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Article

Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete

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ABSTRACT

Positive obligations under the European Convention on Human Rights can be framed with different levels of concreteness. The level chosen is essential for understanding the analytical distinction between the existence of an obligation and its breach. The level of concreteness is an important conceptual framework because it has an impact even on the possibility of making an assessment as to whether the State has breached the obligation, and on how this assessment is performed in the reasoning. *Kurt v Austria* is used to illustrate how positive obligations can be framed both in more abstract and concrete terms, and how the reasoning mediates between the two. The more it tilts towards a concrete formulation of the obligation, the more the Court appears to assume the role of a rule-maker, which is in tension with the principle that States have discretion as to the concrete measures to fulfill their positive obligations.

KEYWORDS: European Convention on Human Rights, positive obligations, *Kurt v Austria*, omissions, risk assessment, *Osman* test

1. INTRODUCTION

The development of positive obligations has been one of the hallmarks of the work of the European Court of Human Rights (ECtHR or the Court) in interpreting the European Convention on Human Rights (ECHR).[1] These obligations have been predominantly examined in light of the specific subject matter (e.g. domestic violence, environmental pollution and natural hazards). They have also been systematized in various ways (e.g. substantive v. procedural obligations, explicit v. implied procedural obligations and obligations with preventive functions v. with remedial functions).[2] These systematisations are useful for better understanding the content of positive obligations (i.e. the measures States need to undertake) and the circumstances when they can be found to be breached. This article takes a novel approach in that it proposes an

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1 Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (2023); Lavrysen, *Human Rights in a Positive State* (2016); Mowbray, *The Development of Positive Obligations under the ECHR* (2004).

2 Gerards, *General Principles of the European Convention on Human Rights* (2019) at 129.

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examination of positive obligations from the perspective of the level of concreteness chosen for their framing. This level refers to the choice of how specific the framing is, given the particular facts.[3] I argue that this level is crucial for grasping the nature of positive obligations and how they can be breached. More specifically, the choice made as to how they are framed is essential for understanding whether and how the analytical distinction between the existence of an obligation and the breach of this obligation can be applied to them. The level of concreteness chosen for articulating positive obligations is important because it has an impact even on the possibility of making an assessment whether the State has failed to fulfil the obligation and on how this assessment is to be performed in the legal reasoning.

To explain the importance of the level of concreteness used in the framing of positive obligations, the article proceeds at follows. Section 2 explains the importance of the analytical distinction between determining the existence of an obligation, on the one hand, and the breach of this obligation, on the other. This distinction poses challenges when an omission is the basis for state responsibility. Although similar difficulties can be identified in the determination of the breach of negative obligations, the challenges with omissions are still distinctive. As Section 2 clarifies, the reason is that the review of the breach of a positive obligation that implies the assessment of omissions includes a wider scope of alternatives as possible counterparts to the claimed omissions. Having identified the necessary steps and inevitable challenges in the legal decision-making when an omission is framed as the basis for state responsibility, Section 3 proceeds to explain the steps *actually* followed by the ECtHR as a decision-maker. It identifies three levels of concreteness in how the ECtHR has chosen to frame positive obligations. These levels reflect a progressive specification in that Levels 1 and 2 are more abstract and thus less concrete. No determination of breach is performed at these levels; rather, the Court aims to articulate some general and abstract standards. Level three is the most concrete since it entails the application of these standards to the specific factual circumstances and identification of specific omissions.[4] The concrete positive obligations that can be derived from these standards are, however, not articulated prior to the determination of breach. This implies that no analytical distinction is made between the *post factum* determination of the obligation (that is assumed to have existed *ex ante*, i.e. at the time when the events were unfolding) and its breach; rather, the whole analysis at Level 3 collapses into the *post factum* determination of breach. This is problematic since, as Section 2 notes, the establishment of State responsibility is based on the assumption that an obligation first exists for the State and only then it can be actually breached.

[3] The adjectives 'specific' and 'concrete' can be opposed to 'abstract', meaning 'considered or understood without reference to particular instances or concrete examples' and 'existing in thought or as an idea but not having a physical or concrete existence'. Oxford English Dictionary.

[4] In its judgements, the Court actually distinguishes between a step of articulating general standards (Level one and two) and the step of applying the standards to the concrete facts (Level three). Levels one and two are reflected in the section of the judgements entitled 'General principles'. Level three is reflected in the section of the judgement entitled 'Application of the above principles in the instant case' or 'Application to the present case'. See, for example, *Kurt v Austria* [GC] Application No 62903/15, Merits and Just Satisfaction, 15 June 2021, at paras 157–210; *Lopes de Sousa Fernandes v Portugal* [GC] Application No 56080/13, Merits and Just Satisfaction, 19 December 2017, at paras 164–7 and 197–205; *Fernandes de Oliveira v Portugal* [GC] Application No 78103/14, Merits and Just Satisfaction, 31 January 2019, at paras 104–132; *Kotilainen and Others v Finland* Application No 62439/12, Merits and Just Satisfaction, 17 September 2020, at paras 65–90; *X and Others v Bulgaria* [GC] Application No 22457/16, Merits and Just Satisfaction, 2 February 2021, at paras 176–193; *Nicolae Virgiliu Tănase v Romania* [GC] Application No 41720/13, Merits and Just Satisfaction, 25 June 2019, at paras 157–172; *Talpis v Italy*, Application No 41237, Merits and Just Satisfaction, 2 March 2017, at paras 95–107; *Hudorovič and Others v Slovenia* Application Nos 24,816/14 and 25,140/14, Merits and Just Satisfaction, 10 March 2020, at paras 139–159. Many judgements do not contain what I have framed as Level 2, i.e. the formulation of general principles in a *specific* context (see below at Section 3.B). In some contexts, however, the Court has developed such principles. These include, for example, domestic violence (*Kurt v Austria* [GC], at paras 161–190), private life and correspondence in an employment context (*Bărbulescu v Romania* [GC] Application No 61496/08, Merits and Just Satisfaction, 5 September 2017, at paras 113–123), and children (*O'Keeffe v Ireland* [GC] Application No 35810/09, Merits and Just Satisfaction, 28 January 2014, at para 146).

Yet, this assumption that implies a demarcation between the existence of an obligation, on the one hand, and the breach of this obligation, on the other, disregards that the obligation can be farmed with different levels of specificities, as the actual reasoning of the Court demonstrates. When this specificity reaches its most concrete level (i.e. what I have framed as Level 3), the collapse that will be concretely demonstrated in this article, is analytically inevitable.

The collapse reveals the nature of positive obligations and the role of the Court in adjudicating them. Specifically, as I will show, positive obligations are underpinned by two dominant and competing ideas working under the surface of concrete court cases: the formulation of rules for States (i.e. the rule-making role of the Court) versus the application of rules to facts (i.e. the rule-application role of the Court). The second role necessarily requires some specifications of the positive obligations, and different choices can be available on how to specify them. Making these choices can imply that the Court engages in rule-making, undermining States' discretion to choose the measures for fulfilling positive obligations. Admittedly, when the Court adjudicates negative obligations, it adopts similar roles.[5] Yet, there is still a nuance since, as Section 2 explains, the scope of choices is wider in the context of positive obligations given the wider scope of alternatives as counterparts to the claimed omissions. In addition, by specifying concrete alternative measures that should have been undertaken, as opposed to identifying conduct that the State should have abstained from to fulfil its negative obligations, it is easier to perceive the Court as adopting the role of a rule-maker.

It has to be also acknowledged that the Court adopts the role of a rule-maker at all of the three levels of concreteness used in the framing of positive obligations (i.e. Levels one, two and three). Even at Levels 1 and 2, standards are formulated. However, since these formulations are abstract and no determination of breach is performed (see Sections 3.A and 3.B), it is only at Level 3 where the rule-making role can be considered as most controversial. The reason is that at Level 3, concrete measures need to be formulated for assessing breach, which can be perceived as being in tension with States' discretion to choose the concrete measures for fulfilling positive obligations. As Section 2 shows, this discretion is an important starting point in the reasoning regarding breach of positive obligations, which adds a distinguishing nuance when compared with negative obligations. [6] As I will further explain in Section 3, by invoking the standard of reasonableness, the Court aims to preserve States' discretion. Yet, the assessment whether the undertaking of certain measures is reasonable necessarily requires the formulation and consideration of alternative measures that need to be specified. This formulation and specification of the alternatives, as inevitable steps in the legal reasoning, renders the above-mentioned tension also difficult to avoid.

A note on the methodology is due. The law on state responsibility is an important starting point for understanding the distinction between the existence of an obligation and its breach.[7] The law on state responsibility also provides certain tools, such as the classification of obligations into obligations of means, and of result, tools that are invoked for facilitating the reasoning in finding a breach.[8] The method that views the ECHR as included in general international law calls for the following clarifications. Although the Court develops its own jurisprudence for the

[5] The determination of breach of negative obligations is also *post factum*, and alternatives need to be included for making the assessment whether the authorities have used the least restrictive means for limiting rights. See Section 2.B.

[6] This discretion is also explained in Section 3.C.(i).

[7] The law on state responsibility has been codified in the Draft Articles on Responsibility of States for International Wrongful Acts (*Yearbook of International Law Commission*, 2001, Vol.II, Part Two). For a detailed examination of the interaction between the law on state responsibility and the ECHR, see Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in van Aaken and Motoc (eds), *The European Convention on Human Rights and General International Law* (2018) 178.

[8] See Section 3.C.(ii).

protection of human rights[9] and is influenced by the national legal systems,[10] as an international treaty, the ECHR is also *embedded* in general international law.[11] In this sense, the violation of the ECHR necessary implies the establishment of state responsibility under international law. It is therefore not unconventional to analyse the ECHR from the perspective of state responsibility as developed in general international law.[12] Although such an approach acknowledges the distinctiveness of human rights law, it still considers it as integrated, rather than isolated, from other areas of international law.[13] Such an approach is in fact followed by the Court itself. The Court has developed an interpretative principle to take other international law norms into account.[14] It has also clarified that it determines state responsibility 'in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty'.[15] This integration is not only accepted by the Court but also by important actors mandated to interpret and develop general international law, including state responsibility.[16]

Although responsibility in human rights law is part of the law on state responsibility,[17] the latter does not suffice for an in-depth analysis of the primary rules the Convention is part of and the positive obligations it imposes.[18] These obligations cannot be understood without a serious engagement with the ECtHR case law. This poses a challenge since the case law is very rich. Yet, the Court has developed certain analytical steps in its reasoning that are normally repeated. The Grand Chamber (GC) judgements are also considered to have an important value.[19] For this reason, Section 3 focuses on *Kurt v Austria* delivered by the GC in 2021 to illustrate the

[9] *Ireland v The United Kingdom* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978, at para 239: 'Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"'. See also *Soering v The United Kingdom* Application No 14038/88, Merits and Just Satisfaction, 7 July 1989, at para 87; *Loizidou v Turkey* (Preliminary Objections) no 15318/89, 23 March 1995), para 75, where the ECHR was characterized as a 'constitutional instrument of European public order'. See also Bates, *The Evolution of the European Convention on Human Rights: From Inception to the Creation of a Permanent Court of Human Rights* (2010) at 359 as to how the ECHR became the 'Europe's Bill of Rights'.

[10] See Section 2.A, where I draw from the national constitutional law theory to explain the distinction between negative and positive obligations.

[11] van Aaken, Motoc and Vasel, 'Introduction' in van Aaken and Motoc (eds), *The European Convention on Human Rights and General International Law* (2018) 1. My understanding of general international law corresponds to the one in Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Kamminga and Scheinin (eds), *The Impact of Human Rights Law on General International Law* (2009) at 2 as the opposite of *lex specialis*, which governs particular topics of international law. Examples are the Vienna Convention on the Law of Treaties or the law of State responsibility as codified in the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), (2001) II (2) ILC Yearbook.

[12] For such analysis, see Milanovic, 'State Acquiescence or Connivance in the Wrongful Conduct of Third Parties in the Jurisprudence of the European Court of Human Rights' in Kajtar, Cali and Milanovic (eds), *Secondary Rules of Primary Importance: Attribution, Causality, Standard of Review and Evidentiary Rules in International Law* (2022) at 221; Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century' in Castermans-Holleman, Hoof and Smith (eds), *The Role of the Nation-State in the 21st Century. Human Rights, International Organisations and Foreign Policy. Essays in Honour of Peter Baehr* (1998) 91, at 97; Conforti, 'Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations' in Fitzmaurice and Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (2004).

[13] Mazzeschi, *International Human Rights Law. Theory and Practice* (2021) at 143.

[14] *Demir and Baykara v Turkey [GC]* Application No 34503, Merits and Just Satisfaction, 12 November 2008, at paras 60–86. See Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28 *Leiden Journal of International Law* 86.

[15] *Banković and Others v Belgium and Others* [GC] Application No 52207/99, Admissibility, 12 December 2001, at para 57.

[16] See the Commentary to the International Law Commission Draft Articles on Responsibility of States for International Wrongful Acts, where the Commission extensively refers to the ECtHR's case law. Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[17] See, for example, Tomuschat, 'What is a "Breach" of the European Convention on Human Rights' in Lawson and de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (1994) 315.

[18] For the distinction between primary and secondary rules, see Crawford, *State Responsibility. The General Part.* (2013) at 216.

[19] See Article 30 ECHR (relinquishing of jurisdiction to the GC) and Article 43(2) ECHR (referral to the GC).

different levels of concreteness in how the Court frames positive obligations.[20] The analytical steps that the Court normally applies to positive obligations in terms of first formulating some general standards (as reflected in what I frame as Levels one and two) and then their specification (Level three), are repeated in *Kurt v Austria* and in this sense, the reasoning in this judgement is a continuation of the Court's argumentative methodology. Since it is not likely that the Court will change this methodology, the analysis offered in this article with focus on *Kurt v Austria* can be expected to have a general validity.

There is an additional crucial reason as to why I focus on a specific case. As I explain in Section 2, the problem regarding the destabilization of the distinction between the existence of an obligation and its breach can be framed as a problem of specification of obligations. To explain precisely this specification and the different levels at which it has been done, a specific case is necessary. Level 3 of specification where the determination of breach is actually done, cannot be elucidated without focusing on a specific case and without a detailed analysis of the reasoning in this very case. Therefore, the best methodological approach that enables me to explain Level 3 of specification is focusing on a specific case. It is only in a specific case, where the question of breach arises, where concretely the scope and the content of the concrete positive obligation (i.e. Level 3) are formulated, and where choices as to the concretisation and the formulation have to be made. In other words, the understanding of the analytical steps actually followed for establishing breach requires a close scrutiny of the reasoning in a specific judgement.

