

# Contents

<i>Table of Cases</i>	xi
<b>Introduction</b>	<b>1</b>
<b>1. Deconstructing Positive Obligations</b>	<b>7</b>
Introduction	7
1.1 The State as an Institutional Mediator	8
1.2 Justifications for Positive Obligations	10
1.3 Plurality of Obligations Owed by the State	12
1.4 Priority of Rights as Organizational Principles	16
1.5 Trigger, Scope, Content, and Types of Positive Obligations	18
Conclusion	20
<b>2. State Knowledge</b>	<b>21</b>
Introduction	21
2.1 The Role of Fault in State Responsibility	21
2.2 Triggering and Breach of Positive Obligations under ECHR	24
2.3 Actual Knowledge versus Putative Knowledge	26
2.3.1 Different Possible Ways of Assessing Putative Knowledge	26
2.3.2 State Knowledge Necessarily Implies Normative Assessment	29
2.4 Assessment of Knowledge	29
2.5 No Benefit of Hindsight	31
2.6 Burden of Proof	32
2.7 The Nature and the Level of Risk	33
2.7.1 The 'Real and Immediate Risk' Standard	33
2.7.2 Man-made versus Natural Harms	38
2.8 Contributory Fault of the Victim	40
Conclusion	42
<b>3. Causation</b>	<b>45</b>
Introduction	45
3.1 The Role and the Standard of Causation	46
3.2 Control and Causation	49
3.2.1 The Rules on Attribution	49
3.2.2 The Role of Control and the Extension of the Logic of the Rules on Attribution	51
3.2.3 Control and Prevention of State-inflicted Harm	53
3.2.4 Assumption of Control in the Area of Public Services	55
3.2.5 Source of the Harm and the Related Level of Control	58
3.2.6 Assumption of Control over the Victim	60

3.3	Techniques for Avoiding Causation	63
3.3.1	Domestic Legality	63
3.3.2	Procedural Protection	66
3.4	Technique for Limiting Responsibility when Causation is Present	67
	Conclusion	70
<b>4.</b>	<b>Reasonableness</b>	<b>73</b>
	Introduction	73
4.1	Intertwinement with Knowledge and Causation	75
4.1.1	Weak Causation Counterbalanced by the Reasonableness Standard	76
4.1.2	Strong Causation Counterbalanced by the Reasonableness Standard	78
4.1.3	Reasonableness and Immediacy of the Risk	79
4.1.4	The Importance and the Justifiability of the Analytical Distinctions	80
4.2	Consideration of Alternative Protective Measures	81
4.2.1	Levels of Abstraction/Concreteness and the Burden of Proof	83
4.2.2	Place and Formulation of the Alternative	85
4.2.3	The Standard of Protectiveness	88
4.3	Margin of Appreciation	89
4.3.1	Delineation between Structural Deference and Appreciation of Alternatives	89
4.3.2	Scrutiny in the Appreciation of Alternatives	92
	Conclusion	93
<b>5.</b>	<b>Competing Obligations</b>	<b>95</b>
	Introduction	95
5.1	Specification for Tensions to Become Cognizable	97
5.2	The Distinction between General Interests and Interests that Form the Basis of Human Rights	99
5.3	Addressing the Competition	103
5.3.1	Equal Moral Status	103
5.3.2	The Relative Importance of the Interests and the Obligations Triggered	104
5.3.3	Action versus Omission	107
5.3.4	Determinacy of the Harm and the Affected Individuals	117
5.4	Accommodation of Obligations	119
	Conclusion	121
<b>6.</b>	<b>Procedural Positive Obligation to Investigate</b>	<b>123</b>
	Introduction	123
6.1	Conditions that Trigger the Obligation	127
6.1.1	Harm Inflicted by State Actors	129
6.1.2	Harm Inflicted by Non-state Actors	131
6.1.3	Harm Linked with Arguable Omissions	134
6.2	Content and Scope of the Obligation	138
6.2.1	Type of Proceedings	138
6.2.2	Initiation of the Proceedings	148

6.2.3	Effectiveness	150
6.2.4	Cooperation with Other States in Cross-border Contexts	159
	Conclusion	167
<b>7.</b>	<b>Substantive Positive Obligations</b>	<b>171</b>
	Introduction	171
7.1	Obligation to Develop Effective Regulatory Frameworks	171
7.1.1	Diversity of Regulatory Spheres and the Role of Criminal Law	174
7.1.2	Types of Deficiencies in the Regulatory Framework	176
7.1.3	Concrete or Abstract Reasonableness Review of the Regulatory Framework	181
7.2	Obligation to Develop Effective National Procedures	197
7.2.1	Not a Self-standing Positive Obligation	198
7.2.2	The Content of the Obligation	200
7.3	Obligation to Take Protective Operational Measures	203
7.3.1	The Test as Originally Developed in <i>Osman v the United Kingdom</i>	204
7.3.2	Modifications of the Test Regarding the Actors of Harm, the Objects of Harm, and the Immediacy of the Risk	205
7.3.3	Adjustment of the Test by Adding Risk Assessment as an 'Integral Part'	211
7.3.4	Adjustment of the Test by Adding Harm-related, Temporal, and Geographical Specifications	214
7.3.5	Content and Scope of the Obligation—the Operational Measures	215
	Conclusion	217
<b>8.</b>	<b>Extraterritorial Positive Obligations</b>	<b>219</b>
	Introduction	219
8.1	Positive Obligations' Normative Preconditions	223
8.1.1	The Role of the State in Society	224
8.1.2	Democratic Legitimacy and Territorial Boundedness	225
8.1.3	Not Contingent Exclusively on Actual Capacity	228
8.2	Deconstructing Jurisdiction	228
8.2.1	The Territorial Paradigm	229
8.2.2	Effective Control over an Area	231
8.2.3	Physical Power and Control over a Person	235
8.2.4	Acts of Diplomatic and Consular Agents	238
8.2.5	Exercise of Public Powers	244
8.2.6	Extraterritorial Effects	250
8.2.7	Procedural Link	257
8.2.8	Conclusion	263
8.3	Adapting Jurisdiction to the Obligations?	265
8.3.1	Dividing and Tailoring	266
8.3.2	Dividing the Tailoring Brought to a Breaking Point	270
8.3.3	Conclusion	273

x Contents

8.4 Deconstructing Extraterritorial Positive Obligations	273
8.4.1 Legality and Legal Competence	275
8.4.2 Reasonableness and Balancing of Interests	293
8.4.3 Causation	303
Conclusion	306
<b>Conclusion</b>	<b>311</b>
<i>Select Bibliography</i>	<b>315</b>
<i>Index</i>	<b>329</b>