

Can Human Rights Judges Travel in Time ?

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

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Research seminar on the 22nd of July 2019

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Introduction : risk and (human rights) law

Law = **risk regulation system**

Law influences future human behaviour and reduces **uncertainty**



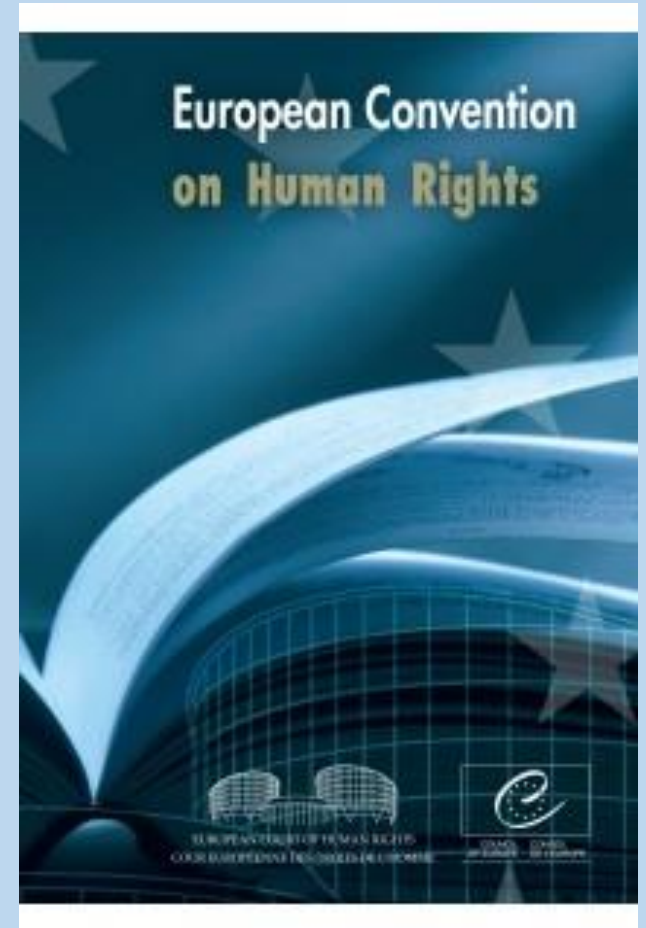
Introduction : risk and (human rights) law

Here, **focus** on Human Rights law (ECtHR case law).

Human rights law is a **part of this risk regulation system**.

Many cases concern a risk of harm (injury, death, *etc.*) that could hurt a HR (right to life, prohibition of ill-treatments, *etc.*)

ECHR can be the **legal basis** of an **obligation** for the States **to (try to) prevent some risks**.



Introduction : risk and (human rights) law



ECtHR is a **last instance body**: it does not manage risks, but sometimes controls how states authorities do.

Introduction : risk and (human rights) law

Two main research questions:

- 1) **how does the ECtHR proceed** when it has to deal with cases involving the notion of risk ?
- 2) **should the ECtHR (and other human rights judges) be guided by the scientific methodologies** of risk analysis and assessment?

Introduction : risk and (human rights) law

Structure of the presentation

- I. Risk as a ubiquitous concept
- II. Risk in the ECtHR case law

Section 1

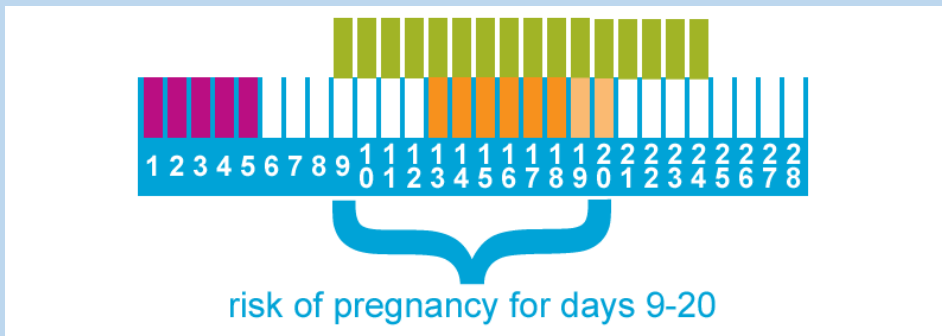
RISK AS A UBIQUITOUS CONCEPT

Risk as a ubiquitous concept

Risk society (facts)

The concept of risk is everywhere.

