Proving discriminatory violence at the European Court of Human Rights

Mačkić, J.; Mackic J.

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Being invisible and without substance, a disembodied voice, as it were, what else could I do? What else but try to tell you what was really happening when your eyes were looking through?

Ralph Ellison, Invisible Man

Proving Discriminatory Violence at the European Court of Human Rights

PROEFSCHRIFT

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Promotor:	prof. dr. L.J. van den Herik
Copromotor:	mr. dr. F.P. Ölçer
Promotiecommissie:	prof. dr. S.C.G. Van den Bogaert
	prof. dr. R.C. Tobler LL.M.
	mr. dr. M.L. van Emmerik
	prof. dr. J.H. Gerards (Universiteit Utrecht)
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Preface

In the powerful book *Between the World and Me*, the American author Ta-Nehisi Coates describes what it is like to live in his country where unarmed African-American men and boys are dying at the hands of police officers and where families and bodies are broken. According to Coates this type of violence is not inflicted accidentally but by design. After describing how his African-American friend Prince Jones was gunned-down by a police officer, he notes that "Prince was not killed by a single officer so much as he was murdered by his country and all the fears that have marked it from birth."[1] For Coates it does not matter whether the perpetrator of violence is 'white or black', what matters is the system that makes your body breakable.

Reading his book in 2015 reminded me of how important it is not only to hold a single perpetrator responsible for an act of discriminatory violence, but – above all – the system that conditions it. In my thesis, which focuses on discriminatory violence complaints before the European Court of Human Rights, I have attempted to find ways to hold states responsible for this type of physical abuse especially when it is systemic in nature. When I first began to study this issue, back in 2011, I could not have imagined that hate crimes and discrimination would receive as much attention as they do today in popular media and in reports from intergovernmental and non-governmental organisations. Partially due to the European refugee crisis and the rising popularity of far-right parties, it is uncertain how the position and the rights of disadvantaged groups in European societies will evolve and how European states will respond to discriminatory violence inflicted upon members of these groups. Therefore, my hope for this book is that it can contribute in finding ways to address and acknowledge discriminatory violence.

Writing this thesis has been quite an adventure, as I was faced with several obstacles along the way. However, those obstacles never really mattered to me. Finding an answer to the main research question has been my driving force and achieving that aim was worth overcoming them. I would like to gratefully acknowledge various people who have encouraged me to start a PhD, persevere with it and finally to finish it.

I am very grateful to Professor Rick Lawson for encouraging me to start writing a thesis on this important and fascinating research topic and for his input in the early stages of this thesis. I am also very grateful to Ard Schoep for providing useful feedback on my research proposal and on the first

1 T. Coates, *Between the World and Me*, New York: Spiegel & Grau 2015, p. 78.

drafts of some of the chapters. I would like to express my gratitude for the supervision provided by Professor Larissa van den Herik and Pinar Ölçer. You have helped me to remain persistent, encouraged me to form original ideas on this research topic and to work daily towards the achievement of my goal. In essence, the two of you have been the key to finalizing this PhD thesis.

I would like to thank my committee members – Professor Stefaan Van den Bogaert, Professor Christa Tobler, Professor Janneke Gerards, Dr. Michiel van Emmerik and Dr. Maarten den Heijer – for their valuable questions and comments on the thesis. I would especially like to thank Professor Janneke Gerards who has shared her expertise with me and who has provided some very useful feedback on the case notes and papers that I have written throughout the years.

This book began life as a PhD at the Europa Institute at Leiden Law School, a period in which I have been able to get to know many interesting people who have helped me to grow and offered me great support and encouragement during the writing process. I would like to express my appreciation to Professor Rikki Holtmaat, who has offered me valuable insights on discrimination-related matters. I would also like to thank Professor Stefaan Van den Bogaert, the Director of the Europa Institute, for his support during the writing process and for giving me an opportunity to work at the Institute again. I would like to thank all my colleagues from the Europa Institute. Nevertheless, I would like to highlight a few who have offered me tremendous support and gave me a helping hand when needed during my PhD: Jorrit Rijpma, Moritz Jesse, Vicky Kosta, Narin Idriz, Nelleke Koffeman, Darinka Piqani and Erik Koppe (Grotius Centre for International Legal Studies).

I have finalised this thesis during my time as a lecturer at the Institute of Criminal Law and Criminology and the Moot Court Department at Leiden Law School. Thank you to the staff of both departments, especially to Professor Jan Crijns and Professor Clementine Breedveld-de Voogd. My sincere gratitude also goes out to the Meijers Institute in assisting me while I was organising the seminar 'Fact Finding in Human Rights Litigation' in 2013 and while I was finalising this book.

Whilst writing this book, I have gained many valuable insights from several individuals from outside Leiden. During my PhD I presented papers at various conferences, including at the University of Sussex, the University of Michigan Law School, the Vrije Universiteit Amsterdam and the Vrije Universiteit Brussels. I have benefited from the feedback at these events.

During my PhD I was also able to work for a couple of months at the Council of Europe's Roma Support Team, and for this I would especially like to thank Jeroen Schokkenbroek and Eleni Tsetsekou very much. Thank you to the University of Michigan Law School for welcoming me as a Visiting Research Scholar. Here I would like to acknowledge Roopal Shah and Stephanie Wiederhold for enabling me to work in such a friendly and intellectual climate. A special word of gratitude is dedicated to Professor Samuel

Gross: your guidance and the many conversations we had in Ann Arbor have been very helpful and inspiring. I will cherish the wonderful memories of Ann Arbor.

I am most grateful to the Netherlands Organisation for Scientific Research (NWO) for awarding me a Mozaïek Scholarship and offering me the opportunity to become part of an academic network. I would also like to express my gratitude to the Leids Universiteits Fonds (LUF) for awarding me an additional scholarship to cover my travel expenses for my trip to the University of Michigan Law School.

Finally, I will conclude on a more personal note. I was lucky to be surrounded with people who have provided me with a lot of love and support throughout my life. Thank you to 'my twins', my sister Arna and my brother Adi. We went through quite a journey together, coming from war-torn Yugoslavia to The Netherlands. We have helped each other to move forward and to build things from scratch. I have so much to thank to my partner, Onno, who has been the greatest support in the last couple of years of my writing process. This thesis could not have been written without his love, support, patience and guidance. I am also very grateful to Onno's family for their heart-warming kindness. Above all, this book is dedicated to my parents. They have always had my back and offered support on every step of writing this PhD. I could not have wished for better parents and would not want to trade with anyone. It is thanks to them that I have learned to deal with circumstances in which the wind was at my face.

Jasmina Mačkić
Amsterdam, February 2017

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1 Introduction

1.1 Discriminatory violence and the European Court of Human Rights: Bonello's dissent in *Anguelova*

Prominent European institutions and organisations frequently report on the incidence of discriminatory violence, motivated on such grounds as colour, association with a national minority, religion or sexual orientation, in various European States.[1] This type of wrongful conduct is also popularly referred to as 'hate crime', meaning "violence directed towards groups of people who generally are not valued by the majority society, who suffer discrimination in other arenas, and who do not have full access to institutions meant to remedy social, political and economic injustice."[2] Discriminatory violence is prohibited by Article 14 (prohibition of discrimination) read in conjunction with Article 2 (right to life) or Article 3 (prohibition of torture) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[3] This thesis explores the engagement of a fundamental European institution with the phenomenon of discriminatory violence, namely, the European Court of Human Rights (ECtHR). The Court is one of the best-known bodies of the leading human rights organisation in Europe, the Council of Europe. The ECtHR oversees the implementation of the ECHR in the 47 Member States of the Council of Europe.

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1 See, for example, ECRI, *Annual Report on ECRI's Activities covering the period from 1 January to 31 December 2012*, Strasbourg: ECRI 2013, p. 7; FRA, *Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary (FRA Report)*, Luxembourg: Publications Office of the European Union 2013, p. 9 and 30; FRA, *Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime*, FRA Opinion – 02/2013 – Framework Decision on Racism and Xenophobia, Vienna: 2013, p. 11; FRA, *Current migration situation in the EU: hate crime*, november 2016 (online).

2 L. Wolfe & L. Copeland, 'Violence against Women as Bias-Motivated Hate Crime: Defining the Issues in the USA', in: M. Davies (ed.), *Women and Violence*, London: Zed Books 1994, p. 200-213, p. 201.

3 On rare occasions, certain forms of discriminatory violence are discussed under Article 14 read in conjunction with Article 8 ECHR (right to respect for private and family life). This occurred, for example, in the case ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*) that will be discussed later in this thesis. The main focus of this study, however, is complaints of discriminatory violence examined under Article 14 read in conjunction with Articles 2 or 3 of the Convention.

Over the last twenty years, the Council of Europe has become more concerned with discrimination issues in general and with discriminatory violence in particular. This development essentially ran parallel with two changes. First, a number of violent conflicts unleashed in Eastern Europe after the end of the Cold War. These conflicts had inter-ethnic dimensions.[4] Consequently, it became apparent that minority-related tensions are capable of destabilising whole regions.[5] A second change of a more institutional nature was that most Central and Eastern European States became Contracting Parties to the Convention after the fall of the Iron Curtain. It has been suggested that the legal systems of most of the States entering the Council of Europe during that period did not meet the requisite ECHR standards.[6] What is even more pertinent to this research is that their accession also entailed an increase in the number of minority groups falling under the Convention's protection.[7] These post-Cold War developments therefore set the stage for a heightened focus on discriminatory violence, as well as an increase in the number of cases of discriminatory violence brought before the ECtHR.[8]

Yet, the ECtHR has struggled to find a manner of properly addressing discriminatory violence. Exemplary of this struggle, the case *Anguelova v. Bulgaria* raised the question of how discriminatory violence can be proved at the Court. In this case, the mother of a teenage Roma boy complained that her son's death in police custody, and the lack of an effective investigation

4 M. Weller, 'Preface', in: M. Weller (ed.), *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities*, New York: Oxford University Press 2005, p. vii-x, p. vii. See also M. Telalian, 'European Framework Convention for the Protection of National Minorities and Its Personal Scope of Application', in: G. Alfredsson & M. Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes*, The Hague: Martinus Nijhoff Publishers 2002, p. 117-135, p. 117.

5 J. Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities', 10 *Human Rights Law Review* (2010), p. 99-129, p. 106.

6 See R. Ryssdal, 'The coming of age of the European Convention on Human Rights', 1 *European Human Rights Law Review* (1996), p. 18-29, p. 27, cited in E. Bates, *The Evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Human Rights*, New York: Oxford University Press 2010, p. 450-451.

7 P. Thornberry, *Indigenous peoples and human rights*, Manchester: Manchester University Press 2002, p. 290-291; J. Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities', 10 *Human Rights Law Review* (2010), p. 99-129, p. 100.

8 Most cases on discriminatory violence were filed at the ECtHR after the 1990s and concerned complaints from the Roma population and Chechens against countries such as Bulgaria, Romania, Ukraine and Russia. See also E.M. Evenson, 'Reforms Ahead: Enlargement of the Council of Europe and the Future of the Strasbourg System', 1 *Human Rights Law Review* (2001), p. 219-242, p. 226.

into the matter, were motivated by racial prejudice[9] on the part of Bulgarian State authorities. While finding a violation of the right to life, the Court rejected her claim regarding discrimination, stressing that it was unable to reach a conclusion on this matter based on the standard of proof 'beyond reasonable doubt'.[10] Judge Bonello dissented:

> "Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence."[11]

Bonello elaborated, arguing that the Court's evidentiary rules form an obstacle to establishing violations under Article 14 read in conjunction with Article 2 or Article 3 of the Convention. Firstly, he criticised ECtHR's application of the standard of proof 'beyond reasonable doubt' in cases concerning discriminatory violence.[12] He found that the application of such a high standard – which has its origins in criminal cases from common law systems – is inappropriate for a human rights court. Secondly, he criticised the Court for refusing to shift the burden of proof to the respondent State to prove that the event was *not* ethnically prompted "when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and [the] impunity of State offenders epidemic …."[13]

This criticism raises difficult questions regarding the most appropriate evidentiary framework in cases of discriminatory violence at the ECtHR. These questions are particularly pertinent when viewed from the perspective of the specific purpose of the Council of Europe and the ECtHR to pro-

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9 The author would like to state that she does not support the use of words such as 'race', 'racial prejudice', 'racism' and the like. Terminology related to 'race' is contested and carries certain negative connotations. There is no scientific evidence demonstrating that there are different, separate, biological races. In fact, it is argued that 'race' only serves to justify discrimination or to create a hierarchy of groups of people (interesting insights on this discussion are provided by Howard, in: E. Howard, *The EU Race Directive. Developing the protection against racial discrimination within the EU*, Abingdon: Routledge 2010, p. 63-83). Nevertheless, the words 'racial prejudice' are mentioned here only because the ECtHR chose in *Anguelova* to describe the applicant's complaint using these words. Therefore, terms such as 'race', 'racial violence', etc. are mentioned throughout this study only when discussing the relevant case law or relevant legislation in which a particular grounds for discrimination was typified in this way by a higher authority, such as the ECtHR.

10 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), para. 168.

11 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 3.

12 Ibid., para. 4.

13 Ibid., para. 18.

tect disadvantaged groups and address violations of fundamental rights, such as discrimination issues.

1.2 Problem statement, research aim and research questions

Inspired by Judge Bonello's dissent in *Anguelova*, this study probes the applicable evidentiary framework in discriminatory violence cases in the wider setting of the ECtHR's mandate, goals and purpose. The aim of this thesis therefore is:

> to determine whether the evidentiary framework deployed by the European Court of Human Rights is adequate in discriminatory violence cases, and to offer suggestions for improvement where it is not.

Adequate is taken here to mean that the evidentiary framework applied by the ECtHR in such cases properly enables it to recognise, address and condemn discriminatory violence against victims who are members of a certain group. At the same time, this study takes into account that the Court can only declare that a Member State violated the Convention if it can be established that a violation has occurred. This highlights the conflict between two distinct aims that the Court attempts to satisfy through its judgments: the Court aims to achieve maximum effectiveness in the protection of human rights, on the one hand, while the Court can only determine State responsibility if it is confident, on the basis of the information before it, that some form of discriminatory violence actually occurred, on the other hand.[14] If it is to maintain its credibility and legitimacy it must not establish violations of fundamental rights lightly.

Hence, this thesis starts from the premise that it is imperative that both parties to a case accept the Court's judgments as authoritative interpretations and applications of the Convention. For the application of the Convention, the appropriate rules of evidence and assessment of the facts of a case must be clear, comprehensible and convincing.[15] Furthermore, they must take the interests of both the *applicant* as well as the *respondent State* into

14 D. Weissbrodt, 'International Factfinding in Regard to Torture', 57 *Nordic Journal of International Law* (1988), p. 151-196, p. 151.

15 This approach was inspired by Gerards and Senden who argue that if insufficient guidance is given to the Member States by the Court, they may choose to follow their own path (J. Gerards & H. Senden, 'The structure of fundamental rights and the European Court of Human Rights', 7 *International Journal of Constitutional Law* (2009), p. 619-653, p. 637-638). Gerards further argues in another contribution that the Court has to position itself carefully vis-à-vis the Member States, balancing between the protection of individual rights and pronouncing judgments that are compatible with fundamental views and legal or institutional constructs existing in a certain State (see J. Gerards, 'Judicial Deliberations in the European Court of Human Rights', in: N. Huls, M. Adams & J. Bomhoff (eds.), *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond*, The Hague: T.M.C. Asser Press 2009, p. 407-436).

account. The evidentiary framework must enable applicants or their family members to effectively enforce their human rights, but may not lead to inadequately substantiated or unwarranted findings of violations by Member States.[16]

Based on the research aim as set out above, the problem statement of this thesis reads:

> How does the ECtHR's application of the rules of evidence in cases of discriminatory violence affect its treatment of this issue?

This problem statement gives rise to the following specific research questions:

1. What do the notions of 'discrimination' and 'discriminatory violence' in the Convention system mean and what elements need to be proved for the different types of discriminatory violence complaints (*chapter 2*)?
2. How is information about the facts of a case at the Court gathered generally, which actors are involved in establishing those facts, and what means of establishing facts would be most useful in establishing discriminatory violence (*chapter 3*)?
3. Does the Court's use of the standard of proof 'beyond reasonable doubt' pose an obstacle to establishing violations in the context of discriminatory violence and are there any alternative standards of proof that the Court could use here (*chapter 4*)?
4. Under what specific circumstances may the ECtHR allow the burden of proof to shift from the applicant to the respondent State for the different types of complaints of discriminatory violence (*chapter 5*)?

16 In the context of balancing applicants' and respondents' interests, it is interesting to note that there is literature which links this 'balanced' approach to the general principle of fairness. This literature stresses that the broad basic general principle in respect of establishing facts and, more specifically, in respect of evidentiary rules, that are applied by international tribunals of any kind, entails that the parties are entitled to a fair trial. This fair trial rule may not necessarily be written down in some legal document, but implicitly applies to all adjudicatory bodies. Fairness then requires that a court must remain impartial and ensure equality of arms, which means that each party must have an equal opportunity to make its case with regard to facts and evidence. The Convention, despite the fact that it often deals with the rights of individuals vis-à-vis the State, also reflects the generally accepted norm of fairness of proceedings. Consequently, the concept of a fair trial in relation to evidence and proof can be extended to the ECtHR. In this context, it is vitally important that "it be recognized that it is in the very nature of a judicial body in dealing, *inter alia*, with evidence and proof of facts, to ensure fairness to both parties, and also protect its own interests in dispensing justice." Hence, all three interests need to be taken into account in establishing fairness in a given situation (see C.F. Amerasinghe, *Evidence in International Litigation*, Leiden: Martinus Nijhoff Publishers 2005, p. 13-15 and p. 34-37).

5. On the basis of what factual elements may the Court derive the existence of different forms of discriminatory violence and on the basis of what evidentiary material may it find that violations have occurred under Article 14 read in conjunction with Article 2 or Article 3 of the Convention (*chapter 6*)?

With a view to grounding the concept of adequacy and contextualising the research questions, the following sections set out the underlying framework for this thesis. This framework can be presented as a triptych. First, section 1.3 introduces the substantive legal framework regarding the prohibition of discrimination as it was developed by the Council of Europe. Section 1.4 then sets out the conceptual framework for the ECtHR's responsibility to address the issue of discriminatory violence. It explains why the Court, particularly in light of its mandate, functions and goals, has a significant task in condemning discriminatory violence. Thereafter, section 1.5 presents the evidentiary framework which is central to this study and that highlights the specific evidentiary issues that the thesis will examine. Finally, to conclude this introductory chapter, sections 1.6 and 1.7 set out the methodology and structure of this thesis, respectively.

1.3 The substantive legal framework: anti-discrimination law in the Council of Europe

This section describes the substantive legal framework that regulates the prohibition of discrimination by the Council of Europe. It highlights certain historical legal and political dynamics that contributed to the creation of a number of documents which prohibit discrimination in general, and discriminatory violence in particular. These dynamics strongly emphasise minority rights[17] concerns and call for more dedication to the fight against discrimination in Europe.

17 At present, international law does not offer a legally binding definition of 'minority'. However, the most influential (legally non-binding) definition comes from Capotorti, who describes a minority as:

> "[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."

See statement by the Austrian government in the UN Study by F. Capotorti, *(1977) Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, 1991, para. 568, cited in G. Gilbert, 'The Legal Protection Accorded to Minority Groups in Europe', 23 *Netherlands Yearbook of International Law* (1992), p. 67-104, p. 71 and in J. Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities', 10 *Human Rights Law Review* (2010), p. 99-129, p. 110.

The Council of Europe adopted three legal texts which place obligations on the Contracting Parties in the field of anti-discrimination. Firstly, there is a 'basic' prohibition of discrimination as laid down in Article 14 of the Convention. Secondly, the European Framework Convention for the Protection of National Minorities (Framework Convention or FCNM) was adopted by the Council of Europe, that was eventually opened for signature in 1995 and entered into force in 1998. It differs from Article 14, in that its focus – as its title suggests – is on the protection of minorities. Thirdly, Protocol No. 12 which entered into force on 1 April 2005, provides for a general ban on discrimination. There are 20 Member States to this Protocol. The creation of these texts reflects, at least, a growing interest in minority rights on the part of the Contracting Parties.

The first calls for greater protection of minorities in the European human rights context had already been made around the time of the genesis of the Convention. The ECHR was created in response to the brutal persecution of certain groups by the Nazis during World War II.[18] Greer observes that both the Council of Europe and the Convention were initially established to serve four prominent goals: (1) to contribute to the prevention of another war from occurring between Western European States; (2) to establish some common values that would contrast sharply from those prevailing in the communist Soviet Union territory; (3) to strengthen a sense of common identity should the tensions present during the Cold War turn 'hot', and; (4) to map and prevent alarming human rights situations in Member States drifting towards authoritarianism (referred to as the 'early warning function').[19] As an inherent part of these four goals that were pursued by establishing the Convention system, at the first meetings held by the Consultative Assembly on the Convention's content (now referred to as the Parliamentary Assembly of the Council of Europe or PACE) from 10th August to 8th September 1949 there were also concrete calls to integrate formal minority rights. The strongest calls came from a Danish representative, Lannung, who stated that "it is necessary to extend, supplement and elaborate [fundamental human rights] in order that national minorities may secure the right to a free national life and protection against persecution and encroachment on account of

18 For more information on the 'World War II context' which gave rise to the Convention, see L. Wildhaber, *The European Court of Human Rights / 1998–2006. History, Achievements, Reform,* Kehl: N.P. Engel 2006, p. 137–138.

19 S. Greer, 'What's Wrong with the European Convention on Human Rights?', 30 *Human Rights Quarterly* (2008), p. 680-702, p. 681.

their national convictions, aspirations and activities."[20] Yet, the Assembly Committee on Legal and Administrative Questions, concerned with drafting the Convention, declined to adopt Lannung's suggestions in the final text.[21] This reluctance on the part of the Assembly is said to have been due to the fact that around the time of the Convention's inception, the declaration of minority rights was considered to be counter-productive because it could foster division within the Council of Europe's Member States between groups that were of different ethnicities, spoke different languages or adhered to different religions. A fear also existed that strong minority rights would stir secessionist claims.[22]

Eventually Article 14 was incorporated in the ECHR, and reads as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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20 Council of Europe, *Collected edition of the Travaux Préparatoires of the European Convention on Human Rights/Council of Europe Vol. I*, The Hague: Martinus Nijhoff Publishers 1975, p. 54. Additional calls came from another Danish representative, Kraft, who underlined the importance for national groups who are citizens in a State to which they do not feel that they belong, to enjoy protection as a human right, and in such a way as to preserve their national life and character (Council of Europe, *Collected edition of the Travaux Préparatoires of the European Convention on Human Rights/Council of Europe Vol. I*, The Hague: Martinus Nijhoff Publishers 1975, p. 68). Additionally, an Irish representative, Everett, expressed that the representatives present at the meeting "should pledge themselves to secure to all citizens, and particularly for any minority in their country, freedom from arbitrary arrest, detention or exile; freedom of speech and expression of opinion generally; freedom of association and assembly; and freedom from discrimination on account of religious or political opinion," (Council of Europe, *Collected edition of the Travaux Préparatoires of the European Convention on Human Rights/Council of Europe Vol. I*, The Hague: Martinus Nijhoff Publishers 1975, p. 104). And during further meetings, held in 1951, the Irish representative Stanford stressed the following:

> "As a member of such a minority I feel that I can appreciate the value of this charter on human rights as perhaps few in this Assembly can appreciate it – that is, from the point of view of the weak, not from the point of view of the strong. The most severe test of justice in a civilisation or in a government lies in its treatment of the weak, the poor, the sick and the few. It is hardly worthy of the name of justice when one strong nation, or one strong party, says to another: 'If you will not hit me, I will not hit you'. But it is true justice when strong nations and strong parties voluntarily agree to give the weak full rights; in other words, to reckon right and wrong in terms of single human beings and not in terms of races, sects, parties or cartels. This is the justice enshrined in this Convention for the Protection of Human Rights."

See Council of Europe, *Collected edition of the Travaux Préparatoires of the European Convention on Human Rights/Council of Europe Vol. VII*, Dordrecht: Martinus Nijhoff Publishers 1985, p. 282.

21 P. Thornberry & M. Amor Martín Estébanez, *Minority rights in Europe*, Strasbourg: Council of Europe Publishing 2004, p. 40.

22 S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, New York: Cambridge University Press 2006, p. 31.

This provision serves as an accessory guarantee to the enjoyment of the other rights in the Convention.[23] The accessory character of Article 14 means that a sufficient connection must be established between the alleged discrimination and one of the rights or freedoms enshrined in the substantive or principal provisions of the ECHR.[24] In cases of discriminatory violence this entails that the applicant must connect Article 14 to either Article 2 or Article 3, or both. This has been described as one of the magnifying effects of Article 14 when another Convention article is, in fact, applicable. The discriminatory element then serves as an additional violation or aggravating factor.[25] It is unnecessary that the Court first establishes a violation of the principal provision – Article 14 does not pre-suppose such a finding. Thus, for example, there may be a violation of Article 14 read in conjunction with Article 2, without a separate violation of Article 2 being established.[26] Consequently, in addition to its accessory character, Article 14 is regarded as having an autonomous standing.[27] The accessory nature, as such, does not obstruct the Court from examining discrimination-related complaints. Yet, in cases concerning discriminatory violence, sometimes the reverse happens, i.e. that the Court itself sometimes *chooses* to discuss such complaints only under Article 2 and/or Article 3 and not to consider them under Article 14.[28]

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23 O.M. Arnardóttir, 'Discrimination as a magnifying lens. Scope and ambit under Article 14 and Protocol No. 12', in: E. Brems & J. Gerards (eds.), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, New York: Cambridge University Press 2013, p. 330-349, p. 331. See also J. Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', 13 *Human Rights Law Review* (2013), p. 99-124, p. 100; R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 212.

24 Articles 2 and 3 ECHR have both been described as 'principal' or 'substantive' provisions. See J.A. Goldston, 'Race discrimination in Europe: problems and prospects', 5 *European Human Rights Law Review* (1999), p. 462-483.

25 O.M. Arnardóttir, 'Discrimination as a magnifying lens. Scope and ambit under Article 14 and Protocol No. 12', in: E. Brems & J. Gerards (eds.), *Shaping rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, New York: Cambridge University Press 2013, p. 330-349, p. 335.

26 See, for the general rule, ECtHR 23 July 1968, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (*Case "relating to certain aspects of the laws on the use of languages in education in Belgium"/Belgium* (*Belgian Linguistic* case) (Merits)) (GC), para. 9. See also – particularly with regard to claims brought under Article 14 read in conjunction with Articles 2 or 3 – R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008), p. 475-516, p. 497.

27 G. Goedertier, 'Artikel 14. Verbod van discriminatie', in: J. Vande Lanotte & Y. Haeck (eds.), *Handboek EVRM. Deel 2. Artikelsgewijze Commentaar. Volume II*, Antwerp: Intersentia 2004, p. 142-144.

28 Chapter 2 will further elaborate on this specific issue.

The second text that is considered here is the European Framework Convention for the Protection of National Minorities (FCNM). This document arose out of the 1993 World Conference on Human Rights, also known as the 'Vienna Summit'. On this occasion, the heads of the Council of Europe's Member States explored and also called for the creation of an Additional Protocol to the Convention to bundle the rights of minorities in one document.[29] This Additional Protocol has not been created to date, however, the Summit did provide for the creation of the FCNM. This is a multilateral treaty aimed at protecting the rights of minorities and has by now been ratified by 39 Council of Europe Member States and signed by 43.[30] It is the only treaty which contains a provision that specifically addresses and explicitly prohibits discriminatory violence in a European human rights context. This prohibition is embedded in Article 6 § 2,[31] and reads as follows:

> "The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity."

This provision is underpinned by principles such as equality, inclusiveness and pluralism in European societies.[32] However, its scope is restricted in two ways. First, Article 6 § 2 has not been incorporated in the ECHR itself or in a separate Protocol and therefore is not subject to review by the ECtHR. Although Article 6 § 2 is legally binding, the Framework Convention only provides a system for monitoring regular State reports by the Committee of Ministers.[33] Another weakness is that this provision is concerned with the protection of *minority groups*, yet has a complex scope, because the con-

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29 See Vienna Declaration, Vienna: CoE 9 October 1993 (online).

30 The founding fathers of the FCNM observed how all regions, and not just those in conflict, were threatened by hatred and war, and believed that "respect for national minorities is essential for stability and peace in Europe, that a climate of tolerance and dialogue promotes participation, and that members of national minorities should be able to develop their culture through language rights." A profound belief was expressed that "[t]he European continent must unite to consolidate peace and stability, commit to pluralism and parliamentary democracy, uphold the indivisibility and universality of human rights, promote the rule of law, and a common cultural heritage enriched by diversity." See for both quotes T.H. Malloy, 'The Title and the Preamble', in: M. Weller (ed.), *The Rights of Minorities in Europe. A Commentary on the European Framework Convention for the Protection of National Minorities*, New York: Oxford University Press 2005, p. 49-73, p. 53.

31 Article 6 § 1 reads as follows: "The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media."

32 J. Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection of National Minorities', 10 *Human Rights Law Review* (2010), p. 99-129, p. 118-119.

33 G. Gilbert, 'The Council of Europe and Minority Rights', 18 *Human Rights Quarterly* (1996), p. 160-189, p. 174.

cept of 'minority' has not been defined in the Framework Convention. As a result, it is difficult to determine which groups fall under the umbrella of Article 6 § 2.[34] At the moment, the provision covers only those who are attacked on account of their *ethnic, cultural, linguistic or religious identity*. Thus, discriminatory violence on the grounds of sexual orientation or gender, for example, does not fall under the protective scope of this Convention.

The accessory nature of Article 14 ECHR was revisited in 2000 when the Council of Europe created Protocol No. 12. This protocol calls on Member States "to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination."[35] The Protocol extends the ambit of the ban on discrimination incorporated in Article 14 ECHR by guaranteeing equal treatment in the enjoyment of any right, including rights under national law. The Explanatory Report to the Protocol indicates that the document was created to strengthen protection against discrimination which was considered to be a core element in guaranteeing human rights. It was mainly a result of debates on how to strengthen sex and racial equality in Europe.[36] Particularly relevant in the context of discriminatory violence is the following statement taken from the Explanatory Report:

> "7. […] ECRI [European Commission against Racism and Intolerance] considered that the protection offered by the ECHR from racial discrimination should be strengthened by means of an additional protocol containing a general clause against discrimination on the grounds of race, colour, language, religion or national or ethnic origin. In proposing a new protocol, ECRI recognised that the law alone cannot eliminate racism in its many forms vis-à-vis various groups, but it stressed also that efforts to promote racial justice cannot succeed without the law. ECRI was convinced that the establishment of a right to protection from racial discrimination as a fundamental human right would be a significant step towards combating the manifest violations of human rights which result from racism and xenophobia. It emphasised that discriminatory attitudes and racist violence are currently spreading in many European countries and observed that the resurgence of racist ideologies and religious intolerance is adding to daily tension in our societies an attempt to legitimise discrimination."[37]

In light of this ECRI proposal, the Committee of Ministers decided to instruct the Steering Committee for Human Rights to examine the advisability and feasibility of a legal instrument to combat racism and intolerance. This document eventually became Protocol No. 12. Although the provisions

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34 G. Pentassuglia, *Minorities in international law. An introductory study*, Strasbourg: Council of Europe Publishing 2002, p. 63-65.

35 Preamble to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

36 FRA & CoE, *Handbook on European Non-Discrimination Law*, Luxembourg: Publications Office of the European Union 2011, p. 13. See also F. Buonomo, 'Protocol 12 to the European Convention on Human Rights', 1 *European Yearbook of Minority Issues* (2001), p. 425-433.

37 Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms COETSER 3 (4 November 2000) (online).

in this protocol do not expressly prohibit discriminatory violence as such, it is clear that violence of this kind has at least led the Council of Europe to introduce a protocol which prohibits discrimination in a broader sense in addition to Article 14. Protocol No. 12, through its adoption and intent, serves to place discrimination on the policy agendas of the Member States. However, bearing in mind that it has not been signed by all Member States, and given that there is not much ECtHR jurisprudence relating to this Protocol, it would appear that this document has not resulted in more attention being devoted to discrimination.

1.4 The conceptual framework: the ECtHR's responsibility to address the issue of discriminatory violence[38]

The question concerning the adequacy of the Court's evidentiary framework pre-supposes a notion about the role of the ECtHR in addressing discriminatory violence. This idea is bound up with broader conceptions of the function and goals of the Court, as set out to some extent in its mandate. These will be discussed in this section. Before turning to these matters, it is first necessary to comprehend the impact that discriminatory violence can have on individuals and communities.

Acts of discriminatory violence have a threefold impact: firstly, they affect the victim in a particular emotional and psychological manner, by encroaching not merely upon a person's physical being, but also the very core of his or her identity;[39] secondly, they have an impact on the 'target-community', meaning the community that the victim belongs to;[40] thirdly,

38 This section builds on J. Mačkić, 'The European Court of Human Rights and Discriminatory Violence Complaints', in: J. Schweppe & M.A. Walters (eds.), *The Globalization of Hate. Internationalizing Hate Crime?*, Oxford: Oxford University Press 2016, p. 233-246.

39 F.M. Lawrence, *Punishing Hate. Bias Crimes under American Law*, Cambridge/London: Harvard University Press 2002, p. 39-41. In his book, Lawrence provides a striking and illustrative example of how deeply a victim may be affected by a 'bias crime' (the term that he uses to typify discriminatory violence and other types of discriminatory treatment): if a residence becomes the target of 'ordinary' vandalism, this amounts into nuisance for the inhabitant. The damage that consequently follows can be 'repaired' with insurance. If the owner of the residence is not insured, the damage might cost him money or time, or both. Vandalism arising from discriminatory motives, by contrast, would have a greater impact. For example, if swastikas are daubed on the house of a Jewish owner, then the owner might suffer not just nuisance. Lawrence argues that deep psychological damage may be the consequence of such a crime, a type of damage that cannot be rectified with time, money, or insurance. The victims of bias crimes may even suffer from depression, withdraw from society, or be affected by feelings of fear or helplessness and isolation (ibid., p. 61-63).

40 This impact on the target-community transforms bias crimes into 'message crimes'. By assaulting an individual belonging to a specific group, the perpetrator is telling the wider community of this group that they are different, unwelcome, and could become the next target of the same crime (ibid., p. 41-43. See also N. Hall, *Hate Crime*, Abingdon: Routledge 2013, p. 166).

discriminatory violence acts affect an even wider circle, notably, society in general.[41] In this third context particularly, a condemnation of discriminatory violence reflects a social aversion to discrimination on the grounds of ethnicity, religious intolerance or other forms of bigotry. It represents those values that matter in a society and those that are most affected by discriminatory violence, such as harmony between different groups and the principle of equality. Since discriminatory violence often has a negative impact on victims belonging to groups who have had to endure suffering and loss in the past, measures condemning this type of conduct may be particularly justified.[42] Condemnation is further encouraged in societies that are already characterised by fragile intergroup lines and a heightened risk of civil disorder, because discriminatory violence in these spheres can only deepen existing tensions and social division.[43] Given this manifold impact, it may be asked whether the ECtHR's specific mandate, function and goals justify devoting more attention to discriminatory violence complaints in the context of European human rights. In order to answer this question, the Court's role as it has evolved in recent decades is analysed below.

The Court's initial role, from the 1950s, was – through its judgments – to act "like an 'alarm bell' warning the other nations of democratic Europe that one of their number was going 'totalitarian'."[44] In this context, the Court

41 F.M. Lawrence, *Punishing Hate. Bias Crimes under American Law*, Cambridge/London: Harvard University Press 2002, p. 43-44. See further F.M. Lawrence, 'Racial violence on a 'small island': bias crime in a Multicultural Society', in: P. Iganski (ed.), *The Hate Debate. Should Hate Be Punished as a Crime?*, London: Profile Books Ltd/Institute for Jewish Policy Research 2002, p. 36-53, p. 38-40. Iganski also elaborates on this 'threefold' effect of discriminatory violence, see P. Iganski, 'Hate Crimes Hurt More', in: B. Perry (ed.), *Hate and Bias Crime. A Reader*, New York: Routledge 2003, p. 131-137.

42 F.M. Lawrence, *Punishing Hate. Bias Crimes under American Law*, Cambridge/London: Harvard University Press 2002, p. 167-169; P. Tatchell, 'Some people are more equal than others', in: P. Iganski (ed.), *The Hate Debate. Should Hate Be Punished as a Crime?*, London: Profile Books Ltd/Institute for Jewish Policy Research 2002, p. 54-70, p. 58.

43 B. Levin, 'Hate Crimes. Worse by Definition', 15 *Journal of Contemporary Criminal Justice* (1999), p. 6-21, p. 18. See also O'Nions who underlines this impact in a more contemporary and European context. O'Nions argues in the specific context of hate crimes against asylum seekers that the victims of such crimes are not just the asylum seekers, but the democratic society itself with its inherent values of pluralism and tolerance which are debased and destabilised by such crimes (H. O'Nions, 'What Lies Beneath: Exploring Links Between Asylum Policy and Hate Crime in the UK', 31 *Liverpool Law Rev* (2010), p. 233–257).

44 E. Bates, 'The Birth of the European Convention on Human Rights – and the European Court of Human Rights', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 17-42, p. 21. In another contribution Bates explains how the drafters of the European human rights mechanism envisaged the ECtHR as "a higher safeguard in the vital period when 'liberty is progressively curtailed' on the path to totalitarianism," (E. Bates, *The Evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Human Rights*, New York: Oxford University Press 2010, p. 54). See also S. Greer, 'What's Wrong with the European Convention on Human Rights?', 30 *Human Rights Quarterly* (2008), p. 680-702, p. 681.

was also expected to serve as a guardian of peace in Europe, requiring it to prevent the escalation of incidental discriminatory violence. One example of a case where the Court fulfilled this mission was the *Moldovan* case, concerning the Hădăreni pogrom in Romania. This case involved the killing of three Romani men, the subsequent destruction of fourteen Roma houses in the village of Hădăreni, and, finally, the degrading circumstances under which the Roma victims were forced to live after the pogrom. Presented with the complaints about these events, the Court established that violations took place under Articles 8 (right to respect for private and family life), 3, 6 § 1 (right to a fair trial) and under Article 14, read in conjunction with Articles 6 and 8 of the Convention.[45] Cahn argues that in the *Moldovan* case "the Court was confronted with an event echoing the reasons for which the Court was founded. With the past as mirror, the Court recognised the harms at issue."[46]

In addition to the alarm bell function, the agenda-setting function of the Court is relevant in understanding the Court's special responsibility for addressing discriminatory violence complaints. Gerards emphasises the ECtHR's ability in this respect to place – through the issuing of judgments in individual cases concerning fundamental rights violations – certain topics on the regulative or policy agendas of national legislatures and executive bodies. She mentions the criminalisation of homosexual acts among the examples to further illustrate this function; the Court's condemnation of such legislation or domestic policy could signal to the Member State involved that it should adjust its stance on this issue.[47]

The Court's agenda-setting function is also highlighted specifically in relation to the protection of minority groups more generally from marginalisation, victimisation and even exclusion. This function may only gain in importance given the current asylum and immigration problems in Europe.[48] As suggested, in such situations of tension, "[t]he ECtHR should

45 ECtHR 12 July 2005, 41138/98 and 64320/01 (*Moldovan a.o./Romania*) *(Judgment No. 2)*.

46 C. Cahn, 'The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights', 4 *European Anti-discrimination Law Review* (2006), p. 13-20, p. 19.

47 Gerards identifies three functions for the contemporary Court with the agenda-setting function being the most relevant in this context. The remaining two functions are typified as 'corrective and protective' and 'standard-setting'. The first of the two remaining functions concerns the Court's ability to assist individuals when they have been harmed by violations of the Convention's rights by Member States. This is the Court's most basic role which consists in determining whether States have failed to comply with their obligations under the Convention. For the second remaining function, she stresses the Court's ability to clarify – through its rulings – the minimum level of protection of fundamental rights that should be guaranteed by the Contracting Parties. More precisely, this function refers to the Court's power to provide a uniform meaning of fundamental rights and to define a minimum level of protection of fundamental rights that all Member States must then guarantee (see J.H. Gerards, 'The Prism of Fundamental Rights', 8 *European Constitutional Law Review* (2012), p. 173-202, p. 184-186).

48 B. Çalı, 'The purposes of the European Human Rights System: one or many?', 3 *European Human Rights Law Review* (2008), p. 299-306, p. 302.

[…] operate as a barometer, pointing to dangerous levels of populism, deep prejudices and the reactionary or hostile treatment of individuals who hold minority views or belong to minority groups."[49]

In relation to the foregoing, the Court's proclaimed constitutional nature should be mentioned. There has been debate in recent years about the nature of the ECtHR. More precisely, it is questioned whether the Court is constitutional in nature or whether it aims to serve individual justice. Greer frames how these two doctrines oppose one another. The individual justice model "exists primarily to provide redress for Convention violations for the benefit of the particular individual making the complaint, with whatever constitutional or systemic improvements at the national level might thereby result."[50] This stands in contrast to the constitutional model which implies that the Court's primary responsibility is to select and to adjudicate the most serious alleged violations and to highlight specific systemic compliance problems in Member States relating to human rights matters.[51] A number of academic observers are in favour of a more constitutional role for the Court or have simply observed that the Court has constitutional features.[52]

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49 Ibid.

50 S. Greer, 'What's Wrong with the European Convention on Human Rights?', 30 *Human Rights Quarterly* (2008), p. 680-702, p. 684.

51 Ibid., p. 684-685.

52 One such protagonist of constitutionalism is Wildhaber, who stresses that individual relief is merely "secondary to the primary aim of raising the general standard of human rights protection and extending human rights jurisprudence throughout the community of Convention States" (L. Wildhaber, *The European Court of Human Rights / 1998–2006. History, Achievements, Reform,* Kehl: N.P. Engel 2006, p. 118). See also Wildhaber's contribution with Steven Greer: S. Greer & L. Wildhaber, 'Revisiting the Debate about 'constitutionalising' the European Court of Human Rights', 12 *Human Rights Law Review* (2012), p. 655-687. See also S. Greer, 'What's Wrong with the European Convention on Human Rights?', 30 *Human Rights Quarterly* (2008), p. 680-702, p. 702; R. Harmsen, 'The European Convention on Human Rights after Enlargement', 5 *The International Journal of Human Rights* (2001), p. 18-43. See also, more indirectly, the views of Gerards, who stresses that the Court ought to deal solely with applications which concern 'real' fundamental rights issues and not those concerning 'ordinary' individual interests (J.H. Gerards, 'The Prism of Fundamental Rights', 8 *European Constitutional Law Review* (2012), p. 173-202). Additionally, she makes an express call for constitutionalism in: J. Gerards, 'The scope of ECHR Rights and institutional concerns. The relationship between proliferation of rights and the case load of the ECtHR', in: E. Brems & J. Gerards (eds.), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, New York: Cambridge University Press 2013, p. 84-105, p. 101.
There are, however, also academics who oppose the stance that the ECtHR is a constitutional court: see B. Çali, 'The purposes of the European Human Rights System: one or many?', 3 *European Human Rights Law Review* (2008), 3, p. 299-306, p. 304-305; J. Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 181-203, p. 187.

ECtHR cases on discriminatory violence at least serve the purpose of rendering individual justice, of course, as do most ECtHR judgments on various human rights topics. These judgments, after all, concern the rights of individuals vis-à-vis the State. Taking into consideration that discriminatory violence judgments concern the most fundamental rights of the Convention and represent real and crucial issues in Europe, they further serve the constitutional model and its purposes. It may be argued, therefore, especially in light of the constitutional approach, that discriminatory violence deserves more attention in the Court's case law, due to its particularly grave nature and potentially wide implications.

The Court has sometimes missed the opportunity to fulfil this constitutional role. A few cases which represented serious allegations of discriminatory violence in the form of pogroms can be pointed to, in this regard. The examples concern systematic arson attacks against Romani citizens in certain parts in Romania. In these cases, the non-Roma villagers burned and otherwise destroyed several houses and other property belonging to the Romani population, in order to chase Roma inhabitants out of the villages. The cases were struck out of the list[53] after Romania had offered compensation for some of the damage suffered by the applicants during the events in question. Sandland stresses that a casual observer might ask the question how it can be appropriate for a court, dedicated to the hearing of cases of alleged abuse of human rights, to refuse to hear cases which exhibit such serious abuses.[54] Sandland's observation is in line with the opinion of the applicants' representatives in these cases, who had requested the Court to dismiss Romania's proposal and to continue with the examination of the merits of the cases. They called for judgments that would expose the flaws of the Romanian judicial system and its systematic failure to provide redress for Roma victims. Additionally, according to these representatives, judgments on these issues would hold "great symbolic value in particular as regards the new forms of discrimination against the Roma population (with regard to access to education, health, employment or other public

53 The Convention enables a single judge to strike out an individual application from the Court's list of cases, where such a decision can be taken without further examination (Article 27 § 1 ECHR). The same applies to a committee of three judges, which can take such a decision by unanimous vote (Article 28 § 1 ECHR). The Court may at any stage of the proceedings also decide to strike out an application from its list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue his or her application, or the matter has been resolved, or for any other reason established by the Court, if it is no longer justified to continue the examination of the application (Article 37 § 1 ECHR).

