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Is Risk Changing the Politics of Legal Argumentation?

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Abstract
While risk has established itself within the social sciences in general and international relations in particular as a theoretical concept in its own right, its 'value added' for understanding international legal processes and argumentation is still rather unexplored. While the dominant approach to risk and law focuses predominantly on the regulation of some specified risk such as diseases or environmental 'risks', this contribution argues that the overall semantic shift from 'threats' to 'risks' signifies an acceleration of time underlying legal argumentation. It introduces a distinction between norms and risks, highlights the respective temporality and reconstructs the current overlap and conflict between them in the case of the European human rights regime.

Key words
human rights; risk; time; uncertainty

According to Ulrich Beck, we lack an adequate vocabulary to capture what actually happened with and since 9/11.[1] Maybe it is this 'silence of worlds' that has led academic and policy circles alike increasingly to embrace the vocabulary of risk, precaution, and uncertainty to describe and assess danger:[2] not the avoidance of 'threats', so the argument goes, but rather the management of 'risks' characterizes current security practices.[3] While 'threats' emerged and were managed between

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1 U. Beck, *Das Schweigen der Wörter. Über Terror und Krieg* (2002); U. Beck, 'Living in the World Risk Society', (2006) 35 *Economy and Society* 329; K. Spence, 'World Risk Society and the War against Terror', (2005) 53 *Political Studies* 284.

2 See for example NATO, *The Alliance Strategy Concept*, available at www. nato.int/docu/pr/1999/p99–065e.htm; Amnesty International, EU Office, *Human Rights Dissolving at the Borders? Counter Terrorism and EU Criminal Law* (2005); European Security Strategy, *A Secure Europe in a Better World* (2003); National Security Council, *The National Security Strategy of the United States of America*, available at www.whitehouse.gov/nsc/nss.html; D. Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease', (2002) 27 *Millennium* 3. For further discussion see C. Daase and O. Kessler, 'Knowns and Unknowns in the War on Terror and the Political Construction of Danger', (2007) 38 *Security Dialogue* 411.

3 C. Aradau and R. van Munster, 'Governing Terrorism through Risk: Taking Precautions, (Un)Knowing the Future', (2007) 13 *European Journal of International Relations* 89; M. Dillon, 'Governing Terror: The State of Emergency of Biopolitical Emergence', (2007) 1 *International Political Sociology* 7; Daase and Kessler, *supra* note 2; S. H. Gotowicki, 'Confronting Terrorism: New War Form or Mission Impossible?', (1997) 77 *Military Review* 61; P. K. Davis and B. M. Jenkins, *Deterrence and Influence in Counterterrorism: A Component in the War on al Qaeda* (2002). Of course, one could argue that 'precaution' is not that unknown to international law, as for example in the *Corfu Channel* case of 1948 or its mention in the 1982 UN Convention on the Law of the Sea.

states, the notion of risk highlights the decoupling of security from states. With risk, security is not a value or goal that states 'pursue', but a product that states demand and both public and private military companies supply.[4] Risk points to a different rationality and different uncertainties prevalent in world politics, answered by illiberal practices such as torture, globally spread secret jails, terror lists, and the recourse to targeted killing flanked by a machinery of surveillance technology employed against one's own population.[5]

Yet the question remains of what the notions of uncertainty, 'precaution', or 'risk' stand for, how and why they challenge security as a concept, and thus what these notions may mean in the context of international law. In this vein, and without the hope of resolving associated confusions, the objective of this contribution is primarily conceptual – to enquire how this semantic shift from 'threats' to 'risks' could be applied to highlight some changing contours of international law. It argues that the turn to 'risk' can be understood as a change in the relationship between the present and the future, a change in the temporality of security politics. While security politics dealt with the resolution of existing dangers and conflicts, recent regulations are more proactive and try to prevent dangers before they materialize.[6] The Caroline criteria of necessity, immediacy, and proportionality, for example, limited self-defence to the present by demanding a 'visible' and 'imminent' threat before acts of self-defence could take place. The idea of pre-emptive self-defence, by which the US administration justified the Iraq war, shifted the modality of the threat from the actual to the possible, from the present to a likely, yet unknown, future.[7] It brought the future closer to present decision-making, since the possibility of a threat is now sufficient to legitimize counter-activity.[8]

From this perspective, risk replaces the politics of space by a politics of time and gives rise to a specific reasoning focused on how to deal with an unknown yet potentially catastrophic future. It points to the management of a potential future rather than to mechanisms of territorially defined dispute resolution; an attempt

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I fully agree – but while precaution is an established principle in environmental law, its application in the context of counterterrorism and international security politics is new.

4 See Dillon *supra* note 3, Beck, 'Living in the World Risk Society', *supra* note 1.

5 Daase and Kessler, *supra* note 2. See also, for example, Security Council Resolution 1267 of 15 October 1999, which established a Sanctions Committee under the targeted sanctions regime against the Taliban. Resolution 1333 of 19 December 2000 and Resolution 1390 of 16 January 2002 supplemented Resolution 1267 and extended the travel and arms embargo.

6 One could now argue that deterrence also was directed towards the control of the future. However, the danger deterrence tried to *prevent* was well known and indeed required an inter-subjectively shared vocabulary to assess and communicate threats and dangers. The recent move to precaution, as many statements by US officials emphasize, addresses the danger before it is known.

7 Of course there are differences between prevention, precaution, and pre-emption; I shall not discuss them at this point. The primary focus of this article is on the difference between norms and risks, and thus both pre-emption and precaution are located on the 'risk' side while 'prevention' follows the temporality of norms. Prevention takes place when, for example, someone knows a house will catch fire today and tries to prevent it happening – even if that includes infringing property rights. 'Precaution' would mean that one occupies the house, arguing that a fire could break out any time.

8 Daase and Kessler, *supra* note 2; Aradau and van Munster, *supra* note 3. For a deeper discussion of different notions of uncertainty, see O. Kessler, *Die Internationale Politische Ökonomie des Risikos* (2008).

to control the uncontrollable where international law, as David Kennedy has pointed out, is often used not to restrain but to legitimate violence.[9] However, the changing relationship between law and politics goes further than simple abuse of existing norms. Regulating the relationship between the present and the future, risk provides a different language to ascribe accountability and to allocate responsibility, and thereby creates new norms. In this sense, this temporality does not seem to stop at some border but seems to spread globally, with the consequence that Europe is perhaps more part of the 'willing' than it is ready to admit. Whereas EU documents highlight the compatibility of the fight against terrorism with human rights, the implementation of precautionary measures such as terror lists demands that the European Court of Justice (ECJ) re-evaluates the meaning of fundamental rights.[10]

This contribution presents its argument in three steps. The first section is conceptual and emphasizes the changing temporality accompanying the semantic shift from 'threats' to 'risks' or from 'insecurity' to 'uncertainty'. This change is recast, however, in terms of 'structured' and 'unstructured' uncertainty and explores some of the contours for a risk approach to the study of current legal changes by arguing that risk has to be seen in juxtaposition to the vocabulary of norms as a specific mechanism to manage the relationship between the present and the future.

The conceptual distinction between risks and norms guides the discussion in sections 2 and 3, where this contribution tries to reconstruct the two temporalities in the context of the European human rights regime. Section 2 is more historical and shows how the widely observed relationship or 'communication' between the European Court of Justice (ECJ) (including the newly established Court of First Instance (CFI)) in Luxembourg and the European Court of Human Rights (ECtHR) in Strasbourg could be understood in terms of a specific temporality inscribed in the vocabulary of norms – that is, the question of norm violation with existing victims and perpetrators. The third section focuses on how precaution and risk, the evaluation of possible harm, and the rights of possible perpetrators and possible victims seem to enter the European human rights case law in Luxembourg and Strasbourg differently, leading to a plurality of temporalities potentially in conflict with each other and thus changing the relationship of the European courts. However, the purpose of this contribution is not to make some kind of 'prediction' of what will happen or that developments are inevitable or necessarily long-lasting. It simply seeks to point to the conflict of different temporalities and how they are negotiated.

