversely, international law and policy on disasters may help to bolster this resistance to nonmilitary global redistribution, as well as otherwise narrowing the aperture of legal and policy argumentation around disaster preparedness and response, by virtue of designating such assistance "voluntary" and in other ways explored in this Essay.

More than just resile from investigation of disasters' root causes (as other scholars have observed),[10] international disaster law and policy manifest in the ILDAs cabin and apportion disaster as a matter of concern. That is, they make disaster the concern of a relatively narrow range of parties deemed affected and naturalize the variable exposure of others, as explained in Parts IV and V respectively. This helps ensure that the world's most privileged and best resourced are only incidentally roused by such concerns, and minimally provoked to reconsider human societies' collective relation to planetary limits, all while ostensibly busying themselves with disaster preparedness, risk reduction, and relief.

This Review Essay develops an argument along these lines in dialogue with three important recent books on (international) law and disaster: *International Law in Disaster Scenarios: Applicable Rules and Principles* by Flavia Zorzi Giustiniani, assistant professor of international law at the Law Faculty of the International Telematic University UNINETTUNO; *Law and Disaster: Earthquake, Tsunami and Nuclear Meltdown in Japan* by Shigenori Matsui, director of Japanese legal studies at the University of British Columbia Peter A. Allard School of Law; and *All is Well: Catastrophe and the Making of the Normal State* by Saptarishi Bandopadhyay, associate professor at Osgoode Hall Law School.[11] Selected because of their diverse approaches to analyzing the relationship between law and disaster, these books offer disparate yet intersecting vantage points on disaster as a jurisprudential artifact. Through a conversation with these three books, juxtaposed with the ILDAs, this Review Essay joins others in

CLIMATE CHANGE, 26 (H.-O. Pörtner et al. eds., 2022) ("current global financial flows for [climate] adaptation . . . are insufficient for and constrain implementation of adaptation options especially in developing countries").

[6] Richard S.J. Tol, *The Distributional Impact of Climate Change*, 1504 ANN. N.Y. ACAD. SCI. 63 (2021).

[7] Emily Boyd et al., *Loss and Damage from Climate Change: A New Climate Justice Agenda*, 4 ONE EARTH 1365 (2021).

[8] Jan McDonald & Phillipa C. McCormack, *Rethinking the Role of Law in Adapting to Climate Change*, 12 WIREs CLIMATE CHANGE e726 (2021); RESEARCH HANDBOOK ON CLIMATE DISASTER LAW: BARRIERS AND OPPORTUNITIES (Rosemary Lyster & Robert R. M. Verchick eds., 2018).

[9] Mizan Khan, Stacy-ann Robinson, Romain Weikmans, David Ciplet & J. Timmons Roberts, *Twenty-Five Years of Adaptation Finance Through a Climate Justice Lens*, 161 CLIMATE CHANGE 251, 365 (2020).

[10] On the importance of root cause analysis to contemporary disaster risk reduction, and the ILC's explicit rejection of such an approach, see Marie Aronsson-Storrier, *Beyond Early Warning Systems: Querying the Relationship Between International Law and Disaster Risk (Reduction)*, 1 Y.B. INT'L DISASTER L. 51 (2018). On the limits of root cause analysis even when adopted, see Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

[11] FLAVIA ZORZI GIUSTINIANI, INTERNATIONAL LAW IN DISASTER SCENARIOS: APPLICABLE RULES AND PRINCIPLES (2021); SHIGENORI MATSUI, LAW AND DISASTER: EARTHQUAKE, TSUNAMI AND NUCLEAR MELTDOWN IN JAPAN (2019); SAPTARISHI BANDOPADHYAY, ALL IS WELL: CATASTROPHE AND THE MAKING OF THE NORMAL STATE (2022).

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sounding alarm about a global want of alarmism about the calamitous and uneven impacts of climate change: a want of alarmism that international law and lawyers help to sustain through the accommodating, reactive industriousness that they promote regarding disaster.

Part II introduces the three books under review. Part III then highlights the puzzle with which this Review Essay wrestles: why is it that disaster has apparently come to provoke less disquiet among many thinkers and makers of "the international" in law and politics in recent decades than it did centuries ago, among influential European shapers of "the international," despite disasters rising in frequency and intensity and being expected to do so further? The books under review help readers to tackle this puzzle, albeit in divergent ways.

Part IV elucidates the potential effect of international disaster law and policy in absorbing the shock of disaster and putting paid to redistributive claims raised in this connection. It does so through a close reading of some features of the ILDAs as exemplars of international disaster law and policy. This Part indicates how the above-mentioned puzzle might be decoded in part: the proliferation of law and policy on disaster have served to limit disasters' normatively disruptive potential and the scope of those understood to have a stake in their handling, creating an impression that the prevalence of disaster is a problem already well in hand. Part V examines notions of vulnerability embedded within the ILDAs and their tendency to normalize uneven exposure to disasters' impacts. The aim of these Parts is not to provide a comprehensive, systematic analysis of the ILDAs (available elsewhere).[12] Rather, brief discussion of some of the ILDAs' features will illustrate how international disaster law and policy may palliate the perils that they purport to address.

Part VI shows how the ILDAs foster disregard for planetary limits. Part VII, in conclusion, contrasts the approach taken in the ILDAs with the approach taken to climate change and associated perils by the International Law Association (the ILA/ADI) in a recent white paper reflecting on the challenges of the Anthropocene for international law. Disaster law and policy may be disastrous, but they could still be otherwise—or so this brief, final contrast suggests.

II. Reading Disaster

Each of the books under review sheds light on what law has made of disaster. Yet Shigenori Matsui's 2019 book, *Law and Disaster: Earthquake, Tsunami and Nuclear Meltdown in Japan*, comes at this question primarily from the opposite side. Matsui's book investigates not so much what law has made of disaster as what disaster has asked of law.[13] The book offers a richly detailed account of the many ways in which national, prefectural, and local law in Japan were challenged by the Great Eastern Japan Earthquake Disaster of 2011 (a compound event described in Part III below). It does so from the perspective of a Canadian-based, Japan- and U.S.-educated scholar of constitutional law, media law, and internet law, writing some eight years after the events in question.

[12] *See generally* Giulio Bartolini, *A Universal Treaty for Disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters*, 99 Int'l Rev. Red Cross 1103 (2017); Elena Evangelidis & Thérèse O'Donnell, *NGOs and the International Law Commission Draft Articles on the Protection of Persons in the Event of Disasters: A Relationship of Mutual or Grudging Respect?*, 1 Y.B. Int'l Disaster L. Online 116 (2019); Walter Kälin, *Protection of Victims of Disasters: The "Vertical" Dimension of the Draft Articles on the Protection of Persons in the Event of Disasters*, 1 Y.B. Int'l Disaster L. Online 28 (2019); Eduardo Valencia-Ospina, *The Work of the International Law Commission on the "Protection of Persons in the Event of Disasters,"* 1 Y.B. Int'l Disaster L. Online 5 (2019).

[13] Matsui, *supra* note 11.

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Although it does not lay claim to any methodological contribution, *Law and Disaster* is a fine example of Law in Context scholarship. This tradition of legal scholarship extrapolates from techniques of legal doctrinal analysis to try to grasp and convey the significance for that analysis of the geographic, professional, social, and historical setting(s) in which it is undertaken, or from which its objects of study emerged. In contrast to much Law and Society and Legal Realist work, Law in Context scholarship offers no far-reaching diagnosis of the condition of society nor signals any great debt to social science.[14] Its politics tend to be more decorous. Matsui works in this mode through a litany of issues that confronted government officials in Japan before, during, and after the Tohoku Earthquake and the Fukushima nuclear meltdown (discussed in Part III). *Law and Disaster* is a close study of bureaucracy under extreme stress.