Certainly, this implies certain limitations. Perhaps the most important one is that *Kurt v Austria* is a domestic violence case and an objection can be anticipated that, as such, it cannot be representative of all positive obligations cases. This is an objection that will be valid for any judgement that might be selected. Yet, as explained in the previous paragraph, a selection is imperative for understanding how positive obligations are specified and for making the analysis of specification at Level 3 manageable. In this sense, the analysis sought to be performed makes the chosen method (i.e. focus on a specific case) indispensable. It is also vital to note that my analysis in Section 3 is sensitive to the specificities of the domestic violence context as one of the many contexts where positive obligations have been developed by the Court. Most importantly, however, no claim of general representativeness of the entire category of positive obligations is attempted. This article rather seeks to illustrate how specification has been performed by the Court and what analytical challenges arise in performing it. The analysis applied to *Kurt v Austria*, particularly *in terms of* identifying the challenges in the specification, could be applied by analogy to any other ECtHR judgement addressing positive obligations. In this specific sense and despite the methodological limitations, the analysis still has general theoretical relevance.

One can still ask why my qualitative analysis that aims to identify the challenges in the specification of positive obligations, focuses specifically on *Kurt v Austria*. Certainly, as already mentioned above, being a GC judgement where the Court in great detail systematizes, reiterates, develops and tries to justify its reasoning on positive obligations is key. The different levels of specification of the positive obligations are thus very clear in the separate parts of the judgement. Critically, all substantive positive obligations were at stake in this case. An additional consideration for my choice was that *Kurt v Austria* can be viewed as a strategic critical case, where the applicants suffered very serious harm and, yet, Austria was not found to have failed to fulfil any specific positive obligations (i.e. Level three). Despite this negative finding, as this article will show, by using the different levels of specification of the positive obligations, the Court still tries to develop protective standards.[21] Furthermore, the finding of no violation at

[20] *Kurt v Austria* [GC] Application No 62903/15, Merits and Just Satisfaction, 15 June 2021. See also *Kurt v Austria* [Chamber], Application No 62903/15, Merits and Just Satisfaction, 4 July 2019.

[21] See, e.g. Section 3.B, where the reference to 'special diligence' is explained.

Level 3 was far from uncontroversial given that seven judges dissented, which also confirms the characterisation of *Kurt v Austria* as a critical case that offers important insights of strategic importance.[22]

As much importantly, I have resorted to tools to mitigate the methodological limitations that necessary follow from my focus on a specific case. First, where relevant, references to other important judgements issued prior to *Kurt v Austria* are also provided to track the continuation and any new nuances. Second, specific engagement with the case law after *Kurt v Austria* is also important to track whether and how the argumentative choices have been repeated in later judgements. Although not all of them are cited, I have reviewed in the HUDOC database all judgements issued after 15 June 2021 when the GC delivered *Kurt v Austria* till 7 November 2022, involving substantive positive obligations under Articles 2 and 3 ECHR, while judgements where the only claimed omission was failure by the State to investigate or to have effective judicial response are excluded.[23] Here, it is relevant to note that the Court applies similar approaches to its review of positive obligations under Articles 2 and 3[24] that have been framed as reflecting 'basic values'.[25] Although *Kurt v Austria* was reviewed only under Article 2, the similarity in the approach to Articles 2 and 3 justifies the extension of my search in the HUDOC database to both provisions to track any subsequent developments. This extension also helped me to track any nuances in the specification of positive obligations in situations of non-deadly violence.[26]

The forthcoming analysis excludes positive obligations delivered under qualified rights, such as Article 8. This exclusion is justified given the different structure of these rights, including the uncertainty whether they trigger positive obligations as a matter of principle under all circumstances where the definitional scope of Article 8 is engaged.[27] As to the exclusion of

[22] See Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) *Qualitative Inquiry* 219 at 229 for how 'a critical case can be defined as having strategic importance in relation to the general problem' and how such a case can produce very important insights.

[23] The relevant domestic violence cases are *Landi v Italy* Application 10,929/19, Merits and Just Satisfaction, 7 April 2022 (see para 78 where the Chamber summarized *Kurt v Austria*); *M.S. v Italy* Application No 32715/19, Merits and Just Satisfaction, 7 July 2022; *A and B v Georgia* Application No 73975/16, Merits and Just Satisfaction, 10 February 2022; *Y and Others v Bulgaria* Application No 9077/18, Merits and Just Satisfaction, 22 March 2022; *De Giorgi v Italy* Application No 23735/19, Merits and Just Satisfaction, 16 June 2022; *Tkhelidze v Georgia* Application No 33056/07, Merits and Just Satisfaction, 8 July 2021; *Tunikova and Others v Russia* Application No 55974/16, Merits and Just Satisfaction, 14 December 2021. Other relevant judgements outside the context of domestic violence are *Gvozdeva v Russia* Application No 69997/11, Merits and Just Satisfaction, 22 March 2022 (suicide of a conscript); *Khudoroshko v Russia* Application No 3959/14, Merits and Just Satisfaction, 18 January 2022 (suicide of a conscript as a result of hazing practices); *Loste v France* Application No 59227/12, Merits and Just Satisfaction, 3 November 2022 (sexual abuse of a child by her foster father); *Lyubov Vasilyeva v Russia* Application No 62080/09, Merits and Just Satisfaction, 18 January 2022, para 61 (failure to protect the life of conscript who committed suicide during military service); *Nana Muradyan v Romania* Application No 69517/11, Merits and Just Satisfaction, 5 April 2022 (suicide of a conscript); *Oganezova v Armenia* Application No 71367/12, Merits and Just Satisfaction, 17 May 2022 (failure to protect a LGBT bar owner from attacks); *Safi and Others v Greece* Application No 5418/15, Merits and Just Satisfaction, 7 July 2022 (sinking of a boat carrying migrants); *Tagiyeva v Azerbaijan* Application No 72611/14, Merits and Just Satisfaction, 7 July 2022 (stabbing of a well-known writer); *Derenik Mkrtchyan and Gayane Mkrtchyan v Armenia* Application No 69736/12, Merits and Just Satisfaction, 30 November 2021 (death of a child at school after being beaten by schoolmates); *Ražnatović v. Montenegro* Application No 14742/18, Merits and Just Satisfaction, 2 September 2021 (suicide of a patient at psychiatric hospital); *Women's Initiatives Supporting Group and Others v Georgia* Application No 73204/13, Merits and Just Satisfaction, 16 December 2021 (homophobic attacks during LGBT rally).

[24] Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87 *Nordic Journal of International Law* 344; Gerards, *General Principles of the European Convention on Human Rights* (2019) at 116.

[25] This characterization has been used for Articles 2, 3 and 4. *S.M. v Croatia* [GC] Application No 60561/14, Merits and Just Satisfaction, 25 June 2020, at para 305. For the convergence of the standards for triggering and the review of the breach of positive obligations under these provisions, see also *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010, at paras 283–9.

[26] See Section 3.A. It needs to be noted, though, that the definitional scope of Article 2 includes harm that does not necessary include death but is 'seriously life-threatening'. *Nicolae Virgiliu Tănase v Romania* [GC] Application No 41720/13, Merits and Just Satisfaction, 25 June 2019, at para 144. This inclusion also, to a certain extent, supports the similarity in the approach to positive obligations under Articles 2 and 3.

[27] *Christine Goodwin v United Kingdom* [GC] Application No 28957/59, Merits and Just Satisfaction, 11 July 2002 §72; *Roche v United Kingdom* [GC] Application No 32555/96, 19 October 2005, at para 157; *Babylonova v Slovakia* Application No

judgements whose focus is on the obligation to investigate or to have an effective judicial response,[28] this obligation was not reviewed in *Kurt v Austria.* The exclusion of the procedural limbs of Articles 2 and 3 is without prejudice to the potential value in analysing them from the perspective of the different choices for specifying investigative measures that might or could have been undertaken by the national authorities.

In sum, although the applied method suffers from limitations and although the Court might depart from some aspects in the reasoning applied in *Kurt v Austria,* a departure that given my analysis in Section 3 might be desirable in some respects, this does not invalidate the theoretical value of the forthcoming analysis that is structured around a specific case. On this ground, Section 3 follows the steps that characterise the reasoning in *Kurt v Austria.*

2. THE DISTINCTION BETWEEN THE EXISTENCE OF A POSITIVE OBLIGATION AND ITS BREACH

Positive obligations become relevant when an argument is made that a State has omitted to do something. Because multiple omissions might be attributable to the State, the application of an analytical tool is needed to delimit those omissions that are legally relevant. In the law of state responsibility, this tool is the distinction between obligation and breach, which implies that it first needs to be determined that the State was under an obligation to act (i.e. not to commit an omission) before an assessment as to the breach of this obligation can be performed. As this section will show, however, this distinction is difficult to apply in the assessment of state responsibility for the breach of positive obligations. Its disruption is actually inevitable since the distinction does not reflect that the decision whether a positive obligation has been breached necessarily demands the specification of alternative measures. This specification can only be done in light of the concrete facts (what I frame as Level three specification) and thus unavoidably *post factum*.

A. Omissions and their Multiple Alternatives

Article 2 of the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates that '[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation'. The Commentary to the ILC Draft Articles clarifies that '[. . .] no difference in principle exists between the two [an action and an omission]'.[29] On closer analysis, to say that there is no difference between actions and omissions is to seriously understate the complexity of establishing responsibility for omissions. Admittedly, the distinction between acts and omissions to collective agents and

69146/01, Merits and Just Satisfaction, 20 June 2006, at para 51–52; *Harroudj v France* Application No 43631/09, Merits and Just Satisfaction, 4 October 2012, at para 47: '[i]n determining *whether or not a positive obligation exists*, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.'. *Fadeyeva v Russia* Application No 55723/00, Merits and Just Satisfaction, 9 June 2005, at para 89: '[i]n these circumstances, the Court's first task is to assess whether the State could reasonably be expected to act as to prevent or put an end to the alleged infringement of the applicant rights.'; *Fedotova and Others v Russia* Application No 40792/10, Merits and Just Satisfaction, 13 July 2021, at para 44: 'While the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, *it may also* impose on a State certain positive obligations to ensure effective respect for the rights protection by Article 8 (emphasis added).' Some deviations in the framing used by the Court can be also observed. See *Beizaraz and Levickas v Lithuania* Application No 41288/15, Merits and Just Satisfaction, 14 January 2020, at para 110: 'Positive obligations on the State *are inherent in the right* to effective respect for private life under Article 8; these obligations *may* involve the adoption of measures even in the sphere of the relations of individuals between themselves (emphasis added).' For a critique of the Court's approach, see Lavrysen, *Human Rights in a Positive State* (2016), where it is argued that if the definitional threshold of Article 8 is passed, 'the authorities are under a prima facie positive obligations to "protect" and "fulfill" the individual's right.'

28 On the distinction between these two, see Kamber, 'Substantive and Procedural Criminal Law Protection of Human Rights in the Law of the European Convention on Human Rights' (2020) *Human Rights Law Review* 75 at 78.

29 Articles on the Responsibility of States for International Wrongful Acts, with Commentaries, ILC Ybk 2001/II(2), 35.

social institutions, such as the State, might be difficult to make, if we do not have 'baseline comparisons'[30] and certain normative positions that can guide us.[31]

Yet, an omission cannot cause harm in the same way as an action. Moral philosophy has engaged with this issue and made the point that causing harm by action cannot be equated with causing harm by omission.[32] The national constitutional law,[33] administrative law and tort law also have adopted the distinction and developed complex analytical frameworks for examining when state authorities can be held responsible for omissions.[34] The issue of causation has played a major role within these frameworks, that is, the causal connection between the omission and the harm.[35] However, causation is far from being the single criterion; policy and other considerations (e.g. knowledge and foreseeability of the harm, the reasonableness of imposing a positive duty to act) also intervene in the assessment,[36] clearly demonstrating that establishing responsibility for omissions is an exercise fraught with complications.

Besides moral philosophy and national law, the ECtHR also insists on the distinction between,[37] on the one hand, negative obligations breached because of an action by the State and, on the other hand, positive obligations breached due to omissions. Surely, in the context of Article 8, the Court often refuses to specify whether it will examine the case as one implicating positive or negative obligations.[38] This refusal does not necessary reflect the Court's conception of obligations but rather its methodology. As Vorland Wibye has explained rather than getting involved in theoretical and conceptual discussions about the distinction, 'the more efficient approach when tackling individual applications is to proceed directly to proportionality review and the ultimate determination of whether the state has struck the right balance between active measures and non-interference'.[39]

Despite the inconsistency, the ECtHR still relies on the distinction. Yet, the delineation criteria have not been clearly articulated in the case law. This failure can be related to the refusal by the Court to 'to develop a general theory of the positive obligations which may flow from the Convention'.[40] Neither the failure nor the refusal is surprising. The Court does not engage with complex philosophical discourses, and, in any case, the problem of distinguishing causing

[30] Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005) 18 *Leiden Journal of International Law* 717 at 728.

[31] Such as the role of the State in the particular society. If this role is more intrusive, the State has wider regulatory functions, and it might be easier to identify omissions as contributory to harm. It might be also easier to justify that the State should be responsible for these omissions since the normative assumption is that the State should be in control. For the argument that control implies responsibility, see Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century', in Castermans-Holleman, Hoof and Smith (eds), 91 at 97. Similar considerations are relevant in the context of claims against public authorities for damages at the national level. See Brodie, 'Compulsory Altruism and Public Authorities' in Fairgrieve, Andenas and Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) 541 at 551.

[32] Smet, 'Conflict between Absolute Rights: A Reply to Steven Greer' 2013 (13) *Human Rights Law Review* 469 at 490; Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing' (1989) 98 *Philosophical Review* 287; McMahan, 'Killing, Letting Die, and Withdrawal of Aid' (1993) *Ethics* 250; J Vorland Wibye 'Reviving the Distinction between Positive and Negative Human Rights' *Ratio Juris* (forthcoming).

[33] Alexy, *A Theory of Constitutional Rights* (2010) at 308–9; Barak, *Proportionality. Constitutional Rights and their Limitations* (2012) at 429–434; Möller, *The Global Model of Constitutional Rights* (2012) at 179; Klatt and Meister, *The Constitutional Structure of Proportionality* (2012) at 85.

[34] Plunkett, *The Duty of Care in Negligence* (2018); Stoyanova, 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the ECHR' (2020) 24 *The International Journal of Human Rights* 632.

[35] Steel, *Proof of Causation in Tort Law* (2015).

[36] Booth and Squires, *The Negligence Liability of Public Authorities* (2006) at 165.

[37] Lavrysen, *Human Rights in a Positive State* (2016) at 9.