54 R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008), p. 475-516, p. 476. The cases referred to are ECtHR 26 April 2007, 57884/00 (*Kalanyos a.o./Romania*) (Striking Out), paras. 27-29, and ECtHR 26 April 2007, 57885/00 (*Gergely/Romania*) (Striking out), paras. 24-26. Another, similar issue, not referred to by Sandland, was ECtHR 26 May 2009, 62954/00 (*Tănase a.o./Romania*) (Striking out).

services)."[55] The Court, however, was not convinced of the usefulness of another judgment on the merits, since it had exposed the flaws of the Romanian judicial system earlier in the *Moldovan* case.[56] It stressed that the measures proposed by the respondent State also provided effective reparation of the alleged violations in these cases.[57]

The Court's approach in these cases was inadequate in view of the importance of offering adequate human rights protection to disadvantaged groups.[58] Pogroms are violent riots which aim to massacre or persecute a certain group. Where allegations of such grave human rights' violations are presented at the Court, it would seem to be insufficient merely to point to previous case law or indicate that a Member State has offered compensation for such atrocities. In view of its constitutional role, and especially where pogroms occur repeatedly in certain areas, the Court could emphasise this. Hence, it should deliver judgments which demonstrate that certain groups are repeatedly mistreated in a Contracting Party, condemn such pogroms and continue to remind Member States of how important it is to prevent them.

Another reason why the Court should dedicate substantial attention to discriminatory violence complaints is because through its judgments it is able to provide a historical record of the events. If the Court were to also condemn such events it could contribute to preventing their repetition.[59] This especially applies to cases which concern Contracting Parties where there are frequent, repeated incidents of discriminatory violence, or larger discriminatory violent events such as pogroms in areas populated by Romani individuals. Court rulings on human rights are capable of setting an example and could be instructive. They could contribute to establishing the facts, and political and social rectification. Judgments that elaborate on the circumstances of the case "bring about the facts, their characteristics, meaning and support, and contribute to the judicial solution, both as regards the evaluation of the facts and the reparations and guarantees of

55 ECtHR 26 April 2007, 57884/00 (*Kalanyos a.o./Romania*) (Striking Out), para. 20, and ECtHR 26 April 2007, 57885/00 (*Gergely/Romania*) (Striking out), para. 17.

56 ECtHR 12 July 2005, 41138/98 and 64320/01 (*Moldovan a.o./Romania*) (*Judgment No. 2)*.

57 ECtHR 26 April 2007, 57884/00 (*Kalanyos a.o./Romania*) (Striking Out), paras. 29-31, and ECtHR 26 April 2007, 57885/00 (*Gergely/Romania*) (Striking out), paras. 26-28.

58 Similarly, in *Karaahmed v. Bulgaria*, the Court failed to condemn the discriminatory nature of a violent demonstration by 150 members of the Bulgarian far-right political party 'Ataka' (meaning: 'Attack') near the Banya Bashi Mosque in Sofia against Muslim worshippers who were gathering for the regular Friday prayer. See ECtHR 24 February 2015, 30587/13 (*Karaahmed/Bulgaria*). This case is discussed in detail in J. Mačkić, case note on: ECtHR 12 May 2015, 73235/12, *EHRC Cases* 2015/155 (*Identoba a.o./Georgia*). For more information on Ataka, see Y. Sygkelos, 'Nationalism versus European integration: the case of ATAKA', 43 *East European Quarterly* (2015), p. 163-188 (online).

59 See L. Burgorgue-Larsen & A. Úbeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary*, New York: Oxford University Press 2011, p. 318-320. See also IACtHR 29 November 2006, Series C No. 162 (*Case of La Cantuta/Perú*) (Merits, Reparations and Costs), para. 57.

non-repetition."[60] Where an ordinary court decision may go without any great reflection on the facts or detailed descriptions of such, a human rights tribunal – aiming to create awareness of human rights concerns and preventing new breaches from taking place – cannot allow itself to leave the context in which the atrocities took place unexamined.

One final note here concerns an encompassing, fundamental principle which shapes the Court's identity, and thus its function and goals, and that is the principle of subsidiarity. This principle articulates the ECtHR's relationship with domestic authorities. It indicates that the task of interpreting the Convention and ensuring respect for the rights enshrined therein lies primarily with the authorities of the Contracting States rather than with the Court. Only where the domestic authorities fail in meeting their obligations under the Convention, may the Court step in.[61] This approach is linked to the perception that the Court ought not to function as a court of the fourth instance or a further court of appeal.[62] According to Ryssdal, this subsidiarity principle reflects three features of the Convention system. Firstly, the Convention does not list exhaustive rights and freedoms that ought to be protected in Member States: the Contracting Parties may always offer more and a higher level of protection than that offered by the Convention system. Secondly, since the Convention merely lays down standards of conduct, Member States remain free to choose the means by which to implement those standards. Thirdly, there is a perception that the national authorities are in a better position than the Court to strike a balance between the general interests of the community and the rights of the individual.[63] This last feature is strongly connected with the margin of appreciation, a principle that refers to the room for manoeuvre that the Court provides to the national authorities in fulfilling their obligations under the Convention.[64]

The idea of subsidiarity also applies in ECtHR case law regarding violent events. Yet, in cases of possible infringement of fundamental rules as set forth in Articles 2 or 3, the Court has also underlined that it undertakes a particularly thorough scrutiny even if certain domestic proceedings and

60 IACtHR 29 November 2006, Series C No. 162 (*Case of La Cantuta/Perú*) (Merits, Reparations and Costs), *separate opinion of Judge S. García Ramírez*, para. 17.

61 Interlaken Follow-up, *Principle of Subsidiarity. Note by the Jurisconsult*, 8 July 2010, p. 2 (online).

62 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 17.

63 R. Ryssdal, 'The coming of age of the European Convention on Human Rights', 1 *European Human Rights Law Review* (1996), p. 18-29, p. 24-25.

64 S. Greer, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Strasbourg: Council of Europe Publishing 2000, p. 5 (online); D. Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Cambridge: Centre for European Legal Studies 2012, p. 2 (online).

investigations have already taken place.[65] Thus, although fully aware of its subsidiary role vis-à-vis the Member States, the Court is still prepared to be more critical of the conclusions of the domestic courts in relation to complaints related to Articles 2 and 3, not least, because of the fundamental nature of the rights enshrined in these provisions.[66] The question of how the principle of subsidiarity should guide the Court in cases of discrimination, particularly discriminatory violence, may also depend on an appreciation of the Court's function and expected role. Taking into consideration that the ECtHR retains an alarm bell function, and also has an agenda-setting function and a constitutional role, this implies that the subsidiarity principle ought to be applied with due regard to the gravity and nature of discriminatory violence complaints. This means that the ECtHR ought to take an active stance to be able to properly signal discriminatory violence when it occurs and to condemn this type of wrongful conduct.

1.5 The evidentiary framework and the rules of evidence: discriminatory violence cases at the ECtHR

There is no formal legal framework governing the law of evidence in ECtHR proceedings. Besides Article 38 ECHR (examination of the case) and certain other provisions included in the Rules of Court and the 'Annex to the Rules (concerning investigations)', there are no further indications as to how the Court should go about establishing the facts in a case. There are no rules concerning the distribution of the burden of proof or the use of standards of proof in the Convention or any other relevant texts. Further, there are no clear rules that address issues of admissibility and the gathering of evidence at the ECtHR. This vacuum in the legal documents has led to the rules of evidence developing mainly through the case law of the Court.

The Court maintains a unique approach towards the collection and examination of evidence. Akin to other supranational or international courts, such as the International Court of Justice (ICJ) and the Inter-American Court of Human Rights (IACtHR), the ECtHR is concerned with determining State

65 ECtHR 26 April 2011, 25091/07 (*Enukidze and Girgvliani/Georgia*), para. 286; ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), para. 155.

66 Articles 2 and 3 enshrine "the basic values of the democratic societies making up the Council of Europe" (ECtHR, 27 September 1995, 18984/91 (*McCann a.o./United Kingdom*) (GC), para. 147; ECtHR 7 July 1989, 14038/88 (*Soering/United Kingdom*) (GC), para. 88). Article 2, which protects the right to life, is one of the few provisions in the Convention that cannot be derogated from in a time of war or other public emergency. Derogation may only be made from Article 2 "in respect of deaths resulting from lawful acts of war" (Article 15 § 2 ECHR, cited in: D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 203). Breaches of Article 3, a provision which entails a prohibition of torture or inhuman or degrading treatment or punishment, are *never* permitted and cannot be justified (ibid., p. 235-236).

responsibility, as opposed to national legislatures and courts, and international criminal tribunals. This task is specifically arranged through Article 19 ECHR (establishment of the Court), which reads as follows:

> "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court'. It shall function on a permanent basis."

Article 19 implies that the ECtHR primarily determines whether the respondent State has violated the rights and freedoms enshrined within the Convention and, therefore, monitors State compliance with international rules.[67] For this reason the Court's proceedings are not 'civil' since they do not regulate private relations between legal subjects, nor are they 'criminal', as the Court cannot penalise individual State agents for individual wrongful conduct they committed as national or international criminal judges may do. ECtHR proceedings are best characterised as *sui generis* and are to be understood in the broader setting of the Court's mandate and function.[68] This means that the Court's evidentiary rules are also *sui generis*, which becomes apparent from the Court's terminology in relation to its own rules of evidence. The ECtHR may borrow certain concepts and terminology from other domestic and international systems, including concepts such as the 'burden of proof' and the 'standard of proof'. It may designate 'beyond reasonable doubt' as the level of persuasion, a term that is most often applied in common law criminal systems. However, owing to its specific adjudicatory

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67 Alter typifies this function as 'international law enforcement', see K.J. Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review', in: J.L. Dunoff & M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art*, New York: Cambridge University Press 2013, p. 345-370, p. 350.

68 In that sense, the ECtHR is very similar to the ICJ and the IACtHR. In the context of the ICJ, a tribunal that also examines a variety of issues, a similar observation has been made, namely that the law of international responsibility is neither civil nor criminal, yet simply international (J. Crawford, *First Report on State Responsibility*, 1 May 1998, A/CN.4/490/Add.1, at par. 60 iv, cited in: L.R. Breuker, 'Waarheidsvinding, genocide en het Internationaal Gerechtshof', in: J.H. Crijns, P.P.J. van der Meij & J.M. ten Voorde (eds.), *De Waarde van Waarheid. Opstellen over Waarheid en Waarheidsvinding in het Strafrecht*, Den Haag: Boom Juridische Uitgevers 2008, p. 237-267, p. 241-242).
In the context of the IACtHR, it has also been observed that the function of this tribunal is to supervise compliance by the Contracting Parties with the obligations under the American Convention of Human Rights and, if necessary, to formally recognise their international responsibility for violations of that document. The jurisdiction of the IACtHR however, is neither that of an international criminal court or tribunal nor that of a domestic court (L. Burgorgue-Larsen & A. Úbeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary*, New York: Oxford University Press 2011, p. 59-60). The IACtHR has stated that "it can nor should not discuss or judge the character of the crimes attributed to the alleged victims, certainly very grave, as that is reserved to the appropriate criminal court" (IACtHR 4 September 1998, Series C No. 41 (*Castillo-Petruzzi a.o./Peru*) (Preliminary Objections), para. 83).

task, it attributes a unique and autonomous meaning to these evidentiary notions.

This study focuses on three evidentiary issues in cases of discriminatory violence. Firstly, it explores how the Court determines the accuracy of applicants' allegations. Here the notion of 'standard of proof' becomes relevant, since this is used as an instrument to express whether the information about the facts is sufficiently persuasive in order to find that there has been a violation under the Convention. The standard of proof is understood as "the degree or level of proof demanded in a specific case, such as 'beyond a reasonable doubt' or 'by a preponderance of the evidence'."[69] Secondly, it focuses on the manner in which the ECtHR collects evidence about the facts in a case. The notion of 'burden of proof' plays a central role in this context. The burden of proof is understood here as "[a] party's duty to prove a disputed assertion or charge."[70] In international trials this concept has been described in a similar manner, i.e. as "the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with the rules, acceptable to, the tribunal."[71] In this context, this study surveys the circumstances in which the burden of proof may shift from the applicant to the respondent State. One important way in which such a shift may be triggered is through the use of presumptions and inferences under specific circumstances. Most notably, in the specific context of discriminatory violence, it is questioned whether in cases of *systemic* violence inflicted upon individuals belonging to a disadvantaged group, a *prima facie* case of discriminatory violence could be inferred and the burden could shift immediately to the respondent State. In this study systemic discriminatory violence may take two forms. First, individual acts of direct discriminatory violence (which may be intended, unintended or based on a non-conscious bias and stereotypes) may form a pattern which reflects an organisational culture or administrative structure which condones or tolerates such acts. The second form may occur through neutral legislation, policies or practices which result in violence being disproportionately inflicted upon members of certain groups and which cannot be justified. This second form is, in essence, indirect discrimination.[72] Thirdly, the study looks at the types of evidentiary materials that may be used by the Court in order to establish a violation of Article 14 read in conjunction with Articles 2 or 3. The term 'evidence' here is taken to mean informa-

69 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 709.

70 Ibid., p. 91.

71 M. Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals*, The Hague: Kluwer Law International 1996, p. 30.

72 This description of systemic discriminatory violence is inspired by explanations offered by Craig, who discusses systemic discrimination faced by ethnic minorities in the employment sphere. See R. Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*, Leiden/Boston: Martinus Nijhoff Publishers 2007, p. 94.

tion by which facts tend to be proved.[73] In the light of evidentiary material, this study takes the following as its starting point. In order to ascertain the facts of a case concerning discriminatory violence, the Court may make use of evidentiary material that it has itself collected or that was submitted to the Court by any of the parties involved in a case. In view of its subsidiary nature, the Court most often establishes facts on the basis of the domestic case file. Additional evidence – thus *not* documented in the domestic case file – may include, for example, statistics or reports from intergovernmental organisations or NGOs (non-governmental organisations), which record discriminatory violence perpetrated against certain groups in certain Member States.

Evidentiary concepts such as the standard of proof, the burden of proof and evidentiary material are interrelated. The burden of proof is used to indicate the party that bears the duty to prove the facts of a case, whereas the standard of proof is used to express the degree to which the proof must be established.[74] In order to shift the burden from one party to the other and in order to reach a certain level of persuasion in a case, there must be sufficient evidentiary material. Further, these three evidentiary concepts may vary in accordance with the type of complaint presented at the Court.[75] For example, the Court has recognised that in respect of alleged discrimination in employment or the provision of services, the burden shifts more easily to the respondent State, as opposed to cases concerning discriminatory violence.[76] Through the manner in which the Court applies these evidentiary concepts, it could take a more active stance against discriminatory violence or a less active one, by making it easier or more difficult to prove. At the same time, the legitimacy of the ECtHR's case law will depend on the quality of the evidentiary rules.

The ECtHR's evidentiary framework has not yet been adequately analysed. Therefore, this study will fill this gap while looking at cases of discriminatory violence. It will thus contribute to the understanding of the procedural law of the Court.

1.6 Methodology

Given the gaps in the relevant legal documents on the rules of evidence, the primary sources for this study are ECtHR case law and literature on the Convention and ECtHR procedure. Insofar as the study aims to set out how the ECtHR's evidentiary framework in case law on discriminatory vio-

73 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 2.

74 J. Auburn, 'Burden and Standard of Proof', in: H.M. Malek (ed.) *Phipson on Evidence*, London: Thomson Reuters (Legal) Limited 2010, p. 149-186, p. 149.

75 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.

76 Ibid., para. 157.

lence has been deployed so far, it was necessary to subject ECtHR cases on this topic to careful scrutiny. Thus, for this purpose, cases were selected for in-depth consideration in which complaints arising from Article 14 read in conjunction with Articles 2 or 3 were presented to the Court. The central method underlying this thesis is therefore a detailed and thorough analysis of the most relevant ECtHR case law on discriminatory violence and – through such analysis – to test the adequacy of the evidentiary framework in light of the Court's role as discussed in section 1.4.

A very selective comparative analysis was also used to assist with addressing the normative questions of whether the current evidentiary framework in ECtHR cases concerning discriminatory violence is adequate, and whether it ought to be improved. To that end, other relevant case law of the Court has been included in this study, notably Article 2 and Article 3 cases and other discrimination cases concerning differential treatment in education, among other things. This analysis is useful for at least two reasons. Firstly, in these cases the Court implemented certain tools which facilitated the applicants' task in proving a number of difficult issues, such as a State's responsibility for the disappearance of a family member or the presence of a discriminatory effect of a certain domestic rule or policy. Therefore, an analysis of these cases illustrates the avenues that the Court has introduced in its case law that relieve the applicants of their burden to prove State responsibility and, following from that, asks whether the ECtHR should apply a similar approach towards evidentiary issues in cases concerning discriminatory violence. Secondly, this analysis comparing ECtHR cases on discriminatory violence on the one hand and ECtHR cases of comparison on the other hand demonstrates why certain types of discriminatory violence complaints are more difficult to prove.

Where relevant, this study also briefly considers how the legal systems of the United States of America, England and Wales and – to a very minor extent – Australia, deal with the issue of proving discriminatory violence. In addition, this study reflects on the manner in which courts such as the ICJ and the IACtHR deal with evidentiary issues in case law concerning discriminatory violence and other forms of violence. Although these two adjudicatory organs have not dealt extensively with discrimination issues, the manner in which they accommodate their evidentiary framework is, nevertheless, worth exploring. Similar to the ECtHR, the ICJ and the IACtHR establish State responsibility. The information resulting from such an exploration may be valuable in order to determine whether specific solutions or options in these systems, if there are any, could inspire the ECtHR to apply similar solutions or options in its own case law.[77] It must be emphasised though, in this regard, that the Convention system itself serves as the common thread throughout the whole study. All these other systems remain

77 M. Andenas & D. Fairgrieve, 'Intent on making mischief: seven ways of using comparative law', in: P.G. Monateri (ed.), *Methods of Comparative Law*, Cheltenham: Edward Elgar Publishing Limited 2012, p. 25-60, p. 51.

in the background; they are merely used as inspiration and for contrast in order to reflect on the adequacy of the ECtHR approach towards evidentiary issues in cases concerning discriminatory violence.

1.7 Structure

This study first lays a foundation which enables a better understanding of the evidentiary framework in the specific context of discriminatory violence. Under this umbrella, chapter 2 discusses 'discrimination' and 'discriminatory violence' in the Convention and the way in which these concepts have gained meaning at the Court. Chapter 3 addresses fact-finding processes and the gathering of information and facts for the ECtHR in general. Based on this foundation, chapters 4-6 look at the adequacy of the Court's evidentiary framework in the specific field of discriminatory violence, through an exploration of (1) the standard of proof in cases of discriminatory violence; (2) the circumstances under which the burden of proof may shift from the applicant to the respondent State in such cases, and; (3) the various types of evidentiary materials that may be used to establish this wrongful conduct.

Chapter 2 sets out the substantive issues of discrimination in general and discriminatory violence specifically in the context of the ECtHR legal system. It answers the question of *what it is* that must be proved at the Court in the various types of discriminatory violence complaints. In this context, it makes a distinction between *factual elements* or *issues of fact* that must be proved and between *legal concepts* or *issues of law* that play a role in the various types of discriminatory violence, such as demonstrating a discriminatory motive in some cases, or demonstrating a discriminatory effect in others.

To establish the relevant factual elements and legal concepts in discriminatory violence cases, chapter 2 first outlines three types of discriminatory violence complaints. In discriminatory violence cases applicants complain that State agents or private individuals killed or beat victims because the perpetrators were motivated by prejudice or intolerance towards those victims based on discriminatory grounds, such as national origin, ethnicity, religion, gender identity, sexual orientation or disability. Victims of discriminatory violence thus argue before the ECtHR that a certain Contracting Party violated the prohibition of discrimination (Article 14) read in conjunction with the right to life (Article 2) or the prohibition of torture or inhuman or degrading treatment or punishment (Article 3) of the ECHR. There are three different types of discriminatory violence cases in this setting. The first type concerns the situation in which applicants allege that a Member State, through its State agents, directly breached Articles 2 and/or 3 based on discriminatory motives, hence also breaching Article 14. In essence, this type of complaint may amount to establishing a violation of the negative duty of State authorities to refrain from inflicting discriminatory violence.

The argument in these cases is that State agents ill-treated a victim or took a victim's life because they themselves were motivated by hostility towards that victim as a member of a certain group. The second type of discriminatory violence cases concern the situation where State authorities failed in meeting their positive procedural duty to conduct an effective investigation into allegations of discriminatory violence and to identify and punish those responsible, regardless of whether the violence was committed by private persons or State agents. According to the Court, an investigation is effective if, in principle, it is capable of leading to an establishment of the facts of the case and the identification and punishment of those responsible.[78] Specifically in the context of discriminatory violence allegations, the Court has highlighted that under this duty State authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of discriminatory violence.[79] Therefore, in this study, the duty to effectively investigate has been interpreted in a broad manner; it refers to police investigation, prosecutorial decisions, and judicial investigation. A variation of a discriminatory violence claim in this context may be that State agents displayed discriminatory attitudes while investigating violent crimes that were inflicted upon individuals belonging to certain groups, thus, that discriminatory attitudes were causal to the ineffectiveness of the investigation.[80] The third type of discriminatory violence cases concerns the situation in which State authorities failed in their duty to take adequate positive preventive measures to protect victims from discriminatory violence, despite victims' requests for protection from this kind of wrongful treatment. Here too, there is a variation where State agents display discriminatory attitudes towards victims of violence who file such requests for protection.[81]

Subsequently, chapter 2 highlights a number of features inherent to Article 14 generally, which may be influential to the manner in which the Court deals with discriminatory violence cases. Finally, it introduces two significant ways in which discriminatory violence complaints may be categorised, i.e. by distinguishing between formal and substantive equality and distinguishing between direct and indirect discrimination. These concepts overlap to some extent, because a recognition of indirect discrimination is

78 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), para. 51.
79 Ibid., para. 52.
80 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98.
81 The three forms of discriminatory violence complaints are discussed in detail in section 2.2 of this study.

a form of a substantive conception of equality.[82] The substantive conception of equality and indirect discrimination are particularly interesting in this context, because they especially allow the Court to address questions of *systemic* disadvantage or oppression of certain groups.[83] Therefore, the final part of this chapter considers how the ECtHR generally views different types of cases of discriminatory violence (thus, as complaints of formal or substantive inequality or as examples of direct or indirect discrimination respectively). These categorisations are useful because, in subsequent chapters particularly, it will be asked how the Court could promote, through its evidentiary framework, a more substantive conception of equality in certain cases of discriminatory violence or typify some of these cases more often as examples of indirect discrimination in order to offer more protection to disadvantaged groups.

The distinction between direct and indirect discrimination is further crucial for two reasons. In the first place, because it has been suggested that the Court should alter its approach in discriminatory violence cases – which are mainly regarded as examples of direct discrimination – by taking inspiration from its approach to issues of proof in indirect discrimination case law.[84] In the second place, the direct/indirect discrimination pair may help to understand why certain types of discriminatory violence are so difficult to prove. Some of these types of complaints require applicants to prove *motive* behind the violent conduct, and are thus considered as cases of direct discrimination, whereas in indirect discrimination claims it is sufficient to prove a discriminatory *effect* of a legal rule or government policy. Motive is connected to the question *why* a person committed a certain offence. It ought *not* to be confused with the term *intent*, which concerns the question of whether a

82 O'Connell argues that substantive conceptions of equality come in different forms, but tend to take as a starting point the idea that some persons, often because of their membership in a particular group, are systematically subject to disadvantage, discrimination, exclusion or even oppression. According to O'Connell, one of the central questions under a substantive conception of equality is not so much whether the law makes distinctions, but whether the *effect* of the law is to perpetuate disadvantage, discrimination, exclusion or oppression. See R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 213. As discussed below, indirect discrimination claims also focus on a potential discriminatory effect of certain legislation or measures. Hence, recognition of indirect discrimination is, in fact, a form of a substantive conception of equality.

83 Ibid., p. 212-213.

84 M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 502.

person *meant* to commit the offence.[85] Although the terms motive and intent are sometimes confused in discrimination law, this study is mainly concerned with the relevance of a respondent State's *motive*.[86]

Subsequently, in chapter 3, the study identifies the different ways in which information about the facts of a case is gathered at the Court and the actors involved in the process of establishing those facts. Through this exercise, it aims to highlight which of these means or actors may be most useful for establishing facts in discriminatory violence complaints. In this context, it introduces different players who contribute to the fact-finding process, including applicants and respondent States, as well as external actors. Additionally, chapter 3 sets out the Court's own investigatory powers enabling it to collect evidence and to determine the facts in a case. This part of the thesis explains how facts in the Convention system are gathered mainly through case law which relates to Articles 2 and 3 of the Convention, because the various tools that the Court uses to establish facts have developed mostly in complaints concerning these two provisions.

Chapter 4 answers the question of whether the ECtHR's use of the standard of proof 'beyond reasonable doubt' in discriminatory violence cases poses too great of an obstacle to finding violations in this field of ECtHR case law, and whether there are any alternative standards of proof that the Court could use here. This chapter mainly discusses issues related to the standard of proof in cases where it was alleged that State agents inflicted discriminatory violence themselves, since it is only under this type of complaint that the Court actually expressly uses this standard of proof. Chapter 4 first provides a definition of the notion 'standard of proof' and presents an overview of often-used standards of proof that are derived from common law and civil law domestic systems in general. Subsequently, it identifies the standards of proof that the ECtHR applies in its case law. Thereafter, it explores the meaning of the standard of proof 'beyond reasonable doubt' in the Court's case law, which appears to be the standard of proof most often used. As a final step, it asks what the origins of this standard in ECtHR case law are, how it is interpreted by the Court and whether it can be regarded as

85 In criminal law, intent is described as the aim of a person's actions (for example, did a person kill another person because he or she intended so or was this person simply reckless). Motive, on the other hand, is described as the reason why a person undertook a certain action. See M. Bell, 'Direct Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 185-322, p. 227; N. Hall, *Hate Crime*, Abingdon: Routledge 2013, p. 178; J. Morsch, 'The Problem of Motive in Hate Crimes: the Argument against Presumptions of Racial Motivation', 82 *Journal of Criminal Law & Criminology* (1991-1992), p. 659-689, p. 665. See also, for an ECtHR context, O.M. Arnardóttir, 'Non-discrimination Under Article 14 ECHR: the Burden of Proof', *Scandinavian Studies In Law*, p. 26 (online).

86 M. Bell, 'Direct Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 185-322, p. 227.

too great an obstacle in proving discriminatory violence. Especially in light of this last question, the final sections of the chapter offer reflections on standards of proof used by other courts that are also concerned with establishing State responsibility, particularly the ICJ and the IACtHR. These comparative reflections help to answer the question of whether it is necessary for the Court to abandon the 'beyond reasonable doubt' standard of proof and whether applications of some other standard, if any, can be derived from the systems compared that would be more adequate and more appropriate for cases concerning discriminatory violence.

Chapter 5 surveys the circumstances under which the ECtHR shifts the burden of proof from the applicant to the respondent State in the three types of discriminatory violence complaints. To do so, it first explores the general meaning of the notions crucial to this exercise, which are: the 'burden of proof' and 'presumptions and inferences'. Presumptions and inferences form, in essence, important techniques to shift the burden of proof from one party to the other. Thereafter, this chapter describes and analyses how the ECtHR distributes the burden of proof between parties in violence cases without a discriminatory nature, hence in complaints under Article 2 and Article 3 of the Convention. More specifically, it shows how presumptions and inferences may influence the distribution of the burden of proof in such cases. Subsequently, it demonstrates how the burden is distributed between parties by the ECtHR in cases in which it is argued that the violence had a discriminatory nature, thus the three types of complaints regarding Article 14 ECHR read in conjunction with Article 2 or Article 3. More importantly, it asks whether the ECtHR should not implement certain techniques in its case law that may render the shifting of the burden of proof from the applicant to the respondent State easier under certain conditions in such cases. The analysis mainly focuses on complaints where it was alleged that State agents inflicted the violence on the basis of discriminatory motives, as these are the most difficult to prove. It explores, in particular, the avenues for shifting the burden of proof from the applicant to the respondent State in cases concerning violence inflicted by State agents upon victims from a particular group that is generally one of the most attacked groups in the respondent State concerned. Hence, in other words, this final part of chapter 5 considers the question of whether the alleged discriminatory nature of violence inflicted by State agents may be more easily accepted by the Court in cases where it can be established that the presumed victim belongs to a disadvantaged group that is systemically the target of violence in a particular Member State. In order to answer this last question, the study explores two possibilities to shift the burden from the applicant to the respondent State. First, it asks whether the Court could apply the same rules related to the distribution of the burden of proof in this type of discriminatory violence complaints as it has applied in cases concerning indirect discrimination, in this way contributing to a more substantive conception of equality. However, if it appears to be difficult to transfer the rules on the distribution of the burden of proof from indirect discrimination cases to this type of complaint, it

could be asked whether a new method can be introduced which enables the burden to be shifted in cases where violence inflicted by State agents upon a particular group appears to be systemic.

Chapter 6, lastly, asks what types of evidentiary materials the ECtHR may use to prove the three different types of discriminatory violence. In essence, this chapter pursues chapter 5's exploration of whether discriminatory violence must be linked to the individual perpetrator, or whether it may be inferred from a wider context of violence repeatedly inflicted upon members of a certain group in a Member State. It thus examines the use of statements and other elements from domestic case files involving a discriminatory motive by the perpetrator. It also discusses the use of statistics and reports of international organisations and NGOs and their potential for establishing systemic discriminatory violence.

The study concludes with chapter 7, where it is evaluated whether the evidentiary framework employed by the European Court of Human Rights in discriminatory violence cases is adequate. Where relevant, it offers suggestions for improvement.

2 Ordering discriminatory violence: three types of complaints

2.1 Introduction

The right to equality is generally considered one of the most fundamental rights.[1] It is mentioned in influential texts, such as the Fourteenth Amendment to the US Constitution, which guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and in Article 26 of the International Covenant on Civil and Political Rights, which emphasises that all persons "are equal before the law and are entitled without any discrimination to the equal protection of the law."[2] The Convention for the Protection of Human Rights and Fundamental Freedoms also includes a non-discrimination clause, which is guaranteed in Article 14 ECHR. This provision imposes a duty on Contracting Parties, acting within the scope of Convention rights, not to discriminate on the grounds listed in the provision, unless the discrimination can be justified.[3] In contrast to other jurisdictions, Article 14 ECHR can only be invoked in connection with one of the other rights protected by the Convention. This feature is also typified as the 'accessory character' of Article 14. For this reason, Article 14 has a narrower scope of application than the 'free-standing' equality provisions, such as Article 26 of the International Covenant on Civil and Political Rights.[4]

This chapter brings together, orders and characterises three distinct types of discriminatory violence complaints as they appear in Article 14 case law of the ECtHR. The main purpose of this chapter is to demonstrate *what it is* that must be proved under these three types of discriminatory violence complaints and to question why some of the forms of discriminatory violence are more difficult to prove than others. In this regard, it makes a distinction between factual elements and legal concepts that must be proved for each type.

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1 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 211.

2 The remainder of this provision reads that "[i]n this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

3 The text of this provision had already been laid down in section 1.3. See also R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 211.

4 See O'Connell (2009), ibid.

First, the elements[5] that must be proved in the three different types of discriminatory violence complaints are discussed in section 2.2. Thereafter, section 2.3 provides a substantive description of the prohibition of discrimination under Article 14 ECHR, emphasising some general features of Article 14. Most attention is devoted to the accessory character of this provision which allows the Court to choose to rule on discrimination complaints on the basis of provisions other than Article 14. In this context, it is particularly questioned whether the accessory character prevents the Court from dealing with discriminatory violence complaints under Article 14 itself.[6] Finally, a distinction between formal and substantive equality, and direct and indirect discrimination, respectively, is made in section 2.4. As previously indicated in section 1.7, it may be asked whether a more substantive conception of equality must be developed in complaints of discriminatory violence and whether in these cases evidentiary rules must be applied akin to those in ECtHR indirect discrimination case law as this would provide the Court with a greater opportunity to address questions of systemic disadvantage and oppression of certain groups. Therefore, in the final section, an analysis is conducted of the ways in which the Court approaches the three types of discriminatory violence complaints, thus as cases of formal or substantive equality or as cases of direct or indirect discrimination.

2.2 Three types of discriminatory violence complaints

Complaints brought before the ECtHR under the auspices of Article 14 read in conjunction with Article 2 or Article 3, may take different forms. The different types of discriminatory violence complaints are basically aligned with the different types of negative and positive obligations that arise from the relevant principal provisions, i.e. Articles 2 and 3. The following table sets out the different types of discriminatory violence complaints occurring in ECtHR case law.

5 The term 'elements' used in this thesis was derived from other academic literature, in which the phrase 'constitutive elements of proof' has been used to indicate what issues should be proved in a discrimination case. See M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 23; G. Bindman, 'Proof and Evidence of Discrimination', in: B.A. Hepple & E.M. Szyszczak (eds.), *Discrimination: The Limits of Law*, London: Mansell Publishing Limited 1992, p. 50-66.

6 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 212.

The negative duty of State officials to refrain from inflicting discriminatory violence	**The positive duty of State officials to effectively investigate discriminatory violence and to identify and punish those responsible**		**The positive duty of State officials to take preventive measures against discriminatory violence**	
Ill-treatment or killing of individuals by State agents motivated by hostility towards the victims based on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status	State agents displaying a discriminatory attitude towards an individual belonging to a certain group, while investigating, prosecuting or adjudicating complaints about violence inflicted upon this individual or his or her family member	Failure of State authorities to conduct an effective investigation into allegations of discriminatory violence or to identify and punish those responsible, without regard to the motive on the part of the authorities	Failure of State authorities to take preventive measures against discriminatory violence, without regard to the motive on the part of the authorities	State agents displaying a discriminatory attitude towards an individual belonging to a certain group, instead of taking preventive measures against discriminatory violence in order to protect that victim

It is important to distinguish the different types of complaints, because each of these alleged types of discriminatory violence requires the demonstration of different elements. For example, when it is alleged that State officials themselves committed acts of discriminatory violence, this requires proof of a discriminatory motive. Yet, it is unnecessary to demonstrate a discriminatory motive when, for example, an applicant claims that State authorities failed to investigate a domestic complaint concerning discriminatory violence or where they failed to take preventive measures against this type of wrongful conduct.[7]

7 Two preliminary aspects need to be stressed. Firstly, cases of discriminatory violence are most often presented to the Court by individuals who complain about the behaviour of 'public authorities'. The latter concept includes all public bodies and organs, among them the judicial authority (J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005, p. 118). Secondly, there is a separate category of jurisprudence somewhat related to discriminatory violence in which the Court recognised that discrimination against a specific group may amount into inhuman or degrading treatment under Article 3 ECHR. This is a different type of discrimination claims than claims concerning discriminatory violence brought under Article 14 in conjunction with Article 2 or Article 3, and is not discussed further in this study. A few examples of such cases are illustrated here. The first example occurred in the case *Cyprus v. Turkey*, where the Grand Chamber noted that the debasing living conditions of Greek Cypriots living in the Karpas area of northern Cyprus amounted to degrading treatment by the Turkish authorities and violated their human dignity purely because they belonged to this particular group (ECtHR 10 May 2001, 25781/94 (*Cyprus/Turkey*) (GC), paras. 309-311). The Court reached the same conclusion in the previously mentioned *Moldovan* case, where ethnic Roma in a Romanian village were forced to leave their homes after violent incidents and were forced to inhabit crowded and unsuitable houses. The appalling living conditions, combined with discriminatory remarks made by some of the authorities dealing with the applicants' complaints, resulted in a violation of Article 3 (ECtHR 12 July 2005, 41138/98 and 64320/01 (*Moldovan a.o./Romania*) (*Judgment No. 2)*, paras. 111-114).

2.2.1 The negative duty of State officials to refrain from inflicting discriminatory violence

The primary obligation resting on Member States under the Convention is – in principle – to refrain from inflicting violence upon individuals through their State agents. This rule, which in essence carries a negative obligation, is grounded in Articles 2 and 3 of the Convention. Article 2 § 1 emphasises that everyone's right to life shall be protected by law and further stresses that no person shall be deprived of his or her life intentionally, except in the execution of a sentence pronounced by a court following his or her conviction of a crime for which this penalty is provided by law. Under Article 2 the Member State's responsibility may also be invoked if a person dies during custody[8] and where persons are presumed to have become victims of enforced disappearances.[9] Under Article 3, which formulates the general rule that no one shall be subjected to torture or to inhuman or degrading treatment or punishment, a Member State bears responsibility when, for example, an applicant successfully claims before the Court that he or she was ill-treated during his or her arrest or during police custody by State officials.[10]

When Article 14 is connected to the rights embedded in Articles 2 or 3, the complaint takes on a further dimension, which is that the violence that was inflicted in violation of Articles 2 or 3, also violated the prohibition of discrimination because of the presence of a discriminatory motive.[11] So, a discriminatory motive is the important issue of law that needs to be demonstrated here. Under allegations of this kind, it must first be demonstrated that State agents inflicted violence upon the victims. This demonstration may or may not be problematic, but it is only possible to discuss allegations of a discriminatory motive once the violence itself has been established. The crucial element in this type of discriminatory violence complaints is thus found in the legal concept of motive, based on some discriminatory ground that is alleged by the applicant. The complaint where an applicant relies on Article 14 read in conjunction with Article 2 may entail that the victim, usually a close family member of the applicant, died at the hands of State agents and that the violence perpetrated on the victim was grounded in a discriminatory motive.[12] There are also cases where an applicant may claim his or her own victimisation, by stressing that he or she was violently attacked by State agents due to discriminatory motives.[13] Under both types of complaints, the Court requires that a discriminatory motive be revealed

8 ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC); ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*); ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*).
9 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*).
10 ECtHR 4 September 2014, 40514/06 (*Rudyak/Ukraine*), para. 59.
11 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 157.
12 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC).
13 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*).

as the causal factor in the killing or ill-treatment.[14] A distinct category of complaints which falls under this type of allegation of discriminatory violence concerns cases in which it is alleged that the ethnic (Romani) origin of certain female patients played a decisive role in the decision of State hospital doctors to sterilise them.[15] Although in such cases applicants relied on Article 14 read in conjunction with Articles 3, 8 and 12 (right to marry), the Court chose to consider the discrimination complaint solely under Article 14 read in conjunction with Article 8, because it found that the interference at issue affected one of the applicants' essential bodily functions and entailed numerous adverse consequences affecting their private and family life, in particular.[16] In order to establish a violation of these provisions, the Court requires a demonstration of objective evidence that must be sufficiently strong to convince the Court that the enforced sterilisation of a Roma woman "was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated."[17]

Under this type of discriminatory violence complaint – where it is thus alleged that State authorities inflicted violence on the basis of a discriminatory motive – a violation of Article 14 is most difficult to prove, as complaints like these are highly subjective. In addition, empirical research suggests that such cases, more often than not, are grounded in mixed motives rather than on the basis of a discriminatory motive alone.[18] This, however, need not be an issue in ECtHR case law, as the Court has recently argued that not only acts based *solely* on a victim's characteristic can be classified as hate crimes, but also acts which were possibly committed for some other, additional reasons, besides a discriminatory motive. The Court has indeed recognised that "perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to."[19]

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14 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 146; ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*), para. 64.

15 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*); ECtHR 12 June 2012, 29518/10 (*N.B./ Slovakia*); ECtHR 13 November 2012, 15966/04 (*I.G. a.o./Slovakia*).

16 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), para. 176.

17 Ibid., para. 177.

18 For example, Mason and Dyer offer an analysis on the issue of mixed motives in cases of discriminatory violence in the context of Australian criminal law. See G. Mason & A. Dyer, ''A Negation of Australia's Fundamental Values': Sentencing Prejudice-Motivated Crime', 36 *Melbourne University Law Review* (2012-2013), p. 871-914, who also refer to *R. v. Winefield* [2011] NSWSC 337 (20 April 2011), [13], [26] and [28]; *Director of Public Prosecutions (Vic) v. RSP*, [2010] VSC 128 (31 March 2010); N.D. Phillips, 'The Prosecution of Hate Crimes. The Limitations of the Hate Crime Typology', 24 *Journal of Interpersonal Violence* (2009), p. 883-905, p. 902; L. Ray, D. Smith & L. Wastell, 'Shame, Rage and Racist Violence' 44 *British Journal of Criminology* (2004), p. 350-368, p. 354–355; D. Gadd, 'Aggravating Racism and Elusive Motivation' 49 *British Journal of Criminology* (2009), p. 755-771, p. 768.

19 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), para. 70.

What remains is the question of what factual elements a discriminatory motive in this type of complaints may be derived from. There are very few cases where a discriminatory motive has been acknowledged by the Court. So far, in ECtHR case law, a discriminatory motive has been established mainly through witness statements which were documented in domestic investigation files, with witnesses claiming that State agents made offensive remarks on account of the victim belonging to a specific group.[20] That was the case in *Antayev*, for example, where the Court took into consideration the discriminatory verbal abuse which eight Chechen victims had been subjected to during ill-treatment by Russian State agents and where the Court additionally took into account internal police instructions to treat suspects of Chechen ethnic origin in 'a particular manner'. The Court noted how State officials conducted searches of the homes of the applicants in connection with what would otherwise appear to have been the investigation of a minor offence, because the suspects were of Chechen origin.[21]

In *Begheluri*, the Court relied on various factual elements in order to find that, together with a number of private persons, Georgian State agents had inflicted religiously-motivated violence upon a group of Jehovah's Witnesses and that they did not meet their positive duty of effectively investigating this type of violence and preventing it from occurring. The Court considered that the largest religious gatherings of the applicants were disrupted, with either the direct involvement of various State officials or their acquiescence and connivance in such. It further considered the fact that the police refused to intervene to protect the applicants as soon as they learnt about their religious background and that individual applicants were additionally subjected to religious insults when lodging their complaints with the police. Finally, the Court also took into account that the national authorities showed complete indifference towards the applicants' numerous complaints concerning various acts of aggression.[22] In addition to these factual elements, the Court relied on information regarding numerous other incidents of attacks on Jehovah's Witnesses in Georgia, whether physical or verbal, which were reported by various international bodies and non-governmental organisations at the material time. According to the Court, "[t]he applicants' allegations of discrimination … appear to be even more valid when evaluated within the relevant domestic context of documented and repeated failure by the Georgian authorities to remedy instances of violence directed against Jehovah's Witnesses."[23] The Court concluded on the basis of all these elements and information not only that the positive duties to effectively investigate and prevent religiously-motivated violence were breached by the respondent State, but also "that the various forms of violence directed against the appli-

20 See ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 126-132; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179.
21 ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.
22 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 174.
23 Ibid., para. 175.

cants either by State agents or private individuals were instigated by a bigoted attitude towards the community of Jehovah's Witnesses."[24]

This study will argue, most notably in chapters 5 and 6, that the Court should establish a breach of the negative duty to refrain from inflicting discriminatory violence by State agents also if it appears that the violence inflicted upon a member from a certain disadvantaged group is not merely an 'incident', but forms part of a systemic or administrative practice of inflicting violence by State agents upon members of that group. More specifically, it will be proposed that if an individual claims that violent treatment was inflicted by State agents because that individual belongs to a particular group, the Court could derive an Article 14 violation based on the existence of a discriminatory *attitude* (rather than a discriminatory motive) on the part of State agents, on the basis of convincing evidentiary material which reveals that members of the group to which the victim belongs are repeatedly and systemically subjected to violence by State agents compared with other groups in the country concerned. Additionally, in certain cases, such as the particular cases of the sterilisation of women from certain disadvantaged groups, this study shall propose, also in chapters 5 and 6, that the Court could consider approaching these cases in the same way as cases of indirect discrimination. Practically, this means that the Court should *not* require proof of a discriminatory motive in such cases as it currently does, but rather proof of domestic legislation or a State policy or practice which has a negative *effect* upon a certain disadvantaged group. Recognising a breach of this negative duty on account of information that reflects that the violence inflicted upon certain groups is systemic in certain Member States is clearly in line with the Court's alarm bell function that was mentioned earlier in section 1.4. Hence, in this way, the Court could spot repeated violence against members of certain groups and warn against escalation of such violence in the Contracting Parties involved.

2.2.2 The positive duty of State officials to effectively investigate discriminatory violence and to identify and punish those responsible

The second type of discriminatory violence complaint which occurs in ECtHR case law concerns the positive obligation of Member States to effectively investigate violence that was committed against individuals who are members of a specific group, such as a minority, and to identify and punish the perpetrators. In this study, this type of complaint is interpreted in the broad sense of police investigations, prosecutorial decisions, and judicial investigations. It is derived from the positive, procedural duties that have evolved under Article 2 and Article 3 case law. Therefore, this subsection first sets out the meaning of this duty under Articles 2 and 3 and then discusses it in the specific context of discriminatory violence.

