

Can Human Rights Judges Travel in Time?

Considerations on the ability of the European Court of HR to assess risks

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Notice

This paper aims at presenting and discussing some of the preliminary results of an ongoing research project entitled “Human Rights and Risk”. It has been written to serve as a support for a research seminar to be held at the *Schulich School of Law* at *Dalhousie University* (Halifax, Nova Scotia, Canada) on the 22nd of July 2019. A more in-depth article, with a higher number of references to relevant literature and case law, is about to be published in French in the online journal *Revue des Libertés et Droits fondamentaux* (RLDF). The full text of this article is already available via the following link: <http://hdl.handle.net/2268/237622>. Other publications related to this research project, both in English and French, are expected in the near future.

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1. – Introduction: risk and (human rights) law – Law, in general, can be seen as a risk regulation system. Legal rules are conceived as means to influence future human behaviour. They aim at reducing the fundamental uncertainty that characterizes the future interactions between individuals in past and current society. This is obvious when you consider criminal law: by prohibiting and punishing murder or theft, law seeks to reduce the risk of violent death or loss of property for every individual. Traffic regulations have a main objective which is to reduce the risk of traffic accidents for road users; each single rule of the code, from the obligation to drive on the right side to the speed limitations, can be seen as an invitation to act in a way that is safer (read: less risky) for oneself and/or for others. What is valid for criminal law also applies to other branches of law: constitutional or administrative law, civil or commercial law can be analysed as tools influencing human decisions and actions in order to avoid situations that legislators or governments see as undesirable.

The research project at stake does of course not intend to address the general and far too broad question of the relationship between law and the notion of risk. It focuses on a more specific topic, which is the notion of risk as it is developed in the field of human rights and, more precisely, in the European Court of Human Rights (ECtHR) case law. The dedication of a research project to this question was motivated by the observation that the ECtHR often refers to the notion of risk¹. There are indeed many cases that concern a risk of harm (injury, death, *etc.*) that could hurt a human right. In these situations, there is, under certain conditions, an obligation for the state authorities to take the risk into consideration and react to try to prevent this potential harm. Several provisions of the European Convention for Human Rights (ECHR), especially article 2 (right to life) and article 3 (prohibition of torture) have been interpreted as legal basis for an obligation to act (positively) when potential events could hurt the fundamental rights of individuals. It means that state authorities have to act not only when human rights are currently affected, but also when they are at risk.

Even if the ECtHR only intervenes as a last instance body to control the decisions and actions taken by the State authorities, it must also, in its judgments, develop reasoning that involves a risk analysis. Judges have to identify the risk (that the authorities know/knew or should (have) known of), assess the level of the risk (is it or was it high enough to imply a positive obligation to react?) and wonder if the authorities give (when the risk is present) or gave (when the risk occurred in the past) an appropriate response with regard to human rights. In this regard, they need to connect past or

¹ On this question, see also: Chr. HILSON, « Risk and the European Convention on Human Rights », *Cambridge Yearbook of Legal Studies*, 2009, pp. 353-375 ; C. HEARD et D. MANSELL, « The European Arrest Warrant : the Role of Judges when Human Rights are at Risk », *New Journal of European Criminal Law*, 2011, pp. 133-147 ; F. C. EBERT et R. I. SIJNENSKY, « Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention? », *Human Rights Law Review*, 2015, pp. 343-368 ; R. SCOTT, « Risks, Reasons and Rights : the European Convention on Human Rights and English Abortion Law », *Medical Law Review*, 2016, pp. 1-33 ; L. SEMINARA, « Risk Regulation and the European Convention on Human Rights », *European Journal of Risk Regulation*, 2016, pp. 733-749.

current decisions or actions with their potential consequences, which means that they have to investigate the future. This is a kind of intellectual time travel. It is undertaken without any machine designed by a mad scientist, but it can imply very complex and controversial reasoning.

The research aims at exploring how the ECtHR proceeds when it has to deal with such cases involving the notion of risk. Beyond this descriptive analysis, the study investigates the relevant academic literature in fields that have gone further in the conceptualisation of risk (such as sociology) or have developed more sophisticated risk analysis methodologies (such as engineering or economic sciences). These analyses should help answering the following question: should the ECtHR (and other human rights judges) be guided by the scientific methodologies of risk analysis and assessment or should they continue to apply the rather intuitive approaches they have been developing for years? If we refer to the metaphoric title of this paper, it is not only a question of whether judges *can* travel in time, but, above all, of *how* they travel and of *how* their travel instruments could possibly be improved.

