Causation: Why and How for Establishing Breach of Positive Obligations under the European Convention on Human Rights?

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Why and How for Establishing Breach of Positive Obligations under the European Convention on Human Rights?

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Abstract:

The judgments of the European Court of Human Rights manifest a mixture of factual and legal causation, when the Court reasons whether omissions should be the basis for breach of positive obligations under the European Convention on Human Rights. However, considerations that can be generally framed as normative govern the reasoning, which implies domination of legal causation. Yet, the Court still invokes factual causation to maintain an appearance that its judgments are based on rationality. Factual causation is invoked for creating the impression that the Court does not simply invent positive obligations. The causal inquiry with its mixture of factual and normative elements is ultimately an inquiry about the existence of positive obligations, about the interpretation of their content and scope, and about the determination of breach. By invoking explicitly or implicitly causal links between harm and omissions, the Court therefore determines the existence of obligations and makes conclusions about their breaches.

1. Introduction

Causation is widely applied in national law for determining responsibility. More generally, it can be regarded as an inherent feature of reasoning about legal responsibility. It underlines any legal inquiry about responsibility and the consequences flowing once responsibility established.[1] At the same time, causation has been difficult to define.[2] These difficulties are perhaps ever greater when the legal inquiry is about omissions as causes.[3] Here by causal inquiry is understood the analytical effort to establish *a link* (a connection) between an omission (or omissions/failures to take measures) by the State and harm in the system of state responsibility under the European Convention on Human Rights (ECHR or the Convention). In this sense, the omission is the claimed cause (A), and the harm is the claimed effect/outcome/result (B). This link is important for establishing responsibility for harm, since the expectation is that in the hypothetical world where the omission(s) had not happened (i.e. if the State had taken measures), the harm could have been prevented.[4] The link therefore can be characterised is one of prevention.

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[1] AM Honoré, 'Causation and Remoteness of Damage' in A Tunc (ed), International Encyclopaedia of Comparative Law: Torts, vol 11, ch 7 (Mohr 1983) 1–156, 21–22.

[2] R Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts', 73 Iowa Law Review (1987–1988) 1001.

[3] T Honoré, *Responsibility and Fault* 41 (Hart Publishing2002); Sartorio, 'How to Be Responsible for Something without Causing It' 18(1) Philosophical Perspectives (2004) 315; M.S. Moore, *Causation and Responsibility: An Essay on Law, Morals, and Metaphysics* (2009) 129–130; Schaffer, 'Causes Need Not Be Physically Connected to Their Effects: The Case for Negative Causation', in C.R. Hitchcock (ed.), *Contemporary Debates in Philosophy of Science* (2004) 197.

[4] In alternative, the risk of harm could have been avoided or reduced. Another alternative is that the harm could have been mitigated. All these alternatives and modifications of the effect (B) will be addressed below. The required degree of likelihood to prevent the harm (B) or the risk of harm is also another relevant question.

My objective is to explain this link in light of the case law of the European Court of Human Rights (ECtHR or the Court). The reasoning of the Court in judgments where omissions are invoked as a basis for state responsibility is therefore of key importance for achieving this objective. All judgments delivered in 2023 and 2024 addressing arguments about breach of substantive positive obligations under Articles 2, 3 and 8 ECHR are considered,[5] so that a sufficiently representative sample is covered. Any standards or considerations used in the Court's reasoning that emerge from the case law, are contextualized so that they can be better understood. In particular, they are contextualized within philosophical discussions about causation and how causation has been addressed in other areas of law. Such comparative parallels allow a better understanding of the role of the causal link in the human rights law reasoning employed by the Court and the justifications of this role.

The following path will be followed. Section 2 explains what is considered as cause and effect in the human rights law reasoning where positive obligations are invoked and how causes and effects might be framed and specified. In particular, Section 2 explains that the causal inquiry is actually an inquiry about the existence of positive obligations and about the interpretation of their content and scope. By invoking explicitly or implicitly causal links between harms and omissions, the Court in fact determines the existence of obligations, their content and scope and simultaneously determines breach.

Section 3 attempts to review the Court's practice through the lenses of this distinction between factual causation and legal causation. This distinction and its rationale have been addressed in other areas of law. Given that the ECHR is an international treaty and that responsibility under the Convention is an international responsibility, international law is therefore an important area of law to draw parallels with. As Plakokefalos and Lanovoy have noted, however, causation has remained under-explored in international law.[6] The codification process of the law of state responsibility in international law has left the question of causation aside, by concluding that it is the relevant primary rules (i.e. the primary obligations) that determine causation.[7] This justifies the engagement with the ECtHR's case law where primary obligations, including positive obligations, have been developed and standards for determining breach advanced. However, as Sections 2 and 3 show the case law is erratic; it therefore needs to be juxtaposed against some more consistent and stable system of legal responsibility. Since the existing scholarship and international law have been underpinned by comparative parallels with tort law, tort law responsibility can offer a comparative framework. In addition, domestic tort law also aims to protect important individual interests, which reveals a normative similarity with human rights law.[8] The domestic counterpart of tort law is thus used in Section 3 to offer insights as to

[5] I do not consider judgments where the only argument raised is breach of the procedural positive obligation to investigate. For this obligation, see K Kamber, *Prosecuting Human Rights Offences* (Brill 2017). Admissibility decisions have been also excluded from the analysis. In the forthcoming analysis, I do not cite *all* the 2023 and 2024 judgments that I have identified in the HUDOC as judgments where positive obligations under Article 2, 3 and 8 have been invoked.

[6] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) European Journal of International Law 471; Vladyslav Lanovoy, 'Causation in the Law of State Responsibility' (2022) The British Yearbook of International Law 1.

[7] Yearbook of the International Law Commission, 2001, vol. II, Part Two: Commentary to Art 31, para 10 ('the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation'). J Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 559: 'ARSIWA pragmatically avoids the issue [of causation], leaving specific determinations to the particularities of each case'.

[8] Jason Varuhas, *Damages and Human Rights* (Hart Publishing, 2016), 474: 'Both human rights law and tort law 'perform similar functions in protecting the most fundamental of interests'; D Nolan, 'Negligence and Human Rights Law: the Case for Separate Development' (2013) Modern Law Review 286, 293–7; V Stoyanova, 'Common

the distinction between legal and factual causation and its rationale. The analysis in Section 3 is thus guided by the question whether the Court has distinguished the different considerations of respectively factual and legal causation (Sections 3.1 and 3.2). Since the answer to this question is negative, Section 3.3 explains that the mixture of factual and legal causation is inevitable. This inevitability is related to the role of the causation inquiry that, as explained in Section 2, simultaneously serves the analytical steps of establishing the content and the scope of the obligation and establishing its breach.

2. What is the cause and what is the effect in the human rights law reasoning?

The causal inquiry seeks to establish *a link* between an omission by the State (A) and effect, i.e. the harm (B), in the system of state responsibility under the European Convention on Human Rights (ECHR or the Convention) for breach of positive obligations. Sections 2.1 offers a better understanding of (B) by explaining that it concerns choices about the definitional scope of the relevant ECHR right. Section 2.2. clarifies that (A) has to be limited to *legally* relevant omissions. Yet, as Section 2.3. further clarifies, the specification of these legally relevant omissions collapses with the determination of breach of the positive obligations. As a consequence, as Section 2.4. explains, causation is a tool for determining both the existence of positive obligations (including their content and scope) and their breach. Finally, Section 2.5. more concretely shows how by making certain choices in the framing and the specification of the causes and effects, the Court can 'control' the conclusion about breach that follow from the reasoning in the judgment.