Through this study, Matsui identifies "foundational" defects in Japan's system of government impeding disaster preparation, response, and remediation—a system that the book depicts as sclerotic and beset by "departmentalism."[15] Primary among these flaws, in Matsui's view, is the absence of any residual national executive power or express constitutional or statutory grant of power "to make sweeping exceptions" in the face of disaster.[16] Japanese law should have "grant[ed] broad[er] emergency powers to the prime minister," Matsui argues, "so the government [could] act more efficiently" and be less beholden to private and vested interests.[17] Matsui is especially scathing about what he describes as Japanese governmental preferences for consensus-based decision making, "the bureaucratic urge to seek accuracy," and tendencies to rely on informal "recommendation and instruction rather than [formal] legal order."[18] The book ends on a note of lamentation, although not for the more than 18,500 persons dead and missing and more than 450,000 evacuated in the Great Eastern Japan Earthquake Disaster (even as concern for them is implicit in the book as a whole), but rather for the failure of the Japanese people to learn its "many significant lessons."[19] In this book's formulation, disasters are didactic, and it is the proper role of law and lawyers to heed their instruction.

Writing in *All is Well: Catastrophe and the Making of the Normal State*, Saptarishi Bandopadhyay, a Canadian-based, India- and U.S.-educated scholar of intellectual property, disaster management, environmental law, and politics, presents disaster in a very different light. In Bandopadhyay's book, disasters are not so much instructive as *constitutive* of the legal architecture of the modern administrative state. That is, the administration of disaster has been a crucial setting in which to shape, justify, and extend "normal" state authority since the Enlightenment. To advance this argument, *All is Well* tells three historical stories of state formation in the maw of disaster, each told with literary flourish and an eye for colorful characters. This is history writing in a mode championed by Anne Orford: aimed at dislodging the apparent self-evidence of contemporary legal positions, not correcting or completing the

[14] William Twining, *Reflections on "Law in Context," in* LAW IN CONTEXT: ENLARGING A DISCIPLINE 36, 40 (William Twining ed., 1997) ("'Law in Context'. . . proceed[s] from a broader jurisprudential base than does the typical [doctrinal law] textbook, yet . . . seek[s] to preserve as far as possible the rigour associated with the narrower approach.").

[15] MATSUI, *supra* note 11, at 4, 255.

[16] *Id.* at 51.

[17] *Id.* at 243, 250.

[18] *Id.* at 117, 147, 152, 251.

[19] *Id.* at 255.

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empirical record.[20] First among the tales that *All is Well* tells is a "moral story about socio-ecological control" from the early-eighteenth-century city of Marseille in which plague helped to consummate a process of state formation at least a half-century in the making.[21] The second is a story of Lisbon and the extraordinary earthquake of 1755 (discussed in Part III) in which the latter appears as a "crucible" for "mold[ing]" the early modern state of Portugal.[22] The third is the story of a famine that killed between a third and half of the population of Bengal and Bihar between 1769 and 1770 while responsibility for its governance was shared between the British East India Company and the Mughal Empire—an event that "refashioned the British as benevolent, state-like occupiers of what would become the Third World" and thereby consolidated colonial control.[23] In the third of these stories especially, Bandopadhyay's work is indebted to Third World Approaches to International Law (TWAIL) scholarship.

By juxtaposing these stories with recent decades' risk and resilience thinking, Bandopadhyay argues that disaster management has been "a precondition of the modern, 'normal' state," and one that has grounded liberal internationalism in the process.[24] Throughout *All is Well*, state officials struggle to leverage disasters to inaugurate modern meanings of risk, responsibility, and power in defense of states' jurisdiction and the rightfulness of their rule. Modern disaster management is secular statecraft borne of "early modern narratives of civilizational progress."[25] And the state in question is not the welfare state, but rather the "developmentalist-security" state: a state in which developmental rationales underwrite security arrangements and vice versa.[26] The modern history of disaster management has a centuries-old coherence in Bandopadhyay's telling. That history prefigures both the present and the future of state and state-like authority.[27]

What, then, do these two very different accounts of state-making and disaster portend for today's international lawyers working on the topic? In *International Law in Disaster Scenarios: Applicable Rules and Principles*, the Italian-based and -educated scholar of international law and European Union law, Flavia Zorzi Giustiniani, shows international lawyers to have been very busy in this domain, even though the "great majority of disasters are entirely managed at the national level."[28] That has been the case since at least 1927, when an international convention was signed establishing the International Relief Union to furnish international assistance to any "suffering population" stricken by disaster.[29]

Tracking international disaster law's "piecemeal" doctrinal development since the 1920s,[30] Zorzi Giustiniani surveys multilateral and bilateral agreements, international and regional

[20] Anne Orford, International Law and the Politics of History (2021).
[21] Bandopadhyay, *supra* note 11, at 76.
[22] *Id.* at 82.
[23] *Id.* at 109–10.
[24] *Id.* at 7–8.
[25] *Id.* at 27.
[26] *Id.* at 18. *See generally* Björn Hettne, *Development and Security: Origins and Future*, 41 Secur. Dialogue 31 (2010).
[27] Bandopadhyay, *supra* note 11, at 210.
[28] Zorzi Giustiniani, *supra* note 11, at 69.
[29] *Id.* at 1–2.
[30] *Id.* at 1.

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instruments, and various forms of soft law. Together, she suggests, these do not comprise a "coherent whole"; rather, rights and responsibilities are "unevenly distributed," norms are "poorly organized," and there are many "gaps."[31] Zorzi Giustiniani has some ideas of how these gaps might be filled. So framed, *International Law in Disaster Scenarios* is in the venerable tradition of moderately progressive doctrinal scholarship.

International disaster law's disarray notwithstanding, Zorzi Giustiniani invests with particular significance the ILC's project on the protection of persons in the event of disasters that yielded the ILDAs.[32] By examining how the ILDAs (and other instruments of international disaster law and policy) relate to other international legal regimes applicable in disaster (namely international humanitarian law and international human rights law), Zorzi Giustiniani positions disaster response as "a cross-cutting issue in international law."[33] At the same time, Zorzi Giustiniani seems especially inspired by the European Union's efforts to institutionalize collective disaster response capabilities through the European Union Solidarity Fund and the Union Civil Protection Mechanism.[34] To Zorzi Giustiniani, these are welcome expressions of solidarity as "a value or as a structural principle of international law."[35]

The versions of disaster's relationship to (international) law that these books present, the questions that they raise, and the projects that they chart for the future could not be more different. For Matsui, disaster is a non-human teacher—a worldly remonstration—and a potential site for bureaucratic renewal that has yet to materialize in Japan. For Bandopadhyay, disaster is a recurrent political opportunity that has been indispensable to modern states' and rulers' realization of their ambitions, Anglo-European states especially. For Zorzi Giustiniani, disaster is a "cross-cutting" legal issue demanding collaborative, fair-minded resolution—nothing that international law and lawyers cannot handle if the appropriate institutional, doctrinal, and policy settings are in place.