1) In the 21st century **everyday life**, individuals are expected to take into consideration the potential consequences of almost each of their decisions or actions.



Risk as a ubiquitous concept

Risk society (facts)

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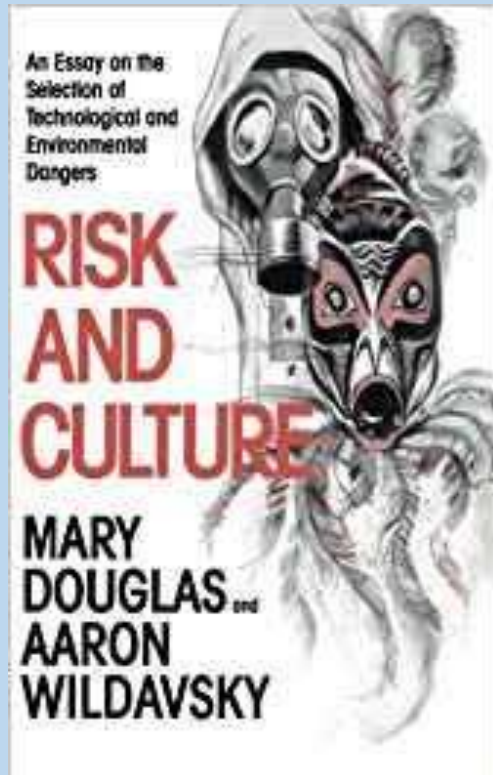
- 1) In the 21st century **everyday life**, individuals are expected to take into consideration the potential consequences of almost each of their decisions or actions.
- 2) The ubiquitous nature of risk is also clearly visible in the **major current global issues** (climate change, nuclear energy or commercial war between superpowers, etc.).



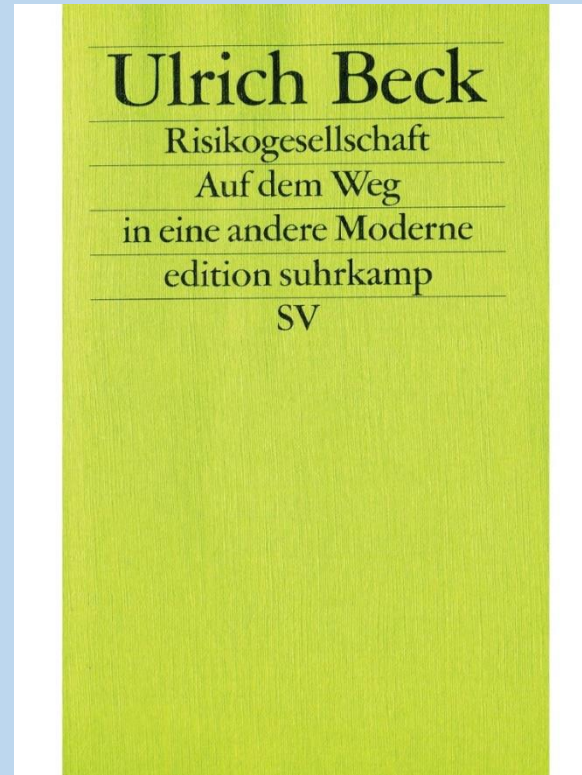
Risk as a ubiquitous concept

Risk society (literature)