9 D. Kennedy, *Of War and Law* (2004).

10 See 'Guidelines on Human Rights and the Fight against Terrorism', adopted by the Committee of Ministers on 11 July 2002, available at www.coe.int/T/E/Human_Rights/h-inf(2002)8eng.pdf (last. visited 10 September 2008).

1. Risk, time, and the move to precaution

1.1. Two concepts of risk

To examine the relevance of risk for international law, it might be worthwhile to differentiate two concepts or approaches.[11] The dominant approach to risk follows a quantitative logic and defines it as the product of probability and expected loss, a definition often used by insurance companies or other surveillance institutions to describe the behaviour of sequences and to categorize and divide large populations into 'risk classes'.[12] This approach is concerned with the measurement of some specific risk, such as the measurement of the 'risk' of dying from a terrorist attack. Sometimes this measure is then compared with the measure of another 'risk', for example that of dying in a car accident, in order to compare the relative social value of some taken measure.[13] This often includes normative judgements of the kind that, for example, because of its lower 'risk', a large amount of money is spent in context A while the same money spent in context B would be 'socially' better and would make the world a better place.

As the reference to insurance companies emphasizes, the primary objective of this approach is to achieve necessary and certain knowledge about a contingent future. Of course, we may not know what number the dice will show next, but at least we know what the dice is, how it behaves, and what probabilities we can expect, as both the laws of probability and the 'laws of big numbers' apply. Hence the dice will always be a dice and will never change into a mouse. It is this static quality that allows actors to bet on future possible states of the world in such a way as to provide a constant and secure income stream – and ultimately to avoid risks. But it is also this quality that weds the concept of risk to a positivist philosophy of science and treats it in naturalistic terms. It is assumed that risk tells us something about the world and its causal forces and natural laws.[14]

Applying this understanding of risk to international law would point to the legal regulation of specific risks such as bovine spongiform encephalopathy (BSE) and nuclear plants, and thus the ways in which risks shape international regulation and regulations shape risks (the risk of regulation and the regulation of risk). It would focus, for example, on how courts address and deal with specific and

11 Of course, this is not to negate the existence of other approaches. However, I think that this division of approaches holds true for other approaches as well, i.e. that the other approaches are subdivisions of these two categories, rather than in contradiction to them. For an overview see B. Adam, U. Beck, and Jan Van Loom (eds.), *The Risk Society and Beyond: Critical Issues for Social Theory* (2000); D. Lupton, *Risk* (1999).

12 For the emergence of 'population' in this respect see I. Hacking, *The Emergence of Probability* (1975), and M. Foucault, *Security, Territory and Population* (2007). This insurance-based approach has had an immense impact on economic decision theory, where it is equally assumed that economic actors can frame an uncertain situation in statistical terms – that is, in terms of possible states of the world and probability distributions.

13 See, e.g., S. Lichtenstein and P. Slovic, 'Preference Reversals: A Broader Perspective', (1983) 73 *American Economic Review* 596; A. Tversky and D. Kahnemann, 'Rational Choice and the Framing of Decisions', in R. M. Hogarth and M. W. Reder (eds.), *Rational Choice* (1983), 67.

14 At the same time, the inscribed positivism requires time and space to be treated as natural conditions of our knowledge: unchangeable and fixed. Time, in other words, is the continuing progression of seconds, hours, and days, where something like a shift in time, as represented by precaution, can only occur in terms of a changed 'risk aversion' as some risk adversity increased. See F. C. Benenson, *Probability, Objectivity and Evidence* (1984).

identified risks, and some cases in international law do in fact address these kinds of question.[15] But following this approach would hardly justify any further discussion on the relevance of 'risk' as a concept, especially as this approach conflates the question of what risk 'is' with how it can be measured. It tells us nothing about the contemporary change in the *meaning* of risk: why does 'risk' as a concept experience such a career these days? What does this semantic shift signify? And what does it tell us about today's legal system? Such reflexive questions require an analysis beyond a purely quantitative logic that puts risk in the context of social structures.[16]

Such an approach becomes possible when we give up the positivist quest for certainty and replace it with contingency. This pushes the door open to a plurality of worlds where risk self-referentially points to itself: there is not only the risk of some fact, but there is also a risk of risk, a fundamental uncertainty and contingency underlying the structuring of the world via risk. In this context, risk functions more like a 'speech act': as soon as the vocabulary of risk, uncertainty, or precaution is applied, a specific set of institutions, a specific rationality, morality, and specific mechanisms to allocate blame and responsibility become relevant. Consequently, such a risk approach is not interested in the observation or measuring of some predefined risk, but in its 'gaze', the observation of other actors or systems and *how* they observe their world when they observe it with 'risk'.[17] Consequently, the positivist 'what' is replaced by the more interpretative 'how' question, emphasizing the drawing of boundaries, the intersubjective constitution of time and space, and the semantic construction of the world.[18] Such an approach is interested in the constitutive boundaries of risk, in what is hidden and what is up front, and how these boundaries are drawn, reproduced, and changed. In this sense, risk does not tell us something about the world, but of our engagement with the world: risk creates its own reality. It is not value-neutral, but linked to values and beliefs that formed and structured available alternatives in the first place, as Mary Douglas and Aaron Widavsky once explained:

> Whose fault? is the first question. Then, what actions? Which means? What damages? What compensation? What restitution? And the preventive actions to improve the coding or risk in the domain which has turned out to be inadequately covered. Under the banner of risk reduction, a new blaming system has replaced the former combination of moralistic condemning the victim and opportunistic condemning the victim's incompetence.[19]

Whilst economics-dominated approaches treat risk as a natural phenomenon – that is, start their analysis with exogenously given risks – more 'cultural' or societal

15 *Mox Plant* case, available at www.itlos.org/case_documents/2001/document_en_192.pdf; or the *Gabcikovo-Nagymaros* case before the ICJ.

16 See in particular N. Luhmann, *Soziologie des Risikos* (1991); M. Douglas and A. Widavsky, *Risk and Blame* (1982); U. Beck, *World Risk Society* (1999).

17 Essentially, the paper argues on the basis of auto-poietic systems theory. For second-order observation see N. Luhmann, *Social Systems* (1999), and N. Luhmann, *Essays on Self-Reference* (1990).

18 For a discussion on the social theoretical dimension see F. Kratochwil, *Rules, Norms and Decisions* (1989), L. Wittgenstein, *Philosophical Investigations* (1957), §19.

19 M. Douglas, *Risk and Blame: Essays in Cultural Theory* (1992), 16.

theoretical approaches uncover its institutional context. Of course, different avenues to define 'the social', the materiality of risks, and the power of discourses exist. These give rise to rather diverse even if not mutually exclusive literatures.[20] However, whether it is Beck's idea of a risk society, Foucault's interest in risk as a new form of governmentality, or Luhmann's sociology of risk,[21] they all put forward the idea that risk is neither an objective thing nor some kind of regularity or social law. Rather it is linked to social conditions of perceptions of how the world is understood and made known.

In this sense, Austrian and post-Keynesian economists have argued for an understanding of uncertainty which is used in *juxtaposition* to risk, where uncertainty describes a perceived unstructured reality, a tabula rasa we may experience in a state of complete ignorance, or with the breakdown of old convictions.[22] In these cases, this unstructured uncertainty needs to be absorbed and (re)structured in order to be subjected to risk decisions. The tabula rasa needs to be filled to provide contour and to allow for signification. Whether this absorption of uncertainty occurs via functional expertise,[23] conventions,[24] or institutions,[25] or ideas of risk themselves,[26] these 'mechanisms' all escape the confines of the quantity-oriented instrumental rationality or individual decision-making. Rather, who or what decides which kind of risk is observed – and which kinds are not – tells us more about social structures and the contours of a society than about 'the risks' themselves.[27] The question is thus not what risk 'is', but what it 'does'.