[38] *Hatton and Others v the United Kingdom* [GC] Application No 36022/97, Merits and Just Satisfaction, 8 July 2003, at para 98.

[39] Vorland Wibye, 'Beyond Acts and Omissions—Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) *Human Rights Review*; See also Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) *Heidelberg Journal of International Law* 691 at 694 where it is demonstrated in detail that the Court's position that the distinction does not matter, is mistaken.

[40] *Plattform Arzte fur das Leben v Austria* Application No 10126/82, Merits and Just Satisfaction, 21 June 1988 at para 31.

harm by action versus by omission is persistent.[41] Although in some situations, the distinction is easier to discern (i.e. like in domestic violence cases where a private actor causes harm and there is no action by the state that has directly caused this harm), there is no normatively neutral way for advancing one single general justification of the distinction in *all possible* situations.[42] It is beyond the scope of this article to engage with such a general justification.

What suffices to note here is that besides the difference between actions and omissions that can serve as a relevant (although, as already observed problematic and thus not all the time sufficient) reference, another related basis for understanding the distinction is that the means (i.e. the concrete measures) for complying with a positive obligation are multiple. In particular, Alexy has usefully explained that there is a structural distinction between defensive rights (that have negative obligations as corresponding obligations) and the rights to positive state action: 'if there is a *command* to protect or support something, then not every act which represents or brings about protection or support is required'.[43] There is thus a variety of ways to protect and different means for achieving certain ends. Alexy observes that if there is one single suitable protective or supportive act necessary to satisfy the protective right, then the structure of the protective right will match that of defensive rights. If there is only one effective means, the state must adopt it, which appears to reflect straightforward situations. However, beyond these situations, positive rights have alternative and disjunctive structure. As opposed to the conjunctive structure of defensive rights, the alternative structure of positive rights means that an omission has no definitive counterpart. It can be argued, however, that there is a range of reasonable alternatives and it might be possible to advance a range of actions to protect the rights.[44]

It follows then that the availability of multiple options/measures for complying with positive obligations *increases* the scope of state discretion and makes the demonstration of breach more difficult. This is clearly reflected in the case law of the Court, where a crucial assumption is that States have a choice how to comply with positive obligations,[45] and there is a 'wide range of possible measures' that they can undertake.[46] Importantly, not every possible measure that brings about compliance with the obligation is required, since there are 'multiple, independently sufficient paths to compliance'.[47]

At this juncture, it needs to be also acknowledged that States can also use different measures for limiting rights, some of them possibly in breach of negative obligations. This means that the availability of multiple options and alternatives is also necessarily present as an analytical step in the review of the breach of negative obligations. This also means that the issues that I will discuss below (e.g. the distinction between the formulation of the content of the obligation and the establishment of breach, the existence of different alternative measures for limiting rights

41 McMahan, 'Killing, Letting Die, and Withdrawal of Aid' (1993) *Ethics* 250.

42 Vorland Wibye has also demonstrated how there is 'no universally reliable correlation between acts and omission and doing and allowing harm'. Vorland Wibye, supra note 39.

43 Alexy, *A Theory of Constitutional Rights* (2010) at 308–9.

44 Alexy, 'On Constitutional Rights to Protection' 3 *Legisprudence* (2009) 1 at 5.

45 'the choice of means for ensuring the positive obligations under Article 2 [the right to life] is in principle a matter that falls within the Contracting State's margin of appreciation. There are a number of avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfil its positive duty by other means.' *Cevrioglu v Turkey* Application No 69546/12, Merits and Just Satisfaction, 4 October 2016, at para 55; *Fadeyeva v Russia* Application No 55723/00, Merits and Just Satisfaction, 9 June 2005, at para 96; *Budayeva and Others v Russia* Application No 15339/02, Merits and Just Satisfaction, 20 March 2008, at paras 134–35; *Öneryildiz v Turkey* [GC] Application No 48939/99, Merits and Just Satisfaction, 30 November 2004, at para 107; *Kolaydenko and Others v Russia* Application No 17423/05, Merits and Just Satisfaction, 28 February 2012, at para 160; *Lambert and Others v. France* [GC] Application No 46043/14, Merits and Just Satisfaction, 5 June 2015, at para 146.

46 *Eremia v the Republic of Moldova* Application No 3564/11, Merits and Just Satisfaction, 28 May 2013, at para 50; *Bevacqua and S. v Bulgaria* Application No 71117/01, Merits and Just Satisfaction, 12 June 2008, at para 82.

47 Vorland Wibye, supra n 39.

and the application of the standard of reasonableness) are also relevant to negative obligations.[48] There is, however, still a difference. In particular, *all* measures that constitute disproportionate limitations are in breach of negative obligations.[49] As Vorland Wibye has noted, once a limitation measure passes the threshold of disproportionality, the only way to comply is to abstain from this measure.[50] One can rebut that States still have a wide range of possible measures at their disposal how to limit rights. However, the normative starting point is that States have to choose the least restrictive measures when they take actions to limit rights.[51] In this way, *their choice of measures is more circumscribed*. In contrast, the Court has never formulated a test to the effect that States have to undertake the most protective measures to ensure the rights.[52] The starting point is rather that States can choose the measures and their failure to choose the best measure for protecting a person (arguably in fulfilment of a positive obligation) does not necessary lead to a breach. In comparison, when the Court adjudicates negative obligations, its starting point is *not* that States have different means of restrictive rights and that even if one restrictive measure is disproportionate, the proportionality of other measures will still be examined. If one measure limiting the right is disproportionate, this measure is straightforwardly in breach of negative obligations.[53]

There is therefore a similarity between positive and negative obligations in that the review of both includes consideration of alternatives. The similarly, however, does not negate the validity of the forthcoming analysis. The subsequent analysis in this article is not premised on the demonstration of the categorical validity of the distinction in all possible situations. In fact, similar analysis regarding, for example, the importance of alternatives for limiting rights and the different levels of concreteness for formulating such alternatives, could be performed for negative obligations, which could be an object of a separate article.

Neither does the existence of the above similarity negate more generally the distinction between positive and negative obligations. The wider choice of means/alternatives that characterise compliance with positive obligations and that can be used as a reference point for the distinction between positive and negative obligations makes the finding of breach more difficult because of the need to consider wider alternatives and counterfactuals (i.e. what other means could be have been used to ensure the right). As Section 3 will show, these alternative means of protection can be framed in different ways and with various levels of specifications, which intensifies the difficulty.

Neither does the existence of similarities invalidate the relevance of the distinction between acts and omissions. Alternatives to omissions are more problematic than alternatives to actions that are relevant to consider in the least restrictive mean test for reviewing the breach of negative obligations. Alternatives to omissions are more problematic for at least two reasons. First, omissions themselves, as opposed to actions that limit rights, are more difficult to perceive and therefore to specify. Second and relatedly, alternatives to these already perceived omissions are also more difficult to specify in a definitive way. As Klatt has observed, 'unlawful omission of

[48] See, for example, Klatt, supra n 39 at 691, who has explored the differences and the commonalities between negative and positive obligations in regard to the balancing of interests.

[49] Ibid. at 694.

[50] Vorland Wibye, supra n 39.

[51] Notably, the Court does not consistently apply the least restrictive test means test as part of its proportionality review in negative obligations cases. See Brems and Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) *Human Rights Law Review* 139; Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) *International Journal of Constitutional Law* 466.

[52] In fact, in the context of Article 8, the Court has even suggested a rejection to search for more protective alternative measures, as part of its review. See *S.H. and Others v. Austria* [GC] Application No 57813/00, Merits and Just Satisfaction, 3 November 2011, at para 106; see also *Hristozov and Others v Bulgaria* Application Nos 47,039/11 and 358/12, Merits and Just Satisfaction, 13 November 2012, at para 125; *Evans v United Kingdom* [GC] Application No 6339/05, Merits and Just Satisfaction, 10 April 2007, at para 91.

[53] Klatt, supra 39 at 695.

an action has no definite opposite'.[54] I have to accept that there is some level of circularity here since the absence of definitive opposites, which implies the availability of multiple options for fulfilment of positive obligations, is premised on the distinction between acts and omissions. This suggests that it is ultimately difficult to completely separate our conceptualization of obligations from the distinction between acts and omissions. In sum, basing state responsibility on omissions is problematic because omissions introduce 'into judicial reasoning a purely hypothetical factor'.[55] They imply a counterfactual analysis. In addition, there are numerous omissions that can be attributed to the State. Many of these might not even be cognizable, at least not prior to the actual materialization of harm. It would be absurd to suggest that every single omission that can be perceived/identified and that can be somehow related to the harm suffered by an individual (or the risk of harm) should be a basis for establishing state responsibility. There need to be ways of establishing the boundaries of the legally relevant omissions, which implies certain analytical tools that guide the assessment of responsibility.

One such fundamental analytical tool is the distinction between the existence of an obligation and the breach of that obligation. In simple words, there must be an obligation to act in the first place that has remained unperformed, against which state responsibility can be assessed. As Crawford has framed it,

> [. . .] omission is more than simple 'not-doing' or inaction: it is legally significant only when there is a legal duty to act which is not fulfilled, and its significance can only be assessed by reference to the content of that duty. [. . .] the absence of any primary obligation 'to do' will mean that no omission may be complained of.[56]

The issue of timing seems to be important here, since it implies a distinction between an *ex ante* existence of an obligation to act, and the *ex post* assessment whether this obligation (i.e. the duty to act) has been performed. The challenge with omissions and positive obligations is framing the obligation to act *ex ante*, which means prior to the time when the events unfolded.[57] The difficulty in framing the obligation *ex ante* implies that the content of the obligation (the measures that the State should have taken) and the scope of the obligation (how many measures or how intrusive these measures should be) are difficult to frame.[58] Not only is the *ex-ante* framing of the obligation and its content and scope a challenge; it might even be debatable whether there was an obligation at the time when the events were unfolding.[59] The answer to this question depends on whether and how an omission can be

[54] Ibid. at 695

[55] Rigaux, 'International Responsibility and the Principle of Causality' in Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 85.

[56] Crawford, supra n 18 at 218.

[57] The actual materialization of the harm (e.g. loss of life) that the State was arguably obliged to prevent can be considered as time zero. The point in time framed as 'ex ante' refers to the time prior to time zero. This is the relevant point in time for framing positive obligations, since their purpose is to prevent the harm. Admittedly, the distinction between the time *before the* harm and the time *of* the harm might be difficult to accept, since even at the time of the harm, the State might have positive obligations. For this reason, it might be better to use the more vague framing of the timing, namely, 'the time when the events unfolded'.

[58] In its case law, the Court has referred to both terms 'content' and 'scope' of positive obligations. See *Y and Others v Bulgaria* Application No 9077/18, Merits and Just Satisfaction, 22 March 2022, at para 89; *S.M. v Croatia* [GC] Application No 60561/14, Merits and Just Satisfaction, 25 June 2020, at paras 305, 333, 309 and 311; *Smiljanič v Croatia* Application No 35983/14, Merits and Just Satisfaction, 25 March 2021, at para 65. The Court has never explicitly explained what it means with these references. It can be, however, inferred from the case law that 'content' refers to type of measures that might be required (e.g. investigation). 'Scope' is used since often the State has undertaken certain protective measures, but the applicant argues that they were not sufficient.

[59] The abstract positive obligation to ensure the rights under Article 2 and 3 exists *ex-ante*. The reason is that, as I will clarify in Section 3.A, the State, due to its very nature and purpose, is assumed to be under a general obligation to administer competently within its jurisdiction. Yet, this does not tell us *ex-ante* much about the concrete measures in concrete situations.

framed. In addition, and assuming that there was an obligation, the latter can be framed at different levels of abstraction and with different levels of concreteness.

B. *Post Factum* Assessment of Omissions and the Importance of their Specification

Articulating the positive obligation *ex ante,* so that the state authorities know how to react to risks, and articulating these obligations *post factum,* so that the ECHR can assess compliance, is a challenge because the ECHR (and more generally human rights law treaties) uses rights as its organizing principle.[60] Linking these rights to corresponding positive obligations is conceptually complicated for at least two reasons. First, as mentioned above, it is indeed a challenge to frame these obligations *ex ante.* Yet, it is not desirable to categorically remedy this problem since human rights law is meant to be dynamic by generating plurality of duties, individual-centred and thus context dependent.[61] Second, the assessment of breach is done with reference to variables such as causation and reasonableness, which are not easy to apply.[62] The Court has to make an assessment without the benefit of hindsight,[63] which means it has to decide whether at the point in time when the State should have arguably acted (arguably in fulfilment of its positive obligation), it was actually reasonable to act and the act could have contributed to preventing the harm.

It then follows that despite the affirmation by the Court that the breach of positive obligations is assessed without the wisdom of hindsight, one can doubt whether this is actually possible for at least two reasons. First, the assessment would not be done if harm had not materialized (i.e. if there were no victim).[64] Importantly, the assessment as to the existence of an obligation—including its content and scope—and its breach, can be contingent on the gravity of the harm, and this gravity becomes known only *post factum* (i.e. after the State arguably breached its obligation and an assessment as to this breach needs to be made).[65] The severity of the harm might affect the scope and content positive obligations,[66] and in some contexts, the Court has been explicit to this effect.[67] At the time when the events are unfolding, the final and actual

60 Article 1 of the ECHR contains an obligation upon the State Parties to secure the rights. This obligation is framed in very abstract terms.

61 Gerards, 'The Prism of Fundamental Rights' (2008) 8 *European Constitutional Law Review* 173.

62 On causation, see Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination' (2015) 26 *European Journal of International Law* 471; Lanovoy, 'Causation in the Law of State Responsibility' (2022) *British Yearbook of International Law* 1; Stoyanova, 'Causation between State Omission and Harm Within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 *Human Rights Law Review* 309.

63 *Kurt v Austria* [GC], supra n 20 at para 160.

64 This can be related not only to one of the procedural requirements (i.e. victim status) but also to one important substantive requirement that relates to the definitional scope of the right invoked. Specifically, the harm described by the applicant has to fall within the definitional scope of one of the rights protected by the ECHR. See Brems and Gerards 'Introduction' in Brems and Gerards (eds), *Shaping Rights in the ECHR* (2013) 1.

65 It makes a difference whether the harm suffered by the applicant falls within the definitional scope of, for example, Article 2 or Article 8. See Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87 *Nordic Journal of International Law* 344.

