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# Coming to terms with precaution

## On the indications and implications of a norm of precaution in international environmental law and in the law of the European Convention on Human Rights

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”[F]öre Harrisburg då var det ju ytterst osannolikt att det som hände i Harrisburg skulle hända. Men sen så fort det hade hänt, då rakade ju sannolikheten plötsligt upp till inte mindre än hundra procent, så att det blev nästan sant att det hade hänt! Men bara *nästan* sant – det är det som är det konstiga. För det är fortfarande som om de går omkring och tycker, såhär lite mer i smyg, att det där som hände i Harrisburg, det var nog så ytterst osannolikt så att egentligen har det nog inte hänt. [---] Alltså, jag förstår mycket väl denna […] tvekan, därför att enligt alla hittills tillgängliga sannolikhetsberäkningar så har det ju varit så att en sån där olycka inträffar kanske bara nån enstaka gång på flera tusen år. Jag menar, då är det ju inte särskilt troligt att den skulle ha hänt redan nu, utan det är väl i så fall betydligt mera sannolikt att den har inträffat längre fram. Ja, och då kommer ju saken i ett helt annat läge. För […] det kan ju inte vi ta ställning till nu. Då. Eller hur det blir då.”

Tage Danielsson, 1979

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# Summary

Although public international law is sometimes referred to as the global legal order, its various disciplines are often considered in isolation. It is therefore interesting to investigate the relationships between the disciplines, because if they are too distant, it may be hard to claim that public international law is a single legal order. The purpose of this thesis is therefore to provide an example for future discussions *on* the interrelationships between public international law in general and its many disciplines, especially international environmental law and international human rights law, *and on* the development of general norms of public international law. To provide such an example, the thesis investigates if there is a norm of precaution in the law of the European Convention on Human Rights, the ECHR, similar to or the same as the precautionary principle in international environmental law. The possibility of a general norm and the importance of terminology in that context are also discussed. The aim is not to give definite answers, but to discuss the possibilities.

Initially, in section 2, the precautionary principle in international environmental law is examined through treaties, literature and case law. In short, the precautionary principle means that action to prevent environmental damage may have to be taken when there is a possible risk of such damage. For action to be required, the possible damage must not be insignificant and the measures necessary to prevent it must be proportionate. The mere fact that the existence of a risk is uncertain is not an excuse for inaction, though. The precautionary principle thus only gives rough guidelines but may be further specified by other norms to which it is applied. Its main function is to guide the interpretation of other norms in an environmentally friendly way. The precautionary principle has this effect, since the acceptance of uncertain risks as reason for action de facto means that the standard of proof is lowered and that the burden of proof may be shifted.

Section 3 is devoted to the ECHR. It is noted that the European Court of Human Rights, the ECtHR, interprets the Convention inter alia so as to make the rights effective. In the interpretation it can also take account of other rules of international law applicable between the parties. Motivated by the need for effectiveness, the Court has interpreted many rights as encompassing obligations for states to prevent individuals' rights from being infringed by other actors than the state. Thus, a norm of precaution could exist under the ECHR to ensure effectiveness. It may or may not exist because of inspiration from the precautionary principle in international environmental law. Three categories of case law of the ECtHR are reviewed, to give examples that may *indicate* a norm of precaution. Hence, an inductive method is used. The three categories concern state obligations under Article 2 to protect the right to life, state obligations under Article 3 to protect people from being subjected to ill-treatment (with focus on cases concerning the

removal of aliens to other states), and state obligations under Article 8 to protect the rights to private and family life etc., in situations with environmental aspects. The investigated cases do indicate that there is a norm of precaution in the ECHR regime, meaning that, if it is proportionate, states may have to take precautionary measures against a risk of a violation of a right. There are many different kinds of risks which may threaten human rights, and therefore the required level of risk varies. To speak of the uncertain existence of risks (as opposed to the uncertain realisation of risks) as in international environmental law, is less suitable here, but the Court has at least accepted very tenuous risks as sufficient to require action.

When comparing the norm of precaution in the ECHR regime with the precautionary principle in international environmental law, in section 4.1, it is argued that the norm of precaution is in fact one and the same in the two disciplines, requiring the same conditions to be met in order for precautionary measures to be necessary. What varies is the meaning of these conditions, due to the different contexts. These adaptations are accommodated within the boundaries of the necessary proportionality assessment, however. This is possible since the norm leaves great discretion to states (and/or judiciary) applying it. The requirement of proportionality means that the norm cannot regulate details but only give guidelines.

In the speculative section 4.2, the fact that the norm of precaution is common in international environmental law and the ECHR regime and that it is motivated by the need for effective protection of the relevant interests, is considered to indicate the possibility of a general norm of precaution. A common (or general) norm is not excluded by the lack of a common term, but the use of a common term could promote the further development of the common norm and perhaps even inspire its application in other disciplines of public international law as well, since common terms can draw attention to connections which may otherwise be overlooked.

Finally, it is concluded that regardless of the existence of a common norm of precaution, the investigation implies that there can be similarities between different disciplines of public international law which may not be obvious at first glance. It would be beneficial to public international law at large if such similarities were identified, since it would promote a better understanding of the true nature of public international law and its claim on being a single legal order.

# Sammanfattning

Fastän folkrätten ibland kallas den globala rättsordningen, betraktas dess olika discipliner ofta enskilt. Det är därför intressant att undersöka förhållandena mellan disciplinerna, eftersom det är svårt att hävda att folkrätten är ett enskilt rättsområde om de är alltför avlägsna varandra. Syftet med detta examensarbete är därför att ge ett exempel som grund för framtida diskussioner *om* de inbördes förhållandena mellan folkrätten i allmänhet och dess många discipliner, särskilt internationell miljörätt och internationella mänskliga rättigheter, *och om* utvecklingen av allmänna folkrättsliga normer. För att tillhandahålla ett sådant exempel undersöks i detta examensarbete huruvida det finns en försiktighetsnorm under den europeiska konventionen om skydd för de mänskliga rättigheterna, EKMR, som liknar eller är densamma som försiktighetsprincipen i internationell miljörätt. Den möjliga existensen av en allmän norm och betydelsen av terminologin i det sammanhanget diskuteras också. Avsikten är inte att ge definitiva svar, utan att diskutera möjligheterna.

Inledningsvis, i avsnitt 2, undersöks försiktighetsprincipen i internationell miljörätt utifrån traktater, litteratur och rättspraxis. I korthet innebär försiktighetsprincipen att åtgärder för att förhindra en miljöskada kan behöva vidtas när det finns en möjlig risk för sådan skada. För att handling ska krävas, får inte den potentiella skadan vara försumbar och åtgärderna som behövs för att förhindra den måste vara proportionella. Endast det faktum att existensen av en risk är osäker är dock ingen ursäkt för passivitet. Försiktighetsprincipen ger således bara ungefärliga riktlinjer men kan specificeras av de andra normer som den tillämpas på. Dess huvudsakliga funktion är nämligen att vägleda tolkningen av andra normer i miljövänlig riktning. Försiktighetsprincipen har denna effekt, eftersom det faktum att osäkra risker accepteras som skäl för handling de facto innebär att beviskravet sänks och att bevisbördan kan växla.

Avsnitt 3 ägnas åt EKMR. Det noteras att Europadomstolen för mänskliga rättigheter tolkar konventionen bland annat så att rättigheterna ska bli effektiva. Den kan vid tolkningen också beakta andra folkrättsliga regler som är tillämpliga mellan parterna. Motiverad av effektivitetskravet har domstolen tolkat många rättigheter som att de medför skyldigheter för stater att förhindra att individers rättigheter kränks av andra aktörer än staten. Således skulle en försiktighetsnorm kunna finnas under EKMR för att just garantera effektiviteten. En sådan norm kan existera på grund av, eller oberoende av, inspiration från försiktighetsprincipen i internationell miljörätt. Tre kategorier av rättsfall från Europadomstolen undersöks för att ge exempel som kan *indikera* existensen av en försiktighetsnorm. Följaktligen är det en induktiv metod som används. De tre kategorierna rör statliga förpliktelser att skydda rätten till liv under artikel 2, statliga förpliktelser under artikel 3 beträffande skydd av individer från att utsättas för omänsklig behandling m.m.

(med fokus på fall som rör förflyttandet av utlänningar till andra stater) samt statliga förpliktelser att skydda rätten till privat- och familjeliv under artikel 8, i situationer med miljömässiga aspekter. De fall som undersöks antyder att det finns en försiktighetsnorm i EKMR-systemet som innebär att stater kan vara tvungna att vidta försiktighetsåtgärder gentemot en risk för en kränkning av en rättighet, om sådana åtgärder skulle vara proportionerliga. Det finns många olika typer av risker som kan hota mänskliga rättigheter och därför varierar nivån på den risk som krävs. Att tala om risker vars existens är osäker (till skillnad från risker vars realisering är osäker) såsom inom internationell miljörätt, är mindre lämpligt här, men domstolen har åtminstone accepterat väldigt svaga risker såsom tillräckliga för att kräva handling.

Vid jämförandet av försiktighetsnormen i EKMR-systemet med försiktighetsprincipen i internationell miljörätt, i avsnitt 4.1, argumenteras det för att försiktighetsnormen i själva verket är densamma i de båda disciplinerna och att den förutsätter uppfyllandet av samma villkor för att försiktighetsåtgärder ska krävas. Det som varierar är betydelsen av dessa villkor, beroende på de skilda sammanhangen. Dessa anpassningar ryms dock inom ramen för den proportionalitetsbedömning som måste göras. Detta är möjligt eftersom normen ger stort utrymme för diskretionära bedömningar av stater och rättstillämpare som tillämpar den. Proportionalitetskravet innebär att normen inte kan reglera detaljer, utan bara ge riktlinjer.

I det mer spekulativa avsnittet 4.2, anses det vara en indikation på att en allmän försiktighetsnorm är möjlig, att försiktighetsnormen är gemensam i internationell miljörätt och inom EKMR-regimen och att den motiveras av behovet av effektivt skydd av de aktuella intressena. En gemensam (eller allmän) norm utesluts inte av avsaknaden av en gemensam term, men användandet av en gemensam term skulle kunna främja den vidare utvecklingen av den gemensamma normen och kanske också inspirera till en tillämpning av normen även i andra folkrättsliga discipliner, eftersom gemensamma termer kan dra uppmärksamheten till kopplingar som annars kan förbises.

Slutligen konstateras att oaktat existensen av en gemensam försiktighetsnorm, så antyder utredningen att det kan finnas likheter mellan de olika folkrättsliga disciplinerna som kanske inte är uppenbara vid första anblick. Det skulle vara fördelaktigt för folkrätten i stort om sådana likheter identifierades, eftersom det skulle främja en bättre förståelse av folkrättens sanna natur och dess anspråk på att vara en enda rättsordning.

# Abbreviations

| | |
|---|---|
| EC | European Community |
| ECHR | European Convention on Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms (Rome) of 4 November 1950* |
| ECtHR | European Court of Human Rights |
| EIA | environmental impact assessment |
| EU | European Union |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| ITLOS | International Tribunal for the Law of the Sea |
| NGO | non-governmental organisation |
| OSPAR Convention | Convention for the Protection of the Marine Environment of the North-East Atlantic |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNECE | United Nations Economic Commission for Europe |
| UNRIAA | United Nations Reports of International Arbitral Awards |
| UNTS | United Nations Treaty Series |
| VCLT | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

# 1 Introduction

## 1.1 Background

Humans and the environment are not the same. There are many obvious ways of distinguishing a human being from a lake, or a tree, or a bird, and these differences are indisputable. But at the same time, humans and the environment are also one. Humans are part of the complex ecosystem on earth where living organisms and their surroundings interact, together making a whole that is more than the sum of the individual parts. Yet modern human life seems to be a desperate struggle for distance to and in oblivion of human origin, and as if nature is but a group of trees mercifully left un-engulfed by the growing sites of civilisation. When climate change and environmental destruction now increasingly threaten human life and interests, the unsustainability of this illusion becomes evident. When pieces of the jigsaw are separated, the bigger picture is easily lost.

This problem seems somewhat reflected in public international law. While public international law is referred to as the global legal order, its various disciplines sometimes seem quite separate or even independent and are often considered in isolation. It is not to be denied that there are differences between the various branches of public international law, but focusing on them may deepen a division between the disciplines. Such a division may have inherent dangers, in line with the separation of humans from the environment – the bigger picture may be lost. If the connections between the disciplines are indeed only few and weak, there may not be enough reason to claim that public international law is a single legal order. It is therefore important as well as interesting to investigate the features that are common to different disciplines of public international law and find the links that tie them together. It is important for the understanding of the nature of public international law – and its claim on the status of world legal order – to examine how the different disciplines relate to each other and influence each other and how general norms of public international law develop. Such abstract issues are best illustrated with concrete examples, however, which is where this thesis can be relevant.

Like any other branches of public international law, international environmental law and international human rights law may differ and correspond in many ways which may be more or less obvious. As an example, one aspect that appears to be a difference between these two disciplines is the fact that there is a norm known as the *precautionary principle* in international environmental law. This term does not seem to be referred to in international human rights law. One might wonder if this is a difference in legal content as well as in terminology or if there are in fact similarities between the two disciplines in their relation to *precaution*. Such thoughts are the point of departure for this thesis.

## 1.2 Purpose, questions and delimitations

The main question discussed in this thesis is whether or not there is a norm of precaution in the European Convention on Human Rights, the ECHR, similar to, or the same as, the precautionary principle in international environmental law. *The purpose* of this is to provide an example for future discussions *on* the interrelationships between public international law in general and its many disciplines, especially international environmental law and international human rights law, *and on* the development of general norms of public international law.

To fulfil this aim, the following questions are investigated.

1. What is the essence of the precautionary principle in international environmental law?

2. Might there be, through the practice of the European Court of Human Rights, some kind of norm of precaution in the ECHR?

3. Might there be a *common* norm of precaution in international environmental law and in the ECHR?

4. Are there any indications of a *general* norm of precaution in public international law? What may be the importance of terminology in this context?

These questions largely set the structure of the thesis, and are further explained in section 1.4 below.

In order to illustrate the interrelationships between different branches of public international law and provide a basis for discussions on the development of general norms, a comparison of norms regarding a certain issue in different disciplines seems necessary. Finding that a certain norm exists in one branch may not have much relevance for public international law in general, unless similar norms can be found in other branches as well. Therefore, comparison is essential. The example chosen concerns precaution in international environmental law and in the ECHR. This choice is based partly on personal interest, but there are other reasons as well. Firstly, to provide a useful example, it is necessary to investigate a norm which is explicitly recognised in one (or a few) discipline(s) of public international law but not in others. This norm must also appear to have the potential of being relevant outside of the regime(s) where it evidently exists – i.e. it must relate to problems which do not appear unique for the regime at hand. The *precautionary principle* in international environmental law seems to have such potential. Hence, this is the starting point.

Further, human rights law offers an interesting comparison with international environmental law since it is a discipline which at first glance appears very different. Despite this, precaution does not seem to be irrelevant for the protection of human

rights. Admittedly, the project could easily have been expanded to encompass other fields of public international law and/or international human rights law in general – and not just the ECHR. However, considering the limits posed by the timeframe and suitable extent of a graduate thesis that would have been ill-advised. The ECHR is also particularly fit for a study of this kind since case law from the ECtHR is rich and accessible and a generous supply of information – preferably case law, which provides practical examples – would seem necessary in order to properly define any legal norm. It must be noted, obviously, that the focus on the ECHR means that any conclusions cannot automatically be assumed to apply to international human rights law in general.

## 1.3 Terminology

Before turning to other issues, a brief note must be made on a few terms used throughout this thesis, to clarify their different meaning. Throughout the thesis the *precautionary principle* is referred to as the relevant norm of international environmental law. There are other names for this norm as well, which may, according to some, have slightly different meanings. This is further explained below, in section 2.1. For the purposes of this thesis, these terms are considered interchangeable – if nothing else is expressed – but it shall nevertheless be underscored that although the term *precautionary* ***principle*** is used here, this is not intended to imply anything about the legal status of the norm.

Further, the term *norm* is also used throughout this thesis in a way that is intended to be neutral. It is beyond the scope of this thesis to investigate the legal status of the precautionary principle or of any norm of precaution in the ECHR. While it is essential to the practical application of any legal norm to distinguish its legal status and determine if it is binding or not, this thesis is *only* concerned with the substance and meaning of these norms. In short, whatever implications may normally adhere to the term *principle* and to the term *norm*, these terms will in this context be considered neutral.

The significance of *terms* in shaping public international law shall not be underestimated, however. Questions related to terminology are discussed further in section 4.2 below. It shall be noted that although section 4.2 is primarily concerned with discussing previously presented information, a brief explanation of some theory concerning terms is also presented. The purpose of this is not to add new information to analyse, but rather to shed light on some ideas which may be used for the analysis.

## 1.4 Method and materials

It is explained in section 1.2 above that the thesis is based on the comparison between international environmental law and the ECHR regime. In other words, the method is comparative. On a more detailed level, the investigation is conducted through the examination of the precautionary principle in international environmental law (question 1) on the one hand, and the approach to precaution in the ECHR regime (question 2) on the other hand. The findings in regard to each question are then compared in order to assess the possibility of a common norm of precaution (question 3) and the results are finally used to discuss the possibility of a general norm of precaution in public international law and the importance of terms in that context (question 4).

The main concern of this thesis – i.e. if there is a norm of precaution in the ECHR similar to the precautionary principle in international environmental law and how this question can exemplify more general issues – does not appear to have been the object of much previous research. However, many of the aspects that must be assessed in order to fulfil the aim of the thesis have previously been examined separately. Consequently, the four questions of this thesis must all be tackled in slightly different ways, depending on the materials available. A related matter is the fact that since the examinations of the two disciplines are based on different materials and require different methods, the sections do not have an identical structure. This is mostly indicated by the lack of correspondence between the headlines of the sub-sections in sections 2 (concerning international environmental law) and 3 (concerning the ECHR). While the method and structure differ, however, both sections have the same purpose – to explain the approach to precaution in the discipline at hand.

In international environmental law the precautionary principle is somewhat defined, and it may therefore be examined through its use and interpretation in treaties and other instruments, literature and case law. The examination is conducted in four steps. Initially, the historical background of the precautionary principle is presented, along with examples of how it has been defined in treaties and other international instruments, to give an introduction and basic understanding. The legal context of international environmental law relevant to the precautionary principle is then described, because in order to understand the norm itself, the other norms along which it operates cannot be ignored. The next step is the examination of the different elements of the precautionary principle, i.e. the aspects that must be considered when it is applied. Finally, some effects of the precautionary principle are assessed. This assessment is necessary to clarify the practical meaning of the elements of the norm.

Literature is central in regard to international environmental law – much due to the scarcity of other sources. International case law is notably scant, but plays a

part in explaining the effects of the precautionary principle. Some literature is worth mentioning specifically, notably *International Law and the Environment*, by Patricia Birnie, Alan Boyle and Catherine Redgwell (Oxford University Press 2009), *Environmental Principles – From Political Slogans to Legal Rules*, by Nicolas de Sadeleer (Oxford University Press 2002), *Principles of International Environmental Law*, by Philippe Sands and Jaqueline Peel (Cambridge University Press 2012), and *International Environmental Law*, by Ulrich Beyerlin and Thilo Marauhn (Hart Publishing 2011).