The core question in *International Law in Disaster Scenarios* is what international lawyers should do next. Their progress must be dually supported, Zorzi Giustiniani contends; on one hand, by upholding the value of solidarity and, on the other, by maintaining respect for individual states' sovereign authority, but the balance between these values has been unstable to date. International law and policy on disaster are troubled by persistent inequities among sovereigns and "reticence" among states about "assigning a fully complementary role to the international community."[36] Utopia slides toward apology in Zorzi Giustiniani's book, but she remains a pragmatist.[37] In the absence of "a binding (institutional as well as legal) framework of comprehensive scope at the universal level" concerning disasters, Zorzi Giustiniani would like to see international disaster law crafted "on a case-by-case basis." The resulting framework might "*necessarily* [be] varied" but it ought still to be modeled on a European "blueprint," Zorzi Giustiniani argues.[38]

[31] *Id.* at 6–7.

[32] International Law Commission, *Analytical Guide to the Work of the International Law Commission: Protection of Persons in the Event of Disasters*, *at* https://legal.un.org/ilc/guide/6_3.shtml; ILC Draft Articles, *supra* note 1.

[33] Zorzi Giustiniani, *supra* note 11, at 17.

[34] *Id.* at 152–64.

[35] *Id.* at 103.

[36] *Id.* at 204.

[37] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (rev. ed. 2006).

[38] Zorzi Giustiniani, *supra* note 11, at 4, 175, 199, 201–02.

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In contrast, Matsui's tale is more replete with frustration and disappointment. Indeed, it is almost Beckettian in its atmosphere of legalized entrapment, if not in its politics.[39] It features a traumatized nation plagued by "ailing legal and political systems" that its people seem little minded to confront.[40] In Matsui's assessment, the people of Japan are encouraged by existing legal and political systems and practices toward "[i]nattention," "incremental[ism]," and "refus[al] to learn" and thus unwilling to centralize powers of "quick and definitive" decision as Matsui would like.[41] And this is all while Japan faces the inevitability—given its volcanic and tectonic geomorphology—of another massive disaster.[42] Passing reference is made to the International Atomic Energy Agency (IAEA) and to other countries offering aid and personnel to Japan, but international institutions and laws are notably absent. Matsui writes faintly in the book's final pages of hope and reform, but he advances "little reason for optimism" and seems to expect little to nothing of international law.[43]

Bandopadhyay's chronicle draws something of a connecting line between these books, albeit a provocative one. Set against the historical backdrops that Bandopadhyay paints, Matsui's aspiration for enhanced executive power resonates with longstanding efforts to leverage disaster to "refin[e] statecraft" by showing that natural calamity might be "mitigated by centralized authority."[44] Read through Bandopadhyay's lens, Zorzi Giustiniani's book seems emblematic of the internationalist outgrowth of this modern statecraft. Contemporary regimes of disaster response and risk reduction, Bandopadhyay argues, give "significant credence to national sovereignty and bottom-up approaches" while casting the international community in "a supervisory role, offering technical (legal, economic, and scientific) guidance which is in keeping with First-World imperatives of neoliberal political economy, sustainable development, and free trade."[45] Juxtaposition with Bandopadhyay's book lends Zorzi Giustiniani's reformism a darker note than it might otherwise sound. In Bandopadhyay's TWAIL-informed assessment, those very regimes of disaster management that Zorzi Giustiniani wants international lawyers to optimize have helped to "cripple dissent, and produce vulnerability and dependence" among Third World peoples. Brief references are made to UN activities in Haiti, the U.S. response to Hurricane Katrina, and to the U.S. and UK governments' mishandling of the COVID-19 pandemic in support of this claim, although it is never really substantiated.[46]

Bandopadhyay's vision of "the crisis of climate" now hopelessly "shackled to [an unequal] future of state formation" leaves his readers nowhere to go except to aspire generally to "live more interventionist lives, less accepting of revealed truths, imperceptible nudges, and marketized solutions."[47] This is an unlikely echo of Matsui's call for the Japanese people to shake themselves free of "familiar pre-disaster patterns" in order to make "tough choice[s]" about

[39] Emilie Morin, Beckett's Political Imagination (2017).
[40] Matsui, *supra* note 11, at 255.
[41] *Id.* at 255–56, 259.
[42] *Id.* at 255.
[43] *Id.* at 256.
[44] Bandopadhyay, *supra* note 11, at 12–13.
[45] *Id.* at 196.
[46] *Id.* at 202–04.
[47] *Id.* at 19.

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energy policy and economic development.[48] In somewhat comparable terms, Zorzi Giustiniani chastises the ILC for its "timid[ity]" about redistribution.[49] She is no fan of "muscular humanitarianism" or the "*interventionist* implications of R2P" (the Responsibility to Protect doctrine), but she would like to see more boldness about "equitable, solidarity-based funding mechanisms" and less "myopia towards the climate change challenge."[50] These books do not agree on much, but they do agree, apparently, on the need for more audacious political and legal action in the climactically imperiled present. For hints as to why that might not have been forthcoming to date, let us return to the 1755 Lisbon earthquake on which two of these books dwell.

III. Questions of Disaster

In 1755, much of the city of Lisbon was destroyed by an earthquake—still considered Europe's most destructive documented seismic event[51]—and by tsunamis and fires that followed. Aftershocks in north Africa, eastern North America, and elsewhere in western Europe caused further devastation.[52] Just as powerful, if not more, was the impact of this disaster on questions people asked of the world and their place in it. It was, according to some interpretations, the "first modern disaster"; one that profoundly "altered European consciousness" and thinking beyond Europe.[53] According to some modern commentary, the Lisbon earthquake's "zone of seismic perception" extended to Scandinavia, the North American coast, the West Indies, parts of the Brazilian coast, and to most of the northwestern coastal zones of Africa.[54] Among Europeans at least, it prompted an extraordinary outpouring of theological, philosophical, political, literary, and legal writing on the relation of humanity to God and nature, of people to one another, and the meaning or meaninglessness of human suffering. European intellectuals including Voltaire, Jean-Jacques Rousseau, and Immanuel Kant (the latter two both significant theorists of the international) wrestled in print with the wider significance of this disaster.[55]

In science, preoccupation with the Lisbon earthquake was widespread. The Peruvian scholar and scientist José Llano Zapato, for example, wrote from Lima to King Ferdinand IV of Spain on the subject.[56] The impacts of seismic devastation were already front-of-mind in colonial Peru since a 1746 earthquake near Lima required much of that capital to be rebuilt.[57] In the international legal field also, the Lisbon earthquake was generative. The Swiss international lawyer, Emmerich De Vattel, took the "disastrous fate of Lisbon"

[48] Matsui, *supra* note 11, at 235, 256.

[49] Zorzi Giustiniani, *supra* note 11, at 172.

[50] *Id.* at 65, 173, 175, 180 (emphasis in original).

[51] Bandopadhyay, *supra* note 11, at 79.

[52] Luiz A. Mendes-Victor, The 1755 Lisbon Earthquake: Revisited 136–38 (2009).

[53] A. Betâmio de Almeida, *The 1755 Lisbon Earthquake and the Genesis of the Risk Management Concept*, *in* The 1755 Lisbon Earthquake: Revisited 147 (2009); Susan Bassnett, *Faith, Doubt, Aid and Prayer: The Lisbon Earthquake of 1755 Revisited*, 14 Eur. Rev. 321, 327 (2006).

[54] Jan Kozák & Vladimír Čermák, The Illustrated History of Natural Disasters 131 (2010).

[55] Jean-Paul Poirier, *The 1755 Lisbon Disaster, The Earthquake that Shook Europe*, 14 Eur. Rev. 169 (2006).

[56] Charles F. Walker, Shaky Colonialism: The 1746 Earthquake-Tsunami in Lima, Peru, and Its Long Aftermath 22 (2008).