This paper is divided in two main sections. The first one relates to the ubiquitous nature of the concept of risk in a rather general perspective. It is where I summarize some of the considerations developed in other disciplines. In the second part, I focus on the ECtHR case law and try to provide answers to the research questions, using the material evocated in the first section.

I. RISK AS A UBIQUITOUS CONCEPT

2. – Risk Society – The concept of risk is everywhere. In the twenty-first century everyday life, individuals are expected to take into consideration the potential consequences of almost each of their decisions or actions. This trend is materialized in many concrete examples. It is a matter of being mindful of the health risks of various products, such as alcohol and tobacco, but also red meat or fish contaminated by plastic waste. When surfing on Internet, people are frequently reminded that their personal data are at risk and that they should act carefully. Even giving birth is analysed as a risk, not only for the woman whom body is concerned, but also for the coming child who could suffer of any kind of illness or malformation, and for his/her family who would have to adapt itself to such a situation.

Moreover, the ubiquitous nature of risk is clearly visible in the major current global issues. Challenges like climate change, the role of nuclear energy or the commercial war between superpowers are daily discussed in the media as worldwide risks. Speeches on the possibility of the extinction of humanity are no longer the exclusive preserve of groups driven by religious or spiritual considerations, but are now held by scientists and expressed in terms of risks rather than mystical threats.

The significance of the notion of risk has been demonstrated several decades ago already, through the work of sociologists like Mary Douglas², Ulrich Beck³, Niklas Luhmann⁴ or Antony Giddens⁵, or historians like Peter Bernstein⁶. While the authors draw different and nuanced lessons from their respective analyses, they agree at the very least that contemporary societies are facing risks more than ever. The observations they have made at the end of the twentieth century are confirmed and even reinforced today.

The risk society, described by these authors, is a tormented society: "it is neither self-confident nor dominant, it is (...), suspicious, worried, anxious (...)"⁷. This does not mean that we encounter more dangerous situations than our ancestors - on the contrary, the knowledge and technologies acquired allow us to control many dangers, such as many serious diseases -, but that we constantly seek solutions to optimally manage risks. Thus, as Patrick Peritty-Watel points out, "we live in a safer, but riskier world"⁸.

It is in this particular cultural and sociological context that authorities, including judges, have to identify, assess and manage many risks.

3. – A hardly definable concept of risk – Despite the ubiquity of the concept, it is difficult to define accurately what a risk is. Like "democracy", "risk" belongs to the notions that almost everybody talks about, but that is hard to describe in a precise and consensual way. It is not only difficult to define for lay people: it is also controversial for specialists⁹. Moreover, "given that experts use the words *risk*, *safety*, and *security* in ways that diverge from everyday understandings of these terms by non-expert audiences or interlocutors, there is always a potential for misunderstanding"¹⁰.

However, it seems to be possible to find a way through the mist and try to elaborate a basic definition that takes into consideration the elements that everyone agrees upon.

² M. DOUGLAS, *Risk and Blame: Essays in Cultural Theory*, New York, Routledge, 1992.

³ U. BECK, *Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Frankfurt am Main, Suhrkamp, 1986. For English translation, see: U. BECK, *Risk society. Towards a new modernity*, Sage, 1992.

⁴ N. LUHMANN, *Soziologie des Risikos*, Berlin & New York, 1991. For the English translation, see: N. LUHMANN, *Risk. A Sociological Theory*, New York, Routledge, 2002.

⁵ U. BECK, A. GIDDENS et S. LASH, *Reflexive Modernization*, Stanford, Stanford University Press, 1994; A. GIDDENS, "Risk and responsibility", *Modern Law Review*, 1999, pp. 1-10.

⁶ P. L. BERNSTEIN, *Against the Gods. The remarkable story of risk*, New York, John Wiley and Sons, 1996.

⁷ D. KESSLER, "Ulrich Beck et la société du risque", *Commentaire*, 2002, pp. 889-892, here pp. 890-891.

⁸ P. PERITTI-WATEL, *La société du risque*, 2nd edition, Paris, La découverte, 2010, p. 3.