Regarding precaution in the ECHR, another approach is necessary. The object of investigation must primarily be case law from the ECtHR, which is analysed in order to determine if the Court seems to rely on any norm that bears any likeness to the precautionary principle in international environmental law. To simplify the comparison, ECtHR practice is scrutinised using, as far as possible, the same terms and the same systematisation as are used to define the precautionary principle in international environmental law, in section 2.3. Before turning to case law however, some theory is required to explain how it is possible that a norm of precaution could be applied by the ECtHR. No such norm is explicit in the ECHR, so its possible existence in the ECHR regime must be motivated with how the Convention is interpreted and with the nature of state obligations. In regard to these initial issues, literature is of some importance, although it generally only plays a secondary part in the ECHR section. Worth mentioning are *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights*, by Harris, D. J., O'Boyle, M., Bates, E. P. and Buckley, C. M. (Oxford University Press 2009) and *Jacobs, White and Ovey, The European Convention on Human Rights*, by Rainey, Bernadette, Wicks, Elisabeth and Ovey, Clare (Oxford University Press 2014).

For the examination of case law from the ECtHR, an *inductive method* is applied.[1] The only way of establishing with absolute certainty the existence and scope of any norm of precaution in the ECHR would undoubtedly be to scrutinise *all* case law from the ECtHR. To do that within the limited scope of a graduate thesis would, however, be impossible – especially considering the fact that the quest is to investigate *if* something exists, not to investigate the nature of a known and already defined norm. Consequently, the examination of the practice of the ECtHR in this thesis is not complete, and it *can only* and *does only* aim at providing a few relevant examples. This would have been a problem if the aim was to establish the precise contents of ECtHR case law, but that is not the function of the case law study in this thesis. Case law is only needed to provide a basis for discussion on what norm of precaution might emanate from the ECHR – it is needed for suggestions rather than proof. Accordingly, this thesis does not intend to *prove* the existence of any kind of norm of precaution in the ECHR regime, but it at-

[1] On induction and logic, see e.g. Cohen (Carl), Copi and McMahon, inter alia pp. 24-27; Cohen (L. Jonathan), inter alia pp. 121-123.

tempts only at *indicating* the possible existence, or non-existence, of a norm of precaution of some kind.

Having said that, it must be underlined that case law is not selected entirely at random. Focus is on cases from three different categories, which are further explained in sections 3.1 and 3.2 below. A few remarks will be made here as well, though. The different categories of cases concern: state obligations under Article 2 of the ECHR to protect the right to life; state obligations under Article 3 of the ECHR to protect people from being subjected to ill-treatment (with focus on cases concerning the removal of aliens to other states); and state obligations under Article 8 of the ECHR to protect the rights to private and family life etc., in situations with environmental aspects. Under the third category – and also partly the first – cases with environmental aspects are assessed. Such cases are interesting because they may highlight differences between the ECHR and international environmental law since the same kind of event may be assessed differently in each discipline. Further, the use by the ECtHR of a norm similar to the precautionary principle may be more likely, or more appropriate, in such cases than in others. The second category consists of cases concerning the removal of aliens to other states. In these cases the ECtHR must examine what risks a person might face if forced to return to a certain country. Thus, these assessments actually concern hypothetical situations, and that would also seem to motivate the use of a norm similar to the precautionary principle. These cases, as well as the non-environmental cases under Article 2, also fill the function of contrasting against the environmental cases. The reason for examining cases belonging to different categories is to gradually distinguish human rights law cases from cases of international environmental law. Cases from the ECtHR concerning environmental matters may concern the same kind of situations that would be relevant in international environmental law. If a norm of precaution is applied in such cases, it might then be further analogised to other ECHR cases as well.

In relation to ECtHR case law, it shall finally be observed that the ambition is to find as recent case law as possible, since newer cases may contradict previous ones as the Court develops its practice. The more recent cases will be assumed to best represent the view of the Court.[2] There can, however, be no guarantees that all cases are found, as is explained above in regard to the inductive method. It is an ambition to give due regard to difficulties of this kind throughout the thesis.

After turning to international environmental law in section 2 and the ECHR in section 3, section 4 is the final part, where the overarching questions are discussed. In order to examine the existence of a common norm of precaution in international environmental law and the ECHR, the findings in regard to the approach to precaution in each regime are compared in section 4.1 – once again us-

[2] Regarding the similar idea of *lex posterior*, see further e.g. Peczenik, pp. 105-107.

ing partly the same systematisation as is elaborated in regard to the precautionary principle in international environmental law in section 2.3. The method in section 4.2, however, is slightly different. This section is of a rather speculative nature and the facts and conclusions of the previous sections are used here as the basis for a discussion on the possibility of a general norm of precaution and the role of terminology in relation to this. The aim is not to draw any definitive conclusions, but rather to consider the possibilities.

## 1.5 Structure

The first part of the thesis, section 2, is concerned with the precautionary principle in international environmental law, and aims at establishing the central ideas of this norm by examining its development and how it is defined in different international legal instruments (section 2.1), how it relates to other norms of international environmental law (section 2.2), what elements it is composed of (section 2.3) and what effects it has (section 2.4). Next part, section 3, deals with the ECHR and focus there is on finding what norm of precaution may exist in this regime. After some explanation of the theoretical context, i.e. some basic features of the interpretation of the ECHR (section 3.1) and the nature of state obligations (section 3.2), case law is examined (section 3.3). The examination of case law is divided in three sub-sections – one for each category of cases. The results of the study of case law are analysed in section 3.4. Subsequently, in section 4, the previous sections are tied together, and the actual comparison between precaution in international environmental law and precaution in the ECHR is made and the main questions are discussed – i.e. if there is a common norm and if there are indications of a general norm of precaution in public international law. Finally, the conclusions are considered in a larger context in section 5. Hence, the structure follows the order of the questions presented in section 1.2 above. The headlines also reflect this outline. It shall also be noted that throughout this thesis, no strict division is upheld between purely descriptive sections and purely analytical sections. Consequently, the materials presented are commented along the way, but sections 2.3, 2.4, 3.4 and 4 have a predominantly analytical character. The aim of the overall structure is promoting the legibility of the thesis and presenting the findings in the most intriguing way.

# 2 Precaution in international environmental law

## 2.1 Background and definitions of the precautionary principle

The precautionary principle has been referred to as one of the most important norms of international environmental law – even as being worthy of a high-ranking position among the Ten Commandments of international environmental law, if such a list existed.[3] The exact meaning, legal status and even name of the norm are, however, far from written in stone.

The antecedent of the precautionary principle originates from Swedish national legislation, where in the 1969 Environment Protection Act, risk of environmental hazard was sufficient for protective action from the authorities – or even a ban of the activity in question.[4] The Nordic countries and other European states such as West Germany and Switzerland soon followed and during the 1980s these ideas grew stronger throughout Europe. The EU subsequently accepted the precautionary principle as one of its central principles, through the Maastricht Treaty in 1992.[5] While the importance of the precautionary principle increased in Europe, the norm also gained influence in a wider international context – it was first referred to in various non-binding instruments, inter alia the UN World Charter for Nature in 1982 and in decisions by the North Sea Ministerial Conferences in 1984, 1987, 1990 and 1995 regarding marine pollution.[6] Eventually it was recognised also in a general context of international environmental law, notably in the *Declaration on Environment and Development*, of the UN Conference on Environment and Development in Rio de Janeiro in 1992 – commonly known as the *Rio Declaration*. The definition in the *Rio Declaration* was based on a proposition from the EU, and is widely recognised and referred to – even as expressing the core of the precautionary principle.[7] The *Rio Declaration* contains several non-binding principles,[8] and Principle 15 reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty

[3] Weiner, JB, "Precaution", in Bodansky, D. et. al. (editors), *The Oxford Handbook of International Environmental Law*, Oxford 2007, pp. 597 and 599, quoted in Beyerlin and Marauhn, p. 47.
[4] Beyerlin and Marauhn, p. 47.
[5] Beyerlin and Marauhn, pp. 47-48; Birnie, Boyle and Redgwell, p. 154; de Sadeleer, pp. 110 and 137-138.
[6] Beyerlin and Marauhn, pp. 48-49; de Sadeleer, pp. 94-97; Sands, pp. 217-219.
[7] Birnie, Boyle and Redgwell, pp. 154-155 and 159; de Sadeleer, p. 97; Sands, p. 218.
[8] de Sadeleer, p. 97.

> shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[9]

This definition of the precautionary principle encompasses the main traits of the principle, which are: *risk* (threat), *damage*, *uncertainty* (lack of full scientific certainty) and *proportionality* (cost-effective measures). After the *Rio Declaration*, the precautionary principle has been included in several other instruments – both binding and non-binding.[10] Some texts more or less recite the *Rio Declaration*,[11] but there are at least twelve different versions of the precautionary principle in different instruments.[12] All of them cannot be reviewed here, but a few examples will be provided, to illustrate the variations. These examples are relevant for the more detailed definition of the different elements of the precautionary principle that is made in section 2.3 below. Before turning to the different instruments, however, a note on terminology is required.

As evident in Principle 15 of the *Rio Declaration*, and as has been noted in section 1.3, the terminology is somewhat confusing. While the *Rio Declaration* presents the norm as *Principle* 15, the text speaks of the precautionary *approach*. The use of the word *approach* was the result of US persistence, but is considered to be of little importance. *The precautionary principle*, *the precautionary approach*, *precautionary action*, *precautionary measures*, or simply *precaution* are all different labels used to describe what is generally the same thing.[13] It has been argued that an *approach* might entail fewer restrictions and thus be more liberal.[14] However, as is explained in section 1.3, the terms will for the most part of this thesis be considered interchangeable – indeed they appear to be the result of "a semantic squabble",[15] as Nicolas de Sadeleer so eloquently put it – in line with what many other scholars seem to think.[16] The use of different terms to describe the norm may, however, have some implications. While some claim that the precautionary principle is customary international law,[17] e.g. with a view to the fact that it has been widely recognised and included in many binding treaties, others find existing state practice insufficient, especially considering that the norm is defined and interpreted in many different ways.[18] It is beyond the scope of this thesis to establish if or to what extent the precautionary principle is part of international customary law (see section 1.3 above), but admittedly, the examples from the various in-

[9] Principle 15 of the *Rio Declaration*.
[10] See furhter e.g. de Sadeleer, pp. 97-100.
[11] See inter alia the preamble to the *Convention on Biological Diversity*, and the preamble to the *United Nations Framework Convention on Climate Change*.
[12] de Sadeleer, p. 97.
[13] See e.g. Beyerlin and Marauhn, p. 47; Birnie, Boyle and Redgwell, p. 155.
[14] Birnie, Boyle and Redgwell, p. 155.
[15] de Sadeleer, p. 92.
[16] See e.g. Birnie, Boyle and Redgwell, p. 155.
[17] Birnie, Boyle and Redgwell, pp. 159-164; de Sadeleer, pp. 100 and 315-319.
[18] Birnie, Boyle and Redgwell, pp. 16 and 159-161; Bosselmann, p. 60; de Sadeleer, pp. 100 and 315-319.

struments presented below do exhibit certain differences. That being said, they also bear many likenesses and if the central meaning is the same, then the mere variation in terminology seems irrelevant. It shall be noted that, in any case, concluding that the norm is not customary international law does not necessarily render it without influence. Customary international law is but one source of international law,[19] and the precautionary principle might yet be considered a general principle of law, and as such have impact on state practice, shape the contents of treaties and international case law and be a weighty argument in the legal debate.[20] In short, it may have political influence.

As to the examples, an early version of the precautionary principle is provided by the 1991 *Bamako Convention*, which aims at ending the import of hazardous waste to Africa. The Convention prescribes that

> [e]ach Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm.[21]

Despite the fact that the norm is referred to as the precautionary *approach*, this is by some considered to be one of the most far-reaching versions of the precautionary principle, since its application is not limited to situations where damage is serious or irreversible – in contrast to Principle 15 of the *Rio Declaration*.[22] Likewise, the 1992 *UNECE Water Convention* says nothing about the gravity of the potential damage either. Here, the norm is referred to as a *principle* to guide the parties in taking measures inter alia to reduce pollution of transboundary water and groundwater. [23] The relevant Article reads as follows:

> The precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.[24]

[19] See Article 38(1) of the *Statute of the International Court of Justice*, further explained e.g. in Shaw, pp. 69-128.
[20] Birnie, Boyle and Redgwell, pp. 27-28, 36, 38 and 162-164.
[21] Article 4.3(f) of the *Bamako Convention.*
[22] Sands, p. 220.
[23] See further *Introduction – About the UNECE Water Convention*, last accessed 2015-03-04 at http://www.unece.org/env/water/text/text.html.
[24] Article 2.5(a) of the *UNECE Water Convention*.

A further example is found in the 1995 *UN Fish Stocks Agreement*, which is to implement certain provisions of UNCLOS, regarding conservation and management of fish stocks.[25] The agreement deals with precaution in the following way:

> Application of the precautionary approach
> 1. States shall apply the precautionary approach widely […] in order to protect the living marine resources and preserve the marine environment.
> 2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.[26]

The provision goes on to list specific measures that must be taken, such as sharing information, applying guidelines, adopting catch limits etc. Some claim that this Article even creates a presumption for conservation.[27] In any case, the Article seems to give quite detailed guidance regarding *how* to adhere to the precautionary principle in a specific context – and that seems rather unusual.

The 1996 *London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972* gives another interesting example;

> In implementing this Protocol, Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.[28]

It can be observed that both this definition and that in the *UNECE Water Convention* speak of lacking evidence to prove a causal link between certain substances/wastes and their possible impact on the environment. This aspect is further elaborated in sections 2.2 and 2.3. Another observation is that both the *London Protocol* and the following example, the 2000 *Cartagena Biosafety Protocol*, might be read as implying that states may take *all* measures required to prevent environmental risks. The precautionary principle would then be a "licence to act"[29]. There is, however, little indication that the principle would entail a *duty* to

[25] More information in *The 1995 United Nations Fish Stocks Agreement*, at http://www.un.org/depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf, last accessed 2015-05-16.
[26] Article 6 of the *UN Fish Stocks Agreement.*
[27] de Sadeleer, pp. 95-96 with notes.
[28] Article 3(1) of the *London Protocol.*
[29] Beyerlin and Marauhn, p. 50.

take certain action.[30] But more on that in section 2.4. Article 10(6) of the *Cartagena Biosafety Protocol* reads:

> Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism […] in order to avoid or minimize such potential adverse effects.[31]

The various examples now presented show that the precautionary principle is relevant in many contexts and that although its terminology may be adapted accordingly, the basis appears to consist of the same features. This is further explored in section 2.3, but before examining the precautionary principle in detail, its legal context must be further investigated.

## 2.2 The legal context of the precautionary principle

The precautionary principle does not exist in a legal vacuum and, consequently, can neither be described nor understood without its surrounding context of other legal norms with which it interacts. Firstly, the existence of any kind of norm requiring precautionary measures presupposes that the environment is in fact considered worthy of protection in the first place. Thus, the basis for the precautionary principle is the *no harm-rule*, also known as *the principle of prevention*.[32] This international obligation to protect the environment seems closely linked to the right of states to territorial integrity. In other words, it follows from the obligation to respect territorial integrity, that states must not cause damage to the environment (i.e. the territory) of other states.[33] This was expressed in the *Trail smelter* arbitration case from 1941, concerning a dispute between Canada and the US over a Canadian smelter causing air pollution which spread across the border. The arbitration tribunal established that "under the principles of international law, […] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[34] The principle of prevention was later confirmed in the 1972 *Stockholm Declaration*, where Principle 21 reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own re-

[30] Beyerlin and Marauhn, p. 50.
[31] Article 10(6) of the *Cartagena Biosafety Protocol*. Article 11(8) is almost identical.
[32] See e.g. Beyerlin and Marauhn, pp. 39-46; Birnie, Boyle and Redgwell, pp. 143-152; de Sadeleer, pp. 61-90.
[33] See further Beyerlin and Marauhn, p. 40.
[34] *Trail smelter*, p. 1965.

> sources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[35]

This is also confirmed in Principle 2 of the *Rio Declaration* and it evidently goes further than the *Trail smelter* case, given that it includes not only the environment of other states but also that outside of national jurisdiction, such as the high seas, the Antarctica, or even the atmosphere.[36]

Based on these confirmations of the norm and of its widespread use and recognition, there seems to be wide agreement that the principle of prevention is a norm of customary international law.[37] One example of its recognition is the ICJ advisory opinion, from 1996, on the *Legality of the Threat or Use of Nuclear Weapons*.[38] The principle of prevention thus means that states must prevent environmental degradation and that they may be held responsible for failing to do so if they have not acted with due diligence. What constitutes due diligence is not clear, however, nor is the question of how grave the damage must be for a state to be liable – it is only clear that it must be more than a minimum. Consequently, a state causing harm while acting with due diligence cannot be held responsible, and nor can a state acting without due diligence if the damage caused is insignificant.[39]

At first glance, the principle of prevention may seem similar to the precautionary principle, in that they both oblige states to act before damage has occurred, in order to avert it. Indeed, a special rapporteur of the International Law Commission, ILC, considered in a report that "the precautionary principle was already included in the principles of prevention and prior authorization, and in the environmental impact assessment, and could not be divorced therefrom".[40] There seems to be a vital difference, however, in that the precautionary principle calls for action at an earlier stage, before risks can be clearly identified and proven. The principle of prevention prescribes action in situations where there is a proven link between cause and effect,[41] i.e. where it is certain that a specific cause of action *can* lead to a risk for specific consequences. This is illustrated by the previously quoted passage from the *Trail smelter* case, where it was required that "the injury is estab-

[35] Principle 21 of the *Stockholm Declaration*.
[36] See further Birnie, Boyle and Redgwell, p. 145.
[37] See e.g. Beyerlin and Marauhn, p. 44; Birnie, Boyle and Redgwell, pp. 143-145; de Sadeleer, pp. 62-63 and 316.
[38] *Legality of the Threat or Use of Nuclear Weapons*, para. 29.
[39] See further Birnie, Boyle and Redgwell, pp. 147-151; de Sadeleer, pp. 63-64 with notes.
[40] *ILC Report A/55/10*, para. 716. The special rapporteur was Mr. Pemmaraju Sreenivasa Rao, responsible for "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities)".
[41] This expression is somewhat confusing, but it is used e.g. in Article 3(1) of the *London Protocol* quoted above, which reads: "[…] even when there is no conclusive evidence to prove a causal relation between inputs and their effects".

lished by clear and convincing evidence".[42] In contrast, the precautionary principle applies when science is *not* clear – where there is no certain link between cause and effect. Thus, the precautionary principle is concerned with situations where the very *existence of a risk* is unclear. Naturally, a risk of damage means that it is not clear whether or not damage will occur in a specific case, but an *uncertain risk* in this context means that it is not certain that a risk is present at all.[43] As an example, this means that if it can be established that toxin X *can* cause damage to the environment, there is a *certain* risk of damage if it is released into the environment – i.e. it is certain that damage *can* occur, but not that it *will* occur. On the other hand, if it *cannot* be proven that toxin Y can cause damage to the environment, there is an *uncertain* risk that it may cause damage if it is released into the environment – i.e. it is *uncertain* if it is capable of causing any damage at all. As explained, it is in the latter case that the precautionary principle applies. This is explicit in several of the instruments presented in section 2.1 above. The *London Protocol* is perhaps the best example as it states that the precautionary principle shall be applied "even when there is no conclusive evidence to prove a causal relation between inputs and their effects".[44]