66 Harmfulness has been invoked as a factor in the examination of state responsibility for the breach of positive obligations. See, for example, *Öneryildiz v Turkey* [GC] supra n 45 at para 72. The notion of 'core' that some rights might have can also affect the content of and the scope of any corresponding positive obligations. See Section 5 in Gerards, 'Core Rights and the Interaction of Normative and Analytical Elements in Human Rights Scholarship' available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333627 Some positive obligations are not even relevant to assess *post factum* if harm of certain gravity has not actually materialized. The ICJ found that a State can be held responsible for a failure to prevent genocide only if genocide is actually committed. Case *Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ, 27 February 200, para 431.

67 Harm than falls within the definitional scope of Article 8 and does not reach the severity of Articles 2 and 3 does not necessary require effective official criminal investigation initiated by the state authorities since private prosecution or other proceedings (civil, administrative or disciplinary) might suffice. The first type of investigation is more exacting since it demands a specific form of the investigation (i.e. official criminal investigation) and, in this way, more seriously limits the discretion of States how to fulfil their positive obligation. *Bărbulescu v Romania* [GC] Application No 61496/08, Merits and Just Satisfaction, 5 September 2017, at para 108; *F.O. v Croatia* Application No 29555/13, Merits and Just Satisfaction, 22 April 2021. See Kamber *Prosecuting Human Rights Offences. Rethinking the Sword Function of Human Rights* (2017).

harm is not known. Once it becomes known (i.e. when it materializes), the easier it is to make an argument that the national authorities ought to have known about it.

Second, it is doubtful whether it is possible to apply the test of 'ought to have known' about the risk of harm (a test that the Court has developed for deciding whether a State was under a positive obligation and whether it has breached it)[68] without some benefit of hindsight. The test of 'ought to have known' necessarily implies some retrospective assessment performed by the Court after the materialization of the harm. During this retrospective assessment, the Court has to simulate ignorance. However, as its name suggests, the test of 'ought to have known' implies some normative assessment that can be influenced by circumstances knowable and known only *post factum*.[69]

Even if we accept that it is possible to make the assessment without the benefit of hindsight, the assessment is guided by certain factors. Knowledge, causation and reasonableness were already mentioned. The last deserves special attention since the content and scope of positive obligations can only be within reasonable limits. The State is only required to take reasonable measures.[70] The factor of reasonableness for the assessment of breach necessarily presupposes a context-specific assessment, and hardly any *ex ante* determination can be made as to what is reasonable to expect from the State. It might be possible to determine *ex ante* in abstract terms what is reasonable in situations where there is risk of harm; however, the articulation of the measures that form the positive obligation *in more concrete terms* in light of the concrete circumstances, might be possible only *post factum*.

At the point, a return to the distinction between positive and negative obligations might be apt. Although the focus of this article is on the conceptual challenges for determining the breach of positive obligations, it is still relevant to observe that reasonableness and proportionality review for determining breach is always a *post factum* review. The same is equally valid for negative obligations. However, the review can be expected to be more complex in cases of omissions due to the wider compliance options, as explained in Section 2.A. The lines of causation can be more complex, and the knowledge can be more difficult to establish. In contrast, if the State acts to limit rights, the causal links and thus state knowledge are easier to discern. For example, if a state agent acts, possibly in breach of negative obligations, causation is not an issue since the agent's actions are directly attributable to the State,[71] and if they are, knowledge of the State is assumed.[72]

In sum, given the factors of causation, knowledge and reasonableness, it cannot be ascertained with certainty in advance whether there is a positive obligation and what that obligation is, including its content (i.e. what measures/actions should have been undertaken) and scope (how far-reaching and demanding these measures/action should have been). Once harm materializes, an *ex post* facto assessment can be performed. It is also important to highlight here that these factors (knowledge, causation and reasonableness) are used not only in assessing whether there is a positive obligation and what its content might be but also in the assessment of breach. This

[68] Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights System: From the *Osman* Test to a Coherent Doctrine of Risk Prevention?' (2015) *Human Rights Law Review* 343.

[69] Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the ECHR' (2020) 33 *Leiden Journal of International Law* 601at 609.

[70] *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* [GC] Application No 47848/08, Merits and Just Satisfaction, 17 July 2014, at para 132. Besides reasonableness, the Court has also referred to the standard of not imposing 'impossible and disproportionate burden' (*Öneryildiz v Turkey* [GC] supra n 45 at para 107) and 'an excessive burden on the authorities' (*O'Keefee v Ireland* [GC] supra n 4 at para 144).

[71] On the issue of attribution, see Articles 5 and 6 of the Draft Articles on Responsibility of States for International Wrongful Acts (*Yearbook of International Law Commission*, 2001, Vol.II, Part Two).

[72] Crawford, supra n 18 at 61; ILC Draft Articles Commentary to Article 2, at para 10; Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility' (1999) 10(2) *European Journal of International Law* 397 at 398.

facilitates the convergence of the analysis of the two analytical steps, namely, the existence of an obligation and the breach of that obligation.[73] More specifically, both analytical processes (making the *ex post facto* assessment as to whether an obligation existed at the relevant point in time in the past and whether it was breached) demand that the decision maker (i.e. the ECtHR) has some idea as to the concrete reasonable and contributory measures that could have been adopted. Otherwise, it will be difficult to perceive and measure the omission as a basis for responsibility. The decision maker needs to consider what measures should have been taken (if none whatsoever were actually undertaken) or what alternative protective measures could have been undertaken (if some were undertaken but they arguably turned out to be ineffective).[74] The omission needs to be framed and articulated before the obligation can be framed and articulated. This framing can be done in different ways depending on the level of concreteness and abstraction applied.

Any positive obligations can therefore only be framed *post factum*, meaning after some harm has materialized and after an actor (most likely the victim of this harm),[75] articulates an action that the State should have taken, in this way formulating a possible obligation. I say 'possible' since this articulation and formulation does not necessary mean that the Court will agree that the State was actually under such an obligation.

The possibility to frame the obligation only *post factum* questions the distinction clarified in Section 2.B. The actual problem is, however, that although this distinction is fundamental in the law on state responsibility,[76] including state responsibility under the ECHR,[77] it is not mindful that the process of making a decision as to whether breach should be found necessary implies specifications of omissions and alternatives in light of the concrete facts (i.e. Level 3). Choices can be made as to which specifications will be selected and how they can be articulated. Importantly, such choices that inevitably have to made so that a determination of breach can be performed, are possible only *post factum*. The hindsight problem therefore occurs in relation to the delineation of the concrete measures that should have been undertaken, which corresponds to what I frame as Level 3. The hindsight problem does not seem to be poignant at Levels 1 and 2, whereas Sections 3.A and 3.B will show abstract positive obligations to generally ensure that the rights have been formulated *ex ante* by the Court in its various judgements.

As explained in Section 2.A, the choices of specification (at Level 3) are wider in the context of positive obligations, which can make the determination of breach more difficult and the hindsight problem more poignant, in comparison to negative obligations. It then follows that the problems mentioned above are related to the standards of reasonableness, causation and knowledge that destabilise the analytical distinction between determining the existence of an

[73] As already noted in Section 1, the question of breach arises only in relation to the concrete obligation that I frame as Level three (see Section 3.C). As Sections 3.A and 3.B will show, the Court has formulated some general positive obligations (i.e. Levels two and three). At Levels two and three, the existence of an obligation can be isolated as a separate analytical step (e.g. the Court has formulated the general positive obligation upon the State to safeguard lives and to exercise special diligence when dealing with domestic violence). However, no analysis as to whether these generally framed positive obligations are breached, is performed.

[74] Another structural question can be also asked, namely how scrutinizing the Court should be in searching for and assessing alternatives. This question relates to the position of the Court and the principle of subsidiarity. The role of subsidiarity, understood as structural deference, is not covered in this article. For the distinction between the structural and the substantive role of subsidiarity, see Letsas, 'Two Concepts of the Margin of Appreciation' (2006) *Oxford Journal of Legal Studies* 705. For the scrutiny exercised by the Court when it searches for alternatives in the context of negative obligations, see Brems and Lavrysen, '"Don't' Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 139.

[75] I use the term victim here generally as a person who has suffered harm, without prejudice as to whether this harm can be a basis for state responsibility.

[76] Crawford, supra n 18 at 216.

[77] Positive obligations, as developed by the Court, have been an object of critique precisely because of their uncertain nature and unpredictability. Klatt, 'Positive Rights? Judicial Review in Balance' (2015) *International Journal of Constitutional Law* 354.

obligation, on the one hand, and the breach of this obligation, on the other, are actually problems about specifications and choices what specifications to use. To understand therefore the *post factum* determination of breach of obligations due to omissions, it is important to understand how the Court performs specification in its reasoning.

3. LEVELS OF CONCRETENESS IN FRAMING POSITIVE OBLIGATIONS

To illustrate the levels of concreteness, the GC's reasoning in *Kurt v Austria* will be used. Although one needs to be mindful of the methodological limitations that my focus on a single case poses, as already observed in Section 1, the specification of obligations can be best explained precisely via a detailed analysis of a specific case.

The applicant in *Kurt v Austria* alleged that the Austrian authorities had failed to protect her and her children from her violent husband and that this resulted in him murdering their son. The child was shot at his school. Before the fatal incident, the authorities issued a barring and protection order that obliged the perpetrator to stay away from their common apartment, the applicant's parents' apartment and the surrounding areas. The applicant argued that this order was an insufficient measure. Instead, the authorities should have held the man in pre-trial detention. The alternative measure, i.e. the content of the positive obligation as framed by the applicant, therefore, was pre-trial detention. The applicant also invoked other measures that the State failed to fulfil, namely, a barring order regarding the school and the sharing of information with the school authorities about domestic violence.[78]

Prior to examining the analytical steps performed in the reasoning, a brief description of the Court's findings is due. The Court held that Austria was not under the concrete positive obligation to hold the man in pre-trial detention,[79] nor was it under the obligation to take the other measures invoked by the applicant. The Court formulated, however, additional measures to assess the conduct of the respondent State; it concluded that these were either fulfilled (e.g. the conduction of a risk assessment regarding the woman) or the State was not under an obligation to perform them (e.g. taking protective operational measures to protect the life of the child). This led to the conclusion that Austria did not fail to fulfil its positive obligations under Article 2 ECHR.

Three analytical steps can be distinguished in the Court's reasoning to reach these conclusions: first, framing of general positive obligations under Article 2; second, framing of general positive obligations under Article 2 in the *specific context* of domestic violence; finally, concretisation of these obligations to the *specific case*. For the sake of simplicity, I will refer to these steps as Level 1 (the most abstract and general level of framing positive obligations), Level 2 (the intermediary level of framing positive obligations) and Level 3 (the most concrete level of framing positive obligations). Below, I will review each one of these steps to understand whether and how the distinction between the existence of an obligation and the breach of this obligation is applied. The review of these steps will also illustrate how the Court reasons when multiple proposals are possible as to the concrete measures that could have been adopted by the State and how the Court navigates between the two roles of rule making and rule application.

[78] *Kurt v Austria* [GC] supra n 20 at para 123; *Kurt v Austria* [Chamber] supra n 20 at para 57.

[79] Any pre-trial detention (arguably in fulfilment of positive obligations) has to comply with Article 5 ECHR (the right to liberty). If the man had been held in detention, Austria risked violating its obligations under Article 5 ECHR. Positive obligations cannot have a content and scope that extends in such unreasonable ways as to demand that the State breach its negative obligations. Mavronicola has framed this as intra-Convention legality. See Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR. Absolute Rights and Absolute Wrongs* (2021) at 54 and 150.

A. Level 1—General Positive Obligations under Article 2

The first step in the Court's reasoning is the most abstract, since it starts its analysis by observing at para 157 that '[t]he first sentence of Article 2(1) enjoins the State not only to refrain from the international and unlawful taking of life, but also to take appropriate steps to safeguards the lives of those within its jurisdiction'. The obligation of taking appropriate steps to safeguard lives is formulated at a very high level of abstraction. The framing is result-oriented since the emphasis is on the objective of safeguarding lives. This framing tells us nothing about the steps (i.e. the measures), other than that they have to be appropriate. This initial formulation of this abstract positive obligation, however, suggests that the State as a matter of principle is constantly under the obligation to safeguard lives. This means that every time harm materialises (death or a life-threatening situation)[80] that might trigger a *post factum* assessment as to a possible breach of the ECHR, the assumption is that the State was necessarily under the obligation to take appropriate measures to prevent that harm. This assumption resembles the French law on administrative liability,[81] where the State, due to its very nature and purpose, is assumed to be under a general obligation to administer competently within its jurisdiction. The abstract obligation of taking of appropriate steps to safeguard life is separated from the question whether any measures were successful in terms of actually preventing concrete harm.[82]

This abstract obligation entails the obligation to criminalise, the obligation to develop an effective regulatory framework, the obligation to take preventive operational measures and the obligation to conduct a risk assessment.[83] The first has been framed in this way at para 157:

> a primary duty of the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, back up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provision.

The obligation to criminalise was not relevant in *Kurt v Austria,* and I will not address it further. It suffices for the purposes of this analysis that the obligation to criminalise is a concretisation of the abstract positive obligation of taking 'appropriate steps to safeguard' lives. The obligation to criminalise also does not normally raise challenging analytical issues regarding the application of the above-mentioned factors of causation, knowledge and reasonableness. In its reasoning, the Court assumes that it is reasonable that grave forms of harms are criminalised at national level, which is important *inter alia* for their prevention.[84] It is normally the actual implementation of the national criminal law, in terms of effective investigation and quality of the criminal proceedings, that the Court has to engage with in its case law.[85]

Criminal law is only one part of the national regulatory framework. For this reason, the Court has also framed the obligation of developing an effective regulatory framework 'to afford protection against acts of violence by private individuals in any given case',[86] which is also

[80] Article 2 covers life-threatening situations. *Tërshana v Albania* Application No 48756/14, Merits and Just Satisfaction, 4 August 2020, at para 132.

[81] Harlow, 'Fault Liability in French and English Public Law' (1976) *Modern Law Review* 517.

[82] Positive obligations are 'obligation of means, not of result'. See Section 3.C.(ii).

[83] These four obligations can be distinguished as belonging to a level that is more concrete than the obligation of 'taking appropriate steps to safeguard' life. I have not, however, made this additional distinction since the latter obligation is so general that it does not tell us much beyond the initial starting point in the reasoning that the State is assumed to be a source of protection.

[84] This assumption is not unproblematic. See Mavronicola and Lavrysen (eds) *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the European Convention on Human Rights* (2020).

[85] In this context, the Court has developed concrete standards. See *Armani Da Silva v UK* [GC] App no 5878/08, 30 March 2016.

[86] See Lavrysen, 'Protection by Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Haeck and Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (2014) 69.

a concretisation. There are multiple national legal frameworks that might have preventive functions. Which of them might be pertinent depends on the factual circumstances of the concrete case and, equally importantly, on which omissions are identified (or identifiable) as causative. This is a point to which I return in Section 3.C.(iv) with reference to *Kurt v Austria* and the avoidance of the GC to articulate an omission with reference to the national regulatory framework.