⁹ B. FISCHHOFF, S. R. WATSON et C. HOPE, "Defining Risk", *Policy Sciences*, 1984, pp. 123-139, here p. 124 ; H. RIESCH, "Levels of Uncertainty", in : S. ROESER & al. (eds.), *Essential of Risk Theory*, Dordrecht, Heidelberg, New York and London, Springer, 2013, pp. 29-56, here p. 29 ; M. ANDRETTA, "Some considerations on the definition of risk based on concepts of systems theory and probability", *Risk Analysis*, 2014, pp. 1184-1195 ; T. AVEN, "Risk assessment and risk management : Review of recent advances on their foundation", *European Journal of Operational Research*, 2016, pp. 1-13, here p. 4. According to Terje Aven, who is currently a leading scholar in the risk analysis field, the absence of a common terminology in the field of risk analysis leads to a situation that he describes as "rather chaotic" (T. AVEN, "An emerging new risk analysis science: foundations and implications", *Risk Analysis*, 2018, pp. 876-888, here p. 883).

¹⁰ M. BOHOLM, N. MÖLLER, S. HANSSON, "The concepts of risk, safety, and security: applications in everyday language", *Risk Analysis*, 2016, pp. 320-338, here p. 321.

At least two components of risk can be highlighted. On the one hand, a risk implies the *potentiality* of an event¹¹. The notion of potentiality is closely linked to that of uncertainty: taking a risk means making « choices involving uncertainty »¹². When the result of a decision or an action is certain, there is no risk; on the contrary, risk implies the mere possibility of a particular consequence. On the other hand, the concept of risk (in the contemporary sense) also implies *adversity*¹³, i.e. the possibility that the choice may lead to a negative consequence, to a damage, that could affect life, health, environment, freedom, relationships, property, assets or any other value. In the 1970's, William D. Rowe described risk as “the potential for realization of unwanted, negative consequences of an event or combination of events to individual, groups of people or to physical or biological systems”¹⁴.

4. – Risk analysis and risk assessment – Given the significance of the notion of risk to any human undertaking, from the most trivial to the most ambitious, it is not surprising to observe that tools have been developed to help individuals, companies and institutions manage risks in an appropriate way. In particular, calculation system based on mathematical and probabilistic work as well as economic theory have been designed and improved from decade to decade¹⁵. This paper is of course not the place to explore it in detail. I would just like to extract the main principles so that I can refer to them when we come to the analysis of the case law of the ECtHR. If we stick to the basics, we can consider that risk management involves two complementary sets of operations: firstly, the identification of the risks implied by a decision and the determination of the level of these risks, which is intended to be an objective process (*risk analysis*), and, secondly, the more subjective evaluation of the acceptability of the quantified risk (*risk assessment*)¹⁶.

Regarding the first step, the risk analysis is fundamentally based on the determination of two elements: the *likelihood* and the *severity* of the potential damage. The level of a risk is the product of the values of these two factors, such that R (risk) = L (likelihood) x S (severity)¹⁷. One of the major difficulties in managing concrete risks is to effectively measure both parameters, especially likelihood. While it is possible to make probability calculation in some situations with a fairly high degree of accuracy, others are largely or entirely beyond human computing capabilities¹⁸, which may involve the use of

¹¹ M. BOHOLM, N. MÖLLER, S. HANSSON, “The concepts of risk, safety, and security: applications in everyday language”, *Risk Analysis*, 2016, pp. 320-338, ici p. 321.

¹² H. R. VARIAN, *Intermediate Microeconomics. A modern approach*, 8^e édition, New York et Londres, Norton, 2010, p. 217.

¹³ J. TAARUP-ESBENSEN, “Making sense of risk – A sociological perspective on the management of risk”, *Risk analysis*, 2019, pp. 749-760, ici p. 751.

¹⁴ W. D. ROWE, *An anatomy of risk*, Washington D.C., Environmental Protection Agency, 1975, p. 1.

¹⁵ T. AVEN, “Risk assessment and risk management: Review of recent advances on their foundation”, *European Journal of Operational Research*, 2016, pp. 1-13, ici p. 5.

¹⁶ See L. WILSON et D. MCCUTCHEON, *Industrial Safety and Risk Management*, Edmonton, The University of Alberta Press, 2003, p. XIX.

¹⁷ A. GARLICK, *Estimating Risk. A management approach*, Aldershot et Burlington, Gower, 2007, pp. 10-12 ; B. FISCHHOFF, “The realities of risk-cost-benefit analysis”, *Science*, 2015, aaa6516-1.