The difference between the principle of prevention and the precautionary principle reflects, according to de Sadeleer, the different stages of environmental protection. Originally, international environmental law was primarily concerned with reparation for damages already incurred. Later, the preventive principle brought about an anticipatory aspect, addressing situations where there is a risk of damage. The latest stage is thus the precautionary principle, which speaks of action when there *might be* a risk of damage.[45]

While the aspect of appropriate time for action has thus evolved, so has the object of protection. Initially, international environmental law, as seen in the *Trail smelter* case, was concerned with the protection of the environment of other states and thereby had an almost bilateral character. Through the *Stockholm Declaration* the scope was widened to encompass the environment outside national jurisdiction and instruments from the Rio Conference (although not the *Rio Declaration* itself) use the term *common concern* for global environmental issues, such as biological diversity and climate change.[46] The question ultimately follows if states now also have an obligation to protect the environment within their own borders. After all, Principle 15 of the *Rio Declaration* calls for a *wide* application of the precautionary principle.[47] Indeed, some believe that the precautionary principle is the foun-

[42] *Trail smelter*, p. 1965.
[43] See furhter e.g. Beyerlin and Marauhn, pp. 52-54; Birnie, Boyle and Redgwell, p. 163; de Sadeleer, inter alia pp. 74-75, 91 and 150.
[44] Article 3(1) of the *London Protocol*.
[45] de Sadeleer, pp. 91-93.
[46] These instruments include the *Convention on Biological Diversity* and the *United Nations Framework Convention on Climate Change*. See further Birnie, Boyle and Redgwell, pp. 128-129.
[47] See also e.g. Article 6(1) of the *UN Fish Stocks Agreement*, quoted above on p. 19, note 26.

dation of far-reaching environmental protection extending over and within state borders.[48] That the precautionary principle should have such application is more likely if one endorses the belief that the principle of prevention is applicable to the national environment, even if damage has no effects outside state territory.[49] Some even argue that the domestic environment is of *common concern* because states must protect it in order to adhere to the principle of sustainable development.[50]

Requiring adherence to the precautionary principle within a strictly national context may be at the fringes of what might today be generally accepted. What seems clear is that the precautionary principle at least ought to be applied by states in relation to damage threatening the environment of other states, due to the roots of the principle of prevention in the *Trail smelter* case. It also seems reasonable to expect that the precautionary principle may apply to the environment outside of state jurisdiction, with a view to trends indicating the consideration of the environment as a *common concern* and thus widening the application of the principle of prevention. It shall be remembered, though, that the application of the precautionary principle may be specifically provided for in different instruments, both in terms of the aspects of the environment that are affected – watercourses, the atmosphere, biodiversity etc. – and in terms of different jurisdictional areas. The question of territorial applicability fortunately does not require an answer for the comparison of the precautionary principle to any norm under the ECHR regime, since the ECHR has no other objects of protection than the persons under the jurisdiction of a state.

A couple of other norms of international environmental law shall be briefly explained in relation to the precautionary principle. Firstly, it is worth noting that the precautionary principle is in its nature future-oriented, as it is about the avoidance of future damage. In international environmental law there is also a norm of *intergenerational equity*, connected to the principle of sustainable development. In short, it means that the present generation must preserve the environment in a condition where it can equally benefit future generations – it should not be passed on to the next generation in a worse condition than it was received in. If future risks are to be avoided according to the precautionary principle (even if focus is on the near future), it seems evident that intergenerational equity will be promoted.[51] This may be of limited relevance to the ECHR, however, since the Convention is concerned with the protection of rights of individuals in specific cases – i.e. in the present time.

[48] Birnie, Boyle and Redgwell, p. 129.
[49] Birnie, Boyle and Redgwell, p. 129; de Sadeleer p. 89.
[50] Birnie, Boyle and Redgwell, pp. 129-130. On the principle of sustainable development and its relationship to the precautionary principle, see Bosselmann, especially p. 60.
[51] See further Birnie, Boyle and Redgwell, pp. 119-122; Bosselmann, e.g. p. 59.

While the precautionary principle thus can advance goals of environmental policy, there are also norms of international environmental law that will promote the precautionary principle. One is the requirement that states make *environmental impact assessments*, EIAs, before conducting certain activities which may harm the environment. These assessments are a tool for risk evaluation and thus for the application of the precautionary principle.[52] The obligation to conduct EIAs has been considered part of international customary law,[53] and a state may in fact not be able to prove that it has observed due diligence if an environmental impact assessment has not been made.[54] Another factor which might affect the assessment of whether or not a state has acted with due diligence is if the state has fulfilled other obligations, such as the duty to inform other states about situations where transboundary harm is likely to occur.[55] It is also worth noting that states may sometimes have an obligation to provide environmental information to *individuals* as well, e.g. according to the *Aarhus Convention*.[56]

## 2.3 Elements of the precautionary principle

There are several aspects of the precautionary principle which affect the results of its application and which must all be considered in order to fully understand the meaning of the principle. These aspects are explored below and as well as explaining the precautionary principle, they serve as a tool for analysing case law from the ECtHR, in section 3. It shall be noted that while this section is much inspired by the very instructive systematisation of the precautionary principle by Nicolas de Sadeleer,[57] it also contains personal conclusions drawn from information provided by other sources. The elements of the precautionary principle are illustrated by the terms marked in italics in Principle 15 of the *Rio Declaration*:

> In order to protect the environment, the precautionary approach shall be widely applied by States *according to their capabilities*. Where there are *threats* of serious or irreversible *damage*, lack of full scientific *certainty* shall not be used as a reason for postponing *cost-effective measures* to prevent environmental degradation.[58]

Thus, a few words are said about *risk* ("threat"), *damage* and *proportionality* ("cost-effective measures") and about how these aspects are all influenced by *uncertainty* ("lack of full scientific certainty"). A note on *intragenerational equity* is also made ("applied by States according to their capabilities").

[52] See further Birnie, Boyle and Redgwell, pp. 164-175; de Sadeleer, pp. 207-209. See also *Request for an Examination*, dissenting opinion of Judge Weeramantry, p. 344.
[53] *Pulp Mills*, para. 204.
[54] de Sadeleer, pp. 64 and 100.
[55] See e.g. Principle 19 of the *Rio Declaration*. Further, Beyerlin and Marauhn, pp. 227-228
[56] See further Beyerlin and Marauhn, pp. 236-239.
[57] de Sadeleer, pp. 149-174.
[58] Principle 15 of the *Rio Declaration*.

*Risk*

In this context *risk* refers to the probability that something will occur – the probability that certain measures or actions will lead to certain consequences.[59] As is explained above, the precautionary principle applies to risks that are *uncertain*,[60] i.e. where a causal link between action and consequence has not been proven and the very *existence* of a risk is in question. *Certain* risks on the other hand, where a causal link has been established, fall under the scope of the principle of prevention.[61] But not all uncertain risks will call the precautionary principle into action, since taking measures to avoid even hypothetical risks would hardly be possible. Consequently, there seems to be agreement that the risk must reach more than a minimum level and that there must be some scientific indication of its possible realisation.[62] Therefore, the requirement that uncertain risks are taken into account does not make science irrelevant – on the contrary, it entails the careful scrutiny even of less established science, since that might be enough to motivate preventive measures.[63] In the advisory opinion of the ITLOS Seabed Disputes Chamber on *Responsibilities and Obligations in the Area*, the scope of application of the precautionary principle was defined as: "where scientific evidence […] is insufficient but where there are plausible indications of potential risks".[64] The application of the precautionary principle in situations of uncertainty is also what separates it from the principle of prevention and thereby widens the scope of environmental protection. In short, the application in situations of uncertainty seems to be the *raison d'être* of the precautionary principle.

Having said that, it may be questioned if the distinction between *certain* and *uncertain* risks is worth making. If the existence of a risk is uncertain, one could say that there is still *a risk that a risk exists*. And if there is *a risk of a risk*, it means that there is in fact still a risk that damage will occur – only a more tenuous risk. Thus, maintaining the distinction between the *uncertainty of the existence of a risk* and the *uncertainty of the realisation of a risk* is an unnecessary complication. It may have a function in theory, but in practice it must be almost impossible to uphold such a construction. Consequently, the claim of the special rapporteur of the ILC (referred to in section 2.2) that the precautionary principle cannot be separated from the principle of prevention seems reasonable. It is perhaps sufficient to say that the precautionary principle lowers the threshold so that states may have to act even in the face of more tenuous risks than previously. Exactly how tenuous those risks may be must be determined on a case by case basis.

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[59] See de Sadeleer, p. 150.
[60] See Beyerlin and Marauhn, pp. 52-54; Birnie, Boyle and Redgwell, p. 163; de Sadeleer, inter alia pp. 74-75, 91-93 and 150.
[61] de Sadeleer, pp. 74-75, 91-93 and 156-159.
[62] Birnie, Boyle and Redgwell, pp. 155-157; de Sadeleer, pp. 157-161.
[63] Birnie, Boyle and Redgwell, pp. 156-157. On the relationship between precaution and science, see further de Sadeleer, pp. 174-201, "4. Science versus precaution: a false dichotomy".
[64] *Responsibilities and Obligations in the Area*, para. 131.

*Damage*

The result of a realised risk is here referred to as *damage*.[65] Damage is thus what the precautionary principle seeks to avoid. But must all damage be avoided? Principle 15 of the *Rio Declaration* only includes damage that is "serious or irreversible", whereas other versions of the precautionary principle may set different thresholds – or none at all. Of the examples presented in section 2.1, only the *Rio Declaration* requires a certain level of damage, whereas other definitions specify the object of damage, e.g. "the conservation and sustainable use of biodiversity"[66], "humans or the environment"[67] or speak of damage as "transboundary impact"[68]. This specificity may be explained with the fact that many instruments are concerned with specific matters, such as biodiversity, whereas the *Rio Declaration* is general in its scope. And likewise, states may have been more reluctant to include a version of the precautionary principle with a broader scope in a general instrument such as the *Rio Declaration* (although it is not binding). However, even if no threshold regarding damage is explicit in a given version of the principle, it seems evident that damage must at least be of some minimum magnitude to prompt action.[69] Not only is such a requirement justified with reference to proportionality, but it also seems appropriate with a view to the fact that the principle of prevention is likewise limited, as explained in section 2.2. The required severity of the damage will also be dependent on the risk. If the risk is quite small but the possible damage severe, precautionary measures may be motivated. Likewise if the damage is rather small, but its realisation is very likely.[70] In fact, this balancing is all about making a proportionality assessment – but clearly, the elements are hard to consider separately.

*Proportionality*

It has already been noted that hypothetical risks and insignificant damage fall outside the scope of the precautionary principle – although the question of where to draw the line remains unanswered. The existence of these thresholds, however, can be explained with *proportionality*, since it would be too difficult to try to avoid all dangers to the environment that could possibly result from human activities. Inherent in this seems to be a consideration of how to best invest the available resources – i.e. a third aspect to be weighed in the equation.[71] Principle 15 of the *Rio Declaration* explicitly mentions *cost-effective measures*, and while the economic dimension seems hard to escape, not all versions of the precautionary principle refer to it. Other examples presented in section 2.1 simply refer to *ap-*

[65] Some instruments use terms such as "harm" or "impact" (see section 2.1). The meaning is here assumed to be the same.
[66] Article 10(6) of the *Cartagena Biosafety Protocol*.
[67] Article 4.3(f) of the *Bamako Convention*.
[68] Article 2.5(a) of the *UNECE Water Convention*.
[69] de Sadeleer, pp. 161-167 and 173-174.
[70] Birnie, Boyle and Redgwell, inter alia pp. 153 and 155; de Sadeleer, p. 161.
[71] de Sadeleer, pp. 167-174.

*propriate* measures,[72] which also seems to indicate the need for a proportionality assessment. From a critical point of view, one could argue that there are certain environmental goods which cannot be valued in economic terms and that such considerations would undermine the principle.[73] However, if truly serious damage were possible, it could also easily be argued that given its grave nature, *any* measure would be cost-effective, since any cost would be reasonable. In any case, proportionality seems to be an important aspect of the precautionary principle.

Related to the issue of proportionality is that of *intragenerational equity*, relevant mainly to the issue of inequality between the developed and the developing world. This is inter alia expressed in Principle 15 of the *Rio Declaration* as the requirement that states apply the precautionary approach *according to their capabilities*. This is an example of the idea of *common but differentiated responsibility*, meaning that while all states are responsible for protecting the environment, account must be taken of the fact that the industrialised states often have contributed more to environmental problems and are also better equipped to fight environmental degradation. The idea is that equality not only requires equal treatment of equals, but also differential treatment of those who are not equal. Common but differentiated responsibility is referred to in inter alia Principle 7 of the *Rio Declaration* but its legal status is unclear.[74] As it is a norm of general application to international environmental law, however, it may be relevant to the precautionary principle, even if it is not part of it. If considerations of the developmental status of states are allowed, that adds yet another dimension to the proportionality assessment. It may be seen as part of the assessment of what is cost-effective, as the reasonableness of certain costs may depend on the status of state economy.

What is evident so far, is that the precautionary principle gives an outline of what factors to assess, but says little about *how* to assess them and *when* action can or must be taken and *what* should be done.[75] The precautionary principle leaves open questions regarding when damage is significant enough to be considered, and when an uncertain risk is sufficiently indicated to be relevant at all. Even if some instruments require e.g. "serious" damage, such terms seem to be left undefined and must be decided on a case-by-case basis.[76] It is perhaps inevitable that a broad norm fails to give detailed guidance in specific situations, since it lies in the idea of proportionality that individual factors always must be considered.

[72] See the *Bamako Convention*, the *London Protocol* and the *Cartagena Biosafety Protocol*. *Appropriate* might, however, also mean that the measures should be adequate to reach the desired results, regardless of costs or other factors.
[73] See further de Sadeleer, pp. 167-174.
[74] Beyerlin and Marauhn, pp. 61-71; Birnie, Boyle and Redgwell, pp. 122-123 and 132-136.
[75] Compare to Birnie, Boyle and Redgwell, pp. 161-164.
[76] Compare to de Sadeleer, inter alia pp. 162-167.

## 2.4 Some effects of the precautionary principle

The effects of the precautionary principle – i.e. the consequences of its application – are, like many other aspects concerning the norm, unclear. One question regards whether the precautionary principle *allows* or *demands* action to prevent damage to the environment. Initially, it must be observed that the precautionary principle may have different functions in different contexts, and that the norm may be given a specific interpretation and meaning in a specific treaty.[77] In general, however, Beyerlin and Marauhn identify three possibilities. *The first* is that the precautionary principle establishes that uncertainty regarding the existence of a risk is not, on its own, a sufficient reason for inaction. This can be exemplified through Principle 15 of the *Rio Declaration*; "lack of full scientific certainty shall not be used as a reason for postponing […] measures". The authors regard this interpretation as not adding much value to the existing legal framework, though.[78] That may be true, but although other excuses for inaction may remain, the precautionary principle at least seems to raise the expectations for environmental protection.

*The second* alternative suggested by Beyerlin and Marauhn is that the precautionary principle *allows* action in situations of uncertainty – perhaps even when such measures would otherwise be considered contrary to other obligations. And *the third* option means that the precautionary principle *demands* action. The authors, probably correctly, consider the third version too demanding to be considered generally acceptable,[79] but both these alternatives assume that the precautionary principle would somehow have precedence over other norms, which might be problematic. Firstly, only *jus cogens* norms would have precedence over other norms,[80] so the second and third alternatives could not be taken too far. Secondly, proportionality would also excuse inaction if the measures required would infringe too much on other interests. The existence of other norms requiring states to act contrary to the precautionary principle in a specific situation is in fact an indication of the existence of such other interests. It would therefore be disproportionate if the principle would always demand states to take action, even in contravention of other norms. But thirdly, and most importantly, there seems to be no need to consider the precautionary principle to be in conflict with other norms at all. Even when such conflicts exist, the primary way of solving them is by interpreting the norms in a way that gives effect to both of them. Shaw speaks of a "presumption against normative conflict".[81] If used in this sense, to reinterpret other norms, the precautionary principle could be a tool for the expansion of environmental protection. This also seems to be the way in which the precautionary principle functions.

[77] Compare to Birnie, Boyle and Redgwell, p. 155.
[78] Beyerlin and Marauhn, pp. 54-55.
[79] Beyerlin and Marauhn, pp. 54-55.
[80] Article 53 of the VCLT; Shaw, pp. 123-127. See further Linderfalk 2007.
[81] Shaw, p. 123.

The function of the precautionary principle as a tool for the re-interpretation of other norms has been suggested in international case law. In the *Pulp Mills* case, the ICJ held that "a precautionary approach may be relevant in the interpretation and application of the provisions of"[82] a treaty between the parties. Similarly, Judge Cançado Trindade, in a dissenting opinion in another case, wanted to interpret a convention in the light of the precautionary principle.[83] In the previously mentioned *Responsibilities and Obligations in the Area*, the Chamber took note of the statement of the ICJ in *Pulp Mills* and seemingly implied that the same might be true for environmental treaties in general. The Chamber referred to Article 31(3)(c) of the VCLT, according to which any rule of international law applicable in the relationship between the parties, should be taken into account when interpreting a treaty.[84] In the WTO Appellate Body *EC Hormones* case, the EC argued that the precautionary principle ought to guide the interpretation of an agreement the EC was accused of violating.[85] The Appellate Body held, however, that the precautionary principle could not have precedence over other principles relevant to the interpretation of the agreement and that it did not override the relevant provisions.[86] This may not speak in favour of interpreting the precautionary principle as allowing states to act in contravention of other obligations, but it may be questioned if norms of interpretation could ever truly be in conflict with each other. Regardless of whether or not the precautionary principle is applied in an individual case, it seems as if it has little use on its own, and that its main function is to guide the interpretation of other norms. Thus, obligations to protect the environment may be strengthened with reference to the precautionary principle.