24 Ibid., para. 179.

Under Article 2 of the Convention, the 'duty to effectively investigate' encompasses putting in place an appropriate legal and administrative framework at domestic level to deter the commissioning of wrongful conduct against persons, it entails establishing a law enforcement apparatus for the prevention, suppression and punishment of breaches of such provisions and it may even require civil remedies to be put in place. Prevention-related matters are discussed separately in the next subsection, because the Court itself singles them out in its own judgments and formulates somewhat different obligations for Member States under that limb. The legal and administrative framework usually entails the adoption of criminal laws which prohibit taking an individual's life or regulating the behaviour of police officers or other State agents, or private persons. The law enforcement apparatus in this context includes the police, the criminal prosecution service and the domestic courts.[25] This duty applies where individuals have been killed either as a result of the use of force by State agents[26] or by private individuals.[27] The Court has determined that the procedural obligation under Article 3 should have the same scope and meaning as the procedural obligation under Article 2.[28] In terms of Article 3, this obligation means that whenever a credible assertion has been put forward that the victim suffered ill-treatment at the hands of the police, other similar agents of the State, or third parties, the respondent State must ensure that an effective official investigation takes place.[29] Similar to cases under Article 2, the procedural obligation under this part applies to complaints put forward at domestic level concerning ill-treatment allegedly committed by either private persons or by State officials.[30]

The Court encourages Member States to adopt an active stance on this by requiring them to act of their own accord in fulfilling the obligation to investigate. In practical terms, this means that the authorities cannot leave it up to the next of kin to lodge a formal complaint or take responsibility for any investigative procedures.[31] Although the Court does not prescribe a particular standard form of inquiry that must be conducted in each case, since it is understood that the form of investigation may vary in different circumstances in different countries,[32] nevertheless, it sets out a number of basic

25 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 204.

26 ECtHR 27 September 1995, 18984/91 (*McCann a.o./United Kingdom*) (GC), para. 161; ECtHR 15 May 2007, 52391/99 (*Ramsahai a.o./The Netherlands*) (GC), paras. 323-325. See also T. Abdel-Monem, 'The European Court of Human Rights: Chechnya's Last Chance?', 28 *Vermont Law Review* (2003-2004), p. 237-297, p. 275.

27 ECtHR 6 May 2003, 47916/99 (*Menson a.o./United Kingdom*) (Admissibility Decision).

28 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 276.

29 ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), para. 131.

30 One example of ill-treatment committed by private persons was presented in ECtHR 4 December 2003, 39272/98 (*M.C./Bulgaria*).

31 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 105.

32 Ibid. See also A. Mowbray, 'Duties of Investigation under the European Convention on Human Rights', 51 *International and Comparative Law Quarterly* (2002), p. 437-448, p. 438.

requirements that any investigation must satisfy. Notably, in the Court's understanding, an effective investigation (1) is conducted by persons independent from those implicated in the events;[33] (2) is capable of leading to a determination of whether the force used was or was not justified in the circumstances of the case[34] and to the identification and punishment of those responsible;[35] (3) is conducted promptly[36] and (4) contains a sufficient element of public scrutiny to ensure accountability in practice as well as in theory.[37] Especially in the context of the second requirement, which is the capacity of the investigation to determine whether the use of force was justified and its capacity to identify and punish the perpetrators, the Court remains alert to Member States' capabilities by emphasising that these are not obligations of result, but of means.[38] Under this second requirement the Court expressly expects that Member States secure evidence concerning the incident. Some effective methods for collecting evidence mentioned by the ECtHR include interviewing key witnesses and eye witnesses,[39] the use of forensic evidence[40] and conducting a full autopsy.[41]

In the specific context of discriminatory violence complaints, applicants before the Court have raised various procedural deficiencies concerning the duty to conduct an effective investigation under the Convention. The Court has been willing to establish violations in this respect, regardless of whether the act of discriminatory violence was committed by State agents[42] or private persons.[43]

One particular type of issue that may arise concerns the allegation that the authorities breached Article 14 read in conjunction with Article 2 or 3, because the investigation into a violent incident was carried out in a discriminatory way. In this context, applicants often claim that police officers, prosecutors or judges uttered biased comments towards them or – in the case of killings – towards the deceased victims or expressed themselves in negative terms about these individuals' characteristics that are linked to their

33 ECtHR 27 July 1998, 54/1997/838/1044 (*Güleç/Turkey*), paras. 81-82; ECtHR 20 May 1999, 21594/93 (*Öğur/Turkey*) (GC), paras. 91-92.
34 ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), para. 87.
35 ECtHR 20 May 1999, 21594/93 (*Öğur/Turkey*) (GC), para. 88.
36 ECtHR 2 September 1998, 63/1997/847/1054 (*Yaşa/Turkey*), paras. 102-104; ECtHR 28 March 2000, 22535/93 (*Mahmut Kaya/Turkey*), paras. 106-107.
37 ECtHR 27 July 1998, 54/1997/838/1044 (*Güleç/Turkey*), para. 78.
38 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 107.
39 ECtHR 27 July 1998, 54/1997/838/1044 (*Güleç/Turkey*), para. 79.
40 ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), para. 89.
41 Ibid. All these requirements evolved in the context of Article 2 case law and were subsequently written down in cases concerning Article 3 allegations. See, for example, ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), paras. 182-185.
42 See, for example, ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC); ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*); ECtHR 12 January 2016, 40355/11 (*Boacă a.o./Romania*).
43 See, for example, ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*).

membership of a certain group. This type of complaint was brought forward in *Cobzaru v. Romania*, where the Court stated that "[i]n the present case, the Court finds that the tendentious remarks made by the prosecutors in relation to the applicant's Roma origin disclose a general discriminatory attitude of the authorities, which reinforced the applicant's belief that any remedy in his case was purely illusory."[44] In contrast to cases concerning the negative duty to refrain from inflicting discriminatory violence by State agents, the Court does not require proof of a discriminatory motive under this type of complaint. Rather, it requires that the legal concept is demonstrated of a 'discriminatory *attitude*' on the part of State agents involved in the investigation. Such an attitude may then be revealed through factual elements that include biased comments made concerning the victims during the investigation.

There is another type of allegation under the duty to effectively investigate that occurs more frequently. In these cases applicants most often allege that there was an absence of an effective investigation into allegations of discriminatory violence at the domestic level. These allegations may concern complaints of discriminatory killing (Article 2) or discriminatory ill-treatment (Article 3). These complaints brought before the Court essentially boil down to an allegation concerning an act of discriminatory violence – inflicted by private persons or State agents – that was submitted to the domestic authorities, but those authorities never properly investigated the complaint. In *Nachova*, a case concerning the killing of two Roma youths by a Bulgarian military police officer, the Grand Chamber stressed that "where there is *suspicion* that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality...."[45] According to the Court, the authorities must "take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events."[46] Asides from this, it underlined that there must be some *plausible information* available which

44 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 100. A similar issue subsequently arose in ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 63-65. It may be useful to mention that in *Cobzaru*, the applicant also claimed that the law enforcement agents failed to investigate possible discriminatory motives for his ill-treatment. The Court concluded that this failure combined with the State authorities' attitude during the investigation amounted to a violation of Article 14 taken in conjunction with Article 3 in its procedural limb (paras. 97-101 of the judgment).

45 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 160 (italicisation added).

46 Ibid. Similar statements were also made in ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*), para. 69; ECtHR 23 February 2006, 46317/99 (*Ognyanova and Choban/Bulgaria*), para. 145; ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 89; ECtHR 26 July 2007, 55523/00 (*Angelova and Iliev/Bulgaria*), para. 115; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), para. 62; ECtHR 10 March 2009, 44256/06 (*Turan Cakir/Belgium*), para. 77; ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 58; ECtHR 20 September 2012, 387/03 (*Fedorchenko and Lozenko/Ukraine*), paras. 65; ECtHR 2 October 2012, 40094/05 (*Virabyan/Armenia*), para. 218; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 121.

is sufficient to alert the State authorities to the need to carry out an initial verification of these complaints and, depending on the outcome, an investigation into possible racist overtones in the events that amounted into the violence.[47] Thus, in cases where it is alleged that the State authorities failed to conduct an adequate investigation into a complaint of discriminatory violence at a domestic level, two things need to be demonstrated before the Court can find a violation: (1) a *suspicion* that discriminatory attitudes induced an act of violence, which it seems must become apparent through the presence of some *plausible information*, and (2) a State's failure to take all reasonable steps to unmask any discriminatory motive. However, it is unnecessary to demonstrate that the State agents involved were motivated by discrimination in their decision not to effectively investigate a complaint of discriminatory violence. It is not even required to demonstrate any discriminatory attitude on the part of State agents in this context. Hence, in contrast to the other types of complaints discussed earlier, this type of allegation is easier to prove. The Court only needs to verify whether there was a suspicion of a discriminatory attitude in a violence case on the basis of the domestic case file and, if there is a suspicion that the primary perpetrators of the violence held such an attitude, establish whether the Member State involved conducted an effective investigation into the complaint.

The Court has acknowledged the existence of a *suspicion* in various scenarios through a variety of factual elements documented in the domestic case file. Where there was evidence – usually through witness statements – of discriminatory remarks allegedly uttered by State agents in connection with the alleged physical abuse;[48] where grossly excessive force was used against unarmed and non-violent victims belonging to certain groups;[49] where there was evidence that the violence was committed by a skinhead group or a far-right group which by its nature is led by an extremist and/or racist ideology;[50] where the perpetrator admitted to the State agents that he or she ill-treated or killed the victim due to prejudiced views, and;[51] where there was evidence that a violent clash took place between different ethnic groups.[52] Besides these factors, the Court has considered as additional evidence published reports about the existence of prejudice and hostility against the group to which the victim belongs in the Member State con-

47 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC)), para. 160.

48 Ibid., paras. 163-164. See also ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*), paras. 73-74; ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 61; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), paras. 125-126; ECtHR 12 April 2016, 12060/12 (*M.C. and A.C./Romania*), para. 124.

49 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 165; ECtHR 27 January 2015, 29414/09 and 44841/09 (*Ciorcan a.o./Romania*), paras. 161-166.

50 ECtHR 31 May 2007, 40116/02 (*Šečić/Croatia*), para. 68; ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), para. 98; ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 49-50.

51 ECtHR 26 July 2007, 55523/00 (*Angelova and Iliev/Bulgaria*), para. 116.

52 ECtHR 23 October 2012, 43606/04 (*Yotova/Bulgaria*), para. 106.

cerned, in order to establish that that Member State failed in its duty to conduct an effective investigation.[53] Thus, the existence of such reports should prompt a Member State to conduct an effective investigation into a complaint of discriminatory violence. Where the Member State fails to do so, a violation of the Convention is found. The Court has also taken into consideration – again as additional evidentiary material – reports providing information about the failure of Member States to effectively implement provisions to punish cases of discriminatory violence.[54] In *Mižigárová*, the Court even recognised "in respect of persons of Roma origin"[55] the possibility that the "existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive."[56] The Court has, however, never indicated what providing 'independent evidence of a systemic problem' entails. From *Mižigárová*, it may be derived that the Court is probably willing to rely on reports drafted by Council of Europe bodies and external organisations, such as NGOs, concerning systemic discrimination against a particular disadvantaged group in a Member State in order to establish a violation of the Convention.[57]

In a recent case, the Court highlighted another factual element that may be taken into account when determining the effectiveness of the investigation. This concerns the issue that proper investigation into alleged discriminatory motives is required when the alleged victim is member of a particularly vulnerable group that has suffered as a result of a turbulent history and constant uprooting. Yet the Court's case law does not clarify whether estab-

53 See, for example, ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 163; ECtHR 12 April 2016, 12060/12 (*M.C. and A.C./Romania*), para. 124.

54 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), para. 52.

55 ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), para. 122.

56 Ibid.

57 Ibid. The Court stated the following:

> "The Court notes with concern the contemporaneous reports documented at paragraphs 57 *et seq*. above which relate to allegations of police brutality towards Roma in Slovakia. In respect of persons of Roma origin, it would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive. However, in the present case the Court is not persuaded that the objective evidence is sufficiently strong in itself to suggest the existence of such a motive …."

This quotation indicates that the independent evidence the Court is referring to here (probably) relates to concurrent reports about brutality inflicted upon a particular group. The reports mentioned in paras. 57-63 of the judgment were written by the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the European Committee for the Prevention of Torture (CPT), ECRI, US Department of State and the International Helsinki Federation for Human Rights. Presumably, if certain bodies, identical or similar to those listed in paras. 57-63 of the judgment, reveal a *systemic* problem of discriminatory violence, this is regarded as independent evidence.

lishing that the alleged victim belongs to a 'particularly vulnerable group' is already sufficient to require a respondent State to investigate discriminatory violence or whether this counts as an additional factor in that regard.[58]

Finally, to fully understand this type of complaint, it is useful to note that the Court has not laid down concrete requirements indicating when 'all reasonable steps' have been taken in the investigation in the context of discriminatory violence. In line with its subsidiary role, the Court has offered some general guidelines to Member States in this context. In *Nachova*, the Grand Chamber stressed that it is important that "the official investigation is pursued with vigour and impartiality," that the Member State involved "demonstrate[s] its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin," that it "must ensure that in the investigation of incidents involving the use of force a distinction is made both in [its] legal systems and in practice between cases of excessive use of force and of racist killing" and that it "must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence."[59] In *Abdu*, the Court added under this type of complaint that Member States at least need to set up domestic rules that render violence based on discriminatory considerations a criminal offence which is punishable by imprisonment and, subsequently, effectively implement those rules.[60] In *M.C. and A.C.*, it highlighted that organisational changes in the police force, although they may add to the difficulties in resolving the case, cannot obviate the State's obligations under the Convention in this context.[61]

In contrast to cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence, cases that relate to the positive duty of State agents to conduct an effective investigation appear to be less demanding in terms of proof. They do not require proof of a discriminatory motive; a discriminatory attitude or a failure on the part of respondent States to react upon a suspicion that discriminatory attitudes induced an act of violence are in themselves already sufficient to find that Member States failed to live up to their obligations in the context of this positive duty. Hence, the Court has been able to establish these issues of law on the basis of wide variety of factual elements.

58 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), para. 53.
59 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 160.
60 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 47 and 52.
61 ECtHR 12 April 2016, 12060/12 (*M.C. and A.C./Romania*), para. 121.

2.2.3 The positive duty of State officials to take preventive measures against discriminatory violence

The last type of discriminatory violence complaints concerns State responsibility for *not* taking (sufficient) action to protect victims within its jurisdiction against discriminatory violence, again, regardless of whether the violence was inflicted by State officials or private individuals. This type of obligation, also positive in nature, is significantly developed in Articles 2 and 3.[62] Hence, this subsection first also provides a brief description of this duty as it has been developed under Articles 2 and 3. Thereafter, an explanation of this duty in cases on discriminatory violence is set out.

In *Osman v. United Kingdom*, the Court stressed that Article 2 may entail "in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[63] However, in order for a violation of this kind to be recognised it is first necessary to determine 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 or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[64] Where Article 3 was concerned, the Court, for instance, underlined that positive measures "should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge."[65]

The duty to take preventive measures in cases of discriminatory violence may be raised under different factual circumstances. For instance, applicants may allege that State agents failed to protect them from discriminatory violence, because those State agents themselves were biased towards the group to which the victims belong. Or they may allege before the Court that State agents failed to protect them from being subjected to discriminatory violence, regardless of the reasons for that omission.

In respect to the first example, the case of *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia* is illustrative. It concerns violence on the grounds of religion, inflicted by a group of Orthodox believers on a group of Jehovah's Witnesses. In that case, the Court recog-

62 For an Article 3 related context, see S. Smet, 'The 'absolute' prohibition of torture and inhuman and degrading treatment in Article 3 ECHR. Truly a question of scope only?', in: E. Brems & J. Gerards (eds.), *Shaping rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, New York: Cambridge University Press 2014, p. 273-293, p. 285-293.

63 ECtHR 28 October 1998, 87/1997/871/1083 (*Osman/United Kingdom*) (GC), para. 115. In *Osman*, the Court repeated a rule from an earlier decision, ECtHR 9 June 1998, 14/1997/798/1001 (*L.C.B./United Kingdom*), para. 36.

64 ECtHR 28 October 1998, 87/1997/871/1083 (*Osman/United Kingdom*) (GC), para. 116.

65 ECtHR 10 May 2001, 29392/95 (*Z. a.o./United Kingdom*) (GC), para. 73.

nised, among other things, that State agents failed to protect the applicants because they were biased in their decision not to offer any protection. The Court observed that "the refusal by the police to intervene promptly at the scene of the incident in order to protect the applicants, and the children of some of their number, from acts of religiously-motivated violence, and the subsequent indifference shown towards the applicants by the relevant authorities, was to a large extent the corollary of the applicants' religious convictions."[66] The Court established a violation of Article 14 read in conjunction with Article 3 and Article 9 (freedom of thought, conscience and religion), on the basis of the comments that State agents had made while receiving requests for protection from the victims. More precisely, the Court considered the fact that the police did not intervene after being informed by some of the applicants about the attacks and that the head of the police station, after learning about the attacks, stated that "in the attackers' place, he would have given the Jehovah's Witnesses an even worse time!"[67] Aside from this, the Court also took into consideration that three other police officers did not take action, because, according to those officers, they "didn't get involved in that type of incident."[68] So, in these types of cases, it is necessary to establish the legal issue that the failure of State agents to prevent discriminatory violence was to a large extent the *corollary* of the victims' membership of a certain group. The Court may accept this kind of failure on the basis of biased comments that were made by the authorities after the victims had filed requests for protection.

The Court has also established violations of the duty to protect certain groups from discriminatory violence, although it may not have necessarily appeared that State agents themselves were explicitly or otherwise biased towards victims who applied for protection. Cases of this type are unique, because it is only here that the Court has sometimes been willing to establish violations mainly on the basis of information revealing that a respondent State *generally* fails to offer protection from violence to a specific group of individuals. The earliest example of where this occurred is the case *Opuz v. Turkey*, an example of gender-based violence, in which the applicant complained about the failure of the local authorities in the town of Diyarbakır to protect her and her mother from her abusive husband. More precisely, she alleged that Turkish law was discriminatory and inadequate in terms of protecting women, since a woman's life was deemed as inferior in the name of family unity. In her submissions to the Court regarding gender-based violence, the applicant provided insight not only into her own history of abuse and the domestic authorities' ignorance in that regard, she also sketched the general situation in Turkey where domestic violence inflicted by men

66 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 140.

67 Ibid., para. 28.

68 Ibid. See also paras. 44 and 140-142.

was tolerated *de facto* and where judicial and administrative bodies granted impunity to the aggressors.[69]

In this case, according to the Court, it was necessary to establish that "the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."[70] Hence, in this case, the Court was prepared to accept that State agents failed to offer protection from gender-based violence to the applicant and her mother, once it was shown that this type of violence occurs generally on a wider scale in the respondent State and that no steps are taken by the State authorities to prevent it. Such defects can be shown by relying on 'undisputed official statistics,' as confirmed in *Opuz*. There statistics were produced from reports prepared by the Diyarbakır Bar Association and Amnesty International.[71] Besides offering statistics, these reports also provided substantive information about discrimination against women in Turkey in general,[72] such as problems in implementing the legislation that was intended as one of the remedies for women facing domestic violence, and unreasonable delays in responding to their complaints.[73]

In *Opuz*, the Court did not require proof of a discriminatory motive on the part of the State authorities.[74] Instead, it noted that the "alleged discrimination at issue … resulted from the general attitude of the local authorities, such as the manner in which women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims."[75] The Court also established that the manner in which the criminal law system was operated by State officials did not provide an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by the perpetrator against the personal integrity of the applicant and her mother. Therefore, it eventually established a violation of Article 14 read in conjunction with Articles 2 and 3.[76]

The Court has not always been consistent in requiring proof of the existence of a general and discriminatory passivity on the part of the judiciary in a Member State creating a climate that is conducive to a form of discriminatory violence. For example, in *Eremia v. Moldova*, the Court put more emphasis on the specific facts of the case, by looking into how the first applicant was treated *personally* by State agents when she asked them to protect her and her daughters from her violent husband.[77] So, the Court considered to a lesser extent the general attitude of the police towards alleged female victims of domestic violence in that country. The Court noted that

69 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 119-121.
70 Ibid., para. 198. See also ECtHR 22 March 2016, 646/10 (*M.G./Turkey*), para. 116.
71 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 183 and 193.
72 Ibid., para. 193.
73 Ibid., paras. 195-196.
74 Ibid., para. 183.
75 Ibid., para. 192.
76 Ibid., paras. 199-202.
77 The other two applicants were first applicant's daughters.

the State authorities repeatedly rejected the applicant's requests for protection by the police. One aspect which was observed in this judgment was that a State agent even insulted the applicant by suggesting reconciliation, since she was anyway "not the first nor the last woman to be beaten up by her husband."[78] The Court underlined that "the combination of the above factors clearly demonstrates that the authorities' actions were not a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman."[79] Finally, by way of supporting evidence, the Court highlighted the findings of the United Nations Special Rapporteur, which revealed that the Moldovan authorities do not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women.[80] So, in *Eremia*, the Court did not put most emphasis on general information, as it did in *Opuz*, to establish that State agents failed to live up to their duty to take preventive measures to protect someone from gender-based violence in an individual case. It turned to the facts of the case instead and only used general information about the government's approach to gender-based violence as supporting evidence.

Hence, in some cases concerning gender-based violence, it is sufficient to show a general and discriminatory passivity by the judicial authorities in a Member State which creates a climate that is conducive to discriminatory violence (*Opuz*). In others, it is necessary to demonstrate that in the case in question the violence was repeatedly condoned by State officials and, furthermore, that there was a discriminatory attitude towards the victim as a member of a certain disadvantaged group (*Eremia*).

A violation of the duty to take preventive measures has also been recognised by the Court in another setting, in the context of violence committed by private individuals on grounds of the sexual orientation of the victims. In *Identoba a.o. v. Georgia*, the Court ruled that the domestic authorities had not undertaken sufficient measures to protect the applicants – who were all supporters of LGBT[81] rights – from an attack in Tbilisi which occurred during a march on 17 May 2012 to mark the International Day Against Homophobia. The first key issue that needed to be established in this case was that "the domestic authorities knew or ought to have known of the risks associated with any public event concerning that vulnerable community, and were consequently under an obligation to provide heightened State protection."[82] The Court established this issue on the basis of the following facts: (1) the fact that the municipal and police authorities had been informed well in advance of the LGBT community's intention to hold a rally in the centre

78 ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), para. 87.
79 Ibid., para. 89.
80 Ibid.
81 An initialism that stands for Lesbian, Gay, Bisexual and Transgender.
82 ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), para. 72.

of Tbilisi on 17 May 2012; (2) the fact that the organisers of the march had specifically requested the police to provide protection against foreseeable protests by people with homophobic and transphobic views, and; (3) the history of public hostility towards the LGBT community in Georgia.[83]

Subsequently, the Court determined whether the authorities had actually failed "to provide adequate protection to the thirteen individual applicants from the bias-motivated attacks of private individuals during the march."[84] The Court established that in *Identoba*, the domestic authorities failed in their obligation in this respect in several ways. There were, for example, only a small number of police patrol officers initially present at the demonstration, who even distanced themselves without any prior warning from the scene when verbal attacks against the demonstrators started. By distancing themselves in such a way, according to the Court, the police officers allowed the tension to escalate into physical violence. By the time that they actually stepped in, it was too late; the applicants and other participants on the march had already been bullied, insulted or even assaulted. The Court also noted how the officers, instead of helping the demonstrators, arrested them and evacuated some of them.[85]

This case is interesting, since the Court for the first time explicitly called upon Member States to provide *heightened* protection to individuals who are attacked on the basis of their sexual orientation or those who are attacked because they stood up for LGBT rights. This requirement to provide heightened protection has not been observed earlier in cases concerning the duty to take preventive measures and it remains to be seen how the Court will elaborate on this obligation in the future.

To sum up, a complaint which concerns a breach of the positive duty to take preventive measures against discriminatory violence is different from all the other types of allegations of discriminatory violence. Only here the Court has, in certain cases, relied mainly on statistics in reports from different organisations or institutions, which demonstrate systemic breaches of this specific duty in a country towards a group of disadvantaged persons (*Opuz*). So, as this section shows, under these types of complaints in order to establish a violation under the Convention it may sometimes be sufficient to demonstrate that State agents generally, on a systemic basis, fail to provide protection to members of the group to which an individual belongs. Nevertheless, there are cases concerning this type of discriminatory violence in which the Court deviates from this approach and considers mainly the facts of the case in order to establish a violation in this context, and in which it only uses general information as supporting evidence (*Eremia*, *Identoba*).

83 Ibid.
84 Ibid., para. 74.
85 Ibid., para. 73.

2.3 General features of Article 14 ECHR and their impact on discriminatory violence complaints

In various Article 14-related issues – including those concerning all three types of complaints of discriminatory violence as depicted above – the Court has indicated that the general principle is that "discrimination means treating differently, without an objective or reasonable justification, persons in relevantly similar situations."[86] Such a view of discrimination reflects the Aristotelean concept of equality according to which 'like situations should be treated alike'. The Aristotelean concept has two aspects to it, both of which have been recognised by the Court as falling under the scope of Article 14.[87] The first prescribes *equal* treatment of persons in *similar* situations. This means that an individual has suffered differential treatment if there was less favourable treatment of that individual compared with other people in analogous situations and if this treatment was based on the prohibited grounds of discrimination.[88] Differential treatment crosses the line to become discrimination when there is no objective or reasonable justification for the different treatment. Such a justification is present if the difference in treatment pursues a legitimate aim and if there is a reasonable relationship of proportionality between the difference in treatment and that aim.[89] In *Ünal Tekeli v. Turkey*, for example, the Court established a violation of Article 14 read in conjunction with Article 8, because the applicant was not allowed, as a married woman, to use her maiden name in official documents, whereas married men could use the surname they had before they were married.

86 In the context of cases which concern the duty of member States to refrain from inflicting discriminatory violence through their State agents, this formula was also mentioned in the following judgments: ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), para. 117; ECtHR 27 January 2011, 44862/04 (*Dimitrova a.o./Bulgaria*), para. 95; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), para. 153; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 119. In the context of the duty to investigate, it was mentioned as a general principle in ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 119. In light of the duty to take preventive measures to avoid discriminatory violence, it was also mentioned in ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 183. The first basis for this formula, however, was laid in an Article 14 case that did not concern discriminatory violence: ECtHR 23 July 1968, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (Case *"relating to certain aspects of the laws on the use of languages in education in Belgium"/Belgium* (*Belgian Linguistic* case)) (GC), para. 10.

87 M. Bell, 'Direct Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 185-322, p. 189.

88 See, for example, ECtHR 7 December 1976, 5095/71, 5920/72, 5926/72 (*Kjeldsen, Busk Madsen and Pedersen/Denmark*), para. 56.

89 ECtHR 23 July 1968, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (*Case "relating to certain aspects of the laws on the use of languages in education in Belgium"/Belgium* (*Belgian Linguistic* case) (Merits)) (GC), para. 10. See also P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 402.

According to the Court, this type of difference in treatment could not be justified under Turkey's objective of 'reflecting family unity'.[90]

The second aspect of the discrimination principle underlines the importance of *different* treatment of persons in *dissimilar* situations.[91] This implies that the Contracting Parties are obliged to take steps to prevent discrimination. In the context of discriminatory violence, for example, the Court recognises that the Contracting Parties have a duty to protect individuals from discriminatory violence[92] and that they have a duty to investigate whether discriminatory violence has occurred.[93] Both aspects of ECtHR's discrimination principle – and their impact on complaints of discriminatory violence – are discussed further in section 2.4.

Article 14 also has an open character: this is enhanced by its wording which stipulates that 'discrimination on *any ground* such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*' is prohibited. This wording clearly indicates that the list of grounds in Article 14 is non-exhaustive.[94] In this light, Article 14 in essence reflects an open model for judicial review, which provides the opportunity for the Court to further elaborate on its meaning and to formulate instructions as to the contents of this provision.[95] In practical terms, this means that it is generally not difficult to demonstrate that a distinction made on the basis of a particular ground within the ambit of a Convention right should result in an Article 14 assessment.[96]

This open model is also reflected in ECtHR case law on discriminatory violence in which the Court has recognised discrimination on various grounds. In a number of cases in which complaints were brought forward by women who alleged that Member States had omitted to adequately protect them from domestic violence based on sex, such as in the *Opuz* judgment, the Court found that these allegations could indeed be regarded as exam-

90 ECtHR 16 November 2004, 29865/96 (*Ünal Tekeli/Turkey*). See also P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 405.

91 M. Bell, 'Direct Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 185-322, p. 189.

92 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*).

93 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC). See also B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey. The European Convention on Human Rights*, New York: Oxford University Press 2014, p. 568.

94 R. Rubio-Marín & M. Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism', 26 *European Journal Of International Law* (2015), p. 881-899, p. 883.

95 J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005, p. 16-18.

96 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 222.

ples of gender-based violence.[97] In a case in which an applicant alleged that the State authorities had failed to properly investigate the attacks against him due to his religious affiliation, the Court considered that when investigating violent incidents State authorities have an additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events.[98] In *Begheluri*, the case mentioned above in which applicants alleged that they were subjected to religiously-motivated attacks, the Court condemned this type of behaviour and explicitly referred to 'religion' as one of the manifest concepts in the text of Article 14 as a ground of discrimination.[99] In *Virabyan*, it underlined that a State's duty to combat discrimination is also applicable in cases where treatment contrary to Article 3 is alleged to have been inflicted for political motives. It appears that the Court qualified this under the heading of 'political or other opinion' as stated in Article 14.[100] Discriminatory violence complaints by Roma individuals and Chechens have been accommodated on the grounds of 'race'.[101] Finally, in the case of *Identoba*, the Court for the first time ruled on the alleged failure of the respondent State to take measures under Article 14 read in conjunction with Article 3 to prevent violence that had homophobic and transphobic overtones. Although discrimination on the grounds of 'sexual orientation' is not expressly mentioned in Article 14, the Court nevertheless accepted that a violation of this provision had taken place in this case.[102]

Another aspect that is relevant here is the accessory nature of Article 14. This means that this non-discrimination clause can only be invoked in connection with one of the other rights protected by the Convention. In other words, it must be demonstrated that a difference in treatment relates to a substantive right under the Convention.[103] The special link which must be established between discrimination and other substantive provisions of the Convention is sometimes regarded in the literature as problematic. Gerards, for instance, identifies three challenges arising from Article 14's accessory character. Firstly, she claims that in certain cases a rather technical construc-

97 P. Londono, 'Developing Human Rights Principles in Cases of Gender-Based Violence: *Opuz v. Turkey* in the European Court of Human Rights', 9 *Human Rights Law Review* (2009), p. 657-667, p. 657. See also ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 191; ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), para. 85.

98 ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), para. 96.

99 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 171.

100 ECtHR 2 October 2012, 40094/05 (*Virabyan/Armenia*), paras. 200, 211, 214, 218.

101 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 144-145; ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), para. 114; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 124. This approach was derived from the *Timishev* case. There, the ECtHR noted that discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination (ECtHR 13 December 2005, 55762/00 and 55974/00 (*Timishev/Russia*), paras. 55-56).

102 ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), para. 64.

103 J. Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', 13 *Human Rights Law Review* (2013), p. 99-124, p. 100.

tion may be required to bring alleged discrimination under the scope of both Article 14 and a substantive provision.[104] Secondly, the accessory character prevents the Court from examining discrimination claims that go beyond the other substantive rights in the Convention but which may be truly serious in nature, especially those concerning social or economic rights. Finally, in many cases the Court has not been able to provide for a substantive assessment of the discrimination complaint.[105]

The first two issues fall outside the scope of this study, as violence is always connected to a substantive provision, most notably Articles 2 and 3. However, the third issue, concerning a lack of substantive assessment of the discrimination complaint, has been noted in the context of discriminatory violence case law. Goldston, for example, argues that the accessory character of Article 14 has led to a practice whereby the Court maintains a certain order when dealing with complaints. Sometimes, the Court will start with an examination of whether there has been a violation of the substantive provision that has been raised together with Article 14. Only after examining the claim under the substantive provision, will the Court possibly continue with an examination of whether there has been a separate violation of Article 14 read in conjunction with that substantive provision. Working in this order, the Court sometimes does not find it even necessary to separately assess the discrimination issue, reasoning that it already found a violation under the principal provision.[106]

However, this practice of not examining a complaint concerning a certain provision in the Convention because of an earlier assessment of that complaint in the context of another ECHR provision, is common practice also with regard to clauses other than Article 14 in the Convention.[107] Therefore, this practice is not unique to complaints pertaining to Article 14 and

104 Gerards shows this with a reference to *Thlimmenos v. Greece*, a case that is discussed more fully below. The type of distinction that the applicant relied upon – he claimed that he was treated differently on the grounds of his status as a convicted person – is a distinction that could hardly be brought under the scope of one of the substantive provisions of the ECHR. The Court nevertheless found a way to examine the complaint under Article 14. It ruled that the applicant had been convicted because he refused to wear a military uniform for religious reasons. With this in mind, the Court decided that the case resembled a substantive distinction based on religion (J. Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights', in: J. Niessen & I. Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Leiden: Martinus Nijhoff Publishers 2004, p. 3-60, p. 7-8. See for the case ECtHR 6 April 2000, 34369/97 (*Thlimmenos/Greece*) (GC), paras. 41-42).

105 J. Gerards, 'The Application of Article 14 ECHR by the European Court of Human Rights', in: J. Niessen & I. Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Leiden: Martinus Nijhoff Publishers 2004, p. 3-60, p. 8-9. See also J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005, p. 108.

106 J.A. Goldston, 'Race discrimination in Europe: problems and prospects', 5 *European Human Rights Law Review* (1999), p. 462-483, p. 466.

107 See, for example, ECtHR 18 February 1999, 27267/95 (*Hood/United Kingdom*) (GC), paras. 70-71.

thus appears to be unrelated to the accessory character of Article 14. In the specific context of discriminatory violence allegations, the Court has also explained why it sometimes does or does not choose to address this issue under the heading of Article 14. The Grand Chamber's *Nachova* ruling indicates that the decision in this regard is up to the Court's own discretion. The Grand Chamber stressed the following in this regard:

> "The Grand Chamber would add that the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made."[108]

This reasoning indicates that although an Article 14-related violation may not be found in certain cases concerning discriminatory physical abuse, this does not imply that the Court has not taken the discriminatory aspects into account under one of the principal provisions of Articles 2 or 3. The Court may find and condemn discrimination without further elaborating on the Article 14-related complaint as such and without thus finding a breach of that provision. Sandland argues that by discussing the violence manifested towards a minority group under only one of the principal provisions, the Court may actually incorporate the principle of freedom from discrimination as one "which runs throughout the Convention as a whole, rather than being confined to Article 14 alone."[109] In a more recent judgment, *Skendžić and Krznarić v. Croatia*, the Court expressed that it considers it necessary to examine a case under Article 14, "if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case."[110]

Hence, the accessory character of Article 14 is not a problem as such, but it does leave the Court with broad discretion to decide whether to view certain events through the lens of discrimination. As a result, the Court handles

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108 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 161. This was later confirmed in, for example, ECtHR 16 February 2006, 43233/98 (*Osman/Bulgaria*), para. 88.

109 R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008), p. 475-516, p. 515.
Indeed, it may be observed in certain judgments on discriminatory violence that the Court chooses to focus on the discriminatory factors solely under a substantive provision of the ECHR. This occurred, for example, in ECtHR 12 June 2012, 13624/03 (*Koky a.o./Slovakia*), a case in which applicants of Roma origin alleged that Slovakia omitted to conduct an effective investigation into their ill-treatment inflicted by a group of right-wing Slovaks (see paras. 216-240 and 244).

110 ECtHR 20 January 2011, 16212/08 (*Skendžić and Krznarić/Croatia*), para. 116. See also ECtHR 12 June 2014, 57856/11 (*Jelić/Croatia*), para. 101.

discrimination issues in this area of its case law in various ways. Aside from cases where the Court chooses to address discriminatory violence under the heading of Article 14, there are also cases in which the Court discusses this issue solely under a substantive provision. In some of these cases, this is caused by a procedural deficiency. For example, in the *Amadayev* case, the Court was faced with an applicant who complained that, despite a prior warning to the police about the possibility of ethnic violence, the Russian authorities had failed to prevent an attack that was inflicted upon him by private individuals. The Court highlighted the discrimination aspects under the Article 3 heading of the complaint:

> "Finally, and irrespective of the applicant's complaint under Article 14 of the Convention examined below, the Court is sensitive to the allegations that there were racial motives for this attack …. It reiterates the particular requirement for an investigation into an attack with racial overtones to be pursued with vigour and impartiality, having regard to the need to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence."[111]

This first sentence in this quote suggests that the Article 14-related complaint was discussed further on in this judgment, however, the Court was very concise in dealing with this issue once it turned to the complaint under that provision. This was due to the fact that the complaint on the possible discriminatory overtones of the violent events was brought out of time and for this reason, the Court found the complaint inadmissible.[112]

But even in cases where there is no procedural obstacle as in *Amadayev*, the Court also sometimes decides to address the discrimination aspect solely under a substantive provision. For example, in *Sakir v. Greece*, where no separate complaint was made by the applicant under Article 14, the Court found a violation of Article 3 on account of an ineffective investigation into alleged discriminatory violence inflicted upon an Afghan man by a group of masked persons in the centre of Athens in 2009. The Court referred to at least three reports (by the Greek Ombudsperson, Amnesty International and Human Rights Watch) which documented that there had been an increase in discriminatory violence in certain neighbourhoods in the centre of Athens since 2009. The reports revealed a pattern of discriminatory violence committed by right wing extremists linked to the Greek far-right political party, 'Golden Dawn'. They also documented serious shortcomings in police action at the time of the incidents and in police investigations. The Court criticised the police for treating the case as an isolated matter, instead of viewing it in the context of a pattern of similar incidents. On the basis of this information, the Court underlined that the State agents should have inves-

111 ECtHR 3 July 2014, 18114/06 (*Amadayev/Russia*), para. 81.
112 Ibid., para. 91.

tigated a potential link between the pattern of discriminatory violence and the assault on the applicant.[113]

There have also been several cases in which the Court found it unnecessary to elaborate on a complaint about discriminatory violence at all. This usually occurred in cases where there was a limited amount of evidence about the alleged discriminatory violence.[114] Some of these complaints have therefore been declared inadmissible.[115]

This section aimed to describe a few of the general features of Article 14 that influence discriminatory violence complaints, most notably this provision's open character and its accessory character. Both of these characteristics as such do not obstruct the Court in establishing the various forms of discriminatory violence. The only issue that actually stands out in this context is that in certain cases, the Court chooses not to discuss an allegation under an Article 14 heading. However, the main reason for this is not

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113 ECtHR 24 March 2016, 48475/09 (*Sakir/Greece*), paras. 70-72. See also E. Brems, 'Sakir v Greece: Racist violence against an undocumented migrant', *Strasbourg Observers* (6 April 2016) (online).

114 See, for example, ECtHR 16 July 2002, 27602/95 (*Ülkü Ekinci/Turkey*), para. 163; ECtHR 20 April 2004, 28298/95 (*Buldan/Turkey*), para. 109; ECtHR 13 July 2004, 29298/95 (*K./Turkey*), para. 64; ECtHR 15 July 2004, 28497/95 (*O./Turkey*), paras. 141-142; ECtHR 9 November 2004, 22494/93 (*Hasan İlhan/Turkey*), para. 130; ECtHR 20 September 2005, 27309/95 (*Dizman/Turkey*), para. 103; ECtHR 20 September 2005, 26972/95 (*Dündar/Turkey*), para. 104; ECtHR 6 October 2005, 28299/95 (*Nesibe Haran/Turkey*), para. 95; ECtHR 6 October 2005, 40262/98 (*H.Y. and Hü.Y./Turkey*), para. 146; ECtHR 22 November 2005, 38595/97 (*Kakoulli/Turkey*), para. 136; ECtHR 21 February 2006, 52390/99 (*Şeker/Turkey*), para. 102; ECtHR 11 April 2006, 52392/99 (*Uçar/Turkey*), para. 158; ECtHR 27 June 2006, 41964/98 (*Cennet Ayhan and Mehmet Salih Ayhan/Turkey*), para. 111; ECtHR 19 October 2006, 68188/01 (*Diril/Turkey*), para. 73; ECtHR 19 October 2006, 56154/00 (*Selim Yıldırım a.o./Turkey*), para. 88; ECtHR 20 February 2007, 39452/98 (*Gürü Toprak/Turkey*), para. 50; ECtHR 8 January 2008, 54169/00 (*Enzile Özdemir/Turkey*), para. 82; ECtHR 13 July 2010, 45661/99 (*Carabulea/Romania*), para. 168; ECtHR 25 February 2014, 651/10 (*Makbule Kaymaz a.o./Turkey*), para. 149; ECtHR 26 July 2016, 68066/12 (*Adam/Slovakia*), paras. 92-95.
See also P. Leach, 'The Chechen conflict: analysing the oversight of the European Court of Human Rights', 6 *European Human Rights Law Review* (2008), p. 732-761, p. 734 and p. 739.

115 ECtHR 24 May 2007, 17060/03 (*Zelilof/Greece*); ECtHR 5 July 2007, 21449/04 (*Celniku/Greece*); ECtHR 6 January 2009, 65354/01 (*Tokmak/Turkey*) (Admissibility decision); ECtHR 18 November 2010, 310/04 (*Seidova a.o./Bulgaria*), paras. 67-74; ECtHR 14 February 2012, 45383/07 (*Puky/Slovakia*) (Admissibility decision); ECtHR 31 July 2012, 40020/03 (*M. a.o./Italy and Bulgaria*), paras. 175-181; ECtHR 25 June 2013, 6978/08 (*Gheorghe Cobzaru/Romania*), paras. 77-80. See also for this last case J. Mačkić, case note on: ECtHR 25 June 2013, 6978/08, *EHRC Cases* 2013/192 (*Gheorghe Cobzaru/Romania*).
Some complaints of discriminatory violence were also declared inadmissible by the Court because of certain procedural shortcomings, such as a failure by the applicants to exhaust all domestic remedies: ECtHR 6 June 2000, 42584/98 (*Durmaz/Turkey*) (Admissibility decision); ECtHR, 5 October 2004, 42572/98 (*İmret/Turkey*) (Admissibility decision); ECtHR 24 January 2006, 46412/99 (*Yaşar/Turkey*), para. 74; ECtHR 4 May 2006, 16926/03 (*Gergel/Slovakia*) (Admissibility decision); ECtHR 6 March 2007, 13252/02 (*Dzeladinov a.o./The former Yugoslav Republic of Macedonia*) (Admissibility decision); ECtHR 6 February 2007, 29703/05 (*Petrie a.o./United Kingdom*) (Admissibility decision); ECtHR 6 March 2012, 54415/09 (*Deari a.o./The former Yugoslav Republic of Macedonia*) (Admissibility decision).

so much the Court's unwillingness to look into the Article 14 complaint, but more the absence of sufficient evidence before the Court to indicate that a violent event was somehow connected with a discriminatory motive or a discriminatory attitude on the part of the perpetrators.

2.4 Further important taxonomies that influence proving the three types of complaints of discriminatory violence

This final section discusses two further ways that discriminatory violence complaints may be categorised, i.e. through the distinction between formal and substantive equality and the distinction between direct and indirect discrimination. In this regard, it provides an interpretation of the notions within these categories and explains how placing the three different types of discriminatory violence complaints into one category or another may influence issues of law that must be proved at the ECtHR. Most attention is devoted to the notions of substantive equality and indirect discrimination. This is because it will be argued in some of the later chapters in particular that with more promotion of a substantive conception of equality and further development of the concept of 'indirect discrimination' in cases of discriminatory violence – where possible – this could help to address systemic violations of the Convention in this sphere.

2.4.1 Formal and substantive equality

As mentioned above, in defining 'discrimination' the Court applies a general rule, that this notion means: "treating differently, without an objective and reasonable justification, persons in relevantly similar situations."[116] This rule has two separate aspects, which are formal equality and substantive equality. Formal equality refers to the norm that 'equal cases must be treated equally'. This means that individuals ought to be treated alike, no matter how they differ from one another in terms of sex, ethnicity, sexual orientation or any other characteristic. O'Connell states that formal equality models typically look for a rational or reasonable justification for any inequality.[117] Substantive equality refers to the norm that 'unequal cases must be treated unequally, according to the degree of inequality'. A substantive equality approach takes as its starting point that "some persons, often because of their membership in a particular group, are systematically subject to disadvantage, discrimination, exclusion or even oppression."[118] Further, "[a] substantive equality model will appreciate that inequality is often covert (even unconscious) … or the product of an accumulation of discrete factors. …

116 ECtHR 20 June 2006, 17209/02 (*Zarb Adami/Malta*), para. 71.
117 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 212.
118 Ibid., p. 213.

Therefore, a substantive equality model may be willing to draw inferences about the existence of prejudiced motives even where these are not explicit. It will be alive to the effects of structural inequality, where it is not possible to identify any one specific 'wrong doer' and his (or her) actions which caused the discrimination."[119] A substantive conception of equality may be implemented in the case law of an adjudicatory organ through calls for positive action and recognition of indirect discrimination, as both imply that a State should take steps to address factual inequalities in a society.[120] Therefore, such a model at least imposes a *positive duty* on States to ensure that disadvantaged groups are not discriminated against. Hence, it stresses that systemic discrimination should be addressed through positive actions.