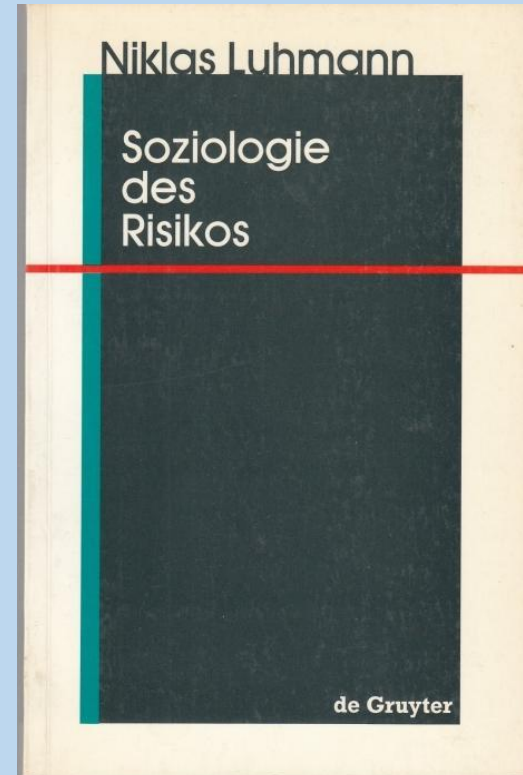
1981



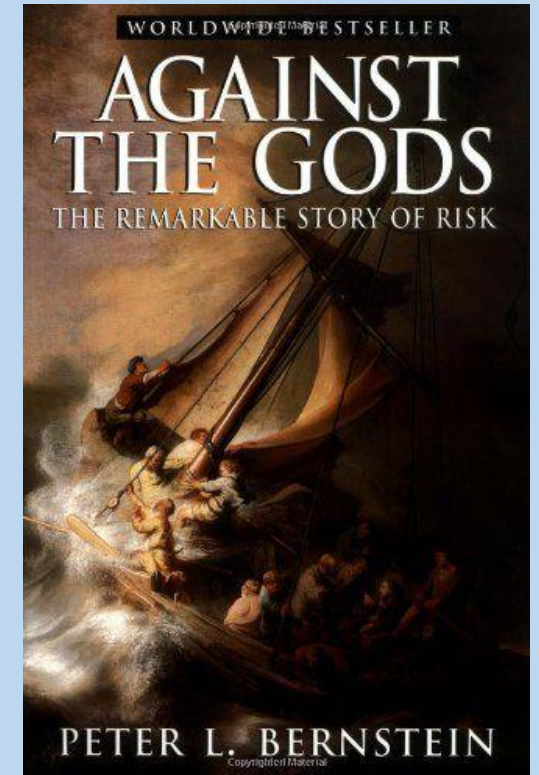
1986



1991



1996



Risk as a ubiquitous concept

Risk as a hardly definable concept

Difficult to define for lay people and controversial for specialists.

However, **two components** of risk can be highlighted:

- **Potentiality** of an event: choices under **uncertainty**
- **Adversity**: possibility that the choice may lead to a **negative** consequence