So, what does it mean to interpret other norms in the light of the precautionary principle? Most likely, it means that the burden of proof will be affected – that is what many hold as the main effect of the precautionary principle. This would mean that those wanting to perform an activity would have to show that it does *not* pose a risk to the environment – but generally only after the party opposing the activity has been able to indicate that there is at least a prima facie risk. If it does not shift the burden of proof, the precautionary principle might at least lower the standard of proof for the party opposing the allegedly harmful activity.[87] Sands et. al. seem to believe that an interpretation of the precautionary principle that shifts the burden of proof is gaining increasing support by state practice.[88] This is in accordance with the view of Judge Weeramantry, who in a dissenting opinion in an ICJ case *also* stated that the precautionary principle had evolved in international environmental law to address situations where evidence of potential

[82] *Pulp Mills*, para. 164.
[83] *Whaling in the Antarctic*, separate opinion of Judge Cançado Trindade, paras. 57-63.
[84] *Responsibilities and Obligations in the Area*, para. 135.
[85] *EC Hormones*, paras. 17 and 121.
[86] *EC Hormones*, paras. 124-125.
[87] See further Birnie, Boyle and Redgwell, pp. 158-160 and 164.
[88] Sands, pp. 222-223.

harm may be in the hands of the conductor of the activities in question, rather than in the hands of those seeking to prevent them.[89]

In the *Pulp Mills* case, however, the ICJ was of a different opinion. Initially, the Court held that while the starting point was that the applicant had to substantiate their claims, this did not relieve the other party of their obligations to cooperate when necessary for the procurement of evidence.[90] But the ICJ went on to say that "it does not follow that [a precautionary approach] operates as a reversal of the burden of proof".[91] The Court further dismissed the claims of one of the parties because "a clear relationship [had] not been established between the discharges"[92] from a disputed mill and the alleged consequences thereof. In his separate opinion, Judge Greenwood held that while the reasoning of the Court regarding the placement of the burden of proof was correct, he believed that the *standard* of proof ought to have been lower – in this case as well as in other environmental cases.[93] Similarly, in a dispute over a nuclear fuel plant, the claimant was found not to have demonstrated the alleged adverse effects to the environment.[94] This was criticised in a dissenting opinion where one arbitrator argued, with reference to the precautionary principle, both for a shift of the burden of proof and a lowering of the standard.[95] Indeed, it seems hard to oppose that the precautionary principle ought to have impact on the burden and/or standard of proof. Distinguishing the precautionary principle from the principle of prevention means accepting that an uncertain risk can be enough. This means *de facto* lowering the standard of proof. This means shifting the burden of proof to the other state, to justify its actions, when a prima facie risk of damage has been indicated. Courts depriving the precautionary principle of this effect are in fact depriving it of any possible effect.

To summarise, perhaps one could say that when the conditions for the application of the precautionary principle are met, it creates a presumption that action should be taken in order to protect the environment and that states who remain inactive must find other justifications than scientific uncertainty. In short, the precautionary principle could be phrased in the following way:

*If there are plausible indications of potential risks of damage to the environment, states are presumed to take precautionary measures, as proportionate, to prevent any damage that is not insignificant, even when there is no conclusive evidence to prove a causal relation between inputs and their effects*.[96]

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[89] *Request for an Examination*, dissenting opinion of Judge Weeramantry, pp. 342-344.
[90] *Pulp Mills*, paras. 160 and 162-163.
[91] *Pulp Mills*, para. 164.
[92] *Pulp Mills*, para. 262. See also paras. 265 and 282(2).
[93] *Pulp Mills*, separate opinion of Judge Greenwood, paras. 25-26.
[94] *OSPAR Award*, paras. 179 and 185.
[95] Dissenting opinion of Gavan Griffith QC in the *OSPAR Award*, paras. 72-82.
[96] Inspiration for the wording has been drawn from Article 3(1) of the *London Protocol* and from para. 131 of *Responsibilities and Obligations in the Area*.

# 3 Precaution in the European Convention on Human Rights

## 3.1 The interpretation of the European Convention on Human Rights

Before turning to the case law of the European Court of Human Rights, the ECtHR, to investigate how precaution is handled, a few observations must be made on some of the guidelines the Court applies when interpreting the European Convention on Human Rights, the ECHR. This is necessary because no norm of precaution is explicitly mentioned in the ECHR and therefore the only way that requirements to take precautionary measures can exist under the ECHR regime is if the Convention is interpreted in a way that allows it. As is explained below, the guidelines for the interpretation of the Convention indeed seem to make the existence of a norm of precaution possible.

Firstly, Article 32(1) of the ECHR establishes the role of the Court as interpreter and applier of the Convention, but it gives no guidance as to how this is to be undertaken. Thus, the guidelines have been developed by the Court itself through its case law. When first elaborating on its principles of interpretation in *Golder v. the UK*, in 1975, the Court applied the VCLT, although it had not yet entered into force. The Court considered, however, that the relevant provisions of the VCLT represented customary international law.[97] In the complex process of interpretation, the Court has not distinguished any principles as more important than others, but focus appears to be a teleological approach. Accordingly, the provisions of the ECHR shall be interpreted with a view to their object and purpose and with consideration of their context as part of the Convention as a whole.[98] In *Saadi v. UK*, the Court condensed its view on interpretation in the following way:

> Under the Vienna Convention on the Law of Treaties, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn […]. The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions […]. The Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.[99]

[97] *Golder v. UK*.
[98] Ovey, pp. 65-66.
[99] *Saadi v. UK*, para. 62.

With regard to the object and purpose – which shall be considered according to Article 31(1) of the VCLT – it is evident that the interpretation differs from that of other treaties because the ECHR confers rights upon individuals. The general rules of treaty interpretation are thus less relevant, since most treaties lack this dimension and are only concerned with the obligations of states towards each other, in a more strict sense.[100] Other rules or principles of international law applicable between the parties to the ECHR may however provide guidance to the interpretation of the ECHR, according to the VCLT.[101] Further, since the aim of the ECHR is the protection of human rights, there is no presumption to the effect that the Convention should be interpreted so as to restrict as much as possible the obligations of states in order not to infringe on state sovereignty – instead it must be interpreted so as to render the rights *effective*.[102] An example is the case of *Airey v. Ireland*, where Article 6(1) of the ECHR was interpreted so as to encompass a right to legal aid, as the right of access to court might otherwise be illusory.[103]

Allegedly, this implies that the ECHR must also be interpreted in a way that takes into account changes of values in society. Consequently, the meaning of different terms – and rights – in the Convention cannot be considered static.[104] E.g. the right of recognition of the gender identity of transsexuals has been found to be encompassed under Article 8 of the ECHR, though it may not have been intended at the drafting of the Convention.[105] In numerous cases the Court has stated that the Convention is a *living instrument* that must be interpreted according to the *present day conditions*.[106] According to some, this means that the ECHR must be given a progressive, evolutive, interpretation, which serves to expand and enhance the meaning of the rights. A balance must however be struck so that the Court does not exceed its mandate.[107] Indeed, while rights may be re-interpreted, no new rights can be invented by the Court. The line between a new right and a re-interpreted right is hard to draw and cannot be thoroughly explained in this context. As an example, however, the right to marry in Article 12 cannot be interpreted as to encompass a right to divorce, although such a right is commonly recognised in many European states – that would mean creating a new right.[108]

While it is the task of the ECtHR to interpret the Convention, this does not mean that there is no room for recognition of the differences between the state parties. The Court sometimes refers to the *margin of appreciation*, which is granted to

[100] See further *Austria v. Italy*; Ovey, pp. 71 and 79-80.
[101] *Saadi v. UK*, para. 62. Such references have been made e.g. in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*; *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*; *Nada v. Switzerland*; *Taşkin and Others v. Turkey*.
[102] *Wemhoff v. Germany*, para. 8; Harris, pp. 5-6 and 15; Ovey, pp. 71-72.
[103] See also inter alia the more recent case of *Salduz v. Turkey*.
[104] See further Harris, pp. 7-8; Ovey, pp. 72-73.
[105] *Christine Goodwin v. UK*; Harris, p. 8; Ovey p. 72.
[106] Inter alia *Saadi v. UK*; see further Ovey, p. 74.
[107] Ovey, pp. 74-75.
[108] *Johnston and Others v. Ireland*; see further Harris, p. 7.

states when they are considered better equipped to judge the appropriateness of certain measures within the national context than the Court. This is mostly relevant under Articles 8-11, which allow for the limitation of the relevant rights under certain conditions. Accordingly, the margin of appreciation provides recognition and acceptance of some of the cultural and legal differences between the state parties to the Convention and correspondingly limits the power of the Court. It reflects the role of the Court in the protection of human rights as subsidiary to that of the states.[109] The margin of appreciation is indeed referred to in some of the cases presented below.

To sum up, it would be possible for the Court to apply the precautionary principle, with a view to the evolutive interpretation and to the regard that is to be given to applicable rules of international law. That presupposes, however, that the precautionary principle is indeed part of public international law, which is not certain (as discussed above in section 2) unless it is included in a treaty between the parties. But regardless of what may be the general opinion of the legal status of the precautionary principle as independent of any specific treaty, nothing prevents the ECtHR from considering the precautionary principle to be binding and therefore referring to it. As noted in section 2.4 above (p. 29), it was the opinion of the ITLOS Seabed Disputes Chamber in the case concerning *Responsibilities and Obligations in the Area*, that the precautionary principle could indeed be used for interpretation of other treaties, with reference to Article 31(3)(c) of the VCLT. As a norm of international environmental law, however, the precautionary principle would have limited influence, since the ECHR is not concerned with environmental protection, unless it coincides with the protection of human rights.[110] But that is the first interesting question – if the precautionary principle in fact has been used to protect human rights, or if it could be. Even more interesting is perhaps if the precautionary principle might be incorporated and applied even in cases where the environment is not relevant – i.e. if it has influenced the ECHR enough to create a "human rights version" of the precautionary principle. Such a development is possible and it is with a view to this that cases with environmental aspects are given specific attention in sections 3.3.1 and 3.3.3 below. However, this possible influence may be more likely, or more easily accepted, if the Court already (perhaps simultaneously) applies a similar mode of reasoning, regardless of the existence of the precautionary principle in international environmental law, simply because the nature of its cases require similar assessments in terms of risk etc. It may be argued that some kind of norm of precaution is necessary in order for the rights to be *effective*. Consequently, there are two perspectives from which a norm of precaution in the ECHR might be relevant – as connected to the precautionary principle in international environmental law and/or independent of it. That is the

[109] Harris, pp. 11-14; Ovey, pp. 79-81 and 325-333.
[110] The fact that the ECHR only protects the environment if it is necessary for the protection of human rights was confirmed in *Kyrtatos v. Greece*, para. 52.

reason for reviewing both cases with environmental aspects and cases without such features. Regarding the first category, case law under Article 8 is of special significance. To explain the case law that is to be examined, however, a note must also be made on the nature of state obligations under the ECHR.

## 3.2 The nature of state obligations

The basis for all state obligations under the ECHR is Article 1, which requires states to *secure* the rights in the Convention to everyone within their jurisdiction. What it means to *secure* a right varies with each provision and may entail various obligations. The most obvious duty is that states must not infringe the rights of individuals – e.g. states must not torture people and thus infringe their right to freedom from torture (Article 3). Obligations of this kind are what the Court refers to as *negative obligations*, since they do not require action on behalf of the state but only demands that states *refrain* from action.[111]

There are some provisions, though, that explicitly *demand* action. Examples are the duty to protect the right to life by law (Article 2) and to provide courts etc. to guarantee the right to a fair trial (Article 6). Thus, the Convention also entails *positive obligations*.[112] Positive obligations are often associated with economic, social and cultural rights, such as the right to education, and were long thought to be only exceptional under the ECHR, since the Convention is primarily concerned with civil and political rights. However, positive obligations are not only explicit in some ECHR provisions, but have also been recognised by the Court as implicit in practically all articles.[113] An example is the previously mentioned case of *Airey v. Ireland*, where the positive obligation to provide legal aid was considered implicit in Article 6(1).[114] The positive obligations have frequently been motivated by their alleged necessity for the *effectiveness* of the right in question,[115] and thus seem to be a natural consequence of the approach to interpretation taken by the Court, which is described in the previous section. It may be observed that the existence of positive obligations outside the field of economic, social and cultural rights is hardly remarkable, nor is the fact that such obligations can exist alongside negative obligations. An example of this is provided by the *Vienna Convention on Diplomatic Relations*, which in Article 22(1) lays down the (negative) obligation for a receiving state not to violate the diplomatic mission of another state. The provision then clarifies that the receiving state is under a "special duty" (positive obligation) to take measures to *protect* the mission against intrusion etc. by other actors than the state itself.

[111] Harris, p. 18.
[112] See further Harris pp. 18-21.
[113] Harris, pp. 18-19; Ovey, pp. 102-103. See further Koch, pp. 96-97.
[114] More examples of this are given throughout section 3.3.
[115] Harris, p. 19.

To complicate matters, positive obligations can be of different kinds. This is best explained with reference to what is known as the *tripartite typology*.[116] According to this theory, state obligations in relation to human rights are obligations to *respect*, *protect* and *fulfil*. Obligations to *respect* correspond to what the ECtHR refers to as negative obligations, but the positive obligations encompass both the duty to *protect* and the duty to *fulfil*. The *Airey* case is an example of the latter category – providing legal aid to *fulfil* the right of access to court. The requirement that states *protect* human rights, on the other hand, covers situations where the rights of individuals are threatened by the actions of other individuals (or other non-state actors). The state must then *protect* the rights of individuals by preventing such interference.[117] Indeed, obligations to protect also exist under the ECHR.[118] Legislation can be a means of *protecting* human rights, but in some cases even more specific action may be required – see section 3.3 below.

Categorising obligations as negative or positive or as obligations to respect, protect or fulfil may have pedagogical purposes, but the distinctions are far from clear and the very existence of such a thing as negative obligations might be questioned.[119] What is more certain is that cases concerning (positive) obligations to protect human rights from interferences by other parties than the state itself are of specific relevance to this thesis, since they involve risk assessments. If something is to be prevented, it must somehow be predicted and this is where a norm of precaution could be relevant. Admittedly, there may be elements of risk assessment in cases that might be categorised as concerning obligations to respect or fulfil, but these may be less obvious. Thus, cases concerning state obligations to *protect* are the focus of section 3.3 below. Among these cases, it is relevant to look at cases that are related to environmental issues, as well as cases that are not (as explained above in section 3.1). To narrow the range of cases for investigation, focus is on the protection of life, under Article 2, and on the protection from torture or other prohibited treatment, under Article 3, since case law concerning these aspects is substantial. Another reason is the fact that, (without wishing to diminish the importance of other human rights), the loss of life or the subjection to torture are serious and irreversible infringements and this could make a norm of precaution more necessary in relation to these provisions. In section 3.3.3, however, a few cases concerning protection under Article 8 are also examined. The primary interest is not to examine a third article, but rather to examine cases where protection of human rights coincides with the protection of the environment.

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[116] See further Koch, p. 85, and further pp. 84-87 on the fact that the typology is criticised and that other alternatives might be possible. Another kind of classification is that of obligations of *conduct* or *result* – see further *ILC Report A/56/10*, para 77 (para. 77 contains commentaries to the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* and the relevant section is in paras. 11-12 of the commentaries to Article 12).
[117] Harris, pp. 18-20; Koch, p. 94. See also Mégret, pp. 130-132.
[118] *X and Y v. the Netherlands*; further Harris, pp. 19-20.
[119] E.g. *Khokhlich v. Ukraine*; see further Koch, pp. 98-99.

## 3.3 Case law from the European Court of Human Rights

### 3.3.1 Protection of the right to life

Even before the obligation to protect life under Article 2 was recognised by the Court, a case concerning future risks to life was decided – *Tauira and 18 others v. France*. The applicants claimed that a French decision to resume nuclear testing in French Polynesia threatened their right to life. They claimed to have been made ill by the tests previously carried out and feared worse consequences. The case thus concerned the possible future violation of the applicants' rights. The application was dismissed, however, since the applicants could not be considered *victims* of a violation. It was observed that applicants in exceptional cases can be victims even if no violation has yet occurred, if they can "produce reasonable and convincing evidence of the likelihood that a violation affecting [them] personally will occur; mere suspicion or conjecture is insufficient in this respect".[120] In this regard the Commission[121] did not consider it sufficient to refer to general risks pertaining to nuclear activity, since many activities give rise to risks. Something more concrete would be necessary. Nor did the Commission wish to rule on the scientific validity of certain reports referred to by the parties, especially since there was disagreement among scientists. With reference to *Soering v. UK* (see section 3.3.2 below) it was held that the applicants would have had to have "an arguable and detailed claim that, owing to the authorities' failure to take adequate precautions, the degree of probability that damage will occur is such that it may be deemed to be a violation, on condition that the consequences of the act complained of are not too remote".[122] There seems to be an indirect requirement for precautionary measures in the indication that states may be considered to have breached their conventional obligations even before damage has occurred, if their lack of precaution has led to a sufficient level of probability that damage (violation) will occur. What level of probability – in the terms of the precautionary principle, what level of *risk* – is required is not quite clear. Mere conjecture or suspicion is not enough though, so – just as under the precautionary principle – there seems to be a requirement of a minimum level of risk.

In *L.C.B. v. UK*,[123] the Court first established the obligation to protect life – i.e. the obligation to "take appropriate steps to safeguard the lives of those within its jurisdiction".[124] This case also concerned nuclear tests – here performed by the UK in the 1950s and 1960s on Christmas Island. The applicant had suffered from leukaemia as a child, allegedly because her father had been exposed to radiation at

[120] *Tauira and 18 others v. France*, p. 131.
[121] The European Commission of Human Rights previously existed alongside the Court. On their different functions, see Ovey, pp. 8-9.
[122] *Tauira and 18 others v. France*, p. 132.
[123] See also *McGinley and Egan v. UK* – concerning nuclear tests, but in relation to Article 6.
[124] *L.C.B. v. UK*, para. 36.

the testing site. She claimed that the state had violated Article 2, since her parents had not been informed about the risks and recommended to monitor her health more closely. The Court found that it was not clear that her father had indeed been exposed to dangerous levels of radiation and that even if he had, the state could not have been expected to advice the applicant's parents, since it had not been *established* – neither at the relevant time nor at the time of the judgment – that there was a *causal link* between the exposure to radiation of individuals and the occurrence of leukaemia in their subsequently conceived children. Further, it was not certain that earlier medical attention would have alleviated the applicant's situation.[125] This seems to indicate a norm of precaution where an uncertain risk is not enough to require action – not even when the possible damage is as severe as death and when sufficient action may be of a rather limited nature, such as the provision of health information. Thus, the ECtHR would seem to require risks that are less tenuous than what might be tolerated under the precautionary principle in international environmental law. However, later practice may contradict this.

A landmark case concerning protection of the right to life is *Osman v. UK*. In this case, a schoolteacher had become obsessed with one of his pupils and stared stalking him and his family, vandalising their home and threatening them. Eventually, the teacher shot and killed the pupil's father and seriously injured the pupil himself. The Court first observed that apart from a general obligation to protect the right to life through criminal law provisions and law enforcement deterring people from killing others, Article 2 "may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".[126] This obligation was specified so as to limit the responsibility of states to situations where "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and [the authorities] failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[127] This limitation was motivated by the need not to impose a disproportionate or impossible burden on states – with a view to "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"[128] and also considering the fact that the power of the police to prevent crimes cannot be unlimited but must respect due

[125] *L.C.B. v. UK*, paras. 37-40.
[126] *Osman v. UK*, para. 115.
[127] *Osman v. UK*, para. 116.
[128] *Osman v. UK*, para. 116. This was later motivated with reference to the wide margin of appreciation that states must enjoy in relation to difficult technical and social issues – see *Öneryıldız v. Turkey*, para. 107.

process – i.e. operational measures may have to be restricted so as not to interfere with the rights protected under Articles 5 and 8.[129]

Although the police had been informed by the school about their concerns for the Osman boy, there had been no suggestions that the lives of the boy or his family had been at risk and no evidence linking the teacher e.g. to incidents of vandalism to the family house. Further, a psychiatrist had not found the teacher unfit for work. Not even the fact that the teacher had made known to the police his intentions of committing murder, was in the view of the Court enough to consider that the police *knew or ought to have known* about a real and immediate risk to the lives of the Osman family, since the threats had been cryptic. The Court concluded that since the police had, reasonably, not found any grounds to suspect the teacher to such a degree that they could have used powers that would actually have stopped him (e.g. arrest), they could not be blamed for not interfering.[130]

While this case does not, like the *L.C.B.* case, call for a *causal link* between action/inaction and the loss of life, it does state that the risk must be *real and immediate*. That level was not considered reached. Against that position, it may be claimed that since a member of the Osman family was actually deprived of his life, the risk must have been real and immediate, though perhaps not known by the authorities. Another way of seeing things is that because of the unpredictability of human behaviour, there is always a risk that any person may be killed by another, but unless the risk is manifested in such a way that the authorities ought to have known about it, it cannot be considered real and immediate. The fact that the risk actually materialises does not mean that the risk must have been objectively identified as real and immediate before the incident, since even risks that are perceived as remote and unlikely may be realised. Not all events can be predicted.