Until recently, the Court's Article 14 case law in general was heavily focused on formal equality, thus by presenting discrimination mainly as a situation in which individuals in relevantly similar situations are treated differently, without there being an objective and reasonable justification for this.[121] However, in recent years, the conception of substantive equality has become more influential in ECtHR anti-discrimination case law.[122] The Court recognised substantive inequality in *Thlimmenos v. Greece*, a case in which an applicant claimed that as a result of once being convicted for his refusal to wear a military uniform in the armed forces at a time of general mobilisation owing to his religious beliefs as a Jehovah's Witness, he was excluded from the profession of chartered accountant. He submitted that the law failed to make a distinction between individuals who were convicted as a result of their religious beliefs and those convicted on other grounds. The Court found a violation of Article 14 read in conjunction with Article 9 and established under Article 14 a positive obligation on the part of the State to treat differently persons whose situations are significantly different, unless there is an objective and reasonable justification not to do so.[123] A substantive conception of equality has also been applied in cases concerning the segregation of Roma children by placing them in special schools or separate classes. For example, in *D.H.*, a case concerning discrimination against Roma children in the education system of the Czech Republic, the Court highlighted that "Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article."[124]

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119 Ibid.
120 Ibid., p. 227.
121 Ibid., p. 212.
122 R. Rubio-Marín & M. Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism', 26 *European Journal Of International Law* (2015), p. 881-899, p. 883-884. See also S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', 16 *Human Rights Law Review* (2016), p. 273-301.
123 ECtHR 6 April 2000, 34369/97 (*Thlimmenos/Greece*) (GC), para. 44.
124 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 175.

A similar development of an understanding of discrimination by the ECtHR that goes beyond the formal equality model may also be observed in cases of discriminatory violence specifically. It is important to be aware of this, because the way in which the Court approaches the three types of discriminatory violence complaints, thus through the lens of the formal or the substantive equality model, influences the legal issues that need to be proved under each complaint. The negative duty of State agents to refrain from inflicting discriminatory violence aligns with the formal equality model. This first type of complaint requires proof that State agents physically abused an individual or a group of individuals on the basis of discriminatory grounds, while individuals not belonging to the victimised group would not have been handled violently under similar conditions.[125]

The second type, regarding the positive duty to effectively investigate a complaint of discriminatory violence, is approached by the Court through the lens of the substantive equality model. In this context, the ECtHR has repeatedly underlined the importance of Member States taking sufficient positive action. In *Menson a.o. v. United Kingdom*, the Court underlined the following obligation:

> "The Court would add that, where that attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence."[126]

The ECtHR further built on this approach in *Nachova*. In this case, the Grand Camber emphasised the following:

> "… When investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention …. In order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing …."[127]

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125 See, for example, the following cases in which allegations of this kind were rejected: ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC); ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*); ECtHR 23 February 2006, 46317/99 (*Ognyanova and Choban/Bulgaria*); ECtHR 24 May 2007, 17060/03 (*Zelilof/Greece*). Successful claims were made in ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*); ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*); ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*).

126 ECtHR 6 May 2003, 47916/99 (*Menson a.o./United Kingdom*) (Admissibility Decision).

127 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 160.

Particularly in the last sentence of the quote, the ECtHR highlights: (1) that State authorities must take positive action by investigating complaints concerning discriminatory violence; and (2) that this obligation becomes even more important when individuals have died at the hands of State agents. More specifically, the Court underlines that complaints of discriminatory violence should be treated differently from other complaints of violence, in such a way that reasonable steps need to be undertaken to unmask any discriminatory motive. Indeed, it clearly states that '[a] failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention'. So, in order to establish a violation in this context, it is not unequal treatment of equals which must be proved (as is the case under the formal equality model), but a lack of different treatment of those who are different (according to the substantive equality model).

The third type, namely the positive obligation to take preventive measures, also falls under the substantive equality model. For example, in *Identoba a.o. v. Georgia*, the Court underlined the respondent State's positive obligation to provide the disadvantaged group concerned with heightened protection from attacks by private individuals.[128] Hence, also in the context of this type of complaint, it must be proven that the norm to treat unequal cases unequally, according to the degree of inequality, has not been respected.

Therefore, the Court has definitely made efforts to develop an interpretation of discrimination that goes beyond the formal equality principle in cases of discriminatory violence. It has done so in complaints which concern the positive duties to effectively investigate discriminatory violence allegations and to protect victims from this type of wrongful conduct. It remains to be seen whether the Court will include a substantive equality approach also in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence. According to O'Connell, Judge Bonello has already underlined the Court's failure to develop a substantive equality model in these types of complaints, by expressing that "Kurds, coloureds, Muslims, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it."[129] This study will further elaborate, in chapters 5 and 6, on the question of whether it would be possible to implement more of a substantive equality approach in cases regarding this negative duty, in order to tackle systemic forms of violence inflicted by State agents upon members of certain groups.

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128 ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), paras. 72-73.

129 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 3, cited by O'Connell in R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 213-214. This quote was also referred to in section 1.1.

2.4.2 Direct and indirect discrimination

On the basis of Article 14, applicants may put forward claims concerning both direct and indirect discrimination.[130] In order to provide some insight into the meaning of both terms, the ECtHR has cited definitions from EU law in its judgments.[131] Particularly Article 2 § 2 of the Council Directive 2000/43/EC (Racial Equality Directive or the RED) has served the Court in this regard. This provision describes the two concepts as follows:

> a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
> b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[132]

In the field of EU law, direct discrimination relates to the disadvantageous treatment of an individual based on his or her specific characteristics that distinguish the individual from other people.[133] The alleging party must prove a *causal relationship* between the discriminatory ground and the less favourable treatment accorded to the victim. By contrast, indirect discrimination does not require such a causal relationship to be demonstrated, it is instead an *effect*-related concept.[134] It is suffered "where some requirement is demanded, some practice is applied, or some other action is taken which produces an 'adverse impact' for a protected class of persons."[135] In the context of EU law, indirect discrimination "may be present in a rule or practice which does not even mention the ground in question, but which has a detrimental effect on persons meant to be protected against discrimination."[136]

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130 B. Rainey, E. Wicks & C. Ovey, *Jacobs, White, and Ovey. The European Convention on Human Rights*, New York: Oxford University Press 2014, p. 567.

131 See, for example, ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 84.

132 Article 2 § 2 Council Directive 2000/43/EC. See similar provisions in Directives which concern other discrimination grounds: Article 2 § 2 Council Directive 2000/78/EC; Article 2 § 2 Council Directive 2002/73/EC; Article 2 Council Directive 2004/113/EC; Article 2 § 1 Council Directive 2006/54/EC; Article 3 Council Directive 2010/41/EU.

133 J. Maliszewska-Nienartowicz, 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?', III (1) *International Journal of Social Sciences* (2014), p. 41-55, p. 42.

134 M.J. Busstra, *The Implications of the Racial Equality Directive for Minority Protection within the European Union* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 137-139.

135 E. Ellis & P. Watson, *EU Anti-Discrimination Law*, Oxford: Oxford University Press 2012, p. 143.

136 D. Schiek, 'Indirect Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 323-475, p. 323.

The disadvantage in cases of indirect discrimination is demonstrated numerically, most notably through statistics.[137] Indirect discrimination thus focuses on the *effects* of a particular treatment and stands in contrast to direct discrimination which implies a certain underlying *motive* or *cause* for some difference in treatment.[138] A detrimental effect in itself, however, does not constitute indirect discrimination. Such an effect may be justified and the rule or practice may be applied provided that "the rule or practice serves a legitimate aim unconnected with prohibited discrimination and does not go over and above what is necessary to achieve that aim."[139]

The ECtHR has never mentioned a specific concept of direct discrimination. However, the Court's definition of discrimination as such, which means 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations', is generally considered as sufficiently broad to capture this type of discrimination.[140] Direct discrimination prohibits the most overt manifestations of bias. It occurs where individuals or groups are treated less favourably because of a particular characteristic, such as sex or ethnic origin.[141] Therefore, a prohibition of direct discrimination essentially falls under the formal equality model.[142] An example of this type of discrimination may be illustrated by the case *Kiyutin v. Russia*, in which the ECtHR ruled that the applicant had been subjected to discriminatory treatment in violation of Article 14 read in conjunction with Article 8, as the Russian authorities refused him permission to reside in Russia on account of his health status, the applicant being HIV-positive. The Court noted that the applicant – as the spouse of a Russian national and father of a Russian child – was eligible to apply for a residence permit because of his family ties in Russia. During the application process, he was obliged to submit to HIV-testing and to enclose a certificate showing that he was

137 Ibid., p. 399.

138 M.J. Busstra, *The Implications of the Racial Equality Directive for Minority Protection within the European Union* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 137-139.

139 D. Schiek, 'Indirect Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 323-475, p. 323.
The EU law approach towards indirect discrimination is virtually identical to the manner in which this notion is interpreted in US and UK case law. See Supreme Court (United States) 8 March 1971, *Willie S. Griggs et al. Petitioners/Duke Power Co.*, 401 U.S. 424 (1971); House of Lords (United Kingdom) 17 February 2000, *R. v. Secretary of State for Employment Ex. p. Seymour-Smith (No. 2)*, [2000] UKHL 12; [2000] 1 All ER 857; [2000] 1 WLR 435. See for the CJEU equivalent of this case: CJEU 9 February 1999, C-167/97 (*Regina/Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*) ECR 1999 I-00623.

140 M. Bell, 'Direct Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 185-322, p. 189.

141 Ibid., p. 185.

142 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 219.

not infected with HIV. The Court observed that after the test had revealed his HIV-positive status, his application for a residence permit was rejected on the sole basis of the absence of the mandatory HIV clearance certificate. Hence, the Court reasoned that "the domestic authorities had obviously refused him a residence permit because of his HIV-status."[143] There was further no objective and reasonable justification for this difference in treatment.[144] The government did not manage to convince the Court that HIV-positive persons in general pose a danger to public health in Russia. The only reason for excluding individuals who are HIV-positive appeared to lie in the perception of the State that these individuals are dangerous, 'dirty' and promiscuous, and that – for these reasons – they do not belong in Russia,[145] which cannot qualify as an objective and reasonable justification.

The Court has explicitly discussed and established the meaning of indirect discrimination. In *D.H. a.o. v. Czech Republic*, it referred to it as "a general policy or measure that has disproportionately prejudicial effects on a particular group [although] it is not specifically aimed at that group …."[146] Additionally, in *D.H.*, the Court also indicated that a situation which amounts to indirect discrimination does not necessarily require proof of intent.[147] Policies or rules creating indirect discrimination often appear neutral and seem to apply to everyone equally, yet a closer look reveals that in practice they produce an unjustified adverse impact on members of a specific group. There is no need to prove that the State acted with the purpose of discriminating or that the policy or rule was induced by discriminatory motives. All that counts is the effect that a policy or rule produces, thus that it negatively impacts on one distinctive group of people whose members share the same characteristics. In that sense, indirect discrimination may be considered as a form of the substantive conception of equality, as both are concerned with the effects of legal rules, rather than focusing on questions of whether the law on paper makes distinctions.[148]

An example of indirect discrimination is the case *D.H.*, mentioned above, in which 18 Romani applicants complained about the system of 'special schools' in the Czech Republic, the purpose of which was to provide an appropriate curriculum for children with special educational needs. National legislation prescribed that children with mental deficiencies who were unable to attend ordinary or specialised primary schools were to be placed

143 ECtHR 10 March 2011, 2700/10 (*Kiyutin/Russia*), para. 60.
144 Ibid., paras. 62-74.
145 J.H. Gerards, case note on: ECtHR 10 March 2011, 2700/10, *EHRC Cases* 2011/84 (*Kiyutin/Russia*), para. 1.
146 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 175. See also ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 154; ECtHR 6 January 2005, 58641/00 (*Hoogendijk/The Netherlands*) (Admissibility Decision); ECtHR 24 May 2016, 38590/10 (*Biao/Denmark*) (GC), para. 103.
147 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 184.
148 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 213.

in these 'special schools'. A decision to place a child in a 'special school', in accordance with this national legislation, was to be taken by the head teacher on the basis of the results of tests carried out in an educational psychology centre to measure the child's intellectual capacity, and required the consent of the child's legal representative.[149] According to the applicants, their placement in such schools amounted to discriminatory treatment on the basis of their race, colour, association with a national minority and their ethnic origin and they relied on Article 14 in conjunction with Article 2 of Protocol No. 1 (the right to education) for that purpose. Although no proof of intent or discriminatory motive was required by the Court in this case, it was necessary to prove that the specific rule – although formulated in a neutral manner – clearly affected a higher percentage of Roma children than non-Roma children. Hence, it had to be proved that the legislation had a discriminatory effect upon the group to which the victims belong. Once such an effect was established, a presumption of indirect discrimination was created and it had to be demonstrated that the difference was the result of objective factors unrelated to any discrimination on the grounds of ethnicity.[150]

Both direct and indirect discrimination may be directly challenged before the Court *and* objectively and reasonably justified.[151] However, the two types differ importantly in terms of what must be proved. In the specific context of discriminatory violence, certain cases can be regarded as examples of direct discrimination. This is the case, for instance, for the first type of discriminatory violence complaint, concerning allegations that State officials disregarded their duty to refrain from inflicting discriminatory violence themselves. As observed earlier, the Court requires proof of a discriminatory motive as the causal factor in the killing or ill-treatment of a victim from a certain group, which means that it must be shown that an individual was treated less favourably (i.e. violently) by State agents because of a particular characteristic of that individual.

The remaining types of complaints of discriminatory violence cannot, however, be easily placed in one category or the other. When it is alleged that State authorities breached Article 14 read in conjunction with Articles 2 or 3, because the investigation into a violent incident was carried out in a discriminatory way, proof of a discriminatory *attitude* on the part of the State agents involved in the investigation is required. This is a form of

149 The different forms in which this phenomenon of Roma school segregation may appear in various European countries is described by K. Arabadjieva, 'Challenging the school segregation of Roma children in Central and Eastern Europe', 20:1 *The International Journal of Human Rights* (2016), p. 33-54, p. 34.

150 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), paras. 175-210.

151 S. van den Bogaert, 'Roma Segregation in Education: Direct or Indirect Discrimination? An Analysis of the Parallels and Differences between Council Directive 2000/43/EC and Recent ECtHR Case Law on Roma Educational Matters', 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2011), p. 719-753, p. 728.

direct discrimination, since the individual is treated less favourably than others because he or she belongs to a certain group. However, where it is alleged that the State authorities failed to conduct an effective investigation into allegations of discriminatory violence in the domestic context, it must be established that there was a suspicion of discriminatory violence in a certain case and that the State authorities never properly investigated this. This type of allegation does not appear to fit into either direct or indirect discrimination claims. Something similar may be said regarding a breach of the positive duty by State officials to take preventive measures against discriminatory violence. In cases where it is alleged that there was a failure on the part of State agents to prevent discriminatory violence due to the *corollary* of the victims' membership of a certain group, this may be typified as direct discrimination. However, the very refusal to offer protection to victims from discriminatory violence, for whatever reason, does not appear to fit into either direct or indirect discrimination claims.

It is difficult to typify the different types of ECtHR cases on discriminatory violence as indirect discrimination, since it is hard to claim that the underlying behaviour, i.e. the violence, resulted from neutral practice or legislation.[152] So far, the only case that somewhat stands out in this sense is *Opuz*. Although the Court did not explicitly indicate in the case that the discrimination complaint can be regarded as one of indirect discrimination, it applied the same rules of evidence as in *D.H.* in order to establish a violation of Article 14 read in conjunction with Articles 2 and 3. Thus, it required proof of the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory passivity of the judiciary in the respondent State created a climate that was conducive to domestic violence.[153] This approach corresponds to the Court's reasoning in cases of indirect discrimination.

There may thus be merit in examining to what extent the *D.H.* approach can be applied to cases concerning the other types of discriminatory violence, which would mean that an applicant would only need to show that some domestic policy of inflicting violence – or not effectively investigating this type of wrongful conduct – disproportionally affects members of his or her group, after which it falls upon the government to demonstrate that any established difference can be explained on other grounds. The situations and criteria which should guide such a shift in the burden of proof are discussed further in chapter 5.

152 See R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008), p. 475-516, p. 507.

153 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 183 and 198.

2.5 Conclusion

This chapter has shown that discriminatory violence complaints can be ordered into three types and that some of these types are more difficult to prove than others. The chapter has further explained that certain features inherent to Article 14, particularly this provision's open and accessory character, do not obstruct the Court in establishing different types of discriminatory violence. Finally, this chapter has considered the three types of discriminatory violence complaints through the lens of formal and substantive equality models and the distinction between direct and indirect discrimination. It has highlighted that in the context of some complaints of discriminatory violence, i.e. those involving positive obligations on Member States, the Court has managed to develop an understanding of discrimination that goes beyond a formal equality approach. Indeed, under these types of complaints concerning Article 14 read in conjunction with Articles 2 or 3, the Court has moved towards a substantive equality model. It has acknowledged the importance of Member States taking positive action against discriminatory violence through effective investigations and by implementing protective measures in the domestic sphere.

The difficulties in proving discriminatory violence are largely determined by *issues of law* that must be demonstrated under each distinct type, such as a discriminatory motive, a discriminatory attitude, or a failure by State agents to offer an adequate response to discriminatory violence. The most challenging in terms of what must be proved are complaints which concern the negative duty of State agents to refrain from inflicting discriminatory violence, since the Court requires proof of the legal concept of discriminatory motive. The existence of a discriminatory motive can be demonstrated on the basis of strong factual elements, such as statements from witnesses claiming that State agents made offensive remarks on account of the victim's membership of a specific group, or internal police instructions to treat individuals from a certain group in a violent manner.

However, in cases where violence inflicted upon a disadvantaged group by State agents appears to be of a systemic nature, it may be desirable to introduce new legal concepts that could be proved also through other factual elements. Therefore, this study will argue in chapters 5 and 6 that instead of requiring proof of a discriminatory motive, the Court could require proof of a discriminatory *attitude* in the context of complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence. In this regard, the study will further argue that such an attitude may be derived from information which indicates that the violence inflicted by State agents on individuals from a certain group is *systemic*. In addition, these chapters will expose how, in cases of sterilisation of women from certain disadvantaged groups, the Court could also apply the same rules of evidence that it uses in cases of indirect discrimination. It will also identify the types of evidentiary material that could be used to establish a violation of Article 14 read in conjunction with Articles 2 or 3 in this complaint. Hence, with this

specific type of allegation of discriminatory violence, the ECtHR should not require proof of a discriminatory motive, but rather proof of a State policy or domestic legislation which has an adverse effect on the disadvantaged group.

By introducing these changes, the Court's case law could have a greater potential to tackle the discriminatory violence that is inflicted on a larger scale. In line with its functions and purpose which were set out earlier in section 1.4, it could warn against escalations or repeated incidents of discriminatory violence (*alarm bell function*), it could place the issue of systemic discriminatory violence on the agenda of the Member States involved (*agenda-setting function*), and it could serve its *constitutional* role by addressing complaints of such a serious nature. At the same time, it could move towards a more substantive conception of equality.

The formal and substantive equality models and the distinction between direct and indirect discrimination will be addressed further in chapters 5 and 6 of this study. They will serve as guidelines in determining the different ways in which systemic discriminatory violence inflicted by State agents could be uncovered through the Court's rules of evidence.

3 The collection of facts and the actors involved in fact-finding at the ECtHR

3.1 Introduction

This chapter describes different ways in which the ECtHR gathers facts and identifies the various actors who may play a role in establishing those facts. A variety of actors may contribute to fact-finding at the Court, including applicants and respondent States as direct parties, but also the Court itself through fact-finding hearings and on-site investigations, as well as external actors through third party intervention or otherwise. Fact-finding is described in this context as "a process (which may consist of different phases) in which [the] court … attempts to clarify an unclear or disputed fact or set of facts."[1] The contribution made by each actor to the fact-finding process and the obligations of the parties involved will be examined in turn. A general overview of fact-finding at the Court will be useful, because it helps to determine what means of gathering evidence may be most effective in establishing the facts in cases of discriminatory violence.

The chapter starts off with a discussion in section 3.2 of the legal framework that governs the examination of cases by the Court. This legal framework forms the basis for fact-finding in the Convention system. It consists of Article 38 of the Convention (regarding the 'examination of the case'), the 'Rules of Court' and 'Annex to the Rules (concerning investigations)'. Article 38 ECHR is of particular importance because it indicates – albeit to a limited extent – how the Court is supposed to carry out its adjudicatory task. It further emphasises the roles of the Court and the different parties during the examination of a case. The different roles of the direct parties are further described in section 3.3 where the procedure by which applicants may present their case is described along with the obligations of respondent States in this context. Section 3.4 subsequently addresses the Court's fact-finding function. The Court may also organise fact-finding hearings and on-the-spot investigations and these are both briefly analysed. Thereafter, section 3.5 considers the ways in which external actors can contribute to the collection and establishment of the facts of a case. In section 3.6 the chapter concludes with an indication of the fact-finding instruments that may be most useful for complaints concerning discriminatory violence.

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1 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 22.

3.2 The legal framework for the examination of a case by the ECtHR

The legal framework for the examination of a case by the ECtHR consists mainly of Article 38 of the ECHR, the 'Rules of Court' and 'Annex to the Rules (concerning investigations)'.[2] These documents provide basic information concerning the manner in which facts may be gathered during proceedings at the Court. The Rules of Court and Annex contain rules that also set out the timeframe within which the presentation of the case must be completed and the provisions governing fact-finding missions carried out by the Court, such as instructions on how fact-finding hearings should be organised.[3]

Article 38 of the Convention contains the principles for the Court to follow regarding establishing the facts. This provision allows the Court to become actively involved in the examination of a case. Instead of laying down that the ECtHR should rigorously apply the principle of *actori incumbit probatio*, which in Convention proceedings prescribes that the burden of proof rests on the one who affirms, Article 38 instead underlines that the process of collecting relevant facts is a joint undertaking on the part of the Court and the actors involved in the proceedings. The provision reads as follows:

> "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

This is also reflected in a statement made by the Court in *Ireland v. United Kingdom*, where it noted that in "the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[4]

In light of the reference in *Ireland v. United Kingdom* to 'the Commission,' it is useful to mention that the 'examination of the case' was originally regulated under Article 28 § 1 ECHR which empowered the former European Commission of Human Rights to conduct an investigation into the main issue and to establish the facts in a case. It is important to be aware of the fact that this institution once existed because it was this Commission that laid the foundation for certain rules of evidence at the ECtHR and which played a crucial role in the fact-finding processes in several cases mentioned elsewhere in this study. The Commission was entrusted with the task of establishing whether the facts amounted to a violation of the Convention. Thereafter, if it considered a case to be well-founded, it could decide to refer the case to the ECtHR or to the Committee of Ministers. In this context, the Court remained more in the background in terms of fact-finding activities.

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2 Hereafter this document is referred to as the 'Annex'.

3 The most recent Rules of Court, dated 14 November 2016, have been evaluated in this thesis. They can be found on the Court's webpage (www.echr.coe.int).

4 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160.

Because the task of establishing the facts was primarily attributed to the Commission under the old Convention system, the Court was cautious in applying its own investigative powers.[5] While this provision was still in force, the Court repeatedly stated in specific cases where it had to decide on difficult factual issues that on the one hand, it was not bound by the Commission's findings of fact and that it remained free to make its own assessment in the light of all the material before it and, on the other hand, that only in exceptional circumstances would it exercise its own investigatory powers.[6]

Alterations to this system were made after most Central and Eastern European States became parties to the Convention in the 1990s. The increased number of members of the Council of Europe created long delays in the processing of cases which were taking at least four to five years (in addition to the time taken to pursue domestic proceedings). Thus, in order to simplify and speed up the system, Protocol No. 11 was introduced which disbanded the Commission.[7] After that protocol entered into force in November 1998, the establishment of facts was regulated in a new provision, i.e. Article 38 § 1a ECHR. From then on, the Court became a full-time institution with the authority to investigate a case and to verify and evaluate the evidence.[8] However, as Protocol No. 11 appeared to be insufficient to manage the increasing case load of the Court, this led to the adoption by the Committee of Ministers of Protocol No. 14 to the Convention in May 2004.[9] With the entry into force of Protocol No. 14 from 1 June 2010, the rule on the examination of the case is now recorded in Article 38 in its current form.

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5 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 26.

6 ECtHR 16 September 1996, 21893/93 (*Akdivar a.o./Turkey*) (GC), para. 78; ECtHR 8 July 1999, 23763/94 (*Tanrikulu/Turkey*) (GC), para. 67. See also L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995, p. 157-158.

7 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 6-7.

8 However, even after Protocol No. 11 entered into force, the Commission still held the power to conduct an investigation into those cases that were placed in the 'transitional' category. Article 5 § 3 Protocol No. 11 prescribed that applications that had already been declared admissible on the day Protocol No. 11 entered into force were supposed to be finalised by the members of the Commission under the former system within a period of one year. Applications that had not been handled within the prescribed amount of time were to be dealt with by the Court under the new system. Consequently, many cases, based on requests filed before 1998 where the Commission had already conducted an investigation, were settled by the Court. See P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 27.

9 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 7.

The 'new' Article 38 indicates that the Court may undertake two specific activities when establishing the facts. Firstly, it may examine the case together with the representatives of the parties. Thus, it then takes into account submissions about the facts of a case from the different parties involved in that case. Since the Convention system has been described as "primarily a written rather than an oral procedure,"[10] this activity is conducted mostly through the examination of written documents previously drawn up in the domestic context. Secondly, the Court may conduct an 'investigation' into the circumstances of a case itself, where deemed necessary. This is an activity for which the Member States involved must furnish all 'necessary facilities'. However, in most cases such investigations are regarded as superfluous because the facts are not contested by the parties to the dispute or have already been considerably clarified by the domestic judgments.[11] Therefore, in most cases, it may be assumed that the documentary material has already been collected and presented in the national context and passed on to the Court by the parties' representatives. So, in the vast majority of cases, ECtHR judges – while ascertaining the facts – rely on previous decisions that were taken in the domestic setting concerning those cases and on documents created in the course of prior domestic proceedings. The Court's task is then limited to assessing whether or not the established factual findings reveal a violation of the Convention.[12]

This approach by the Court is in line with the subsidiary nature of its role, which means that the ECtHR needs to be wary of assuming the function of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case.[13] However, the presence of 'cogent elements' in certain cases may require the ECtHR to depart from the reasoned findings of fact arrived at by national judicial authorities. Cogent elements arise in situations where the fact-finding activities performed by

10 Ibid., p. 44.

11 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 207; M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 121.
This was also noted in a broader context for international tribunals in general, such as the ICJ, the IACtHR and the ECtHR. See P. Kinsch, 'On the uncertainties surrounding the standard of proof in proceedings before international courts and tribunals', in: G. Venturini & S. Bariatti (eds.), *Diritti Individuali E Giustizia Internazionale/Individual Rights and International Justice/Droits Individuels et Justice Internationale. Liber Fausto Pocar*, Milano: Giuffrè Editore 2009, p. 427-442, p. 434.

12 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 69.

13 R. Ryssdal, 'The coming of age of the European Convention on Human Rights', 1 *European Human Rights Law Review* (1996), p. 18-29, p. 24-25. See also ECtHR 8 October 2015, 36503/11 (*Gahramanli a.o./Azerbaijan*), para. 72.

national courts show serious deficiencies.[14] Under such circumstances, the ECtHR has imposed an obligation on itself to conduct a particularly thorough scrutiny of all the material submitted by the parties. In that regard, and particularly in the context of cases where allegations have been made under Articles 2 or 3 of the Convention, the Court has underlined that:

> "The Court is sensitive to the subsidiary nature of its role and recognises that it must refrain from taking on the role of a first-instance tribunal of fact unless this is rendered unavoidable by the circumstances of a particular case. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny even if certain domestic proceedings and investigations have already taken place. The Court is not bound by the findings of domestic courts, and cogent elements may require it to depart from and set aside these findings …."[15]

So, in principle, the Court adopts a position of reserve as far as fact-finding activities are concerned because fact-finding is, in principle, considered to be the task of national courts. There are still circumstances in which the Court itself conducts a more thorough investigation into the facts of the case and establishes facts not solely on the basis of written documents. Hence, fact-finding is sometimes based on the Court's own active engagement in the collection of evidence and on the direct and external parties' cooperation with the Court in all matters relating to the establishment of facts. Consequently, in those cases, establishing the facts before the Court is not simply a matter of one party bearing the duty to present the relevant factual elements and all the evidentiary material in order to persuade the Court of their arguments. Rather, establishing the facts appears to be an interplay between the different actors, which are the applicant and the respondent Member State, the Court and sometimes even external actors.

3.3 How applicants and respondent States are engaged in fact-finding during the procedure before the ECtHR

One way in which facts are gathered at the Court is through submissions made by the applicants and respondent States. In order to understand how they may contribute to the fact-finding process, this section first sets out how these direct parties may become engaged in a procedure before the ECtHR, i.e. through individual petitions or through inter-State applications. More precisely, it outlines how applications may be presented to the Court. Thereafter, it focuses on the duty of both parties, and respondent States in particular, to cooperate with the Court in gathering evidence.

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14 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 208; D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 143.

15 ECtHR 26 April 2011, 25091/07 (*Enukidze and Girgvliani/Georgia*), para. 286.

3.3.1 Presenting an application to the Court

Two types of application procedures may be lodged with the Court: individual applications and inter-State applications. The basis for individual applications is laid down in Article 34 ECHR, which prescribes that applications may be brought by "any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." The right of individual petition is considered by the Court as "a key component of the machinery for protecting the rights and freedoms set forth in the Convention."[16] The last sentence of Article 34 ECHR indicates that Member States ought "not to hinder in any way the effective exercise of this right." Obstructing applicants or potential applicants in taking their cases to the ECtHR will lead to findings of violations of this provision.[17]

In addition to individual petitions, it is also possible to bring inter-State complaints before the Court, which is provided for by Article 33 ECHR. Leach makes a distinction between three categories of inter-State cases.[18] The first arises where applicant States represent, or are closely related to, the individual victims in the context of a certain political dispute, or some other controversy, between States. For example, a series of cases have been brought before the Commission and the Court by Cyprus against Turkey following Turkey's military operations in northern Cyprus in 1974, its continuing occupation of that territory and its proclamation of the 'Turkish Republic of Northern Cyprus' in 1983.[19] A second category concerns cases in which applicant States attempt to obtain a remedy for one of their nationals whose rights have been violated by a respondent State. Leach mentions the case *Denmark v. Turkey* as an example in this regard. In this case it was argued that a Danish national had been tortured by the Turkish police. Eventually, a friendly settlement was reached between the parties, which included the payment of a sum of money to the applicant government and a statement of regret by the respondent government concerning the incidence of occasional and individual cases of torture and ill-treatment in Turkey.[20] A third category of inter-State cases are those issues where applicant States conduct a so-called policing role. Through such procedures, they condemn the human

16 ECtHR 4 February 2005, 46827/99 and 46951/99 (*Mamatkulov and Askarov/Turkey*) (GC), para. 122.

17 ECtHR 16 September 1996, 21893/93 (*Akdivar a.o./Turkey*) (GC), para. 106; ECtHR 21 February 2002, 23423/94 (*Matyar/Turkey*), para. 159; ECtHR 12 April 2005, 36378/02 (*Shamayev a.o./Georgia and Russia*), para. 518; ECtHR 25 May 1998, 15/1997/799/1002 (*Kurt/Turkey*), para. 165; ECtHR 4 February 2005, 46827/99 and 46951/99 (*Mamatkulov and Askarov/Turkey*) (GC), para. 128.

18 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 13-14.

19 EcomHR 26 May 1975, 6780/74 and 6950/75 (*Cyprus/Turkey*) (Admissibility decision); EcomHR 10 July 1978, 8007/77 (*Cyprus/Turkey*) (Admissibility decision).

20 ECtHR 5 April 2000, 34382/97 (*Denmark/Turkey*) (Friendly Settlement), paras. 23-24.

rights situation in another Council of Europe Member State on a more generic level.[21] Leach refers to the *Greek* case to illustrate this third category of inter-State complaints. In this case, the applicant States complained that, following the *coup d'état* in 1967, among other things, the Greek government violated Article 3 of the Convention. They alleged numerous cases of torture or ill-treatment of political prisoners at the time in Greece, which resulted in an administrative practice (this is discussed below in section 5.4.2).[22] This example demonstrates that applicant States do not necessarily need to have some sort of relationship with the victims of violations by another Member State. The victims do not necessarily have to be the nationals of the applicant State, for example. Hence, inter-State cases could concern allegations of large-scale human rights violations in a specific Contracting Party, and those Council of Europe members that complain about such practices are not necessarily pursuing some national interest with this activity. Rather, they raise a concern about the "public order of Europe."[23]

The inter-State mechanism has been invoked in addressing situations of systemic violations.[24] However, given the negative diplomatic and political consequences that can potentially arise from one Member State accusing another of being a violator of human rights, inter-State procedures are not used very often.[25] Thus, Member States do not often draw the Court's attention to allegations of serious and repeated violations of the Convention committed by other Member States. In the context of widespread complaints about violations committed by Turkey, the following has been observed:

> "The inter-State mechanism under the Convention is more readily designed to raise these larger issues. However because the political will is absent on the part of other States to become involved in such an application against Turkey, it is in the context of the individual complaints mechanism that efforts have been made to raise complaints of such large scale violation …."[26]

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21 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 13-14.

22 EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972).

23 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 115-117.

24 Examples include EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972); ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC).

25 L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 79-80.

26 A. Reidy, F. Hampson & K. Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey', 15 *Netherlands Quarterly of Human Rights* (1997), p. 161-173, p. 172.

Thus, currently the focus is more on individual complaints, of which it has been said that each separate judgment on a certain issue "adds credibility to allegations that human rights violations are widespread and that systemic reform is required."[27]

Rules 46 and 47 of the Rules of Court enumerate the contents that must be included in inter-State and individual applications. In inter-State applications, a State applicant must provide the Court with a statement of the facts, a statement of the alleged violation(s) of the Convention and the relevant arguments, a statement on compliance with the admissibility criteria (exhaustion of domestic remedies and the six-month rule) laid down in Article 35 § 1 of the Convention and copies of any relevant documents and in particular the decisions, whether judicial or not, relating to the object of the application (Rule 46). A complaining individual must provide a concise and legible statement of the facts and of the alleged violation(s) of the Convention and the relevant arguments with a concise and legible statement of the applicant's compliance with the admissibility criteria mentioned in Article 35 § 1 ECHR (Rule 47 § 1). Among the documents to be submitted the applicants may include "domestic court claim forms, witness statements and judgments and relevant correspondence, reports and other non-judicial decisions, including any document which is required to show that the admissibility criteria (notably, the exhaustion of domestic remedies and the six-month time limit) have been complied with."[28]

Practitioners representing the applicants are advised to submit to the Court the most convincing application already at the initial stage when the Court decides on the admissibility of a case. This applies particularly to individual complaints. In this context, convincing applications are necessary for several reasons. Firstly, sufficient information about a case allows the Court to conduct an initial analysis of the application. Sufficient information makes it possible to decide that individual applications with clear problems of admissibility can be submitted rapidly to a single judge for a further decision.[29] The admissibility of cases mostly concerns procedural issues which, if found, may prevent the Court from dealing with the case. Thus, applicants are required to satisfy a number of conditions of admissibility as set out in Article 35 ECHR before the Court can examine the merits of the case. In the context of individual complaints, it is important that applicants exhaust

27 L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 81.

28 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 29.

29 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 118.

all domestic remedies before they turn to the ECtHR[30] and that they do so within a period of six months from the date on which the final decision by a domestic judge was taken. If they do not fulfil these conditions, their cases are declared inadmissible. Other reasons for inadmissibility are: anonymous applications; applications that are substantially the same as matters that have already been examined by the Court or have already been submitted to another procedure of international investigation or settlement and contain no relevant new information; applications that are incompatible with the provisions of the Convention or its Protocols, are manifestly ill-founded, or entail an abuse of the right of individual application, or; applications from which it appears that applicants have not suffered a significant disadvantage. Complaints that are incompatible *ratione personae*, *ratione loci*, *ratione temporis* or *ratione materiae* are also declared inadmissible.[31] This stands in contrast with inter-State applications, where the only applicable admissibility criteria are the requirement to exhaust domestic remedies,[32] the six-month rule and the conditions *ratione personae*, *ratione loci*, *ratione temporis* or *ratione materiae*.[33]

The second reason why applications must be convincing is connected to the first and concerns the inadmissibility condition that a complaint is 'manifestly ill-founded' in individual applications (Article 35 § 3 ECHR). This condition, in essence, entails a preliminary test of the case on its merits.[34] The Court will declare an application inadmissible if, on preliminary investigation, the application does not disclose *prima facie* grounds that there has been a breach of the Convention.[35] More concretely, this means that during the admissibility stage, *prima facie* evidence must be presented that supports the application. In international law, a *prima facie* case is described as evidence "which, unexplained or uncontradicted is sufficient to maintain

30 There is an exception to this rule. Applicants need not exhaust domestic remedies in cases where such remedies are either ineffectual or impractical. See Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 11.

31 Council of Europe, *Practical Guide on Admissibility Criteria*, Strasbourg: Council of Europe 2014 (online), p. 41-81.

32 There are two exceptions to the exhaustion rule in inter-State cases. The first is that the rule does not apply to inter-State complaints regarding legislative measures. The second exception is that the rule is waived where there is an administrative practice in the respondent State that would render any remedies ineffective (see ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), paras. 125 and 147-158). Both exceptions are mentioned in D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 46.

33 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 45.

34 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 29.

35 Ibid., p. 157. See also D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 122.

the proposition affirmed."[36] Leach mentions, as an example, that applicants need to produce sufficient evidence of telephone tapping or torture, for example, failing which an application will be declared inadmissible as being manifestly ill-founded.[37] Hence, the more authoritative and convincing an initial application is, the less likely it is to be declared inadmissible.[38]

Currently, it has become the usual practice that the Court takes a decision on admissibility and merits together (Article 29 § 1 ECHR). In many cases, therefore, the Court immediately establishes the existence of *prima facie* evidence on a case, also during the discussion of the merits. However, the Court can still choose to take a decision on admissibility separately (Article 29 § 1 ECHR), which means that the presence of *prima facie* evidence will be assessed at the admissibility stage. This stands in contrast with inter-State cases, where the Court has refused to assess the merits of a case while assessing admissibility. Consequently, an inter-State application cannot be rejected as manifestly ill-founded under Article 35 § 3 ECHR.[39]

Finally, sufficient and convincing information enables the Court to identify high priority cases at the initial stage of proceedings concerning individual applications. The Court's priority policy ensures that the most serious cases revealing the existence of widespread problems are dealt with more rapidly. Cases in higher categories relate to urgent applications, such as those where there is a particular risk to the life or health of the applicant, applications that raise questions which may have an impact on the effectiveness of the Convention system, inter-State cases and applications whose main complaints appear to raise issues under Articles 2, 3, 4 (prohibition of slavery and forced labour) or 5 § 1 (right to liberty and security) of the Convention (the 'core rights'), irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings. These issues will be eligible for examination before applications which are manifestly inadmissible, for example.[40]

This subsection has shown that in individual applications the facts are principally brought primarily by the applicant when presenting the case, as it is the applicant who brings the case to Court. Even at the initial stages, the applicant must be able to make a strong case. However, as will be demon-

36 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 230.

37 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 157.

38 Ibid., p. 29.

39 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 45.

40 'The Court's Priority Policy' is available online and may be viewed on the Court's web page. See also D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 118-120.

strated below, in many cases in which Article 2 and 3 complaints are made, providing sufficient evidence to the Court is particularly complicated. In such cases it may occur that evidentiary material is not available to the applicants, while the State authorities have exclusive knowledge of the events at issue.[41] In this context, respondent States are required to cooperate with the establishment of facts at the Court. The next subsection discusses how far these obligations extend in this context.

3.3.2 The parties' obligation to cooperate with the Court

Both parties to a case are bound to cooperate with the Court during the examination of a case in accordance with Article 38. For example, where there are circumstances which make the gathering of evidence practically impossible for the applicant and where the respondent State controls access to the evidentiary material, the obligation formulated under Article 38 ECHR for the respondent State to 'furnish all necessary facilities' becomes particularly important. This requirement includes the following non-exhaustive list of activities that the Contracting Parties must undertake: submit to the Court all documentary evidence relating to the case, identify, locate and ensure the attendance of witnesses, comment on documents submitted to the Court and reply to questions posed by the Court.[42]

Further obligations regarding cooperation are provided in Rule 44A of the Rules of Court in addition to Article 38 ECHR. This rule underlines both parties' duty to cooperate fully with the Court in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty applies equally to those Member States that are not parties to the proceedings, but whose cooperation is still deemed necessary. Where there is a failure to comply with an order of the Court concerning the conduct of the proceedings, the President of the designated Chamber has the power to take any steps which he or she considers appropriate (Rule 44B). If one of the parties fails to produce evidence or provide the information that was requested by the Court or to divulge relevant information of its own motion or otherwise fails to take part effectively in the proceedings, the Court may

41 H. Keller & C. Heri, 'Enforced Disappearance and the European Court of Human Rights. A 'Wall of Silence, Fact-Finding Difficulties and States as 'Subversive Objectors'', 12 *Journal of International Criminal Justice* (2014), p. 735-750, p. 738.

42 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member States' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 14. See also P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 13.

draw such inferences as it deems appropriate (Rule 44C § 1).[43] However, such failure or refusal by a party shall not, in itself, be a reason for the Chamber to discontinue the examination of the application (Rule 44C § 2).

Additionally, the Annex to the Rules prescribes that the applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures (Rule A2 § 1). The second paragraph of Rule A2 imposes significant duties on Contracting Parties on whose territories on-site proceedings shall take place before a delegation (as discussed in the next section). Accordingly, these Contracting Parties are required to extend to the delegation the facilities and cooperation necessary for the proper conduct of the proceedings, such as, to ensure, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. These Contracting Parties also have the responsibility to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or any assistance provided, to the delegation.

The Court's jurisprudence reveals numerous examples in which the duty to cooperate with the Court in establishing the facts under Article 38 was not respected in practice, especially by respondent States. In various Article 2 and Article 3 related issues, Member States did not comply with their duties under Article 38 where, for example, they failed to provide the Court with an unexpurgated version of an investigation file containing information that had been deleted from the file originally sent [44] or where they failed to submit a requested document or omitted to submit it within the requisite time.[45]

Member States cannot successfully rely on the allegedly secret nature of a document in order to justify why they failed to provide the document to the Court.[46] For example, in the cases *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, the Court did not accept the respondent government's argument that it was not in a position to submit to the Court all the requested information and documents about the presumed torture of terrorist suspects on CIA 'black sites' that were allegedly facilitated by Poland on its territory. The respondent State stated that it was obstructed from providing any information on the matter, because in the interests of the administration of justice it was required to adhere strictly to the secrecy of the investigation. In response to that argument, the ECtHR stated:

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43 The Court's leeway to 'draw inferences' from parties' conduct is discussed in detail in chapter 5 of this study.

44 ECtHR 2 August 2005, 65899/01 (*Tanış a.o./Turkey*), para. 164.

45 ECtHR 9 May 2003, 27244/95 (*Tepe/Turkey*), para. 131.

46 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*), para. 67; ECtHR 12 February 2009, 2512/04 (*Nolan and K./Russia*), para. 56; ECtHR 24 July 2014, 28761/11 (*Al-Nashiri/Poland*), paras. 345-376.

> "The absence of specific, detailed provisions for processing confidential, secret or otherwise sensitive information in the Rules of Court – which, in the Government's view justified their refusal to produce evidence – does not mean that the Court in that respect operates in a vacuum. On the contrary, and as pointed out by the applicant..., over many years the Convention institutions have established sound practice in handling cases involving various highly sensitive matters, including national-security related issues. Examples of procedural decisions emerging from that practice demonstrate that the Court is sufficiently well equipped to address adequately any concerns involved in processing confidential evidence by adopting a wide range of practical arrangements adjusted to the particular circumstances of a given case...."[47]

In light of this reasoning, the Court eventually established that the Polish government failed to live up to its obligations under Article 38 of the Convention.[48]

Member States also cannot claim that a requested document has already been examined by the national authorities who established that the applicant's allegations were groundless. Otherwise, the Court will establish the facts in favour of the applicant.[49] Besides which, they may not decide for themselves what is the relevance or importance of a particular witness or other evidence. This is an issue which the Court must decide on and a respondent State is not allowed to refuse to summon a specific witness that the Court has requested to appear, for example.[50] In this last context, the Court has underlined that it is for the Court to "decide whether and to what extent the participation of a particular witness would be relevant for its assessment of the facts and what kind of evidence the parties are required to produce for due examination of the case."[51] The parties then have the task to comply with the Court's evidentiary requests and instructions, to inform the Court in time of any obstacles to complying with these and to provide reasonable or credible explanations for any failures in that context.[52]

In addition, when Member States are unwilling to cooperate with the Court during on-site visits (a means of fact-finding discussed in the next section), this represents a violation of Article 38 of the Convention and Rule A2 § 2 of the Annex. Certain Member States have attempted to put pressure on delegates from the former Commission or the Court in their fact-finding process during those visits. Serious examples of States' non-cooperation were presented in the two *Cyprus v. Turkey* cases in which the Commission's delegation was refused entry into Turkey by the respondent State and in which

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47 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 371; ECtHR, 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 364.

48 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 372; ECtHR, 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 365.

49 See ECtHR 31 May 2005, 27693/95 (*Çelikbilek/Turkey*), paras. 71-72. In this case, owing to the government's failure to provide the requested information, the Court concluded that the applicant's brother had indeed been arrested and detained by agents of the State, as the applicant alleged.