[57] *Id.*

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as a prompt to lay out the obligations of states to "contribute to the perfection" of other states.[58]

Preoccupation with the Lisbon earthquake outlasted the eighteenth century too.[59] In recent thinking about the relationship between disaster, law, and politics, the Lisbon earthquake remains a recurrent point of reference. Zorzi Giustiniani states that it remains a "paradigmatic example,"[60] and, as already noted, Bandopadhyay dedicates a chapter to Lisbon.[61] Thus, this event continues to sound a base note throughout contemporary disaster law and policy and related scholarship.

Two and a half centuries after the Lisbon earthquake, an earthquake rocked the Tohoku Region in northeast Japan that was roughly the same magnitude as Lisbon's is thought to have been. It was followed by an extraordinarily powerful tsunami, the combination of which caused a massive meltdown at the Fukushima Nuclear Power Plant causing radioactive contamination on a devastating scale.[62] This compound catastrophe, that came to be known as the Great Eastern Japan Earthquake Disaster, did not, however, "inspire the metaphysical crisis [that] the quake in Lisbon did."[63]

After the Great Eastern Japan Earthquake Disaster, those in Japan may have felt, in historian Seki Hirano's words, that Japan could "no longer be the nation it earlier was."[64] Public attitudes toward nuclear power around the world may have been affected.[65] Yet, with the possible exception of German energy policy,[66] major global perturbations in legal, political, and social thought plausibly traceable to the Great Eastern Japan Earthquake Disaster are scarce to non-existent. Empathy was in abundance. Offers of assistance came from around the world, some taken up.[67] Yet the contemporary international legal order seemed capable of digesting the horrors of the Great Eastern Japan Earthquake Disaster without much discomfort or disorientation at all. Even within Japan, according to Matsui, people seemed "[s]atisfied with incremental changes" in its wake and readily inclined to "forget the disaster."[68] It would be drawing a long bow to attribute the latter to the effects of international law and policy, but this accommodation of the extraordinary is remarkable nonetheless.

[58] EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 264 (Thomas Nugent trans., 2008).

[59] Walter Benjamin, *The Lisbon Earthquake*, *in* SELECTED WRITINGS, VOL. 2, PT. 2, 1931–1934, *at* 536–42 (Rodney Livingstone trans., 2004); THEODOR W. ADORNO, NEGATIVE DIALECTICS 361 (E. B. Ashton trans., 1973).

[60] ZORZI GIUSTINIANI, *supra* note 11 at 173

[61] BANDOPADHYAY, *supra* note 11, at 79–106

[62] MATSUI, *supra* note 11, at 44–46, 77–84.

[63] John Whittier Treat, *Lisbon to Sendai, New Haven to Fukushima: Thoughts on 3/11*, 100 YALE REV. 14, 17 (2012).

[64] *Id.* at 15.

[65] Younghwan Kim, Minki Kim & Wonjoon Kim, *Effect of the Fukushima Nuclear Disaster on Global Public Acceptance of Nuclear Energy*, 61 ENERGY POL'Y 822 (2013).

[66] Dorothee Arlt & Jens Wolling, *Fukushima Effects in Germany? Changes in Media Coverage and Public Opinion on Nuclear Power*, 25 PUB. UNDERSTANDINGS SCI. 842 (2016); Lukas Hermwille, *The Role of Narratives in Socio-technical Transitions—Fukushima and the Energy Regimes of Japan, Germany, and the United Kingdom*, 11 ENERGY RES. SOC. SCI. 237 (2016).

[67] UN Office for the Coordination of Humanitarian Affairs, Japan: Earthquake & Tsunami – Situation Report No. 16, at 5–6 (2011).

[68] MATSUI, *supra* note 11, at 256.

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It may seem naïve to remark upon the vast differences in these disasters' societal resonance. After all, perceptions of human placement and power in the world altered completely between the mid-eighteenth and early twenty-first centuries. It is little wonder, given intervening developments, that questions raised by disaster did not resound in the same way across this span of time.

Nonetheless, international law is often characterized as a field blind to the injustices of the everyday; a field especially exercised by crisis.[69] Accordingly, one might have expected global reactions to disaster to have become *less* not more accommodationist during a period that saw the international become thick with the juridical.[70] Contrary to that expectation, international disaster law and policy have helped to direct legal and policy reformism—and social and political agitation more broadly—in a devastatingly quiescent direction in the face of rapidly closing windows for effective action on climate change. Questions as to how that might have occurred and what could be done about it are among those that the excellent books introduced above help readers to think through.

Before entertaining these questions, however, it is important to register just how much law and policy tumult *was* occasioned by the Great Eastern Japan Earthquake Disaster. In devastating detail, Matsui's book recounts the many "unprecedented legal questions" that arose in the disaster's aftermath regarding burial, waste disposal, healthcare and welfare delivery, taxation, insurance, education, visa requirements, food labeling, and countless other matters.[71] Matsui's assessment of Japan's legal system's capacity to rise to these many challenges is damning; "the chain of command became unclear and chaotic," Matsui observes, with "[m]any decisions [being] made without sufficient supporting information."[72]

Even so, notably absent from Matsui's account, and from discussion surrounding the Great Eastern Japan Earthquake Disaster, are the kinds of worries that, according to Bandopadhyay's book, have typically circled disaster in less affluent parts of the world: worries about chaos borne of disaster leaching outward through political destabilization, mass migration, crime and corruption, disease transmission, and state failure. Disaster-response capacity, Matsui's book implies, can and should be cabined within the national legal and political architecture of an affected state, even if that state is "clearly unprepared"—at least when that state is Japan or comparable to it.[73] Matsui does not address it explicitly, but the Great Eastern Japan Earthquake Disaster does not appear to have provoked worries internationally of mass exodus from or governmental dysfunction in Japan.

In contrast, Bandopadhyay's book shows the kinds of fears just mentioned (about contagious mayhem, mass flight, and potential state failure) to have been core to governments' disaster response in other instances: in British responses to the Bengal famine of 1770 that were both meager and punitive, for instance.[74] Racialized fears of the state being overrun, as well as physiocrats' preoccupation with trying to harmonize the boundary between the social and the natural to ensure state security and prosperity: these are cast by Bandopadhyay as

[69] Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377 (2002).

[70] MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER, 1300–1870 (2021).

[71] MATSUI, *supra* note 11, at 6.

[72] *Id.* at 92.

[73] *Id.* at 3.

[74] BANDOPADHYAY, *supra* note 11, at 124–26.

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"uncomfortable continuities" linking eighteenth-century and twenty-first-century disaster management in what is now the Third World.[75] The unflagging confidence in the capacity of the twenty-first-century Japanese state, despite its many failures, that is documented in Matsui's *Law and Disaster*, might be read in support of Bandopadhyay's claim (although without detailed study of a contemporary comparator for eighteenth-century Bengal, it is a stretch).

The contrasts are telling, even if this aspect of Bandopadhyay's argument never gets fully worked through. In states presumed powerful and competent (regardless of their actual record in disaster response), disaster is an occasion to perfect the state and affirm its autonomy, as in eighteenth-century France and Portugal in *All is Well*, in contemporary Japan in *Law and Disaster*, and among the states of the European Union in *International Law in Disaster Scenarios*. In states that do not benefit from such presumptions, disaster readily calls a state's autonomy and capacity into question and often justifies the extension of external rule, as in Bengal in *All is Well*. In *International Law in Disaster Scenarios*, the contemporary counterpart is Myanmar, a state deemed "unable and/or unwilling to cope" with the devastation wrought by Cyclone Nargis in 2008 in part because of its initial refusal to accept humanitarian aid or admit relief personnel from international organizations or Western countries.[76] As Zorzi Giustiniani emphasizes, this was a complex scenario that belies easy summation. Nonetheless, it is clear from the books under review that assertions of sovereign prerogative to deal with disaster resonate quite differently according to when, how, and from where they emanate.