The requirement of a real and immediate risk to the life of an identified individual has been confirmed in a number of cases, which also provide further guidance as to what constitutes such a risk. Several cases deal with risks emanating from the the human mind, which may be more or less unpredictable. In *Opuz v. Turkey*, the state should have taken measures to prevent a woman from being killed by her ex-husband, since the authorities had known about her situation (inter alia she had been threatened and stabbed with a knife) and she had petitioned the prosecutor, stating that her life was in immediate danger. The Court observed that the authorities had had several options for protective measures but had not done much more than taking statements, which was not enough.[131] Likewise in *Branko Tomašić and Others v. Croatia*, the authorities had failed to act upon a real and immediate risk, when a man killed his wife and daughter after having repeatedly threatened to do so and having been imprisoned for the very reason of these threats. The au-

[129] *Osman v. UK*, para. 116.
[130] *Osman v. UK*, paras. 117-122.
[131] *Opuz v. Turkey*, especially paras. 128-149.

thorities had thus identified the risk that he posed, but failed to take adequate measures, since he was released from prison without having been given psychological treatment, although such treatment had been deemed necessary by the authorities.[132] There are also cases where mentally ill persons under the care of the authorities have killed others or themselves. A known mental condition in combination with the higher degree of responsibility that follows when the state has people in its care, seem to make violations of Article 2 likely in such cases.[133] There are instances, however, where the conduct of those causing loss of life is simply too unpredictable to reasonably be prevented. Such was the situation in *Keenan v. UK*, where a psychiatric patient committed suicide despite having been closely monitored and deemed fit for release from isolation, and also in a case where a woman set herself on fire when the police came to evict her family from their illegal dwelling.[134] The Court specifically noted in the latter case that "reasonably speaking, self-immolation as a protest tactic does not constitute predictable or reasonable conduct in the context of eviction from an illegally occupied dwelling, even in a situation involving such a particularly vulnerable sector of the population as refugees and internally displaced persons."[135]

There are other cases where the risk to a person's life emanates not directly from human behaviour, but from other factors such as accidents, medical conditions, or natural disasters. In several cases the Court has held that the authorities are obliged to provide necessary healthcare to people in custody, in order to protect their right to life. With a view to their vulnerable position, the authorities have a special obligation to protect people in detention. This places a heavier burden of proof on the authorities of showing that a person's death is not imputable to the state. Further, in these cases it seems as if a *real and immediate* risk is not required. In *Jasinskis v. Latvia*, a deaf man died in custody after the police had put him in a sobering-up room, believing that his behaviour was due to intoxication rather than the severe head injury he had sustained after a fall – a fall which the police knew about. The policemen were incapable of understanding sign language but had removed the note pad used by the man to communicate. As a result, and despite the desperate attempts of the man to attract the attention of the officers by banging on his cell door, he was given no medical attention until almost seven hours had passed after the officers first discovered that he could not be awakened from his supposed sleep. In this case, the Court only set out to determine if the authorities knew or ought to have known about the danger to the man's *health*,

[132] *Branko Tomašić and Others v. Croatia*, especially paras. 49-61.
[133] See inter alia *Paul and Audrey Edwards v. UK*; *Reynolds v. UK*.
[134] *Mikayil Mammadov v. Azerbaijan*.
[135] *Mikayil Mammadov v. Azerbaijan*, para. 111. See, however, the dissenting opinion of Judges Spielmann and Malinverni who claim that the police did not act as they should have – indeed one officer even offered the woman a matchbox to help her carry out her threat.

and if they had acted with due diligence. The conclusion was that the state had failed to safeguard the life of the man.[136]

The obligation to provide health care to persons in detention seems to be a concrete example of what precautionary measures to protect life might encompass in specific situations. The fact that the Court does not refer to a real and immediate risk of loss of life but instead to dangers to health, implies that the required level of risk does not have to be quite as high in these cases. It seems natural that when states have increased power over individuals (and indeed, better possibilities of monitoring them and identifying risks), they must also have increased responsibilities. Thus, the expansion of the application of the requirement for precautionary measures to situations with lower levels of risk, seems to be compensated by the fact that states already have far-reaching powers and obligations in custodial situations. The question then follows, why a real and immediate risk was in fact required in the cases concerning mentally ill persons under the care of the authorities, e.g. in *Keenan v. UK*. Perhaps the answer lies in the *source* of the threat to the persons' lives. In these cases, death was caused by the actions of mentally ill persons – actions which may be impossible to predict, due to the fickleness of the human mind. To fully eliminate all such risks would be, if not impossible, very difficult. Consequently, only the real and immediate risks may reasonably be expected to be prevented.

Yet, there are other cases where a real and immediate risk is actually required – cases in which this makes sense because they do not concern as limited situations as individuals in custody or other institutions, but where the source of the risk might actually be more predictable than the human mind. One – which is even more important since it has environmental aspects – is *Öneryıldız v. Turkey*, where a rubbish tip had exploded, due to lack of ventilation to prevent methane and other explosive gases from accumulating. The explosion killed some of the people living in shacks beside the tip. The Court referred to the positive obligation to protect life and observed that "this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites".[137] It seems here as if international environmental law may have had influence. No explicit reference to the precautionary principle was made, but when specifying the preventive measures that may be relevant, the Court referred inter alia to the fact that there is a right to information in relation to dangerous activities which has been recognised under Article 8 and which may also be relevant under Article 2 "particularly as this interpretation is supported by current developments in European

[136] See also e.g. *Salman v. Turkey*; *Saoud v. France*; *Tarariyeva v. Russia*. Further examples are given in Harris, pp. 45-46 and Ovey, pp. 156-157.
[137] *Öneryıldız v. Turkey*, para. 71.

standards".[138] It appears as if the Court not only used international environmental law as a subsidiary means of interpretation, but that it also took an evolutive approach to interpretation, in taking account of *developments in European standards*. This willingness to be influenced by international environmental law seems to open up for the possibility of also taking account of the precautionary principle.

In the *Öneryıldız* case, there was apparently no doubt that the risk was real and immediate and that the authorities did know about it – and failed to take the reasonable measures which would have prevented the explosion.[139] One might consider that the risk was obviously *real and immediate* also in *Budayeva and Others v. Russia*, but in this case the Court did not use this expression at all, which is somewhat confusing. The case concerned a series of mudslides which had hit a small town, destroying buildings and killing a number of people. Mudslides had since long been a reoccurring phenomenon in the area and the risk for a particularly difficult mudslide during the summer in question had been known. Nevertheless, the protective dam had not been repaired, nor had the inhabitants received sufficient information and warning.[140] The Court referred to the fact that an impossible or disproportionate burden must not be placed on the state, with regard to preventive measures and noted that "[t]his consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature".[141] Further, the Court held that:

> In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, [the considerations previously mentioned] should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use […]. The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.[142]

This seems to mean that in order for a state to be liable for not protecting people from natural disasters, the event in question must have been imminent, clearly identifiable and possible to prevent. Perhaps then, the omission of *real and immediate* is of little importance. In fact, the threshold set in this case may be considered even higher than if the risk had been required to be real and immediate.

[138] *Öneryıldız v. Turkey*, para. 90. On the right to information, see *Tătar v. Romania* in section 3.3.
[139] *Öneryıldız v. Turkey*, paras. 97-110, especially 101. The risk for an explosion and the measures necessary to prevent it had been well described in a report almost two years before the accident.
[140] *Budayeva and Others v. Russia*, paras. 13-38 and 147-160.
[141] *Budayeva and Others v. Russia*, para. 135.
[142] *Budayeva and Others v. Russia*, para. 137.

One last case worthy of a comment is *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, where once again, natural phenomena were important. In this case a schoolboy had died when attempting to walk home in a snow storm after the school had been closed early without the school bus operator being informed and thus being able to take the pupils home. The Court did refer to the *Osman* standard of a real and immediate risk, but also stated that in the relevant context "it cannot be considered as unreasonable to expect the school authorities to take basic precautions to minimise any potential risk and to protect the pupils".[143] This may imply that schools have very far-reaching responsibilities for children, since they are expected to *minimise any potential risk* (not just real and immediate risks, but *potential* risks!). This is in line with the increased responsibilities for persons in custody, who are also dependent on the authorities, and it also reflects the fact that children are more vulnerable than adults. However, the statement might simply mean that if the measures required to prevent a risk are truly basic and require practically no resources (such as informing the shuttle service), there is no reason not to expect such measures to be taken, even in the face of risks that are only *potential*. What seems to be clear is that there are many relevant factors, all of which must be considered in the proportionality assessment.

### 3.3.2 Protection of the right not to be subjected to torture etc.

Article 3 of the ECHR prescribes that no one shall be subjected to torture or other inhuman or degrading treatment or punishment. As well as Article 2, this entails not only an obligation for states not to treat people in such a way, but also an obligation to prevent that they are subjected to such treatment by others. This is particularly evident in cases where the extradition or deportation of aliens to states where they may face such treatment, has been considered a violation of Article 3. It might be claimed that an obligation not to remove people from the state is a negative obligation, but it could also be phrased as a positive obligation to allow people to remain in the state. Whichever definition is more correct, the important fact remains that when deciding that a person must not be removed, a risk assessment must be made. This is why these "removal cases" are the focus of this section. There are also other situations where people must be protected from ill-treatment by other actors than the state – a few of these cases are also briefly commented.

The most important case in this field is that of *Soering v. UK*. Not only is this case central for the protection aspect of Article 3, but it has also been referred to in relation to other articles, notably Article 2, in *Tauira and 18 others v. France* mentioned in section 3.3.1 above. In *Soering v. UK*, a German national was to be extradited from the UK to the US, where he faced a capital murder charge. The applicant claimed that Article 3 would be violated if he was extradited to the US

[143] *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, para. 41.

(to the state of Virginia), since he would be exposed to the *death row phenomenon*, if he was sentenced to death there.[144] The Court began by establishing that, in line with the object and purpose of the ECHR, and with the necessity of interpreting the rights so as to make them practical and effective and considering the fundamental values expressed in the absolute right not to be subjected to torture etc., there had to be in Article 3 an inherent obligation not to extradite persons in certain situations.[145] The Court seems to have relied on some kind of norm of precaution in stating the following:

> It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 […] by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article […] [T]he decision by a Contracting State to extradite a fugitive may […] engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.[146]

In assessing whether the applicant faced a *real risk* of treatment contrary to Article 3, the Court took account of the fact that he had admitted killing the two people whose murders he was charged with and that he was likely to be convicted. The Court also examined Virginia law, from which it concluded that the death penalty was likely to be imposed in a case such as the one at hand. A relevant factor was also the impossibility for the Virginia authorities to, upon request from the UK, give any guarantees that the death penalty would not be imposed. After finding that the psychological stress caused by the conditions at death row was sufficient to constitute treatment contrary to Article 3, the Court thus concluded that the extradition of the applicant would constitute a violation of Article 3.[147]

The Court thus motivated the precautionary need not to extradite people in the face of a real risk of torture etc. with the seriousness and irreparability of the damage as well as with the need to make the protection offered by Article 3 *effective*. Precautionary measures (i.e. non-removal) are required, according to this case, when there are *substantial grounds for believing that there is a real risk* of prohibited treatment. In the numerous cases following in the footsteps of *Soering*, there

[144] *Soering v. UK*, paras. 80-81. The applicant did not claim that the death penalty in itself would be a violation of the ECHR, and that could not have been the case either, since there is an exception to Article 2, according to which the death penalty is allowed. See further Harris, p. 81.
[145] *Soering v. UK*, paras. 85-89.
[146] *Soering v. UK*, paras. 90-91.
[147] *Soering v. UK*, paras. 92-111.

are many other examples which clarify what the requirement of a *real risk* means. One is *Vilvarajah and Others v. UK*, where the applicants, who were Tamils from Sri Lanka, claimed to be at risk of ill-treatment from the authorities due to their associations with the liberation movement. The Court observed that any member of the Tamil community might previously have been at real risk of ill-treatment due to the intensive violence directed at the group by the government, but since the situation had improved and many Tamils had returned voluntarily, the "mere possibility of ill-treatment"[148] was not enough.[149] The Court held that "there existed no special distinguishing features in their cases that could or ought to have enabled [the UK authorities] to foresee that they would be treated in this way".[150]

A further example is provided by *Collins and Akaziebie v. Sweden*, where a Nigerian woman claimed that she and her daughter would be at risk of female genital mutilation if forced to return to Nigeria. When applying for asylum in Sweden, the mother had given contradictory accounts as to whether or not she had in fact already been subjected to this practice and she also claimed that it was much more wide-spread than what was indicated inter alia by reports of NGOs. The Court noted that while it would often be necessary to grant asylum seekers the benefit of doubt in assessing their statements, due to their difficult situation, an asylum-seeker would have to give a satisfactory explanation to discrepancies in their account. In this case, the applicants had failed to substantiate the allegation that they would face a *real and concrete risk* of female genital mutilation.

While the requirement of a *real risk* may seem high, there are cases where the Court has found a violation of Article 3, despite a seemingly more tenuous risk than in *Soering*, for instance. E.g. in *Hirsi Jamaa and Others v. Italy*, it was considered a violation to send refugees from Italy to Libya, because they would there risk being sent back to Eritrea and Somalia where they would in turn run a risk of ill-treatment.[151] This is in fact a risk *of a risk* of damage. It might well be that the evidence is quite strong in an individual case, but in general it would seem as if such a "two step risk" would be more uncertain than a simple risk of ill-treatment. E.g. if there is an 80 per cent risk of being ill-treated in state X, and an 80 per cent risk of being sent to state X from state Y, the total risk of ill-treatment would only be 64 per cent. Thus, adding a link in the chain of risks will weaken it – although it may be strong enough in an individual case. When also accepting these "two step risks" as real, it would consequently seem as if the Court somewhat lowered the threshold for what may be considered a real risk.

In most of the cases examined above, the risk assessments were made before the applicants had been removed from the state. This differentiates these cases from

[148] *Vilvarajah and Others v. UK*, para. 111.
[149] *Vilvarajah and Others v. UK*, especially paras. 109-116.
[150] *Vilvarajah and Others v. UK*, para. 112.
[151] See also *T.I. v. UK*. Further Harris, p. 86 and Ovey, p. 179.

those concerning risk assessment under Article 2, where the possible violation often lies in the past. There are, however, also cases under Article 3 where the situation is examined retrospectively. In these cases an important aspect is – as in the cases under Article 2 – what the state *knew or ought to have known* about the risk before the removal of the person to the other state. In *Vilvarajah and Others v. UK* the Court summarised its view on what to consider in the assessment of the risk of ill-treatment in three main points. The first was that the issue must be examined in light of all the material placed before the Court or, if necessary, obtained by the Court itself. The second was that the risk must be assessed primarily based on what was known or ought to have been known to the state at the time of the removal of the person, but that information revealed later could also be considered, since it could confirm or rebut the risk assessment of the state. The third point was that the ill-treatment must reach a minimum level of severity in order to constitute a violation of Article 3. These three points appear to be generally applicable, except that in the case of a pending removal, the Court will examine the *present* situation.[152]

A factor that may be of importance to the risk assessment is whether or not the state has received from the state requesting an extradition any guarantees that ill-treatment will not occur. Such a guarantee may not eliminate the risk of ill-treatment, though, since it may be inadequate or be contradicted by other evidence.[153] Harris et. al. appear critical of the fact that the Court seems to be more apt to find that no violation has occurred in retrospective cases where assurances have been given, than otherwise.[154] True or not, it would appear harder to assess what the state knew or ought to have known in a retrospective case, when the ill-treatment is already a fact. But if the Court is indeed more willing to identify a violation before the event has occurred than after, it might be because damage may then be prevented. In that sense, the Court might indeed apply a norm of precaution.

When there is a real risk for ill-treatment in the receiving state, the Court has made it clear that there is an *absolute obligation* not to extradite or deport the person. In *Chahal v. UK*, the Court had found that an Indian man supporting the Sikh separatist movement would face a real risk of ill-treatment if removed to India. The government argued that he posed a threat to national security in the UK and that the UK interest in having him deported would outweigh his interest not to be subjected to a risk of ill-treatment. This, the Court did not accept.[155] Similarly, in *Saadi v. Italy*, the state claimed that the applicant supported fundamentalist Islamist groups involved in terrorism, and that he was therefore a threat to national se-

[152] *Vilvarajah and Others v. UK*, para. 107, with reference to *Cruz Varas and Others v. Sweden*. See also e.g. *Mamatkulov and Askarov v. Turkey*. See further Ovey, pp. 178-179.
[153] See further *Othman (Abu Qatada) v. UK*, paras. 188-189.
[154] See Harris, pp. 85-86, with references to several cases.
[155] *Chahal v. UK*, paras. 75-82.

curity. The Court explained that since the right not to be subjected to treatment contrary to Article 3 is absolute and without exceptions, the conduct of the person in question is not relevant. The risk of ill-treatment for the person concerned cannot be affected by any alleged threat that they may pose to national security in the state if not removed. Evidence either indicates a real risk of ill-treatment, or it does not.[156]

Despite this, there are cases where considerations of *priorities and resources* are relevant (as they were in the *Osman* case, where the Court considered that the burden on the state would be too heavy if regard was not given to the fact that the police has limited resources). In *D. v. UK*, a man from St Kitts had been convicted of a crime in the UK and after serving his sentence was to be sent back to his home state. By then, however, the applicant was in the advanced stages of AIDS and claimed that it would be contrary to Article 3 to send him back as he could not be given appropriate treatment and would have no friends or family in St Kitts to support him. The Court noted that the lack of effective treatment in combination with his social situation would expose the applicant to a real risk of severe physical and psychological suffering and that in such "very exceptional circumstances and given the compelling humanitarian considerations"[157] to be made, his deportation would constitute a violation of Article 3.[158] The Court further stressed the exceptional nature of this case in the similar *N. v. UK*. After giving account of several other cases where similar claims had been dismissed, the Court held that the differences in the level and availability of treatments for certain diseases may vary significantly between states,[159] but that "Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States".[160] The Court thus seems to take a more restrictive approach when the non-removal of persons from a state would entail too substantial financial implications.[161] One might question why the obligation not to remove severely ill persons would be considered more burdensome than the continual hosting of any other persons, who may cause expenses in many ways. It seems evident, however, that economic aspects are not irrelevant to the proportionality assessment.