Risk as a ubiquitous concept

Risk analysis and risk assessment

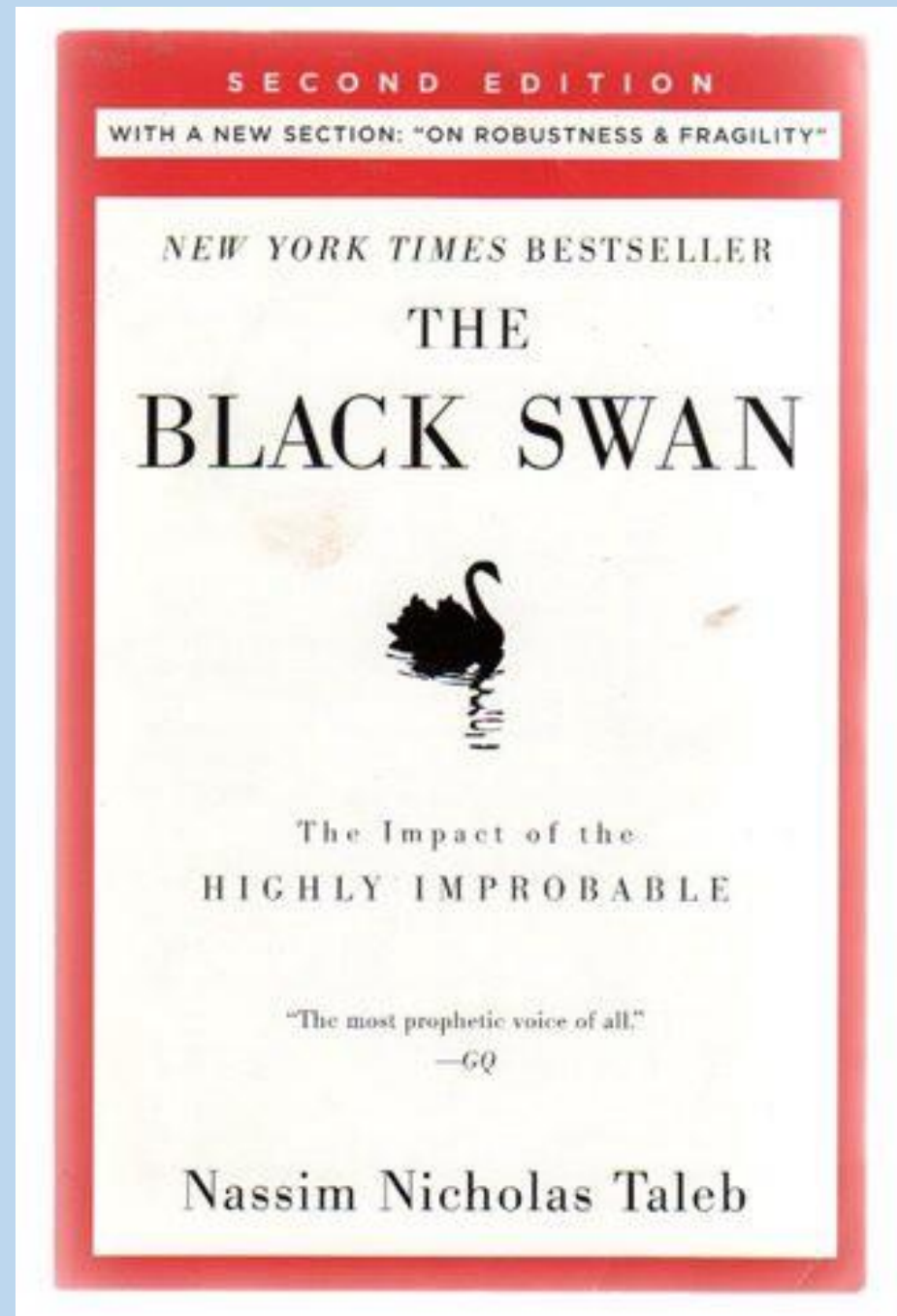
If risk is related to uncertainty, how can we analyse it?

Is it possible to assess the level of a risk to take it adequately into consideration in our decisions?

Complex and **controversial** questions :

- Development of a vast literature (*Risk analysis*, etc.)
- Definition of the basic concepts is not achieved (AVEN)
- Scepticism

« the applications of the sciences of uncertainty to real-world problems has had ridiculous effects »



Risk as a ubiquitous concept

Risk analysis and risk assessment

Traditional principles of the risk analysis theory:

The level of a risk depends on two factors:

(1) **Severity** of the potential damage

(2) **Likelihood** of the occurrence of this damage

$$\mathbf{R} \text{ (risk)} = \mathbf{S} \text{ (severity)} \times \mathbf{L} \text{ (likelihood)}$$