2.1. The effect: harm to important interests as protected by the ECHR

(B), i.e. the harm,[9] is understood as the negative effects upon the interests protected by the rights that are enshrined in the different provisions of the Convention. In the context of the European Court of Human Rights (ECtHR) judgments, this harm understood as negative effects upon interests, is an object of inquiry in the determination of the definitional scope of the right.[10] This definitional inquiry aims to answer the question whether these effects pass the threshold for being defined as an *interference* with the right to life, the right to private life etc. The usage of the term 'interference' here might be confusing, since it does not refer to breaches/violation of any obligations. The question of obligations is not relevant at this stage of the human rights law review. The establishment of 'interference' simply means that the definitional scope of the right is engaged since the harm done to the applicant is of such a nature that it has actually negatively *affected* the important interests protected by, for example, the right to life or the right to private life.

There is therefore a causal inquiry at play at the definitional stage of the review; but it is different from the causal inquiry about the link between (A) and (B). The former is not a causal inquiry about obligations, which implies that it is not about omissions of taking measures as the causes. It is not about the required conduct of the State. The former pertains to the definitional scope of the right and it is about the link between the factual condition of the individual applicant and the interests protected by the ECHR provisions.[11] It is about the normative

Law Tort of Negligence as a Tool for the Deconstruction of Positive Obligations under the European Convention on Human Rights' (2020) 24 The International Journal of Human Rights 632.

[9] In the risk-based reasoning for establishing breach, it is not anymore (B) that matters, but the risk of (B), which modifies the causation inquiry. See Section 2.5 below.

[10] J Gerards and E Brems, 'Introduction' in E Brems and J Gerards, *Shaping Rights in the ECHR* (CUP 2013) 1.

[11] I use the term 'condition' here since it is neutral, as opposed to the term 'harm' that already has a negative connotation. In the rest of the chapter, however, I use the term 'harm' under the assumption that the factual conditions of the application have been found to fall within the definitional scope of the ECHR right invoked.

assessment whether this condition should be considered as affecting these ECHR interests. This implies a prior normative assessment as to how expansively these interests should be interpreted. The more expansive, the more factual conditions (that applicants argue that have been harmful to them) can be covered by the definitional scope of the right.

The causal inquiry pertaining to the link between (A) and (B) is an inquiry about measures (arguably that form the content of positive obligations) and elimination (or mitigation) of the harmful condition that has been already found worthy of protection at the definitional stage of the review. Once found worthy of protection, since the harmful condition is considered as having negatively affected the relevant ECHR interests, this already necessary implies that the State's conduct will be subjected to review by asking whether and what measures have been in place to prevent or mitigate the harm (or the risk of harm).

An example about the above clarified distinction can be provided with *Locascia and Others v Italy*, where the applicants complained about the inability of the State to ensure proper functioning of waste collection in the region where they lived.[12] As part of the definitional review whether the applicants' condition can be considered as negatively affecting interests protected by Article 8, the Court noted:

> *a causal link existed* between exposure to waste treatment and an increased risk of developing pathologies such as cancer or congenital malformations, even though other factors such as family history, nutrition and smoking habits in the area might also have influenced the mortality rate.[13]

It also added that 'living in the area marked by extensive exposure to waste in breach of the applicable safety standards made the applicant more *vulnerable to* various illnesses'[14] and that 'the environmental nuisance that the applicants experienced in the course of their everyday life *affected, adversely and to a sufficient extent, their private life* during the entire period under consideration.'[15] Having established the link between the applicant's condition and the Article 8 interests, the Court continued to examine the question of obligations.[16]

In *Locascia and Others v Italy* therefore the definitional inquiry implied the establishment of a link between, on the one hand, the reality that included existence of waste and pollution in the region and, on the other, the Article 8 interests. This is different from the question what conduct the State should have adopted (i.e. what measures that might form the content of positive obligations) to protect the affected interests.

Admittedly, the Court does not always make the above clarified distinction between the definitional inquiry and the obligation inquiry. The reasoning in *Locascia and Others v Italy* regarding the waste collection problem after 1 January 2010 when the state of emergency ended, is illustrative. The Court observed that

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[12] *Locascia and Others v Italy* App no 35648/10, 19 October 2023.
[13] *Locascia and Others v Italy* para 127.
[14] *Locascia and Others v Italy* para 130.
[15] *Locascia and Others v Italy* para 132.
[16] *Locascia and Others v Italy* para 133. For another relevant example see *Moldovan v Ukraine*, App no 62020/14, 14 March 2024, para 30, where the applicant argued that '[t]here therefore existed a direct link between the establishment of paternity and the applicant's private life.' At para 35 of the judgment the Court agreed by considering that 'the right claimed by the applicant discloses sufficient relevant elements to fall within the concept of "private life".' See also *Vlaisavlevikj v North Macedonia* App no 23215/21, 25 June 2024, para 37-39.

> the applicants have not demonstrated whether and to what extent the *shortcomings* in the management of waste treatment and disposal services in Campania in the period following the end of the state of emergency *had a direct impact on their home and private life.* Although the presence of large quantities of "ecobales" shows the persistence of a general deterioration of the environment in Campania, this is not in itself sufficient to establish that the situation specifically *affected* the population of the municipalities of Caserta and San Nicola La Strada and, if so, *the extent of the interference with the applicants' right to respect for their home and private life*.[17]

The reasoning in this paragraph reveals a confusion.[18] If the deterioration of the environment could not be causally linked to the interests protected by Article 8, then Article 8 is not relevant to begin with. Contrary to what the above paragraph suggests, the question of any obligations and therefore any 'shortcomings in the management' is not relevant either.

In *Verein Klimaseniorinnen Schweiz and Others v Switzerland,* the Court suggested the distinction that I explained above. A full appreciation of the causal inquiry performed in this judgment is not attempted here.[19] My point here is limited to highlighting the distinction made between the following two links. On the one hand,

> the link between the various adverse effects of the consequences of climate change, and the risks of such effects on the enjoyment of human rights at present and in the future. In general terms, this issue pertains *to the legal question of how the scope of human rights protection* is to be understood as regards the impacts arising for human beings from an existing degradation, or risk of degradation, in their living conditions.[20]

On the other, the Court also formulated 'the link, at the individual level, between a harm, or risk of harm, allegedly affecting specific persons or groups of persons, *and the acts or omissions of State authorities* against which a human rights-based complaint is directed.'[21]

The first link pertains to the definitional limits of the interests protected by the rights enshrined in the Convention. Asking about this link suggests that human rights law has its limits in the sense that harms might not necessary be addressed by this body of law. The second pertains to the obligations and shows that even if the harm affects important interests as protected by the ECHR, this does not necessary mean that there are obligations upon the state to do something about this harm, as a matter of human rights law.

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[17] *Locascia and Others v Italy* para 135.

[18] In its case law, the ECtHR does not consistently follow the distinction between definitional review and the review of the violation. For an analysis related to negative obligations, see J Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466; J Gerards and H Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7(4) International Journal of Constitutional Law 619.

[19] V Stoyanova, '*KlimaSeniorinnen* and the Question(s) of Causation' Verfassungsblog 7 May 2024.

[20] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 425. See also para 515: 'The question of 'actual interfernce' in practice relates to the existence of a direct and immediate link between the alleged environmental harm and the applicant's private or family life or home.'

[21] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 425.

2.2. The cause: legally relevant omission(s)

Normally, harm is easy to demonstrate. We just need to focus on the factual reality and observe loss of life, injuries, deterioration of human health etc. Whether this harm, however, can be called (B), meaning effect/outcome/result of something identifiable and specifiable as (A) is a separate question. Whether and how different areas of law (e.g. tort law, public law, human rights law) establish any links between (A) and (B), to attribute responsibility for (B) is also a separate query.[22]

This brings us to the need to better understand (A). As noted above, it is an omission or multiple omissions, which complicates the analysis and to which I will come back below. In general, it is quite uncontroversial that States can be held responsible under the Convention for omissions.[23] More generally in international law it is also accepted that States can incur international responsibility for omissions.[24] Omissions are however difficult to identify, perceive and specify unless we have some baselines expectations about the counterparts of these omissions, i.e. *the measures that need to be taken*.[25] At this point, the consensus that generally omissions can base responsibility is not helpful. There needs to be some understanding about the conduct that should have been performed in the hypothetical world where no omission(s) had been done. There needs to be therefore some understanding about the counterparts to these omissions so that the omissions can be perceived, formulated and articulated.