Matsui invites his readers to exercise *their* prerogative to approach disaster as a legal and political opening: a window into "how the government could change" in Japan.[77] Zorzi Giustiniani likewise wants international lawyers to bed disasters down amid "new layers of law" establishing "clear and binding criteria on the distribution of responsibilities among states."[78] Meanwhile, Bandopadhyay presents readers with a very different view of the political and legal possibilities surrounding disaster: as "a kind of Catherine wheel on which the social and natural orders in the Third World are routinely stretched and sometimes broken."[79]

How these books' differing versions of law and disaster's relation are likely to land on readers depends in part on how the ground has been prepared for them. International disaster law and policy have played a role in that preparation. And it is the argument of the next Part that their cumulative effects have been cushioning and muffling. Disasters shock still, but international law and policy tend to defuse that shock's reverberations, discouraging agitation for thoroughgoing change that the three books reviewed encourage their readers toward.

IV. Non-shocks: How (International) Law and Policy Deaden Disaster

Before proceeding with the argument promised in the Introduction, let me address one possible form of counterargument. It might seem misplaced to try to set the dulling of disaster at the feet of international law and lawyers, citing the relatively muted international reaction

[75] *Id.* at 202.
[76] Zorzi Giustiniani, *supra* note 11, at 62–66.
[77] Matsui, *supra* note 11, at 4.
[78] Zorzi Giustiniani, *supra* note 11, at 95, 204.
[79] Bandopadhyay, *supra* note 11, at 9.

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to the Great Eastern Japan Earthquake Disaster. Perhaps the world was taking its lead, in that instance, from reactions to the disaster within Japan, among a people exhausted by two decades of economic stagnation and a long history of seismic devastation. John Whittier Treat has suggested that "[i]n a sense the Great Eastern Japan Earthquake of 2011 . . . was *normal*" insofar as it "simply reprised the lessons already learned in the 1995 Great Hanshin-Awaji Earthquake: the inadequacy of Japanese disaster preparations, the incompetent response of the government, the unreliability of the media, the predictability of even rare catastrophes—all these [were] familiar in Japan."[80] Matsui's book lends this interpretation support.[81]

Other critics have, however, portrayed a more mixed array of reactions to the disaster within Japan.[82] More to the point, there is nothing about the Great Eastern Japan Earthquake Disaster that invited international lawyers to view it as a singularly Japanese event as they seem to have done (and as Matsui's *Law and Disaster* portrays it), even as its international repercussions were widely acknowledged. If anything, this extraordinary conjunction of seismic and nuclear devastation, with its impacts compounded by urbanization and the interaction of transboundary contamination and global value chains, seemed perfectly configured to provoke widespread international law and policy disquiet. Nuclear law includes numerous international instruments and is overseen by a dedicated international organization: the IAEA. There is not a Sustainable Development Goal to which the Great Eastern Japan Earthquake Disaster did not speak.

Also, there is a more recent comparator than the Lisbon earthquake that suggests what the Great Eastern Japan Earthquake Disaster could have been for international law and lawyers. Twenty-five years prior, the 1986 Chernobyl disaster was understood to have "placed severe strains on the international legal system, revealing many of the system's limitations, but at the same time illustrating the potential of international cooperation in dealing with the ever-increasing array of problems of international dimension."[83] As in Vattel's eighteenth-century work, Chernobyl prompted Leibnizian calls to try to perfect an "imperfect" international legal order.[84] In contrast, international lawyers of recent decades have written only around the edges of Fukushima, dwelling on questions of individual and state liability, ensuing dispute resolution processes, and the implementation of particular international legal regimes.[85] The Great Eastern Japan Earthquake Disaster did not rock international law to its core. Indeed, it seemed to be received more as an assurance of international law's varied beneficence than a cause for disciplinary or broader self-doubt.

How international law and policy may deaden the impact of disasters is apparent from the ILDAs on which Zorzi Giustiniani lays emphasis.[86] In effect the ILDAs create a series of

[80] Treat, *supra* note 63, at 18.

[81] MATSUI, *supra* note 11, at 20–26.

[82] Tamaki Mihic, *Japan After Fukushima*, *in* RE-IMAGINING JAPAN AFTER FUKUSHIMA 11 (2020).

[83] Richard E. Levy, *International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System*, 36 U. KANS. L. REV. 81, 81 (1987).

[84] *Id.*

[85] *See, e.g.*, Aleksandra Čavoški, *Revisiting the Convention on Nuclear Safety: Lessons Learned from the Fukushima Accident*, 3 ASIAN J. INT'L L. 365–91 (2013); Harold S. Yun, *Fukushima and* New Zealand v. France Nuclear Tests*: Can Japan Be Brought to the International Court of Justice for Damages Caused by Fukushima Plants?*, 24 MINN. J. INT'L L. 387–412 (2015); Kanami Ishibashi, *Further Developments in Fukushima and Other New Movements for Implementing International Human Rights Law in Japan*, 21 ASIAN Y.B. INT'L L. 202–10 (2015).

[86] ILC Draft Articles, *supra* note 1.

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normative levees to try to limit disasters' disruptive potential and the scope of those understood to have a stake in its handling. For example, those cast as "persons concerned" by a disaster, for the ILDAs' purposes, are confined to "people directly affected by the disaster, including by being displaced thereby, as opposed to individuals more indirectly affected."[87] Similarly, the term "affected State" is defined narrowly as "a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place."[88] Recognition of impacts and realization of commonalities across State borders are implicitly discouraged; it is only in "exceptional cases, [that] there may be two affected States" let alone more.[89]

It is this presumptively solitary, sovereign state—the "affected State"—that is given a central role in the ILDAs. The "key feature in disaster response or disaster risk reduction," according to the ILDAs, "is State control."[90] According to Zorzi Giustiniani, this is indicative of a sectoral reaction against tendencies, prevalent in prior decades, for donors and non-governmental organizations to bypass or undermine national and local authorities in the course of providing disaster relief.[91] It is also consistent with Bandopadhyay's argument that disaster management has been a vehicle for states to shore up their authority including over other states.

Precisely *which* state is in control may shift, nonetheless, if offers of external assistance are forthcoming. Whether or how external assistance is offered is left almost entirely outside the ILDAs' purview, within prospective donor states' discretion. During their drafting, the special rapporteur on the protection of persons in the event of disasters observed that the "overwhelming majority" of states made submissions to the effect that international law does not give rise to any legal obligation to assist a disaster-affected state when asked to do so.[92] Accordingly, the ILDAs have nothing much to say on global redistribution except to insist that an affected state has a non-binding "duty to seek assistance" to the extent that a "disaster manifestly exceeds its national response capacity."[93]

If, however, external assistance is forthcoming, a range of expectations of affected states are then triggered under the ILDAs. Affected states become subject to non-binding duties of timely decision on offers of assistance; restrictions on their conditioning of assistance; obligations to facilitate provision of external assistance and to protect relief personnel; and a requirement to consult on any termination of external assistance.[94] The needier the affected state, the more burdened by international legal expectation they are likely to become. As one ILC member has observed, the ILDAs are "one directional" in that "affected States have duties while third States have rights but the reverse is not true."[95]

[87] *Id.* Art. 2, Commentary para. 7. On the limited rights protection afforded individuals by the ILC Draft Articles more generally, see Bartolini, *supra* note 12, at 1110–11 and Kälin, *supra* note 12, at 45–46.