1.2. Risk and the regulation between the past, the present, and the future

At this point, it is worthwhile remembering that the notion of risk itself emerged only in the seventeenth century, when time was increasingly addressed not in terms of *aeternitas* and *tempus* but in terms of future and past.[28] The distinction of *aeternitas* and *tempus* framed time in religious terms by separating the sphere of God 'outside' time from the human condition marked by its temporality.[29] Apart from its inscribed hierarchical world view,[30] this distinction also emphasizes the past over the present

20 See *supra* note 4.

21 U. Beck, *Risk Society: Towards a New Modernity* (1992); M. Foucault, 'Governmentality', trans. R. Braidotti and rev. C. Gordon, in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (1991), 87; N. Luhmann, *Das Recht der Gesellschaft* (1993).

22 J. M. Keynes, *The General Theory of Employment, Interest and Money* (1936), 214; C. Menger, *Untersuchungen über die Methode der Socialwissenschaften, und der politischen Oekonomie insbesondere* (1871); F. A. von Hayek, 'The Use of Knowledge in Society', (1945) 35 *American Economic Review* 519.

23 F. Knight, *Risk, Uncertainty and Profit* (1921).

24 Keynes, *supra* note 22.

25 Menger, *supra* note 22; Hayek, *supra* note 22. See also F. A. von Hayek, *The Meaning of Competition* (1946); F. A. von Hayek, *Individualism and the Economic Order* (1949), 92.

26 D. MacKenzie and Y. Millo, 'Constructing a Market, Performing Theory: The Historical Sociology of a Financial Derivatives Exchange', (2003) 109 *American Journal of Sociology* 107.

27 For a discussion on the self-referential logic of institutional facts see J. Searle, *The Construction of Social Reality* (1997), 32.

28 This section draws from Luhmann, *supra* note 16; and, in particular, R. Koselleck, *Futures Past: On the Semantics of Historical Time* (1985).

29 See for example the suggestion of St Augustine that God knows no future or past, only eternal present. See *Confessiones*, Book 1, ch. 7, and his discussion of time and 'interest' in Book 9.

30 Most famously during the conflict between the Catholic Church and Galileo Galilei. See also P. Feyerabend, *Against Method* (1993). On the hierarchical world view, see for example the extent to which Latin as a mode of

and future.[31] This societal predominance of the past was constitutive for the idea of science and the legitimacy of power and authority, and it also set the confines within which it was possible to extrapolate the 'before' in the past and the 'after' in the future.[32] Only in the seventeenth century did the distinction 'past'/'future' replace the older form to demarcate the 'before' and 'after', which then altered not only the legitimation of power or the entire scientific vocabulary, but challenged the societal dominance of the past.[33] This shift in the temporal dimension from the past to the future allowed for the emergence of risk, where risk became the modern form of explaining future harm or a contingent outcome, a position previously held by Fortuna, sins, and ancient oracles.[34] Risk, in other words, provides a mechanism to regulate the relationship between the present and the future and highlights their individual contingency: risk connects the present and the contingent and yet unknown future in so far as the imagination of the future feeds back on actual decisions. Via the contingency of the future, the present itself becomes contingent, which requires that more alternatives are available than can be materialized. Risk, in other words, signifies a highly abstract arrangement of contingencies and thereby also regulates the relationship between the past, the present, and the future.[35]

Now one could argue that norms are quite similar in this respect. They are counterfactually valid, stabilize expectations over time, and thereby also regulate the relationship between the present and the future. And like risk, they reduce unstructured uncertainty and transform it into structured contingency which then manifests itself in questions of whether the right norm has been applied or a norm has 'really' been violated, or how issues of responsibility may arise.[36] Norms also structure situations in so far as they tell us not only about what behaviour is appropriate in some context but about what situation we actually find ourselves in, who the actors and the relevant competencies are, and how rights and duties are to be allocated. As every legal system has established a plurality of processes and structures by which these questions are settled, one could assume that the vocabulary of norms is entirely sufficient to deal with contingency within the legal

communication supported a hierarchical world view and the revolutionary impact of Luther by translating the Bible into German and thus making it comprehensible for the common man.

31 Ancient documents were, for example, seen not as 'books' but as authorities, subject to demonstration. See Hacking, *supra* note 12, ch. 3.

32 See St Augustine's treatment of the occult, *supra* note 29, Book 10. See also how the distinction of immanence and transcendence corresponds with *tempus* and *aeternitas*, leading to a conceptualization of time in religious terms. See J. Assmann, 'Das Doppelgesicht der Zeit im altägyptischen Denken', in A. Peisl and A. Mohler (eds.), *Die Zeit*, (1983), 189. See also the extent to which the modern treatment of time has departed from the language of movement. See, for example, C. Taylor, *Hegel* (1977); G. Günther, *Idee und Grundriss einer nicht Aristotelischen Logik* (1959). See also Luhmann, *supra* note 16, ch. 2.

33 See R. Kosselleck, *Vergangene Zukunft* (1979), Luhmann, *supra* note 16, at 41. The changes can be traced from the emergence of 'fashion' to the legitimacy of authority.

34 In this sense the reference to time immediately shows the social theoretical dimension of risk: risk is not independent of how societies frame and communicate about time. That images or representations of time have changed is widely accepted. Kosselleck, *supra* note 33; Luhmann, *supra* note 16, at 20.

35 Luhmann, *supra* note 16, at 70

36 This is not the place to engage in a lengthy discussion on the concept of norms from a systems-theoretical point of view. See Luhmann, *supra* note 21, and N. Luhmann, *Die Gesellschaft der Gesellschaft* (1998), ch. 5.

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system and its social consequences, and for an understanding of the ways in which it constructs its own reality.[37]

Although norms and risk both regulate the relationship between past, present, and future, they differ in one crucial aspect: risk is more forward-looking. Norms evaluate some incident in the past or in the present, whereas risk focuses more on a possible yet contingent future and only then asks how present alternatives are to be evaluated. This difference in the temporal dimension has led to the development of different social institutions that process associated contingencies differently. One need only remember that one cannot violate a 'risk' in the same way as one can violate a 'norm'. Of course, risk can become an issue in legal proceedings, when for example massive bad speculation raise issues of responsibility,[38] but such a translation of risk into norms shifts the underlying temporality in so far as it already implies an evaluation of some accepted risk in the past.

This difference in their respective temporalities suggests at the same time that recent interest in risk points to a change in the temporal dimension underlying the societal production of contingency. It points to an acceleration of time which transcends the confines of the vocabulary of norms. From this perspective, risk signifies the emergence of a different rationality within the legal system, a rationality which is based on a shift towards the future. If this analysis is correct, risk impacts on international law and its legal institutions, rationalities, and the question of the validity of norms via this altered temporality. In the context of the 'war on terror', risk provides a new formation of reason directed to controlling the potentiality of a danger. The control of this potentiality redefines fundamental political distinctions such as public/private, war/crime, civil/military, inside/outside, here/there, and inscribes itself into new security policies and military doctrines, in institutions, practices, and arguments. It redefines what is known and how it is known – and at the same time characterizes what is not known, kept hidden, or deliberately excluded;[39] what is thought to be manageable, what and how something is subject to regulation; and the technologies and rationalities of governing individuals, subjects, and actors, and potential 'risks'. In the following paragraphs, this contribution tries to trace these two temporalities. It uses the recent conflict between anti-terrorism and human rights as an example to reconstruct the impact of precaution on the European human rights regime.

2. Divergence and convergence within the European human rights regime

The previous section discussed two concepts of risk and argued that norms and risk can be seen as functional equivalents in allocating responsibility and accountability. They differ, however, in their respective temporality, the kind of uncertainty

37 For a discussion on norms see in particular F. Kratochwil, 'How Do Norms Matter?', in M. Byers (ed.), *The Role of Law in International Politics* (2000), 35.

38 In other words, when the distinction between gambling and investing breaks down, as in the recent case of Société Générale in a state of near-collapse. For a discussion on the distinction between investment and gambling see Kessler, *supra* note 8.

39 Daase and Kessler, *supra* note 2.

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they address, and the rationality to which they give rise. The vocabulary of norms addresses the kind of uncertainties that arise within a well-defined ontology and asks, for example, what norms apply in some incident in the past or the present, whether a violation took place, and what remedies might follow. Risk evaluates a possible incident in a yet unknown future, an only possible danger that feed backs on some actual decision problem. The second and third parts of this contribution try to identify these two temporalities in the context of the European human rights regime. This second part argues that 'communication' between Luxembourg and Strasbourg is constituted by the vocabulary of norms and its inscribed temporality, which allowed the two courts to communicate co-operation, threats, and conflicts. The third part traces the introduction of, overlap with, and potential conflict with the temporality of risk.