It shall be noted that the obligation to protect people from treatment contrary to Article 3 has been recognised also outside the field of extradition and deportation of non-nationals. These cases appear to be predominantly retrospective, like most cases under Article 2, and have concerned e.g. children abused by their parents. In

[156] *Saadi v. Italy*, paras. 127 and 139.
[157] *D. v. UK*, para. 54.
[158] *D. v. UK*, paras. 40-54.
[159] *N. v. UK*, paras. 29-45.
[160] *N. v. UK*, para. 44.
[161] See further Ovey, pp. 177 and 180.

*Mahmut Kaya v. Turkey*, a man had been abused and eventually killed by unknown persons – allegedly because he, as a doctor, had given medical care to wounded members of the PKK. The Court held – with reference to the *Osman* case – that since states must ensure that individuals are not subjected to treatment contrary to Article 3, they may be responsible either if the legal framework provides inefficient protection, or if "the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known".[162] This seems to be essentially the same obligation as in relation to Article 2 and the removal cases under Article 3, with the difference that the risk is not required to be neither *real* nor *immediate* – if this difference in terminology actually matters.[163] It can further be noted that the obligation to protect persons from ill-treatment applies "in particular, [to] children and other vulnerable persons".[164]

### 3.3.3 Article 8 and the environment

Article 8(1) of the ECHR establishes a right to respect for private and family life, home and correspondence. This right is not absolute like Article 3, however, but may be limited under the circumstances described in Article 8(2), i.e. "in accordance with the law and [when] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others". A few cases are considered below, in which threats to the environment have been claimed to also threaten people and their rights under Article 8. These cases (at least one of them) strongly indicate a norm of precaution – more so than the environmental cases referred to under Article 2, despite the possibility for exceptions offered by Article 8(2).

In the case of *Guerra and Others v. Italy* of 1998, the applicants complained of a factory in the vicinity of the small town where they lived, which had emitted poisonous fumes when it was operating. The factory had posed a known risk – the authorities had classified it as high risk facility – and people had previously been poisoned by its emissions.[165] The Court observed that there are positive obligations inherent in the obligation to respect private and family life and that its task would be to determine if the authorities had taken "the necessary steps to ensure effective protection"[166] of the applicants' rights. The Court referred to the fact that the risks were known and the fact that severe pollution could affect individuals' well-being and prevent them from enjoying their rights guaranteed by Article 8.

[162] *Mahmut Kaya v. Turkey*, para. 115.
[163] There seems to be quite few cases concerning the protection/prevention aspect of Article 3 which do not concern the removal of people to other states, and most (if not all) appear to be retrospective, which might account for focus not being on risk assessment. Examples of cases are given by Harris, pp. 107-108 and Ovey, pp. 192-193.
[164] *Z and Others v. UK*, para. 73.
[165] *Guerra and Others v. Italy*, paras. 12-27 and 56-57.
[166] *Guerra and Others v. Italy*, para. 58.

Since the applicants had not been given any information that could have helped them to assess the risks posed to their rights by the factory, the state had not fulfilled its obligation to secure the applicants' rights.[167] Implicit in the reasoning of the Court seems to be the idea that an obligation to take some sort of preventive action is necessary in order for the rights to be effective. In this case, when the risk was known, information about it should have been provided – as a precaution. This indicates that failure to provide information about risks can support the view that the state has not acted with due diligence – just as it may do under the precautionary principle in international environmental law (see section 2.2).

Pollution was also the issue in *Fadeyeva v. Russia*, from 2005. A woman complained that pollution from a factory she had been living close to had violated her rights under Article 8. Inter alia she had become ill, but despite the known dangers the authorities had not allowed her to be re-housed to an area less exposed to pollution. The Court noted firstly that environmental pollution must reach a certain minimum level in order to fall under the scope of Article 8 and in assessing the seriousness of the infringement all circumstances of the case would be relevant.[168] After having stated that the Court normally applies a standard of proof *beyond reasonable doubt*, it noted that flexibility had often been allowed – taking into account the nature of the right at stake and difficulties in the procurement of evidence which may exist. Since only the government may be in possession of certain information, the burden cannot be entirely placed on the applicant to prove their claim.[169] In the instant case, the Court found that since the pollution had exceeded the allowed level, it would be potentially harmful to human health. Although that presumption might not be true in all cases, the Court found that the indirect evidence and presumptions made possible a conclusion that the applicant's health had deteriorated because of the pollution and that the infringement of her rights thus reached the level sufficient to be considered under Article 8.[170] The Court concluded that the state had been in a position to evaluate the pollution and take measures to prevent or reduce it but that the authorities had not acted with due diligence since it had had many options for protecting the applicant's rights (re-housing, pollution reduction etc.) but failed to do so. Thus, Article 8 had been violated.[171] This case seems to indicate a willingness of the Court to lower the standard of proof in cases where evidence is difficult to find, and recognition of the fact that the effects of environmental pollution may be such a case. Lowering the standard and thus "helping" the applicant to reach the minimum level of interference required, seems to imply ideas very similar to the precautionary principle in international environmental law.

[167] *Guerra and Others v. Italy*, paras. 59-60.
[168] *Fadeyeva v. Russia*, paras. 68-70.
[169] *Fadeyeva v. Russia*, para. 79.
[170] *Fadeyeva v. Russia*, paras. 87-88.
[171] *Fadeyeva v. Russia*, paras. 89-134, especially paras. 92 and 116-134.

The last case that is examined here, however, takes the implications from the previous cases to a new level. In the case of *Tătar v. Romania* from 2009 – after all other environmental cases referred to in this section and in section 3.3.1 had been decided – the Court not only explicitly referred to the *precautionary principle*, but it appears to have been influenced by the precautionary principle in its approach and findings. In 1999 a mining company had been given permission to extract gold and silver at a site close to Baia Mare, where the applicants lived. In 1993 an environmental impact assessment had been made, according to which the mining would not have a significant effect on the characteristics of the region. The area was described as already polluted, which would seem to have influenced the conclusion, because there were actual doubts expressed as to the effects on the environment of the method for extraction that was to be used – one employing sodium cyanide. The 1993 assessment acknowledged the risk of pollution of water in case of an accident, after which mists containing cyanide (a substance that can have an irritating effect on the respiratory organs) could spread over populated areas via the rivers. Already in January 2000, large quantities of cyanide polluted water leaked into nearby rivers and spread over large areas, poisoning aquatic life and emitting poisonous fumes. The applicants claimed that their rights under Article 8 had been violated, inter alia because the asthma of one of the applicants had been worsened by the pollution caused by the accident.[172]

The Court began by noting that pollution can affect the well-being of individuals and prevent the enjoyment of their rights to private and family life. The positive obligations mean that states must take all reasonable measures to protect the rights under Article 8 – inter alia by ensuring that decision processes take account of relevant information in order to predict and evaluate the possible consequences for the environment and for the rights of individuals so that a fair balance can be struck between the competing interests.[173] Turning to the facts of the case the Court noted that, unlike in other cases, there were no official documents that could *indicate in a sufficiently clear manner the danger posed by the activity* to human health and to the environment. The Court concluded, however, that based on inter alia a UN report and the information provided by the applicants, the pollution caused by the extraction *had* been capable of affecting the applicants' well-being and prevent them from enjoying their rights under Article 8. It was pointed out, though, that any presumed danger for pollution could always be definitively rebutted by the government, by an environmental impact assessment.[174] Already at this point in the judgment, it seems as if the Court was willing to lower the standard of proof – or even reverse it – in favour of the applicants and accept the

[172] *Tătar v. Romania*, paras. 19-31 and 73-77. The case is only available in French.
[173] *Tătar v. Romania*, paras. 85-88.
[174] *Tătar v. Romania*, paras. 89-97.

applicability of Article 8 despite a lack of *sufficiently clear* evidence of the dangerousness of the activity in question.[175]

Although one of the applicants evidently suffered from asthma, although sodium cyanide is a toxin dangerous to human health and although the levels of pollution had been high near the applicants' home after the accident, the cause of the aggravation of the illness could not be proven. The Court held that "the applicants have not succeeded in proving the existence of a sufficiently established causal link between the exposure to certain doses of sodium cyanide and the aggravation of the asthma".[176] Despite this lack of a causal link, the Court claimed that the state had in fact had a positive obligation to protect the applicants' rights. It said:

> despite the absence of a causal probability in this case, the existence of a serious and substantial risk to the health and to the well-being of the applicants presses on the State the positive obligation to adopt reasonable and adequate measures capable of protecting the rights of the parties in respect of their private life and their home and, more generally, the enjoyment of a healthy and protected environment.[177]

In this case, the authorities would have had to observe this positive obligation already before the accident and while an environmental impact assessment had been made in 1993, and while the Court admitted that states must have a wide margin of appreciation in this kind of cases, the Court observed that the technology was new and its environmental consequences unknown. The only measures required would have been those in the power of the authorities which were *reasonably capable of preventing the risks that had come to their knowledge*.[178] The Court went on to refer to the *precautionary principle* and then observed that according to its files, the Romanian authorities had not even discussed the risks, which in this case had been foreseeable.[179] In conclusion, the Court found that the authorities had failed in their obligation to evaluate in a satisfactory manner the possible risks of the activity in question and to take adequate measures capable of protecting the applicants' rights. Among these positive obligations, the Court stressed the importance of giving the public access to information permitting them to evaluate the risks themselves. But no such information had been provided in this case. Indeed, the activities had been allowed to continue even after the acci-

[175] This appears to have been confirmed in *Hardy and Maile v. UK*, para. 189.
[176] *Tătar v. Romania*, para. 106 as translated by the author. In the original language it reads: "les requérants n'ont pas réussi à prouver l'existence d'un lien de causalité suffisamment établi entre l'exposition à certaines doses de cyanure de sodium et l'aggravation de l'asthme".
[177] *Tătar v. Romania*, para. 107 as translated by the author. In the original language it reads: "malgré l'absence d'une probabilité causale en l'espèce, l'existence d'un risque sérieux et substantiel pour la santé et pour le bien-être des requérants faisait peser sur l'État l'obligation positive d'adopter des mesures raisonnables et adéquates capables à protéger les droits des intéressés au respect de leur vie privée et leur domicile et, plus généralement, à la jouissance d'un environnement sain et protégé".
[178] *Tătar v. Romania*, paras. 107-108.
[179] *Tătar v. Romania*, paras. 109-111.

dent in 2000, using the same technology. In this regard, the Court recalled "the importance of the precautionary principle"[180] and held that the positive obligations had been applicable *a fortiori* after the accident. After the accident the inhabitants of Baia Mare had lived in a state of anxiety and uncertainty, worsened by the passivity of the authorities. The state had therefore violated Article 8.[181] Thus, if not before, then through this case, a norm of precaution appears to be relevant to the rights in the ECHR. This norm will now be more closely examined.

## 3.4 The norm of precaution

After examining case law it seems evident that there is indeed some sort of norm of precaution in the ECHR. The question now remains as to its closer meaning and definition. In discussing this, the natural starting point is the precautionary principle in international environmental law, and to simplify a comparison, the ECHR norm is described, as far as possible, with the same terms and systematisation.

In *Tătar v. Romania* the Court explicitly referred to the precautionary principle in international environmental law, and used it to support its finding that the state had not fulfilled its positive obligation to protect the applicants' rights under Article 8. This clarifies that the precautionary principle in international environmental law can actually be imported into the ECHR and be used to promote protection of human rights. It shows that while the ECHR does not protect the environment as such, norms of international environmental law may be applied in human rights cases when the measures necessary for the protection of human rights coincide with the measures necessary for the protection of the environment. Indeed, it seems hard to motivate why the standards of precaution would differ in such situations depending on whether they were scrutinised under international environmental law or under human rights law, when the measures required are the same. Requiring less by the state under the ECHR regime would make no sense, since adopting the standard of the precautionary principle would not add to the responsibilities already undertaken by the state. Apart from this general unreasonableness, it would also be hard to motivate different standards when considering Article 31(3)(c) of the VCLT, which requires the taking into account of other norms of international law applicable between the parties, when interpreting a treaty. The function that the precautionary principle has in the *Tătar* case is not one that entirely revolutionises the approach to precaution taken by the Court, however. Instead, it rather confirms practices that appear to have evolved over a long period of time, independently of the developments in international environmental law, motivated by the need to ensure that the ECHR rights are *effective* in practice. In

[180] *Tătar v. Romania*, para. 120 as translated by the author. In the original language it reads: "l'importance du principe de precaution". Regarding the right to information, the *Aarhus Convention* (see section 2.2 above) was also explicitly referred to by the Court, in para. 118.
[181] *Tătar v. Romania*, paras. 112-125.

section 3.1 above it is noted that there are two possible ways in which a norm of precaution may become relevant in the ECHR – through influence from the precautionary principle in international environmental law and independently of it, because of the need for the rights to be effective. The *Tătar* case shows that both ways are relevant, but the reference to the precautionary principle in international environmental law mainly serves to highlight the common features of the two legal fields and simply draws attention to the norm of precaution that the Court since long applies.

In the case law examined above, precautionary ideas are present in many cases decided long before the *Tătar* case and without environmental aspects. The essence of all these cases is that in order to secure the rights in the ECHR, states must protect them from being violated by other actors or forces of nature. To do so, states must take reasonable measures to prevent risks of such violations that they know or ought to know about. The more precise conditions of this obligation are discussed below using the same systematisation as is used in section 2.3 above in regard to the precautionary principle.

*Risk*

The exact level of risk that is required in order for the precautionary obligation to apply is a difficult to identify. Starting with the easy bit, it seems clear that there is a minimum level, below which states will not be obliged to act. In *Tauira and 18 others v. France* it was made clear that "mere suspicion or conjecture is insufficient" and in *Vilvarajah and Others v. UK*, that the "mere possibility" of ill-treatment is not enough. A minimum level of risk is also required under the precautionary principle in international environmental law. According to the precautionary principle, however, an uncertain risk can be enough to warrant action – a causal link does not have to be proven. But under the ECHR, it is less clear that an uncertain risk can be accepted as sufficient in order to oblige states to act. In *L.C.B. v. UK*, the applicant had failed to *establish a causal link* – an expression which undoubtedly indicates that an uncertain risk would not be enough. But that such a standard would be prevailing is contradicted by several other things.

The first reason why a causal link could not always be required is that if the requirement was for a *certain* risk (an established causal link) in all cases it would make no sense to point out that mere conjectures etc. are not enough. Such observations are only relevant if the Court means that, "yes, uncertain risks may actually be enough, but they must not be *that* uncertain". Further, in most other cases the risk is required to be *real and immediate* (under Article 2) or just *real* (under Article 3). By the sound of it, this is a higher threshold than the *uncertain existence of a risk*, which can be enough under the precautionary principle in international environmental law. It might be argued that the requirement for a *real* (and *immediate*) risk means not only that the *existence* of a risk must be *certain* – i.e. that there must be a causal link between input and effect – but that there must also

be a real and immediate probability that this risk will be *realised* in the particular case – i.e. that the risk of damage must reach a specific level of strength. But on the other hand, it could also be claimed that a *real and immediate* risk is more potent than an *uncertain* risk, but less so than a *certain* risk. In that sense, it would only be a matter of the *existence* of a risk, and not of its potency in a given case.

This distinction between the *uncertain existence of a risk* and the *uncertain realisation of an existent risk* has been problematized already in section 2.3 above, but its shortcomings are even more evident here. In international environmental law, such a distinction could perhaps be made since it would in some cases be possible to distinguish between the existence of environmental risks in general (e.g. the causal link between toxin X and death of aquatic animals) and their possible realisation in a specific case (e.g. how likely it is that fish will die if toxin X is released in the river Y). But in cases concerning human rights, risks are often of a very different nature, where it may either be impossible to ever establish causal links or where such a distinction would simply be too complicated to make. Consequently, this means that what might be defined as *uncertain risks* must sometimes be accepted as sufficient also under the ECHR. To exemplify, there are cases (e.g. *Opuz v. Turkey* and *Branko Tomašić and Others v. Croatia*) where the threat of (ex-)husbands towards their wives has been considered *real and immediate*. Could the existence of such a risk ever be certain? And when the risk emanates from an *individual* human being, how could the *existence* of a risk be separated from its *possible realisation*? In such a case there is no *general* risk, such as a known toxin or industrial activity, there is only an *individual* risk. While some human actions may indeed be highly predictable, one can never say with certainty what a human being might do – the human mind does not lend itself to the establishment of causal links. If a *certain* risk was required in such cases before the authorities were obliged to act, their responsibility would be very limited indeed. It therefore seems inevitable that the Court must accept even risks that are to some extent uncertain as sufficient to oblige states to act – otherwise, the ECHR rights could not be *effectively* protected. The need to interpret the rights so as to make them effective thus calls for a norm of precaution.

The acceptance of *uncertain risks* is even more evident in *Hirsi Jamaa and Others v. Italy*, where the Court was prepared to accept as *real* a risk of ill-treatment in two steps, where there first was a risk that the applicants would be removed from Libya to Somalia or Eritrea, and then – if they actually were removed – that they would *there* face a risk of ill-treatment. This extra step in the chain of risks means that, in fact, the very *existence* of a risk of ill-treatment was uncertain in this case. And in the cases of *Fadeyeva* and – especially – *Tătar*, the Court evidently lowered the standard of proof, thus accepting more tenuous risks. In the *Tătar* case, the Court explicitly said that the state had an obligation to take precautionary measures, despite the fact that there was no causal link. In these cases, if nowhere else, the Court has indeed been willing to accept a very tenuous risk at a level that

seems to correspond to what would be enough under the precautionary principle in international environmental law.

Consequently, too much focus should not be placed on the terminology of the Court in regard to risks. The fact that a risk is described with the same terms in different cases does not mean that the level of risk is in fact the same, nor does the use of different terms mean that the risks are in fact different. This is because it is very hard to compare risks that emanate from different sources. In cases such as *Öneryıldız v. Turkey*, when the risk is related to environmental processes and chemical reactions, causal links *can* be established, even if it may be difficult. Human behaviour on the other hand – whether it threatens someone's life through direct violence as in the *Osman* case or affects the general situation in a state where an individual may risk ill-treatment – cannot always be explained, as it is not always rational and not as such bound by the laws of physics. Thus, when a risk of loss of life due to events in the environment is considered *real and immediate*, it might mean that there is more than a causal link, but when a risk to the life or well-being of persons due to human behaviour is considered *real and immediate*, it might mean that although the risk is uncertain, it is as certain as it could be, since no causal link could ever be established.

The different sources of risks to human rights also motivate that the required levels of risk should vary, due to considerations of effectiveness of protection and proportionality. In cases such as the aforementioned *Opuz*, when risks emanate from the human mind, protection would not be effective if very strong risks were required. But the threshold must not be set too low either, since it would be impossible for a state to prevent *all* risks due to human behaviour – it is simply too unpredictable and such an obligation would be disproportionate. In other cases, there may be reasons to set the standard differently. This is further discussed in relation to the proportionality aspect below, but it can be observed that in paragraph 137 of the *Budayeva* case, the Court itself said that "[t]he scope of the positive obligations […] would *depend on the origin of the threat* and the extent to which one or the other risk is susceptible to mitigation" (emphasis added).