[88] ILC Draft Articles, *supra* note 1, Art. 3(b).

[89] *Id.* Art. 3, Commentary para. 15. On the possibility of two states concurrently qualifying as "affected" by a single disaster and the ILC Draft Articles' inattention to their relation, see Bartolini, *supra* note 12, at 1114.

[90] ILC Draft Articles, *supra* note 1, Art. 3, Commentary para. 14.

[91] Zorzi Giustiniani, *supra* note 11, at 60–62.

[92] Twining, *supra* note 14, at 171–72.

[93] ILC Draft Articles, *supra* note 1, Art. 11.

[94] *Id.* Arts. 10–17.

[95] Dire Tladi, *The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?*, 16 Chin. J. Int'l L. 425, 450 (2017).

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In the foregoing ways, and through their emphasis on "timeliness,"[96] the ILDAs sequester disaster spatially and temporarily and try to contain its normative and political reverberations. Emphasis is placed on cooperation throughout the ILDAs—that is, states' cooperation among themselves, with the UN, with "components of the Red Cross and Red Crescent Movement," and with "other assisting actors."[97] Also, all states are obligated to "reduce the risk of disasters."[98] Nevertheless, the ILC's commentary makes explicit that the latter obligation "implies measures primarily taken at the domestic level" by "each State individually" and that any "implication of a collective obligation" or recognition of third states' responsibility for factors contributing to disasters' impacts were deliberately avoided during the ILDAs' drafting.[99]

Moreover, the indicative disaster risk reduction measures singled out for mention in the ILDAs make clear that their focus is informational, not structural. Disaster risk reduction is envisaged in this context to include "the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems."[100] No revisitation of global patterns of investment, trade, consumption, or development is invited insofar as these may compound or intensify disaster risk. On the contrary, the ILC's commentary on the ILDAs directs readers to double down on already established patterns, affirming those measures that are "typically taken" or are the "most common" and trying to fend off "*a contrario* interpretations."[101] The aim seems to be to make the devastation being wrought by climate change upon our planet, and the more intense and frequent disasters that result from that, somewhat less surprising, not to insist on any collective action being taken to avert that course. Yet as Part VII will show by reference to a recent ILA/ADI white paper on the Anthropocene, international law does not necessarily demand such an acquiescent approach.

V. Vulnerability and the Normalization of Uneven Exposure

As well as sequestering and tempering disaster, the ILDAs tend to normalize uneven exposure to disasters' impacts through the notion of "vulnerability." The ILDAs stress that the "needs of the particularly vulnerable" must especially be considered.[102] More precisely, those needs must be "tak[en] into account" under Article 6.[103] Read in context, that phrasing

[96] ILC Draft Articles, *supra* note 1, Art. 2, Commentary para. 2; *see also* Art. 13(3).

[97] *Id.* Arts. 7–8.

[98] *Id.* Art. 9.

[99] *Id.* Art. 9, Commentary para. 8. "[M]ore radical provisions were dismissed during the drafting process," thereby "fail[ing] to provide a satisfactory answer to . . . the uneven distribution of [disaster] risk." René Urueña & Maria Angelica Prada-Uribe, *Disasters, Inter-State Legal Obligations, and the Risk Society: The Contribution of the ILC's Draft Articles*, 1 Y.B. Int'l Disaster L. Online 70, 84–85 (2019).

[100] ILC Draft Articles, *supra* note 1, Art. 9(2).

[101] *Id.* Art. 9, Commentary paras. 12, 15.

[102] *Id.* Art. 6.

[103] The ILC Draft Articles' insistence (in Article 6) that relative vulnerability be "tak[en] into account" could be read to require thoroughgoing investigation of those vulnerabilities and expansive measures of "positive discrimination" to address these; the ILC's commentary stipulates that positive discrimination should "not be taken as exclud[ed]." *Id.* Art. 6, Commentary para. 7. That commentary's emphasis, however, on the "neutral[ity]" of the term "vulnerable" suggests that those making claims for affirmative action under the ILC Draft Articles likely face an uphill battle. *Id.* Art. 6, Commentary paras. 6–7.

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implies that these needs are not to be the focus of broad-ranging investigation, remedy, or reparation, but rather accommodated through minimal, calculative adjustment and reporting after the fact. The ILC's commentary on Article 6 explains, for instance, that "taking into account" covers, "*inter alia*, accessibility to information and community participation."[104] Furthermore, as Thérèse O'Donnell has observed, as "between Draft Articles 6 [on "[h]umanitarian [p]rinciples"] and 9 [on disaster risk reduction] there is a shift from recognising the plight of vulnerable communities in broad terms to a far narrower series of scientific and technical options."[105]

In principle, as Bandopadhyay acknowledges, an approach to international disaster law and policy that emphasizes peoples' and communities' varying levels of vulnerability is "egalitarian" in ambition.[106] As translated into the ILDAs, however, vulnerability is a limited qualifier upon a generic approach to analyzing the needs of disaster-affected persons. Disparate vulnerability is not, in the ILDAs' version, an ongoing concern of all, but mainly a concern of the "particularly vulnerable" and for those charged with managing the risks that they are taken to embody.[107]

Moreover, in the context of the ILDAs, vulnerability is primarily conceived in terms of frailties and differences at the level of the human body. The ILC commentary mentions "girls, boys, women, older persons and persons with disabilities" as well as "persons living with HIV and other debilitating illnesses" by way of an indicative, non-exhaustive list of the vulnerable and then, only in passing, includes "non-nationals."[108] This construction of vulnerability is deliberately open-ended, yet the illustrative examples offered set the tone for its interpretation, making clear that it does not invite other, structural axes of inequity to be considered. For example, one vulnerability of the kind not contemplated is that arising from the concentration of nuclear power plants in certain municipalities within Japan (many in relatively poor areas) where, as Matsui observes, local governments have been given lucrative financial incentives to accept them.[109]

That some peoples and groups are more vulnerable than others to the adverse impacts of disaster takes on a naturalness, even a necessity, in the ILDAs. Beyond their generic invocation of the principle of non-discrimination,[110] the ILDAs do not prompt their readers or users to consider how economic inequality, political underrepresentation, social marginalization, or racial domination might produce, compound, or intersect with vulnerabilities to disaster. This ignores a significant body of scholarship that has—and had already at the time of the ILDAs' adoption—called for an intersectional approach to disaster vulnerability or otherwise traced disparate disaster impacts to enduring regimes of oppression.[111]

[104] *Id.* Art. 6, Commentary para. 8.

[105] Thérèse O'Donnell, *Vulnerability and the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters*, 68 INT'L COMP. L. Q. 573, 583 (2019).

[106] BANDOPADHYAY, *supra* note 11, at 24.

[107] ILC Draft Articles, *supra* note 1, Art. 6, Commentary para. 7.

[108] *Id.*

[109] MATSUI, *supra* note 11, at 90.

[110] ILC Draft Articles, *supra* note 1, Art. 6, Commentary para. 6.