2.1. The institutional setting of the status quo

It is certainly fair to describe the European human rights regime as a rather diffuse set of institutions resulting in an equally diverse set of descriptions, interpretations, or perspectives. Without wanting to reduce its complexity, one key element is the inter-court relationship between the ECJ and CFI in Luxembourg and the ECtHR in Strasbourg.[40] A defining element in their relationship is their different sources of jurisdiction: while the ECtHR bases its jurisdiction on Article 19 of the ECHR and became with Protocol 11 to the ECHR the sole authority for interpreting the ECHR, the ECJ on the other hand derives its authority from Articles 220–245 of the EC Treaty, Article 35 of EU Treaty, its own statute, and 'general principles of Community law'.[41] Given this background, as is widely known, the ECJ had initially no jurisdiction over human rights issues but introduced them only gradually.[42] Yet the rise of human rights concerns within the EU did not translate into the EU's membership of the ECHR.[43] And although the Convention was 'mentioned' in the

40 I thank Laurent Scheeck for his comments on this part. For an introduction to the ECJ see A. Arnull, *The EU and its Court of Justice* (2006); R. Beddard, *Human Rights and Europe* (1994), J. Macdonald, F. Matscher, and H. Petzold, *The European System for the Protection of Human Rights* (1993). For the ECtHR see P. Mohoney and S. Prebensen, 'The European Court of Human Rights', in R. St. J. Macdonald, F. Matscher, and H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 638.

41 General principles of community law (mentioned in Art. 6(2) EUT) are used by the Court to fill 'gaps' in the treaty. As a body of unwritten principles, they allow for significant discretion and thus autonomy for the court. See U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (2000); J. Usher, *General Principles of the EC Law* (1999). As we shall see, fundamental rights entered the EU as such a 'general principle of law'.

42 The court even rejected taking human rights into account in *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community*, 1959, Case No. 1–58. A first indication of a change can be found in *Stauder v. Ulm*, where the court notes that fundamental rights were 'enshrined in the general principles of Community law and protected by the Court.' (Case 29/69, [1969] ECR 419, at 425, para. 7). The turn was manifested fully in *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle Getreide* (Case 11/70, [1970] ECR 1125), where the court argued that fundamental rights would constitute a fundamental principle of national legal systems.

43 For a discussion see L. Scheeck, 'Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance', *Questions de Recherchel Research in Question*, 15 (October 2005), available at http://www.ceri-sciencespo.com/publica/question/qdr15.pdf; O. de Schutter, 'The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination', New York University School of Law, Jean Monnet Working paper (2004); see also D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, in particular Twomey, 'The European Union: Three Pillars without a Human Rights Foundation'. See also J. Weiler, A. Cassese, and A. Clapham (eds.), *Human Rights and the*

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Maastricht Treaty (Arts. 2, 5(1)), the ECHR has not developed any binding force on the EU, as Article 6(2) of the EU Treaty reads:

> The Union shall *respect* fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[44]

In so far as the ECJ only 'shall respect' fundamental rights, the ECHR in itself does not have any binding force.[45] According to the treaty, the ECtHR has no jurisdiction over the EU itself, the ECJ is not bound by the ECtHR, and the ECJ has, formally speaking, no authority to settle human rights disputes.[46]

The growing importance of the EU itself was perceived by the ECtHR as marginalizing the Council of Europe, the ECHR and the court itself. To the extent that the ECJ claimed jurisdiction over human rights issues, the ECtHR feared losing ground, with the danger of being sidelined by the members of the EU: diverging judgments on similar topics would foster the image of fragmentation which would then allow political discretion and forum-shopping. At the same time, the emergence of human rights issues within the EU also provided an opportunity for the ECtHR. While its role within the EU as the sole judicial authority of the ECHR could be threatened, it could at the same time provide a means of securing its institutional survival if not the occasion to obtain a foothold in the EU – if Strasbourg could ensure that Luxembourg aligned its rulings with those of the ECtHR. For the ECJ, on the other hand, the gradual introduction of human rights concerns would extend its institutional supremacy within the EU.[47] However, the ECJ was to walk a tightrope. On the one hand, the ECJ could not accept the ECHR as binding for EU law itself, as this would have established the authority of the ECtHR within the EU. On the other hand, if the ECtHR were to declare the case law of the ECJ as being against the ECHR, states could use human rights and the ECHR to challenge its supranational status.[48]

European Community (1991); H. G. Schermers, 'The Scales in Balance: National Constitutional Courts v. Court of Justice', (1990) 27 *Common Market Law Review* 97.

44 Art. 6(2) EU Treaty, available at http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf (emphasis added).

45 Since the 1970s the ECJ has drawn 'inspiration' from the ECHR. In 2000 the EU itself issued two directives on anti-discrimination. On the current status of the Charter of Fundamental Rights, see www.europarl.europa.eu/charter/default_en.htm.

46 The Charter of Fundamental Rights proclaimed by the EU summit on 7 December 2000 has not yet become binding law. It was planned that the charter would be implemented as part of the new EU constitution, which, of course, has so far failed to be ratified. Although the charter is not legally binding in the formal sense, the ECJ and the CFI both use it as supplementary source of law.

47 Of course the question of supremacy is open to dispute. In its ruling in *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case No. 11-70, the court referred to the fundamental rights acknowledged by the states to justify its claim of the supremacy of EU law over national constitutions. See also the famous Maastricht *Urteil* by the German Bundesverfassungsgericht (Constitutional Court), concerning the relationship between the Maastricht Treaty and EU law and the German constitution, available at www.servat.unibe.ch/dfr/bvo89155.html.

48 That does not mean that there is no divergence at all. See, for example, *Hoechst v. Commission*, joined Cases C-46/87 and 227/88 (21 September 1989), Judgment of the Court of Justice; *Niemitz v. Germany*, [1992] ECHR (Ser. A), 251-B, paras. 29–33. For a more detailed discussion see Scheeck, *supra* note 43.

The 'solution' to this 'double contingency' was the creation of a common case law.[49] From the mid-1970s onwards, the ECJ increasingly referred to the ECHR in general in order to establish human rights as a 'theme' within the EU – and thereby create the demand for 'juridical' overview – that is, its institutional autonomy.[50] However, the court used the ECHR not directly, but, as for example in the *Internationale Handelsgesellschaft* case, in terms of 'general principles' of community law.[51] For example, the ECJ assured in the *Hauer* judgment that

> Fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the court. In safeguarding those rights, the latter is bound to draw inspiration from constitutional traditions common to the member states, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the community. International treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of community law.[52]

This passage is symptomatic of the ECJ's approach: it introduces human rights as part of general principles, speaks about 'inspirations' and 'guidelines', and sees itself more in line with national constitutional courts than with 'treaty law'. Meanwhile the court referred to the ECHR in more than a hundred cases.[53] However, these references follow a particular logic, as Laurent Scheeck demonstrates:

> The ECJ always specifies that the observance of the general principles of law is ensured by itself. A direct reference to the ECHR would imply recognition of the pre-eminence of the ECtHR – which is to ensure the observance of the ECHR – whereas an indirect use of the ECHR is a way of keeping Strasbourg outside of its legal order.[54]

The ECJ, in other words, makes sure that reference to the ECtHR does not develop any binding force – which could threaten the ECJ's institutional autonomy.[55] At the same time, Luxembourg actively aligns its case law with Strasbourg, which now holds a position of a 'quasi-constitution court' for questions of human rights, and thereby managed to pull the EU closer to the convention.[56] In other words, the

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49 See for example Todt, 'Human Rights', in *Encyclopaedia of European Community Law* (1990), 284.

50 J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', (2002) 29 *Common Market Law Review* 662, who argue that by changing from a defensive to an offensive mode, fundamental rights are used to extend the court's jurisdiction into areas previously reserved to member states and their courts.