¹⁸ See already the difference between “unmeasurable uncertainty” and “measurable one” developed in 1921 by F. H. KNIGHT, *Risk, uncertainty and profit*, Boston and New York, Houghton Mifflin, 1921.

qualitative methods to complement the probabilistic approach¹⁹. This is why I prefer the word “likelihood” (which is a generic term) instead of “probability” (which refers to one of the available methods for assessing the likelihood)²⁰. The complexity of the analysis also results from the fact that uncertainty (that characterizes every risk) often consists of two distinct elements: one is inherent in the system being assessed (*ontological* uncertainty: we know that something produces uncertain consequences in certain circumstances), while the other results from imperfect knowledge or ignorance (*epistemic* uncertainty: we don’t know – or we are not sure to know – what consequences something produces in certain circumstances)²¹. In many cases, “our lack of knowledge may lead to probabilities and expectations resulting in poor predictions”²². While the difficulties in providing relevant measures are already great in the industrial, medical or environmental fields, it is even harder when we consider the potential consequences of human behaviour, the unpredictability of which is particularly high.

Once a risk has been identified and analysed, the next step is to examine the *acceptability* of this risk. It remains to be decided whether or not to take this risk, which raises the question of whether it is acceptable or not. This exercise is partially influenced by the first operation: a low risk is *a priori* more acceptable than a high risk. However, evaluating acceptability also involves other parameters, so that, in a concrete situation, a significant risk may be more acceptable than a lower one. This is because the benefit - understood here broadly, not only in the financial sense - that is expected when taking that particular risk is an essential element to be included in the analysis. One may agree to take a relatively high risk because one hopes to obtain a substantial advantage, while one may reject a low-risk option because it seems unsuccessful or because a similar result can be achieved by an even less risky way²³. This operation is necessarily subjective: it is above all a question of perception²⁴, which involves cultural and psychological factors, some individuals being more inclined than others to take risks²⁵. This is why “concluding that an activity is safe enough is a judgement based on both science and value”²⁶.

¹⁹ T. AVEN, "Risk assessment and risk management: Review of recent advances on their foundation", *European Journal of Operational Research*, 2016, pp. 1-13, here p. 6

²⁰ A. GARLICK, *Estimating Risk. A management approach*, Aldershot et Burlington, Gower, 2007, p. 12.

²¹ See H. RIESCH, « Levels of Uncertainty », in : S. ROESER et al. (éds.), *Essential of Risk Theory*, Dordrecht, Heidelberg, New York & Londres, Springer, 2013, pp. 29-56, here p. 31, that refers to previous works : I. HACKING, *The emergence of probability*, Cambridge, Cambridge University Press, 1975, and D. GILLIES, *Philosophical theories of probability*, London, Routledge, 2000.

²² T. AVEN, *Risk Analysis. Assessing Uncertainties Beyond Expected Values and Probabilities*, Chichester, Wiley, 2008, p. 47.

²³ B. FISCHHOFF, S. LICHTENSTEIN, P. SLOVIC, S. L. DERBY et R. L. KENNY, *Acceptable risk*, Cambridge, London, New York, New Rochelle, Melbourne and Sidney, Cambridge University Press, 1981, p. 3.

²⁴ On this topic, see M. N. FUNICANE, « The Role of Feelings in Perceived Risks », in : S. ROESER et al. (eds.), *Essential of Risk Theory*, Dordrecht, Heidelberg, New York and London, Springer, 2013, pp. 57-74.

²⁵ “People are often willing to take risks to avoid losses but are unwilling to take risks to accumulate gains” (C. GUTHRIE, “Prospect theory, risk preference, and the law”, *Northwestern University Law Review*, 2003, Vol. 97, No 3, 1115-1163, here p. 1116).

²⁶ T. AVEN, “Risk assessment and risk management: Review of recent advances on their foundation”, *European Journal of Operational Research*, 2016, pp. 1-13, here p. 2.

II. RISK IN THE ECtHR CASE LAW

5. – Context of the risk assessment – As I mentioned in the introduction, the European Court of Human Rights is often dealing with cases that lead it to assess risk. Various types of facts may be involved in these cases. The most common issues addressed in the case law include suicides of individuals who were under states authorities control (prison or military service)²⁷, violence on individuals who were notoriously threaten by other people²⁸, damages on persons and properties caused by natural disaster²⁹ or industrial accident³⁰, ill-treatment or torture of persons returned against their will to their country of origin³¹, *etc.* In these various situations, it can often be considered that the event that caused the damage was uncertain, but that there was an opportunity to anticipate it and, possibly, to avoid it. When a case reaches the ECtHR, judges have to assess the level of the risk and discuss the way states authorities manage(d) it.