Omissions can also become perceivable and possible to identify and specify once the harm materialises, which also raise questions about the link between (A) and (B). The link is understood to be historical/chronological – first is (A) and then (B) in terms of temporal sequence. The issue then that arises is how we can know what is (A) (i.e. the cause understood as omission(s) to take measures) when we still do not know (B) given that (B) has not yet occurred. Here it is relevant to note that the establishment of legal responsibility is *post factum* since (B) has already occurred.[26] Since the harm has already materialized, the possibility to perceive and specify omissions also arises (or at least becomes easier) and therefore the possibility for applicants to formulate and specify omissions for the sake of arguing that the State is responsible. All of this means that the harm (B) affects the perception about (A) and accordingly the possibility to identify (A). This seems to defy the temporal sequence and the logical temporal link between (A) and (B).[27]

In the context of establishing state responsibility, it is not the case that any possible counterpart to the omission(s) matter and, in this sense, that any possible measure is relevant. It would be utterly unacceptable to claim that every conceivable omission, simply because it can be

[22] For a useful comparison between public law and private law, see Ellen Rock, 'Causation in Public Law' (2023) 30 Australian Journal of Administrative Law 56; Gemma Turton, 'Causation and Risk in Negligence and Human Rights Law' (2020) 79(1) Cambridge Law Journal 148.

[23] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).

[24] A Ollino*, Due Diligence Obligations in International Law* (CUP).

[25] Even the mere distinction between positive and negative obligations is determined with reference to certain baseline expectations in the particular societal context. For a clear illustration, see *Diaconeasa v Romania*, App no 53162/21, 20 February 2024, para 49, where the Court reasoned that since the applicant did not ask for a new measure, but was deprived by the State of a measure (i.e. personal assistant) that she could previously benefit from, her Article 8 claim was reviewed as a possible breach of a negative obligation.

[26] This is also reflected in the admissibility requirement for a victim status under the ECHR.

[27] Rhetorically the ECtHR seems to have solved this problem by consistently stating in its case law that breach of positive obligations is assessed without the benefit of the hindsight. See, however, the Partly Dissenting Opinion in *O'Keeffe v Ireland* [GC] App no 35810/09, 28 January 2014.

detected, identified, perceived and linked to the harm an individual has endured (or the risk of such harm), grounds state responsibility under the ECHR. There must be limits *on what omissions are legally significant*, demanding analytical tools to navigate the complex analytical landscape for establishing legal responsibility.[28] Such a tool is the distinction between the existence of an obligation and the breach of that obligation. As Crawford has observed 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.[29]

Put simply, there must first be an obligation to take measures (i.e. to avoid the omission) that has not been complied with. This obligation serves as the basis for determining breach that leads to responsibility. The cause is not simply a cause (i.e. factually a cause); the law recognises it as a cause for the purpose of determining responsibility. The cause must be a breach of an already existing and identifiable obligation.

2.3. The specification of legally relevant omission(s) collapses with the determination of breach

All of this brings us to the important questions about the framing of positive obligations in human rights law, the specification of the content of these obligations in their framing, and the determination of breach of the obligations once these are specified. The text of the ECHR does not frame and specify such obligations.[30] Their content, understood as the concrete measures that States are required to undertake, is only specified in the context of the reasoning in a concrete judgment where the question of breach needs to be decided. As a result, the question of whether there was an obligation (and therefore a legally relevant omission) *collapses* with the question whether there was a breach of the obligation.[31] It is thus difficult to maintain the separation between the determination as to whether a positive obligation existed and the determination whether it was breached in the specific case.

The reasoning in *Biba v Albania* can be helpful to illustrate this collapse. A thirteen-year-old pupil used a catapult to shoot a projectile into the right eye of another pupil. This caused almost total blindness of the eye. The incident happened at the premises of a private school in Albania, during a break between classes. The father of the injured child argued *inter alia* that the State 'failed to adequately supervise the licensed private school', which implied an argument that the State could have prevented the accident by taking certain measures.[32] The Court agreed with the applicant. It observed that 'an educational institution is in principle under an obligation to supervise pupils during the entire time they spend in its care.'[33] It added that '[e]ducational institutions are expected to take *appropriate* measures to prevent the use of dangerous objects

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[28] V Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete' (2023) 23(3) Human Rights Law Review 1.
[29] J Crawford, *State Responsibility. The General Part* (CUP 2013) 218 (emphasis added).
[30] Besides the abstract framing in Article 1 of the Convention that States 'shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention (emphasis added).'
[31] For a detailed analysis, see V Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete' (2023) 23(3) Human Rights Law Review 1.
[32] *Biba v Albania*, para 52. The applicant invoked also procedural omissions. For how the Court mixes procedural omissions/deficiencies and substantive omissions in its reasoning, see V Stoyanova, Biba v Albania: positive obligations under Article 8 and the question of causation - Strasbourg Observers
[33] *Biba v Albania*, para 52, para 71 with reference to *Kayak v Turkey* App no 60444/08, 10 July 2012, para 60.

by pupils on school premises or custody.'[34] According to the Court's reasoning, the accident occurred, therefore the State did not take 'appropriate' measures to prevent it, and therefore Albania breached its positive obligations under Article 8. The latter were never specified beyond the invocation of the standard of appropriateness. It then follows that there are no two distinct analytical steps in the reasoning: first, specification of the 'appropriate' measures and then review whether any were undertaken. In fact, the 'appropriateness' is judged in combination with the identification, the articulation and the specification of the omissions.

The reasoning in *Validity Foundation on Behalf of T.J. v. Hungary* offers another valuable example to demonstrate this collapse of the analysis about existence of a positive obligation and the analysis about breach of the obligation. The case concerned the death in a social care home of a woman with severe disabilities. According to the applicant organisation that represented her, although the direct cause of death was pneumonia, 'long-term neglect was the decisive factor leading to her death.'[35] By specifying the measures in the determination that they were *not* undertaken,[36] the Court simultaneously performs the two analytical operations/steps – first, the determination of the existence of an obligation to take measures and, second, the determination that the obligation was breached since the measures were not taken. In other words, the omissions are made legally relevant and assessed as a basis for responsibility for breach of an obligation, via their specification.

A final illustration with *E.K. v Latvia* can be offered. The applicant argued that Latvia breached its positive obligations under Article 8 since it did not help him to enforce his contact rights with his daughter in view of the mother's opposition. In particular, the applicant argued that Latvia had not taken measures to facilitate his contact and to ensure the mother's cooperation.[37] The Court stated that Article 8 imposes on the State 'an obligation to take measures that would reconcile the conflicting interests of the parties, keeping in mind the paramount interests of the child.'[38] According to the Court's reasoning, the 'key consideration' for determining breach is 'whether the authorities have taken *all necessary steps* to facilitate contact as can reasonably be demanded in the special circumstances of each case.'[39] Similarly to *Biba v Albania,* where, as mentioned above, the 'appropriate' measures remained initially unarticulated, 'all the necessary steps' in *E.K. v Latvia* were never identified and specified as a first step so that then a second analytical step of reviewing the actual state conduct can be performed. By specifying measures in the determination that they were *not* undertaken,[40] the Court concurrently determined the existence of an obligation to take measures and breach since the measures were not taken. As to the standard of necessity (i.e. 'necessary steps'), no inquiry is performed in the reasoning whether any specified measures were actually *necessary*. Necessary can be understood as being