51 See Scheeck, *supra* note 43, at 18. Meanwhile the court referred to the ECHR in more than 100 cases. See also E. Guild and G. Lesieur, *The European Court of Justice on the European Convention on Human Rights: Who Said What, When?* (1998); see also A. Rosas, 'With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts', (2005) *Global Community Yearbook of International Law and Jurisprudence* 203.

52 *Liselotte Hauer v. Land Rheinland-Pfalz*, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61979J0044, para 3.

53 See the *Baustahlgewerbe* case, where the ECJ refers to the ECtHR's case law for the first time. For a detailed analysis see Scheeck, *supra* note 43, at 23 ff.

54 Scheeck, *supra* note 43, at 20–1.

55 Ibid., at 24.

56 This shift may be best represented in the abandonment of the court's 'M. & Co.' 'paradigm' – which said that the court would refrain from EU-related issues – and its active embrace of issues with reference to EU law. Modified first in *Cantoni v. France* (45/1995/551/637), 15 November 1996, where the ECtHR accepted a case that addressed the implementation of a EU directive in national law. The Court avoided a direct engagement with the 'M. & Co.' doctrine as the violation of a national norm was interconnected, opening the way for Art. 1 ECHR. And finding that Article L. 511 was defective would therefore amount to making the same finding

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creation of a common case law, supported by regular meetings, pulled these two courts closer together while at the same time allowing the courts to increase their institutional autonomy.[57]

2.2. Communicating the status quo

How the two courts used their case law to strengthen the validity of their judgments can be seen in the case law concerning Article 8 of the ECHR. For example, in *Hoechst* v. *Commission*,[58] the ECJ had to decide whether the way in which the Commission pursued its investigations (Art. 14 of Regulation 17) violated the right to respect for the home provided for in Article 8(1) of the ECHR. By noting that there would be no ECtHR case law on this matter, the court rejected the extension of Article 8 to private businesses. In *Niemitz* v. *Germany*, the ECtHR followed the ruling of the ECJ.[59] The ECJ again clarified its *Hoechst* judgment in the light of new rulings by the ECtHR in the *Roquette Frères* judgment. By taking each other's decisions into account, the two courts not only increased the weight of their decisions, but signalled co-operation.

The courts signalled not only mutual support but also threats with their respective case law. In this respect, the *Matthews* case is quite instructive. In contrast to the 'M. & Co. paradigm' – that is that the ECtHR refrains from hearing cases concerning the EU – the ECtHR found that the United Kingdom is required to secure elections to the European Parliament notwithstanding the Community character of those elections: the Maastricht Treaty, with its changes to the EC Treaty, was entered into freely by the United Kingdom. Although the 1976 act might have been an act by the community, the Maastricht Treaty is not. The United Kingdom is therefore responsible *ratione materiae* under Article 1 of the Convention to secure equivalent protection of rights.[60] In other words, the members of the ECHR are responsible even after transferring their rights to an international organization. This implied that EU institutions are not allowed to take steps which would make it impossible for its members to fulfil their obligations under the ECHR. The *Matthews* judgment, in other words, requires that the EU recognize the ECHR as such and grant it priority in case of norms collisions.[61] The *Matthews* judgment was a strong signal to the ECJ. It was the first case in which the court held a member state responsible for a case rooted in community law. In particular, the ECtHR acted on a subject matter where

in respect of Directive 65/65. See in this respect also the German Constitutional Court's decision in *Solange* (*Solange* II) 1986, 73 BVerfGE 339. For the changing role of the ECtHR see e.g. *John Murray v. United Kingdom*, 18731/91 [1996] ECHR 3 (8 February 1996); *Roquette Frères* case C-94/00 [2002] ECR I-9011.

57 While ECJ had unilaterally already declared the supremacy of EU law in the first (Community) pillar in the 1960s, its influence in the second and third pillars are close to non-existent. See in this respect the Maastricht decision of the Bundesverfassungsgericht. On the other hand, especially the second and third pillars are particularly relevant in the fight against terror from a human rights perspective. A significant institutional impact of the anti-terror campaign on the ECJ is therefore almost certain.

58 Joined cases 46/87 and 227/88 ECR 2859.

59 See also *Roquette Frères* case, *supra* note 56. Also *Orkem v. Commission*, Case 374/87 [1989].

60 On the criteria of 'equivalent protection' see also the *Solange* Judgment, *supra* note 56.

61 A clear signal to the ECJ that caused some concern in Luxembourg. See also Scheeck, *supra* note 43.

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the ECJ itself did not have authority to review the case. As one EU official admitted, '*Matthews* was an annoying judgement round here.'[62]

A couple of months later the ECJ answered with its judgment in the *Baustahlgewerbe* case. The background to this case was the fining by the Commission of the German company Baustahlgewerbe GmbH for infringement of European competition law under Article 85(1) of the EC Treaty.[63] The company filed a suit against this decision and the CFI reduced the fine.[64] Against this judgment the complainant filed for an appellate proceeding by the ECJ on 14 June 1995, asserting an infringement of its right to a fair trial under Article 6 of the ECHR: the CFI had given its judgment 22 months after the close of the oral proceedings, in violation of the principle of promptitude.[65] The ECJ found no such violation, as 'the appellant has not established that the duration of the deliberations had any impact on the outcome of the proceedings before the Court of First Instance, in particular as far as any impairment of evidence is concerned'.[66] Yet the court stated, citing ECtHR case law,[67] that 'the reasonableness of such a period . . . [depends] on the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities'.[68] Although the CFI was granted extended time in exceptional cases, this would not apply to the present case.[69] Therefore the court considered that a reduction of the fine by 50,000 European currency units (ECU) was reasonable given the excessive duration of the proceeding. Otherwise, the court dismissed the appeal.[70] The streamlining of the case law was thus intended not to support but to keep the ECtHR out of the EU and avoid potential intrusion.

While the creation of a common case law allowed both courts to communicate with each other, the current constellation rests on rather fragile assumptions. For example, the status quo can be threatened by new developments within the EU. Meanwhile the European Union has created its own human rights instrument, the Charter on Fundamental Rights of the European Union.[71] It was originally planned that the charter would form an integral part of a future European constitution, and it is now subject to the dispute surrounding the Lisbon treaty.[72] How the Lisbon treaty will affect the current 'equilibrium' cannot be answered at this point, given the uncertainty of both the current process and of the likelihood of the EU becoming a member of the ECHR. However, if the ECJ is able to 'free' itself from the ECHR and the ECtHR, current endeavours to align their case law are likely to come to a

62 Quoted in ibid., at 33.
63 Art. 1 of Commission Decision 89/515/EEC of 2 August 1989.
64 *Baustahlgewebe GmbH v. Commission*, Case T-145/89, [1995] ECR II-987 (hereinafter *Baustahlgewerbe* case).
65 To be more precise, the proceeding commenced on 20 October 1989, the date on which the application for annulment was lodged, and closed with the judgment of the CFI on 6 April 1995.
66 Case C-185/95 P, Judgment, 17 December 1998, para 53.
67 In particular *Erkner and Hofauer* of 23 April 1987, Series A No 117, § 66; *Kemmache* of 27 November 1991, Series A No 218, § 60; *Phocas v. France* of 23 April 1996, *Recueil des arrêts et décisions* 1996-II, 546, § 71, and *Garyfallou AEBE v. Greece* of 27 September 1997, *Recueil des arrêts et décisions* 1997-V, 1821, § 39.
68 *Baustahlgewerbe* case, *supra* note 64, para. 43.
69 Ibid., paras. 30–47.
70 Ibid., para. 141.
71 See also the Single European Act 1987, where the European Convention is mentioned as a source for fundamental rights.
72 See Convention for the Future of Europe 2004, Art. 7.

standstill. The current co-operation between the two courts will then translate into competition, if not conflict.