Risk matrix		Severity				
		Negligible	Minor	Medium	Major	Disastrous
L i k e l i h o o d	Very unlikely	Very low risk	Very low risk	Low risk	Moderate risk	Significant risk
	Unlikely	Very low risk	Low risk	Moderate risk	Significant risk	High risk
	Quite likely	Low risk	Moderate risk	Significant risk	High risk	Very high
	Very likely	Moderate risk	Significant risk	High risk	Very high risk	Critical risk
	Almost certain	Significant risk	High risk	Very high risk	Critical risk	Critical risk

Risk as a ubiquitous concept

Risk analysis and risk assessment

Traditional principles of the risk analysis theory:

The level of a risk depends on two factors:

- (1) Severity of the potential damage
- (2) Likelihood of the occurrence of this damage
- (3) **Acceptability / tolerability**

A risk is acceptable if

Expected **benefit** > risk level

Risk acceptance: **cultural** dimension



Risk acceptance: **local** dimension



Risk acceptance: individual/political dimension



Section 2

RISK IN THE ECtHR CASE LAW

Risk in the ECtHR

Context of the risk assessment by the Court

Most common issues addressed in the case law:

- **suicides** of individuals who were under states authorities control (prison or military service),
- **violence** on individuals who were notoriously threaten by other people,
- **damages** on persons and properties caused by **natural disaster** or **industrial accident**,
- **ill-treatment** or torture of persons **returned** against their will to their country of origin, *etc.*

Risk in the ECtHR

Context of the risk assessment by the Court

Concerning the **chronology**, two types of situations may arise:

- 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 this risk.
- the Court is seized with regard to an alleged **past risk** (the **possible damage** - which may or may not have finally occurred - is also **past**) and the Court has to examine *a posteriori* how the authority has reacted to it.

**CURRENT
RISK**

Assessment of the Court

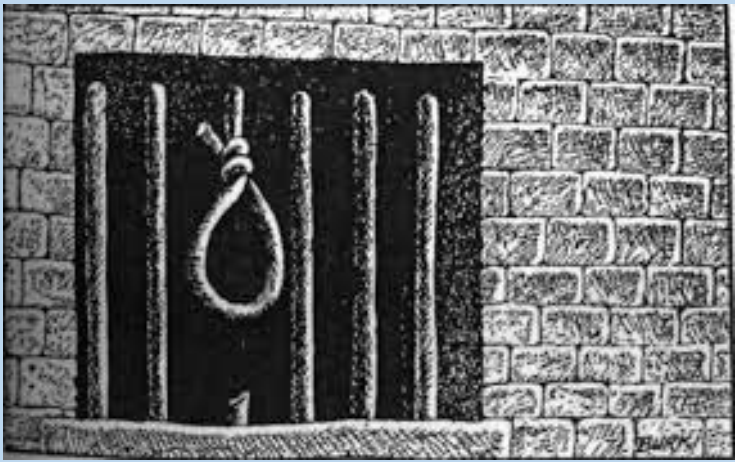
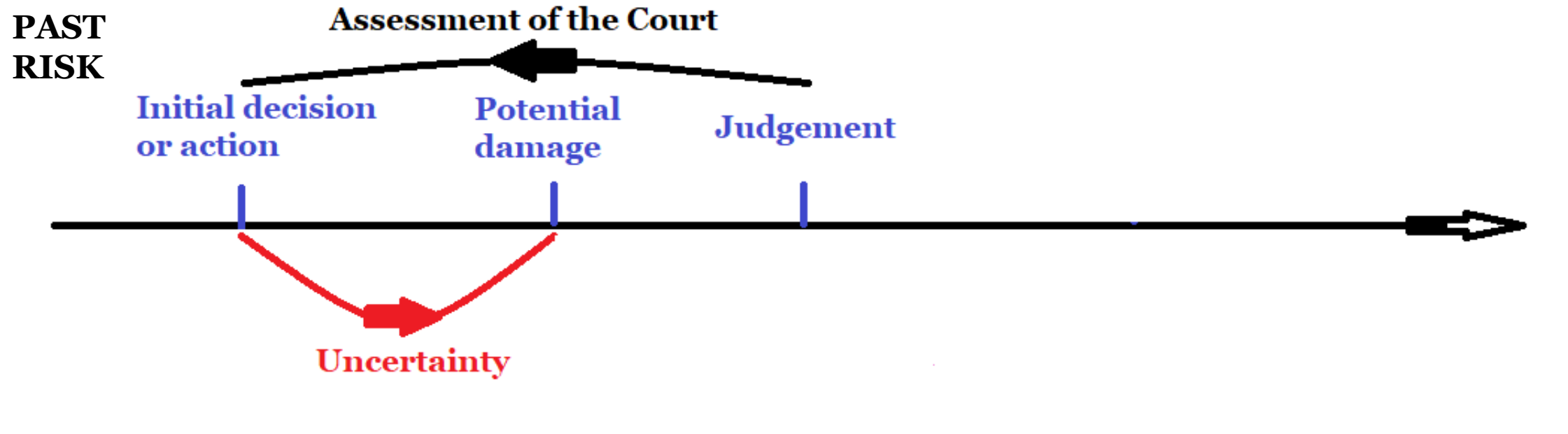
**Initial facts
or decision**