Concerning the chronology, two types of situations may arise: either the Court is seized with regard to an alleged current risk (the possible damage is future) and must assess the current attitude of the public authority towards the risk, or the court is seized with regard to an alleged past risk (the possible damage - which may or may not have finally occurred³² - is also past) and the Court has to examine *a posteriori* how the authority has reacted to it. In the first case, uncertainty is obvious when judges consider the potentiality of an event. In the second case, the course of subsequent events is known (and therefore no longer necessarily uncertain), but the Court must reflect, in order to assess the potentiality of a damage, as if it were unaware of these events. However, lay people - and perhaps judges too - have a certain propensity to look at past risks with greater severity when an accident has finally occurred³³.

6. – Risk terminology – The word “risk” appears very frequently in the case law of the ECtHR. A quick research on *Hudoc*, the official search engine of the institution, shows that it used in more than four thousand judgements of a chamber or of the Grand Chamber. This quantitative information confirms the ubiquitous nature of the concept,

²⁷ See, for example, ECtHR, *Malik Babayev v. Azerbaïdjan*, 1 June 2017; ECtHR, *Renolde v. France*, 16 October 2008.

²⁸ See, for example, ECtHR, *Opuz v. Turkey*, 9 June 2009; ECtHR, *Osman v. the United Kingdom*, 28 October 1998.

²⁹ See, for example, ECtHR, *Budayeva v. Russia*, 20 March 2008.

³⁰ See, for example, ECtHR, *Öneryıldız v. Turkey*, 30 November 2004.

³¹ See, for example, ECtHR, *Paposhvili v. Belgium*, 13 December 2016.

³² Thus, the Court sometimes agrees to deal with a situation where a death has not happened (the damage has not occurred), but where a person has, at some point in the past, found himself in a situation where there was a serious risk to his life (see, for example, ECtHR, *Pisari v. Republic of Moldova and Russia*, 21 April 2015, § 54 ; ECtHR, *Selahattin Demirtaş v. Turkey*, 23 June 2015, § 30 ; ECtHR, *Brincat and others v. Malta*, 24 July 2014, § 82 ; ECtHR, *Eduard Popa v. Republic of Moldova*, 12 February 2013, § 45).

³³ C. DANNER et P. SCHULMAN, “Rethinking Risk Assessment for Public Utility Safety Regulation”, *Risk Analysis*, 2019, pp. 1044-1059, here p. 1048.

but is not very interesting in itself. It seems more relevant to examine with which other words and in particular with which adjectives the noun “risk” is used, since it will help to understand the approach of the Court when it has to deal with the concept of risk.

In the light of the foregoing, one may expect to find in the judgments some adjectives qualifying the risks that the ECtHR has identified. One may expect to read that such a high or serious risk, which has not been sufficiently taken into account by the authority, is a decisive factor in finding a violation of the Convention, or that the absence of anticipation in the face of a low risk is tolerated. Such occurrences exist, but are rather rare. It is not common for the court to express the level of the risk on a scale, as would a risk analysis specialist.

Indeed, the most frequent formulas that can be found in the relevant case law are “real and immediate risk” or simply “real risk”.

The first one is used in many cases where the right to life (article 2 of the Convention) is at stake. The ECtHR considers that a State violates the right to life if it has not taken adequate measures to prevent the materialization of a real and immediate risk to the life of an identified individual. These are in principle situations where the damage was not inflicted by the authorities themselves, but where the authorities should have intervened to try to reduce the risk that the damage occurs. The standard case is one where a person was threatened by somebody else, who finally implemented his criminal intentions, without being prevented by the authorities, while they were aware of the risk or should have been aware of it³⁴. The Court also commonly uses this formula when a person committed suicide while under the responsibility of the State (generally in a prison or in a military context)³⁵. Beyond the scope of Article 2, the notion of real and immediate risk has also been applied as a criterion to determine the existence of an obligation based on other provisions of the Convention. Thus, a State violates article 3 of the Convention when “the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”³⁶.