What is more important for the purpose of this paper is the possible repercussions of a change in the underlying temporality of the constellation and 'discourse' between the two courts. The two courts used their case law to signal co-operation, competition, and conflict.[73] This communication, however, is based upon and structured by the temporality inscribed in the vocabulary of norms. The communication between the courts is based on a specific temporality defined by the legal rationality of 'responsibility'. The cases dealt with past incidents with victims and norms violations and were bounded by structured uncertainty. For example, the general information on procedures of the ECtHR reads,

> Any Contracting State (State application) or individual claiming to be a victim of a violation of the Convention (individual application) may lodge directly with the Court in Strasbourg an application alleging a breach by a Contracting State of one of the Convention rights.[74]

In other words, the cases took a past event as a vantage point from which to reconstruct the meaning of the case on their own terms. The temporality determined the range of possible arguments and the reasoning of the court. The past incident provided 'guidance' or 'inspiration' both for the present allocation of rights, duties, and responsibilities and for 'future' behaviour.

The temporal structure of the cases directly relates to notions of uncertainty and norms: the uncertainty relevant for evaluating and judging the cases was addressed by the vocabulary of norms. Legal questions addressed the issue of whether a norm was violated and what consequences might follow. What the turn to 'risk' now suggests is a reconfiguration of this temporality, a challenge to the norm-based legal rationality of 'responsibility' included. The next section suggests that the two courts differ in their approach to anti-terrorism measures. Luxembourg seems to incorporate the idea of precautionary measures as some kind of legal argument, whereas the ECtHR relies on the previous case law and temporality. It is beyond the scope of this paper to show whether or how the ECJ could thereby drive out the ECtHR. The primary objective is to show that 'risk' allows us to identify the emergence of a different kind of uncertainty that provides a different rationality in allocating accountability and responsibility within international law. However, the discussion does suggest that conflicts Arising from the two temporalities will manifest themselves in the second and third pillars (respectively a common foreign and security policy (CFSP), and police and judicial co-operation in criminal matters (PJCC)) of the European Union.

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73 See for example the opinion 2/94 (28.03.1996) by the ECJ that blocked the ECtHR by denying the competence of the EU to adhere to the ECHR. The Commission's requests for negotiating directives led the Council in 1994 to ask the ECJ under Art. 228(6) EC whether accession by the Community to the ECHR would be compatible with the EC treaty.

74 See Art. 25(1) ECHR, available at http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basic+information+on+procedures/.

3. Risk and the issue of human rights in times of anti-terrorism

Since the terrorist attacks of 9/11 the European Union has intensified its endeavour to formulate a coherent anti-terrorism policy. While the European response was characterized by diverging views and opinions, a meeting of the Justice and Home Affairs (JHA) Council on 20 September 2001 formulated the basic confines of the policy to come. Certainly its implementation was further stimulated by the United States and by binding UN Security Council resolutions, but already in December 2001 a Council Framework Decision put anti-terrorism measures into effect.[75] As the *Guidelines on Human Rights and the Fight against Terrorism* published by the Council of Europe emphasized, Europe would recognize the importance of human rights,[76] a position often defined in juxtaposition to the United States.[77] Whether or not the high status ascribed to European Convention on Human Rights justifies the idea of ascribing some kind of normative power to Europe,[78] the war on terror does affect the European human rights regime in so far as the European Union today takes a more precaution-friendly stance. For example, the EU Council fact sheet, 'The European Union and the Fight against Terrorism', published on 14 May 2007, emphasized that 'The first objective is to prevent people turning to terrorism', meaning that 'people' are continuously examined and subject to new surveillance machineries that help to identify potential subjects and put them under special regulation beforehand.[79]

Characteristic of this new precaution 'dispositif' is the practice of the terror list, where suspects are identified and then subject to 'targeted' sanctions such as the freezing of assets.[80] However, these identified persons do not have the right to be informed beforehand that they are treated as 'suspects', nor do they have a right to be heard or to a fair trial once their name is on the list. Rather, the

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75 Common Position 2001/930 aimed to deprive of all funds persons who commit or attempt to commit, or participate in, terrorist acts; Common Position 2001/931, which provides a definition of a terrorist act, included a list of some 29 individuals. See also Regulation 2001/930 and 2580/2001.

76 *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 803rd meeting of the Ministers' Deputies, published by the Council of Europe. See in this respect also E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 611, where she argues that the ECHR has evolved into a regional *jus cogens*. See also C. Warbrick, 'The European Response to Terrorism in an Age of Human Rights', (2004) 15 EJIL 989. See also D. Bigo. S. Carrera, E. Guild, and R. B. J. Walker, 'The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project', Centre for European Public Policy, Brussels, 2007, 4; E. Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the "Terrorist Lists"', (2008) 49 *Journal of Common Market Studies* 173.

77 C. Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism', (2002) 7 *European Human Rights Law Review* 287.

78 M. van Leeuwen (ed.), *Confronting Terrorism: European Experiences, Threats, Perceptions and Policies* (2003); [UK] Home Office, 'Counter Terrorism Powers. Reconciling Security and Liberty in an Open Society: A Discussion Paper', 2004, CM 5147, available at http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf; EU Network of Independent Experts in Fundamental Rights (CFR-CDF), 'The Balance between Freedom and Security in the Response of the European Union and its Member States to the Terrorist Threats', 2003.

79 I shall not discuss the European measures in detail. For a discussion see for example Ian Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-terrorism Sanctions', Report Council of Europe 06/02/2006; Ian Cameron, 'European Union Anti-terrorist Blacklisting', (2003) 3 *Human Rights Law Review* 225; Alicia Hinarejos, 'Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists', (2007) 7 *Human Rights Law Review* 772.

80 Common Positions 2001/930/CFSP, 2001/931/CFSP. For a detailed discussion see E. Guild, *supra* note 86.

processes of listing and de-listing are based on a rather dubious process of evidence gathering by secret services and their evaluation by 'specialized' committees. From this perspective it comes as no surprise that the EU formulated its countermeasures policy programme predominantly within the second and third pillars, where there is almost no juridical oversight by the ECJ.[81] The question relevant for this part is, then, how does this embrace of precaution by the EU affect the European human rights regime?

3.1. Jurisprudence in Strasbourg[82]

The well-known *Soering* case might provide an analogy of how the ECtHR approaches the war on terror. In that case a German national was to be extradited from the United Kingdom to the United States, facing charges of murder before a Virginian court. The ECtHR argued that such an extradition would constitute a violation of Article 3 of the ECHR, as a case of 'inhumane treatment' due to being on death row for a considerable time period.[83] It is of course noteworthy that the court did not base its argument on Article 2 and the right to life. However, this case also shows how the court treats 'future' threats: it ties the 'threat' to the modality of actuality, and even though the court did 'foresee' the likely result of a trial in Virginia, it did not evaluate the likely or possible 'threat', but rather the actual consequences of a past incident – that is, the factual consequences of the US legal system. In other words, the court engaged in prevention but not in precaution. This *Soering* judgment proved to be paradigmatic for the court's approach to preventive measures when it later argued that the ECHR does not allow for preventive detention for deportation if an immediate removal of that circumstance is not secured.

A case more concerned with the practice of blacklisting is *Segi and Gestoras Pro Amnestía* v. *the Fifteen Member States of the European Union*, where the court had to review the EU common position 2001/931 concerning anti-terrorism measures.[84] Segi, a Basque youth movement, regards itself as a promoter and protector of the Basque identity and language. Gestoras Pro Amnistía describes itself as a non-governmental organization for the protection of human rights in the Basque lands. On 5 February 2002 and 19 December 2001 respectively, the Spanish National Court magistrate, Judge Baltasar Garzón, classified the two organizations as part of the Basque terrorist organization ETA and ordered as a preventive measure a suspension of the associations' activities and the freezing of their assets. Blacklisted, without funds, and with their activities suspended, the two organizations filed an application to the ECtHR, arguing that these measures violated their rights to freedom of expression and association as well as their property rights. In its ruling the ECtHR dealt at length with EU common positions and the second and third pillars. Ultimately the court declared the application inadmissible because of a lack of victim status. The

81 Regulation 2580/2001, 27 December 2001. See also Title V of the EUT, which excludes explicitly acts under CFSP from review by European courts. In the third pillar, juridical oversight exists but is very limited.

82 For an overview of the jurisprudence of the ECHR on terrorism, see Warbrick, *supra* note 77.

83 See J. Dugard and C. van den Wyngaert, 'Reconciling Extradition with Human Rights', (1998) 92 AJIL 187. The judgment is in *Soering v. the United Kingdom*, Judgment, 7 July 1989.