[34] *Biba v Albania*, para 52, para 72 (emphasis added). See also *A.E. v Bulgaria* App no 53891/20, 23 May 2023, para 89 where the standard of 'appropriateness of the authorities' response' was also invoked.
[35] *Validity Foundation on Behalf of T.J. v. Hungary* App no 31970/20, 10 October 2024 para 81.
[36] These included shortage of medical staff, insufficient medical and therapeutic care, inappropriate living conditions, the excessive use of means of restraint. *Validity Foundation on Behalf of T.J. v. Hungary* para 91-94.
[37] *E.K. v Latvia* App no 25942/20, 13 April 2023, para 70. For a detailed analysis of this case, see Tristan Cummings' chapter in this volume.
[38] *E.K. v Latvia* para 75.
[39] *E.K. v Latvia* para 76 (emphasis added). See also *I.S. v Greece* App no 19165/20, 23 May 2023, para 84.
[40] *E.K. v Latvia* para 86-97 (e.g. the domestic court not ordering 'the other steps sought by the applicant with a view to facilitating contact and reconciling the conflicting interests of the parties, including the obligation on I.B. [the mother] to attend psychological support sessions' (para 87); no consequences for the mother for disregarding the exercise of contact rights (para 90); therapy or medication, *inter alia*, 'educating the parents on the effect of their behaviour on the child, or imposing a fine on the uncooperative parent' (para 91), 'ordering specialist help' (para 92)).

indispensable for achieving the desired outcome (i.e. facilitation of the contact between the father and the child).

2.4. Causation as tool for both determining both the existence of positive obligations and their breach

What does this collapse of the analysis about existence of a positive obligation and the analysis about breach of the obligation imply for the causal inquiry? The link between the omission that is the claimed cause (A) and the harm that is the claimed effect/outcome/result (B) is relevant for both. In other words, the determination that an obligation existed at the relevant point in time and the determination that it may have been breached, are conflated. Therefore, the causal inquiry is relevant at the same time to both analytical steps: first, the existence, the framing and the specification of the obligation and, second, the determination of breach of the obligation. It then follows that the causal inquiry is actually an inquiry about the interpretation of the content and scope of the primary positive obligations.[41] By invoking explicitly or implicitly causal links between harm and omissions, the Court therefore *determines the existence of obligations*, determines and reasons about their content and scope and the Court also concurrently makes conclusions about breaches of these obligations.

Let's revert to the three judgments mentioned in Section 2.3. above to better explain the point made in the previous paragraph about the role of the causal inquiry. As already noted, in *Biba v Albania* the Court stated that '[e]ducational institutions are expected to take *appropriate* measures to prevent the use of dangerous objects by pupils on school premises or custody.'[42] The standard of 'appropriate' is suggestive that the measures are expected to somehow contribute to prevention. Via the invocation of this standard (i.e. 'taking appropriate measures'), the Court determined that there was a positive obligation and that it was breached since the state conduct (in the form of omissions) was not 'appropriate'.

In *Validity Foundation on Behalf of T.J. v. Hungary,* the Court also drew upon the standard of 'appropriate measures to protect' life.[43] It also invoked the standard of 'adequate response', where adequacy can be perceive as expressing the idea of a causal link between omitted measures and harm.[44] A third standard was also referred to in the reasoning in *Validity Foundation on Behalf of T.J. v. Hungary:* the State 'failed to demonstrate that the domestic authorities had had the *requisite standard of protection* that would have enabled them to prevent the deterioration in health and ultimately death of Ms T.J.'[45] By using the standards of

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[41] For a very similar argument, see Lord Hoffmann, 'Causation' in R Goldberg (ed) *Perspective on Causation* (Hart Publishing 2011) 3, 5: '[…] anyone is entitled to say that in treating X in some particular context as having caused Y, the courts are stretching the ordinary meaning of 'cause.' But this is *engaging in a legitimate argument over interpretation* and not introducing the concept of 'real' causation as a preliminary test which has to be satisfied before the question of interpretation arises.' See also L Green, 'Are There Dependable Rules on Causation?', 77(5) University of Pennsylvania Law Review (1929) 601.

[42] *Biba v Albania*, para 52, para 72 (emphasis added).

[43] *Validity Foundation on Behalf of T.J. v. Hungary,* para 72 and 88.

[44] *Validity Foundation on Behalf of T.J. v. Hungary,* para 94: 'The Government however failed to demonstrate that the authorities had provided an adequate response to the generally difficult situation in Topház: [].' See also *A.E. v Bulgaria* App no 53891/20, 23 May 2023, para 100, where the standard of adequacy was used: '[…] the applicable legal provisions are not fully capable of responding to domestic violence […].' See also *Abbasaliyeva v Azerbaijan* App no 6950/13, 27 April 2023 para 37: 'Taking into account the domestic courts' reasoning and conclusions in the present case, it cannot be established that they conducted an *adequate* balancing exercise between the applicant's right to respect for her private life and the newspaper's freedom of expression. (emphasis added).' See also *G.T.B. v Spain* App no 3041/19, 16 November 2023, para 128.

[45] *Validity Foundation on Behalf of T.J. v. Hungary* para 96.

'appropriate', 'adequate' and 'requisite' that hint at the idea of causation, the Court's reasoning formulates the obligation and determines its breach.[46]

The standard of 'all necessary steps' used in *E.K. v Latvia* introduces some nuances in the causation inquiry in comparison with the standards of 'appropriate measures' and 'adequate response'. First, the adjective 'necessary' implies that the content of the positive obligation consists only of necessary (understood as indispensable) measures. This seems to limit the scope of measures that might be legally relevant for the content of the obligation and the determination of its breach. Second, the word 'all' in the expression 'all necessary measures' implies that any conceivable measure that passes the threshold of being defined as 'necessary' must be taken by the State. This seems to expand the scope of the obligation since even if one necessary measure was not undertaken, breach should follow.[47] For example, in *Biba v Albania* the standard was *not* '*all* appropriate measures', which would imply that even if one 'appropriate measure' was not taken by the state authorities, breach should follow.

Finally, it should be mentioned that in *E.K. v Latvia* the Court qualified the standard of 'all necessary steps' in the following way: 'all necessary steps to facilitate contact *as can reasonably be demanded in the special circumstances of each case*.'[48] The standard of 'reasonable' can also be understood as reflecting a causal link between the measures expected from the State and the prevention of the harm. Since the measures have to be reasonable, these measures should be possible to logically link with the prevention of the harm given the circumstances. Notably, what is reasonable is always context dependent,[49] which supports the position about the collapse of the analytical operations meant to determine the existence of a positive obligation and the breach of this obligation.[50]

2.5. Choices in the framing and the specification of the harm and the causes

So far Section 2 aimed to clarify the cause (A) and the effect (B) that are linked for the purpose of establishing state responsibility for breach of positive obligations under the ECHR. This section aims to explain that any links between (A) and (B) and therefore the framing of the

[46] Other standards, such as sufficiency, have been also invoked. See *Alhowais v Hungary* App no 59435/17, 2 February 2023, para 117. 'Due diligence' has been also invoked. See *G.T.B. v Spain* App no 3041/19, 16 November 2023, para 124: 'The authorities were thus under a positive obligation stemming from Article 8 to act *with due diligence in order to* assist the applicant in obtaining his birth certificate and his identity documents, so as to ensure effective respect for his private life (emphasis added).'

[47] *I.S. v Greece* App no 19165/20, 23 May 2023, para 93 illustrates the impact of the 'all' standard: 'Admittedly, the authorities faced a very difficult situation which stemmed in particular from the tensions existing between the parents of the children, as highlighted by the Government. However lack of cooperation between the separated parents cannot exempt the competent authorities from implementing *all the means likely* to allow the maintenance of the family bond (references omitted)(emphasis added).'

[48] *E.K. v Latvia,* para 76 (emphasis added). The standard of 'reasonable' although initially invoked at para 76, is not mentioned in the actual determination of breach in the specific case. See also *Janočková and Kvocera v Slovakia* App no 39980/22, 8 February 2024, para 44; *Zavridou v Cyprus* App no 14680/22, 8 October 2024, para 78 and 81.