Besides criminalisation and an effective regulatory framework, a third positive obligation has been formulated by the Court in the following way: 'positive obligation on the authorities to take preventive operational measures to protect the individual whose life is at risk from the criminal acts of another individual'.[87] This is the so-called *Osman* test, which has been well established in the case law.[88] For the obligation of taking preventive operation measures to arise,

> it must be established that 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 from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk.[89]

The Court has also added that the preventive operational measures

> must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[90]

The innovation of *Kurt v Austria* is that the GC modified the *Osman* test regarding the nature of the risk required so that the obligation is triggered in the specific context of domestic violence. This specification will be addressed in the next section. Another innovation of *Kurt v Austria* is that the GC added a fourth positive obligation framed in this way:

> the assessment of the nature and level of risk constitutes an integral part of the duty to take preventive operational measures where the presence of a risk so requires. Thus, an examination of the State's compliance with this duty under Article 2 must comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggered the duty to act was or ought to have been identified, the adequacy of the preventive measures taken.[91]

The Court has thus framed a procedural positive obligation that implies risk assessment.[92] Given the high level of abstraction in which it is expressed, the relationship between this procedural positive obligation, and the substantive positive obligation of taking protective operational measures, is not entirely clear. As the above quotation suggests, the first is 'an integral part' of the second, which suggests that risk assessment is not a separate obligation. However, the question remains how the nature and level of risk can be assessed, if there is no obligation to assess risk in the first place. Below, I will show how this ambiguity of the nature of the procedural

[87] *Kurt v Austria* [GC] supra n 20 at para 157.
[88] *Osman v United Kingdom* [GC] Application Nos 87/1997/871/1083, Merits and Just Satisfaction, 28 October 1998.
[89] Ibid. at para 116; *Opuz v Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009, at para 130.
[90] *Osman v United Kingdom* [GC] supra n 88 at para 116.
[91] At para 159.
[92] On how the Court has framed different procedural obligations, see Gerards and Brems (eds) *Procedural Review in European Fundamental Rights Cases* (2017).

obligation is addressed with the concretisation of the obligation. I will also show its effects on the determination of breach.

Here, it is also relevant to observe that the obligation to conduct a risk assessment can be perceived as more specific than the obligation of 'taking appropriate steps to safeguard' life. Yet, I have placed both of them at Level 1. This inconsistency reflects an instability in the distinctions between the Levels. Yet, paragraph 159 of *Kurt v Austria* where the Court articulated the obligation of a risk assessment is in the part of the judgement entitled 'General principles'. If it was limited to the domestic violence context, the risk assessment would have been formulated in the part of the judgement entitled 'Positive obligations under Article 2 in the context of domestic violence', which would justify its conceptualization at Level 2. In addition, the ambiguous relationship between the obligation of conducting the risk assessment and the obligation of taking protective operational measures also explains why I frame both of them at Level 1.[93] It is also pertinent to note that in its subsequent case law, the Court has invoked the obligation of the risk assessment in other contexts, not limited to domestic violence,[94] which additionally justifies the conceptualization of this obligation at Level one. An outstanding question is whether the risk assessment as a general obligation framed at Level one has been invoked by the Court in cases of *non-deadly* violence. The case law after *Kurt v Austria* in the area of domestic violence suggests an answer in affirmative.[95]

As to non-deadly violence/harm outside the context of domestic violence, I found no judgements in this effect in the post *Kurt v Austria* case law.[96] It remains therefore to be seen whether the Court will expand the ECHR by formulating an obligation of risk assessment at Level 1 *across all contexts and regardless of the deadliness of the harm*. Such a development might be anticipated for two reasons. First, the obligation of conducting risk assessment is related to the obligation of taking protection operational measures (i.e. the *Osman* test). The latter has been certainly applied to forms of harm that are not deadly.[97] Second, the Court tends to expand positive obligations by drawing on standards developed in one context and applying them to a different context.[98] Despite these two reasons, caution is also warranted. The formulation of a general obligation of risk assessment at Level 1 regardless of the context and the deadliness of the harm might be an unreasonable expansion of positive obligations via encouragement of measures of risk aversion and pre-emptive actions aimed to avert or protect from risks. Societies might have to accept certain levels of risks in various contexts, which militates against the expansion of the positive obligation and, accordingly, against its articulation as a distinctive obligation at Level 1.

It is finally important to note that at Level 1 analysis, where very abstract and general positive obligations are framed, no determination of breach is made and the challenging questions about delimiting responsibility for omissions are not relevant. Rather, the objective is the formulation of some general principles regarding the objective of safeguarding life, which can

[93] For this ambiguity, see also Sections 3.B.(i) and 3.B.(ii).

[94] *Derenik Mkrtchyan and Gayane Mkrtchyan v Armenia* Application No 69736/12, Merits and Just Satisfaction, 30 November 2021, at para 50 that concerned the death of a child at school after being beaten by schoolmates.

[95] *Malagić v Croatia* Application No 29471/17, Merits and Just Satisfaction, 17 November 2022, at para 65; *M.S. v Italy* Application 32715/19, Merits and Just Satisfaction, 7 July 2022, at para 120; *De Giorgi v Italy* Application No 23735/19, Merits and Just Satisfaction, 16 June 2022, at para 69.

[96] Although it is problematic to draw inferences based on omissions (i.e. what the Court does not say in its reasoning), I could identify judgements post *Kurt v Austria* of non-deadly harm outside the context of domestic violence, where the Court did not mention at all risk assessment as a separate obligation. See *Oganezova v Armenia* Application No 71367/12, Merits and Just Satisfaction, 17 May 2022 (failure to protect a LGBT bar owner from attacks); *Women's Initiatives Supporting Group and Others v Georgia* Application No 73204/13, Merits and Just Satisfaction, 16 December 2021 (homophobic attacks during LGBT rally).

[97] *X and Others v Bulgaria* [GC] Application No 22457/16, Merits and Just Satisfaction, 2 February 2021, at para 198 (alleged sexual abuse of children in an orphanage reviewed under Article 3).

[98] See *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010.

be related to the constitutional role of the Court[99] to formulate some general standards for state conduct.[100]

B. Level 2—General Positive Obligations under Article 2 in the Specific Context of Domestic Violence

After framing the above-mentioned four positive obligations at an abstract level, a second step can be identified in the Court's reasoning. This step entails the concretisation of the obligations to the context of domestic violence.[101] In particular, in *Kurt v Austria*, the GC affirmed that 'special diligence is required from the authorities when dealing with cases of domestic violence'.[102] Given the Court's constitutional role, this affirmation seems to send a signal that more demanding positive obligations might be formulated. This will be better explained below with reference to the specification of the *Osman* test. The reference to 'special diligence' can also mean that each individual case of domestic violence that might raise an issue of state responsibility for omissions is examined in light of the wider societal problem of domestic violence. As the GC framed it, '[t]he issue of domestic violence – which can take various forms [. . .] – transcends the circumstances of an individual case'.[103] This might imply that the reasoning is more contextual and abstract, not exclusively focused on the concrete factual circumstances and on the concrete causal links between specific omissions and harm. Such a contextualisation and abstraction of the reasoning might imply an easier finding of a breach when the case fits within some wider problems perceived as structural in society.

Having observed that cases of domestic violence are to be subjected to a more abstract review given the 'special diligence' required from the State, and that the issue of domestic violence 'transcends the circumstances of an individual case', we can now see how the Court concretizes the general positive obligations mentioned in Section 3.A in the specific context of domestic violence. The analysis in this section is limited to the concretisation of the obligation of taking preventive operational measures (the *Osman* test) and the obligation to conduct risk assessment, since these obligations were further specified by the GC in *Kurt v Austria.* In contrast, the obligation to develop an effective regulatory framework was not further specified. The reason is that the GC chose not to frame omissions related to the national legal framework as causative to harm, which made the further specification of this positive obligation unnecessary in the reasoning.[104] Section 3.C.(iv) will suggest possible reasons for this choice.

(i). The obligation to take preventive operational measures in the specific context of domestic violence

The Court specified the immediacy standard that the *Osman* test demands by noting that the obligation of taking preventive operational measures is triggered in 'any situation of domestic violence in which harm is imminent *or has already materialised and it likely to happen again*'.[105] This means that the immediacy of the harm is not a requirement for the State to be under the positive obligation of taking protective operational measures. Rather, the likelihood for the harm

[99] Christoffersen, 'Individual and Constitutional Justice' in Christoffersen and Madsen (eds) *The European Court of Human Rights between Law and Politics* (2011) 181.

[100] *Paposhvili v Belgium* [GC] Application No 41738/10, Merits and Just Satisfaction, 13 December 2016, at para 130.

[101] Such concretization can be identified in other areas, such as medical negligence cases (*Loupes de Sousa Fernandes v Portugal* [GC] Application No 56080/13, Merits and Just Satisfaction, 19 December 2017) or cases related to the protection of children (*O'Keeffe v Ireland* [GC] supra n 4 at para 28).

[102] *Kurt v Austria* [GC] supra n 20 at para 166. For affirmation of the 'special diligence' requirement, see also *A and B v Georgia* Application No 73975/16, Merits and Just Satisfaction, 10 February 2022, at para 47; *Tkhelidze v Georgia* Application No 33056/07, Merits and Just Satisfaction, 8 July 2021, at para 48.

[103] *Kurt v Austria* [GC] supra n 20 at para 161.

[104] This choice of framing can be deduced from the difference in the reasoning between the Chamber and the GC. In contrast to the latter, the former did frame omissions related to the national regulatory framework. See Section 3.C.(iv).

[105] *Kurt v Austria* [GC] supra n 20 at para 175 (emphasis added).

to happen again suffices in the specific context of domestic violence. The Court clarified that the standard of immediacy has to be applied

> in a more flexible manner than in traditional *Osman*-type situations, taking into account the common trajectory of escalation in domestic violence cases, even if the exact time and place of an attack could not be predicted in a given case.[106]

The Court further specified the nature of the operational measures called for by providing three examples: risk management plans, coordinated support services for victims and treatment programmes for perpetrators.[107] As to pre-trial detention, the action invoked by the applicant, the GC held that this was not a measure that can as a matter of principle be used, unless it meets the demanding requirements of Article 5(1) that enshrine the right to liberty.[108]

(ii). The obligation to conduct lethality risk assessment

As to the obligation to conduct risk assessment, the Court specified it as a 'lethality risk assessment'. It noted that

> in order to be in a position to know whether there is a real and immediate risk to the life of a victim of domestic violence, the authorities are under a duty to carry out a lethality risk assessment which is autonomous, proactive and comprehensive.[109]

In contrast to the ambiguity as to the independent existence of this procedural positive obligation when framed by the Court at Level 1, the Level 2 analysis performed by the Court speaks in favour of an independent obligation. Three reasons support this conclusion. First, the judgement contains a distinct subsection entitled 'Obligations relating to risk assessment'. Second, the first paragraph in this subsection refers to Article 51 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. Article 51 is very clear to the effect that it establishes an obligation upon States to 'ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out'. This is an independent procedural obligation, not linked to the result of the risk assessment or to any *post factum* assessment as to whether any measures were taken after the risk assessment. Third, the statement in the judgement that the 'authorities are under a duty to carry out a lethality risk assessment which is autonomous, proactive and comprehensive', also suggests an independent procedural obligation.

In addition to these three reasons, it is relevant to observe that the domestic violence case law after *Kurt v Austria* supports the position that the procedural obligation of risk assessment is independent.[110] Yet, some deviations could still be identified,[111] which signals uncertainty. This might be an indication that in some cases the Court might still prefer to integrate the risk assessment exclusively within its Level 3 analysis as part of the *Osman* test. The consequence

[106] Ibid. at para 176.
[107] Ibid. at paras 180–1.
[108] Ibid. at paras 182–8.
[109] Ibid. at para 168.
[110] See *Landi v Italy* Application No 10929/19, Merits and Just Satisfaction, 7 April 2022, at para 78; *M.S. v Italy* Application No 32715/19, Merits and Just Satisfaction, 7 July 2022, at para 116; *A and B v Georgia* Application No 73975/16, Merits and Just Satisfaction, 10 February 2022, at para 42; *Y and Others v Bulgaria* Application No 9077/18, Merits and Just Satisfaction, 22 March 2022, at para 89; *De Giorgi v Italy* Application No 23735/19, Merits and Just Satisfaction, 16 June 2022, at para 69, where the Court in the part of the judgements entitled 'General principles' formulated risk assessment as an independent obligation.
[111] See *Tkhelidze v Georgia* Application No 33056/07, Merits and Just Satisfaction, 8 July 2021, where risk assessment was not included in the part of the judgement about the general principles.

of such an approach will be that the concrete measure of risk assessment, even in the domestic violence context, will be narrowly related to the specific facts of the case and the importance of the omission to undertake such a measure tailored to the specific case. As a consequence, such an omission as a basis for the establishment of state responsibility is less likely to be assessed on its own, but as related to other omissions or other considerations (i.e. those reflected in the *Osman* test) as relevant in light of the specificity of the concrete case.[112] These reflections demonstrate the importance of identifying the level of concreteness at which measures that form the content of positive obligations are framed. A hesitation by the Court to formulate a measure at Level 2 might signal that the omission on its own to undertake this measure is less likely to lead to breach as assessed Level 3. In this sense, the formulations used at Level 2 affect the analysis at Level 3.

The uncertainty as to whether lethality risk assessment is a separate and independent obligation was of limited significance in the Level 2 analysis itself, since similarly to what was explained regarding Level 1, no determination of breach is made at Level 2. Although the reasoning is more concretely relevant to the facts of the specific case, the objective of the pronouncements made at Level 2 is the formulation of general principles for furthering the objective of safeguarding life, which objective can be also related to the Court's constitutional role. The question of breach rather arises at Level 3 analysis, which reflects the most concrete level of framing positive obligations. Analytically, this is the most challenging level, where the analysis zooms in on the specific facts and where individual justice guides the reasoning.[113]

C. Level 3—Concrete Positive Obligations in Light of the Specific Case of Domestic Violence

This section will show how positive obligations are articulated in the reasoning, so that a determination about breach can be made in light of the concrete facts of the case. In relation to each positive obligation (taking preventive operational measures to protect the applicant, conducting lethality risk assessment, taking preventive operational measures to protect the children and adopting effective regulatory framework), it is highlighted that various concrete articulations are possible. Although such articulations are necessary in the reasoning, they also imply that the Court might adopt a rule-making role, which might undermine state discretion. Techniques can nonetheless be identified in the reasoning for obscuring this role so as to avoid the perception that state discretion might be undermined.