In short, it may be hard to claim that there is a common standard in the ECHR as to what level of risk is required in order for states to be obliged to take precautionary measures. Different terms are used, and the risks are of such different natures that they cannot easily be compared. What can be said is that, just as the precautionary principle in international environmental law requires a minimum level of risk, so does the norm of precaution under the ECHR. And although the standard may have been set rather high in some cases, the Court has indeed accepted risks that must be considered quite tenuous. Thus, in regard to the risk aspect, the norm in the ECHR and the precautionary principle in international environmental law are quite similar.

*Damage*

Turning now to the aspect of damage, it is clear that a minimum level is required here as well – just as it is according to the precautionary principle in international environmental law. As is obvious, and has been explicitly stated e.g. in *Soering* and *Vilvarajah*, the possible infringement of rights must be serious enough to be considered a violation of the article in question, in order to oblige states to take precautionary measures. This is more of an issue under Articles 3 and 8, than under Article 2, since ill-treatment and infringements of privacy are matters of degree, while the same cannot be said about death. Under Article 3, however, when that level is reached, the obligation to take precautionary measures is *absolute* and cannot be refuted with reference to financial implications or other proportionality arguments. This is different from the situation under Article 8, where it seems as if there is no upper limit above which inaction can be excused – as long as the reasons are strong enough. It also seems as if when a violation of a human right is expected, it would not matter much to the proportionality assessment how "serious" the violation would be – i.e. a person in risk of "mild" torture would be just as worthy of protection as one in risk of "serious" torture, since both cases reach the minimum level.

*Proportionality*

It is evident in the reasoning above that it is hard to separate the elements of the norm of precaution, since the proportionality aspect is ever present. Although it is not explicitly referred to, it is clear that considerations of proportionality explain much of the reasoning of the Court. From a proportionality perspective, the level of risk when states are obliged to act may be affected by the circumstances of the case. It is therefore sensible that the Court speaks of a *real* (and *immediate*) risk in cases where the risk has a source that is hard to control – such as human behaviour. But if the authorities are in control of a situation – such as in cases concerning people in custody or other institutions – their ability to identify and prevent risks is greater, and demanding more from them in terms of due diligence is proportionate. Therefore, the lower risk requirement in the *Jasinskis* case (not real and immediate) is reasonable. Likewise, it is not disproportionate to expect authorities to act to prevent *any potential risks*, as in *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, when the measures required are very simple and the power of the authorities over the situation is substantial. Further, children may be in need of more protection than adults – that has also been confirmed under Article 3.

Although few would openly put a price on human rights, economic factors are part of the proportionality assessment even in the ECHR. In *Osman*, the Court stressed the importance of not placing an impossible burden on the state and noted that "priorities and resources" call for restrictions on state obligations. And even though the obligation under Article 3 to take precautionary measures in the face of a risk of ill-treatment has been called *absolute*, the Court was not, in the case of *N. v. UK*, prepared to oblige states to protect people suffering from illnesses that

could not be properly treated in other countries, since providing medical care would be too heavy a burden. It could be argued that what the Court actually considered in the *N.* case, was that the sending of a person to a state with less qualified health care would not reach the minimum level of severity required under Article 3, but on the other hand a person does not become any less ill or suffer any less simply because a state considers their treatment too expensive. Indeed, in the previous case of *D. v. UK*, the suffering caused by lack of treatment for an illness *was* enough to constitute a violation of Article 3. In backing from that position, the Court showed that, apparently, the *absolute* obligation not to remove people when they risk ill-treatment, is only *absolute* when it is convenient.

It shall also be noted that in retrospective cases, the Court tends to focus on what the state *knew or ought to have known*. This implies that a specific *result* is not demanded from states – indeed, that may be impossible, since some risks cannot be prevented. States are thus only obliged to act with due diligence. This is exemplified inter alia in paragraph 111 in *Mikayil Mammadov v. Azerbaijan* quoted above, where the state was not held responsible for the death of a woman, since her decision to set herself on fire had not been predictable.

The main *effect* of the precautionary principle in international environmental law has been considered to be its influence on the burden and standard of proof, as explained in section 2.4 above. Judge Weeramantry has even claimed that the precautionary principle developed in order to address situations where the conductor of potentially dangerous activities has better access to information about the risks than those opposing the activities in question (see section 2.4). The most obvious consequence of the fact that the ECHR places obligations on states in relation to individuals, is that the parties before the ECtHR (usually) are individuals challenging states.[182] Because of the unequal parties, the burden on the individual applicants to substantiate their claims can already be lessened in some cases – this is implied inter alia in the case of *Collins and Akaziebie v. Sweden* referred to in section 3.3.2.[183] It might therefore be expected that a norm of precaution would not be as necessary, or would not have as evident effects under the ECHR, compared to international environmental law, where the parties of disputes are states. But in *Tătar v. Romania*, as well as in *Fadeyeva*, it was clear that the standard in fact was lowered even further – in *Tătar* with explicit reference to the precautionary principle. In *Fadeyeva* the Court found a *presumption of danger* in favour of the applicant and in *Tătar* the lack of *sufficiently clear* evidence did not exclude the finding of a violation of Article 8. But the advantage for the applicants must also be the consequence of precaution in other cases, since – just as in international environmental law – accepting lower levels of risk means de facto lowering the standard of proof. The rather more explicit reasoning to this effect in *Fadeyeva*

[182] See further Harris, pp. 4-5 and 32-34.
[183] See further e.g. Harris, pp. 849-851; Mowbray, pp. 43 and 823-824.

and *Tătar* shows, however, that the norm of precaution already present in the ECHR may be strengthened through influence from the precautionary principle in international environmental law.

So, there seems to be a norm of precaution in the ECHR – at least in the types of cases reviewed. One of the central features of these cases is that the requirement for precautionary measures is an extension of the positive obligations of states to protect the rights of individuals. As mentioned in section 3.2, positive obligations have been recognised under practically all ECHR articles. Given also that most of the interests covered by the different rights may be interfered with by other actors than the state, there will be a need for the state to protect these interests by preventing violations from occurring. And if something is to be prevented, risks must somehow be assessed and acted upon – which is why a norm of precaution is likely to have been applied by the ECtHR already, in regard to other articles as well as the ones reviewed here. To sum up the discussion above, a norm of precaution in the ECHR may be phrased in the following way:

*If there is a risk, which is more than a mere conjecture, of a violation of a right protected by the ECHR, the state must take precautionary measures, as proportionate, to prevent a violation from occurring. This obligation applies to risks that the state knows or ought to know about and the mere fact that a risk is tenuous is not in itself a sufficient reason for inaction.*

# 4 A common norm of precaution

## 4.1 A common norm

Having examined the precautionary principle in international environmental law and the norm of precaution that seems to exist within the ECHR, two questions remain to discuss. The first one is addressed in this section and concerns whether there might be a common norm of precaution in the two examined disciplines. The second question is if there are any indications of the existence of a *general* norm, relevant to other fields of public international law as well, and what importance terminology might have in this context. This question requires a rather more speculative discussion and is examined in section 4.2.

In this section, it is argued that although the two norms have so far been referred to as being just that – two different norms – their similarities are in fact significant enough to motivate a conclusion that there is in fact only *one norm*. The differences are mainly due to the fact that this single norm is applied to a variety of situations within the two legal regimes and that the assessment is adapted accordingly. But these necessary adaptations are accommodated within the boundaries of the proportionality assessment, which is possible since the norm gives great discretion to states (and/or judiciary) applying it. What the norm essentially does is pointing to a number of conditions which must be fulfilled in order for precautionary action to be required in a specific case. These conditions are examined below and basically concern the three elements which are considered in sections 2 and 3 above – risk, damage and proportionality. It is therefore inevitable that this section partly overlaps with section 3.4, where some comparison between the "two norms" could not be avoided. It shall be noted that this is but one way of explaining the components of the norm of precaution in the two regimes examined. Before turning to the different conditions, the two ways of defining the norm presented in sections 2.4 and 3.4 must be remembered. They read as follows:

***The precautionary principle in international environmental law***
*If there are plausible indications of potential risks of damage to the environment, states are presumed to take precautionary measures, as proportionate, to prevent any damage that is not insignificant, even when there is no conclusive evidence to prove a causal relation between inputs and their effects.*

***The norm of precaution in the ECHR***
*If there is a risk, which is more than a mere conjecture, of a violation of a right protected by the ECHR, the state must take precautionary measures, as proportionate, to prevent a violation from occurring. This obligation applies to risks that the state knows or ought to know about and the mere fact that a risk is tenuous is not in itself a sufficient reason for inaction.*

*The first condition* necessary for the requirement of precautionary measures is that ***the risk reaches more than a minimum level***. This is expressed in the definitions above in that measures are required *if there are plausible indications of potential risks* or *if there is a risk, which is more than a mere conjecture*. It is clear in international environmental law that hypothetical risks are not enough and in ECtHR case law, mere suspicions and conjectures are dismissed as insufficient. As noted in section 3.4, however, remarks to this effect would be quite meaningless unless risks that were in fact rather tenuous could be accepted as sufficient. And that is indeed the case – ***uncertain or tenuous risks can be enough to require action***. According to the precautionary principle in international environmental law, precautionary measures may be required even when the existence of a risk is uncertain – in the words of the definition above: *even when there is no conclusive evidence to prove a causal relation between inputs and their effects*. Under the norm of precaution in the ECHR, it is less obvious that such *uncertain* risks can be enough although inter alia the case of *Hirsi Jamaa* strongly implies it, with a view to the "two-step risk" accepted there, as explained in section 3.4. As explained, the difference between the uncertain *existence* of a risk and the uncertain *realisation* of a risk in a given case may be of little significance. Other ECtHR cases also indicate the acceptance by the Court of very tenuous risks compatible to *uncertain* ones – not just the *Fadeyeva* and *Tătar* cases, but also e.g. *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*. This motivates the phrase in the ECHR definition according to which *the mere fact that a risk is tenuous is not in itself a sufficient reason for inaction*. So far, the two manifestations of the norm of precaution appear to be essentially the same.

However, there still seems to be a difference between the precautionary principle in international environmental law and the ECHR norm, in that the latter appears to tend more towards the requirement for slightly more potent risks, than the precautionary principle in international environmental law. On closer consideration, however, this apparent divergence becomes rather illusory. A first reason for this is that it is difficult to compare risks of such different kinds as in these two regimes and, as noted in section 3.4, what appears to be a different standard may in fact be very similar. A second reason is that there is no absolute demand for action as soon as an uncertain or tenuous risk exists – a stronger risk may be required to motivate action e.g. if the damage at stake is small. This is due to the proportionality assessment which must be made and which requires the level of risk to vary in different cases. Stronger risks must therefore sometimes be required in environmental cases as well. This would have been obvious if the same amount of case law concerning international environmental law, as concerning the ECHR, had been available. Consequently, the occurrence of "high risk cases" under the ECHR does not mean that the ECHR norm sets a different standard.

It may be argued, however, that the variation in the sources of risks would require different norms of precaution. It is true that the sources of risks vary greatly in the

cases under the ECHR and – as the Court noted in *Budayeva* – the obligations of the state must vary accordingly. Although risks to the environment may also be of different sources, environmental risks are nevertheless a more homogenous group. The environment is physical and thus subjected only to physical risks, encompassing everything between chemical reactions and deforestation. Such risks can also threaten human rights, since humans are indeed physical beings. But humans are also – unlike the environment – exposed to risks emanating from the human mind. Not only can human rights be of a non-physical nature, but they may also be at risk due to psychological factors in the minds of others, such as in the *Osman* case, where the threat originated from the thoughts of a disturbed man. Considering these variations and the high unpredictability of some risks – especially those from the human mind – there may in fact be some categories of risks to human rights where it would in most cases be disproportionate to require action in the face of an uncertain risk. In regard to the environment, it might be harder to distinguish any such group of risks. But this does *not* call for two different norms of precaution. It would be inconvenient to attempt a definition of different groups of cases in order to prescribe different levels of risk. The differences would be hard to explain and all possible variations could not be encompassed anyway. The only reasonable solution is therefore to grant states certain discretion, which is precisely what the proportionality aspect of the norm of precaution does.

To sum up, the norm of precaution sets the same conditions in regard to risks in both legal regimes, but the meaning of the conditions will vary with the circumstances of the individual case to which they are applied and cannot be further specified in a definition of the norm. The norm of precaution means that lower levels of risk are accepted and – as has been pointed out in sections 2.4 and 3.4 – the main effect is therefore on the standard (and/or burden) of proof.

*The second condition* that must be met in order to require precautionary measures is that the ***damage reaches more than a minimum level***. This is required in both branches of public international law and this similarity was noted already in section 3.4. In the two definitions of the norm presented above, precautionary measures may be required to prevent *any damage (to the environment) that is not insignificant* or *a violation of a right protected by the ECHR*. Like the requirement for a minimum level of risk, a minimum level of damage is also necessary due to the aspect of proportionality – it would not be reasonable to require prevention of *every* negative effect. What is necessary will also depend on the level of risk, since a weaker risk will require the support of a more serious damage in order to motivate precautionary measures, when weighed against other interests in the proportionality assessment. Under the ECHR the minimum level is decided by the relevant article of the Convention – it is only if an actual *violation* of a human right protected by the Convention is at risk that precaution is required. Likewise, a specific level of damage sometimes makes precautionary measures an *absolute* requirement under the ECHR. Such is the case under Article 3, where other inter-

ests *cannot* outweigh the need for precaution which presents itself as soon as the appropriate levels of risk and damage are at hand. At first glance, the lines seem harder to draw in international environmental law and the limits appear much more fluid and undecided. But this does not mean that there are two versions of the norm of precaution – this is not a substantive difference between two norms but rather an illusion due to the nature of this investigation. As argued in section 2.4, the precautionary principle in international environmental law is not really applied on its own, but is rather used to interpret other norms of international environmental law. In this thesis, however, it has been reviewed in relation to international environmental law in general. If it had instead been scrutinised as part of a specific international environmental treaty – the way it is applied in practice – it would probably have been clear that it can have the same kind of "sharp" limits as the norm of precaution can be given under the ECHR. As an example, there may be a norm of international environmental law prescribing an absolute ban on the killing of *any* individuals of a specific species of animals. The minimum level of damage required would then be the death of such an animal. Likewise, if the ban was absolute, no arguments of proportionality could be used to justify action that would lead to the death of such an animal. The situation would then be the same as under Article 3 of the ECHR. To conclude, this shows that the level of damage required will depend on the situation in the instant case as well as on the requirements of any other norms of public international law to which the norm of precaution is applied. Therefore, any differences in the required minimum levels do not mean that the norm of precaution is not the same, but that the circumstances to which it is applied are different.

Next condition necessary for a requirement of precautionary measures has already been implied and partly discussed, which is inevitable since the conditions are dependent on each other. *The third condition* is that ***the combined weight of the risk and the potential damage is greater than that of any other conflicting interest***. Except when other norms prescribe absolute obligations (as discussed above), states can only be obliged to take precautionary measures when considerations of other interests do not make such measures disproportionate. This is indicated in the two definitions of the norm, in the phrase that measures are to be taken *as proportionate*. The proportionality assessment thus required is not outlined in detail and nor could or should it be – it is in the very nature of proportionality that it allows for discretion and that the factors to be considered will vary with the individual case. Since the norm of precaution is aimed at dealing with risks and unclear future situations of varying kinds it is necessary to have the possibility of discretion in order to avoid unreasonable results. The norm must be somewhat undefined, since it must be possible to apply it to an undefined variety of situations – even within one single field of international law.

If the interests over which precautionary measures must be prioritised are financial or practical, it may be easier to find that the interest protected by the norm of

precaution ought to be favoured. The very existence of a norm of precaution applicable to an interest would seem to give it an advantage over other interests. But under the ECHR the situation may sometimes occur where two protected interests are to be weighed against each other, which must entail a more difficult assessment. A clear example is the *Osman* case, where people's lives were at risk due to another person. The Court noted that the possibilities to prevent the perpetrator from attacking were limited because his human rights also had to be considered – inter alia the right not to be arbitrarily deprived of one's liberty. The situation under the ECHR can thus be one where the human rights of one person must somehow be weighed against the human rights of another person and this could motivate requirements of higher levels of risk, since the rights of potentially innocent persons might otherwise too easily be infringed. Similar complications may not arise quite as often in international environmental law.

On the other hand, a complication when making a proportionality assessment in international environmental law is the taking into account of the impact of any decision on future generations. Intergenerational equity is an important idea in international environmental law and may be expected to reinforce any arguments in favour of precautionary measures. It is clear, however, that if future interests were to be given full weight, almost any human activity might be considered dangerous. Considerations of this kind are bound to complicate the proportionality assessment. They seem, however, not to be a problem for the ECtHR, which is concerned only with the human rights at stake in the case before it.

The considerations to be made in regard to risk and damage, and the considerations mentioned so far under the proportionality assessment, all concern the *objective* aspects of the assessment of whether or not precautionary measures must be taken. These aspects concern only the factual situation and are independent of the state involved. But there are also aspects pertaining to the individual state – they may here be referred to as *subjective* aspects – which are important if the question of state responsibility is to be evaluated. The mere fact that there is a sufficient risk of a sufficiently grave damage and that these two factors outweigh another interest may be enough to say that precautionary measures ought to be taken, but depending on the circumstances in the state, such a requirement may still be disproportionate. It has been mentioned in section 2 that states can only be held responsible if they have not acted with due diligence and in ECtHR case law it has been clarified that states must not be given an impossible or disproportionate burden. To evaluate if states have indeed acted with due diligence, it may thus be necessary to consider the situation in the relevant state and its available resources. Such considerations are possible inter alia according to the idea of intragenerational justice in international environmental law (i.e. equality between rich and poor countries) and the margin of appreciation in the ECHR (which allows for tolerance of certain legal and cultural differences between states). These considerations are not specifically prescribed by the norm of precaution itself, but by the

surrounding legal context. The possibility of taking such factors as economy and resources etc. into account implies that the means by which to protect a given interest may vary, as long as they are suitable for the purpose. At the same time, there can be no requirement for states to achieve a certain result, i.e. to always manage to protect the interest at risk, since that may be impossible. This was explicit in the ECtHR *Budayeva* case, where the Court noted that state obligations must be affected by the extent to which risks are actually possible to mitigate.

Lingering a moment on the topic of due diligence, it shall be noted that when the ECtHR has assessed possible violations retrospectively, it has often focused on whether or not the state ***knew or ought to have known*** about the risk in question. This is included in the ECHR definition of the norm above and it is an important *part of the third condition* (proportionality) which is necessary for the requirement of precautionary measures. Although the precautionary principle in international law does not in any of the exemplified versions in section 2.1 explicitly state such a requirement, it must be considered inherent in the very ideas of proportionality and due diligence. Firstly because it would be unreasonable to hold states responsible for failing to take precautionary measures to prevent risks that they *could not have known* about. Secondly, it would be equally unreasonable if states were *not* held responsible for failing to take measures to prevent risks that they *ought to have known* about, since a state could then easily escape responsibility by claiming ignorance. This means that states must exercise due diligence in *identifying* potential risks as well as in preventing them. If precaution is to matter, it must mean that states are to be pro-active – not that the authorities can sit idle.