84 ECtHR 16/23.5.2002, No 6422/02 and 9916/02.

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organizations would not be directly affected by the common positions as such but by their implementation by member states. At the same time the court pointed out that implementation of second-or third-pillar measures could, in principle, raise issues of responsibility under the Convention. In other words, while the court acknowledged its potential jurisdiction with respect to second-and third-pillar measures, an affected individual has nevertheless to be a victim, according to Article 34 of the Convention.

A similar tendency is detectable in the *Bosphorus* case,[85] addressing the relationship between the ECHR and EU legislation stimulated by UN Security Council resolutions. To address the violence in the former Yugoslavia, the UN Security Council adopted several resolutions, such as Resolution 820 of 17 April 1993, under Chapter VII of the UN Charter, imposing sanctions on the Federal Republic of Yugoslavia (FRY).[86] The EU implemented these resolutions with, for example, Regulation 990/1993. On the basis of these documents, a Turkish airline and travel organizer found one of its aircraft, leased from a Yugoslavian national airline, impounded by the Irish authorities. In the ensuing legal dispute the Supreme Court of Ireland requested the ECJ to evaluate whether the regulation concerned applied to private undertakings. To respond to this request the court needed to evaluate the proportionality and relationship of property rights and UN sanctions. The court argued that the resolution under consideration explicitly stated that it would apply to 'any aircraft which is the property of a person or undertaking based in or operating from the FRY'.[87] Accordingly, to the ECJ, it was not necessary to have actual or effective control over the aircraft, especially

> as compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violation of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.'[88]

After the Supreme Court's dismissal of the application the applicant claimed before the ECtHR that the impounding of its leased aircraft would breach the right to peaceful enjoyment of its possession according to Article 1 of Protocol 1 to the ECHR. In this judgment the ECtHR had to settle the question of whether or not member states can be held responsible under the ECHR for the implementation of Security Council Resolutions in EU law. It therefore had to compare an EU regulation with the ECHR. The ECtHR found that the second paragraph of Article 1 of Protocol 1 was applicable – that is, that a state can preserve the right to control the use of property in accordance with the general interest. True to its previous case law, the court did not interfere with the transfer of rights from states to an international organization. This international organization could not, as long as it was not a member of the

85 *Bosphorus Airlines v. Ireland*, Application No. 45036/98.
86 UN Doc. S/Res/820, 17 April 1993, available at http://www.ohr.int/other-doc/un-res-bih/pdf/820e.pdf.
87 *Bosphorus* case, *supra* note 89, Judgment, para 24.
88 Ibid., para. 26.

ECHR, be held responsible under the ECHR itself, as long as equivalent protection was provided by the organization. As EC law would provide such an equivalent standard, Ireland was not to be held responsible under the ECHR.

What is interesting in the judgment is the non-use of the term 'general interest'. General interest could – by identifying a state of emergency that 'terrorism' often is said to constitute – serve as an entrance for precautionary measures. As is pointed out in the judgment at paragraph 48, the 'general interest' to end the civil war could legitimize the impounding of the aircraft as a 'preventive' measure. In this case, the evaluation process would change, as the avoidance of violence and the rights of the potential victims would have to be compared with the rights of the (potential) offenders. However, the court argues differently, and discusses at length the relationship between the EU, the member states, and the convention, and the conditions under which issues of responsibility may arise.[89] This line of argumentation shows that 'there was no dysfunction of the mechanisms of control of the observance of Convention rights',[90] yet at the same time reserves the right to hold member states responsible for violations of the ECHR by the EU. This reinforcement includes Article 34 and the applicant's status as victim.[91] As the court itself writes, cases are struck out because the applicant's victim status ceased to exist.[92] The need for an actual victim binds the ECtHR to the temporality of its previous case law.

How that focus on the present frames the area covered by the court also became visible in the *Senator Lines* case, where the company Senator Lines asked the court to annul a fine of €12.75 million which had been imposed by the Commission for breach of antitrust law. Before the ECtHR could finalize its proceedings, the CFI decided on 22 October 2003 to annul the fine, leaving Strasbourg without a case. On 10 March 2004 Strasbourg decided that the application by Senator Lines was inadmissible by declaring that there were no longer victims. Whether or not the CFI deliberately annulled the fine to terminate proceedings at the ECtHR is beyond the scope of this paper. However, it does show that the ECtHR bases its case law on the temporality provided by the vocabulary of norms, that the ECtHR has not (yet) introduced ideas of precaution to assess accountability and clarify responsibility.[93]

89 Ibid., paras. 141–164.

90 Ibid., para. 166. It is noteworthy that the focus is on mechanisms of control and not on the violation of ECHR norms per se.

91 *Bourdov v. Russia*, no. 59498/00, § 30, ECHR 2002-III.

92 Available at http://www.echr.coe.int/NR/rdonlyres/0F2B45AE-4F54–41AB-AA8B-1E12D285110C/0/COURT_n1976742_v4_Key_caselaw_issues__Article_34__The_concept_of__the_victim___trad_eng.pdf.

93 One could now argue that the ECtHR also embraces precautionary measures in the context of the *Labita v. Italy* case (App. 26772/95), Judgment of 6 April 2000. Here the court also argued that 'In this connection, the Court considers that it is legitimate for preventive measures, including special supervision, to be taken against persons suspected of being members of the Mafia, even prior to conviction, as they are intended to prevent crimes being committed' (para. 195). Nevertheless, there are some differences. The court first of all put emphasis on the continued victim status of the applicant (para. 144). The court evaluates a *past* violation of the ECHR and argues that the mere association with the 'family' is not sufficient for justifying 'such severe measures being taken against him in the absence of any other concrete evidence to show that there was a real risk that he would offend' (para. 196). So Italy *did* violate Art. 2 of Protocol No. 4, arguments of precaution notwithstanding. What is interesting in this case is exactly the question of evidence. By demanding sufficient evidence of the 'real' risk, the actuality of the threat, the court would actually allow only for preventive, not precautionary, measures.

One of the reasons for this is probably the fact that only states can be defendants. The state first engages in some counterterrorist measure and only then does the court evaluate its compatibility with the ECHR. It can never evaluate the conduct of terrorists, which will only emerge as a background to legitimize specific state action.[94] But terrorists themselves will not be held responsible by the court. Ultimately, the ascription of risk to some specific individual to deprive that person of his fundamental rights, such as the right to a fair trial, or to eclipse the presumption of innocence does not work. Rather, the ECtHR seeks to downsize the threat of terrorism. It will certainly resist an application of Article 15, and in *Hulki Gunes* v. *Turkey* or *Klass* v. *Germany*,[95] the court tried to uphold the fundamental rights of the potential 'terrorists'. In other words, the court tries to attach the threat to actuality and not potentiality, as Warbrick observed: 'what the court required was that the nature of the particular threat to be demonstrated and the proportionality of the response be established'.[96] As such, the ECHR focuses on the location of the victim and less on the status of the 'terrorists' as risk.

3.2. Jurisprudence in Luxembourg

While the ECtHR avoided the question of whether or not 'targeted' sanctions were compatible with the ECHR, the CFI directly addressed this question by embracing precaution as a legal argument.[97] For example, in the *Yusuf* and *Kadi* cases the CFI had to address the legality of terror lists,[98] a measure introduced and fostered by the Security Council by several of its resolutions[99] and implemented via PJCC and CFSP EU regulations.

Ahmed Ali Yusuf, a Somali-born Swedish resident, and Yassin Abdullah Kadi, a citizen of Saudi Arabia, found their names on the list and overnight found themselves without funding; any external financing could have counted as the financing of potential terrorists. With two other persons, whose names were later removed from the list, they filed an application to the CFI arguing that according to Articles 60 and 301 EUT, the EU lacked competence for its regulations 881/2002, 467/2001, and 2199/2001 implementing Security Council Resolutions 1267, 1333, and 1390; that the regulations would violate Article 249 EG; and that they ultimately even violated fundamental rights as guaranteed by the ECHR.[100]

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94 *Brogan v. United Kingdom*, (1988) 11 EHRR 117.