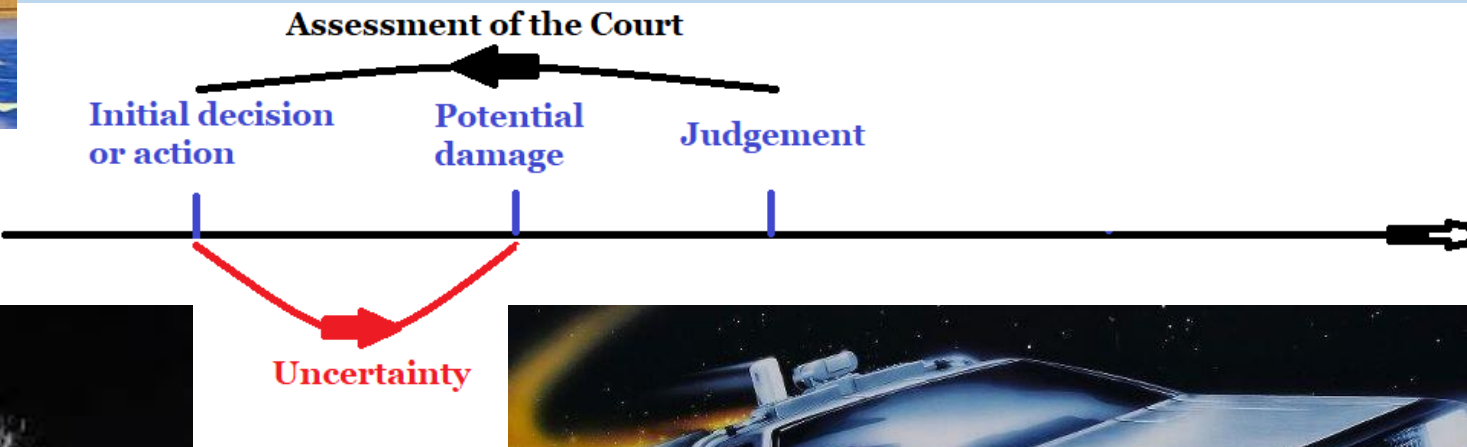
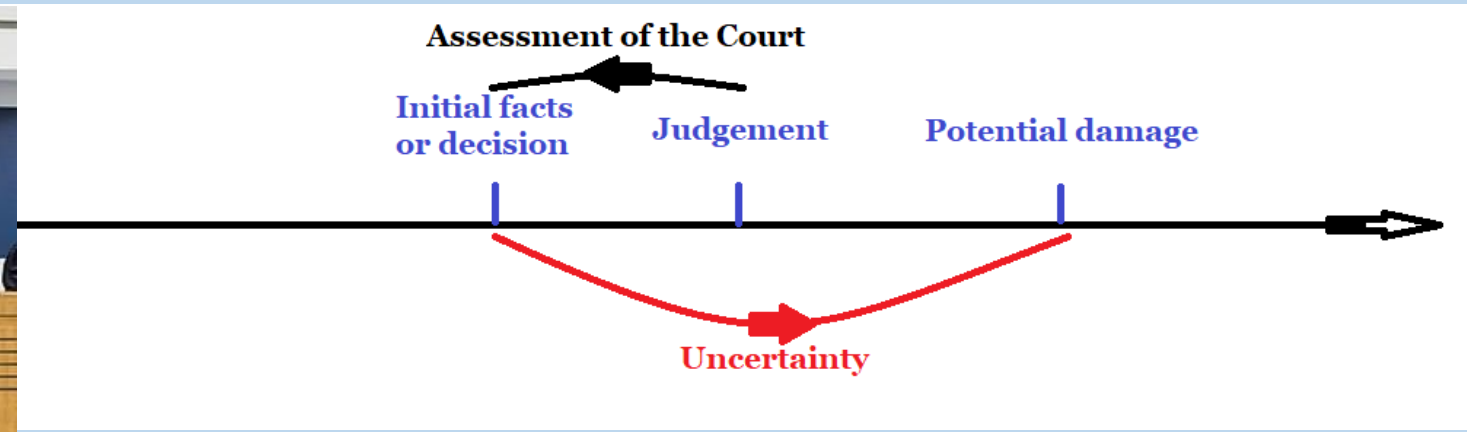
Judgement