50 ECtHR 17 February 2004, 25760/94 (*İpek/Turkey*), para. 125.

51 ECtHR 21 October 2013, 55508/07 and 29520/09 (*Janowiec a.o./Russia*) (GC), para. 208.

52 Ibid.

cooperation was refused during an investigation in northern Cyprus.[53] In the *Greek* case, the Commission's delegates were denied access to specific premises which made conducting interviews and inspecting the premises impossible.[54] Special measures were taken by the Court against Russia in *Shamayev a.o. v. Georgia and Russia*, after Russia refused to provide access to thirteen applicants for a delegation of Strasbourg judges, despite the Court's repeated requests to do so. In addition to the conclusion that Russia did not fulfil its obligation under Article 38,[55] the Court ordered Russia to reimburse the costs incurred by the Court during its preparations for the fact-finding visit. Because the planned visits of the Court's delegation had to be cancelled, the Court ruled that the respondent State had to bear the cost of the cancelled air travel tickets for the entire delegation of the Court and for the two interpreters who had been hired by the Court in Russia. The total sum of €1,580.70 was ordered to be paid into the Council of Europe budget.[56]

Another problem in the context of Member States' obligation to cooperate with the Court is connected to their duty to ensure that witnesses attend the hearings organised by the Court. This aspect is often challenging, given that fact-finding missions organised by the Court generally deal with incidents in 'trouble-zones'. As a result, many applicants or witnesses have been intimidated, harmed or some allegedly even murdered in the past.[57] In this context, in a resolution dating from 2007, the Parliamentary Assembly of the Council of Europe has called upon Member States to take positive measures:

> "to protect applicants, their lawyers or family members from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner."[58]

53 EcomHR 26 May 1975, 6780/74 and 6950/75 (*Cyprus/Turkey*) (Admissibility decision); EcomHR 10 July 1978, 8007/77 (*Cyprus/Turkey*) (Admissibility decision).

54 EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972).

55 ECtHR 12 April 2005, 36378/02 (*Shamayev a.o./Georgia and Russia*), paras. 494-504.

56 Ibid., paras. 534-536.

57 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 145; H. Keller & C. Heri, 'Enforced Disappearance and the European Court of Human Rights. A 'Wall of Silence, Fact-Finding Difficulties and States as 'Subversive Objectors'', 12 *Journal of International Criminal Justice* (2014), p. 735-750, p. 747.

58 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member States' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 17.2.

The Court has been repeatedly faced with cases in which witnesses, for one reason or another, did not attend the hearings.[59] The ECtHR's powers do not reach so far that the Court is able to compel the attendance of witnesses during hearings. This has often been described as a weakness in the Court's system.[60] The Court may declare that the Member State concerned fell short of its obligations under Article 38 ECHR, if it did not manage to ensure that a certain witness was present during the hearing.[61] Such a declaration does not really compensate in any way for the defects caused by a government's non-cooperation, as the obstacles thrown up by governments in this regard can sometimes even make it impossible for the Court to find that violations have occurred.[62] What is more effective, in this context, is the option of making presumptions and drawing inferences, since utilising such tools may have major consequences for the distribution of the burden of proof.[63] Presumptions and inferences as concepts essentially enable the Court to conclude that because some facts have been proved, other facts may be presumed or inferred to be accurate. This is further discussed in chapter 5.[64]

3.4 Fact-finding missions conducted by the ECtHR

The Court itself has avenues by which it can become more actively involved in gathering information about a case. The most effective fact-finding activity undertaken by the ECtHR is a 'fact-finding mission'. Its practice, proce-

59 Some examples may be mentioned here. In *Ergi*, no reason was given for the absence of the witnesses (ECtHR 28 July 1998, 66/1997/850/1057 (*Ergi/Turkey*), para. 27); in *Bilgin*, two witnesses died, one fell ill, and two others were too afraid to testify (ECtHR 16 November 2000, 23819/94 (*Bilgin/Turkey*), para. 61); in *Kaya*, the witnesses were put under pressure by the police to refrain from appearing (ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), paras. 36-37). In *Kiliç*, the respondent government presented numerous practical reasons to the Court as to why several witnesses could not appear before the Court's delegation: one witness could not be traced, another witness was about to appear for the hearing but due to weather conditions his flight was cancelled, and yet another failed to appear claiming that he could not recall being petitioned for the hearing (ECtHR, 28 March 2000, 22492/93 (*Kiliç/Turkey*), para. 35).

60 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 146. See also P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 60.

61 ECtHR 14 November 2000, 24396/94 *(Taş/Turkey)*, para. 54.

62 ECtHR 8 July 1999, 23763/94 (*Tanrikulu/Turkey*) (GC).

63 Ibid., paras. 96-99. See also H. Keller & C. Heri, 'Enforced Disappearance and the European Court of Human Rights. A 'Wall of Silence, Fact-Finding Difficulties and States as 'Subversive Objectors'', 12 *Journal of International Criminal Justice* (2014), p. 735-750, p. 738.

64 A similar impact of presumptions and inferences on adjudicators' decision-making has been observed in a U.S. criminal law context. See T. Gardner & T. Anderson, *Criminal law*, Belmont: Thomson Wadsworth 2009, p. 50.

dure and organisation are regulated by the Annex to the Rules. According to Leach, Paraskeva and Uzelac, a fact-finding mission includes both fact-finding hearings and on-the-spot investigations, and some fact-finding missions contain elements of both.[65] The authors describe a fact-finding hearing as "a formal hearing process during which witnesses give evidence before a delegation of the Court and are subject to a process of examination and cross-examination."[66] Fact-finding hearings are usually organised on the territory of the Contracting Parties and are conducted by a delegation of ECtHR judges.[67] Very occasionally such hearings take place in Strasbourg.[68] This in contrast to on-the-spot investigations which are not formal (which, therefore, means that there is no examination and cross-examination of witnesses) and usually involve inspections in prisons or other places of detention.[69]

There are some basic rules regulating how both fact-finding hearings and on-the-spot investigations should be organised and managed. Rule A1 § 1 of the Annex allows a Chamber to adopt any investigative measure which it considers capable of clarifying the facts of the case either at the request of a party or of its own motion. The fact that the Court can actually operate 'of its own motion' implies that the Court's decision to conduct a fact-finding mission (or not) is sovereign and does not depend on having Member States' permission.[70] This provision allows the Court to invite the parties to produce documentary evidence and to hear a witness or expert or a person in any other capacity whose evidence or statements seem likely to assist the Court in carrying out its tasks. The Chamber may also ask any person or institution of its choice to express an opinion or to produce a written report on any matter considered to be relevant to the case by the ECtHR (Rule A1 § 2). After it has declared a case admissible or, rather exceptionally, before the decision on admissibility, the Chamber may select one or more of its members or other judges of the Court as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. If it considers it appropriate, the Court may appoint any person or institution of its choice to assist the delegation in this fact-finding process (Rule A1 § 3). Third parties can also contribute at this stage of the Conven-

65 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 9.

66 Ibid., p. 10.

67 Ibid., p. 53.

68 A fact-finding hearing was organised in Strasbourg in the following case examples: ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC); ECtHR 19 December 1989, 10964/84 (*Brozicek/Italy*) (GC); ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC).

69 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 10 and p. 71 ff.

70 Ibid., p. 34.

tion proceedings: Rule A1 § 6 permits the Court to invite, or grant leave to, any third party to participate in an investigative measure. As indicated earlier in this chapter, Rule A2 sets out the further duties of the Contracting Party on whose territory the fact-finding mission will be conducted to fully cooperate with the Court. If a party considers it necessary for the Court to conduct a fact-finding mission, it may request the Court to do so, in writing, after the admissibility decision has been taken.[71]

In respect to fact-finding hearings, the Court determines which individuals should be heard, although the parties to the case may provide suggestions to the Court on this matter. However, the Court is free to reject any such initiative by a party, and it may do so without providing reasons for the rejection.[72] An important factor in the choice of specific witnesses is the relevance of their testimony.[73] When preparing a fact-finding hearing, Rule A4 § 2 permits the head of the delegation to hold a preparatory meeting with the parties or their representatives before any formal proceedings have taken place before the delegation. The main goal of such a meeting is to consider whether testimonies from certain proposed witnesses would be relevant or useful, and to determine whether the witnesses will be available to provide evidence.[74]

The Court maintains a flexible approach to the process of hearing witnesses. In past cases, it has applied questioning methods originating from both continental (more inquisitorial) and common law (more adversarial) legal systems. The procedure to be followed was determined very much on a case-by-case basis. In *Ireland v. United Kingdom*, involving two common law countries, the Commission applied the adversarial approach in the interrogation of witnesses. More concretely, this means that the parties' representatives questioned the witnesses first and, only when it found it to be necessary, the Commission posed further questions. Leach, Paraskeva and Uzelac describe the accounts of members of the former Commission who were involved in the case and who stressed that the interrogations were started on behalf of the British government and that the interrogators used "very typical British tactics" throughout this process.[75] This early example of fact-finding in *Ireland v. United Kingdom* stands in contrast with many

71 Ibid., p. 30.

72 Ibid., p. 35. An example of a case in which the Court rejected the applicant's request to conduct a fact-finding mission is ECtHR 4 May 2001, 28883/95 (*McKerr/United Kingdom*), para. 102.

73 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 47.

74 Ibid., p. 48-49. A preparatory meeting was organised in, for example, ECtHR 24 July 2003, 26973/95 (*Yöyler/Turkey*).

75 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 56.

other cases in which the Court's interrogation procedure leaned more towards the continental style of hearing witnesses.[76] In practical terms, this means that the Court delegates question the witnesses first, after which the parties' representatives may pose further questions.

The process of hearing witnesses is now further regulated under Rules A4 and A7 of the Annex. On the basis of the first paragraph of Rule A4, the delegates are in charge of the proceedings before them. Rule A7 § 1 then prescribes that any delegate may ask questions to anyone appearing before the delegation, including the Agents, advocates or advisers of the parties, to the applicant, witnesses and experts. Agents and advocates or advisers of the parties are allowed to examine witnesses, experts and other persons appearing before the delegation. This takes place under the control of the head of the delegation (Rule A7 § 2). Beyond this, it is up to the head of the delegation to make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where this is required for the proper administration of justice (Rule A7 § 4). Finally, where a dispute arises from an objection to a witness or expert, it is up to the head of the delegation to decide on the matter. In that regard, for information purposes, the delegation may hear a person who is not qualified to be heard as a witness or expert (Rule A7 § 5).

Apart from facilitating a formal hearing, a delegation of three (or sometimes two) judges from the Court may visit the location concerned in a particular case and even inspect the premises. Usually, these 'on-the-spot investigations,' as they are referred to, are organised in order to ascertain the conditions under which prisoners were held in detention and, on other occasions, the conditions in psychiatric institutions. The delegation of judges may be assisted by medical experts or experts from other fields in assessing the facilities and well-being of the applicants. The delegation usually observes in detail the facilities, the equipment and the general atmosphere at the relevant location. Additionally, the delegation ascertains the physical and psychological state of detainees, by carrying out interviews with the prisoners and with the officials responsible for the detention facility.[77]

Fact-finding missions have been organised, e.g. after a state of emergency was declared, where there has been an armed conflict or where an 'autonomous province' has attempted to become independent from central State control. These types of situations open the door to grave human rights abuses committed both by State agents and private persons, where there is a lack of accountability or supervision by national authorities.[78]

Several factors may lead the Court to conduct a fact-finding mission, some of which are directly linked to the particular case and some of which may not be directly related to it. Case-related factors which may lead the Court to conduct a fact-finding mission include the following: the grave

76 Ibid.
77 Ibid., p. 71-76.
78 Ibid., p. 5.

nature or seriousness of the case (particularly 'serious' allegations, mostly those related to Articles 2 and 3, are eligible for a fact-finding mission), the presence of factual disputes between the parties that cannot be resolved through the case file, the failure of the national authorities to conduct an effective investigation into the allegations, the realistic prospects of resolving the factual disputes involved, any *prima facie* indication that the allegations can be substantiated, and the limited amount of time which has elapsed since the events in question took place.[79] In relation to this last factor, the Court considers that fact-finding missions may be expected to have little impact and will be less credible, more difficult to arrange and more open to manipulation, if they are conducted several years after the alleged events took place.[80] General factors, unrelated to the specific facts of the case, are time and cost considerations, the existence of a presumption against fact-finding missions conducted by the Court (i.e. sometimes, there is more willingness within the Court to decide a case without a fact-finding hearing; this is also described as a culture within the Court which is not 'fact-finding friendly'), the pedagogical functions of fact-finding missions (i.e. would the fact-finding mission serve the purpose of attracting the attention of a lot of officials on the topic) and the subsidiarity principle.[81] In accordance with this last principle, fact-finding missions are the exception rather than the rule. The ECtHR's subsidiarity role has been invoked as an argument for not holding fact-finding missions in certain cases of a civil nature, because "[s]uch an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact-finding tribunals."[82]

Despite the fact that the Convention system offers the possibility of conducting fact-finding missions, the Court has shown a preference over the years for reaching "its conclusions by placing the responsibility on the parties to produce the evidence that is within their knowledge and by relying on a variety of adjudicatory techniques involving the drawing of adverse

79 The research of Leach, Paraskeva and Uzelac reveals in this context that fact-finding missions are likely to be held when the Court considers that there is a *systematic* failure in the functioning of the domestic courts. See ibid., p. 37-39. See also M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 125 and p. 136-137.

80 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 40-42.

81 Ibid., p. 42-44.

82 ECtHR 4 May 2001, 28883/95 (*McKerr/United Kingdom*), para. 117.

inferences or the utilisation of presumptions when they fail to comply."[83] There are several explanations for this. The first has already been mentioned and is linked to the principle that ECtHR is often able to establish the facts of a case on the basis of adduced documentary evidence.[84] As all national remedies must be exhausted before a complaint is filed in Strasbourg, in most cases, the facts have already been established at a lower level by the domestic courts.[85] As a general rule, the Court even prefers that national courts assess the evidence, thus underlining its own subsidiary nature. The Court has frequently underlined that the primary task of establishing the facts in a case rests with national courts and that it would not normally be within its own province to substitute its own assessment of the facts for that of the domestic adjudicators.[86] The Court has, for instance, in its jurisprudence emphasised the great benefit which the domestic courts have in seeing the witnesses give their evidence and evaluating their credibility at first hand.[87]

Another reason for the Court's reluctance to organise fact-finding missions appears to be connected with the Court's original function. Under the system in operation prior to the enforcement of Protocol No. 11, it was the Commission, and not the Court, that was charged with the task of fact-finding.[88] According to O'Boyle and Brady, under that system, the Court extensively and almost exclusively relied on the facts established by the Commission. They argue, therefore, that the Court has always understood its own

83 M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 140. In this regard, a reduction in the number of ECtHR fact-finding missions can be observed. Leach, Paraskeva and Uzelac revealed that the former Commission conducted 74 fact-finding missions, whereas 18 fact-finding missions were conducted by the Court in the period 1998-2009 (P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 27; P. Leach, C. Paraskeva & G. Uzelac, 'Human Rights Fact-Finding. The European Court of Human Rights at Crossroads', 28 *Netherlands Quarterly of Human Rights* (2010), p. 41-77, p. 42).

84 See also in this regard P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 55.

85 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 69.

86 See, for example, ECtHR 22 September 1993, 15473/89 (*Klaas/Germany*), para. 29, and, more recently, ECtHR 22 January 2013, 32501/11 (*Suleymanov/Russia*), para. 126. See also M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 207-208.

87 ECtHR 22 September 1993, 15473/89 (*Klaas/Germany*), para. 30. See also M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 121.

88 ECtHR 8 July 1999, 23763/94 (*Tanrikulu/Turkey*) (GC), para. 67.

role as primarily that of interpreting and applying the Convention, rather than conducting investigations into the facts itself. Hence, the Court is more inclined to examine evidence on the basis of the submissions of the parties and external actors.[89] The Court's rare use of more thorough investigatory powers may ultimately be explained by policy reasons. Investigatory activities take time and money, two precious commodities for the ECtHR. Some judges are therefore not inclined to hold fact-finding hearings due to costs and delays.[90]

3.5 Contributions to fact-finding by external actors

The foregoing has shown that the Court may pursue various avenues in order to establish the facts of a case. Some of these avenues are not always helpful to the fact-finding process. For example, applicants may not be able to provide the Court with all the information because they do not have access to it, while respondent States may be unwilling to provide all the relevant information about a case to the ECtHR. The Court may also actively investigate the facts of the case itself. However, this is a means that the Court does not use very often. Besides these options, the Court can also obtain information from external actors. The Court may use the documents that these external actors produce as a source in establishing the facts.[91] In addition, it may allow them to become formally involved in the Court proceedings through third party interventions. These interventions enable external actors to provide information on issues of law and to clarify the context in which a particular policy or practice has been adopted by a Contracting Party.[92] This section highlights which external actors can contribute to fact-finding, and then looks at the involvement of NGOs in the fact-finding process, since NGOs have been most actively involved in establishing facts.

89 M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 136.

90 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 59; M. O'Boyle & N. Brady, 'Investigatory Powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 138.

91 K.C. Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-finding', 25 *Connecticut Journal of International Law* (2009-2010), p. 127-151, p. 127.

92 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 50.

The Court relies on various documents, mostly in the form of reports, from several bodies in order to establish the facts regarding a specific human rights issue in a Member State. Firstly, the Court utilises reports and opinions produced by competent international bodies, primarily those related to the Council of Europe, but also occasionally from outside.[93] For example, in terms of the Council of Europe bodies, the ECtHR has often obtained information from the European Committee for the Prevention of Torture (CPT). The Court has frequently used reports by this body to establish whether the detention conditions in a Member State lived up to the Convention standards.[94] The CPT has a broad mission in this sense: it visits a wide variety of places of detention throughout the Council of Europe's Contracting Parties, reports on the treatment of prisoners in these institutions and, if necessary, recommends improvements to Member States.[95] In addition to the CPT, there are also other examples of Council of Europe-related organisations that have assisted the Court in establishing facts. For example, in *D.H.*, the Grand Chamber also relied on ECRI reports to determine the number of Roma children in special schools.[96] The ECtHR sometimes also turns to intergovernmental bodies outside the Council of Europe to establish facts. In *M.S.S. v. Belgium and Greece*, the Court relied on observations provided by the United Nations High Commissioner for Refugees (UNHCR), appearing as a third party in the proceedings, to establish the detention and living

93 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 144.

94 See, for example, ECtHR 15 May 2012, 38623/05 (*Plotnicova/Moldova*). In this case, the applicant alleged, among other things, that she had been held in inhuman conditions and had not been given sufficient medical assistance while in detention. To verify the accuracy of her complaint, the Court turned to several reports from the CPT on its visits to Moldova between September 2004 and September 2007. The ECtHR stated the following: "[t]he applicant's description also matches that given several months earlier by the CPT .... Accordingly, the Court accepts the applicant's submission in this respect" (para. 37 of the judgment).

95 The mandate of the CPT arises from Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and reads as follows:

> "There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as 'the Committee'). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."

See also P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 74; D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 145.

96 See ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 192.

conditions of asylum seekers in Greece.[97] The factual findings of that same body were used by the Court in *Hirsi Jamaa a.o. v. Italy*, in order to establish that the applicants would be exposed to the risk of inhuman and degrading treatment if forcibly returned to certain countries outside the European continent.[98]

Aside from providing information about the human rights situation in a certain country through reports or opinions, external actors may also contribute substantially to ECtHR proceedings by intervening as third parties in a case. Third party interventions find their basis in Article 36 ECHR and Rule 44 of the Rules of Court. Any third party seeking to intervene must request permission to do so from the President of the Chamber within twelve weeks of the notice of the application being given to the respondent Contracting Party.[99] Once the request has been granted, the Court sets out the conditions for intervening, including the following: (1) a maximum length for the written submissions (usually ten to fifteen pages); (2) a specified time frame for lodging the submissions (usually within three to six weeks), and; (3) the conditions regarding the matters that may be covered by the intervention.[100] Requests for third party interventions may be refused when they are submitted too late or too close to the hearing of the case. Furthermore, requests may be refused where the Court has already granted permission to other organisations to intervene and where the Court considers that it has a sufficient number of interveners.[101] A well-established rule in this context is that a third party intervener should not comment on the particular facts or merits of the case (matters which are only for the parties). Interventions which do not respect this rule may be refused or only accepted in part.[102] This means, more specifically, that third party interveners principally comment on issues of law. However, there may be occasional exceptions to this approach, where the Court uses general information from external actors submitted through third party interventions about the human rights situation in a country. For instance, in expulsion cases, the Court may seek general information from third party interveners about the living conditions and levels of safety in a certain country.[103]

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97 ECtHR 21 January 2011, 30696/09 (*M.S.S./Belgium and Greece*) (GC), paras. 229, 255 and 258.

98 ECtHR 23 February 2012, 27765/09 (*Hirsi Jamaa a.o./Italy*), paras. 133 and 150.

99 See Rules 44 § 1 (b), § 2 and § 3 (b) of the Rules of Court. Some exceptions to this rule are also set out in Rule 44 of the Rules of Court.

100 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 49.

101 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 154.

102 See P. Harvey, 'Third Party Interventions before the ECtHR: A Rough Guide', *Strasbourg Observers* (24 February 2015) (online). See also D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 154.

103 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 154.

Written submissions are eventually sent to the parties to the case, to enable them to submit observations in reply or, where relevant, to reply at any hearing. If the parties makes any such observations, they will be sent to the intervener, although the latter will usually have no opportunity to submit any comments in return.[104]

Three types of interventions can be distinguished. The first arises from Article 36 § 1 ECHR, which grants the opportunity to submit written comments or take part in hearings before a Chamber or the Grand Chamber to any High Contracting Party of which the applicant is a national. This type of third party intervener is therefore also allowed to appear before the Court in oral hearings and has the right to gain access to the entire case file, and in this way holds a stronger legal position than, for example, an NGO seeking to intervene.[105] The second type of third party intervener is enshrined in Article 36 § 2 ECHR, which prescribes that the President of the Court may, in the interests of the proper administration of justice, invite any High Contracting Party that is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or, exceptionally, take part in hearings.[106] Rule 44 § 3 (b) of the Rules of Court lays down that requests for this purpose must be duly reasoned and submitted in writing. This type of third party intervention can be further subdivided into three categories of interveners: (1) interventions by governments other than the respondent government that have a specific interest in the subject matter of the case; (2) interventions by people other than the applicant who are directly implicated in the facts of the case, and; (3) interventions by interested parties who have special expertise in a certain area, such as NGOs[107] with particular experience in or knowledge of the subject matter of the case before the Court.[108] A famous example of the first category under Article 36 § 2 ECHR is *Saadi v. Italy*, where the UK government intervened in order to

104 P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 50.

105 See also Rule 44 § 1 of the Rules of Court. And see D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 152. An example of a third party intervention under Article 36 § 1 ECHR is ECtHR 7 July 1989, 14038/88 (*Soering/United Kingdom*) (GC).

106 See also Rule 44 § 3 (a) of the Rules of Court.

107 'Any person concerned' thus also includes NGOs. See for that matter, L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 37.

108 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 152-153. See, for comparison, P. Harvey, 'Third Party Interventions before the ECtHR: A Rough Guide', *Strasbourg Observers* (24 February 2015) (online). Harvey distinguishes between six types of interveners: (1) States exercising the right in Article 36 § 1 of the Convention to intervene in cases brought by one of their nationals against another Contracting State; (2) interventions by States when they have sought leave (rather than exercised the right) to do so; (3) interventions by other international institutions; (4) interventions by national human rights institutions; (5) interventions by NGOs (including bar associations), and; (6) interventions by litigation projects at leading universities.

request the Court to overturn its earlier case law on expulsion matters under Article 3 ECHR.[109] The second category does not occur very often. One of the few examples in this context is the case *Perna v. Italy*, concerning the conviction of an applicant who had slandered a judge. In that case, the judge was granted leave to intervene.[110] The third category mostly concerns contributions from NGOs,[111] which intervene because they have special expertise on certain legal issues raised by a case.[112]

A third category of interveners is laid down in Article 36 § 3 ECHR, which prescribes that the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings in all cases before a Chamber or the Grand Chamber.[113] This formal procedure was introduced with a view to protecting the general interest more effectively.[114] To understand this, it is necessary to become aware of the unique and independent position of the Commissioner in the Council of Europe.

The Commissioner for Human Rights is a non-judicial institution created to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe.[115] To achieve these goals, the Commissioner takes a three-pronged approach. Firstly, he carries out country visits to all Member States to make a comprehensive evaluation of the human rights situation. During his visits, the Commissioner meets with various governmental officials as well as members of human rights protection organisations and civil society. He also visits relevant sites, such as prisons and asylum-seeker centres. After the visits, he publishes a report about the human rights situation and offers recommendations for improvement where necessary. Secondly, he offers advice and information on the protection of human rights and the prevention of violations. Finally, the Commissioner works with national human rights institutions (such as Ombudsmen and national human rights organisa-

109 ECtHR 28 February 2008, 37201/06 (*Saadi/Italy*) (GC).

110 ECtHR 6 May 2003, 48898/99 (*Perna/Italy*) (GC).

111 See D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 153. However, contributions have also been submitted in this category by more formal institutions. See, for example, European Commission's intervention in ECtHR 30 June 2005, 45036/98 (*Bosphorus/Ireland*) (GC), concerning the implementation of EU law. See also the United Nations High Commissioner for Human Rights' observations in ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), concerning extraordinary rendition.

112 D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 153-154.

113 See further Rule 44 § 2 of the Rules of Court.

114 Council of Europe Treaty Series - No. 194, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Strasbourg 13.V.2004, para. 87.

115 Article 1 of Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999 at its 104th Session).

tions) to develop an effective system of cooperation with them to foster the implementation of human rights standards.[116] These activities enable him to determine whether particular human rights problems in a country are systemic. Consequently, the Commissioner has been given right to intervene under Article 36 § 3 because it is expected that, given his experience, the Commissioner may be able to help enlighten the Court on certain questions, particularly in cases which highlight structural or systemic weaknesses in the situations of the respondent States or other High Contracting Parties.[117]

Proposals have been made over the years to involve the Commissioner more systematically in the formal proceedings of the ECtHR. For example, before Article 36 § 3 ECHR in its current form was included in the Convention, the Parliamentary Assembly proposed that the Commissioner should be ascribed a more far-reaching role. This entailed the creation of a post of Public Prosecutor at the ECtHR and entrusting this function to the Commissioner. The idea was that the Commissioner could bring cases before the Court regarding serious human rights violations, particularly where individuals or Contracting Parties are faced with obstacles in bringing complaints. The Parliamentary Assembly noted that applicants may be prevented from bringing complaints in several ways. Firstly, obstacles to bringing complaints may be related to an armed conflict or emergency situation, the occupation of part of a State's territory, or the intervention by one State in the territory of another, or the effective absence of control by a State over part of its territory. Secondly, individual applicants may be prevented from bringing complaints to the ECtHR through a lack of awareness of the ECHR or for practical reasons. Finally, another potential obstacle concerns the scale and gravity of violations which could be regarded as war crimes or crimes against humanity, and to which even thousands of individual applications would fail to do justice. Hence, the proposal to ascribe the role of Public Prosecutor to the Commissioner for Human Rights was an attempt to resolve the legal vacuum created by such obstacles, most notably, to put an end to the existence of areas where the ECHR cannot be implemented.[118] However, this proposal was rejected because the capacity of the Commissioner as a complainant was regarded to be incompatible with his role as a negotiating partner with the Contracting Parties in the context of his other tasks.[119]

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116 M. Lezertua & A Forde, 'The Commissioner for Human Rights', in: T.E.J. Kleinsorge (ed.), *Council of Europe*, Alphen aan de Rijn: Kluwer Law International 2010, p. 114-124, p. 117-119.

117 Council of Europe Treaty Series - No. 194, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Strasbourg 13.V.2004, para. 87.

118 Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Report. Areas where the European Convention on Human Rights cannot be implemented*, Rapporteur Mr. Christos Pourgourides, Doc. 9730, 11 March 2003 (online).

119 J. Vande Lanotte & Y. Haeck, *Handboek EVRM. Deel 1. Algemene beginselen*, Antwerp: Intersentia 2005, p. 804-805.

As noted earlier, valuable information on certain human rights issues has been provided mainly by NGOs. NGOs have performed different roles during proceedings at the ECtHR and have been able to activate and engage the ECtHR in the protection and expansion of human rights in several ways.[120] There have been cases where they represented the applicants[121] or appeared as applicants,[122] in these ways helping to establish the facts. Additionally, the Court has more generally used relevant documentation produced by NGOs for the press and public in order to comprehend the relevant factual human rights situation in a Member State, without the NGOs being further involved in a formal procedure at the ECtHR.[123] NGOs have also intervened as third parties in cases and have informed the Court in this context most notably about issues of law. So far, NGOs have assisted the Court in establishing consensus on particular human rights-related issues in Europe. For example, in *Soering*, the Court quoted the Amnesty International submission in order to observe the "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice."[124] In some cases, NGOs have inspired the Court to expand the scope and meaning of certain Convention provisions. This occurred in *Nachova*, for example, where the Open Society Justice Initiative argued that Article 14 ECHR also includes a procedural duty to investigate racial discrimination and violence,[125] a view subsequently accepted by the ECtHR.[126] Furthermore, NGOs have provided comparative law analysis and practical information to the Court about certain legal issues.[127] In *Sheffield and Horsham v. United Kingdom*, for example, the British-based NGO 'Liberty' provided the ECtHR with a comparative survey on the legal position of transsexual people in several Contracting

120 R.A. Cichowski, 'Civil Society and the European Court of Human Rights', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 77-97, p. 81; W.A. Schabas, *The European Convention on Human Rights. A Commentary*, New York: Oxford University Press 2015, p. 794.

121 ECtHR 21 June 2007, 57953/00 and 37392/03 (*Bitiyeva and X/Russia*), para. 2; ECtHR 18 December 2012, 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (*Aslakhanova a.o./Russia*), para. 2. See also N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104, p. 96.

122 See Article 34 of the Convention. See also L. van den Eynde, 'An Empirical Look At the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights', 31/3 *Netherlands Quarterly of Human Rights* (2013), p. 271-313, p. 276.

123 ECtHR 18 December 2012, 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (*Aslakhanova a.o./Russia*), paras. 78-79. See also R.A. Cichowski, 'Civil Society and the European Court of Human Rights', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 77-97, p. 81.

124 ECtHR 7 July 1989, 14038/88 (*Soering/United Kingdom*) (GC), para. 102.

125 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 143.

126 Ibid., paras. 160-168.

127 D. Shelton, 'The participation of nongovernmental organizations in international judicial proceedings', 88 *American Journal of International Law* (1994), p. 611-642, p. 638.

Parties.[128] In *Timurtaş v. Turkey*, the Kurdish Human Rights Project (KHRP), who assisted in the representation of the applicant, asked the Center for Justice and International Law (CJIL; an NGO based in Washington DC) to provide written comments on the IACtHR's jurisprudence on disappearances. The Court subsequently used this information to adapt its rules in order to establish gross and systemic violations of human rights.[129] Albeit exceptionally, NGOs have sometimes informed the Court about the general factual situation in a Member State regarding a certain human rights issue. In *Nachova*, the European Roma Rights Centre informed the Grand Chamber, for example, about the numerous incidents of ill-treatment and killing of Roma by law enforcement agents and private individuals of Bulgarian ethnic origin in Bulgaria.[130] In *M.C. and A.C.*, the Association for the Defence of Human Rights in Romania, the Helsinki Committee (the APADOR-CH), informed the Court about a general culture of impunity in Romania with regard to police officers who abuse their position and about discrimination towards the victims of crimes based on their ethnic origin, sexual orientation, or beliefs.[131] In that same case, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) submitted several reports by international organisations revealing a general climate of hostility towards LGBTI individuals in Europe. It pointed out that in the respondent State, which was Romania, the level of discrimination on grounds of sexual orientation was the fifth highest in the European Union.[132]

Concerning the greater involvement of NGOs in ECtHR proceedings, practitioners and scholars debate whether or not the role of NGOs in ECtHR proceedings should be expanded, by facilitating them with *locus standi* at the ECtHR. The argument in favour of such a proposal is that some rights have a collective dimension and may not be properly reflected through individual applications. Hence, some scholars argue that NGOs should have *locus standi* as far as general or public interests are concerned, so that they can advance these interests through *actio popularis*.[133]

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128 ECtHR 30 July 1998, 31–32/1997/815–816/1018–1019 (*Sheffield and Horsham/United Kingdom*) (GC).

129 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*). See also L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 83.

130 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 138-139.

131 ECtHR 12 April 2016, 12060/12 (*M.C. and A.C./Romania*), paras. 99-100.

132 Ibid., paras. 101-103.

133 M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 57-66; N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104.

There are various objections to this, however. In the first place, it is argued that establishing an *actio popularis* would reduce the scope of individual applications. In the second place, concerns have been raised that only those who have access to 'vocal' organisations would benefit from this new avenue. Thirdly, fears have been raised that this would increase the workload of the ECtHR which would only add to the length of the proceedings.[134] Particularly in light of the first argument, it is emphasised that the "strong individual nature of the rights enshrined in the ECHR entails the consequence that, as a rule, only the victim of the violation of the right should have the procedural right to bring the action."[135] Hence, extending the scope of NGO litigation could jeopardise the individual application system. In addition to this criticism, there is also some scepticism about what motivates NGOs to litigate, since – it is sometimes suggested – they are driven by the imperatives of their funding bodies instead of being led by individual applicants' interests and the interests of European society in general.[136] The *status quo* on this issue so far appears to be that NGOs can potentially be useful, as long as they act in service of the law and its institutions.[137] The work of external actors in general, and NGOs in particular, is also considered to be a valuable contribution to the protection of human rights in Europe because of the various ways in which they may become involved in cases at the ECtHR.[138]

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134 M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 57-66. Frigessi di Rattalma is generally very critical of this proposal. He argues that granting NGOs *locus standi* at the Court is "neither realistic nor appropriate" (p. 61). He stresses that inter-State complaints already assume the character of an *actio popularis*, since any Member State has the right to file a complaint about any alleged violation of a Convention right, regardless of whether there is a special relationship between the rights and interests of the applicant State and the alleged violation (p. 61).
Vajić is also very sceptical of this proposal. With regard to the argument that collective rights would be served by the NGOs having *locus standi*, she refers to the present practice of 'pilot cases' or 'pilot judgments', which enables the ECtHR to deal with similar groups of cases involving numerous applicants in the same situation. See N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104, p. 102-103.

135 M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 57-66, p. 63.

136 L. Hodson, *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart Publishing Ltd 2011, p. 93.

137 Ibid., p. 40.

138 N. Vajić, 'Some Concluding Remarks on NGOs and the European Court of Human Rights', in: T. Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague: T.M.C. Asser Press 2005, p. 93-104, p. 104.

3.6 Conclusion

The aim of this chapter was to provide an overview of the Court's approach to the examination of cases in general and to set out how information about the facts of a case is gathered at the ECtHR. On the whole, there are no particular problems in relation to fact-finding at the ECtHR, since the facts may be derived from the case file or domestic courts' judgments. As highlighted earlier, the Court's main task is generally limited to assessing whether or not the established findings are in accordance with the requirements of the Convention. In those cases where the facts are disputed and cannot be resolved by the documents in the Court's possession, the ECtHR may turn to various specific fact-finding techniques. Where there is little or no information on the facts, the Court may arrange fact-finding hearings or on-the-spot investigations. Information may also be gathered from other Council of Europe bodies or through other external avenues. External actors themselves may also choose different means to draw attention to pertinent human rights issues, most notably through submissions of documentary or other evidentiary material or through third party interventions. Among the third parties, NGOs appear to contribute the most in resolving legal and factual issues.

The question that subsequently arises concerns the means of fact-finding that may be most appropriate to establish the different types of complaints of discriminatory violence discussed in chapter 2. It may be assumed that especially with regard to those complaints concerning serious human rights violations, the ECtHR cannot always or blindly rely on the paper trail provided by the domestic courts. In individual complaints, applicants may not be able to produce all the relevant evidentiary material, while respondent States may be reluctant to furnish crucial information in a discriminatory context. Little may also be expected in inter-State complaints. Although in theory Member States are able to draw Court's attention to serious and repeated human rights violations in another Member State, in practice they are reluctant to do so. It is unlikely that the Court will resort to fact-finding missions for these types of complaints, if only because for the reasons of time and cost. Consequently, if the Court struggles with the gathering of facts in the three types of cases concerning discriminatory violence, it appears to be useful to explore how external actors can provide the Court with the information it needs.

The role of external actors in contributing to fact-finding at the ECtHR may be useful for all three types of complaints concerning discriminatory violence. They can contribute substantially in finding *systemic* violations of the duty of State agents to refrain from inflicting discriminatory violence, the duty to conduct an effective investigation into discriminatory violence in the domestic jurisdiction and the duty to take preventive measures against such wrongful conduct. Both formal and informal external actors may keep track of these types of violations in the Contracting Parties and in this way reveal a systemic pattern of violations by State officials. They may do this by collecting statistics about all three issues, or documenting their incident

in reports. In this way, they can report the history of the events, revealing that certain groups of individuals in certain Member States are exposed to discriminatory violence on a larger scale.

The next question arising in this context is what type of external actors may be most efficient at the Court in addressing systemic and deeply-rooted discriminatory violence. Firstly, the variety of external actors that the ECtHR already turns to through third party interventions, or by using the reports they produce, is already valuable and may continue to be valuable in further revealing issues related to discriminatory violence. Secondly, a greater role for the Commissioner for Human Rights could be reconsidered and discussed by the Council of Europe. The previously suggested post of Public Prosecutor at the ECtHR may be inappropriate in view of the fact that this could jeopardise the Commissioner's role as a negotiating partner with the Contracting Parties. However, the greater involvement of the Commissioner as a third party intervener may be useful in establishing the *status quo* of a particular human rights issue in a Member State. The Commissioner – whose current tasks enable him to find out about human rights situations in Member States – may be able to spot alarming and repeated human rights violations and different forms of discriminatory violence in Europe and raise them at the Court.

Thus, essentially, both the Commissioner and the remaining external actors may be capable of signalling to the Court situations where the Court must serve its role as an 'alarm bell' through third party interventions or publishing frequent reports on discriminatory violence in Member States. In this way, they can indicate to the Court whether there is a danger that occasional examples of discriminatory violence in a Member State could escalate and whether it is therefore even more necessary to underline the seriousness of such issues, condemn the incidence of discriminatory violence and call upon the Member States involved to take steps to combat this wrongful conduct.

4 The standard of proof in cases of discriminatory violence

4.1 Introduction

Having outlined the elements that must be proved under the three types of discriminatory violence complaints and the means of gathering information about the facts of a case at the Court generally, this study now turns to the heart of the matter, which is the Court's evidentiary framework in cases concerning discriminatory violence. The evidentiary framework consists of the standard of proof, the burden of proof and the evidentiary material. This chapter concentrates on the standard of proof, or the 'level of persuasion' as the Court sometimes calls it,[1] which is used as an instrument in determining whether the information provided concerning the facts is sufficiently persuasive to be able to establish a violation under the Convention. Above, in chapter 1, this notion was defined as "the degree or level of proof demanded in a specific case, such as 'beyond a reasonable doubt' or 'by a preponderance of the evidence'."[2] The standard of proof is connected to the burden of proof. In a nutshell, the standard of proof refers to the degree of proof that must be offered and the burden to the identity of the actor whose obligation it is to provide all the necessary evidence to meet the standard of proof.[3] The burden of proof hence indicates the party whose duty it is to prove the facts of the case and the standard of proof indicates the degree to which that party must persuade the adjudicators that the alleged facts are correct.

This chapter first sets out the meaning of the notion of standard of proof in general and offers some insights into standards of proof that are often used. To this end, standards are presented in section 4.2 that are used mainly in common law and civil law domestic systems. Subsequently, section 4.3 discusses the notion of standard of proof in the framework of proceedings before the Court. It outlines the meaning of 'standard of proof' in this context and establishes whether the Court has applied different standards of proof in its case law in general. Section 4.4, thereafter focuses on the Court's use of the 'beyond reasonable doubt' standard and describes how this threshold was introduced and has evolved in the Court's case law. This

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1 See, for example, ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para 147.

2 See section 1.5.

3 J. Mačkić, 'Proving the Invisible: Addressing Evidentiary Issues in Cases of Presumed Discriminatory Abuse against Roma before the European Court of Human Rights through *V.C. v. Slovakia*', in: M. Goodwin & P. de Hert (eds.), *European Roma Integration Efforts – A Snapshot*, Brussels: Brussels University Press 2013, p. 51-75, p. 60.

section also zooms in on discriminatory violence cases, although only cases concerning the negative duty of State agents to refrain from ill-treating or killing individuals on the grounds of a discriminatory motive. Only these types of complaints have been focused on, because it is only here that the Court explicitly applies the standard of proof of 'beyond reasonable doubt.' Criticism of the Court for applying this standard is analysed and based on this analysis, an assessment is made of whether the 'beyond reasonable doubt' standard is an appropriate and adequate standard of proof in cases concerning discriminatory violence, or whether it constitutes too great an obstacle in complaints of pertinent discriminatory violence and should therefore be abandoned by the Court. The chapter also offers, as part of the analysis, a few brief and comparative reflections on standards of proof used by other courts that are also concerned with establishing State responsibility, the ICJ and the IACtHR. This brief comparative exercise was undertaken to further consider the question whether or not the 'beyond reasonable doubt' standard should be abandoned and, if so, what other standards could be used.

4.2 Some general observations on the notion of 'standard of proof'

The standard of proof indicates "the degree of probability to which facts must be proved to be true."[4] This notion is particularly relevant for adjudicatory bodies but it also has relevance beyond the courts.[5] A standard of proof may serve different purposes. Some commentators consider that it has a regulatory function within the law of evidence. More precisely, they consider that it indicates to judges the level of persuasion they must gain before they can take a final decision on a certain legal matter. For instance, in line with this approach, Del Mar observes that standards of proof enable adjudicators to "mark a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other."[6] Wilkinson notes that it is difficult to establish where the standard should be situated along the scale. In respect to its purpose, he argues:

> "Standards of proof are traditionally applied to regulate certain actions that would otherwise be prohibited, or as a threshold for reaching a finding in a legal context. Degrees of persuasiveness appear to be fair because they take into consideration the issues at stake

4 I.H. Dennis, *The Law of Evidence*, London: Sweet & Maxwell 1999, p. 342.

5 It has been noted that leading NGOs, Special Rapporteurs, and monitoring and reporting mechanisms established by Security Council Resolutions 1612 and 1960 apply standards of proof during their fact-finding missions. See S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2013.

6 K. Del Mar, 'The International Court of Justice and standards of proof', in: K. Bannelier, T. Christakis & S. Heathcote (eds.), *The ICJ and the Evolution of International Law. The enduring impact of the Corfu Channel case*, London: Routledge 2011, p. 98-123, p. 98.

> and the possible impact of punishments that may be authorised. Setting standards of proof is therefore central to efforts to prevent arbitrary infringements of individual liberty and false accusations."[7]

Because the issues at stake may differ from one legal system to another, or from one legal field to another, the standard of proof must be laid down in predictable legal rules and tailored to the specific requirements of the jurisdictional setting in which it operates and the particularities of the case in which it is applied.

There are also commentators who argue that a standard of proof is not so much an epistemological issue, as an issue of responsible decision-making in the face of any remaining uncertainty.[8]

The traditional source and setting for standards of proof lies in domestic legal systems. The notion of a standard of proof manifests itself differently in civil law systems than in common law systems. As a general observation, it may be said that civil law systems do not expressly differentiate between different standards of proof, while common law systems do, thereby differentiating between 'beyond reasonable doubt' and the 'preponderance of the evidence' or 'balance of probabilities.'[9]

The difference between the two approaches is important for two reasons. Firstly, the ECtHR has often been inspired by domestic standards of proof. For example, the ECtHR has adopted the term 'beyond reasonable doubt' in its own case law to express the standard of proof which applies to Article 2 and 3 related matters and matters of discriminatory violence. Secondly, when commentators make suggestions for alternative standards of proof that the Court could use, particularly in cases concerning discriminatory violence, these commentators usually refer to notions that are applied in domestic jurisdictions.[10] Therefore, it is necessary to be aware of their particular meanings.

The legal system of the United States of America accommodates three different types of standards of proof. Clermont identifies this as the 'procedure's magical number three.'[11] The first standard is 'beyond reasonable

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7 S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2013, p. 16.

8 P. Kinsch, 'On the uncertainties surrounding the standard of proof in proceedings before international courts and tribunals', in: G. Venturini & S. Bariatti (eds.), *Diritti Individuali E Giustizia Internazionale/Individual Rights and International Justice/Droits Individuels et Justice Internationale. Liber Fausto Pocar*, Milano: Giuffrè Editore 2009, p. 427-442, p. 427-428.

9 K.M. Clermont & E. Sherwin, 'A Comparative View of Standards of Proof', 50 *American Journal of Comparative Law* (2002), p. 243-275.

10 This is discussed in detail later in this chapter. One example may be mentioned here already, which is Bonello's suggestion that the Court should apply the standard of proof 'balance of probabilities' in its case law (ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*, para. 13).