95 ECHR, Series A No. 28, para 39.

96 C. Warbrick, 'The European Response to Terrorism in an Age of Human Rights', (2004) 15 EJIL 989.

97 For a discussion on sanctions see P. Wallensteen and C. Staibanò (eds.), *International Sanctions – Between Words and Wars in the Global System* (2005); D. Cortright and G. A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (2000).

98 For an evaluation see in particular the Council of Europe's Parliamentary Assembly memorandum, 'Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States', available at http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf. For a discussion see Guild, *supra* note 76; I. Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, (2003) 72 *Nordic Journal of International Law* 159; A. Biachi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', (2006) 17 EJIL 881.

99 UN Doc. S/RES/1267 (1999), UN Doc. S/RES/1333 (2000), UN Doc. S/RES/1390 (2002), UN Doc S/RES/1452 (2002).

100 *Kadi v. Council and Commission*, T-315/01 (available at http://curia.europa.eu), para. 78.

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Faced with the questions of whether and how the precautionary measure of terror lists would violate human rights, the court made a rather surprising move: it 'constitutionalized' the UN Charter and thereby established the legality and authority of the Security Council resolution for the EU. It argued that according to Article 103 of the UN Charter and Article 307 of the EUT, and

> from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.[101]

Referring to the ICJ opinion on *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*,[102] it observed that UN members agreed to accept and carry out the decisions of the Security Council (Art. 25 UN Charter). Hence, despite the fact that the community itself is not a member of the United Nations and that Article 25 of the Charter would therefore not apply to the EU itself, the creation of the EU would not somehow alter member states' obligations under the UN Charter,[103] particularly as the UN Charter was signed before the European Communities came into existence, and Article 297 of the EC Treaty explicitly accepted its obligation 'to carry out obligations it has accepted for the purpose of maintaining peace and international security'.[104] Since the EU is equally bound by the UN Charter,[105] the CFI would have no authority to review Security Council decisions per se:

> [T]he Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and . . . in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.[106]

However,

> [T]he Court is Empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[107]

If a resolution were to derogate from *jus cogens*, as recognized in the preamble of the Charter, then the members of the EU would not be bound by it, a point derived from Article 24(2) of the Charter.[108] The question for the court to answer was thus whether Security Council resolutions would violate *jus cogens*. The fundamental rights then

101 ibid., para. 228.
102 *Libyan Arab Jamahiriya v. United States of America*, [1992] ICJ Rep., paras. 42, 39.
103 *Kadi*, *supra* note 100, paras. 242 ff.
104 Ibid., para. 238.
105 'Nevertheless, the community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it' (ibid., para. 243).
106 Ibid., para. 254.
107 Ibid., para. 277. See also para. 272.
108 Ibid., paras. 279, 281.

examined in detail by the court were the rights 'to make use of their property', 'to a fair hearing', and to 'an effective judicial remedy'.[109] However, it did not pursue the point of whether the resolutions would violate these rights, rather, it focused more on whether these rights would be part of *jus cogens* and found that they were not. Hence the Security Council did not violate *jus cogens*, the resolutions were binding, and the court had no authority to review these decisions. Consequently the court dismissed the application's action against the Council regulations.

What the judgment shows is that the CFI 'constitutionalizes' UN law and therewith introduces precautionary measures in its legal argumentation, while in its *Gestoras Pro Amnistía* decision the ECtHR dismissed the charge by the two Basque organizations assumed to have contacts with international terrorism, on the basis that the freezing of accounts had not yet occurred.[110] Playing out the different temporality, then, Luxembourg has already evaluated the conflict between precautionary security policy and human rights protection with important repercussions for the evaluation of evidence or the right to information. In its *Sison* judgment, for example, the CFI confirmed that it would have to balance restrictions on the right to information against the 'public interests' embodied in the fight against terrorism.[111] Overall, the CFI explicitly downplays the role of the ECHR and reduces the scope of influence of the ECtHR, and thereby loosens the net that the ECtHR had tightened in its *Matthews* decision.[112] Looking at *Segi and others* and the *Kadi* case, two cases that address the jurisdiction of the two courts concerning measures taken under the second and third pillars, the tensions arising from the two different temporalities at play manifest themselves quite openly, and it seems that there is increased competition between the courts concerning criminal matters.[113] At least the ECJ took crucial steps towards the third pillar with its *Pupino* decision and continues this trend in its recent judgments in the context of the fight against terrorism. The ECJ thereby not only tries to establish the supremacy of EU law in the third pillar, but it is the ECJ that protects fundamental rights in this area.[114] Strasbourg on the other hand could

109 Ibid., paras. 284–346.

110 CSDP 2001/930, 27.12 2001 ABl. Nr. L344 v. 28. 12. 2001, Council Declaration EG/2580/2001 27.12. 2001 Abl. Nr L344 v. 28.12.2001.

111 Joint cases T-110/03, T-150/03, and T-405/03, *Sison* [2005], 47/03, para 186. And although *Sison* is remarkable as the court annuls the council decision, the court still argues in para. 245 that 'in the present case, with more particular regard to the damage referred to in (a), (b) and (d) of paragraph 228 above, it is appropriate to note that the freezing of the applicant's funds, financial assets and other economic resources is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the person concerned to property in the assets in question but only the use (*Yusuf*, paragraph 299) and therefore the availability of those assets'.

112 Of course, this does not mean that this trend is irreversible or that there is a strong 'movement' in Luxembourg towards precautionary measures. However, the vocabulary of risk and precaution is introduced, the two different temporalities are at work. How it will develop in the future is hard to tell. The ECJ could always argue that blacklisting as a means of fighting terrorism is illegal. But as the opinion of the Advocate General Miguel Poiares Maduro suggests, such a move would include a re-evaluation of the relationship between EU and UN law.

113 See in this respect also recent jurisprudence of the ECJ concerning Art. 54 of the Convention Implementing the Schengen Agreement, or *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, C-303/05 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0303:EN:HTMLO), concerning the European Arrest Warrant Framework Decision. For further information see in particular http://police.homeoffice.gov.uk/publications/operational-policing/european-arrest-warrant.

114 For a further discussion see Scheeck, *supra* note 43.

always argue that the EU system is now regarded as 'deficient' and that a review of the ECJ judgments is necessary.

4. Conclusion

To foster its argument, this contribution has separated risk from norm as two modes of ascribing responsibility in international law. While the primary focus of norms is on the present or the past, risks are more future-oriented. This difference in temporality shows itself, for example, in the description of deviant behaviour and the kind of uncertainty addressed. In this vein the paper argued that the move to precaution as a new 'dispositif' or 'paradigm' of risk can be understood as a change in the temporal dimension of legal reasoning. Precautionary measures redefine the relationship between the present and the future and the uncertainties addressed. Legal rationalities are redefined, allowing for the unstructuring of situations and a re-evaluation of legal processes. Precaution alters the rules of information gathering, evidence, and argumentation in both politics and international law. As such, risk provides a new formation of reason and rationality based on the ever-present yet contingent terrorist act. It establishes itself as an alternative to the vocabulary of norms for the ascription of accountability and thus the allocation of responsibility.

The article has traced the impact of precaution in the context of the European human rights regime, characterized by a particular constellation between Luxembourg and Strasbourg. Whilst current links between these two courts are fragile and based upon a specific temporality underlying the distinction of victims and perpetrators, the move to precaution introduces a new reasoning into legal argumentation. While Strasbourg still bases its case law on the present, in the *Yusuf* and *Kadi* cases Luxembourg began to evaluate and compare the rights of potential terrorists and victims. Is it legal to deprive a suspected terrorist of some basic rights in order to save possibly thousands of lives? And how can these rights be compared with the human rights of that suspect? In any case, an answer to these questions will inevitably shift the balance between the ECtHR and the ECJ. The conflicts between these two temporalities, including the relationship between Strasbourg and Luxembourg as well as the relationship between the UN Charter and European law more generally, are currently negotiated. Even if the ECJ in its current review of the *Kadi* case were to set aside the CFI judgments – that can only be hoped for – the tensions between these two temporalities remain.