[111] *See, e.g.*, Stacia S. Ryder, *A Bridge to Challenging Environmental Inequality: Intersectionality, Environmental Justice, and Disaster Vulnerability*, 34 SOC. THOUGHT & RES. 85 (2017); Kyle Breen, *Disaster Racism: Using Black Sociology, Critical Race Theory and History to Understand Racial Disparity to Disaster in the United States*, 31 DISASTER PREVENTION & MGMT. 229 (2021); Committee on the Elimination of Discrimination Against

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How these geographies of vulnerability came about and have been reproduced are not questions about which the ILDAs encourage curiosity. Rather, they direct attention toward categories of persons with which vulnerability tends to be identified routinely or those who "find themselves being particularly vulnerable in the wake of a disaster," seemingly spontaneously.[112] The ILDAs propagate a sense that there is not much to be done about peoples' uneven exposure to the adverse impacts of disaster beyond some patching and spackling to accommodate and aid diverse "subgroups of individuals" as and when their vulnerabilities emerge, mainly in reliance on national-level regimes of law and policy.[113] That is not to say that the ILDAs are anti-interventionist. Rather, the disaster responsiveness that they encourage states and non-state actors to adopt is anti-reflexive or disinclined to include rigorous scrutiny by those actors of their own responsibilities for uneven disaster risk.

This naturalizing, anti-reflexive reading of vulnerability might be attributable to a range of factors. A Review Essay such as this does not afford room to explore its genealogy even if the books under review debated that, which they do not.[114] Nevertheless, whatever its provenance, the ILDAs' view of vulnerability could become entrenched in international disaster law and policy if they become the basis for an international convention, an eventuality that the UN General Assembly agreed in December 2021 to "consider further" upon the ILC's recommendation.[115]

VI. Law Unlimited: Spurning Planetary Exhaustion

In addition to the accommodationist dispositions that they engender, international disaster law and policy, as exemplified by the ILDAs, foster disregard for planetary limits and inattention to the unsustainability of current global levels of non-renewable resource extraction. First, as noted in Part IV, the ILDAs engender a sense that certain peoples, states, and territories are discretely affected by disasters, such that others may be presumed unaffected. The latter may, by implication, proceed relatively unperturbed by their occurrence except insofar as they are moved to extend assistance to those affected. Second, and in tension with the prior point, the ILDAs foster habituation to what they refer to as "the disaster cycle" and to the escalating "frequency and severity of natural and human-made disasters."[116]

The trigger for the ILDAs' application is embedded in their definition of disaster discussed in Part I.[117] As is acknowledged in the accompanying commentary, "[t]he requirement of serious disruption [for a disaster to occur within the ILDAs' scope] necessarily also implies

Women (CEDAW), General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, para. 2, UN Doc. CEDAW/C/GC/37 (Mar. 13, 2018).

[112] ILC Draft Articles, *supra* note 1, Art. 6, Commentary para. 7.

[113] *Id.* Art. 6, Commentary para. 7.

[114] Bandopadhyay's book makes a passing claim that the vulnerability paradigm within disaster law may be "rooted in colonial practices of 'scientifically' identifying and subjugating dangerous spaces full of corrupt, hapless, and ungrateful people in need of saving." Bandopadhyay, *supra* note 11, at 24. Meanwhile, Zorzi Giustiniani's index only affords vulnerability one mention and Matsui's book has virtually nothing to say on the matter beyond noting "the absence of concern for vulnerable minorities" in Japanese law. Matsui, *supra* note 11, at 73.

[115] GA Res. 76/119 (Dec. 9, 2021).

[116] ILC Draft Articles, *supra* note 1, pmbl., Commentary para. 3.

[117] *Id.* Art. 3(a).

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the potential for such disruption."[118] That is, the ILDAs set the bar high for something to qualify as a disaster so as not to have to deal with copious lesser instances and forms of devastation expected to become routine. On one hand, disasters are framed in the ILDAs largely as discrete "event[s]" that are of immediate concern only to those "affected" by them, especially the "vulnerable."[119] On the other hand, disasters are presented in the ILDAs as unavoidably recurrent and catastrophically disruptive.

By contemplating societal disruption occurring with increasing regularity, the ILDAs place everyone on a permanent disaster footing. Yet, at the same time, they communicate that people ought not to bridle against existing routines or policies in any given nation state. Aside from a passing reference to land use controls in the accompanying commentary,[120] the ILDAs offer no hint that equitably maintaining human well-being on this planet might demand collective relinquishment of privileges or radical shifts in law and policy thinking and practice. Rather, disaster risk reduction is identified in ILC commentary with the making of "risk-informed investments."[121] Likewise, beyond brief mention of climate change adaptation in ILC commentary,[122] the ILDAs draw no connection to work underway, at the time of their adoption, elsewhere in the UN system on global emissions reduction. They similarly do not entertain the prospect of societies accepting losses or redirecting wealth for disaster risk reduction reasons (economic losses associated with fossil fuel divestment or the withdrawal of state subsidies for fossil fuel industries, for instance).

Having invoked the specter of society's functioning being seriously disrupted on a regular basis, the ILDAs posit a very narrow frame for addressing that prospect: one based on discretionary assistance and optional cooperation among states in response to discrete events traced to an "affected State" in the singular. At the same time, the ILDAs affirm generalized faith in the expectation that "higher standards of living, full employment, and conditions of economic and social progress and development" will continue into the future, at least for those among whom this is a current expectation.[123] What they communicate to their more affluent readers and users is that life, growth, economies, and social and legal institutions can and should carry on as usual—and most people should continue to expect global improvement in living standards—even as "calamitous event[s]" become more frequent and widespread.[124]

This combination of straitened and far-reaching aspirations is quite characteristic of international lawyers who tend to be addicted to progress, but ambivalent about mass politics. Likewise, international institutions "tend . . . to be infused with their own peculiar kind of utopianism, a kind of piecemeal ambition for the betterment of the world."[125] And, as I have argued elsewhere, faith in progressive legal systematization on a global scale has long demanded ghettoization of literal and figurative kinds.[126] The idea of an inexhaustible

[118] *Id.* Art. 3, Commentary para. 10.
[119] *Id.* Arts. 1, 6, 10.
[120] *Id.* Art. 9, Commentary para. 18.
[121] *Id.*
[122] *Id.* Art. 9, Commentary para. 5.
[123] *Id.* Art. 7, Commentary para. 1 (*quoting* UN Charter, Art. 55(a)).
[124] *Id.* Art. 3(a).
[125] PALACES OF HOPE: THE ANTHROPOLOGY OF GLOBAL ORGANIZATIONS 19 (Ronald Niezen & Maria Sapignoli eds., 2017).
[126] Fleur E. Johns, *Global Governance: An Heretical History Play*, 4 GLOB. JURIST [i]–49 (2004).

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body of international law, forever exhibiting "progressive development" without limit,[127] requires the spurning of many claims and claimants, including those highlighting the non-renewability of global resources.

VII. Conclusion

Part I of this Essay mentioned another contemporary instrument that one might have on hand when reflecting on what the books under review suggest about international disaster law and policy to come: an ILA/ADI white paper on the Anthropocene. In celebration of the 150th anniversary of the Association for the Reform and Codification of the Law of Nations, which later became the ILA/ADI, the ILA/ADI's French branch initiated a series of thematic white papers addressing major twenty-first-century challenges. One white paper is on the Anthropocene, envisioning international law in and for an epoch in which humans "are upsetting earth system equilibrium in profound ways."[128] This white paper's provocations are both pointed and profound. The possible global scenarios that it sketches are confronting, even more for their plausibility. On international lawyers' progress to date in ensuring planetary integrity, it offers meager congratulations:

> In th[e] context [of the Anthropocene], the main response to environmental threats has been the development of international environmental law. . . . However, despite impressive normative developments . . . and some successes (such as the ongoing restoration of the ozone layer), international environmental law has been largely unable to halt the increasing impacts of human activities on planetary integrity.[129]

On the imperative for action, it is unsparing: "we cannot solve ecological problems unless eco-considerations are not restricted to environmental regimes, but penetrate into all corners of international regimes."[130] The word "progress" appears very little in this white paper's pages; in this version of the international legal project, it is by no means an article of faith.