Potential damage

Uncertainty







Risk in the ECtHR

Risk reasoning

As a **legal body**, the ECtHR does not assess the level of the risk as a risk manager would : the Court seeks **evidence of a relevant risk**.

Is (was) there a **real (and immediate) risk** that the authorities should prevent (or should have prevented)?

Risk in the ECtHR

Risk reasoning

Nevertheless, traces of the application of the risk analysis theory can be found in the ECtHR reasoning.

SEVERITY

- **Admissibility** : Court must check whether the applicant has suffered or could suffer a “**significant disadvantage**”.
- **Merits** : in many cases, the Court examines whether the (potential) damage exceeds a “**minimum level of severity**”.

Risk in the ECtHR

Risk reasoning

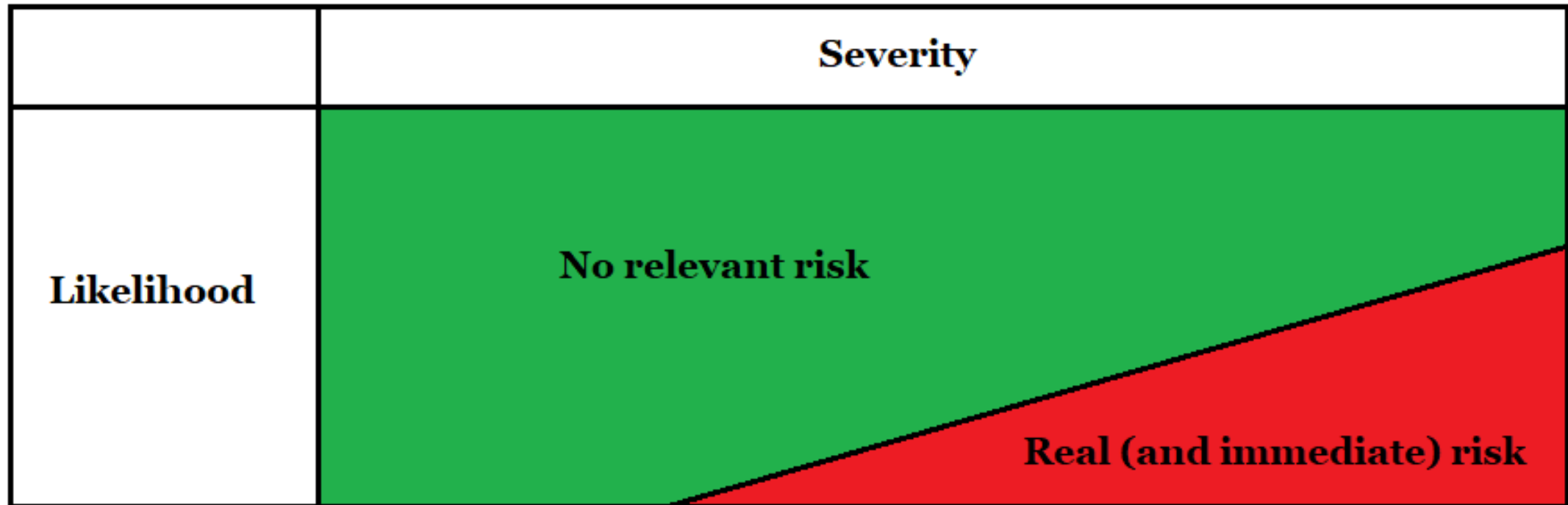
Nevertheless, traces of the application of the risk analysis theory can be found in the ECtHR reasoning.

LIKELIHOOD

- ECtHR seeks for evidence of the **plausibility of the potential damage**
- Example : when the return of a person to his/her country of origin is at stake, the Court analyses reports which describe the situation regarding the compliance with human rights in this country.

Risk in the ECtHR

Binary risk matrix of the ECtHR



Risk in the ECtHR

Risk reasoning