11 K.M. Clermont, 'Procedure's Magical Number Three: Psychological Bases for Standards of Decision', 72 *Cornell Law Review* (1986-1987), p. 1115-1156.

doubt', which means proof with a virtual certainty and which rarely prevails outside criminal law. Besides 'beyond reasonable doubt', proof by 'clear, strong and cogent' evidence is applied in US courts. Sometimes understood as meaning 'much more likely than not', this second standard is applied in certain cases regarding special issues, such as cases concerning parental rights. The third option is the 'preponderance of the evidence' which is applied in civil cases. This standard may, in rare situations, apply to the accused where he or she may bear the burden of proof in criminal proceedings on certain issues. This translates to 'more likely than not'.[12] In essence, the three standards reflect different levels of persuasion, where 'beyond reasonable doubt' is the highest standard of proof. Clermont observes that whichever standard is used greatly depends on the task of the legal field concerned. If the law is to avoid making a particular kind of error, such as convicting the innocent, the 'beyond reasonable doubt' standard of proof is the logical choice. If the aim is to reduce the danger of deception or bias or to disfavour certain claims, it can apply the standard of clear, strong and cogent evidence. Finally, if the aim is to minimise errors in general, a 'preponderance of the evidence' may be applied.[13]

The three standards may also be categorised on the basis of the extent to which a court regards the claim to be probable: 'beyond reasonable doubt' expresses that a trier regards that the asserted facts *almost certainly* happened; 'clear, strong and cogent evidence' is connected to those claims where the trier thinks that they *highly probably* occurred, and; 'a preponderance of the evidence' reflects a trier's finding that the asserted facts *probably* happened.[14] Occasionally, attempts have been made to translate all three standards into quantifiable numbers: 'beyond reasonable doubt' requires an estimated 90-95 per cent level of persuasion; 'clear, strong and cogent' evidence is found at a level of approximately 75 per cent certainty, and; 'a preponderance of the evidence' corresponds to a 51 per cent level of certainty.[15]

Initially, the English legal system recognised two standards of proof, namely a 'beyond a reasonable doubt' for criminal cases and a 'balance of probabilities' for civil cases.[16] However, since 2009, the standard of proof in criminal cases has been replaced by the standard of proof 'sure': thus, juries must be 'sure' before an accused is condemned and sentenced, rather than being convinced to a level of 'beyond reasonable doubt'.[17]

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12 Ibid., p. 1119-1120.

13 Ibid., p. 1118-1120.

14 J.P. McBaine, 'Burden of Proof: Degrees of Belief', 32 *California Law Review* (1944), p. 242-268, p. 246-247.

15 J.J. Cocozza & H.J. Steadman, 'The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence', 29 *Rutgers Law Review* (1975-1976), p. 1084-1101, p. 1084.

16 K.M. Clermont & E. Sherwin, 'A Comparative View of Standards of Proof', 50 *American Journal of Comparative Law* (2002), p. 243-275, p. 251.

17 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 107-109. See also Court of Appeal (Criminal Division) (United Kingdom) 12 October 2009, *R. v Majid (Abdul)*, [2009] EWCA Crim 2563.

Contrary to common law systems, civil law systems usually do not make use of terms such as 'beyond reasonable doubt' or a 'preponderance of the evidence', in order to identify various standards of proof. There is no consensus between legal scholars on whether these systems actually apply different standards of proof depending on the nature of the allegations made. Some observers argue that in civil law systems, judges must be persuaded that the alleged facts took place in all cases generally.[18] They maintain that the civil law systems both in civil and criminal cases require a standard of proof, i.e. the probability of a certain event, "to the degree that this is possible in [the] ordinary experience of life itself, doubts are excluded and probability approaches certitude."[19] Clermont and Sherwin claim that civil law countries apply the standard of proof 'beyond reasonable doubt' in criminal and in civil cases.[20] They equate this standard with the French phrase *intime conviction*.[21] In the context of the French system, specifically, it has been stressed that the judge must be persuaded "without a shadow of a doubt, of a person's fault, be it penal or civil."[22]

However, there are observers who contest the idea that civil law countries apply the same high standard of proof in all types of cases. Taruffo, for example, argues that commentators who stress that judges from civil law systems apply a high standard of proof, wrongly assume that the French expression *intime conviction* is equivalent to 'beyond reasonable doubt' and that it is used in civil law systems to decide civil cases. In addition, she argues that they give the wrong impression that judges from *every* European continental country work on the basis of the French principle *intime conviction*.[23]

To sum up, both common law and civil law systems apply standards of proof. Common law systems use distinct terms to identify a standard of proof, indicating the highest threshold with the term 'beyond reasonable doubt' and the lowest with a 'preponderance of the evidence'. Conversely, civil law systems do not work with such identifiable terms, although their adjudicators apparently do use (unidentifiable) standards of proof. What both systems have in common, however, is their purpose: in both systems

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18 C.F. Amerasinghe, *Evidence in International Litigation*, Leiden: Martinus Nijhoff Publishers 2005, p. 233.

19 The quotation is derived from the definition of 'evidence' provided in the *Encyclopaedia Britannica. See H. Nagel, Encyclopaedia Britannica. Online Academic Edition*, Encyclopaedia Britannica Inc. 2013 (online).

20 K.M. Clermont & E. Sherwin, 'A Comparative View of Standards of Proof', 50 *American Journal of Comparative Law* (2002), p. 243-275.

21 Ibid. See also D. Demougin & C. Fluet, *Deterrence vs Judicial Error: A Comparative View of Standards of Proof*, Montreal: Cirano 2004, p. 1; U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 74.

22 J-M Baissus, '*Common v. Continental*: A Reaction to Mr. Evan Whitton's 1998 Murdoch Law School Address', 5 *Murdoch University Electronic Journal of Law* (1998), para. 77 (online).

23 M. Taruffo, 'Rethinking the Standards of Proof', 51 *American Journal of Comparative Law* (2003), p. 659-677, p. 667-669.

standards of proof guarantee the quality of the evidentiary decision and aim to prevent wrong outcomes in rulings. It may be questioned whether different standards of proof, more in line with common law systems, may be more appropriate in the Court's judgments also, because the acceptable margin of error is different for different types of cases, a question that is answered below, in subsequent sections.

4.3 Standards of proof in ECtHR case law

The Convention, the Rules of Court and the Annex to the Rules (concerning investigations) do not prescribe any specific standards of proof for various cases that may appear before the Court, nor do they give a definition of the notion 'standard of proof'.[24] The jurisprudence of the Court also does not set out a formalised theory for the standard of proof. The main explanation given for the absence of evidentiary rules regulating the standard of proof in ECtHR proceedings, concerns the nature of the allegation raised.[25] This means that the Court may require a different level of persuasion in a case that was examined at domestic level by a criminal judge than in the case of an allegation regarding a more 'civil' topic, such as an alleged breach in the field of family law. Thus, owing to the broad diversity of cases presented to the Court, it may be difficult not only to lay down one general standard of proof to be applied in all cases, but even a number of fixed ones.

The Court has also never provided any clear definition of the notion of 'standard of proof'. However, in *Nachova*, the Grand Chamber did refer to a set of factors that may influence the standard to be applied:

> "… the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights …."[26]

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24 See section 1.5. See also L.G. Loucaides, 'Standards of Proof in Proceedings under the European Convention of Human rights', in: 46 *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu* (1992), p. 1431-1443, p. 1433; L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 158; T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 563; M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 211.

25 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 211; K. Rogge, 'Fact-Finding', in: R. St. J. Macdonald et al. (eds.), *The European System for the Protection of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1993, p. 690.

26 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147. The same set of factors, thus, influences the distribution of the burden of proof. This is further discussed in the next chapter.

Here the Court emphasises that the standard of proof is variable. Since *Nachova*, the Court has often referred to this formula.[27] However, neither in *Nachova* nor in subsequent case law, has the ECtHR clarified how the vari-

27 A HUDOC search reveals approximately 60 judgments in which the formula was mentioned. It was mentioned, for example, in its entirety in ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147; ECtHR 29 September 2005, 24919/03 (*Mathew/The Netherlands*), para. 156; ECtHR 26 July 2007, 57941/00, 58699/00 and 60403/00 (*Musayev a.o./Russia*), para. 143; ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 93; ECtHR 8 January 2008, 54169/00 (*Enzile Özdemir/Turkey*), para. 43; ECtHR 24 June 2008 44587/98 (*Isaak/Turkey*), para. 107; ECtHR 24 June 2008, 36832/97 (*Solomou a.o./Turkey*), para. 66; ECtHR 27 October 2009, 45388/99 (*Kallis and Androulla Panayi/Turkey*), para. 55; ECtHR 10 June 2010, 44290/07 (*Sabeva/Bulgaria*), para. 40; ECtHR 24 March 2011, 23458/02 (*Giuliani and Gaggio/Italy*) (GC), para. 181; ECtHR 23 February 2012, 29226/03 (*Creangă/Romania*) (GC), para. 88; ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), para. 151; ECtHR 30 May 2013, 8810/05 (*Davitidze/Russia*), para. 83; ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), para. 94; ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 394; ECtHR, 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah/Poland*), para. 394; ECtHR 16 September 2014, 29750/09 (*Hassan/United Kingdom*) (GC), para. 48; ECtHR 27 November 2014, 51857/13 (*Amirov/Russia*), para. 80; ECtHR 27 January 2015, 29414/09 and 44841/09 (*Ciorcan a.o./Romania*), para. 157; ECtHR 5 February 2005, 46404/13 (*Khloyev/Russia*), para. 73; ECtHR 2 June 2015, 13320/02 (*Kyriacou Tsiakkourmas a.o./Turkey*), para. 168.
And in the following cases, only (some of) the abovementioned factors were mentioned: ECtHR 13 December 2005, 55762/00 and 55974/00 (*Timishev/Russia*), para. 39; ECtHR 26 October 2006, 53157/99, 53247/99, 53695/00 and 56850/00 (*Ledyayeva a.o./Russia*), para. 89; ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 178; ECtHR 24 January 2008, 48804/99 (*Osmanoğlu/Turkey*), para. 45; ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 183; ECtHR 20 May 2010, 32362/02 (*Visloguzov/Ukraine*), para. 44; ECtHR 23 September 2010, 17185/05 (*Iskandarov/Russia*), para. 107; ECtHR 7 October 2010, 12773/03 (*Pankov/Bulgaria*), para. 59; ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), para. 116; ECtHR 20 October 2011, 5774/10 and 5985/10 (*Mandić and Jović/Slovenia*), para. 58; ECtHR 20 October 2011, 5903/10, 6003/10 and 6544/10 (*Štrucl a.o./Slovenia*), para. 65; ECtHR 10 January 2012, 42525/07 and 60800/08 (*Ananyev a.o./Russia*), para. 121; ECtHR 10 January 2012, 15492/09 (*Sakhvadze/Russia*), para. 86; ECtHR 17 January 2012, 43710/07, 6023/08, 11248/08, 27668/08, 31242/08 and 52133/08 (*Fetisov a.o./Russia*), para. 89; ECtHR 5 June 2012, 55822/10 (*Shakurov/Russia*), para. 119; ECtHR 10 July 2012, 52327/08 (*Yudina/Russia*), para. 65; ECtHR 24 July 2012, 58104/08 (*Sizov/Russia (No. 2)*), para. 42; ECtHR 20 September 2012, 31720/02 (*Titarenko/Ukraine*), para. 54; ECtHR 2 October 2012, 14743/11 (*Abdulkhakov/Russia*), para. 118; ECtHR 15 November 2012, 30075/06 (*Zamferesko/Ukraine*), para. 44; ECtHR 4 December 2012, 41452/07 (*Lenev/Bulgaria*), para. 112; ECtHR 18 December 2012, 2944/06 and 8300/07, 50 184/07, 332/08, 42509/10 (*Aslakhanova a.o./Russia*), para. 97; ECtHR 29 January 2013, 11146/11 (*Horváth and Kiss/Hungary*), para. 108; ECtHR 14 March 2013, 28005/08 (*Salakhov and Islyamova/Ukraine*), para. 131; ECtHR 2 April 2013, 21880/03 (*Olszewski/Poland*), para. 92; ECtHR 25 April 2013, 71386/10 (*Savriddin Dzhurayev/Russia*), para. 129; ECtHR 1 August 2013, 51432/09 (*Saidova/Russia*), para. 63; ECtHR 3 October 2013, 31890/11 (*Nizomkhon Dzhurayev/Russia*), para. 87; ECtHR 24 October 2013, 7821/07, 10937/10, 1404 6/10 and 32782/10 (*Dovletukayev a.o./Russia*), para. 191; ECtHR 7 November 2013, 43165/10 (*Ermakov/Russia*), para. 159; ECtHR 14 November 2013, 29604/12 (*Kasymakhunov/Russia*), para. 100; ECtHR 31 July 2014, 1774/11 (*Nemtsov/Russia*), para. 65; ECtHR 23 October 2014, 28403/05 (*Vintman/Ukraine*), para. 143; ECtHR 10 March 2015, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (*Varga a.o./Hungary*), para. 68; ECtHR 7 April 2015, 679/13 (*Veretco/Moldova*), para. 41.

ous factors may influence the standard of proof. Yet it has indicated that the specificity of the facts, the nature of the allegation made and the Convention right at stake, are factors influencing the standard of proof. Therefore, in Article 2 and Article 3 related matters, taken in conjunction with Article 14 or on their own, the Court requires higher standards of proof.

A closer look at the Court's case law demonstrates that the standard most often mentioned in this respect is 'beyond reasonable doubt', particularly in cases where State agents were allegedly involved in violent events – and these are most often Article 2 and 3 related matters.[28] In the specific context of cases concerning discriminatory violence, the standard of proof 'beyond reasonable doubt' has been the *only* standard expressly mentioned by the Court. Therefore, 'beyond reasonable doubt' is discussed separately and in more detail in the next section.

There have been very few judgments where standards other than 'beyond reasonable doubt' have been explicitly applied by the Court. Therefore, it is difficult to provide an accurate depiction of different standards of proof adopted by the Court. It is generally hard to tell whether the Court uses any other standard besides 'beyond reasonable doubt', because in cases where this standard of proof is *not* mentioned, the Court is unclear about whether it has applied a different level of persuasion. For example, in *Mamazhonov v. Russia*, a case concerning an Uzbek national who was abducted and illegally transferred from Russia to Uzbekistan, the Court required "sufficient, clear and convincing evidence"[29] in order to reach the conclusion that the Russian authorities had violated Article 3. The Court found this level of persuasion to be justified, considering "the gravity of the allegation of State agents' involvement in the forcible removal and concealment of the applicant."[30] While still high, this seems to be a lower standard of proof than 'beyond reasonable doubt'.

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28 Some examples are ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 161; ECtHR 8 July 1999, 23657/94 *(Çakıcı/Turkey*) (GC), para. 92; ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), para. 121. See further L.G. Loucaides, 'Standards of Proof in Proceedings under the European Convention of Human rights', in: 46 *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu* (1992), p. 1431-1443; R.A. Lawson & H.G. Schermers, *Leading cases of the European Court of Human Rights*, Nijmegen: Ars Aequi Libri 1999, p. 628; U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85; G. Bonello, 'Evidentiary Rules of the ECHR in Proceedings Relating to Articles 2, 3 and 14 - A Critique', 2 *Inter-American and European Human Rights Journal* (2009), p. 66-80; D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights*, New York: Oxford University Press 2014, p. 148; M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 211; P. Leach, *Taking a Case to the European Court of Human Rights*, New York: Oxford University Press 2011, p. 192 and 210.

29 ECtHR 23 October 2014, 17239/13 (*Mamazhonov/Russia*), para. 204.

30 Ibid.

The Court has also mentioned the notion of 'standard of proof' when examining complaints which concern the rarely invoked Article 18 ECHR (limitation on use of restrictions on rights). In *Khodorkovskiy v. Russia*, the applicant – who was the major shareholder in one of Russia's formerly largest oil companies (Yukos) – complained before the Court that the entire criminal prosecution of Yukos managers, including himself, had been politically and economically motivated, and hence had breached Article 18. The ECtHR noted that a mere 'suspicion' that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.[31] Furthermore, it emphasised that "a very exacting standard of proof" applies when Article 18 is invoked and that "there is nothing in the Court's case-law to support the applicant's suggestion that, where a *prima facie* case of improper motive is established, the burden of proof shifts to the respondent Government."[32] According to the Court, the burden of proof in such a context should rest with the applicant.[33] It appears that the ECtHR applies a higher standard of proof in this case than 'beyond reasonable doubt'. Yet, it remains unclear to what extent this 'very exacting standard of proof' differs from 'beyond reasonable doubt'.

Scholars have also sometimes read implicit standards of proof into the Court's case law. Ambrus, for example, analysing cases concerning the freedom of religion (Article 9 ECHR), argues that the standard of proof in such cases is connected with the notion of 'margin of appreciation'. She stresses that the terms 'standard of proof', 'level of scrutiny' and 'margin of appreciation' describe the same phenomenon, albeit from different perspectives. One of her main conclusions is that the margin of appreciation is identified either as wide or narrow, which could be interpreted as low or high standards of proof. So if the Court adopts a wide margin of appreciation in a case, for example, the respondent State's standard of proof was lower, or the other way around.[34] In this context, she identifies high, low and intermediate standards of proof, all varying depending on the margin of appreciation ascribed to the Member States.[35] Among the examples she mentions is the *Jehovah's Witnesses of Moscow a.o. v. Russia* case, which concerned the dissolution of a religious community and thus touched upon both Articles 9 and 11 (freedom of assembly and association) of the Convention. While focusing on the Article 11 complaint, the ECtHR stressed that:

31 ECtHR 31 May 2011, 5829/04 (*Khodorkovskiy/Russia*), para. 255.
32 Ibid., para. 256.
33 Ibid.
34 M. Ambrus, 'The European Court of Human Rights and Standards of Proof in Religion Cases', 8 *Religion and Human Rights* (2013), p. 107-137, p. 109-110.
35 Ibid., p. 136-137.

> "[t]he State's power to protect its institutions and citizens from associations that might jeopardise them must be used sparingly, as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom." [36]

According to Ambrus, the Court seemingly established a high standard of proof for the respondent State with this statement.[37]

Turning to ECtHR cases concerning allegations under provisions that are more relevant to this study, i.e. Articles 2 and 3, there have been authors who claim to have spotted other standards of proof besides that of 'beyond reasonable doubt' in the Court's case law. Kokott claims that the threshold of 'clear and convincing evidence' has been applied in Court judgments in the context of Article 3. She observes this standard of proof in the *Ribitsch* case. In this case, the Court held that the government was "under an obligation to provide a plausible explanation of how the applicant's injuries were caused",[38] since they were considered to have occurred during the period when the applicant was in police custody. According to Kokott, this suggests that the Court accepted inferential evidence and required the respondent State to prove to a level of clear and convincing evidence that the ill-treatment of the individual could not be attributed to State agents.[39]

In cases concerning potential future violations of the Convention, such as those related to the principle of *non-refoulement*,[40] there is a tendency among certain authors to look for a standard of proof in the long-established principle which says that deportation:

> "by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country …."[41]

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36 ECtHR 10 June 2010, 302/02 (*Jehovah's Witnesses of Moscow a.o./Russia*), para. 100.

37 M. Ambrus, 'The European Court of Human Rights and Standards of Proof in Religion Cases', 8 *Religion and Human Rights* (2013), p. 107-137, p. 115.

38 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), para. 34. The same type of reasoning was confirmed in ECtHR 18 December 1996, 21987/93 (*Aksoy/Turkey*), para. 61.

39 J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, The Hague: Kluwer Law International 1998, p. 202.

40 *Non-refoulement* is the return of an individual to his or her State of origin.

41 See ECtHR 28 February 2008, 37201/06 (*Saadi/Italy*) (GC), para. 125. See also ECtHR 7 July 1989, 14038/88 (*Soering/United Kingdom*) (GC), para. 91; ECtHR 20 March 1991, 15576/89 (*Cruz Varas a.o./Sweden*) (GC), para. 69; ECtHR 15 November 1996, 22414/93 (*Chahal a.o./United Kingdom*) (GC), para. 74; ECtHR 12 April 2005, 36378/02 (*Shamayev a.o./Georgia and Russia*), para. 335; ECtHR 19 November 2009, 41015/04 (*Kaboulov/Ukraine*), para. 107; ECtHR 18 February 2010, 54131/08 (*Baysakov a.o./Ukraine*), para. 48; ECtHR 23 March 2016, 43611/11 (*F.G./Sweden*) (GC), para. 111.

Academics differ in their stance on what standard of proof this quote incorporates. Smith suggests that this whole sentence essentially indicates the standard of proof used by the Court, although he does not clarify what level of persuasion has been applied. He suggests only that the standard of proof here is lower than the level of 'beyond reasonable doubt'.[42] De Londras and Battjes identify the 'real risk' aspect within the statement as an indication of a standard of proof.[43] Thienel, in contrast, states that 'real risk' is merely a substantive finding and not the standard of proof to be applied in the process of decision-making.[44]

Hence, it appears that in *non-refoulement* cases it is difficult to derive what type of standard of proof the Court uses, because the Court generally does not make use of identifiable terms, such as 'beyond reasonable doubt' or a 'balance of probabilities'. In fact, the Court has hardly ever expressly mentioned the 'beyond reasonable doubt' standard in *non-refoulement* matters, as it has in many other Article 2 and 3 related claims. This is understandable because it is difficult to imagine that ECtHR judges become persuaded 'beyond reasonable doubt' that an expulsion may amount to a violation of Article 3, since the act of expulsion has not yet occurred.[45] For this reason, some observers also find the use of 'beyond reasonable doubt' in other cases which require an assessment of future events, to be conceptually mistaken. They argue that it is inappropriate for the Court to use an identical standard of proof in cases where an assessment of proof of past events has to be made and in cases where information concerning future events needs to be evaluated.[46]

What this section essentially demonstrates is that there are cases in which the Court does not *explicitly* require that an allegation be proved to a level of 'beyond reasonable doubt'. This does not mean that the Court does not work with other standards of proof. It may be that other standards are appropriate in certain cases. However, it remains unclear what those standards are and how they differ from the 'beyond reasonable doubt' standard of proof.

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42 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 211.

43 F. De Londras, '*Saadi v. Italy*', 102 *American Journal of International Law* (2008), p. 616-622, p. 618-619; H. Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed', 22 *Leiden Journal of International Law* (2009), p. 583-621, p. 608.

44 T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 562-563.

45 Although it did refer to 'beyond reasonable doubt' in the following cases: ECtHR 12 April 2005, 36378/02 (*Shamayev a.o./Georgia and Russia*), para. 338; ECtHR 7 June 2007, 38411/02 (*Garabayev/Russia*), para. 76; ECtHR 20 May 2010, 21055/09 (*Khaydarov/Russia*), para. 96.

46 H. Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed', 22 *Leiden Journal of International Law* (2009), p. 583-621, p. 609.

4.4 'Beyond reasonable doubt' in ECtHR case law

'Beyond reasonable doubt' is mainly applied by the Court in the assessment of Article 2 and Article 3 complaints. In the specific context of cases concerning discriminatory violence, 'beyond reasonable doubt' has been the *only* standard expressly mentioned by the Court. It is, however, only applied in complaints regarding the negative duty of State agents to refrain from inflicting discriminatory violence.[47] The Court does not appear to use any standards of proof under the complaints concerning the positive duty to effectively investigate allegations of discriminatory violence or the positive duty to take preventive measures against this type of wrongful conduct. These two complaints are different in nature, because the Court can more easily verify whether they can be upheld. Thus, often it is possible for the Court to determine on the basis of the case file whether an investigation into discriminatory violence was initiated or whether preventive measures have been taken in the domestic jurisdiction. So, whether ECtHR judges have really been persuaded that a violation has occurred only come into play during an assessment of the negative duty of State agents to refrain from inflicting discriminatory violence. In this context, the Court must be persuaded that a State agent inflicted violence based on a discriminatory motive.

This section concentrates on the 'beyond reasonable doubt' standard in ECtHR cases concerning discriminatory violence and beyond. Firstly, the ECtHR's definition of 'beyond reasonable doubt' is discussed along with the origins of this standard in the general setting of ECtHR cases (section 4.4.1). The criticism levelled at the Court for using this standard of proof is then examined and it is established whether this criticism is justified. Particular consideration is given to whether the 'beyond reasonable doubt' standard of proof poses too great an obstacle for finding that violations have taken place under the negative duty of State agents to refrain from inflicting discriminatory violence (section 4.4.2).

4.4.1 The ECtHR definition of 'beyond reasonable doubt' and the origins of this standard of proof

The 'beyond reasonable doubt' standard was introduced very early on, in 1969, by the Commission in Convention proceedings in the *Greek* case. This inter-State case concerned complaints of torture or ill-treatment of political prisoners allegedly committed by Greek State officials. The Commission defined the standard of proof 'beyond reasonable doubt' as follows:

47 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147; ECtHR 21 June 2007, 27850/03 (*Karagiannopoulos/Greece*), para. 75.

> "A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented."[48]

The Court followed the Commission's approach in the inter-State case *Ireland v. United Kingdom*. In that case, in 1978, the Court adopted the 'beyond reasonable doubt' standard for the first time in determining whether the United Kingdom had violated Article 3 ECHR:

> "… To assess this evidence,[49] the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account."[50]

There are now various theories about the underlying reasons for the Commission and the ECtHR to adopt the standard of 'beyond reasonable doubt'. Yet there was no discussion in literature concerning the reasons why they chose to introduce this standard of proof in cases related to violence around the time that this standard emerged in ECtHR case law. For example, in his detailed analysis of the *Greek* case, Beckett describes the standard and means of proof to be applied, yet hardly shares his thoughts on the Court's adoption of this particular standard of proof.[51] Beckett merely refers to the standard of proof 'beyond reasonable doubt' as "a very rigorous standard of evidence",[52] however, it is unclear whether this is intended as a criticism. In his discussion on the *Greek* case, Buergenthal does not elaborate upon the evidentiary matters at all, focusing merely on the complaints arising from Article 15 (derogation in time of emergency).[53] *Ireland v. United King-*

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48 EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972), p. 196.

49 'Evidence' here refers to 100 witnesses that were heard by the Commission and to the medical reports relating to sixteen illustrative cases the Commission had asked the applicant government to select. The Commission also relied, to a lesser extent, on the documents and written submissions in connection with 41 cases (ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 161).

50 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 161.

51 J. Becket, 'The Greek Case Before the European Human Rights Commission', 1 *Human Rights* (1970-1971), p. 91-117, p. 112-117. The same may be said for Robertson, who, in his assessment of the Commission's ruling did not elaborate on the newly adopted standard of proof (A.H. Robertson, *Human rights in Europe: being an account of the European convention for the protection of human rights and fundamental freedoms signed in Rome on 4 November 1950, of the Protocols thereto and of the machinery created thereby: the European Commission of Human Rights and the European Court of Human Rights*, Manchester: Manchester University Press 1977, p. 39-42).

52 J. Becket, 'The Greek Case Before the European Human Rights Commission', 1 *Human Rights* (1970-1971), p. 91-117, p. 97.

53 T. Buergenthal, 'Proceedings against Greece under the European Convention on Human Rights', 62 *American Journal of International Law* (1968), p. 441-450.

dom inspired academic commentators to write, in the first place, about the distinctions between the different gradations of ill-treatment referred to in Article 3 and the absolute character of this provision, rather than focusing on evidentiary issues.[54] O'Boyle and Bonner discuss, to a certain extent, the new evidentiary aspects of these cases but, again, do not assess the implications of the use of this standard in a human rights setting.[55] The only clear discussion of the use of the 'beyond reasonable doubt' standard originates from the Irish government in *Ireland v. United Kingdom.* The applicant government expressed that it is "an excessively rigid standard for the purposes of the … proceedings."[56]

During the course of the 1990s, when the ECtHR's case load grew rapidly due to the accession to the Convention of the younger democracies from Central and Eastern European States, several observers started to question why the ECtHR chose to apply the high standard of proof 'beyond reasonable doubt', which is applied in common law criminal cases.[57] Some authors claim that the words 'beyond reasonable doubt' in *Ireland v. United Kingdom* were introduced by the Court, because the parties in that case were two common law countries, and their judges thus also have a common law background. 'Beyond reasonable doubt', stemming from common law systems, would therefore suit cases in which such parties are involved.[58] It is argued, however, that the standard of proof 'beyond reasonable doubt' also properly reflects the requirement in civil law systems of the judge's full conviction or moral certainty. The standard should therefore appeal to all State parties, with either a civil or a common law system background[59] and could even be seen as a general principle of law.[60]

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54 E.B. Cohn, 'Torture in the International Community – Problems of Definition and Limitation – The Case of Northern-Ireland', 11 *Case Western Reserve Journal of International Law* (1979), p. 159-185.

55 M. O'Boyle, 'Torture and Emergency Powers under the ECHR: Ireland v. the United Kingdom', 71 *American Journal of International Law* (1977), p. 674-706, p. 697-701; D. Bonner, 'Ireland v United Kingdom', 27 *International and Comparative Law Quarterly* (1978), p. 897-907, p. 899.

56 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 161.

57 H.C. Krüger, 'Gathering Evidence', in: M. de Salvia & M.E. Villiger (eds.), *The Birth of European Human Rights Law. L'éclosion du Droit européen des Droits de l'Homme* (Liber Amicorum Carl Aage Nørgaard), Baden-Baden: Nomos Verlagsgesellschaft 1998, p. 249-259, p. 253; L.G. Loucaides, 'Standards of Proof in Proceedings under the European Convention of Human rights', in: 46 *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu* (1992), p. 1431-1443, p. 1433.

58 Álvaro Paúl, 'In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights', 55 *Revista Instituto Interamericano de Derechos Humanos* (2012), p. 57-102, p. 60.

59 P. Kinsch, 'On the uncertainties surrounding the standard of proof in proceedings before international courts and tribunals', in: G. Venturini & S. Bariatti (eds.), *Diritti Individuali E Giustizia Internazionale/Individual Rights and International Justice/Droits Individuels et Justice Internationale. Liber Fausto Pocar*, Milano: Giuffrè Editore 2009, p. 427-442, p. 436.

60 T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 566.

It has also been observed that the ECtHR may well have been influenced in its choice of the 'beyond reasonable doubt' standard by the reasoning of the ICJ in the *Corfu Channel* case where the phrase "no room for reasonable doubt" was also mentioned.[61] In the *Corfu Channel* case, which concerned the Albanian government's alleged knowledge of the mine laying operations, the ICJ held that:

> "[it] must examine … whether it has been established by means of indirect evidence that Albania has knowledge of mine laying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt."[62]

Other explanations offered for the Court's use of 'beyond reasonable doubt' include the suggestion that the *Ireland v. United Kingdom* case was a 'quasi-criminal' case, which thus implies that the nature of the case determined the standard of proof that was utilised by the Court.[63] Potentially, the Court may have wished to imply that the relevant human rights violations constituted a form of State criminality.[64]

However, this explanation does not seem valid, taking into consideration that the Grand Chamber later explained in *Nachova* that in the application of 'beyond reasonable doubt', "it has never been its purpose to borrow the approach of the national legal systems that use that standard."[65] It further stressed that:

> "[i]ts role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof."[66]

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61 ICJ 9 April 1949, I.C.J Reports 1949, p. 4 (*Corfu Channel (United Kingdom/Albania)*) (Merits), cited in T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 571-573. Loucaides also discussed the *Corfu Channel* judgment in the context of the standards of proof employed by the ECtHR. See L.G. Loucaides, 'Standards of Proof in Proceedings under the European Convention of Human rights', in: 46 *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu* (1992), p. 1431-1443, p. 1433.

62 ICJ 9 April 1949, I.C.J Reports 1949, p. 4 (*Corfu Channel (United Kingdom/Albania)*) (Merits), p. 18.

63 C.F. Amerasinghe, *Evidence in International Litigation*, Leiden: Martinus Nijhoff Publishers 2005, p. 235-236.

64 P. Kinsch, 'On the uncertainties surrounding the standard of proof in proceedings before international courts and tribunals', in: G. Venturini & S. Bariatti (eds.), *Diritti Individuali E Giustizia Internazionale/Individual Rights and International Justice/Droits Individuels et Justice Internationale. Liber Fausto Pocar*, Milano: Giuffrè Editore 2009, p. 427-442, p. 435-436.

65 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.

66 Ibid.

Other reasons for Court's application of 'beyond reasonable doubt' could be considered. It may be that in the 1960s and 1970s, the 'beyond reasonable doubt' standard was selected in light of the politically sensitive nature of the events surrounding both these cases. Because of the many serious accusations of ill-treatment filed against the respondent Contracting Parties, the Commission and the Court may have felt the need to justify why they reached conclusions that violations had taken place. 'Beyond reasonable doubt' may have been their way of expressing that they had thoroughly examined the complaints, before finding any violations against the respondent States involved in this context. Another reason may be related to the period in which the cases were heard; in the 1960s and 1970s, the Council of Europe's institutions were not overwhelmed by applications and, consequently, the Commission and the Court had sufficient time and means at their disposal to conduct thorough investigations of the facts of the case until they reached a point of 'beyond reasonable doubt' concerning the allegations. Moreover, incipient courts may have a stronger desire to gain credibility and obtain legitimacy not only with a broader audience, but also most particularly with the State parties that created them.[67] A further relevant factor may be that both cases were *inter-State*. In these types of cases, two equally strong opponents – thus, two Contracting Parties – face each other in a proceeding. For this reason, the Commission and the ECtHR may have found it reasonable to require a high standard of proof.

4.4.2 Testing the 'beyond reasonable doubt' standard in discriminatory violence cases

The application of 'beyond reasonable doubt' in ECtHR's judgments has raised many questions and critical responses among legal scholars. There are calls for the Court to desist from using this standard of proof in all cases generally.

A principal reason for the criticism is that 'beyond reasonable doubt' brings to mind an association with criminal procedures of common law

67 See L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell International Law Journal* (1993), p. 133-165, p. 137; J. Gerards & H. Senden, 'The structure of fundamental rights and the European Court of Human Rights', 7 *International Journal of Constitutional Law* (2009), p. 619-653, p. 637-638; N. Grossman, 'The Normative Legitimacy of International Courts', 86 *Temple Law Review* (2013), p. 61-106, p. 65-68. See also E. Voeten, 'Politics, Judicial Behaviour, and Institutional Design', in: J. Christoffersen & M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*, New York: Oxford University Press 2011, p. 61-76, p. 62.

systems.[68] In 1992, Loucaides, a former judge at the ECtHR, stressed that the standard of proof 'beyond reasonable doubt' makes sense in domestic criminal procedures that aim to punish an individual for a criminal offence, particularly in those procedures which are of an adversarial character and in which the liberty of the accused must be protected through the application of rigid standards of proof. Loucaides was among the first to observe that human rights litigation differs from criminal proceedings both in object and procedure, as well as the position of the parties. In an ECtHR procedure, the 'accused' is always a Member State.[69] Hence, in Court proceedings, the respondent State is not a citizen facing a Public Prosecutor who needs to be protected by a judge from wrongful conviction. Therefore, according to Loucaides, "[i]n view of the different objectives of the proceedings, it is submitted that when applying the 'reasonable doubt' formula in the context of proceedings alleging violations of human rights against a State, care should be taken to disassociate such [a] formula from the rigid concepts and

68 T.V. Mulrine, 'Reasonable Doubt: How in the World Is It Defined?', 12 *American University Journal of International Law and Policy* (1997), p. 195-225, p. 213-218. It should be noted, however, that even in these systems, 'beyond reasonable doubt' remains a somewhat questionable notion. For example, in both England and Wales and in the United States of America there is inconsistency about the meaning of the term. More recent accounts note that 'beyond reasonable doubt' is not used in criminal cases in England and Wales any longer and judges are urged not to direct juries by referring to proof 'beyond reasonable doubt'. The reason for this is the potential to confuse jurors by expressing a standard of proof in such a manner (A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 107-108). In the legal system of the United States of America it has been found that many states do not provide a statutory definition of 'beyond reasonable doubt', despite the fact that every state adheres to this standard when deciding on a defendant's guilt in a criminal trial. Furthermore, there is confusion in applying definitions in this context: a study once discovered various definitions of 'reasonable doubt' in the case law, court rules and statutory law of the 50 states and federal Courts of Appeal. In addition, it was noted that despite all attempts by many of the states to define 'beyond reasonable doubt', studies show that juries are unable to understand jury instructions on this matter (C. Hemmens, K.E. Scarborough & R.V. Del Carmen, 'Grave Doubts about "Reasonable Doubt": Confusion in State and Federal Courts', 25 *Journal of Criminal Justice* (1997), p. 231-254). In the context of hate crimes specifically, some American observers raise the question of whether the requirement for the prosecution to prove a racist motive to 'beyond reasonable doubt' is difficult, if not impossible, to meet (see R.J. Allen, 'The Restoration of *In re. Winship*: A Comment on Burdens of Persuasion in Criminal Cases after *Patterson v. New York*', 76 *Michigan Law Review* (1977-1978), p. 30-63, p. 47; 'Combatting Racial Violence: A Legislative Proposal', 101 *Harvard Law Review* (1987-1988), p. 1270-1286, p. 1271 [Author Unknown]; J. Morsch, 'The Problem of Motive in Hate Crimes: the Argument against Presumptions of Racial Motivation', 82 *Journal of Criminal Law & Criminology* (1991-1992), p. 659-689, p. 669).

69 L.G. Loucaides, 'Standards of Proof in Proceedings under the European Convention of Human rights', in: 46 *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu* (1992), p. 1431-1443, p. 1435.

considerations of criminal justice and procedure from which the formula originates."[70]

In line with this reasoning, Loucaides continued to observe in 1995 that in common law systems 'beyond reasonable doubt' is "intertwined with the principle that the burden of proof is upon the prosecution and that the accused does not have to prove anything in support of his innocence."[71] So, the high standard is allocated to the more 'powerful' party in domestic proceedings, which is the prosecutor. In these types of proceedings, the accused has the right to remain silent and his silence may not be interpreted as confirmation of the allegations against him. By contrast, in human rights proceedings, the applicant is the weaker party. For this reason, the Court may collect evidence *proprio motu* and the respondent State that – metaphorically speaking – is the 'accused' in ECtHR proceedings, is obliged to assist the Court in the collection of evidence. A Member State's silence in this context, in contrast with the silence of the defendant in a domestic criminal case, may most certainly work against it, as the Court may draw inferences from the Member State's behaviour. Loucaides therefore rejects the use of the 'beyond reasonable doubt' standard in ECtHR proceedings, suggesting that the ECtHR should use more abstract terms to express its level of persuasion instead. The simple word 'satisfied', as is often used by the ICJ,[72] or 'convinced', which Loucaides observes in the IACtHR judgment of *Velásquez*

70 Ibid., p. 1436. In subsequent years, others followed Loucaides' approach. See ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), *joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič*; ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*; T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 578-579.

71 L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 162. See also U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 78. Academics who write about domestic legal systems also tend to link this standard of proof to the presumption of innocence, or to the maxim that "it is better to acquit 10 guilty men than to convict one innocent person." See A.A. Morano, 'A Re-examination of the Development of the Reasonable Doubt Rule', 55 *Boston University Law Review* (1975), p. 507-528; B.J. Shapiro, '"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850', 38 *Hastings Law Journal* (1986-1987), p. 153-193; J.H. Langbein, *The Origins of Adversary Criminal Trial*, New York: Oxford University Press 2003, p. 261-266; C. Hemmens, K.E. Scarborough & R.V. Del Carmen, 'Grave Doubts about "Reasonable Doubt": Confusion in State and Federal Courts', 25 *Journal of Criminal Justice* (1997), p. 231-254.

72 L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 168. Loucaides does not refer further to any judgments by the ICJ in which the term 'satisfied' was actually used.

Rodríguez,[73] seem to him more appropriate for ECtHR case law. Loucaides does not offer detailed explanations for his preferences in this regard, merely noting that 'beyond reasonable doubt' conveys a more rigid rule than the aforementioned alternatives.[74]

It is doubtful that Loucaides' suggestion would alter the outcome of ECtHR's judgments. The ICJ and the IACtHR indeed appear more reluctant in expressly mentioning 'beyond reasonable doubt' as the designated standard of proof. However, some other issues could potentially arise if the Court were to incorporate this terminology regarding levels of persuasion into its own case law.

Firstly, both the ICJ and the IACtHR do indeed use other expressions in their case law to depict the level of persuasion required,[75] which do not necessarily reflect a lesser degree of persuasion than 'beyond reasonable doubt'. The ICJ uses terms such as 'fully convinced',[76] 'high level of certainty appropriate to the seriousness of the allegation',[77] and 'conclusively established'[78] to pinpoint the level of persuasion which must be achieved in order to establish State liability. The ways in which this court expresses levels of persuasion are debated and are sometimes considered unclear.[79] The IACtHR uses

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73 Loucaides refers to IACtHR 29 July 1988, (Ser. C) No. 4 (1988) (*Velásquez Rodríguez/Honduras*) (Merits), paras. 127-129 (see L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 168-169). In his view, para. 129 is particularly interesting, since it says that the IACtHR is required to "apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a *convincing* manner [italicisation added]."

74 L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 168-169.

75 The ICJ has hardly expressed its standards of proof through 'typical' terms, such as 'beyond reasonable doubt', 'clear and convincing evidence' or 'preponderance of the evidence'. Wilkinson states in this regard that "the Court remains vague in its judgments as to its intention to follow a unique standard" (S. Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2013, p. 20).

76 ICJ 26 February 2007, I.C.J. Reports 2007, p. 43 (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro)*), para. 209.

77 Ibid., para. 210.

78 Ibid., para. 319.

79 For example, scholars read various standards of proof into ICJ's *Genocide* case. See A. Gattini, 'Evidentiary Issues in the ICJ's *Genocide* Judgment', 5 *Journal of International Criminal Justice* (2007), p. 889-904; L.R. Breuker, 'Waarheidsvinding, genocide en het Internationaal Gerechtshof', in: J.H. Crijns, P.P.J. van der Meij & J.M. ten Voorde (eds.), *De waarde van waarheid. Opstellen over waarheid en waarheidsvinding in het strafrecht*, The Hague: Boom Juridische Uitgevers 2008, p. 237-267; T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588. See also the recent discussion on standards of proof applied by the ICJ by Judge Gaja in ICJ 3 February 2015, I.C.J. Reports 2015 (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia/Serbia)*), *separate opinion of Judge Gaja*, paras. 4-5.

such abstract notions to express the level of persuasion it requires, that it is not even clear what standard of proof it applies in its cases, thus leaving room for debate and speculation on the matter.[80] In *Velásquez Rodríguez*, it held that it was "convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority."[81] So if the ECtHR were to choose to use phrases from these courts to express levels of persuasion, new discussions and speculations on the meaning of the newly introduced phrases would be likely to occur.

Closely related to this is the fact that international and regional courts adjust the standards of proof to the type of complaint they are dealing with. Both the ICJ and the IACtHR have underlined that standards of proof must differ according to the nature of the case. Thus, the ICJ found in the *Genocide* case that the applicable standard of proof had to be made appropriate to the charges of exceptional gravity.[82] Similarly, in *Velásquez Rodríguez*, the IACtHR said the following:

> "The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner."[83]

The ECtHR has also stated that the level of persuasion is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. Further, it has highlighted that it remains attentive

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80 Some discussions are provided by: C.F. Amerasinghe, *Evidence in International Litigation*, Leiden: Martinus Nijhoff Publishers 2005, p. 239-240; T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 574-575; Álvaro Paúl, 'In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights', 55 *Revista Instituto Interamericano de Derechos Humanos* (2012), p. 57-102.

81 IACtHR 29 July 1988, (Ser. C) No. 4 (1988) (*Velásquez Rodríguez/Honduras*) (Merits), para. 182.

82 ICJ 26 February 2007, I.C.J. Reports 2007, p. 43 (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro)*), para. 181. The ICJ said that:

> "The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity …. Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it".

83 IACtHR 29 July 1988, (Ser. C) No. 4 (1988) (*Velásquez Rodríguez/Honduras*) (Merits), para. 129.

to the seriousness attached to a ruling that a Contracting State has violated fundamental rights.[84] Thus, this indicates that the ECtHR, similar to the ICJ and the IACtHR, is unable to declare that a Member State has violated some of the most fundamental human rights principles before being strongly persuaded that they have occurred. Presumably, in this way, the ECtHR makes sure that respondent States are not stigmatised and blamed for human rights abuses for which they are not responsible.

Aside from the observation that 'beyond reasonable doubt' is unsuitable for ECtHR proceedings, since it originates from criminal cases in the common law systems, there is another type of criticism of the Court's use of this standard of proof. This criticism is closely connected with issues discussed in chapter 3 concerning non-cooperation with the Court by some Member States during the fact-finding process. Non-cooperation by governments may pose a huge obstacle to collecting evidence to the threshold of 'beyond reasonable doubt' in Article 2 and 3-related cases. In this context, it is asked how applicants can ever prove an asserted fact to the level of 'beyond reasonable doubt' if the government holds all the relevant evidence but refuses to hand it over to the applicant or the Court.

This question arose, for example, in a joint partly dissenting opinion attached to *Labita v. Italy*. In this opinion, dissenting Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič criticised the majority of the Court for considering that "the applicant has not proved 'beyond all reasonable doubt' that he was subjected to ill-treatment in Pianosa as he alleged."[85] They argued that the standard of proof 'beyond reasonable doubt' is "inadequate, possibly illogical and even unworkable since, in the absence of an effective investigation, the applicant was prevented from obtaining evidence and the authorities even failed to identify the warders allegedly responsible for the ill-treatment complained

84 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.