On their face, international disaster law and policy seem well poised to engage with the questions and speculations advanced in this white paper. Their recognition of the interconnectedness of natural and human-made disasters; their canvassing of compounding threats to human well-being; their attention to inequity in the register of vulnerability: all these seem to augur well for international disaster law and policy to be at the forefront of the "the total ecologization of international law" for which the ILA/ADI white paper calls.[131]

However, as the books under review show to varying degrees, international disaster law and policy have so far been reticent and regressive in many respects—or, in the case of Matsui's *Law and Disaster*, all but absent from decisionmakers' purview.[132] As is apparent in the

[127] ILC Draft Articles, *supra* note 1, pmbl.

[128] ILA France, Anthropocene, ILA/ADI White Paper 02 (2022) 11–12, *at* https://www.ilaparis2023.org/en/white-paper/anthropocene.

[129] *Id.* at 13.

[130] *Id.* at 73.

[131] *Id.* at 76.

[132] *Cf.* O'Donnell, *supra* note 105, at 607 (describing the ILC Draft Articles as "ask[ing] very little of non-disaster-prone states"); Tladi, *supra* note 95, at 451 (concluding that the ILC Draft Articles are "likely to have no impact whatsoever on disaster relief practice").

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ILDAs, international disaster law and policy propagate the fiction that disasters affect certain places and peoples for limited periods of time, and are adequately addressed by voluntary measures. This fiction is maintained against a backdrop of much, ongoing disaster risk reduction activity, driven by national governments (some more than others) and an immense corps of risk management experts (or in Bandopadhyay's assessment, "contingency experts" who accept "the possibility of ecological collapse as a given").[133] When this activity is viewed through the lenses afforded by *Law and Disaster* and *All is Well*, the impression created is of international law's very profusion—the "progress" documented in *International Law in Disaster Scenarios*—evacuating disaster of generative possibilities and tapering its potential to provoke legal change toward the benefit and reassurance of a privileged few.[134]

In other words, international disaster law and policy allow for those not invited to see themselves as "affected" to carry on busily more-or-less as usual, unless and until their respective national governments are moved to take such "appropriate measures" as they see fit.[135] This approach is understandable; assistive intervention is never benign. Yet, as the Intergovernmental Panel on Climate Change has made clear, the period within which it is tenable to indulge the continuance of business (or busyness) as usual is coming to an end, after which the range of available options for reparative action decline precipitously.[136] Already, there is not a life form on this planet that is not living in an affected state.

For these reasons, the ILDAs do not warrant the "welcom[ing]" that Zorzi Giustiniani gives them.[137] They are not up to the urgent and momentous tasks that international law and lawyers—along with everyone else—face at this juncture. The ILC would do well to undertake their wholesale revision, or to embark upon another, cognate body of work, possibly coming out of their current project on sea-level rise in relation to international law.[138]

In revisiting international disaster law and policy, the ILC might perhaps have regard to the root-and-branch ambition expressed in the ILA/ADI white paper on the Anthropocene. Of course, the ILC and the ILA/ADI have quite distinct purposes and mandates. The ILC is charged by the UN General Assembly with "the promotion of the progressive development of international law and its codification," concerning itself "primarily with public international law."[139] The ILA/ADI is a non-governmental organization dedicated to "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law."[140] The ILA/ADI was "from the start an organi[z]ation open to all, whether lawyers, students, diplomats or interested members of the public,"[141] while the ILC is composed of international legal experts

[133] BANDOPADHYAY, *supra* note 11, at 194.

[134] *Cf.* Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005).

[135] ILC Draft Articles, *supra* note 1, Art. 9(1).

[136] IPCC Press Release, The Evidence Is Clear: The Time for Action Is Now. We Can Halve Emissions By 2030. (Apr. 4, 2022), *at* https://www.ipcc.ch/2022/04/04/ipcc-ar6-wgiii-pressrelease.

[137] ZORZI GIUSTINIANI, *supra* note 11, at 204.

[138] International Law Commission, *Analytical Guide to the Work of the International Law Commission: Sea-Level Rise in Relation to International Law*, *at* https://legal.un.org/ilc/summaries/8_9.shtml.

[139] Statute of the International Law Commission, Adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, Art. 1 (1947).

[140] Constitution of the International Law Association, as amended at the 77th Conference of the ILA/ADI, Johannesburg, Art. 3(1) (2016).

[141] J. Crawford, *The International Law Association from 1873 to the Present*, 2 REV. DROIT UNIF. 68, 68 (1997).

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nominated and elected by UN member states. Nonetheless, these two venerable international legal institutions almost certainly influence one another; the ILA/ADI has been described as one of the ILC's "older relatives."[142] Perhaps an intergenerational dialogue around disasters involving these two stewards of the international legal project could be generative.

At this stage, it remains unclear what direction the "exponential growth" in international disaster law and policy now underway might yet take.[143] It is clear nonetheless that the ILDAs' synthesis of the field is ill-equipped to meet the moment. Insofar as the ILDAs depend on states voluntarily taking action to ensure "adequate and effective response to disasters and reduction of the risk of disasters,"[144] Matsui's book reveals that reliance to be misplaced. Japan, a high-income, technologically well-equipped country with a long history of disaster response activity, fielded a "woefully inadequate" response to the Great Eastern Japan Earthquake and remains poorly equipped legally to act otherwise in the future.[145] Insofar as the ILDAs presume that disaster relief will be provided by "assisting States" to an "affected State" to meet peoples' "essential needs,"[146] Bandopadhyay's book suggests that presumption is often wrong: "disaster management is not always about saving humanity, but it is always about refining statecraft."[147] Read together, these texts suggest that international disaster law and policy are not just "poorly organized."[148] They are manifestly disastrous in ways that the planet, and all that inhabit it, can no longer afford to indulge.

I suggested above that international disaster law and policy could perhaps become less disastrous, even play a part in international law's "total ecologization."[149] With that phrase, I understand the ILA/ADI to be envisioning the prospect of "mak[ing] those [humans, non-humans, and environments] who suffer the most from global ecological crisis central to [democratically informed international legal] decision-making in the Anthropocene."[150] To push the phrase further, international law could, itself, be approached ecologically. That is, the thought and practice of international law might encompass not just relations among states, international organizations, peoples, individuals, corporations, and the like, but also relations among sensors, databases, archives, river systems, oceans, animal colonies, and forests. The books reviewed here offer sobering insights both as to the urgency of such a project and as to its improbability. But sometimes it is worthwhile lingering with strange, even shocking thoughts.

[142] Eduardo Valencia-Ospina, *Seventy Years of the International Law Commission: Drawing a (Sustainable) Balance for the Future*, 48 ENVTL. POL'Y L. 181, 181 (2018).

[143] ZORZI GIUSTINIANI, *supra* note 11, at 199.

[144] ILC Draft Articles, *supra* note 1, Art. 2.

[145] MATSUI, *supra* note 11, at 6.

[146] ILC Draft Articles, *supra* note 1, Arts. 2–3.

[147] BANDOPADHYAY, *supra* note 11, at 12; *see also* ZORZI GIUSTINIANI, *supra* note 11, at 49 ("care for victims is not the only objective of the stricken State, which is equally and legitimately concerned with protecting its sovereignty . . . against internal and external threats").

[148] ZORZI GIUSTINIANI, *supra* note 11, at 7.

[149] ILA France, *supra* note 128, at 76.

[150] *Id.* at 70.

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