The key question is what the adjectives “real” and “immediate” mean. The Court, however, does not provide a general definition of these terms. We can even consider that a certain mystery surrounds the scope of the words, despite their frequent use. Based on a common definition of the word “real”, it should be considered as a risk that is “actually (...) occurring in fact; not imagined or supposed”³⁷. Understood in this way,

³⁴ The Court has developed this approach for the first time in *Osman v. the United Kingdom*, 28 October 1998, § 116. See also, among many examples, ECtHR, *Opuz v. Turkey*, 9 June 2009, § 130.

³⁵ See, for example, ECtHR, *Malik Babayev v. Azerbaijan*, 1 June 2017, §§ 67 and 70; ECtHR, *Trapeznikova and others v. Russia*, 1 December 2016, § 40; ECtHR, *Hiller v. Austria*, 22 November 2016, § 49; ECtHR, *Isenc v. France*, 4 February 2016, §§ 38 and 40; *Keenan v. the United Kingdom*, 3 April 2001, § 93.

³⁶ See, for example, ECtHR, *Dorđević v. Croatia*, 24 July 2012, § 139.

³⁷ *Oxford Dictionary* online.

the adjective "real" (translated as "réel" or sometimes "certain" in the French versions of the judgments³⁸) would not indicate a particular level of risk, but could mean that the Court only takes into consideration potential damage whose occurrence is objectively demonstrable, as possible consequences of a situation over which the authorities had some controls. As for the "immediate" nature of the risk, it probably implies that the potential damage is in the process of materializing. It is understandable, from the reading of some judgments, that the criterion is satisfied when threats appear to lead to "imminent materialisation"³⁹. The court, as an official body composed of lawyers, not of risk managers, is primarily interested in the question of *evidence*. A real risk would be a risk whose existence can be strongly demonstrated, independently of its level. When the Court requires the existence of an immediate risk, it refers to a risk that is clearly apparent, almost obvious, due to the chronological proximity of its potential materialization. The distinction between two kinds of uncertainties, which I have mentioned above (n° 4), could be helpful here: it could be argued that the ECtHR requires a reaction from States whenever there is a risk for which *epistemic* uncertainty is low, since there are sufficient data on the causality between a situation and a potential harmful effect.

This interpretation seems to be confirmed by the analysis of cases where the court uses the expression "real risk", without the adjective "immediate". The relevant cases have one thing in common: they concern situations where the State authority has to take a decision or an action, and is then required to consider the potential consequences of its intervention. Unlike the situations mentioned above (suicides, violence among individuals, *etc.*), where the authority is passive, here we are dealing with an active authority, whose initiative could contribute to an increase in the risk. In practice, this configuration most often occurs in a particular type of litigation. Many cases involve the expulsion or extradition of a person to a foreign State and lead the Court to wonder whether there is a real risk that he or she will be executed there (which would constitute a violation of article 2)⁴⁰, tortured or ill-treated (article 3)⁴¹, arbitrarily deprived of his or her liberty (article 5)⁴², or exposed to a flagrant breach of justice (article 6)⁴³. The absence of reference to the notion of immediacy seems logical here: when one examines the situation of someone before a decision is taken, the risk that he or she will suffer the harmful consequences of that decision is not perceived as immediate – in the sense of imminent – since its materialization depends, in particular, on the decision still to be taken.

³⁸ Compare the French versions of ECtHR, *Fernandes de Oliveira v. Portugal*, 31 January 2019, § 110, and ECtHR, *Giuliani and Gaggio v. Italy*, 24 March 2011, § 248.

³⁹ ECtHR, *Talpis v. Italy*, 2 March 2017, § 122.

⁴⁰ See, for example, ECtHR, *Allanazarova v. Russia*, 14 February 2017, § 99.

⁴¹ See, for example, ECtHR, *A.S. v. France*, 19 April 2018, § 60; ECtHR, *M.A. v. France*, 1 February 2018, §§ 51-52; ECtHR, *N.A. v. Switzerland*, 30 May 2017, § 41; ECtHR, *A.I. v. Switzerland*, 30 May 2017, § 48.

⁴² ECtHR, *El-Masri v. Former Yugoslav Republic of Macedonia*, 13 December 2012, § 239.

⁴³ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, 17 January 2012, §§ 261, 263, 271, 273, 275, 282 and 285.