85 See ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), *joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič*, para. 1. In *Labita*, the ECtHR stressed that "the evidence before it does not enable the Court to find beyond all reasonable doubt that the applicant was subjected to treatment that attained a sufficient level of severity to come within the scope of Article 3" (ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), para. 129). Thus, in the judgment there is no explicit indication of a requirement that *the applicant* must prove his claims to the threshold of 'beyond reasonable doubt'. It rather appears that after evaluating *all the evidence before it*, the Court was not convinced with that level of persuasion that the applicant had been ill-treated by warders in the Pinaosa prison. In a partly dissenting opinion attached to a subsequent judgment, Bonello claimed that although the Court did not expressly assert that the applicant had an obligation to prove her allegations of torture 'beyond reasonable doubt', the ECtHR does indeed expect the applicant to prove the allegations to this standard of proof (see ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*, para. 10). So Bonello's statement suggests that although the Court's judgments may not explicitly stress that the applicant must put forward evidence which reflects that violations occurred to meet a threshold of 'beyond reasonable doubt', this is what the Court requires in practice. However it is difficult to verify whether this also applied in the *Labita* judgment.

of."[86] Consequently, they considered that such a high standard created an unfair situation for the applicant who found himself in a disadvantaged position relative to the powerful Member State. They argued that in cases like these, Member States are rather more keen on hiding their involvement in situations which infringe human rights than they are willing to properly investigate the human rights complaints. The dissenters stressed that since effective and adequate investigations of human rights related complaints are often not conducted at domestic levels, there is consequently no proof which meets the 'beyond reasonable doubt' standard that applicants can put before the Court. Therefore, they urge that the ECtHR applies different evidentiary principles. For the standard of proof, the dissenters propose that the standard to which the applicant must prove his or her case should be lowered if, despite requests to do so, the authorities fail to carry out effective investigations and furnish all the necessary facilities to the Court.[87]

Judge Bonello continued this criticism in his partly dissenting opinion attached to *Sevtap Veznedaroğlu v. Turkey*, in which he stated that in cases where allegations of torture have been made, the standard of proof 'beyond reasonable doubt' is "legally untenable and, in practice, unachievable."[88] He argues that the Court ought to review claims of ill-treatment in three steps, thus: "[c]onfronted by conflicting versions, the Court is under an obligation to establish (1) on whom the law places the burden of proof, (2) whether any legal presumptions militate in favour of one of the opposing accounts, and (3) 'on a balance of probabilities', which of the conflicting versions appears to be more plausible and credible."[89] Thus, he proposes that the Court should apply a lower standard of proof, 'balance of probabilities', which also originates from common law systems.

Judicial debates about the 'beyond reasonable doubt' standard have also surfaced in the specific context of discriminatory violence. In his dissenting opinion attached to *Anguelova*, Bonello argued that the 'beyond reasonable doubt' standard was the main reason why the Court was unable to establish a link between the physical violence and ethnicity in those cases which

86 ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), *joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič*, para. 1. Something similar was argued in R.A. Lawson & H.G. Schermers, *Leading cases of the European Court of Human Rights*, Nijmegen: Ars Aequi Libri 1999, p. 628.

87 ECtHR 6 April 2000, 26772/95 (*Labita/Italy*) (GC), *joint partly dissenting opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič.*

88 ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*, para. 11. See, for similar thoughts, ECtHR 14 May 2009, 8413/02 (*Alibekov/Russia*), *partly dissenting opinion of Judge Spielmann*, paras. 10-14; ECtHR 10 January 2008, 67797/01 (*Zubayrayev/Russia*), *partly dissenting opinion of Judge Loucaides, joined by Judge Spielmann*.

89 ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*, para. 13. Bonello repeats identical criticism concerning the application of 'beyond reasonable doubt' and provides the same alternatives as in his article from 2009: G. Bonello, 'Evidentiary Rules of the ECHR in Proceedings Relating to Articles 2, 3 and 14 - A Critique', 2 *Inter-American and European Human Rights Journal* (2009), p. 66-80.

concerned alleged anti-Roma violence. He typifies this inability as an "injurious escape from reality."[90] He indicates how it is surprising that – despite the fact that the Convention does not mandate its use – 'beyond reasonable doubt' remains part of the Court's case law. In his view, the standard goes against the wide discretion afforded to the Court under Article 32 ECHR (jurisdiction of the Court), which prescribes that the ECtHR must give thorough implementation to the Convention's provisions. He stresses that this standard is also not in accordance with the principle which prescribes that the Court should guarantee rights under the Convention as 'practical and effective'. Other regional and national courts maintain a more realistic and reasonable approach towards issues of proof in violence and anti-discrimination matters, in Bonello's view. Along with Loucaides, he refers to the IACtHR's position in *Velásquez Rodríguez* that international protection of human rights is distinct from the criminal justice field.[91] In addition, he points to US Supreme Court judgments, such as *Griggs v. Duke Power Co.* and *McDonnell Douglas Corp. v. Green*, in which the judges placed the burden on the plaintiffs to bring forward *prima facie* evidence of discriminatory practices in the employment sphere. He notes that in these judgments the Supreme Court expected the plaintiffs to reach the standard of proof to the level of an 'arguable claim'.[92] In a final note, he suggests that the Court ought to explore other alternatives for standards of proof, such as a 'preponderance of the evidence' or a 'balance of probabilities'.[93]

Bonello is supported in his claims about the ECtHR's use of 'beyond reasonable doubt' by others who find this standard to be a clear obstacle to establishing discriminatory violence. Sandland, for example, argues that that the Court must have been aware of discriminatory violence against Roma in Bulgaria in cases like *Velikova* and *Anguelova*, since it listed the evidence from international bodies reporting on that matter in both judgments. So, in his view, the Court's application of the 'beyond reasonable doubt' standard must have been the main reason why the Court did not discharge the burden of proof to the respondent State and failed to establish a violation of Article 14.[94]

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90 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 4.

91 IACtHR 29 July 1988, (Ser. C) No. 4 (1988) (*Velásquez Rodríguez/Honduras*) (Merits), para. 134.

92 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, paras. 9-12. Bonello referred to Supreme Court (United States) 8 March 1971, *Willie S. Griggs et al. Petitioners/Duke Power Co.*, 401 U.S. 424 (1971) and Supreme Court (United States) 14 May 1973, *McDonnell Douglas Corp./Green*, 411 U.S. 792 (1973).

93 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 18.

94 R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008), p. 475-516, p. 484-485. Furthermore, the Grand Chamber's application of 'beyond reasonable doubt' in *Nachova* is criticised in 'European Court of Human Rights Finds Bulgaria Liable for Failure to Investigate Racially Motivated Killings', 119 *Harvard Law Review* (2005-2006), p. 1907-1914, p. 1911 [author unknown].

Although the Court has been widely criticised for its application of the 'beyond reasonable doubt' standard, it is open to question whether this criticism is entirely justified. Firstly, in respect to the criticism that this is a standard that belongs to domestic criminal cases, it should be noted that the Court has attributed a unique meaning to its own version of 'beyond reasonable doubt'. O'Boyle and Brady emphasise that, although it is a high standard, it would be wrong to confuse the ECtHR's standard of 'beyond reasonable doubt' with the standard that is used in domestic common law criminal trials. The Court explained in *Tanlı v. Turkey* that criminal law liability is distinct from international law responsibility under the Convention. Responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in the light of the relevant principles of international law. The responsibility of a Contracting Party, arising from the acts of its 'organs, agents and servants', is not to be confused with the issue of individual criminal responsibility examined at domestic level. The Court is not concerned with reaching any findings concerning guilt or innocence in that sense.[95] In *Nachova*, the Grand Chamber stressed that the Court indeed mentions 'beyond reasonable doubt', but that it was never meant for this term to bear the same meaning as in the national legal systems that use that exact same term.[96] Therefore, the Court has adopted an autonomous meaning of 'beyond reasonable doubt' in its jurisprudence. As to how this standard ought to be understood in ECtHR proceedings, O'Boyle and Brady explain what the Court's task in fact-finding is, namely, solely to "examine the reality of certain versions of events and to determine whether this corresponds with the applicant's or the Government's story."[97] Viewed from this perspective, the Court's version of 'beyond reasonable doubt' should be understood as less demanding than its equivalent in domestic common law systems.[98]

Secondly, the use of 'beyond reasonable doubt' could be justified through the subsidiary role played by the Court in the adjudication process. Thienel argues that the Court, owing to its subsidiary role, often does not become involved in the establishment of the facts, since the facts in most cases have already been established at the domestic level. Consequently, the Court, because of its subsidiary role, is reluctant to challenge such findings. However, when cogent elements call on the Court to depart from the findings of the domestic court and, thus, when the ECtHR must look for evidence itself, this is when the standard of proof starts to matter. Thienel stresses that in such

95 ECtHR 10 April 2001, 26129/95 (*Tanlı/Turkey*), para. 111.
96 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.
97 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 126.
98 Ibid.

scenarios, the evidence "must leave the Court in no 'reasonable doubt' that the domestic court was wrong, so that it can then depart from that court's findings and make its own, contrasting assessment."[99] In essence, Thienel suggests here that 'beyond reasonable doubt' safeguards the Court's subsidiary role vis-à-vis the Member States. Accordingly, when the Court engages in more actively establishing facts, it must somehow justify why it has distanced itself from a domestic court's establishment of facts and decisions. 'Beyond reasonable doubt' then protects the Court's alternative finding; it highlights that after the most careful consideration and with the highest conviction possible, the Court had no other choice than to find differently than the national courts. Therefore, it is logical to assume that 'beyond reasonable doubt' in Court judgments also guards against the danger that violations by Member States are found lightly. Through the use of 'beyond reasonable doubt', the Court strives for sound reasoning in its judgments and better quality of its procedure.[100]

4.5 Conclusion

This chapter has provided insights into the manner in which the ECtHR incorporates the evidentiary notion of standard of proof in its case law on discriminatory violence. It was determined that the most commonly used expression by the Court in Article 2 and Article 3 cases to indicate the level of persuasion principally has been, and still is, 'beyond reasonable doubt'. This standard of proof is also expressly applied in discriminatory violence cases where a breach is alleged of the negative duty of Member States to refrain from inflicting this wrongful conduct through their State agents.

The main issue in this chapter concerned the question of whether 'beyond reasonable doubt' is an adequate standard of proof for the Court to use in cases of discriminatory violence relating to this negative duty. It was established that 'beyond reasonable doubt' may not be an inappropriate standard for the Court at all, in contrast to what has been claimed by

99 T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 580.

100 Compare in this regard the explanations offered by James Q. Whitman of the origins of 'beyond reasonable doubt' in common law systems. This is interesting, because Whitman highlights that 'beyond reasonable doubt' has a function that goes beyond the protection of the accused against the prosecution. He argues that in these systems, this term developed as a sort of protective shield for jurors, to help overcome their anxieties in delivering a judgment. Hence, 'beyond reasonable doubt' did not always aim to verify the facts of a case, and thus to find the accused guilty once these facts had been established, but also to offer moral support to judges who were afraid of making wrongful convictions. When this standard of proof was first introduced, in medieval times, the society was dominated by a fear of taking responsibility for a judgment and by a fear of vengeance after ruling on a case from both human beings and from God. See J.Q. Whitman, *The Origins of Reasonable Doubt. Theoretical Roots of the Criminal Trial*, New Haven & London: Yale University Press 2008.

its critics. Several reasons were given for this. Firstly, other regional courts, most notably the ICJ and the IACtHR, do not provide any adequate or appropriate alternatives to 'beyond reasonable doubt'. Secondly, the Court has underlined its own autonomous meaning for this term in its own jurisprudence. There is, of course, the continuing confusion created when this standard is explicitly mentioned in the Court's case law. 'Beyond reasonable doubt' in ECtHR judgments is constantly associated with the common law standard of proof used in domestic criminal cases. However, this confusion is unnecessary, since the Court has pointed out that the standard should be viewed in a separate context from domestic procedures. Thirdly, factors that influence the standard of proof in ECtHR cases, such as the 'nature of the allegation made' and 'the Convention right at stake', particularly justify the use of a higher standard in complaints concerning the fundamental issue of discriminatory violence. As in other serious cases, the ECtHR uses 'beyond reasonable doubt' as an expression in its judgments to highlight to the parties to a case and to the general public that it understands that cases on discriminatory violence are serious matters, that they may have a negative stigmatising effect on the Member State concerned if a violation in this context is found, and consequently, that the Court shall declare that violations have taken place in this context, only if it has been strongly persuaded that such violations were committed by State authorities.

This chapter has shown that the use of the standard of proof 'beyond reasonable doubt' by the Court does not pose an obstacle to finding that violations have taken place in the context of discriminatory violence. Rather it is a sound rule that contributes to the legitimacy of the Court's judgments. 'Beyond reasonable doubt' means that the Court must be strongly persuaded that discriminatory violence occurred before it will find that violations occurred. In that sense, the Court signals that it takes its adjudicatory task seriously, thus rendering its judgments acceptable to the parties and the general public.

As it is unnecessary to make any alterations with regard to the standard of proof, it may be useful to consider whether any ways may be found to make alterations in other aspects of Court's evidentiary framework through which it may establish discriminatory violence more easily. The following chapters will therefore consider under what circumstances the burden of proof could shift from the applicant to the respondent State in cases of discriminatory violence (chapter 5) and what evidentiary materials may be successful in demonstrating to the Court that discriminatory violence has taken place (chapter 6).

5 The distribution of the burden of proof in cases of discriminatory violence

5.1 Introduction

The previous chapter focused on the standard of proof, which refers to the degree of proof that must be provided. This chapter concentrates on the burden of proof, which identifies the party who bears the responsibility to provide the necessary evidence to meet the standard of proof. The Court uses two rules for the distribution of the burden of proof between the parties. Firstly, based on a more traditional approach, the Court applies the principle of *actori incumbit probatio* as its starting point, which means 'he who asserts must prove'. The Court then places the burden of proof on the applicant "who must rely on the facts of an interference with his – or another person's – human rights before the Court, and who therefore bears the burden of proof …."[1] If the applicant succeeds in so doing, the burden of proof then shifts to the respondent State who then must disprove the allegation(s) made. However, given that the Court's proceedings always concern State action, or a lack thereof, which sometimes means that certain kinds of evidentiary materials are impossible for an individual to obtain because they are exclusively in the hands of the government, the Court does not strictly place the burden of proof on any particular party in every case.[2] Hence, there is a second rule which is illustrated by the case *Ireland v. United Kingdom,* mentioned previously. There, the Court underlined that in "the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[3] So it appears from the Court's jurisprudence that the burden is not always specifically placed on one party or the other.

The way in which the Court applies the notion of burden of proof has great significance, especially to applicants. If the Court always strictly relied on the principle *actori incumbit probatio* this could weaken the position of the applicant, particularly in cases where only the government has access to crucial evidentiary material regarding the allegations made.

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1 T. Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', 50 *German Yearbook of International Law* (2007), p. 543-588, p. 551.

2 J. Gerards & H. Senden, 'The structure of fundamental rights and the European Court of Human Rights', 7 *International Journal of Constitutional Law* (2009), p. 619-653, p. 642-643.

3 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160, also mentioned in section 3.2.

This chapter focuses on the distribution of the burden of proof under the three types of complaints of discriminatory violence as identified in this thesis. In this context, it aims to establish the specific circumstances in which the ECtHR may allow a shift in the burden of proof from the applicant to the respondent State under the three different types of complaints of discriminatory violence. The manner in which the Court distributes the burden of proof has been subject to criticism, especially in cases where it was alleged that State agents killed or ill-treated victims because the victims belonged to a specific disadvantaged group. In this context, some scholars suggest that when a member of a disadvantaged group suffers harm in an environment where there is a high degree of discriminatory violence against that group and where State offenders remain unpunished for their crimes, the Court should allow for the burden of proof to shift from the applicant to the respondent State.[4] This chapter particularly explores whether implementing this suggestion would be desirable and feasible.

The chapter is structured as follows. Firstly, the meaning and the function of the notion of burden of proof are discussed in section 5.2. More precisely, the manner in which this notion has been given meaning in common law and civil law domestic systems, as well as international jurisdiction, is described. The ECtHR's approach to the burden of proof is also set out. After discussing the notion of burden of proof itself, section 5.3 defines the notions of presumptions and inferences, as these are important devices in shifting the burden of proof from one party to another. Subsequently, section 5.4 analyses the ways in which the Court distributes the burden of proof between parties in cases of violence, thus covering complaints under Articles 2 and 3. The analysis looks at cases concerning injuries and deaths of individuals in custody as well as enforced disappearances, and at cases in which a systemic or administrative practice of violent behaviour inflicted by State agents was alleged. It is useful to analyse these cases because the Court has devised ways to shift the burden of proof from the applicants to respondent States in situations where it would otherwise be almost impossible for the applicants to prove State liability for violent conduct. Finally, section 5.5 demonstrates how the burden of proof is distributed between parties by the ECtHR in cases where the discriminatory nature of the violence was alleged. Additionally, this section looks at the criticism of the Court's approach to the burden of proof, which says that the burden should shift in cases where there are indications that the discriminatory nature of violence against the group to which the victim belongs is systemic or occurs on a wide scale basis in general. In this context, most attention has been devoted to the first

4 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 18. See further: G. Bonello, 'Evidentiary Rules of the ECHR in Proceedings Relating to Articles 2, 3 and 14 - A Critique', 2 *Inter-American and European Human Rights Journal* (2009), p. 66-80; M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507.

type of complaints of discriminatory violence, relating to the negative duty of State agents to refrain from killing or ill-treating victims arising from discriminatory motives, as the Court has been most hesitant in shifting the burden of proof from the applicant to the respondent State in these types of cases.

In this last context, it is particularly interesting to consider whether there are other ways to shift the burden of proof from the applicant to the respondent State in cases where there are signs that discriminatory violence against the group to which the victim belongs is *systemic*, because this would enable the Court to introduce a more substantive conception of equality as previously discussed in chapter 2. This chapter explores two ways in which this substantive conception of equality in discriminatory violence case law could be reached. Firstly, it aims to establish whether there may be scenarios where the Court could distribute the burden of proof in the same way as it has in its case law on indirect discrimination. Subsequently, the chapter explores other ways that may enable the burden of proof to be shifted from the applicant to the respondent State. It proposes that the Court should not require proof of a discriminatory motive to establish a *prima facie* case, but proof of a discriminatory *attitude* instead, in this way making it easier to shift in the burden of proof. It explains how such an attitude may be derived particularly from a situation in which one case of violence against a member from a disadvantaged group – that was inflicted by a State agent – appears to be part of a pattern of numerous, similar complaints regarding the Member State concerned.

5.2 Some general observations on the 'burden of proof'

The burden of proof indicates which party must prove an assertion. In the first chapter of this study an attempt was already made to define this notion. There, the burden of proof was referred to as "[a] party's duty to prove a disputed assertion or charge", or, in the context of international law, as "the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with the rules, acceptable to, the tribunal."[5] The manner in which the burden of proof is distributed can be decisive to the outcome of the proceedings. Freeman and Farley emphasise this idea as follows:

> "burden of proof [is] a key element, indicating what level of support must be achieved by one side to win the argument. Burden of proof acts as [a] move filter, turntaking mechanism, and termination criterion, eventually determining the winner of an argument."[6]

5 See section 1.5.

6 K. Freeman & A.M. Farley, 'A Model of Argumentation and Its Application to Legal Reasoning', 4 *Artificial Intelligence and Law* (1996), p. 163-197, p. 163.

Generally, in each legal system this notion is seen as "helping maintain fairness in adjudication by providing a rough equality between the parties in the form of a tie-breaker rule requiring each party to prove his or her own allegations." [7]

The notion of the burden of proof is commonly found in various legal systems. This section aims to establish the meaning of this notion, more generally, in order to understand how it may contribute to establishing the facts of a case. The most common explanations of this notion in common and civil law systems and international law are looked at for this purpose. There is no extended discussion of the meaning and function of the 'burden of proof' in each country and before each type of international tribunal, but some overarching insights gathered from a selection of jurisdictions are offered instead. The section concludes with the meaning and function that this notion has been given in the Court's case law specifically. As will appear in the following, the burden of proof, in essence, serves the same function in any kind of legal system. Thus, everywhere, it provides a mechanism for determining the outcome of an argument in the face of inevitable uncertainty,[8] and, in this way, aims to ensure a fair outcome of the proceedings.

The burden of proof plays a significant role in common law systems, especially in the relationship between the parties, the judge and the jury. Under US law, this term encompasses two separate burdens of proof, in both civil and criminal cases. The first burden is the burden of producing evidence, satisfactory to the judge, of a particular fact at issue. The second is the burden of persuasion, which specifically entails persuading the trier of fact (the jury if there is one; otherwise the judge) that the alleged fact is true.[9] The burden of producing evidence is usually placed on the party who has pleaded for the existence of a certain fact, but may shift to the adversary when a pleader has discharged its initial duty. It becomes relevant in the first phase of trial proceedings, during which the judge evaluates the evidence, decides upon the admissibility of the case and considers whether there is sufficient evidence for the case to go forward to the jury for a decision on its merits. The judge's consideration of whether the pleader has put forward sufficient evidence to support its claim is regarded as a *question of law*. The burden of production is therefore linked with this type of question, that is always resolved by the judge and not by the jury.[10] Where the judge decides that sufficient evidence is available, this means that the party hold-

7 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 189.

8 K. Freeman & A.M. Farley, 'A Model of Argumentation and Its Application to Legal Reasoning', 4 *Artificial Intelligence and Law* (1996), p. 163-197, p. 164.

9 J.W. Strong (ed.), *McCormick on Evidence (Volume 2)*, St. Paul, Minn.: West Group 1999, p. 409.

10 Ibid.

ing the burden has made out a *prima facie* case. This indicates that the case is good enough to be passed to the jury.[11]

The second type of burden, the burden of persuasion, only becomes relevant when the parties have sustained their burdens of producing evidence and only when all the evidence has been introduced. It does not shift from one party to the other during the trial, because it need not be allocated until it is time for a decision. When the time for a decision comes, the jury, if there is one, must be instructed on how to decide the issue if their minds are left in doubt. The jury is then told that if the party bearing the burden of persuasion has failed to satisfy that requirement, the issue is to be decided against that party. If there is no jury and the judge is in doubt, the issue must be decided against the party holding the burden of persuasion.[12]

This second type of burden is strongly linked to the standard of proof. In civil cases, "[t]o say a party bears the burden of persuasion (or risk of non-persuasion) is to say she can win only if the evidence persuades the trier of the existence of the facts that she needs in order to prevail. Ordinarily that means that she wins only if, on the basis of the evidence, the facts seem more likely true than not."[13] More precisely, this means that the burden of persuasion is reached when the party carrying that burden has managed to persuade the decision-maker to a level of a 'preponderance of the evidence' that the allegations occurred. In criminal law, this concerns the question of whether the jurors have been persuaded to a certain level that the accused is guilty.[14] As explained above, the level that needs to be reached is then most often 'beyond reasonable doubt'. This question of persuasion put to the jurors at this stage of the proceedings is a *question of fact*.[15]

Burdens are phrased differently in English law, although the term 'burden of proof' has the same function as in the United States of America. In the context of English law, Keane and McKeown state that the expression 'burden of proof' is self-explanatory: it is the obligation to prove.[16] Similar to the United States, the burden of proof is influenced by the division between questions of law and questions of fact. Questions of law are determined in England and Wales also by the judge and questions of fact – mostly – by the jury. The first type of question concerns, among other things, issues of substantive law, the competence of a person to appear as a witness and the

11 C.B. Mueller, L.C. Kirkpatrick & C.H. Rose III, *Evidence. Practice Under the Rules*, United States of America: Aspen Publishers 2009, p. 107-108.

12 J.W. Strong (ed.), *McCormick on Evidence (Volume 2)*, St. Paul, Minn.: West Group 1999, p. 409-410.

13 C.B. Mueller, L.C. Kirkpatrick & C.H. Rose III, *Evidence. Practice Under the Rules*, United States of America: Aspen Publishers 2009, p. 104.

14 J.W. Strong (ed.), *McCormick on Evidence (Volume 2)*, St. Paul, Minn.: West Group 1999, p. 428-432.

15 C.B. Mueller, L.C. Kirkpatrick & C.H. Rose III, *Evidence. Practice Under the Rules*, United States of America: Aspen Publishers 2009, p. 109.

16 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 83.

admissibility of evidence, while the second type of question concerns the credibility of a witness, the weight to be attached to the adduced evidence and the existence or non-existence of the facts at issue.[17]

There are two kinds of burdens that can be identified in both civil and criminal cases in English law, which are the evidential burden and the legal burden. The evidential burden is defined as "the obligation on a party to adduce sufficient evidence of a fact to justify a finding on that fact in favour of the party so obliged."[18] Whether a party has discharged the burden is decided only once in the course of the trial, and by the judge. The burden is discharged when there is sufficient evidence to justify, as a possibility, a favourable finding of a tribunal of fact.[19] This kind of burden of proof is essentially the same as the American burden of producing evidence. In contrast, the legal burden is defined as "the obligation imposed on a party by a rule of law to prove a fact in issue."[20] Whether that burden has been discharged and, thus, whether a fact in issue has been proved, is determined only once by a tribunal of fact, which is mostly the jury, at the end of the proceedings after the triers have viewed all the evidence presented by the parties. In that sense, the legal burden is the equivalent of the American burden of persuasion. When the proceedings are criminal in nature, the legal burden is borne by the prosecutor. However, when the accused raises insanity by way of defence, the legal burden is allocated to the accused. In civil proceedings in which an action of negligence is brought forward, the claimant bears the legal burden on the issue of negligence and the defendant on contributory negligence.[21] Here too, there is a link between this type of burden and the standard of proof: the standard of proof required to discharge the legal burden depends on whether the proceedings are civil or criminal. In civil proceedings, the standard required is proof 'on the balance of probabilities'; in criminal proceedings, the standard required of the prosecution is proof that makes the tribunal of fact 'sure'. A party who fails to discharge the legal burden borne by him or her to the required standard of proof will lose on the issue in question.[22]

Civil law countries also use a burden of proof in both civil and criminal proceedings. However, in contrast to the common law countries, they do not distinguish between the burden of producing evidence or evidential burden on the one hand, and the burden of persuasion or the legal burden on the other. For example, Kokott explains that in Germany "[g]enerally the tendency is to put the subjective burden (of production) into the foreground, often overlooking the existence of an objective burden (the risk of non-persuasion). This is the reason why in Germany, the term 'burden of proof' has,

17 Ibid., p. 32.
18 Ibid., p. 85.
19 Ibid., p. 85.
20 Ibid., p. 83.
21 Ibid., p. 83-84.
22 Ibid., p. 83.

at times, been used synonymously with the burden of adducing evidence (burden of production, subjective burden of proof)."[23] In France too, there is no clear distinction between different burdens. Article 9 of the French New Code of Civil Procedure reads that "[e]ach party is under a duty to prove in accordance with the law those facts which are necessary for the success of his *claim*."[24] The French Supreme Court explains that "the uncertainty or doubt subsisting after the production of evidence should necessarily be retained to the detriment of the one who had the burden of proof."[25] In the Dutch legal system, which may also be classified as a civil law system, a rough distinction is made between the ways in which the burden of proof is distributed in civil cases and in criminal cases. In civil cases, where parties are involved in a dispute before a (passive) judge, the burden of proof is placed on the one who asserts certain facts. Rules on the burden of proof indicate which party risks losing the procedure if the asserted facts are not proven by that party or remain unclear (*non liquet*). The trier uses those rules in order to determine what the consequences should be for the parties if the facts are unresolved. The trier is obliged to make a decision on all that has been claimed or requested by the parties, and he or she may not refuse to take a decision. Thus, rules related to the burden of proof legitimise the outcome of a proceeding.[26] In Dutch criminal cases, by contrast, there is no strict distribution of the burden of proof. This is related to the nature of criminal proceedings in this system which arises from the idea that *the judge* eventually must be persuaded – on the basis of all the information before him or her – that a crime has been committed by the accused. The Public Prosecutor is indeed obliged to start criminal proceedings through an indictment, claiming that the accused has committed a certain crime and adduce evidence supporting the claim throughout the process, however, the Public Prosecutor does not carry the burden of proof *sensu stricto*. The Public Prosecutor can, for example, claim acquittal, while the judge can still find the charges to be proven. So the judge is not bound by the parties' stance.[27]

The concept of 'burden of proof' in international proceedings, notably in ICJ proceedings, is closer to that in civil law countries – where this expression is solely used to refer to the duty of the parties to a proceeding to prove their allegations – than to that in common law countries.[28] As seen above,

23 J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, The Hague: Kluwer Law International 1998, p. 10.

24 Cited in C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 202.

25 Ibid.

26 H.W.B. thoe Schwartzenberg, *Civiel bewijsrecht voor de rechtspraktijk*, Antwerp: Maklu-Uitgevers 2013, p. 73-75.

27 J.F. Nijboer, *Strafrechtelijk bewijsrecht*, Nijmegen: Ars Aequi Libri 2011, p. 159-166.

28 M. Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals*, The Hague: Kluwer Law International 1996, p. 367.

common law countries apply this concept in a different setting, i.e. in the relationship between the parties, the judge and the jury. The basic rule of the burden of proof that is recognised in international law is *actori incumbit probatio*, which means that the party alleging the occurrence of certain facts carries the burden of proof.[29] Rules related to the burden of proof are important in international courts, since it is the task of these courts to reach a decision on disputes put before them. So the burden of proof is intended to help ensure that a decision is reached in all cases.[30]

There are several factors underlying the rule on the burden of proof in international law. Firstly, the burden of proof helps to ensure the fairness of the proceedings, by dictating a rough equality between the parties and by requiring that each actor proves his or her own allegations.[31] As stressed earlier, this is a general principle which underlies rules on the burden of proof in each legal system. Secondly, specifically in the context of international law, the burden of proof upholds respect for the dignity of the States involved in a proceeding. This means that there is a presumption that all States are committed to the good of the community and all act consistently with the applicable norms ('presumption of compliance' as it is known).[32] So, "what is customary, normal or more probable is presumed and … anything to the contrary must be shown to exist by the party alleging it."[33] This presumption helps to protect States from unwarranted claims that they are in breach of their obligations. Thus, a claimant who alleges so must expect to bear the burden of proving the allegation.[34] Yet, there is still flexibility in the application of the rules related to the burden of proof where necessary. Departing from the rule *actori incumbit probatio* may be warranted when this approach would create such a level of inequality between the parties that it would affect the fairness of the proceedings.[35]

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29 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 185; M. Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals*, The Hague: Kluwer Law International 1996, p. 369. Various international tribunals apply the rule *actori incumbit probatio*. The ICJ, for example, once held that "each party has to prove its alleged title and the facts upon which it relies" (ICJ 17 November 1953, I.C.J. reports 1953, p. 52 (*Minquiers and Ecrehos Case (France/United Kingdom)*).

30 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 187.

31 Ibid., p. 189.

32 Ibid., p. 189-190.

33 C.F. Amerasinghe, *Evidence in International Litigation*, Leiden: Martinus Nijhoff Publishers 2005, p. 215-216.

34 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 190-192.

35 Ibid., p. 192-193.

Turning to the 'burden of proof' in ECtHR proceedings, it can be observed that the Court has never offered any definition of this expression. However, taking into consideration some of the Court's cases on Article 6 ECHR (right to a fair trial), in which the ECtHR has guided Member States on how to distribute the burden of proof in certain domestic proceedings, it appears that the Court understands this notion in the same way as other adjudicators do, thus as a mechanism for determining the outcome of an argument.[36] During the assessment of its own judgments, it generally first places the burden on the applicant who must deliver *prima facie* evidence of his or her version of the events. If the applicant succeeds in this, the burden then shifts to the respondent State who must disprove the allegations made.[37]

What has been said about the burden of proof in the context of international law generally also applies to the Court specifically. Concretely, this means that the ECtHR also applies the traditional rule of *actori incumbit probatio*.[38] As mentioned in section 5.1, however, the ECtHR does not stringently adhere to this rule of *actori incumbit probatio*. In certain cases it deviates from this traditional approach, emphasising that:

> " … the Court will not rely on the concept that the burden of proof is borne by one or other of the [parties] concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[39]

36 See also ECtHR 7 October 1988, 10519/83 (*Salabiaku/France*), para. 28. In that case, the Court underlined that Article 6 allows national rules which place the burden of proof on the accused to establish his or her defence, as long as the overall burden of establishing guilt remains with the prosecution. Other examples of cases in which the Court has instructed Member States on the use of the burden of proof include ECtHR 7 May 2002, 46311/99 (*McVicar/United Kingdom*), para. 87 and ECtHR 15 February 2005, 68416/01 (*Steel and Morris/United Kingdom*), para. 93.

37 ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), para. 165.

38 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160; ECtHR 10 May 2001, 25781/94 (*Cyprus/Turkey*) (GC), para. 113; ECtHR 24 April 2003, 24351/94 (*Aktaş/Turkey*), para. 291; ECtHR 24 March 2005, 21894/93 (*Akkum a.o./Turkey*), para. 210; ECtHR 24 May 2005, 25660/94 (*Süheyla Aydın/Turkey*), para. 147; ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 157; ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 179.

39 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160. This quote is, obviously, somewhat outdated, for the Commission ceased to exist. However, the Court essentially continues to apply the same approach in its case law. See, for example, the inter-State case ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), para. 95, in which it stressed that "[i]n establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates."

A departure from the rule *actori incumbit probatio* by the Court should be seen in light of its special function as a regional human rights court. Thus, the Court's task is *not* to reach a criminal conviction and *not* to treat the respondent State as if it is the accused in a criminal trial. So the respondent State need not receive the same protection as the accused in criminal proceedings and the applicant need not always be the party who has to demonstrate that what is alleged has occurred. It is also not the Court's task to rule on civil liability, but rather to establish State liability. Therefore, especially in cases where the applicant may suffer a significant disadvantage because of the burden of proof that is placed upon him or her, the Court may choose to depart from the rule *actori incumbit probatio*. One example of where this may occur is in a situation in which only the respondent State has access to information that can reveal whether or not that State violated the Convention.[40] As indicated earlier in section 3.3.2, in such situations Member States are principally obliged under Article 38 of the Convention, to furnish the Court with all necessary facilities in the process of resolving the matter. Where Member States are unwilling to cooperate with the Court, requesting the applicant to bear the burden of proof is regarded as unfair.[41] This fits well with Bentham's idea that the burden should be placed "on whom it would sit lightest."[42] In such situations, the Court would be obstructed from establishing the facts in a case and, thus, the protection afforded by the Convention would be undermined. This also applies to those cases where there was no effective domestic investigation into the allegations made by the applicant and in which the ECtHR had to establish the facts on the basis of certain documents, such as records of witness statements, forensic, police and military reports.[43]

In summary, it is clear that the Court takes a two-sided approach towards the burden of proof, as other international courts often do. The basic rule remains *actori incumbit probatio*, however, there is room for flexibility in the application of this rule where that is considered necessary. As in each legal system, the function of the burden of proof is straightforward: it indicates the party that must prove a certain issue. The burden need not remain on the alleging party, but may shift to the respondent State. The

40 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 62.

41 Ibid.

42 J. Bowring, *The Works of Jeremy Bentham (Vol. VI)*, Edinburgh: William Tait 1843, p. 136 and 139 cited in J.B. Thayer, 'The burden of proof', 4 *Harvard Law Review* (1890-1891), p. 45-69, p. 59 and in C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 206.

43 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 62. See also M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 218.

circumstances in which such a shift may occur, in particular, are worth exploring, because this can help to alleviate the applicant's task of proving a certain assertion. This chapter will therefore now turn to these circumstances by first introducing the meaning of the terms 'presumptions' and 'inferences', which are useful tools in shifting the burden of proof from the applicant to the respondent State (section 5.3). A number of cases concerning Article 2 and Article 3 allegations in which the Court has been willing to shift the burden of proof from the applicant to the respondent through the use of presumptions and inferences are then analysed. These concern "two most common inferences and presumptions of fact: state responsibility for a detainee's injury or death in custody, and specific harm where evidence discloses a general practice or modus operandi of harm in the context in which applicants allege they were harmed."[44] A variation of the first type concerns situations in which individuals allegedly became victims of enforced disappearances. 'A general practice or *modus operandi* of harm', hence, the second type, is referred to by the Court as an 'administrative practice', as shall be further considered below (in section 5.4). Finally, (in section 5.5.) the circumstances in which the Court shifted the burden of proof from the applicant to the respondent State in cases in which a *discriminatory nature* of violence was claimed are explored along with the potential circumstances in which the Court may do so in such cases in the future.

5.3 Presumptions and inferences

The Court can only establish violations of the Convention insofar as they are proved by evidence. In addition to direct evidence, the Court may rely on indirect or circumstantial evidence and presumptions in order to find that certain facts are proved or disproved.[45] Direct evidence is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."[46] In English law, this is sometimes referred to as 'direct testimony' and usually entails a witness's statement in which a witness describes that he or she observed a fact in issue with one of his or her five senses.[47] Direct evidence is often placed in contrast to indirect or circumstantial evidence, which may be described as "evidence based on inference and not on personal knowledge and observations" or "all evidence that is not given by eyewitness testimony."[48] In the absence of

44 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 206.

45 This applies to international courts in general. See C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 234.

46 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 281.

47 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York; Oxford University Press 2014, p. 10.

48 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 280.

direct evidence, the Court may turn to presumptions to reach conclusions on issues of disputed fact. Further, it may draw inferences about the existence of certain facts where no direct proof of the relevant circumstances is available.[49] In *Ireland v. United Kingdom*, the Grand Chamber recognised the potential use of inferences and presumptions, by stressing that the Court adopts the standard of proof 'beyond reasonable doubt', but added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[50]

Presumptions and inferences are complex notions, since (clear) definitions of the two terms are lacking. Nonetheless, in an attempt to understand what they mean, some explanations have been derived from a few national jurisdictions and from a few scholars who have discussed the meaning of these terms in the context of the ECtHR. The concept of presumptions is generally known in common law and civil law and is applicable "where one fact is deemed to be proved on the basis of another."[51] Keane and McKeown, who discussed presumptions and inferences in the context of civil and criminal cases in England and Wales, stress that where a presumption operates, a certain conclusion may or must be drawn by a court in the absence of evidence in rebuttal. They explain that a presumption assists a party bearing a burden of proof. In addition, they highlight that "[p]resumptions are based on considerations of common sense and public policy but not necessarily those of logic."[52] With regard to the relationship between presumptions and inferences, they provide the following illustration:

> "if, after an operation, a swab is found to have been left in a patient's body, it seems reasonable enough to infer, in the absence of explanation by the surgeon, that the accident arose through his negligence.... If a surgeon uses proper care, such an accident does not, in the ordinary course of things, occur; negligence may be presumed."[53]

What this example illustrates is that negligence is *presumed* on the basis of a certain fact (a swab being found to have been left in a patient's body). Subsequently, in the absence of an explanation by the surgeon, negligence is *inferred*. It may be expressed, therefore, that a presumption is indeed a fact proved on the basis of another fact. An inference, on the other hand, is a conclusion that a trier may draw from a presumption.

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49 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 129-133.

50 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 161.

51 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 234.

52 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York; Oxford University Press 2014, p. 672.

53 Ibid.

It is hard to find proper descriptions of presumptions and inferences in the context of the ECtHR, as there is no unified approach concerning their meaning. The Court has never defined these terms, although it frequently communicates to the Member States under what conditions the use of presumptions and (adverse) inferences by their national authorities is acceptable under Article 6 ECHR.[54] Nonetheless, there are scholars who have attempted to clarify their meaning. Smith observes that presumptions are nothing more than inferences drawn by judges. This, according to him, explains why the term 'presumption' can be used interchangeably with the term 'inference', as it also appears to be used by the Court. He describes presumptions as "conclusions drawn from known facts about unknown facts", whereas inferences are "used to draw logical conclusions from available facts, based on circumstances that usually attend such facts."[55] O'Boyle and Brady do not offer any definitions of presumptions and inferences, however, they stress that presumptions form a basis for the Court to reach conclusions on issues of disputed facts. Presumptions of fact often arise in the following circumstances: in cases where a detainee is found injured or dead in custody; if evidence demonstrates that persons were last seen being taken into custody and then later disappeared, and; where killings occur in areas under the exclusive control of State authorities.[56] Additionally, they note that where the Court refers to inferences, this usually means that inferences are adverse to one side in the dispute. The authors provide as an example a failure by a respondent State to cooperate with the Court in the examination of the case, as required under Article 38 of the Convention. Such a failure may then result not only in a violation of Article 38 being established, but also lead to inferences being drawn concerning the substantive and procedural violations alleged by the applicant.[57] These circumstances, in which presumptions and inferences may be used to the benefit of the applicant's position, and in which they may influence the distribution of the burden of proof, are looked at in more detail in the next section.

There are two sides to the use of presumptions and inferences as fact-finding techniques. On the one hand, they can be a useful fact-finding tool for a regional human rights court such as the ECtHR, because they enable the Court to effectively enforce human rights. In cases where direct evidence is lacking or where respondent States are either unable or unwilling

54 ECtHR 7 October 1988, 10519/83 (*Salabiaku/France*), para. 28; ECtHR 8 February 1996, 18731/91 (*John Murray/United Kingdom*); ECtHR 20 March 2001, 33501/96 (*Telfner/Austria*).

55 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 214.

56 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 129-130.

57 Ibid., p. 131-133.

to provide information, the ECtHR seeks recourse to such 'creative' fact-finding techniques to establish State liability.[58] Consequently, the Court does not need direct evidence *per se* to establish the facts, but may turn to presumptions and inferences to ascertain the issues in a case. On the other hand, in certain cases, there need to be limits on the use of presumptions and inferences. For example, in cases where governments do not provide information concerning a certain allegation, the Court cannot always know why a government remains silent in response to that allegation. Obviously, the State may refuse to cooperate in order to conceal its own guilt for the alleged wrongful conduct. But there are several other possibilities which could explain the Member State's decision. Smith argues that the State may not want to lend any credence to the allegations by repeating them in the process of denying them. In addition, it may be that some Member States are plagued with unstable circumstances or lack systemic and reliable record-keeping at the moment when their cooperation is requested by the Court.[59] Smith further observes that the conclusion that a Member State has violated the Convention should not be made lightly, because establishing a violation can place a certain stigma on the respondent State.[60] Another reason why the Court should be cautious in the use of presumptions and inferences is connected to the applicants' authenticity and possible motivations for their allegations. The Court must take into account that there may be applicants who either consciously or unconsciously have incentives not to be truthful. This may occur when the applicant is an opponent of the State and aims to denounce the State.[61] Prisoners, in particular, may exaggerate their problems, either because they have little else to occupy their minds or to undermine criminal prosecutions, convictions or confessions.[62]

This section provided an introduction to the terms 'presumptions' and 'inferences'. The following section will analyse how these terms are used in cases concerning alleged State responsibility for a detainee's injury or death in custody, and in cases concerning a systemic or administrative practice of violent behaviour by State agents. It will especially highlight how presumptions and inferences influence the distribution of the burden of proof in such cases.

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58 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 210-216.

59 Ibid., p. 221. See also C.N. Brower, 'The Anatomy of Fact-Finding Before International Tribunals: an Analysis and a Proposal Concerning the Evaluation of Evidence', in: R.B. Lillich (ed.), *Fact-Finding Before International Tribunals*, Ardsley-on-Hudson, New York: Transnational Publishers, Inc. 1992, p. 147-151, p. 149.

60 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 221.

61 L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 163.

62 D. Weissbrodt, 'International Factfinding in Regard to Torture', 57 *Nordic Journal of International Law* (1988), p. 151-196, p. 165.

5.4 The influence of presumptions and inferences on the distribution of the burden of proof in violence cases

As stated above, the Court is often inclined to place the burden of proof on the applicant to prove an asserted fact in accordance with the rule *actori incumbit probatio*. Yet, in specific cases concerning Article 2 and Article 3 complaints, the Court has applied certain methods that enable the burden to be shifted from the applicant to the respondent State. These methods include the use of presumptions and inferences in situations where a detainee has been injured or died in custody and situations where a victim allegedly disappeared while in hands of State agents. Presumptions and inferences are also used in situations where the evidence discloses a systemic practice or an administrative practice in which applicants claim that they or other victims were harmed. An analysis of these cases is useful, because it demonstrates the different ways that the Court has implemented the devices of inferences and presumptions in its case law to alleviate the applicant's position vis-à-vis the respondent State. A question which will eventually result from this analysis is whether these methods could be applied in cases in which violence of a discriminatory nature is alleged.

5.4.1 Cases in which individuals were injured, died or disappeared while in the hands of State agents

Presumptions and inferences are often applied by the Court in Article 2 and Article 3 related matters where individuals claim to have been injured or that family members were killed while in custody or while otherwise held under the control of State agents.[63] The ECtHR applies these two devices also in cases of enforced disappearances. As the following will show, these are useful tools that the Court has applied in its case law to shift the burden of proof from the applicant to the respondent State, because in the situations discussed below, it would otherwise be almost impossible for the applicants to prove State liability for the alleged violence. In this context, it is important to clearly delimit the boundaries between two important questions which are at stake during the assessment of such cases, because the two questions may influence the distribution of the burden of proof between the parties. As will be shown below, the first question in cases of alleged detention by State agents is whether an applicant can demonstrate that he or she or another victim was detained by State agents and was injured or died during detention. The applicant can succeed in this if he or she manages to raise a *presumption* that the alleged ill-treatment or killing indeed occurred during custody, upon which the burden of proof will shift to the

63 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 129-130.

respondent State. The second question is whether the respondent State can actually be held responsible for the alleged violence. During the assessment of that question, the Court requires the respondent State to offer an explanation for the alleged violence, otherwise the Court will draw *inferences* about how well-founded the applicant's allegations are. In cases relating killings, specifically, respondent States may be required to justify any use of lethal force by their agents. The drawing of inferences may eventually amount to a conclusion – usually to the threshold of 'beyond reasonable doubt' – that the respondent State violated Articles 2 or 3 of the Convention. With respect to cases of enforced disappearance, the two questions may be framed as follows: (1) whether, in the absence of a body, the alleged victim may be presumed dead, and (2) whether the evidence adduced is sufficient to establish State liability for the disappearance in question.[64] How presumptions and inferences impact on the distribution of the burden of proof in such cases is illustrated below, with an analysis of some examples of allegations of injuries and deaths during custody, and allegations of enforced disappearances, respectively.