(i). Obligation to take preventive operational measures to protect the application

Given the history of domestic violence the applicant was subjected to, it was easy to conclude that the national authorities were under the obligation to take preventive operational measures to protect her. The key question was rather what concrete measures this obligation implied.

1. Merge of the two steps: Imposition of an obligation and determination of breach

As explained in Section 2, if the distinction between the existence of an obligation and its breach is to be maintained, such measures will have to be specified *in advance* in the Court's reasoning and then an assessment made whether the measures were actually undertaken. This is difficult to perform for two reasons: practical and institutional. On the practical side, it is difficult to think about and enumerate *all* possible measures that could or should have been undertaken

[112] This argumentative approach implies construction of 'nets' of omissions, where it is not clear what the importance of each omission is in comparison with other identified omissions or how the different omissions are related to each other in the reasoning. See Smet, *Resolving Conflicts between Human Rights* (2018) who has coined the phrase 'nets of arguments' to explain the ECtHR's reasoning.

[113] For a detailed explanation of the relationship between the level of concreteness in the Court's analysis and the type of justice pursued, see Moonen and Lavrysen, 'Abstract but Concrete, or Concrete but Abstract? A Guide to the Nature of Advisory Opinions under Protocol No 16 to the ECHR' (2021) *Human Rights Law Review* 752, 760.

when a situation like the one of the applicants arises. This relates to the observation made in Section 2 that a State may perform multiple omissions, and such omissions have no definitive counterparts.

Even if it were practically feasible to enumerate all possible measures, the reasoning as a *post factum* review would also have to include an assessment of whether all of these measures could have contributed to preventing the harm, so that the requirement for causation is fulfilled. If they could not contribute, these measures should not be part of the positive obligation. Even if these thinkable measures could have contributed to prevention, it also needs to be considered whether it was reasonable to undertaken them. In sum, it would be a challenge to practically frame the reasoning in a way that implied specification of the measures in advance, so that the content of obligation was articulated in the beginning of the analysis. In addition, it might make little sense to specify measures, as part of the formulation of the content of the positive obligation, when it is not clear whether these measures could have prevented the harm and/or were reasonable to undertake.

Besides this practical challenge, there is also an institutional aspect related to the relationship between the Court and the State Parties. The starting point in this relationship is that States have discretion as to what measures to undertake to fulfil positive obligations. The Court has consistently confirmed this in its case law:

> the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are a number of avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfill its positive duty by other means.[114]

The Court has also stated that it is not its role 'to replace the national authorities and to choose instead of them from among the wide range of possible measures that could be taken to secure compliance with their positive obligations'.[115] Therefore, States have at their disposal a wide range of alternatives, and it is difficult to specify the measures in advance. Such an initial specification might also bring the Court very close to taking on the role of rule-maker,[116] which also explains the merging in the analysis of the two analytical steps, i.e. the imposition of an obligation and the determination as to its breach. Given the integration of these two steps, the

[114] *Fadeyeva v Russia* Application No 55723/00, Merits and Just Satisfaction, 9 June 2005, at para 96; *Budayeva and Others v Russia* Application No 15339/02, Merits and Just Satisfaction, 20 March 2008, at para 134–35; *Öneryildiz v Turkey*, supra n 45 at para 107; *Kolaydenko and Others v Russia* Application No 17423/05, Merits and Just Satisfaction, 28 February 2012, at para 160.

[115] *Eremia v the Republic of Moldova* Application No 3564/11, Merits and Just Satisfaction, 28 May 2013, at para 50; *Bevacqua and S. v Bulgaria* Application No 71117/01, Merits and Just Satisfaction, 12 June 2008, at para 82. It needs to be admitted that in cases of grave harm, in some respects, this margin has been explicitly limited by the Court. For example, in such cases, the State has to criminalize the harmful conduct. The margin has been further limited by, for example, requiring a specific way of interpreting the national criminal law. See *M.C. v Bulgaria* Application No 39272/98, Merits and Just Satisfaction, 4 December 2003, at para 171.

[116] A note as to the role of subsidiarity, understood as structural deference, is due here. With or without structural deference, the starting point is that States can choose the concrete measures for ensuring positive obligations. This can prevent the Court, as a judicial body, from formulating the concrete measures and then testing compliance (i.e. formulating concrete positive obligations and then assessing breach). Yet, various alternative measures need to be formulated more concretely so that omissions can be analytically reviewed (see Section 3.C.(i)). Subsidiarity can influence the formulation of these measures in at least two ways. First, subsidiarity can influence the number of measures included in the reasoning. All things being equal, more structural deference implies a wider variety of possible answers as to how to fulfil positive obligations, which means a wider variety of measures. More structural deference means less likelihood that the Court will include this variety in its reasoning; it will rather limit its review to few measures without asking questions whether alternative measures might have been reasonable. Second, subsidiarity can influence the level of abstractness at which the measures are formulated. All things being equal, more structural deference might mean more abstract formulation of the measures, which might allow more superficial assessment of the States' conduct.

judgement is tailored to the specific facts, which creates the impression that it does not entail imposition and definition of new rules, but rather the application of rules to facts.

In sum, since the measures cannot be specified, the obligation also cannot be specified. The whole assessment of state responsibility therefore is reduced to the question of breach: Did the State breach an obligation that has never been specifically articulated in advance and whose content and scope is not known, and in this sense cannot be specified in advanced either? In other words, the questions whether there is an obligation and what its content and scope might be collapsed into the question of breach.

2. Ways of specifying the obligation

How has the Court more specifically approached these conceptual difficulties? In particular, how has it, in its reasoning, dealt with the conceptual challenge that omissions have no definitive counterparts but rather introduce hypothetical and counterfactual analyses? Three interrelated ways can be identified in the Court's reasoning.

Review of the measures actually undertaken

First, in *Kurt v Austria*, the Court enumerated all the measures *actually* undertaken by the national authorities when the events were unfolding and concluded that these measures 'demonstrate that the authorities displayed *the required special diligence* in their immediate response to the applicant's allegations of domestic violence'.[117] This way of reasoning in the judgement shows that it is possible to know whether the obligation has been fulfilled only *post factum* in the context of a *post factum* review, like the one performed by the Court. It also shows that the standard of 'required special diligence' cannot be specified in advance before the *post factum* review. This standard has no initial and independent content. It cannot exist independently of the concrete facts, which further explains the collapse of the two analytical steps (i.e. the imposition of an obligation and determination of breach) in the reasoning.

Review of the measures explicitly invoked by an actor

A second way can be identified in the reasoning in *Kurt v Austria* for approaching the difficulties arising from the absence of an advance specification of the content of the obligation (i.e. the concrete measures) and the related absence of a conceptual distinction between the obligation and its breach. This second way implies framing the reasoning around the omissions specifically invoked by the applicant or other actors (e.g. third-party interveners). This means that the positive obligation is specified by the applicant's proposal as to what measures should have been undertaken. In this way, the applicant makes the omission cognizable.[118] For example, the applicant in *Kurt v Austria* complained about the choice of the measures taken by the national authorities: she argued that the perpetrator should have been taken into pre-trial detention. If the reasoning were to be framed around this argument, then the specific question the Court had to address would be expressed in this way: Did Austria have a positive obligation to take the perpetrator into pre-trial detention to protect the child's right to life under Article 2 ECHR? A negative answer will imply simultaneously the absence of an obligation and the absence of a breach. A positive answer will necessarily imply an existence of an obligation and simultaneously its breach (since the husband was not taken in pre-trial detention).[119] It follows then that the imposition of an obligation and the assessment of its breach converge again as analytical steps. This also explains why the Court avoids framing in its reasoning the positive obligation in such

[117] *Kurt v Austria* [GC] supra n 20 at para 194 (emphasis added).

[118] See also *Frick v Switzerland* Application No 23405/16, Merits and Just Satisfaction, 30 June 2020, at para 90; *Budayeva and Others v Russia* Application No15339/02, Merits and Just Satisfaction, 20 March 2008, at para 146.

[119] Here, I ignore the complications caused by Article 5, that imposes conflicting obligations corresponding to the perpetrator's right to liberty.

concrete terms in the very beginning of its Level 3 analysis but rather that the reasoning focuses on the question of breach.

Despite these two ways used by the Court to practically address the conceptual difficulties in framing the concrete positive obligations, it also needs to be acknowledged that multiple alternatives to those invoked by the applicant (or other actors) could be specified, so as to make an omission cognisable. For example, the GC judges who dissented invoked other alternative omissions.[120] The question that arises then is whether the examination of state responsibility should include these identifiable alternatives and, more generally, how to restrict the scope of such alternatives as can be included in the analysis.[121] An institutional problem also arises: if the establishment of state responsibility includes consideration of multiple alternatives framed in very concrete terms, this can amount to indicating the precise measures that should have been undertaken by the State. This is difficult to square with the starting point, already mentioned above, that States have discretion as to what measures to undertake to comply with their positive obligations.

The use of qualifiers such as 'reasonable'

Due to this tension, it is understandable why the Court refers to malleable terms like 'sufficient', 'adequate', 'effective' or 'reasonable' to characterise the measures that form the content of positive obligations.[122] These qualifications serve simultaneously three interrelated objectives. First, they enable the Court to deal with the multiplicity of possible proposals as to which measures could have been taken. Second, in the absence of an initial standard (i.e. the concrete protective measures that form the content of the positive obligation), they analytically enable the reasoning of the Court. Third, the usage of these terms serves the objective of preserving state discretion as to what concrete protective measures should be undertaken. Below, I will explain these three objectives in more detail.

As to the first objective, flexible terms, such as 'sufficient', 'adequate' or 'reasonable' serve a particular function: they enable the judges to provide a reasoning when faced with abstract standards, such as those at Levels 1 and 2. In other words, these flexible notions enable the Court to reason and to reach a conclusion (i.e. breach or no breach of the ECHR) when faced with the choices about how to integrate facts from the social reality with the abstract standards, when multiple alternative paths are possible as to the course of conduct that could (or should) have been adopted by the State.

As to the second objective, the usage of qualifiers such as 'reasonable' to describe the measures that form the content of the positive obligation creates the impression that there are two analytical steps in the reasoning: first, the description of the measures (i.e. the content of the positive obligation), and second, an assessment whether the measures have been performed (i.e. the breach of the positive obligations in case of non-performance). Yet, since the meaning of what is reasonable cannot be pre-determined,[123] and since various considerations can be relevant for determining reasonableness,[124] the distinction between these two steps is difficult

[120] 'advising the applicant of the level of risk', 'advising the applicant to move to a shelter with her children', 'closer police protection of the family' and 'immediate counselling to the perpetrator'.

[121] In the context of the *Osman* test, the alternative measures that should be considered for assessing omissions can be limited to those that can provide an *immediate* protection. However, after the reformulation and the specification of the *Osman* test in the specific context of domestic violence (see above at Section 3.B.(i)), this argument might be difficult to maintain.

[122] *Kurt v Austria* [GC] supra n 20 at para 209; *Öneryildiz v Turkey* supra n 45 at para 108; *Söderman v Sweden* [GC] Application No 5786/08, Merits and Just Satisfaction, 12 November 2013, at para 117; *Ribcheva and Others* Application No 37801/16, Merits and Just Satisfaction, 30 March 2021, at para 180.

[123] In the same way as the standard of 'required special diligence' cannot be specified in advance before the *post factum* review.

[124] A similar point has been made in relation to balancing for determining the breach of negative obligations. Çalı has clarified the importance of 'the choice of considerations, by way of which a valid communal interest is concretised'. Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) *Human Rights Quarterly* 251 at 264.

to maintain. Analytically, the two steps collapse into each other, since what is 'reasonable' can only be assessed at the second step.

As to the third objective, the reference to reasonableness, sufficiency and adequacy to characterise the measures legitimatizes the Court's decision-making process and the discretionary power of the judges to define rules.[125] As Corten has explained, 'the notion of reasonableness enables judges to present their decisions and motivations, often of their own creation, as perfectly in line with the intention of States'.[126] In this way, qualifiers such as 'reasonable' obscure the rule-making role of the Court. In sum, the flexible terms used in the framing of positive obligations mask the rule-making function of the Court that it inevitably adopts when it applies abstract standards to concrete facts, and hide multiple and divergent alternatives that can be used to achieve the objectives pursued by these abstract standards (e.g. safeguarding the right to life).[127]

This does not mean that there is a *complete and categorical* conflation of the actual formulation of the standards (i.e. the formulation of the concrete positive obligation) and their application (i.e. the determination of breach of the concrete obligation), leading to an assessment of breach that is completely unpredictable. Given that the Court has framed positive obligations at Level 1, has adapted them to some contexts (what I frame as Level 2) and has consistently reiterated them in its judgements for a long time, it is hard to say that there is a complete conflation. In addition, the Level 3 analysis can indirectly provide examples of more concretely framed obligations that can be relevant for future cases. In this sense, every documentation of a breach at Level 3 is a way of signalling what more concrete measures might be considered as required for complying with positive obligations. All this demonstrates the value of having the different levels of concretization of the obligations and the importance of clarifying them, which is the objective of this article. It also shows the importance of better understanding, specifically the last level of concretization (i.e. Level 3) and, in particular, the choices that can be made within this concretization. These choices that inevitably have to be made in the reasoning challenge the distinction between an initial existence of an obligation with some initially defined scope and content, on the one hand, and application of the obligation, on the other. In this sense, despite the cogent arguments for separating the definition of positive obligation and their application,[128] rule making and rule application are analytically difficult to isolate as self-confined steps in the reasoning.

Going back to the facts in *Kurt v Austria*, a relevant question related to the identification of the concrete measures (i.e. the content of the positive obligation of taking protective operational measure) is whether it is possible to formulate these measures in concrete terms, when no risk assessment has been performed and, in this sense, the risks have not been specified enough. This brings us back to the positive obligation of conducting risk assessment and the question of its independent nature when the Court precedes to Level 3 analysis.

(ii). Obligation to conduct lethality risk assessment

Three steps will be undertaken to better understand the positive obligation of conducting risk assessment. The first focuses on the question whether breach of the obligation is dependent on the result of the risk assessment. Second, I will explain the implications for the role of the Court, if the obligation is understood as being one of means as opposed to one of result, where

[125] Ollino, *Due Diligence Obligations in International law* (2022) at 173.

[126] Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradiction' (1999) 48 *International and Comparative Law Quarterly* 613.

[127] Corten has also noted that these alternatives express different values, and the usage of 'reasonableness' serves to give the reasoning a value-neutral appearance.