Having now examined the conditions under which precautionary measures can be required, it is clear that they are the same in both regimes of public international law. The sources of risk vary, but if a risk is more than hypothetical it can be sufficient to demand action, even if it is tenuous or uncertain. The types of damage vary, but if the possible damage is more than insignificant and/or reaches the levels required by the other norms to which the norm of precaution is applied, it can be sufficient to demand action. The other interests to be weighed against the need for precautionary measures also vary, but as long as it can be considered proportionate with a view inter alia to state resources and what the state knows or ought to know about the risk, precautionary measures can be demanded. The norm of precaution is one that leaves much room for discretion, which is necessary since risks are by their very nature unpredictable. In order to prevent risks, an assessment of each individual situation must therefore be made and with the endless variation of possible scenarios even within *one* legal regime, it ought not to be surprising that the norm of precaution can give only a rough outline of what factors to assess.

There is also another reason for the relative "vagueness" of the norm. It was noted already in section 2.4 that the main function of the precautionary principle in in-

ternational environmental law is to guide the interpretation of *other* norms of international environmental law and strengthen environmental protection by lowering the threshold for when action is required. Indeed, the precautionary principle is often included as a norm of interpretation in international instruments, as evident in section 2.1. Under the ECHR the requirement for precautionary measures likewise seem to be the result of the need to interpret the rights so as to make them effective. Thus, the norm of precaution is not about granting protection to interests previously ignored, but to strengthen protection of interests that are *already* regulated. The norm of precaution is thereby mainly a general guideline and a reminder that if something is to be effectively protected, an anticipatory approach is necessary. Seen from this perspective, the norm of precaution does not need to be specific, since more detailed conditions are provided by the other norms to which it is applied.

In the introduction to this section, the two definitions of the norm of precaution from sections 2 and 3 are recalled. The norm has evidently been described differently, but that is mostly due to the different terminology used in each field of law. Since the conditions for requiring precautionary measures are found to be the same, and since the norm is thereby to be seen as one and the same, the two definitions can easily be merged in to one, as below. This is certainly not the only way to phrase the norm of precaution, but simply an example.

***The norm of precaution***
*If there are plausible indications of potential risks of damage to a protected interest, states must take precautionary measures, as proportionate, to prevent any damage that is not insignificant. This obligation applies to risks that the state knows or ought to know about and the mere fact there is no conclusive evidence to prove a causal relation between inputs and their effects, or that the risk is otherwise tenuous, is not in itself a sufficient reason for inaction.*

## 4.2 A common term and the possibility of a general norm

Having found that the norm of precaution is common to both international environmental law and the ECHR, the question follows if there are any indications of a general norm of precaution. Firstly, it shall be emphasised that it is not for this thesis to give a definite answer, but only to discuss a few relevant aspects. In order for a norm to be general, it might be expected to exist in several, if not all, fields of public international law. At best, this thesis only demonstrates its existence in international environmental law and perhaps in the ECHR regime – two fields which do not represent a very large share of public international law in total, especially considering the fact that even the human rights field encompasses so much more than just the ECHR. However, just as a number of cases from the ECtHR concerning a few articles of the ECHR can *indicate* the existence of a

norm of precaution there, the existence of a norm in the two branches examined can also *indicate* that the norm might be general.

The main reason to suspect that a norm of precaution may be relevant in other regimes of public international law as well as the ones reviewed is the fact that the norm of precaution is motivated in both international environmental law and in the ECHR by the need for *effective protection* of the interests in question. It seems evident that any obligation to protect an interest must be anticipatory by nature, since protection will be of no use when damage has already occurred. The ECHR has also motivated precautionary measures with the need to ensure that human rights are *effective*. This would indicate that a norm of precaution *could* be relevant to any legal regime which aims at the protection of some kind of interest against damage. A brief speculation might here be in place, regarding some possible fields of public international law where a norm of precaution may be relevant. For example, what is the meaning of international humanitarian law if not to protect civilians and combatants against unnecessary suffering and death in international armed conflicts? Could not a norm of precaution be relevant there, e.g. in relation to the obligation not to attack civilian targets? Further, are there not norms for the protection of certain economic interests in international trade law? Could not a norm of precaution be relevant there? And has not, in fact, a right to pre-emptive self-defence (albeit highly contested) been discussed in relation to the prohibition on the use of force? There may surely be other examples and in order to examine the existence of a general norm of precaution, regulation such as this might be an appropriate place to start.

If there actually is a general norm of precaution, it has at least not been acknowledged as such. Evidence of that – or perhaps the reason for it – is that there is no general *term* to describe it. But the lack of a general term does not preclude the existence of a general norm – just as the lack of a common term in international environmental law and the ECHR regime does not mean that there is no common norm. However, a common term in international environmental law and the ECHR regime might further the development of the common norm. And in the long run, it may also further the development of a general norm – or the recognition of such a norm, if it already exists. This is simply because a common norm may be a source of inspiration. This can be the case with the norm of precaution, but also with other norms. Thus, the relationship between international environmental law and the ECHR regime, and the common norm of precaution in these two disciplines, is discussed below in order to exemplify what may be true for public international law in general.

Before considering the implications of terminology more closely, a brief note on *terms* in general seems appropriate. As is evident in many situations of everyday life a term (and language in general) is not always capable of communicating the intended message, and even if it is capable of doing so, the desired result is not

always obtained. There are various theories about the functions of terms in law and law making, but the assumption here will be that terms can have different functions, and that they can have more than one function at a time. Terms may thus be used simply to *describe* something, but they may also – perhaps simultaneously – be used (or have as an unintended effect) to convey other messages, encouraging certain actions etc. The success of any communicative endeavour will depend inter alia on the general situation in which the term is used and on the experiences, knowledge and values etc. of the receiver. The use of a certain term may lead to better understanding of the idea it aims at describing, but it may also just mask pre-existing confusion about the actual content of the idea, if the users of the term attribute different properties to it.[184] These initial remarks are important to keep in mind.

Turning now to the terminology used in relation to the norm of precaution, the term *precautionary principle* is used to describe the norm of precaution when it appears in international environmental law, while in the ECHR, there is no specific term at all, even though the norm seemingly exists there as well. The first question is *why* the terminology is different, when the norm appears to be the same. It would seem that, despite the fact that the norm is in essence the same, it would not be reasonable to expect it to be referred to with the same term – at least not initially. This is because general norms of public international law are not enforced on all the different branches of public international law "from above". If that were the case, the terms ought indeed to have been the same. Rather, general norms are derived from their use in the different disciplines. In other words, general norms may be expected to develop in the context of the different disciplines, before becoming general. The formation of legal norms in one field of law might therefore happen independently of any similar developments in other fields and any similarity in the terms chosen to describe these norms would then seem unlikely.

This kind of simultaneous but independent development appears to be the reason for the different terminology of the norm of precaution in the two examined legal regimes. Consequently, it could potentially explain differences in terminology in other fields of public international law as well. In international environmental law, the introduction of the precautionary principle is by some (see section 2.2) seen as the third step in the evolution of environmental protection – international law was initially only interested in the retroactive aspect of making amends for actual damages, but the principle of prevention moved focus from reparation to anticipation, which was reinforced by the introduction of the precautionary principle, calling for action at an even earlier stage. In a way, a similar development has taken place in the ECHR regime, since positive obligations have gradually been recognised under most articles, thus adding an anticipatory aspect in situations when violations caused by non-state actors are to be prevented. In the cases from the

[184] See furher Linderfalk 2013/14.

ECtHR reviewed in this thesis, however, there is little awareness of the precautionary principle in international environmental law until recent years and even in the *Tătar* case it is treated rather as an alien phenomenon. The overlap of the precautionary principle with the "ECHR norm" – a norm which may be traced back at least to the *Soering* case from 1989 – appears to be overlooked in that case. Thus, the development of the norm of precaution in each field of law appears to be simultaneous but independent.

While a norm of precaution thus existed in the ECHR before the *Tătar* case, because it was considered necessary to make the rights in the Convention effective, the *Tătar* case shows that inspiration from the precautionary principle in international environmental law is still relevant. This is because reference to the precautionary principle in international environmental law may shed light on the norm of precaution that is already in use in the ECHR, as noted in section 3.4. A relevant question may be what function a common term (or a general term) would actually have, considering the fact that a common norm apparently *can* develop in the absence of a common term. The *Tătar* case indicates part of the answer. The two separate (but matching) lines of development of the norm of precaution indicate that the existence of some fundamental likeness between the two regimes, or at least between the situations they regulate, may be enough to give rise to a common norm. In this case the basic need for the protection of the interests in question to be *effective* seems to be the driving force, as noted above. But there is room for improvement of the current situation, and a term common to both international environmental law and the ECHR regime, to describe the norm of precaution, may be beneficial for several reasons. This will now be explained. And as noted above, the example of what is beneficial in the context of the norm of precaution common to these two legal regimes, may also have bearing on a (possible) general norm of precaution and/or on public international law in general.

Firstly, the lack of a common term makes the *identification* of the common norm more difficult. A common term could give a hint that, maybe, the underlying norm is the same as well, and thus lead researchers and practitioners to look in a certain direction. Consequently, there seems to be a risk that the existence of a common norm is overlooked if it is not spoken of in common terms. Indeed, the fact that there seems to be a norm of precaution at all in the ECHR might under the present conditions be surprising to some, not to mention the fact that the norm appears to be essentially the same as the precautionary principle in international environmental law. In the long run, the unacknowledged existence of common norms may support a false impression that the discrepancies between the separate fields of public international law are more substantial than they actually are. Some claim that public international law is already moving in a direction where its various disciplines are distancing themselves from each other, causing potential conflicts between norms of different fields – a phenomenon referred to as the *frag-*

*mentation* of international law.[185] It might be assumed that the use of different terms to describe the same norm in different fields of public international law would hardly curb any such advances.

A common (or general) term could not only be expected to help *identifying* the actual use of the same norm, but it would also help *developing* it. Putting an idea into words or giving a name – a term – to a norm, furthers the understanding of what the norm really is. But more than just making evident what already exists, terms may also change and shape the norm they describe, by connecting it to all the expectations associated with the term. Likewise, if the norm changes, that will affect the understanding of the term. Thus, terms and norms – i.e. law and the language used to describe it – will fertilise each other. So, if the same term is used to describe what was thought to be two separate norms it seems evident that the term will not only acknowledge that the norms are *one*, but also create a *bridge* between the two manifestations of the norm, enabling them to influence each other. A common term for the norm of precaution in international environmental law and in the ECHR regime would therefore further the development of the norm of precaution in general. If the parallels between the two disciplines were highlighted, the specific use of the norm in each field could inspire the other. Even in this limited study it is evident that some of the common features of the norm of precaution are more elaborated and more easily identified in one legal regime than in the other.

There are several examples of this. One example is the classification of risks as *certain* or *uncertain*, which is upheld in international environmental law, and which has furthered the understanding of the risks assessed under the ECHR. But likewise, an attempted application of the demand for an *uncertain risk* in the ECHR regime has also clarified that the difference between the uncertain *existence* of a risk and the uncertain *realisation* of a risk in a specific case is rather illusory – which in turn can further the understanding of precaution in international environmental law. Another example of how one manifestation of the norm of precaution can further the understanding of the other one, is the fact the function of precautionary measures as promoting the protection of the interest in question is better illustrated in the ECHR, where the positive obligations of states are explicitly referred to. A third example is that it is clear in ECtHR case law that states ought not to be held responsible for risks they are not able to know about or prevent. It would be unreasonable if this was not also the case in international environmental law. Thus, the understanding of the norm of precaution can be promoted if its two manifestations are compared. However, the use of a common term may have more far-reaching effects than this. It seems likely that if practitioners of one discipline were given reason to look to other disciplines for inspiration, further similarities might be discovered as well and along with them additional

[185] On *fragmentation* see further inter alia *ILC Study Group Report A/CN.4/L.682*.

sources of inspiration. In the long run, the use of common terms to describe common norms could therefore contribute to increased cross-fertilisation between the different branches of public international law, which would develop each of the branches as well as public international law in general and lead to a higher level of harmonisation. And if common norms are acknowledged as such in a number of fields of public international law, it may inspire the use of the same norm in other fields as well, thereby gradually expanding common norms into general ones. In this specific case, perhaps the use of a common term for the common norm of precaution would increase the likelihood of its becoming (or being recognised as) a general norm.

A very concrete difficulty that a common term for the norm of precaution could help abating, is the reluctance on behalf of many states to sufficiently protect the environment. As a common good, and as an entity without the ability to speak for itself, the environment is inescapably at risk of being abused. This would perhaps motivate a higher level of protection and regulation in international environmental law compared to other fields of law and the need for a term in order to strengthen the norm of precaution seems more pressing. But the fact that there is a term (*precautionary principle*) and that the norm of precaution is thereby acknowledged, may not be enough, since the norm appears not to be recognised in other disciplines of public international law. This makes the *precautionary principle* stand out as if it were something rather unique. It can easily be imagined that a state which is already reluctant to the taking of measures for the protection of the environment will be even more unwilling to do so if the *precautionary principle* is seen as embodying an odd requirement, *sui generis*. The discussion referred to in section 2.1 about whether to use the term *precautionary principle* or *precautionary approach* in international environmental law is an indication of the fear on behalf of some states that precautionary obligations would be cumbersome. But if it was made evident – through the use of a common term – that the same kind of requirement exists under the ECHR, that might contribute to a normalisation of the norm of precaution and prove that, in fact, society would not crumble by the mere introduction of precautionary measures.

Introducing a common term for the norm of precaution in international environmental law and the ECHR regime is not entirely unproblematic, however. While inspiration from another branch of public international law may be beneficial to each discipline, a common term might also lead to the importation of ideas which ought not to be imported into other fields of law without due consideration. As an example, it was argued in section 3.4 above that it may be inappropriate to categorise risks to human rights as *certain* or *uncertain* risks, as may be done in international environmental law, since risks to human rights may be of a different kind than risks to the environment. If the use of a common term led to the unreserved incorporation into the ECHR regime of the norm of precaution exactly as it is applied in international environmental law (or vice versa), problems would undoubt-

edly ensue. Apart from that issue, terms are interpreted differently when appearing in different contexts, as noted above, and using the same term in two disciplines of public international law therefore does not guarantee the same effects. Further, the understanding of a term can change over time and the norm of precaution might also develop in different directions in the two disciplines, in which case the use of the same term could lead to increased confusion. Thus, a common term should not be introduced too easily, because if the differences between the manifestations of the norm in each regime are too substantial, a common term would not bridge the gap but rather hide it under linguistic make-up, and thereby hinder the identification and reduction of the discrepancies. The same might be equally true for other norms and in other branches of public international law.

Consequently, while it is important to acknowledge the similarities between the different legal regimes and their take on similar problems – such as the need for precautionary measures – the differences must not be overlooked. Considering the variety of issues regulated throughout public international law it would be foolish, at the very least, to expect any norm to be interpreted and applied in the *exact* same way in every discipline. That would not only be unrealistic but undesirable and in the case of the norm of precaution it would in fact deprive the norm of one of its main characteristics, which is the proportionality aspect. The norm of precaution as described in this thesis is defined by its room for discretion and the inherent adaptation to varying circumstances. If the norm was not applied in a way that took into account the varying sources of risks and other specific features of each field of public international law, it would lose its function. Careful considerations and adaptations are necessary.

If a common term was to be used in international environmental law and the ECHR regime, it would have to be one that would indicate that the norm is one and the same, while still respecting the need for adaptations to the individual circumstances. The invention of an entirely new term might be considered, but it would seem unnecessary when a term already exists in international environmental law. It would also be difficult to replace the *precautionary principle* in international environmental law with another term, since it is by now well-established. A suggestion could therefore be to refer to the norm of precaution as *the precautionary principle* ***in the ECHR***, and *the precautionary principle* ***in international environmental law***, respectively. In this way the term would be both common and specific. The term could also be adapted to any other field of public international law where the norm may also exist. However, a disadvantage of this term would be that it might still appear too strongly connected to international environmental law and even if the ECtHR may be able to handle that, the change in terminology would perhaps seem insignificant in international environmental law and the term might consequently appear too familiar to encourage influences from other disciplines – which would be one of the purposes of a common term.

Finding an appropriate term is not an easy task, and it is not for this thesis to perform it. However, the appropriate term ought perhaps not to be chosen, but rather it should be allowed to develop over time. Therefore, a reasonable conclusion would seem to be that the important thing – regardless of the specific term – is to recognise and emphasise that although the norm of precaution is essentially one and the same in international environmental law and in the ECHR regime, it is not – and should not – be applied identically. Recognition of this fact could prompt the development of the norm of precaution in the two regimes, as well as spark ideas in other branches of public international law where a norm of precaution may be needed to strengthen protection of a threatened interest or where a norm of precaution already exists, under the disguise of another term. The fact that the use of terms and the use of norms may not always correspond is regrettable but preventable. When lawyers identify the existence of a common norm without a common term, there are two things they can do to improve the situation. The first is to come to terms *with* it. The second is, perhaps, to find a common term *for* it. As for the norm of precaution, further studies will show what the proper cause of action might be.

# 5 Conclusion

It would be pretentious to claim that this thesis proves the existence of a norm of precaution which is common to international environmental law and the ECHR regime. It does not. Such a claim would have to be supported by more extensive studies of the precautionary principle in international environmental law on the one hand, and much more extensive studies of ECtHR practice on the other, in order to be substantiated. Especially regarding the ECHR it must be remembered that only some cases, regarding some aspects of a few articles have been scrutinised and that the remainder of the case law could point in other directions. What this thesis might provide, however, is a starting point for further investigations of the subject and a possible indication of a likely result.

Regardless of the success of the attempt to indicate a common norm of precaution, the thesis may hopefully provide some input into a general debate on the common features and divergences of the various regimes of public international law. The investigation still suggests that apparent discrepancies, e.g. the prevalence of a certain term, may not be as conspicuous as they seem when exposed to closer scrutiny. In other words, it may be rewarding to look below the surface of a matter and beyond its terminology. But although terms used to describe legal phenomena can be misleading, the use of the right term in the right place can strengthen the law it refers to. Further, the mere fact that risk assessments can display similarities in very diverse situations, such as when chemicals threaten the environment or when individuals are threatened by dangerous stalkers, is in itself a reason to consider if some questions are so fundamental to the nature of law, that they are omnipresent. When such issues are found, this thesis suggests that the possibility of a general norm, perhaps accompanied by a general term, may be of interest for further examination. The need for precautionary measures may be such an issue.

The norm of precaution may be one example of how apparent differences between the branches of public international law may be illusory. Identifying other examples of false discrepancies could in time reveal the true nature of public international law and remind lawyers not to lose sight of the bigger picture – of public international law as a single system. A strict categorisation of public international law in different fields, even regarding issues that ought to be considered in a general context, may be a reflection of the many human attempts throughout society to categorise reality in understandable portions. However, the annoying truth may be that the world is sometimes too complicated for human categorisation. This may be true about humans and the environment, about international environmental law and human rights law or about public international law at large. Some things, such as the approach to precaution in international environmental law and in the ECHR regime, may be similar even though they appear different. That may be a complicated fact, but it is a truth we must come to terms with.

# Table of treaties and UN documents

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