[49] Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradiction' (1999) 48 International and Comparative Law Quarterly 613; V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within the Beyond Boundaries* (OUP 2023) 73.

[50] In some judgments, the Court does not even invoke the standards of 'appropriate' or 'necessary'. See *Moldovan v Ukraine*, App no 62020/14, 14 March 2024, para 44, where the Court formulated its task in the following way: 'The Court will therefore examine whether the respondent State, in handling the applicant's action for judicial recognition that a late person was his father, has complied with its positive obligation under Article 8 of the Convention.' In other cases (e.g. *A.E. v Bulgaria* App no 53891/20, 23 May 2023, para 93), instead of 'appropriate' or 'necessary' measures, the Court refers to the standard of efficiency.

content and scope of positive obligations, can be expressed with different levels of specification by modifying (A) and (B). Stated otherwise, there are choices that the Court can make in its reasoning as to how (A) is formulated and with what level of specification (A) is expressed. More precisely, the measures that are the alleged counterparts to the omissions might be formulated as measures to prevent harm. In alternative, the measures might be articulated as measures of mitigating harm. Mitigation might have different degrees that might not be even specified in the reasoning, in which case it might be difficult to even understand what (A) is.[51] Precaution might be also invoked as the standard for specifying the measures. Similarly, there are choices to be made in the reasoning as to how (B) is framed and specified. A notable example here is the modification of (B) as not being the harm itself, but the *risk* of harm or the potential risk.[52] In addition to risk-based harm,[53] the Court can resort to other choices in how to frame (B), i.e. how to frame the negatively affected interests.[54]

Daraibou v. Croatia can be used as an illustration.[55] The case concerned a fire that broke out in a detention centre, in which three detained migrants died and the applicant suffered severe injuries. The applicant complained about the authorities' failure to protect his life and their failure to properly investigate the incident under Article 2 of the Convention. The Court reasoning was characterised with the invocation of the standard of precaution, which indeed in the prison setting appeared warranted.[56] In particular, the Court noted that:

> even where it is not established that the authorities knew or ought to have known about any such risk, there are certain basic *precautions* which police officers and prison officers should be expected to take in all cases in order to minimise *any potential risk* to protect the health and well-being of the arrested person.[57]

The Court was clear that it could not 'discern sufficient evidence to show that the authorities knew or ought to have known that there had been a real and immediate risk that the applicant and other detainees would try to set fire or injure themselves in any other way.'[58] This means that no actual or putative knowledge about the specific type of risk (i.e. real and immediate) from the specific harm (i.e. fire), could be established. However, the Court chose to reframe the

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[51] See e.g. A.*P. v. Armenia* App no. 58737/14, 2024 that concerned sexual abuse of a pupil with intellectual disability at school, para 121: 'A failure to take readily available measures that could have had a *real prospect of altering the outcome or mitigating the harm* caused is sufficient to engage the responsibility of the State.'

[52] *A.P. v Armenia* App no. 58737/14 (2024) para 116 (risk of sexual abuse); *Alhowais v Hungary*, App no 59435/17, 2 February 2023, para 117: 'Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that *the risk* is reduced to a reasonable minimum. (emphasis added)'.

[53] When the harm is reframed as risk, this has implication for the content of the positive obligation. The Court has formulated the positive obligation 'to put in place regulations geared to the specific features of the activity in question, particularly *with regard to the level of risk potentially involved* (emphasis added).' *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 538.

[54] The reframing of the harm as risk of harm, which implies looser causation and consideration of wider counterfactuals and thus wider scope of the obligation, can be distinguished from cases where the Court has decided to formulate a separate procedural positive obligation upon the State to perform risk assessment. For the latter, see *Gaidukevich v Georgia* App no 38650/18, 15 June 2023, para 57 ('autonomous, proactive and comprehensive lethality risk assessment' in the context of domestic violence). For the role of risk in the formulation of positive obligations, see also Theu Chesterfield's chapter in this volume.

[55] *Daraibou v. Croatia* App no. 84523/17

[56] For another setting where precaution was used by the Court, see *Kotilainen and Others v Finland* App no 62439/12, 17 September 2020, a case about shooting at school. The applicants in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] invoked precaution, but the Court chose not to use this standard in its reasoning.

[57] *Daraibou v. Croatia* para 84.

[58] *Daraibou v. Croatia* para 87.

knowledge standard and make it one of precaution.[59] The Court also chose to reframe the harm as one of 'potential risk of grave incidents.'[60] The Court chose not to consider the standard of imminence.[61]

Once these choices in the framing were made, a wider set of circumstances could be considered. To elaborate, wider set of omissions could be included in the analysis without much specificity as to how each articulated omission could have prevented the harm (already reformulated as 'potential risk of grave incidents'). In particular, the following omissions were articulate in the reasoning in *Daraibou v. Croatia:* (1) lights (that probably started the fire) were not taken from the detainees, (2) there was no proper monitoring of the detainees, (3) there was no expert report as to the fire-protection measures in the building. The Court concluded 'the Bajakovo police station building and its personnel were rather ill-prepared to deal with a fire outbreak on their premises.'[62] This conclusion did appear very much warranted; all that I try to highlight here is that there are choices that the Court can make as to how to formulate the harm, its causes and the link between these two.

The judgment in *Mitrevska v North Macedonia* can be also used to exemplify certain choices as to the framing of the harm and the omissions.[63] The applicant, who was adopted as a child, complained about her inability to obtain information about her biological origins and health information about her biological parents. For the purposes of the definitional scope of Article 8 (see Section 2.1. above), the harm was formulated in the following way:

> The Court reiterates that persons who, like the applicant in the present case, seek to establish their parentage have a vital interest, protected by the Convention, *in receiving the information* necessary to discover the truth about an important aspect of their personal identity. In addition, the applicant also had *an interest in obtaining information relevant to her health*, given that she argued in the domestic proceedings that she was seeking information concerning the medical history of her parents in order to determine whether she had a hereditary disease.[64]

The harm was therefore not receiving information. The omission, however, for the purposes of establishing the obligation and its breach, was however, re-articulated in the Court's reasoning as 'absence of a possibility to obtain access to non-identifying information'.[65] Given this choice of framing, the articulated omission is causally distanced from the harm as formulated by the applicant and the Court (i.e. providing her with information) at the definitional scope of the analysis (see Section 2.1. above). The omission could be remedied, which means that she might be provided with the possibility; but this would not necessarily lead to actual provision of information. In this sense, the causal chain between the omission and the harm is obscured.[66]

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[59] See also *Daraibou v. Croatia* para 88: 'In the Court's view, there were certain basic precautions the police should have been expected to take in respect of the persons held in their custody in order to minimise any potential risk of grave accidents such as the one in the present case (ibid.).'

[60] *Daraibou v. Croatia* para 88. See also the domestic violence case of *A.E. v Bulgaria* App no 53891/20, 23 May 2023, para 96, where the harm is framed as risk.

[61] For the dilatation of this standard in the case law of the Court, see V Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 205.

[62] *Daraibou v. Croatia* para 92.

[63] *Mitrevska v North Macedonia,* App no 20949/21.

[64] *Mitrevska v North Macedonia* para [references omitted] [emphasis added].

[65] *Mitrevska v North Macedonia,* para 85.