[128] This corresponds to the separation between the existence of an obligation and the breach of this obligation, as explained in Section 2.

the criterion for the distinction between obligations of means versus obligations of result is the concreteness in their framing. Third, I will explain the implications, if the criterion for this distinction is the efforts performed.

1. A procedural obligation dependent on the result

The facts in *Kurt v Austria* showed that the national authorities conducte risk assessment in relation to the applicant. The GC had to review only whether this risk assessment met the qualitative standards of being autonomous, proactive and comprehensive. These standards were found to have been complied with,[129] a relatively easy conclusion to reach given the facts and the outcome (i.e. the applicant herself was not killed). The more difficult question for the GC concerned the obligation of conducting lethality risk assessment regarding the children. The Court 'solved' the question by observing in paragraph 205 that

> While it is true that *no separate risk assessment* was explicitly carried out in relation to the children, the Court considers that on the basis of the information available at the relevant time *this would not have changed the situation*, [. . .].[130]

Two observations are due here. The first concerns the nature of the procedural positive obligation of conducting a lethality risk assessment as framed at Level 3 analysis. In particular, in stark contrast to the Level 2 analysis (see above at Section 3.B.(ii)), this procedural obligation is not framed as an independent one at Level 3 analysis. This implies that since there was no separate positive obligation to conduct risk assessment regarding threats to the life of the children, the question of breach did not need to be engaged with. If it had been, an easy finding of breach would follow.

The second observation regarding paragraph 205 concerns the Court's reasoning that even if risk assessment in relation to the children had been carried out, 'this would not have changed the situation'. In other words, even if the authorities had done a separate risk assessment, the result would have been the conclusion that the children were *not* at risk. The Court clarified that

> The authorities could legitimately assume that the children were protected in the domestic sphere from potential non-lethal forms of violence and harassment by their father to the same extent as the applicant, through the barring and protection order. There were no indications of a risk to the children at their school let alone a lethality risk.[131]

Indeed, given the facts of the case, it seems correct that there were no indications that could make the national authorities aware that the children might be exposed to a *lethal* risk. However, this refers to the result of the risk assessment, not to the question whether the national authorities conducted a risk assessment in relation to the children. It was clear that they did not.[132] If conducting a risk assessment is a separate obligation that arises in the context of domestic violence as suggested by the Court in its Level 2 analysis, failure to fulfil it should lead to a breach. However, when the Court concretely formulated the obligation at Level 3 to the specific facts to assess breach, it watered it down by making the result a relevant consideration. This illustrates how the reasoning is pulled in different directions. On the one hand, the Court aims with the judgement to establish some general standards of state conduct by formulating positive obligations at the abstract level (such as Levels 1 and 2). On the other hand, when

[129] *Kurt v Austria* [GC] supra n 20 at para 202.
[130] Ibid. at para 205 (emphasis added).
[131] Ibid. at para 206.
[132] See Joint Dissenting Opinion in *Kurt v Austria* [GC] supra n 20 at paras 8–12.

these obligations are concretized and applied to the particular facts, they can be narrowed down. For this purpose, the overall reasoning includes ambiguities as to the nature and content of the obligation (i.e. is it one of means or of result), which ensures the scope of manoeuvre for the Court when determining whether the obligation has been breached. The post *Kurt v Austria* case law has not been helpful in resolving this ambiguity.[133]

As suggested above, the reasoning in *Kurt v Austria* implies that the assessment, whether there was a positive obligation to conduct risk assessment and whether it was breached, is linked with the result (i.e. the conclusion that the children were not at risk). At face value, this seems difficult to square with the general principle established in the case law that positive obligations are obligations 'of means and not of result'.[134] At this juncture, a brief foray into the meaning of this characterisation of positive obligations as obligations of means is appropriate. It is also relevant to reflect upon how this dichotomy (i.e. obligations of means versus obligations of result) can be applied to procedural obligations, and how it affects the way in which breach is determined.

The distinction between obligations of means versus obligations of result is suggestive of the taxonomy between obligations of conduct and obligations of result used in general international law.[135] Importantly, there are two possible meanings that can be attached to this taxonomy. These two meanings will be clarified below, and their explanatory relevance to the positive obligations under the ECHR will be elucidated.

2. The distinction between obligations of means and obligations of result with reference to the level of concreteness in their framing

The first meaning of the distinction between obligations of means and obligations of result refers to the concreteness in the framing of the obligations. The distinguishing criterion thus 'rests on the extent to which international law encroaches upon the state machinery by instructing state organs to conform to a particular behaviour'.[136] In this sense, obligations of conduct 'specify the means of the course of action to be taken by the state'.[137] Obligations of conduct/means are therefore more specifically framed, or more concrete. In contrast, obligations of result are more abstractly framed and respect the discretion of the State how to achieve a result.[138] Given the relatively concrete framing of the obligation to perform risk assessment, this obligation can be classified as one of conduct/means, since it requires the State to adopt a particular course

[133] An approach similar to *Kurt v Austria* was applied in *Landi v Italy* Application No 10929/19, Merits and Just Satisfaction, 7 April 2022, at paras 90–1 since in the Court's reasoning (at Level 3) the obligation of conducting risk assessment is made dependent on the result. In *Landi v Italy*, the result was the conclusion that there was actually a risk and therefore, among other failures, the authorities were found to have failed to carry out risk assessment. See also *M.S. v Italy* Application No, 32715/19, Merits and Just Satisfaction, 7 July 2022, at para 125 and *De Giorgi v Italy* Application No 23735/19, Merits and Just Satisfaction, 16 June 2022, at para 78. The reasoning in *Y and Others v Bulgaria* Application No 9077/18, Merits and Just Satisfaction, 22 March 2022, at para 98–105 seems to be different since the Court focused on the *efforts* by the authorities to perform risk assessment and only when it moved to review breach of the *Osman* test, it noted that 'Had the authorities carried out a proper risk assessment, in particular on 17 August 2017, it is likely that they would have appreciated—based on the information available to them at that time—that Mr V., [. . .] could pose a real and immediate risk to her life, as those notions are to be understood in the context of domestic violence'. See also *Tunikova and Others v Russia* Application No 55974/16, Merits and Just Satisfaction, 14 December 2021, at para 108 that suggests that the breach of the obligation to conduct risk assessment is not dependent on the result (i.e. the conclusion whether there was risk or no): 'It is immaterial that there was no recurrence of violence in Ms Tunikova's case, as in order to determine whether this obligation has been fulfilled, the authorities must be able to shown that they have undertaken a proactive and autonomous risk assessment, [. . .]'. See, however, *Tkhelidze v Georgia* Application No 33056/07, Merits and Just Satisfaction, 8 July 2021, at para 54, where risk assessment was clearly not formulated as a separate obligation at Level 3. Risk assessment was rather mentioned as a measure that the authorities should have taken to fulfil their obligation to take protective operational measures (i.e. the *Osman* test).

[134] *Kurt v Austria* [GC] supra n 20 at para 159; see also *Güzelyurtlu and Others v Cyprus and Turkey* Application No 36925/07, Merits and Just Satisfaction, 29 January 2019, at para 219.

[135] Draft Articles 20 and 21, ILC Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading (1996) ILC YB II/2 draft Article 23.

[136] Ollino, supra n 125 at 77.

[137] Ibid.

[138] Ibid. at 70.

of conduct. This also fits well with the nature of procedural obligations as obligations that require specific steps to be taken that enable a particular result (i.e. a particular decision).[139] The decision itself is not under review, but the steps and whether they comply with certain procedural guarantees.

The determination as to whether obligations of means/conduct are breached can be regarded as *easier* to make since such obligations require the State to undertake certain *concrete* measures. Risk assessment can be viewed as an example of such a measure and 'the mere fact of not adopting that measure constitutes in itself a breach of the international obligations in question'.[140] If this reasoning is followed and, as already suggested above, the mere fact that Austria did not conduct risk assessment regarding the children should lead to an easy finding of a breach. In this sense, obligations of means/conduct can be assessed as more demanding since they imply that international law directs States as to what concrete measures to undertake in this way undermining their internal discretion.[141]

In contrast, the determination of breach of obligations of result is less easy. States are free to choose the measures (i.e. the concrete conduct) to achieve the result. As Ollino has explained, the breach of an obligation of result requires 'a failure of the state, *in concreto*, to achieve the desired result. In other words, the mere adoption by the state of measures abstractly in conflict with the result set by the obligation was not sufficient for determining responsibility'.[142]

The crucial question that arises here is the identification and the articulation of the result in the formulation of the obligation. An equally crucial question is the distinction between means and result. Applied to *Kurt v Austria*, these questions can be framed in the following way: Is the result in question the saving of the child's life? Is the result in question putting the authorities in a position that could enable them to know about risks to life and risk assessment is the means that can help in the achievement of this result? Is the result in question the taking of protective operational measures? If the GC reasoning in *Kurt v Austria* is followed, all of these questions should be answered in the negative. Rather, the result that the reasoning refers to is the *knowledge* about risk. Pursuant to the GC, no knowledge about risk for the life of the child would have been gained, even if risk assessment had been performed. Thus, the reasoning arguably merges elements that characterise the obligations of means (i.e. risk assessment is a concrete measure and, in this sense, the content of an obligation of means) and obligations of result (i.e. the gaining of knowledge about a lethality risk, a result that could not have been achieved).

This conclusion, however, is contingent on how the Court chooses to formulate the result. If the result is formulated as ensuring that the authorities are in a position that they could have known better, a breach could have been found. This possibility for reformulation suggests that the obligation to conduct a risk assessment as applied at Level 3 in the reasoning in *Kurt v Austria* does not fit within the above-described classification of obligations (means versus result). The classification therefore might not be very useful in guiding the process of reasoning leading to a conclusion of breach or no breach. This finding is in line with Crawford's observation that the distinction is 'not a dichotomy but a spectrum'.[143] Tomuschat has also observed that obligations can combine both aspects—means and results—'to such a degree that the different components can hardly be separated from one other'.[144]

[139] Huijbers, *Process-based Fundamental Rights Review* (2019) at 113.
[140] ILC Commentary on the Draft Articles', 138.
[141] Ollino, supra n 125 at 81–2.
[142] Ibid. at 80.
[143] Ollino, supra n 125 at 85.
[144] Tomuschat, 'What is a "Breach" of the European Convention on Human Rights' in Lawson and de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe* (1994) 324.

The distinction still has some analytical value, however. Using it as a reference point allows us to conclude that the obligation to conduct risk assessment appears to be an obligation of means, since it is concretely formulated. As such, an easy determination of breach could have been made. However, such a determination could imply direct intrusion into state discretion, since it entails a formulation of a concrete measure to be undertaken at national level. The intrusion was avoided by reference to a result. The result used as a point of reference in the reasoning was the gaining of relevant knowledge by the Austrian authorities. This result would not have been achieved by the state authorities, even if the concrete measure of risk assessment had been taken.

3. The distinction between obligations of means and obligations of result with reference to the efforts

A second meaning, not related to level of concreteness in the formulation of the obligation, can be attached to the dichotomy between obligations of means/conduct versus obligations of result. According to this second meaning, obligations of means/conduct can be regarded as less demanding since they require of the State only to *endeavour* towards the pursuit of a certain result without necessarily achieving the result.[145] In this sense, obligations of conduct are obligations of efforts, while obligations of result demand the achievement of a certain result, and in this sense are more demanding. It is in this sense that the Court uses the dichotomy between obligations of means and obligations of result. Positive obligations are therefore obligations of efforts.[146]

However, procedural positive obligations, such as the obligation to conduct risk assessment, pose a conceptual challenge. If they are separate and independent obligations,[147] they can be viewed as obligations of result, the result being the risk assessment itself. If this result is not achieved, as in *Kurt v Austria* (no risk assessment was performed regarding the children), breach should follow. This is *not* how the Court framed its reasoning in *Kurt v Austria*, though.

The procedural obligation can, however, be linked to the obligation of taking protective operational measure, which entails that the former is not a separate obligation. It is rather *part of the efforts*, and breach will be assessed accordingly.[148] In other words, as noted above, obligations of efforts are less demanding and breach less likely. This seems to be the approach adopted by the GC in *Kurt v Austria* in its Level 3 analysis. The reference to a result (i.e. no relevant knowledge would have been gained anyway, even if the authorities had carried out a risk assessment) in the GC's reasoning does not aim to modify the nature of the obligation (as an obligation of means and thus of efforts). The reference to this particular result rather reflects the *post factum* assessment by the Court of the efforts.

If, however, the result, the aim of the efforts, were to be framed differently, the reasoning would be different. Specifically, the aim of the efforts could be framed as placing the state authorities in a position to know better about risks. Risk assessment could still be conceptualised as part of these efforts.[149] If, however, the result/aim is framed in this way, the benefit of the hindsight would be less relevant. It would be less relevant that in retrospect it can be concluded that even if the authorities had placed themselves in a position to know better, they would not have gained

[145] Ollino, supra n 95 at 82.

[146] *Kurt v Austria* [CG] supra n 20 at para 159: '[. . .] the fact that such measures may nonetheless fail to achieve the desired result is not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2'.

[147] The obligation to conduct effective criminal investigation (i.e. the procedural limb of Articles 2 and 3) is a distinct obligation that 'can give rise to a finding of a separate and independent "interference"'. See *Armani Da Silva v the United Kingdom* [GC], supra n 85 at para 231.

[148] This approach, i.e.risk assessment as part of the efforts, was clearly applied in *Tkhelidze v Georgia* Application No 33056/07, Merits and Just Satisfaction, 8 July 2021, at para 54.

[149] Admittedly, risk assessment might be the only effort (i.e. the only means) that could achieve this result (i.e. placing the state authorities in a position to know better). This leads to the collapse of the distinction between means and the result. This would imply that risk assessment should rather be an independent obligation, and thus an obligation of result, the result being the risk assessment itself.

relevant knowledge. This different framing of the result might imply that it is less likely that the Court will benefit from a *post factum* assessment.