What about the notion of ACCEPTABILITY ?

Cultural, local, individual and political dimensions.

If the risk analysis science can help for the assessment of the severity and of the likelihood of a potential damage, we are here more dependent on the intuitions of judges.

These dimensions are reflected in the « margin of appreciation » that the ECtHR allows to the States.

Risk in the ECtHR

Risk reasoning

(1) Some risks are acceptable because the States have a limited **material** capacity.

The positive obligation “*must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities*”.

In particular, the Court takes into consideration “*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*”.

Risk in the ECtHR

Risk reasoning

(2) Some risks are acceptable because the States have a limited **legal** capacity.

For example, the Court takes into account

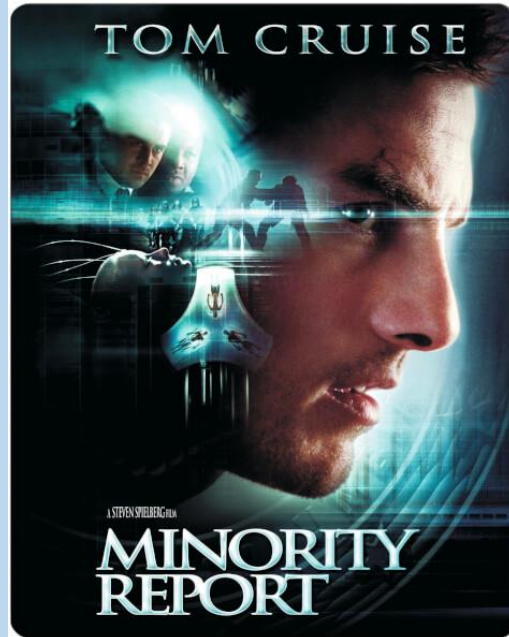
“the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention [which respectively prohibit arbitrary arrests and protect private and family life]”

Risk in the ECtHR

Risk reasoning

Technologies available today are reducing **material** limitations.
Legal limitations are therefore more important than ever.

2001



2019



Thank you for your
attention

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