[66] See also *Vlaisavlevikj v North Macedonia* App no 23215/21, 25 June 2024, para 37-29 and 45 (In this case, the harm that was found to fall within the scope of Article 8 was collection and use of personal data. Breach was, however, found not because of the failure by the national authorities to order the private company to delete the

3. Factual and legal causation

An important conclusion from the analysis in Section 2 is that the establishment of state responsibility for omissions under the ECHR is marked by conceptual difficulties and availability of different choices that the Court can make when it reasons. To better understand these difficulties and choices, comparative parallels with more stable systems of legal responsibility can offer relevant insights. In particular, legal systems try to make a distinction between the multiplicity of possible factually relevant causes from legally relevant causes for the harm.[67] In this sense, at least theoretically the causal inquiry has been explained as consisting of two consequent steps.[68] The first one is factual causation that seeks to establish the factual link between an omission and the harmful outcome. This is meant to reflect the historical picture of the events leading to the outcome. This picture can be very wide, which can make the inquiry overly inclusive. The inquiry may be also hampered by scientific complexity and uncertainty.[69]

Once the first step of factual causation is performed, the second step follows. This second step has been framed as legal causation. Other possible framings that have been used are remoteness, 'proximate cause' assessment or scope of responsibility.[70] This second step seeks to determine for which effects (harms) of the wrongful act, the defendant is be held legally responsible and is to accordingly ensure remedies.[71]

This section attempts to review the practice of the Court by applying the distinction between factual and legal causation. The analysis is guided by the question whether the Court has distinguished the different considerations of respectively factual and legal causation (Sections 3.1 and 3.2). The response to this question is negative. Section 3.3 explains that the mixture of factual and legal causation is inevitable. The inevitability is related to the role of the causation inquiry that, as explained in Section 2, includes both analytical steps that are performed

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data. Breach was found because the domestic courts failed to examine the question whether 'the continued retention and use of the applicant's data corresponded to that legitimate aim.')

[67] J Spier, *Unification of Tort Law: Causation* (Kluwer 2000); M Infantino, 'Causation Theories and Causation Rules' in M Bussani and AJ Sebok (eds), *Comparative Tort Law: Global Perspectives* (Elgar 2021) 264–83; AM Honore, 'Causation and Remoteness of Damage' in A Tunc (ed), *International Encyclopaedia of Comparative Law: Torts*, vol 11, ch 7 (Mohr 1983) 1–156; HLA Hart and AM Honore*, Causation in the Law* (Clarendon Press 1985); S Steel, *Proof of Causation in Tort Law* (CUP 2015); R Goldberg (ed), *Perspectives on Causation* (Hart 2011).

[68] Stapleton, 'Unpacking "Causation"' in P Cane, T Honoré and J Gardner (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80thBirthday* (2001) 145, 166–167. Francesco D. Busnelli, Giovanni Comandé, Herman Cousy, Dan B. Dobbs, Bill W. Dufwa, Michael G. Faure et al. 'Causation' in *Principles of European Tort Law. Text and Commentary* (Springer 2005) 43, 59: 'For practical purposes, every (European) legal system (under review) accepts that the mere fact that a condition sine qua non-relation between a loss and an activity is established, does not mean that every and all consequent losses have to be compensated by the liable person.' Some legal systems perceive the issue as part of causation, 'whereas others perceive it an unrelated legal vehicle.'

[69] In such cases, a normative approach to the inquiry might have to be applied, which questions the distinction between factual and legal causation. Jane Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) *Law Quarterly Review* 388, 388.

[70] It is more accurate to describe this second step as scope of responsibility rather than a test of 'causation' per se. Jane Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) Law Quarterly Review 388, 388.

[71] The second step is therefore intrinsically linked with the remedial function of the law and the idea that remedies (including monetary compensation) should not be afforded for all possible loses/harms. In this paper, I do not address the question of remedies. The link, however, between the approach to causation for determining breach of primary obligation and the nature of the secondary obligations (i.e. the remedies) needs to be acknowledged.

simultaneously in the reasoning: first, the establishment of the content and the scope of the obligation and, second, the establishment of its breach.

3.1. Factual causation

The inquiry into factual causation is restrained give the specific facts of the case and the arguments raised by the parties. Omissions have to be identified and specified; in the ECtHR's proceedings, this is normally done by the applicant.[72] Possible alternatives as counterparts to the omissions (i.e. measures actually taken) might be identified and specified by the respondent State.[73]

In the identification of omissions and counterparts to omissions, there might be certain restraints coming from the determination of the definitional scope of the right (see Section 2.1). In particular, given how the Court has chosen to frame the definitional scope (i.e. which interests are considered affected and how), only certain harms can be considered as relevant. [74] There might be also restraints from certain admissibility requirements, such as victim status.[75] It might be objected that these two restraints (i.e. formulation of the definitional scope and the victim status requirement) are not actually factual since they are *legally* and therefore *normatively* imposed. These restraints indeed impose certain limits on the factual causal inquiry. Since these limits are normative, they seem to defy the distinction between factual causation and legal causation. I will, however, follow Plakokefalos who has argued that the normative character of the above-mentioned restraints does not make them legal/policy tools and considerations. What they do is ensuring that the factual causation is investigated within 'particular – legal - boundaries'.[76]

Having introduced this clarification, we can focus on the identification and the specification of omissions for the purposes of the factual causation inquiry. To factually link harm to the omissions that might be invoked by the applicant, different tests can be applied. In the context of tort law, the 'but-for' test has been applied. According to this text, an omission is considered

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[72] *Daniel Karsay v Hungary* App no 32312/23, 13 June 2024, para 94 and 136; *Moldovan v Ukraine*, App no 62020/14, 14 March 2024, para 39; *Vagdalt v Hungary* App no 9525/19, 7 March 2024, para 44; *Biba v Albania*, App no 24228/18, 7 May 2024, para 52; *Validity Foundation on Behalf of T.J. v Hungary* App no 31970/20, 10 October 2024, para 60; *Varyan v Armenia* App no 48998/14, 4 June 2024, para 77-79; *Vlaisavlevikj v North Macedonia* App no 23215/21, 25 June 2024, para 35; *Zavridou v Cyprus* App no 14680/22, 8 October 2024, para 71-72; *A.E. v Bulgaria* App no 53891/20, 23 May 2023, para 63 (minor bodily harm was not an offence subject to public prosecution). *Kilic v Austria* App no 27700/15, 12 January 2023, para 138. Omissions can be also identified based on the reasoning of the domestic courts. See *A.P v Armenia* App no 58737/14, 18 June 2024 (failure to protect a pupil from sexual abuse by a teacher at the school).

[73] *A.P v Armenia* App no 58737/14, 18 June 2024, para 102 (the teacher who sexually abused the applicant received severe punishment). See also *Biba v Albania*, App no 24228/18, 7 May 2024, para 56-7; *Varyan v Armenia* App no 48998/14, 4 June 2024, para 80-86; *Vlaisavlevikj v North Macedonia* App no 23215/21, 25 June 2024, para 36. *Zavridou v Cyprus* App no 14680/22, 8 October 2024, para 73-76; *A.E. v Bulgaria* App no 53891/20, 23 May 2023, para 74-80. Other parties, including interveners can also specify measures. See *Kilic v Austria* App no 27700/15, 12 January 2023, para 144.

[74] As much important, in choosing how to frame the definitional scope of the right, the harm that is the object of the review can be expanded and, accordingly, the scope of counterfactuals and possible causal omissions are also expanded. See *Alhowais v Hungary*, App no 59435/17, 2 February 2023, para 112: '[…], the Court has considered that the sphere of application of Article 2 of the Convention cannot be interpreted as being limited to the time and direct cause of the individual's death. Chains of events that were triggered by a negligent act and led to loss of life may also fall to be examined under Article 2.' There is a circularity at play in this statement: the establishment of negligence is assumed for the purpose of triggering the definitional scope of Article 2.

[75] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 478-488 and 533-535.

[76] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) European Journal of International Law 471, 476.

the cause of the harmful outcome, since this outcome would not have occurred without the omission. The 'but-for' test asks whether the outcome would be the same if the abnormal factor (i.e. the omission) is removed from the set of historical facts. In this sense, the factor has to be the necessary precondition.