7. – Risk reasoning – To complete the study, we propose to analyse the case law in another way and to apply a reading grid based on the basic elements that structure risk assessment theory, i.e. the concepts of severity, likelihood and acceptability. Through this approach, we seek, in the ECtHR's judgments, traces of the reasoning that is typically applied in risk assessment processes.

Regarding the concept of *severity*, the Court is led to investigate the existence of possible damage which is sufficiently serious to raise a question under the Convention. It is well known that the assessment of severity takes place as soon as the admissibility of a request is examined: the Court must check whether the applicant has suffered or could suffer a “significant disadvantage”⁴⁴. However, the severity analysis continues with the examination of the merits of the case⁴⁵. In many situations, the Court examines whether the (potential) damage exceeds a “minimum level of severity”⁴⁶; this operation means that the degree of severity must be assessed and that, below a certain level, the situation is presumed not to involve a violation of the Convention. On the other hand, when the bar is crossed, an alert level is reached. When a sufficiently serious (potential) damage is identified, the other parameters (likelihood and acceptability) are used to decide whether a violation of the Convention is finally found. A particular difficulty arises from the fact that, according to the Court, the assessment of the minimum level of severity is itself relative and depends on all the data in the case: in my view, this reflects a certain aggregation, or even confusion, between two parts of the reasoning: the one on severity of the potential damage and the one on the risk acceptance.

The assessment of the *likelihood* of a damage is at the heart of the cases involving risk. I will show, through two examples, how the court takes this dimension into account. Cases involving the expulsion of individuals to a foreign state will provide the first illustration. In these cases, the assessment of the likelihood of a harmful event (typically, ill-treatment) occurring in the country of destination relies on several elements. Among these, there are two types of data that often play a decisive role. On the one hand, the Court refers to the content of reports, produced by various governmental or non-governmental sources, which describe the situation regarding the compliance with human rights, and which sometimes indicate that a particular category of individuals is regularly the victim of violence, in a particular context, such as incarceration⁴⁷. On the other hand, the Court takes into consideration the possible existence of diplomatic guarantees given by the authorities of the State of destination, not to act in a way that would result in a violation of the Convention, in the particular context of the case under consideration⁴⁸. Furthermore, the Court sometimes seems to

⁴⁴ Article 35, 3, b, ECHR.

⁴⁵ The Court states that “in cases where the Court employs the consequence-based approach, the analysis of the seriousness of the impugned measure’s effects occupies an important place” (see ECtHR, *Denisov v. Ukraine*, 25 September 2018, § 110).

⁴⁶ See, for example, ECtHR, *Bouyid v. Belgium*, 28 September 2015, § 86.

⁴⁷ See, for example, ECtHR, *A.S. v. France*, 19 April 2018, § 62; ECtHR, *Saadi v. Italie*, 28 February 2008, § 131.

⁴⁸ See, for example, ECtHR, *Trabelsi v. Belgium*, 2 September 2014, § 122; ECtHR, *Saadi v. Italy*, 28 February 2008, § 147.

assume that some non-European States are not safe, which is a presumption that the likelihood of damage is higher in such States⁴⁹. As a second illustration, I focus on cases where the Court is seized after a suicide has been committed by an individual under the close supervision of the public authority. In each particular situation, the question is whether the contextual elements showed that the occurrence of the fatal act was likely. This may include, among other considerations, the medical record of the person⁵⁰, his or her prior unstable or alarming behaviour⁵¹ or the fact that he or she had already attempted suicide⁵².

The next step is to look for traces of reasoning on the *acceptability* of risk in the relevant case law of the ECtHR. This ultimate task includes determining whether the Court recognizes that the State may ignore certain risks (make a decision or refrain from acting despite their existence), without violating the Convention. We outline here two kinds of considerations in response to this question. First, the Court regularly holds that not every risk implies an obligation on the part of the State to prevent it. The Strasbourg judges underline that the positive obligation “must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities”⁵³. Basically, the Court recognizes that States have, in practice, limited capacity and resources with which they must operate. In this perspective, the Court takes into account “the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”⁵⁴. Since the States do not have infinite capacity, particularly in terms of human and financial resources, it must be recognized that they cannot react to and manage all the risks that could raise questions under the Convention. As to how they should allocate their resources, the Court naturally leaves the States a relatively wide margin of appreciation in determining their priorities⁵⁵. Secondly, it can be observed that other considerations, which derive from the overall dynamics of the Convention, are likely to make some risks acceptable. Even if the authority has the resources to identify and respond to risks, it does not have the right to do everything possible to achieve its ends - even the most legitimate ones, such as protecting people's lives. Thus, with regard to the prevention of violence, the Court takes into account “the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention [which respectively prohibit arbitrary arrests and protect

⁴⁹ A. PEYRE, « Ainsi parlait Daoudi, une jurisprudence pour tous et pour personne », *La Revue des droits de l'homme* [online], Actualités Droits-Libertés, published online on 18 May 2018.