All of the above demonstrates how obligations can be framed differently and how this framing affects the determination of breach. The analysis also shows that the framing of positive obligations does not necessarily fit into specific classifications. The taxonomy of obligations of means, as opposed to obligations of result, has analytical value,[150] since it is useful to better understand positive obligations as developed by the Court. Yet, it is crucial to also deconstruct the taxonomy and to understand what stands behind it. Once this is done, it becomes clear that there are different aspects—the level of concreteness in how the obligation is framed, the related intrusion into State discretion, the distinction between means (i.e. efforts) and objectives (i.e. results), the choice made as to how the result is framed and the role played by the benefit of the hindsight. The assessment of breach includes choices as to which of these different aspects should be given prominence. The choices can affect the conclusion (i.e. breach or no breach).[151]

(iii). Obligation to take preventive operational measures to protect the children

The choice as to which aspect to highlight and how to concretise was also essential when the GC considered the obligation of taking preventive operational measures to protect the children. As mentioned in Section 3.B.(i), this obligation arises upon real and immediate risk. The concretisation of the immediacy standard was already explained in the same section. Other aspects of the obligation, however, can be also objects of concretisation. In particular, the risk could be circumscribed to specific locations (geographical delimitation of the risk) and/or to specific timing (temporal delimitation of the risk) and/or as being of specific kind/severity/category (category delimitation). For example, in *Kurt v Austria*, the GC noted that

> [. . .] the Court agrees with the Government that, on the basis of what was known to the authorities at the material time, there were no indications of a real and immediate risk of further violence against the applicant's son *outside the area* for which a barring order had been issued, let alone *a lethality risk*.[152]

These words suggest a category delimitation, since the risk was not framed more generally as risk of harm but as lethality risk. A geographical delimitation of the risk was also used in the formulation of the obligation, since it was noted that '[t]here were no indications of a risk to the children *at their school*'.[153] The reference to certain areas and to 'private or public spaces' also suggests a geographical framing of the risk.[154]

The use of such concretisations in the formulation of the obligation is analytically necessary so that the Court applies the more abstract standards (i.e. the formulations at Levels 1 and 2) to concrete facts. The crucial point here is that when the Court reasons, it can choose which concretisations to use when it articulates the obligation and, accordingly, which aspects to highlight. In *Kurt v Austria,* the obligation was framed narrowly with reference to the above-mentioned delimitations, which made it easier to conclude that there was no breach.

[150] In agreement with Ollino, supra n 125 at 95.

[151] As already suggested in Section 2, the assessment of breach of positive obligations can depend on various other factors (e.g. knowledge, causation and reasonableness). The focus in this section on the level of concreteness in how the obligation is framed, the related intrusion into State discretion, the distinction between means (i.e. efforts) and objectives (i.e. results), the choice made as to how the result is framed and the role played by the benefit of the hindsight does not negate the importance of other factors and does not aim to oversimplify the complex and holistic reasoning regarding the breach of positive obligations.

[152] *Kurt v Austria* [GC] supra n 20 at para 209 (emphasis added).

[153] Ibid. at para 206 (emphasis added).

[154] Ibid. at para 209.

A clarification is immediately due here. Given the above-mentioned, geographical, temporal and category concretisations, the GC concluded that 'there was *no obligation* incumbent on the authorities to take *further preventive operational measures* specifically with regard to the applicant's children, whether in private or public spaces, such as issuing of a barring order for the children's school'.[155] This quotation suggests that there was no obligation (as articulated in the specific way chosen by the Court) in the first place, and the question of breach is therefore irrelevant. At the same time, the reference to 'further preventive operation measures' suggests that there was actually an obligation to take preventive operational measures. The measures actually taken were, however, assessed as adequate by the Court.[156] All of this again shows that the choice of how the obligation is framed and articulated is crucial, first, for the distinction between the existence of an obligation and its breach, and second, for the establishment of breach.

The more the obligation is framed with reference to geographical, temporal and category concretisations, the more the finding of a breach will entail instructions to the national authorities as to the measures that should have been taken. This was not an issue that arose in *Kurt v Austria*, since no breach was found. However, it can be observed in other cases, where the conclusion was different and where the framing of the obligation contained various concretisations.[157] This can be seen as an intrusion in state discretion and erosive of the principle that States have discretion to choose the concrete measures to fulfil their positive obligations.[158]

(iv). Obligation to adopt effective regulatory framework regarding barring orders

The obligation of taking preventive operational measures (the *Osman* test) is invoked when there is a concrete victim exposed to a specific kind of risk (defined as 'real and immediate') and omissions can be identified that, if avoided, could have prevented this specific kind of risk.[159] Omissions can also be identified, however, that are not of an operational, but of more systemic and structural nature pertaining to the national regulatory framework.[160] The risks that they pose might not be 'immediate' and the victims might not be concretely identifiable. Instead, the applicant in a specific case might happen to be a representative victim of some systematic and structural omissions. The analytical question that arises in this context is how to formulate these omissions, and relatedly, what level of specificity to use in formulating positive obligations.

As mentioned in Section 3.A, the GC in *Kurt v Austria* did not articulate an omission with reference to the national regulatory framework. The applicant, however, did formulate such omissions. First, the Security Police Act, as worded at the time of the events, was arguably deficient since it did not allow the police to extend the barring order to premises outside the vicinity of the home. Second, there was no requirement under Austrian law at the time of the events that information regarding domestic violence be shared with the children's school.[161] In the GC's judgement, these omissions were mentioned as part of the assessment whether Austria had to

[155] Ibid. at para 209 (emphasis added).

[156] Ibid. at para 209: 'The measures ordered by the authorities appear, in the light of the result of the risk assessment, to have been adequate to contain any risk of further violence against the children'.

[157] See, e.g., *Y and Others v Bulgaria* Application No 9077/18, Merits and Just Satisfaction, 22 March 2022, at para 107.

[158] See also Section 3.C.(i) where it was explained that the use of terms such as 'reasonable' to qualify the concrete measures, serves the objective to preserve state discretion.

[159] As already noted in Section 2, while the Court has rejected a 'but for' test for causation (see *E. and Others v The United Kingdom* Application No 33218/96, Merits and Just Satisfaction, 26 November 2002, at para 99), it has never explicitly established a specific causation standard.

[160] Clarification as to the distinction between operational and systemic/structural is due. Systemic failures relate to legislative or policy failures, while operational failures relate to omissions by individual officers or non-compliance with the existing national legislation or guidelines in the particular case. Admittedly, the distinction is not that clear cut.

[161] See para 31 of the Dissenting Opinion in *Kurt v Austria* [GC] supra n 20.

take additional protective operational measures regarding the children. As clarified in Section 3.C.(iii), the GC reasoned that the respondent State was not under such an obligation.[162]

The examination of these omissions through the prism of the *Osman* test implies that the omissions were not reviewed in abstract but rather in relation to their concrete effects on concrete victims. This meant that the review of the Court included only an assessment whether the legislative omissions were contributory to harm to the *concrete* victims. This way of applying the *Osman* test is understandable, given the nature of the obligation of taking protective operational measures. Specifically, the obligation is framed in relatively specific terms, with concrete identification of victims who arguably need to be protected and perpetrators who arguably need to be restrained. This level of specification also implies that the finding of a breach depends on more clearly on discernible causal links between the harm sustained by the concrete victims and the measures (i.e. the content of the obligation) meant to protect by restraining the perpetrators.

When omissions are reviewed through the prism of the positive obligation to adopt an effective regulatory framework, however, there is a wider scope for flexibility in the articulation of the causal links and, consequently, in the formulation of the positive obligation. The starting point for explaining this flexibility is the following principle established in the case law: 'the Court reiterates that its review of the domestic regulatory framework is *not an abstract one*, but rather one that assesses the manner in which *it affected the applicant in the specific case*'.[163] This means that the Court has framed its task as examining the concrete application of the regulatory framework, rather than some general compliance. The Chamber in *Kurt v Austria* started its analysis as to whether the State had failed to adopt effective regulatory framework by reiterating this starting point. It is helpful to reflect here what it means that the review is not an abstract but a concrete one. The concrete review meant that the Chamber's reasoning zoomed in on the implications of the legislation for the specific person and the specific harm sustained by this person. The Chamber in *Kurt v Austria* thus reasoned that the deficiencies in the legal framework did not sufficiently contribute to the specific harm (i.e. the killing of the child). The Chamber motivated the weak causality with reference to two main considerations. First, the authorities did not know about the risk to the child's life, a motivation that reveals the intertwinement between the factors of causation and knowledge. Second, the applicant had at her disposal alternative measures enshrined in the legal framework: getting a temporary restraining order from the competent district court under the Enforcement Act, which could have banned her former husband from public places beyond residential premises.[164]

This concrete review implied a *specific framing of the positive obligation* and its content. The questions the Chamber responded to were the following: Was Austria under the obligation to issue a barring order for the school to save the life of the child? Was Austria under the positive obligation to share information about the domestic violence with the school to save the life of the child?[165] This concrete framing of the obligation implies that the decisions by the national authorities in relation to specific individuals (in this case, the children) are reviewed. These decisions are indeed based on implementation of the general national regulatory framework. However, this framework as a whole, and any abstract defects that it might have, were not reviewed in the reasoning.

An alternative framing of the positive obligations is also possible, however. The obligations can be framed in a way that would demand a review of the reasonableness of the national

[162] *Kurt v Austria* [GC] supra n 20 at paras 208–9.
[163] *Kurt v Austria*, Chamber, supra n 20 at para 77 (emphasis added). See also *Fernandes de Olivia* [GC] supra n 4 at para 116.
[164] *Kurt v Austria*, Chamber, supra n 20 at para 77–9.
[165] The Chamber in *Kurt v Austria* did not explicitly use this framing of the positive obligations. This framing is rather my own reconstruction of the reasoning.

regulatory framework *as a whole*.[166] This implies a more abstract framing of the obligation, where causation and knowledge recede into the background and reasonableness is placed in the foreground. If we take the facts of *Kurt v Austria* as an example, a more abstract framing would imply that the following question is placed at the heart of the analysis: Is it reasonable to have a national legislation that does not allow the extension of barring orders to premises outside the vicinity of the home and does not allow sharing of information with schools regarding domestic violence? Such an abstract framing implies that whether to what extent and how the omissions in the national legislative framework affected concrete applicants and contributed to their specific harm (or risk of harm) becomes less important in the reasoning.[167] Knowledge about risk of harm to the concrete applicants also becomes less important.

An abstract framing of the positive obligation thus implies more flexibility in the reasoning since it leads to an assessment of the overall reasonableness of the national legal framework. The causal effects between any rules or absence of rules on the one hand, and harm sustained by the concrete applicant on the other, recede to the background. The abstract review also accordingly implies that the positive obligations are framed in a way that is more detached from the concrete case and the concrete harm.

To conclude, despite the affirmation that the State has 'special diligence' to prevent domestic violence (see Section 3.B), neither the Chamber nor the GC went so far as to formulate more abstract positive obligations that would imply a review of the national legislation in more abstract terms and thus a review of the overall reasonableness of the national legislation. It is worthwhile, however, to reflect upon the implications if such a formulation and review were attempted and if such breach is found. The implication would be a pronouncement by the Court that States have positive obligations under the ECHR to issue barring orders and to share information. The role of the Court would then come closer to that of a legislator. This would be controversial and explains why the Court might not be willing to take this path.

4. CONCLUSION

The State as an abstract organisational entity that has an instrumental value and that is assumed to be in control of its territory, commits multiple omissions that can be framed as contributory to harm. Which of them can lead to state responsibility is contingent on their identifiability, on how omissions are framed and relatedly on how any positive obligations upon the State to act are formulated.[168] As to their identifiability, what characterises omissions is that they do not have definitive counterparts. Positive obligations can therefore be complied with via multiple independently sufficient measures that States can choose from. This discretion implies multiple ways for formulating any positive obligation. These formulations can oscillate between being more general or more concrete. The general and the concrete formulations, and the oscillation between the two, serve different purposes. As demonstrated with reference to *Kurt v Austria*, the Court has framed a general positive obligation upon the State to protect the right to life (Level 1 of concreteness) and has specified it in the context of domestic violence by noting that 'special diligence' is required in this context (Level 2 of concreteness). The purpose of this

[166] As Gerards has demonstrated, in many cases the Court chooses abstract review. See Gerards, 'Abstract and Concrete Reasonableness Review by the European Court of Human Rights' (2020) 1 *European Convention on Human Rights Law Review* 2018.

[167] For such more abstract framing, see, for example, *Vilnes and Others v Norway* Application Nos 52,806/09 and 22,703/10, Merits and Just Satisfaction, 5 December 2013, at paras 236–244, where the following question was formulated: In view of the practices related to the use of rapid decompression tables, did the divers receive the essential information needed to be able to assess the risk to their health? The Court reviewed in abstract the national regulatory framework regarding the tables without necessary asking whether if the specific divers had access to more information, this would have made a change.

[168] This statement could be controversial since it seems to suggest that positive obligations do not exist independently from how actors (i.e. the ECtHR) choose to describe them.

general formulation is the establishment of some general guidance for state conduct. The issue of breach does not arise at these two levels.

This issue arises when, in its reasoning, the Court has to integrate facts from the concrete case, which is a challenge since multiple proposals are possible as to the concrete measures that could have been adopted by the State. At this level of analysis, the Court is faced with choices as to how to formulate concrete obligations (Level three of concreteness). The choice made influences the finding of breach. In addition, the more the choice tilts towards a concrete formulation of the obligation, the more the Court appears to assume the role of a rule-maker, which is in tension with States' discretion as to what concrete measures to take to fulfil their positive obligations. Yet, more concrete formulations of the positive obligations are analytically necessary in the legal reasoning so that a conclusion about breach can be reached given the concrete facts in the case.

Four major conclusions regarding the choice of framing positive obligations at Level three emerge. First, the usage of flexible notions such as reasonableness enables the Court to perform its review task when faced with choices on how to integrate facts from the social reality with abstract rules and when multiple proposals are possible as to the concrete measures that could have been adopted by the State. Second, besides the inclusion of flexible notions such as reasonableness, other techniques for making choices in the framing of the obligations could also be identified. Such a technique is the mixture of the means and the result in the analysis, which can be observed in the different ways in which the Court chose to frame the positive obligation of conducting a risk assessment in *Knut v Austria*. Choices can be also made as to which results (e.g. the risk assessment in itself, better knowledge about risks or the conclusion that the children were not at risk) should be used as points of reference. Third, choices are also available as to whether any geographical, temporal or category concretisations will be used in the framing of the obligations. Finally, different choices are also possible as to the level of causation demanded between the harm sustained by the specific applicant and any alleged omissions. The lower this level, the more abstract the way in which the obligation can be framed.

Overall, this article has demonstrated the value in better understanding the different levels of concretisation of positive obligations and how these levels affect the determination of breach. The key role of Level three concretisation was highlighted since it is at this level where multiple choices of formulations and specifications of measures arguably in fulfilment of positive obligations are possible. At Level 3, these choices have to be circumscribed and the limitations chosen affect the outcome (i.e. breach or no breach of the obligation). The necessary availability of choices at Level 3 reveals that the isolation between rule making and rule application (i.e. the isolation between existence of an obligation and its breach) as separate steps is difficult to achieve. This difficulty is aggravated in the context of positive obligations in comparison with negative ones due to the wider compliance choices available in the context of the former.

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