The problem here is that there are multiplicity of omissions and none of them might be possible to factually *exclusively* link to the harm, so that the specific omission can be considered as *the* cause that satisfies the 'but-for' test.[77] These might be concurrent omissions. Each one of them on its own might be normatively worthwhile to assess as basing legal responsibility. This reveals how the choice of test is affected not only by factual/evidential challenges (i.e. evidential difficulties in proving exclusivity), but also by normative considerations. In light of such normative consideration, an alternative to the 'but-for' test has been advanced. This is the NESS test (i.e. necessary element of a sufficient set),[78] that requires the identification of *a* cause, not *the* cause, which makes it more inclusive.[79]

The ECtHR has never explicitly referred to the NESS test. It has, however, explicitly rejected the 'but-for' test. This was made explicit for the first time in *E. and Others v the United Kingdom*:

> The test under article 3 however does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state.[80]

The last sentence in this quotation contains indicators that can be perceived as implying the idea of causation: 'real prospect of altering the outcome'. The Court, however, does not use consistently the 'real prospect' test.[81] Overall, the Court has never indicated a causation test of general relevance in its positive obligations case law.[82] Terminologically there is also a huge diversity of terms and concepts in the case law that can be understood as expressing the idea of factual causation. For example, in *Dimaksyan v. Armenia* that concerned the death of applicant's

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[77] The nature of omissions is such that usually they are always many that can be identified.

[78] According to this test, '[a] particular condition is a cause (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result.' Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts', 73 Iowa Law Review (1987–1988) 1001, 1019. Another explanation of NESS is the following: whether the wrongful act was one among many other possible causes of the harm. See Sophie Treacy's chapter in this volume.

[79] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) European Journal of International Law 471, 478.

[80] *E. and Others v United Kingdom* App no. 33218/96 (26 November 2002) para 99. *O'Keeffe v Ireland*, para 149. For more recent rejections of the 'but-for' test, see *Dimaksyan v. Armenia* App no. 29906/14, 2023 para 83; *A.P. v Armenia* App no. 58737/14 (2024) para 108; *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] App no 53600, 9 April 2024, para 444.

[81] V 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. The choice of 'real prospect' test or whatever other concepts the Court has used to express the idea of causation, has not been justified in the reasoning. This is not surprising since the Court does not engage with theoretical discussions. However, the question whether the 'real prospect' test should be the test used in human rights law, can be an object of theoretical investigation.

[82] For a slight modification of the test, see e.g. *A.P. v Armenia* App no. 58737/14 (2024) para 121: 'A failure to take *readily available* measures that could have had a real prospect […] (emphasis added).' This implied that it was the easy availability of the measures that influenced the determination of breach.

son during compulsory military service following accidental shooting by a fellow serviceman, after rejecting the 'but for' test the Court held that

> what is important, and sufficient to engage the responsibility of the State under Article 2, is to show that the deficiencies in the operation of the relevant regulatory framework *worked to an individual's detriment*, which, in the Court's opinion, occurred in the present case.[83]

The standard of 'to an individual's detriment' seems to be looser than the NESS test since it does not include an inquiry as to whether any identifiable deficiencies were actually necessary for the materialisation of the harm.

In *Alhowais v Hungary* that concerned the death of F., a Syrian migrant and the applicant's brother, which occurred during a border control operation at a river on the Hungarian-Serbian border, the Court noted '[i]t is confined to examining, among other things, whether in the present case, in the organisation and planning of the border control operation in question, failings occurred which can be *linked directly to the death* of F.'[84] Linking failings/omissions to the harm reveals an attempt to perform a causal inquiry. However, questions about the necessity of certain failings and/or the sufficiency of a groups of failings are not asked, as demanded by the NESS test.

To conclude, although some causation tests (such as 'real prospect') can be identified in the Court's reasoning that are suggestive of the idea of factual causation, these are not consistently used. As much important, as the next section will show, whatever omissions the Court chooses to identify and specify in its reasoning, they are not independent and separate considerations that can be isolated as factual causation applied as an initial isolated necessary step in the human rights review. These considerations are rather mixed with other considerations that are theoretically regarded as belonging to the toolbox of the legal causation.

3.2. Legal causation

Legal causation implies 'some policy-based control over responsibility.'[85] It offers tools for determining causation in law that are normative in nature: these tools are not related to factual causes, many of which might not be epistemologically accessible in any case. The answer to the question 'what made a difference in bringing about a transition between states' is therefore driven by normative considerations. [86] The reason is that the answer depends on the perspective taken by the decision-maker and the general objective of the responsibility system where the question is asked. Certain normative and policy choices therefore ground the answer whether the actor whose responsibility is at stake should be held legally responsible.

It then follows that not only is the choice of a test for factual causation affected by normative/policy considerations (that might defy the characterisation of the test as 'factual'),

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[83] *Dimaksyan v. Armenia* App no. 29906/14, para 83 (references omitted) (emphasis added).
[84] *Alhowais v Hungary* App no. 59435/17, para 133 (emphasis added).
[85] Vladyslav Lanovoy, 'Causation in the Law of State Responsibility' (2022) The British Yearbook of International Law 1, 61. Lanovoy refers to Judge William Andrews in *Helen Palsgraf v The Long Island Railroad Co* (1928) 248 N.Y. 339: 'What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics'.
[86] Jane Stapleton, 'Perspectives on Causation' in Jeremy Horder (eds) *Oxford Essays in Jurisprudence* (OUP 2000) 61, 62.

but additional normative/policy considerations are relevant for the assessment of breach.[87] Given their normative nature, it is questionable whether they should be called causation at all. Such considerations can be summarized as foreseeability of the harm, the reasonableness of taking measures, the closeness in time and space between the omission and the harm, the severity of the harm and violation of any existing rules.[88]

All of these have been used by the Court in its case law. In particular, the Court has consistently invoked the foreseeability of the harm,[89] and actual[90] or putative knowledge[91] of the State about harm (or risk of harm) to determine responsibility for omissions. Similarly, the standard of reasonableness is consistently invoked.[92] 'Disproportionate burden' can be understood as a reformulation of the reasonableness standard.[93] The immediacy of the harm[94] and the location of the harm have been also relevant considerations.[95] The nature of the harm in the sense of its gravity is also pertinent. [96] In addition, the Court consistently refers to domestic[97] and international[98] legal standards to assess whether omissions should lead to breach of positive obligations. In some judgments, the Court might choose to foreground some of these considerations and to dimmish the role of others. As explained in Section 2.5. above, the Court can make choices in the framing of the harm and the causes, which also implies choices whether

[87] Stapleton, 'Unpacking "Causation"', in P. Cane, T. Honoré and J.I Gardner (eds), *Relating to Responsibility: Essays in Honour of Tony Honoré on his 80thBirthday* (2001) 145, 173.
[88] 'Causation' in *Principles of European Tort Law. Text and Commentary* (Springer 2005) 43, 59.
[89] See V Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 Leiden Journal of International Law 601.
[90] *A.P. v Armenia* App no. 58737/14 (2024) para 130; *G.T.B. v Spain* App no 3041/19, 16 November 2023, para 126; *Hovhannisyan and Karapetyan v Armenia* App no 67351/13, 17 October 2023, para 101.
[91] *Varyan v Armenia* App no 48998/14, 4 June 2024, para 93 where the Court summarises the various factors in order to determine actual or putative knowledge.
[92] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023) 73; See, for example, *Hubert Howak v Poland*, App no 57916/, 16 February 2023, para 78-79, where there was a clear causal link between the omission of the doctor who examined the applicant after the car crash and the harm suffered by the applicant. Yet, no violation of Article 2 ECHR was found since the Court did not consider it reasonable that isolated incidence of medical malpractice, should lead to responsibility under the ECHR.
[93] See *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 538 for further references.
[94] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 417: 'immediate danger to humans'. See also e.g. *Alhowais v Hungary* App no 59435/17, 2 February 2023, para 94, 136 and 143. V Stoyanova, *Positive Obligations under the ECHR. Within and Beyond Boundaries* (OUP 2023) 203.
[95] See e.g. *A.P. v Armenia* App no 58737/14, 18 June 2024 which concerned the school setting and where the Court held that States have an 'inherent obligation […] to ensure their [the children's] protection from ill-treatment, especially in a primary-education context […].' See also *Biba v Albania*, App no 24228/18, 7 May 2024 for the school setting. See e.g. *Varyan v Armenia* App no 48998/14, 4 June 2024 for the military/army setting.
[96] See e.g. *G.T.B. v Spain* App no 3041/19, 16 November 2023, para 115: […], certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the *importance of the interest at stake* and whether "fundamental values" or "essential aspects" of private life are in issue (references omitted) (emphasis added).' *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] para 417: 'In the longer term, some of the consequences risk destroying the basis of human livelihoods and survival in the works affected areas.'
[97] *Hovhannisyan and Karapetyan v Armenia* App no 67351/13, 17 October 2023, para 109 ('contrary to military rules'); *Locascia and Others v Italy* App no 35648/10, 19 October 2023, para 141 ([…] the landfill site was operated – in breach of the relevant legislative provisions administrative authorisations – […]).
[98] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [GC] that contains references to international environmental law. See generally A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018).