⁵⁰ See, for example, ECtHR, *Perevedentsevy v. Russia*, 24 April 2014, § 98.

⁵¹ See, for example, ECtHR, *Kilinç and others v. Turkey*, 7 June 2005, § 45.

⁵² See, for example, ECtHR, *Renolde v. France*, 16 October 2008, §§ 87-89.

⁵³ See, for example, ECtHR, *Verein gegen Tierfabrieken Schweiz (VgT) v. Switzerland (No. 2)*, 30 June 2009, § 81.

⁵⁴ See, for example, ECtHR, *Talpis v. Italy*, 2 March 2017, § 101.

⁵⁵ See also Chr. HILSON, « Risk and the European Convention on Human Rights », *Cambridge Yearbook of Legal Studies*, 2009, pp. 353-375, here p. 358.

private and family life]”⁵⁶. This implies that States cannot be on the alert for any risk, even if they have the resources to do so. These legal limits to the capacity of the State are added to the material limits mentioned just before; they are particularly important in a rapidly changing society, whose technologies are precisely pushing back some of the material limits, for example, through devices that allow criminal risk to be assessed in real time.

8. – Intuitive reasoning or more science based approach? – The study of the relevant case law shows that the Court does not treat risk with the methodology and systematism of a risk manager. Its reasoning seems often more intuitive: it seeks evidence of certain risks to build its conviction, without necessarily detailing the steps of its analysis. However, it is possible to find, in the case law, traces of typical risk assessment reasoning. The transfer of certain concepts (severity, likelihood, acceptability) in the field of fundamental rights also makes it possible to think in an original way about certain major issues, like the margin of appreciation or the conflicts between different rights.

It seems to me that, in some cases, judges could find inspiration in the literature on risk analysis and management, since they are so often called upon to focus on this ubiquitous concept in decisive points in their judgments. There is however no point in arguing that the Court should radically change its way of reasoning in order to refer more explicitly to techniques that are commonly used by managers or engineers: this paper should not be understood as a call for mathematization of legal reasoning. Moreover, the controversies that animate risk analysis specialists encourage caution when attempting to transpose into the legal field concepts that are subject to discussion in the discipline that produced them.

Finally, to conclude, it should not be forgotten that a significant part of the risks at stake here are related to the future behaviour of individuals towards other individuals. In this respect, until the time machine is invented, it should be recognized that judges must integrate major ontological and epistemic uncertainties into their reasoning. In such cases, intuitions of several judges who deliberate together on complex facts is perhaps more efficient – and respectful of the human rights – than any more science based approach.

⁵⁶ See, for example, ECtHR, *Talpis v. Italy*, 2 March 2017, § 101.

Abstract

Human rights judges – namely the European Court of HR – often refer to the notion of risk. There are indeed many cases that concern a risk of harm (injury, death, *etc*) that could hurt a human right. In these situations, there is, under certain conditions, an obligation for the state authorities to react and try to prevent this harm in order to avoid a European Court judgment of violation.

When they are dealing with such cases, judges have to assess the level of the risk and wonder if the authorities give (when the risk is present) or have given (when the risk occurred in the past) an appropriate response with regard to the human rights. In this regard, they need to connect past or current decisions or actions with their potential consequences, which means that they have to investigate the future.

Even if judges do their job very seriously, they do not seem to have a clear methodology for pursuing this complex task. However, in other academic fields, especially in economics and engineering science, there is a rich literature regarding the notion of risk. Some risk analysis scholars even try to develop this topic as a proper field of science.

The research relates to the support that other fields could possibly provide to the legal reasoning of human rights judges. Some of the main questions are as follows: are key notions of the risk analysis process (severity, likelihood, acceptability) transferable to the human rights case law? should judges be guided by methodologies developed by risk specialists? or should they continue to apply the rather intuitive approaches they have been developing for years?