for example immediacy of the harm should be highlighted or how stringently to interpret the standard of immediacy.[99]

While some of these considerations might be *masked* as causation (i.e. suggesting ideas about causation),[100] they ultimately imply *concurrent* inquiries about existence of a positive obligation, the content and the scope of such an obligation and its breach.[101] As already suggested in Section 2.4 above, these three inquiries collapse into each other when the claimed basis for responsibility is omission. Since omissions have no definitive counterparts as related to the discretion of States how to 'ensure' the rights protected by the ECHR,[102] and accordingly, since the content of the primary positive obligation is never specified in advance, the *post factum* determination of breach has to resort to certain tools of reasoning that create the impression that the Court does not simply *invent obligations* for the determination of breach in specific cases. The impression needs to be created that in the concrete case, obligations with the some more specific content and scope actually existed in the past, prior or at least at the time of the materialisation of the harm (or the risk of harm). The impression needs to be created that the whole analysis does not entirely collapse into normativity and policy by the creation of rules and standards (i.e. invention of obligations) that States have never explicitly agreed with. The mixture between what theoretically has been framed as factual and legal causation, is therefore inevitable for ensuring the perception that the Court's reasoning does not invent obligations, but reviews compliance with arguably existing obligations.

3.3. Inevitable mixture of factual and legal causation

One tool for creating such a perception is *resort to rationality*, which is achieved with the inclusion of factual causation in the reasoning and the invocation of reasonableness. Factual causation and thus references to scientific studies, regardless of their inconclusiveness and possible selectivity in the choice of studies,[103] legitimize the Court's decision-making process and its discretion in inventing obligations. The invocation of factual causation masks the obligation-making function of the Court and consequently, the normative role of the Court, that it unavoidably assumes when it has to apply abstract standards to concrete facts. The reasoning is presented as not being exclusively normative, but also as being based on rationality.[104]

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[99] For the standard of immediacy of the harm, see F Christian Ebert and R Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 Human Rights Law Review 343.

[100] Terms used by the Court that can be perceived as expression the idea of causation are proximity, remoteness, foreseeability.

[101] In agreement with Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) European Journal of International Law 471. See also L Green, 'Are There Dependable Rules on Causation?', 77(5) University of Pennsylvania Law Review (1929) 601.

[102] V Stoyanova, 'The Disjunctive Structure of Positive Rights under the ECHR' (2018) 87 Nordic Journal of International Law 344; R Alexy, 'On Constitutional Rights to Protection' (2009) 3 Legisprudence 1, 5; V Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) 23 Human Rights Review 479; M Klatt, 'Positive Obligations Under the European Convention on Human Rights' (2011) Heidelberg Journal of International Law 691, 694.

[103] Generally, the procedural question of evidence and which studies the Court chooses to accept is understudied. See Marie-Bénédicte Dembour, 'The Evidentiary System of the European Court of Human Rights in Critical Perspective' (2023) 4 The European Convention on Human Rights Law Review 363. For a more detailed exploration about selectivity in the Court's choices as to which medical studies to rely on and how this impacts the framing of the case and consequently the determination of responsibility, see e.g. Fleur van Leeuwen, 'Epistemic Blind Spots, Misconceptions and Stereotypes: The Home Birth Jurisprudence of the European Court of Human Rights' (2024) 35 European Journal of International Law 153.

[104] For a similar argument applied to the context of civil law and criminal law, see L Green, 'Are There Dependable Rules on Causation?', 77(5) University of Pennsylvania Law Review (1929) 601, where it is argued that while the

When the Court uses concepts and terms that somehow express the idea of a causation, i.e. a link between cause and effect, it achieves the following. The Court might be actually addressing the normative questions about the scope and content of the obligation and the breach of the obligation, when in fact *this is presented* as a discussion about factual causality. Why would the Court do this? When it is presented as a factual causality, the reasoning appears based on reason, on facts and evidence. The reasoning appears rational. In this way any normative considerations might remain hidden or obscured and the judgment is presented as being based on evidence and rationality. All of this means that normative considerations might not be explored separately; they might not be even recognized as being normative.

The above explanations are not meant to be a critique against the Court and its reasoning. Indeed, it might be in the interest of legal certainty to distil the normative considerations in the reasoning (i.e. legal causation/scope of responsibility) from factual causation and to have a clear test for factual causation.[105] Along the same lines, it can be also advanced that it is one question to address the factual involvement of the State in the harm (i.e. factually whether omissions by the State caused the harm/) and it is a separate (normative) question to consider *whether* the State should have acted and *how* the State should have acted to prevent the harm. The two questions, however, collapse in the same way as the question about the existence of a positive obligation collapses with the question of its breach (see Section 2.4 above). There is a conflation of the questions, since omission(s) become *legally* and normatively relevant with the identification and the specification of the conduct (i.e. the measures) that should have 'corrected' the omissions. To put it differently, the measures (that should have been undertaken in the hypothetical world as alternatives to omissions so that they somehow 'made up' for the omissions) become legally relevant with their designation as being part of the content and the scope of the positive obligation.

It then follows that the mixture of factual causation and legal causation is inevitable in the reasoning. It is inevitable since the Court has to reason about omissions that have no definitive counterparts. It is inevitable since the Court has to reach a conclusion by invoking rationality to legitimize its judgments so that it can present the finding of a breach of a positive obligation, as being in line with the demands of this obligation (even though the content of the obligation remains vague).

4. Conclusion

The judgments of the European Court of Human Rights manifest a mixture of factual and legal causation, when the Court reasons whether omissions should be the basis for breach of positive obligations under the European Convention on Human Rights. However, considerations that can be generally framed as normative govern the reasoning, which implies domination of legal causation. Yet, the Court still invokes factual causation to maintain an appearance that its judgments are based on rationality. Factual causation is invoked for creating the impression that the Court does not simply invent positive obligations. The causal inquiry with its mixture of

inquiry might be stated 'in what seems to be terms of *cause* is in fact whether the defendant should be held responsible. (emphasis in the original)'

[105] Jane Stapleton, 'Choosing What We Mean by Causation in the Law' 73 (2008) Modern Law Review 463. Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) European Journal of International Law 471, 490: 'an effort to differentiate between the issue of factual involvement of the respondent in the harmful outcome (cause in fact) and the issue of the scope of responsibility that is dictated by broader concerns regarding the proper scope of the primary rule breached.'

factual and normative elements is ultimately an inquiry about the existence of positive obligations, about the interpretation of their content and scope, and about the determination of breach. By invoking explicitly or implicitly causal links between harm and omissions, the Court therefore determines the existence of obligations and makes conclusions about their breaches.