When an applicant alleges that he or she was harmed by State agents during custody or that another victim died while in detention, the Court has recognised that persons in custody are in a vulnerable position and the authorities have a duty to protect them. For these reasons, the Court has accepted the general rule that "[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention."[65] Under such circumstances, the Court therefore presumes that the Member State was responsible for the alleged ill-treatment or killing. The Court places a particularly strict obligation on the Member State concerned to provide explanations for the treatment of an individual in custody where that individual has died.[66]

In the assessment of the first question above, the ECtHR requires that the applicant demonstrates that the individual in question was indeed taken into custody or was otherwise entirely held under the control of State agents during the alleged incidence of violence. An applicant is obliged to make a *prima facie* case at the ECtHR before the Court is prepared to shift the burden to the respondent government.[67] The Court has found applicants'

64 J. Barrett, 'Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights', 22 *Harvard Human Rights Journal* (2009), p. 133-143, p. 136.

65 ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 100.

66 Ibid., para. 99.

67 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 83. The report made reference to ECtHR 31 May 2005, 27601/95 (*Toğcu/Turkey*), para. 95.

allegations plausible on the basis of, among other things, medical reports or statements from forensic experts demonstrating that the individual involved suffered physical harm while he or she was held entirely under the control of the respondent State.[68] In assessing credibility, the Court has also taken into consideration any discrepancies in explanations provided by the State.[69] In cases where there were several applicants alleging the same type of ill-treatment at the same location, the ECtHR has also considered the fact that those applicants were unequivocal in their account that they had been assaulted by State officials.[70] All these elements may thus lead to a presumption that the alleged victims were deliberately beaten or killed by State officials and the presence of such a presumption may result in the burden of proof being shifted to the respondent State. Hence, if the applicant succeeds in making a *prima facie* case, the burden of proof shifts to the respondent State which is then under the obligation to provide a satisfactory and convincing explanation of how the harm was caused to the individual.[71]

This is where the second question arises which also plays throughout the assessment of this type of complaint. This question asks whether the respondent State can be held responsible for the alleged violence. If the respondent State does not satisfactorily establish that the individual's injuries or death were caused other than – entirely, mainly or partly – by the treatment he or she suffered while detained by State agents, the ECtHR establishes a violation of Article 2 or 3 ECHR.[72] As set out above, State responsibility for violent behaviour must generally be established to a threshold of 'beyond reasonable doubt'.[73]

Salman v. Turkey illustrates the Court's reasoning in this regard. In that case, the applicant alleged that her husband was taken into custody in apparent good health and without any pre-existing injuries or active illness, yet he died while in detention. She managed to present a *prima facie* case by relying on medical evidence which showed that the victim had been subjected to force during custody. For the Court, this was sufficient to shift the burden of proof to the respondent State and to require it to provide a plausible explanation for the victim's injuries and subsequent death. However,

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68 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), paras. 33-34; ECtHR 18 December 1996, 21987/93 (*Aksoy/Turkey*), para. 60; ECtHR 20 July 2004, 47940/99 *(Balogh/Hungary*), paras. 44-54.

69 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), paras. 33-34.

70 ECtHR 10 October 2000, 31866/96 (*Satık a.o./Turkey*), para. 57. The case concerned ten applicants who complained to the Court that they were beaten by prison warders and prison administrators with truncheons and wooden planks.

71 ECtHR 27 August 1992, 12850/87 (*Tomasi/France*), paras. 108-111; ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), para. 34; ECtHR 18 December 1996, 21987/93 (*Aksoy/Turkey*), para. 61; ECtHR 28 July 1999, 25803/94 (*Selmouni/France*) (GC), para. 87; ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 100; ECtHR 20 July 2004, 40154/98 (*Mehmet Emin Yüksel/Turkey*), paras. 25-31.

72 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), paras. 34-40; ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 102-103.

73 ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 100.

the respondent State did not provide any account for the victim's death, which led to the conclusion that the State could be held responsible for the violence and that it had violated Article 2.[74]

The Court has regularly facilitated a shift in the burden of proof to the respondent State in cases where there has been a lack of cooperation from the side of the respondent State in establishing the facts. This also occurred in the case *Akkum a.o. v. Turkey*, for example, which concerned the death of the applicants' relatives during a military operation. In that case, the victims had not died in custody, yet were found dead in an area under the exclusive control of the authorities of the State. The Court was unable to establish the accuracy of the applicants' allegations, due to the government's failure to submit certain documents to the Court. Under the circumstances, the Court found it 'inappropriate' to conclude that the applicants had failed to submit sufficient evidence in support of their allegations, but found that in such situations the burden of proof may be regarded as resting on the authorities to explain how the deaths of the victims were caused.[75] The Court stated that "in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise."[76]

Not all allegations concerning beatings or killings in custody necessarily lead to the conclusion that the State was responsible for the violence. Further, not in all cases does the Court clearly indicate how the burden of proof is distributed between the parties and how presumptions and/or inferences may influence the distribution of the burden of proof. The case *Sevtap Veznedaroğlu v. Turkey* illustrates both these issues. In that case, the applicant alleged that she had been ill-treated by State agents during police custody and supported her claims with three medical reports, two of which she managed to obtain while still in custody. During the assessment of the complaint, the Court made no use of presumptions to shift the burden of proof to the respondent government, nor did it draw inferences to find a violation. Overall, it did not expressly refer to terms such as '*prima facie* case', 'burden of proof', 'presumptions' and 'inferences'. It also did not discuss the following two questions separately: (1) whether the applicant had become injured during custody, and; (2) whether the State could be held responsible for her injuries. Instead, the Court discussed the two questions in an unstructured manner. Firstly, it noted that the government indeed did not deny that the applicant had suffered some injuries during her time

74 Ibid., paras. 102-103.
75 ECtHR 24 March 2005, 21894/93 (*Akkum a.o./Turkey*), paras. 209-210.
76 Ibid., para. 211.

in custody. Subsequently, it took into consideration the respondent State's claims that the injuries were minor and that such injuries could not have been inflicted by State officials.[77] The Court finally underlined that:

> "[it] finds it impossible to establish on the basis of the evidence before it whether or not the applicant's injuries were caused by the police or whether she was tortured to the extent claimed. It is not persuaded either that the hearing of witnesses by the Court would clarify the facts of the case or make it possible to conclude, beyond reasonable doubt …, that the applicant's allegations are substantiated."[78]

This type of reasoning raises the question of whether the Court has placed the burden of proof on any of the parties at all, or whether it has freely evaluated all the evidence that was presented to it. Judge Bonello, in a partly dissenting opinion, explains that the Court expected the applicant to prove her allegations 'beyond reasonable doubt', although it did not expressly assert that the applicant had an obligation to prove her allegations to that degree.[79] Bonello criticises that approach and argues that the Court should have applied a reasoning which says that "[w]here an individual, when taken in police custody, is in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."[80] According to Bonello, such circumstances were clearly present in this case and, therefore, the burden of proof should have shifted to the respondent State which would then have been obliged to provide a plausible explanation for the injuries.[81] Bonello stresses how the Court "after having established that the dearth of evidence is the defendant's fault, … visited the consequences of this failure on the applicant."[82] He argues that the applicant was penalised for not submitting evidence that the Convention requires the State to produce. This opinion found support in subsequent academic writing which stressed that the burden was laid squarely with the applicant.[83]

The Court has also used presumptions and inferences and redistributed the burden of proof in the context of a particular kind of allegation of ill-treatment during custody, in cases which are referred to as 'extraordinary rendition' cases. Extraordinary rendition is a strategy developed and refined

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77 ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), para. 30.
78 Ibid.
79 ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*, para. 10.
80 Ibid., para. 9.
81 Ibid.
82 Ibid., para. 19.
83 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 84; H. van der Wilt, case note on: ECtHR 11 April 2000, 32357/96, *EHRC Cases* 2000/48 (*Sevtap Veznedaroğlu/Turkey*).

by a series of US administrations. Numerous countries currently apply that strategy, including some Council of Europe Member States.[84] Weissbrodt and Bergquist describe it as follows:

> "Extraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals. It involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation. As is the case with state-sponsored disappearances, extraordinary rendition appears to be a practice in which perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses."[85]

What this quote suggests is that evidentiary obstacles may arise for those complaining about extraordinary rendition, because States tend to deny any involvement in such operations. The applicant's claim in the case *El-Masri v. the Former Yugoslav Republic of Macedonia* provides a good example in this context. In that case, the applicant complained that he had been victim of a secret rendition operation during which he was arrested, held in isolation, questioned and ill-treated by Macedonian State agents and subsequently transferred to United States Central Intelligence Agency (CIA) agents who further subjected him to ill-treatment in Afghanistan. The respondent State entirely contested the allegations made by the applicant. So, a prominent issue in this case was whether, due to the firm denial by the government of any involvement in the extraordinary rendition, the burden of proof could be shifted from the applicant to the respondent State.[86]

Before turning to this issue, it is necessary to identify on whom the burden of proof was initially placed to demonstrate that the applicant had indeed become a victim of extraordinary rendition and that the Member State was somehow involved in that event. It becomes clear from the *El-Masri* judgment that the Court required *prima facie* evidence in favour of the applicant's version of events to be proved.[87] However, the judgment does not explicitly answer the question of whether the applicant was *exclusively* under a duty to present all the evidence – and thus carried the burden of proof – to establish a *prima facie* case of the respondent State's involvement in the alleged extraordinary rendition. The judgment suggests that the Court took into consideration evidentiary material collected through various avenues, and not just from the applicant, to reach the conclusion that a *prima facie* case had been made.

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84 D. Weissbrodt & A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', 19 *Harvard Human Rights Journal* (2006), p. 123-160, p. 124.

85 Ibid., p. 127.

86 ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), para. 154.

87 Ibid., para. 165.

The judgment in *El-Masri* reveals that the Court considered the applicant's description of the circumstances to be credible, by stating that his alleged ordeal was very detailed, specific and consistent throughout the whole period following his return to his home State, Germany.[88] The Court also referred to "other aspects of the case which enhance the applicant's credibility"[89] in order to establish a *prima facie* case. These other aspects included a substantial amount of indirect evidence obtained during international inquiries and the investigation by the German authorities, including aviation logs and flight logs monitoring the movements of the aircrafts which had transported the applicant to various locations, scientific testing of the applicant's hair follicles confirming that the applicant had spent time in a South Asian country and had been deprived of food for an extended period of time, geological records that confirmed the applicant's recollection of minor earthquakes during his alleged detention in Afghanistan, sketches that the applicant drew of the layout of the Afghan prison, which were immediately recognisable to another rendition victim who had been detained by US agents in Afghanistan and general information about the 'rendition programme' run by the US authorities at the time produced by various external actors, including the United Nations General Assembly, Amnesty International and Human Rights Watch. Additionally, the Court referred to a written statement provided by a person who was, at the relevant time, the Minister of the Interior of the respondent State and soon afterwards became Prime Minister. In that statement, which was the only direct evidence in *El-Masri*, the witness confirmed that the Macedonian law-enforcement authorities, acting upon a valid international arrest warrant issued by the US authorities, had subjected the applicant to the US rendition programme.[90] The Court found this statement from a high-ranking official to be particularly important, especially because that official had played a key role in the dispute in question and had acknowledged facts or conduct that put the authorities in an unfavourable light. According to the Court, such a statement could be construed as a form of admission.[91] On the basis of this evidence, the Court found that a *prima facie* case had been established and subsequently shifted the burden of proof to the respondent State.[92]

The government, in turn, was under a duty to provide a satisfactory and convincing explanation of how the events in question occurred. However, it failed to offer an explanation of the applicant's fate from the moment he was apprehended by Macedonian State agents. That allowed the ECtHR to draw inferences from the available material and the authorities' conduct and to eventually establish that applicant's allegations were sufficiently convincing

88 Ibid., para. 156.
89 Ibid.
90 Ibid., paras. 157-161.
91 Ibid., para. 163.
92 Ibid., para. 165.

to a 'beyond reasonable doubt' level of proof regarding the Member State's contribution to the extraordinary rendition.[93]

Even more challenging to prove were the allegations made in the cases *Al Nashiri* and *Husayn (Abu Zubaydah)*, because of an absence of any direct evidence that the respondent State (Poland) had contributed to the ill-treatment of the applicants. In these cases, the applicants claimed that they had been held at a CIA 'black site' in Poland, and that Poland had knowingly and, despite the real risk of further ill-treatment and incommunicado detention, intentionally enabled their transfer from Polish territory to a jurisdiction where they would be denied a fair trial. In both cases, the Court established that Poland had facilitated the process of rendition on its territory, had created the conditions for it to happen and had made no attempt to prevent it from occurring, with this violating Article 3 of the Convention.[94] The Court established such a violation despite the absence of any form of testimony of the events complained of by the applicants, even regarding the issue of whether the applicants had ever been in Poland. Such an absence was due to the fact that, from the moment of their arrest, the applicants had been continually held in the custody of the US authorities, initially in the hands of the CIA at an undisclosed detention centre at various black sites and then in the custody of US military authorities in Guantánamo. Both applicants were unable to communicate with the outside world, apart from the team of the International Committee of the Red Cross (ICRC), the military commission's members and their US counsels. These circumstances had a considerable impact on the applicants' ability to plead their case before the Court. So the Court had to establish Poland's alleged implication in the transfer of the applicants on the basis of circumstantial evidence, including a great deal of evidence obtained from international inquiries, redacted documents released by the CIA, other public sources and evidence from experts and one witness.[95]

In both cases, the Court first underlined the general rules that "it is for the applicant to make a *prima facie* case and adduce appropriate evidence"[96] and that "if the respondent Government in their response to his allegations fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred, strong inferences can be drawn."[97] Although the Court did not explicitly mention the term 'burden of proof', these quotes suggest that it in fact distributed the burden of proof between the parties,

93 Ibid., paras. 166-167.

94 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 401-519; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 401-514.

95 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 397-400; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 397-400.

96 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 395; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para 395.

97 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 395; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 395.

or planned to do so during the assessment of the allegations. Hence, from these quotes it appears that initially the Court placed the burden of proof on the applicants to establish a *prima facie* case of Poland's involvement in the extraordinary rendition and suggested that if the applicants succeed in this, then the burden could shift to the respondent State to rebut the allegations. However, the Court also underlined that 'strong' presumptions in respect of the applicants' injuries during detention may arise where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. The existence of such strong presumptions, according to the Court, leads to a shift in the burden of proof to the authorities to provide a satisfactory and convincing explanation of the events. If no such explanation is provided, the Court may draw inferences favourable to the applicants.[98] From this, it therefore appears that the burden was not strictly placed on the applicants.

When it turned to the assessment of the actual case, the ECtHR did not explicitly apply such a distribution of the burden of proof between parties through the use of presumptions and inferences. Rather, from the judgment it appears that it evaluated all the evidence collected through various channels to eventually establish that the applicants' allegations concerning their ill-treatment and secret detention in Poland and their transfer from Poland to other CIA black sites had been proved 'beyond reasonable doubt'.[99] The Court based its examination on documentary evidence which had mostly been supplied by the applicants and, to some extent, supplemented by the government. It further used the observations of the parties, material available in the public domain, the testimony of experts and a witness who gave oral evidence before the Court at a fact-finding hearing. During the hearing, the Court heard three expert witnesses, these were Mr. Giovanni Claudio Fava, in his capacity as the Rapporteur of the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of Prisoners (the TDIP; the relevant inquiry also known as 'the Fava Inquiry'), Senator Dick Marty, in his capacity as the Parliamentary Assembly of the Council of Europe's Rapporteur in the inquiry into the allegations of CIA secret detention facilities in the Council of Europe's Member States (the Marty Inquiry), and Mr. J.G.S., in his capacity as an advisor to Senator Marty in the Marty Inquiry.[100] The documentary evidence included CIA reports describing transfer procedures of 'high-value detainees', flight plan messages by Euro Control and information provided by the Polish Border Guard and the Polish Air Navigation Services Agency (PANSA), the US Department of Justice Office of Professional Responsibility

98 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 396; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 396.

99 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 417; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 419.

100 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 42; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 42.

Report, entitled "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" (the 2009 DOJ Report), a report from the Center for Human Rights and Global Justice (CHRGJ), expert evidence reconstructing the chronology of rendition and detention of the applicants at the relevant time and statements and reports from international organisations about extraordinary rendition in general.[101] The Court did not specifically highlight the moment when the burden of proof shifted to the respondent State during its assessment of the case, but it did note that Poland had not offered any explanation for the nature of, the reasons for, or the purposes of rendition aircraft landing on its territory.[102] Owing to the lack of any explanation by the government and its refusal to disclose to the Court documents necessary for its examination of the case, the Court drew inferences to determine that the applicants' allegations that during the relevant period they were detained in Poland, were sufficiently convincing.[103]

Hence, in rendition cases, the Court initially, under the general rules, suggests that there is a certain distribution of the burden of proof between parties. The cases above indicate that the Court first requires from applicants to demonstrate a *prima facie* case that the respondent State somehow contributed to the extraordinary rendition of an applicant, following which the burden of proof shifts to the respondent State which must then prove that it was not involved in such an activity. However, once the Court turns to the actual assessment of the case, a clear distribution of the burden of proof between parties becomes less apparent. Instead, the Court evaluates all the evidence before it to establish State liability for the extraordinary rendition. This makes it difficult to indicate how much the applicant must demonstrate to establish a *prima facie* case and what exactly must be put forward by the respondent State to rebut such a case.

In cases concerning alleged enforced disappearances, again, two separate questions arise during the assessment of the cases. As indicated earlier, the first question is whether in the absence of a body, the alleged victim may be presumed dead. The second question is whether the evidence adduced is sufficient to establish State liability for the disappearance in question. In this study the term 'enforced disappearance' should be understood in the light of the definition formulated in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, thus as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the

101 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 406-416 and 418-443; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 406-418 and 420-445.

102 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 414; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 414.

103 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 415; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 415.

authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

In these cases, similar evidentiary issues may arise as in cases concerning extraordinary renditions, namely a lack of direct or other evidence indicating that the respondent State was responsible for the wrongful conduct and that the respondent State is unwilling to acknowledge such. Furthermore, respondent States may not wish to provide access to the relevant information that could resolve factual issues to the applicants or the Court.[104] With regard to the distribution of the burden of proof in these cases, Barrett distilled the following analysis from the Court's case law:

> "(1) if the applicant makes out a prima facie case concerning the state's responsibility for a detention and the Court is prevented from reaching a definitive conclusion concerning the issue because the state fails to provide the relevant criminal case file, then the burden of proof regarding the relevant events will shift to the state; and (2) in the absence of a plausible explanation concerning the apparent disappearance of the victim, the state will be held to have violated Article 2 of the Convention."[105]

Indeed, in some cases concerning enforced disappearances, the Court has distributed the burden of proof between parties in this way.[106] A few ECtHR cases show that applicants can make a *prima facie* case on the basis of witness statements which, for example, revealed that around the time of the disappearance of the presumed victim, armed men in uniform driving military vehicles were able to move freely through federal roadblocks during curfew hours or that they were checking identity papers and apprehended several persons in their homes in the area of a town.[107] A *prima facie* case has also been established on the basis of witness accounts of other detainees who were apprehended on the same date as the presumed victim and who stated that they were held together with that individual.[108] After establishing a *prima facie* case, the Court requires from the respondent State to submit the documents which are in its exclusive possession or to provide another plau-

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104 See, for example, ECtHR 9 November 2006, 7615/02 (*Imakayeva/Russia*), para. 124. See also P. Leach, 'The Chechen conflict: analysing the oversight of the European Court of Human Rights', 6 *European Human Rights Law Review* (2008), p. 732-761, p. 746, and M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 237.

105 J. Barrett, 'Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights', 22 *Harvard Human Rights Journal* (2009), p. 138-139.

106 ECtHR 29 May 2008, 37315/03 (*Betayev and Betayeva/Russia*), para. 69; ECtHR 3 July 2008, 12703/02 (*Musayeva/Russia*), paras. 100-101; ECtHR 3 July 2008, 12712/02 (*Ruslan Umarov/Russia*), paras. 92-93; ECtHR 3 July 2008, 32059/02 (*Akhiyadova/Russia*), paras. 61-62.

107 ECtHR 29 May 2008, 37315/03 (*Betayev and Betayeva/Russia*), para. 68; ECtHR 3 July 2008, 12703/02 (*Musayeva/Russia*), paras. 98-99 and 101; ECtHR 3 July 2008, 12712/02 (*Ruslan Umarov/Russia*), paras. 90-91 and 93.

108 ECtHR 3 July 2008, 12712/02 (*Ruslan Umarov/Russia*), para. 90.

sible explanation for the events in question. If the government fails to act accordingly, the Court draws inferences by establishing that the presumed victim was indeed apprehended by State agents and that the victim must be presumed dead 'beyond reasonable doubt' following unacknowledged detention by State servicemen.[109]

Although such a clear distribution of the burden is not apparent in every case regarding enforced disappearances. Generally, it is difficult to derive from some of these cases what the applicant must prove to make a *prima facie* case and what the respondent State must prove in return by way of rebuttal. This lack of clarity is caused by the fact that in certain enforced disappearance cases the Court has been inclined to analyse the two aforementioned questions together and to discuss them in an indistinguishable manner. For example, in *Bazorkina v. Russia*, the Court underlined that it would identify a number of crucial elements that should be taken into account when deciding whether the disappeared individual may be presumed dead and whether his death can be attributed to the authorities.[110] On the basis of a number of elements, which are briefly further set out below, and taking into consideration that no information has come to light concerning the whereabouts of the disappeared individual for more than six years, the Court was satisfied that he must be presumed dead following unacknowledged detention. On that basis, the Court determined that the responsibility of the respondent State had been engaged. Finally, noting that the authorities had not relied on any grounds of justification in respect of the use of lethal force by their agents, the Court established that liability was attributable to the respondent government.[111] From this analysis, it is difficult to trace the momentum of when the burden of proof shifted from the applicant to the respondent State. Furthermore, the analysis does not make clear what the applicant must demonstrate to establish a *prima facie* case and what explanations the respondent State must offer in order to rebut the allegation put forward by the applicant. Instead, it appears that the Court considered all the evidence that was before it to establish a presumption of State responsibility for an enforced disappearance. Subsequently, it offered a final opportunity for the Member State to justify the necessity for the use of lethal force on the victim and/or to provide other explanations as to what happened.

A question arising from this concerns the factors or the types of evidentiary material on the basis of which the Court decides whether there is sufficient evidence to conclude that Article 2 was violated by the respondent State. The Court has formulated the following general rule for this purpose, which states that:

109 ECtHR 29 May 2008, 37315/03 (*Betayev and Betayeva/Russia*), paras. 70 and 75; ECtHR 3 July 2008, 32059/02 (*Akhiyadova/Russia*), para. 65.

110 ECtHR 27 July 2006, 69481/01 (*Bazorkina/Russia*), para. 110.

111 Ibid., para. 111.

> "[w]hether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody."[112]

A further question arising from this is: under what circumstances are there 'concrete elements' present which allow the Court to determine that 'issues' may arise under Article 2. In *Bazorkina*, the Court attached importance to the fact that the government did not deny that the presumed victim was detained during a counter-terrorist operation in the village of Alkhan-Kala on 2 February 2000 and that there has been no reliable news of him from that moment on. *Bazorkina* was also one of the few cases in which direct evidence was available on the events, including a videotape showing that the presumed victim had been interrogated by a senior military officer who, at the end of the interrogation, said that he should be executed. This was confirmed by numerous witness statements in the criminal investigation file. That videotape and the witness statements provided the Court with sufficient basis to conclude that the presumed victim must have found himself in a life-threatening situation.[113]

In other cases, where no direct evidence was available, the Court has relied on circumstantial evidence to establish State responsibility for an enforced disappearance. This occurred for example in a case in which it was established that a person's abduction occurred at the same time and in the immediate vicinity of a military 'mopping-up' operation conducted by the respondent State. It was also established in that case that the victim's body had been discovered together with the bodies of other people with whom she had been detained and that the bodies found in the mass grave were wearing the same clothes as those worn by the individuals in question on the day of their detention.[114]

A relevant, though not decisive, factor that has been taken into account frequently in order to establish State responsibility for an enforced disappearance, is the period of time that has elapsed since the disappeared individual was placed in detention. The more time that has passed without any news of the detained person, the greater the likelihood that he or she is dead.[115] What has further played a role in establishing enforced disappearance are the fact that the applicant's official enquiries to the government about the disappeared person were met with denials, establishment that the disappeared person was taken to a place of detention by State officials and

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112 This rule was formulated in ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*), para. 82, and subsequently repeated also in ECtHR 18 June 2002, 25656/94 (*Orhan/Turkey*), para. 329 and ECtHR 2 August 2005, 65899/01 (*Taniş a.o./Turkey*), para. 200.

113 ECtHR 27 July 2006, 69481/01 (*Bazorkina/Russia*), para. 110.

114 ECtHR 9 November 2006, 69480/01 (*Luluyev a.o./Russia*), paras. 80-85.

115 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*), para. 83.

the fact that the presumed victim was wanted by the authorities for certain activities. The Court has additionally taken into account – as supporting evidence – the general context of the situation in the respondent State, from which it was known that the unacknowledged detention of a specific suspect would be life-threatening to that person.[116] This last factor was taken into consideration in several cases against Turkey, where the Court referred to the general context of the situation in south-east Turkey in a relevant period when it was known that an unacknowledged detention of PKK suspects could amount to the deaths of the detainees.[117] The Court has made similar observations regarding disappearances in Chechnya, maintaining that, in the context of the Chechen conflict, when a person is detained by unidentified servicemen without any subsequent acknowledgement of that detention, this can be regarded as life-threatening to that individual.[118]

This subsection has shown that the Court has shifted the burden of proof from the applicant to the respondent State in a variety of Article 2 and Article 3-related cases. In order to be able to pronounce violations, the Court generally requires that applicants demonstrate a *prima facie* case by invoking a presumption about a certain type of violent State behaviour, following which the burden of proof shifts to the respondent State which must then explain how the alleged behaviour cannot be attributed to its State agents or, in Article 2-related claims specifically, that the lethal use of force by its agents was justified. If the respondent State fails this duty, the Court will draw inferences as to the well-foundedness of the applicant's allegations and establish that they occurred to a threshold of 'beyond reasonable doubt'. What these cases essentially demonstrate is that the Court has introduced certain ways to alleviate the applicants' burden in proving their allegations. Presumptions and inferences have enabled the burden of proof to be shifted from the applicant to the respondent State in cases where evidence about the alleged violence was scarce or inaccessible to applicants and sometimes even to the Court. In the next section (5.5) the question will be examined of whether the ECtHR should apply a similar approach to evidentiary issues in cases where violence of a discriminatory nature, inflicted by State agents, is alleged. More specifically, it is questioned whether an applicant could raise a presumption of violence of a discriminatory nature, following which the burden of proof could shift to the respondent State to explain that the violence was not prejudice-based and, if so, under what circumstances such a shift could take place.

116 Ibid., paras. 84-85.

117 Ibid., para. 85. See further ECtHR 31 May 2001, 23954/94 (*Akdeniz a.o./Turkey*), paras. 88-89. See also J. Chevalier-Watts, 'The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?', 11 *Human Rights Review* (2010), p. 469-489.

118 ECtHR 9 November 2006, 7615/02 (*Imakayeva/Russia*), para. 141. See also ECtHR 5 July 2007, 68007/01 (*Alikhadzhiyeva/Russia*), para. 61; ECtHR 4 December 2008, 27233/03 (*Bersunkayeva/Russia*), para. 101.

5.4.2 Presumptions and inferences in cases in which evidence discloses an administrative practice

Presumptions and inferences may also be used in cases which are mostly referred to as examples of an 'administrative practice'. This term gained meaning particularly in the context of widespread allegations of torture or other forms of ill-treatment allegedly committed by State agents in breach of Article 3. This type of complaint has also often been presented in inter-State procedures, with applicant States arguing that a certain respondent State subjected a large number of individuals to specific wrongful conduct of a violent nature.

The first complaints on this issue were submitted in the *Greek* case and in *Ireland v. United Kingdom*. The *Greek* case concerned numerous people who were taken prisoner during the Regime of the Colonels. The applicant States claimed that a large number of individuals had been subjected to ill-treatment or torture inflicted by State officials in Greece. The alleged conduct, according to the presumed victims, occurred in the form of *falanga*[119] and other severe beatings of all parts of the body in order to obtain a confession or other information.[120] The Commission defined the notion of 'administrative practice' for the first time in the *Greek* case, stressing that the term consists of two elements, these being: a 'repetition of acts' conducted by State agents, and an 'official tolerance' of certain behaviour by the Member State. It expressed that the first element refers to:

> "... a substantial number of acts of torture or ill-treatment which are the expression of a general situation. The pattern of such acts may be either, on the one hand, that they occurred in the same place, that they were attributable to the agents of the same police or military authority, or that the victims belonged to the same political category; or, on the other hand, that they occurred in several places or at the hands of distinct authorities, or were inflicted on persons of varying political affiliations."[121]

The second notion, that of 'official tolerance', was interpreted by the Commission as meaning:

> "... that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible though cognisant of such acts,

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119 The Commission described *falanga* or *bastinado* as follows: "a method of torture known for centuries. It is the beating of the feet with a wooden or metal stick or bar which, if skilfully done, breaks no bones, makes no skin lesions, and leaves no permanent and recognisable marks, but causes intense pain and swelling of the feet." See EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972), p. 499.

120 Besides *falanga*, the detainees were subjected to electric shocks, squeezing the head in a vice, pulling out of hair from the head or pubic region, kicking of the male genital organs, dripping water on the head and intense noises to prevent sleep. Ibid., p. 500.

121 Ibid., p. 195.

> take no action to punish them or prevent their repetition; or that higher authority, in [the] face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied."[122]

A decade later, in *Ireland v. United Kingdom*, the Court explained that a repetition of acts is proved if it can be shown that a certain practice "consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches."[123] Vermeulen derives from this sentence three elements that must be proved before a repetition of acts can be established: first, the practice in question entails one particular type of breach; second, a sufficient number of breaches has occurred, and; third, the breaches are inter-connected in such a way that they amount to a pattern.[124] Vermeulen argues that an 'official tolerance' relates to State conduct and manifests itself in two ways: that firstly, the superiors of those responsible for the atrocities did not take the necessary measures to prevent the repetition of the wrongful acts, although they were aware of the atrocities; or secondly, the authorities refused to conduct an effective investigation into the case or the victims had no access to a fair hearing in judicial proceedings.[125]

The incidence of an administrative practice has also sometimes been alleged through individual applications at the ECtHR. In the context of Article 2 and Article 3 claims, this has specifically occurred in cases concerning enforced disappearances in Turkey.[126] The Court has not accepted an administrative practice in that context, owing to a lack of sufficient evidence attesting to such a practice.[127] An administrative practice has, however, been recognised in other individual applications. This occurred, for example, in numerous cases concerning a failure by the Italian civil courts to deliver judgments within a reasonable time. According to the ECtHR, there was an accumulation of identical breaches in these cases which were sufficiently numerous to amount to more than just isolated incidents. This accumulation of breaches accordingly resulted in a practice that is incompatible with Article 6 § 1 of the Convention.[128] Van der Velde points to the advantage

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122 Ibid., p. 196.
123 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para 159.
124 M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 205.
125 Ibid.
126 See, for example, ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), paras. 114-117.
127 M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 205-206. Vermeulen referred in this context to ECtHR 25 May 1998, 15/1997/799/1002 (*Kurt/Turkey*), para. 112 and ECtHR 27 February 2001, 25704/94 (*Çiçek/Turkey*), paras. 152 and 155.
128 ECtHR 28 July 1999, 34884/97 (*Bottazzi/Italy*), paras. 22-23.

of recognising such practices; cases in which similar allegations are made can be dealt with relatively easily by the Court. In his view, establishing an administrative practice in this type of case essentially amounts to a shifting of the burden of proof. So, if a similar case is brought to the Court, a violation of Article 6 § 1 is presumed and the burden of proof shifts to the government. State liability will be established, unless the government can deliver proof which demonstrates that in this specific case there were special circumstances or that the case significantly differs from other cases.[129] Another example concerns the recognition of an administrative practice in Armenia in the period March-April 2004, which consisted of deterring and preventing opposition activists from taking part in demonstrations, or punishing them for having done so. The Court recognised the existence of such a practice in *Hakobyan a.o. v. Armenia* on the basis of reports from the PACE Committee on the Honouring of Obligations and Commitments by Members States of the Council of Europe, Human Rights Watch and the Armenian Ombudsman. It further noted the number of cases before it in which applicants made almost identical allegations.[130] In determining that the three applicants in that case were victims of such a practice, the Court also considered the fact that all three applicants were members of opposition political parties, that all three of them were individually taken to the same police department around the period when the protest rallies were being held in Armenia, and that they were subjected to two practically consecutive terms of administrative detention by the same court in strikingly similar circumstances.[131] According to the Court, the "similarities and coincidences, which can hardly be considered to have been of a purely accidental nature, point to the existence of a repetitive pattern of subjecting persons to administrative detention which fits into the description of the administrative practice mentioned above."[132] The Court eventually concluded, on the basis of all material before it, that it could "draw strong, clear and concordant inferences to the effect that the administrative proceedings against the applicants and their ensuing detention was a measure aimed at preventing or discouraging them from participating in the opposition rallies, which it is undisputed were peaceful, held in Yerevan at the material time."[133] Therefore, it established an interference with the applicants' right to freedom of peaceful assembly, guaranteed under Article 11 of the Convention.

In this type of case, the Court often does not explicitly state how the burden of proof is distributed between the parties or how presumptions and inferences may precisely influence the distribution of the burden. However,

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129 J. van der Velde, case note on: ECtHR 28 July 1999, 34884/97, *EHRC Cases* 1999/1 (*Bottazzi/Italy*).

130 ECtHR 10 April 2012, 34320/04 (*Hakobyan a.o./Armenia*), paras. 90-92. This was later confirmed, e.g., in ECtHR 2 October 2012, 40094/05 (*Virabyan/Armenia*), para. 203.

131 ECtHR 10 April 2012, 34320/04 (*Hakobyan a.o./Armenia*), paras. 93-96.

132 Ibid., para. 97.

133 Ibid., para. 99.

there are a few cases, most notably concerning inter-State procedures, in which the Court has emphasised that the burden of proof is not borne by one or other of the two governments concerned, but that rather it will study all the material before it from whatever source it originates. In addition, it has pointed out in such cases that the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account.[134] So it appears that the Court does not always place the burden of proof strictly on one party or the other in this context.

In certain cases, such as *Georgia v. Russia (I)*, the Court also made use of presumptions to draw conclusions about the facts. In this particular case, the Court concluded that there was an administrative practice in breach of Article 4 of Protocol No. 4 (prohibition of collective expulsions of aliens), and Articles 5 § 1 and 5 § 4 ECHR (concerning the right not to be subjected to unlawful detention and the right to an effective remedy against a judicial decision in this regard). The case concerned the arrest, detention and expulsion of a large number of Georgian individuals from Russian territory in the period between September 2006 and January 2007. The administrative practice was established on the basis of statistics presented by the Georgian government (which showed that 4634 expulsion orders had been issued against Georgian nationals, of whom 2380 had been detained and forcibly expelled, and 2254 had left the country of their own accord), circulars and instructions that were issued by the Russian government to deprive Georgian individuals of their rights under the aforementioned Convention provisions, international governmental and NGO reports, and on the basis of witness accounts.[135] The Court considered that because it had previously established that Russia had fallen short of its obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case and, therefore, had acted in violation of Article 38 ECHR, there was a strong *presumption* that the applicant government's allegations regarding the content of the circulars ordering the expulsion specifically of Georgian nationals were credible.[136] Russia's failure consisted of a refusal to provide the Court with a copy of the two relevant circulars.[137]

The cases in this subsection have revealed the option available to the Court to identify large-scale human rights abuses, this being an administrative practice of human rights violations. Such a practice may be established if it appears that a substantial number of identical or analogous human rights violations have taken place (such as the beating of numerous individuals by State agents in a certain period in a certain Member State), which is referred to as a *repetition of acts*. An administrative practice is also estab-

134 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), paras. 160-161; ECtHR 10 May 2001, 25781/94 (*Cyprus/Turkey*) (GC), para. 113; ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), para. 95.

135 ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), paras. 128-146.

136 Ibid., para. 140.

137 Ibid., paras. 96 and 100-110.

lished if it can be shown that the numerous expressions of a specific type of human rights abuse (such as beatings by State agents) are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or prevent their repetition, or fail to investigate them. Such a situation is described as *official tolerance*. Hence, these types of breaches amount not just to isolated incidents, but occur in a more general context.

The finding of an administrative practice to some extent makes the Court's fact-finding task easier. Because once the Court has recognised its existence in a certain context, as it did in the Italian 'within a reasonable time' judgments,[138] it may presume that there has been a violation of the Convention in identical or analogous complaints that are submitted to it subsequently. So an administrative practice may enable the burden of proof to be shifted to the respondent State, who must then disprove that a complaint fits into the pattern of complaints that are part of the administrative practice.

5.4.3 Interim conclusion

The main purpose of this section was to demonstrate the various ways that enable the burden of proof to be shifted from the applicant to the respondent State in cases before the Court. In respect of Article 2 and Article 3 related matters where individuals claim to have been injured or claim that family members were killed while in custody or otherwise held under the control of State agents, it has shown how the mechanism of presumptions and inferences may influence how the burden of proof is distributed. In addition, it has shown that a violation of the Convention may be presumed in cases in which a complaint fits into a pattern or system of identical or analogous complaints. In other words, the violation may be presumed if the situation that is alleged forms part of an administrative practice.

The question may be raised of whether identical or similar mechanisms for shifting the burden of proof from the applicant to the respondent State may be applied in cases in which a violation of Article 14 read in conjunction with Article 2 or 3 is alleged. It is particularly important to consider these mechanisms in relation to complaints about State agents who have allegedly ill-treated or killed individuals based on discriminatory motives, as this type of complaint is the most difficult to prove. These cases are different from those discussed in this section, because here applicants claim an additional component, which is a *discriminatory nature* of the violence. The next section will explore whether presumptions and inferences can be used in order to establish violations of the Convention in that particular context. Furthermore, the following section will explore the possibility of shifting the burden of proof from the applicant to the respondent State in cases where there seems to be a systemic or administrative practice of State

138 See, again, ECtHR 28 July 1999, 34884/97 (*Bottazzi/Italy*), paras. 22-23.

agents inflicting discriminatory violence upon members of a disadvantaged group in a Member State.

5.5 The distribution of the burden of proof in cases in which a discriminatory nature of violence is alleged

Where the previous section has mainly analysed complaints concerning violent behaviour of State agents, this section focuses on complaints in which the *discriminatory nature* of violence is alleged. Usually in these cases, the Court has already established a separate violation of Article 2 or Article 3, and subsequently assesses whether one of these two provisions read in conjunction with Article 14 has been breached.[139]

In ECtHR case law in which complaints of discriminatory violence are made, the distribution of the burden of proof is regulated in the same way as in cases concerning Article 2 and Article 3 related issues, which do not feature an additional complaint concerning discrimination. In this regard, it is necessary to recall the three different types of discriminatory violence complaints from section 2.2. Under these three types, the applicant will bear the burden of proof to demonstrate to the Court a *prima facie* case (1) that State agents inflicted violence upon an individual based on discriminatory motives; (2) that State agents failed to conduct an effective investigation into a complaint where the discriminatory nature of violence was alleged, or; (3) that State agents failed to take preventive measures against violence of a discriminatory nature. Once the applicant succeeds in this, the burden of proof shifts to the respondent State to explain that it did not act in violation of the Convention. So for all three forms of discriminatory violence, the ECtHR allocates the burden of proof according to these principles.[140]

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139 See also ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC); ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*); ECtHR 22 April 2010, 2954/07 (*Stefanou/Greece*).

140 In the context of allegations that State agents ill-treated or killed individuals based on discriminatory motives, the Court formulated this rule also in the following judgments: ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), paras. 115 and 117; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 178-179; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 128. Regarding the duty to undertake an effective investigation, the notion of the burden of proof is virtually non-existent, regardless of whether it is argued by applicants that State officials omitted to conduct an effective investigation into allegations of discriminatory violence or whether it is alleged that State agents were biased while conducting an investigation into physical abuse of the victims. Nevertheless, there are cases from which it can be derived that even in this context, the Court regulates the rules on the burden of proof in accordance with what has been described here. See, for example, ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 58. The rules on the distribution of the burden of proof are applied also in cases regarding the duty to take preventive measures against discriminatory violence. See ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 183; ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 179.

The circumstances in which the burden of proof may shift from the applicant to the respondent State in cases concerning Article 14 read in conjunction with Article 2 or 3, also vary in accordance with the type of complaint of discriminatory violence. The analysis in section 2.2 on the different types of complaints becomes relevant here. This analysis revealed the legal issues that must be proven through various factual elements before a violation of Article 14 read in conjunction with Article 2 or 3 can be established. The following will show that once these legal issues have been proven through the relevant factual elements, a *prima facie* case of discriminatory violence can be established and the burden of proof shifts to the respondent State.

As shown in section 2.2, the degree of difficulty in establishing a *prima facie* case varies depending on the type of discriminatory violence, as some types are more difficult to prove than others. Complaints concerning ineffective investigations into discriminatory violence or a lack of preventive measures against the wrongful conduct are easier to establish than cases where a complaint is made that a State agent inflicted discriminatory violence based on a discriminatory motive. Therefore, the difficulties in shifting the burden of proof particularly arise under this last complaint. These types of complaints are different, for example, from allegations where an applicant 'solely' claims that he or she was harmed by State agents during custody or that another victim died while in detention without further alleging that a discriminatory motive on the part of a State agent led to the violence. As shown in the previous section, in such cases the Court has acknowledged the rule that 'where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention'. By contrast, in cases where violence of a discriminatory nature inflicted by State agents was alleged, the Court has underlined that it cannot easily shift the burden of proof, because "such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned."[141] Hence, there is a subjective aspect inherent to complaints concerning the discriminatory nature of violence inflicted by State agents, as opposed to the cases discussed in the previous section, that renders proving discriminatory violence more difficult. The subjectivity lies in the complex legal concept of 'motive' that must be proved in this type of complaint. Consequently, because it is difficult to prove a breach of the negative duty, critics argue that the ECtHR ought to shift the burden of proof to the respondent State whenever it is established that a member of a disadvantaged group suffered harm in an environment where tensions on the basis of some discriminatory ground are high, and State offenders are generally afforded impunity. In the critics' view, it would then be up to the respondent State to

141 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 157.

prove that the violence was not due to discriminatory motives.[142] In respect to Roma cases specifically, Möschel further explains:

> "Following this approach, the Court would take into consideration the broader picture of racial violence against disadvantaged minority groups and of impunity of state actors and not just the narrow fact patterns and the presence or absence of racial slur/insults. Thus, 'outside' international NGO reports and official documents would become highly relevant in determining whether there are high racial tensions and impunity of state offenders. However, the ECtHR could also simply rely on its own case law and presume that the violence was racially motivated whenever the case involves one of those countries that have often been respondents in anti-Roma violence cases."[143]

This section is concerned with two aims. Firstly, the circumstances under which the burden of proof shifts from the applicant to the respondent State under all three forms of allegations of discriminatory violence are outlined in section 5.5.1. Some overlap with section 2.2 is inevitable here, because demonstrating the legal concepts and factual elements presented in that section essentially results in the burden being shifted from the applicant to the respondent State. Thereafter, section 5.5.2 explores the notion of whether there are alternative circumstances in which the burden of proof may shift from the applicant to the respondent State that the Court has not yet considered and which could offer a response to the aforementioned criticism of the Court's approach towards the burden of proof. In this regard, it attempts to resolve the difficulties in shifting the burden of proof in cases where a breach of the negative duty of State agents to refrain from inflicting discriminatory violence is alleged. It explores two possibilities that may more smoothly facilitate a shift in the burden of proof and, consequently, eventually lead to a recognition of discriminatory violence. Both relate to situations in which violence inflicted on members of certain groups appears to be systemic.

Firstly, it explores whether there are scenarios in which the Court could distribute the burden of proof under similar conditions as it has done in its case law on indirect discrimination. Secondly, in cases where it is not possible to take the same approach towards the distribution of the burden of proof as in indirect discrimination case law, this study attempts to find another way that makes it easier to shift the burden of proof. Concretely, it proposes that the Court should require proof of a discriminatory attitude, rather than a discriminatory motive, in order to enable a shift in the burden of proof. It may derive that such a discriminatory attitude exists from cases where violence inflicted upon a member of a certain group by State

142 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 18. See also the submission by the third party intervener, the European Roma Rights Centre (ERRC), in ECtHR 26 February 2004, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*), paras. 152-154.

143 M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 501.

agents is something that occurs systemically in the Member State concerned. Introducing these new ways of shifting the burden may eventually contribute to the implementation of a more substantive conception of equality in ECtHR case law, hence a conception which is "alive to the effects of structural inequality."[144]

5.5.1 The circumstances under which the burden of proof may shift

5.5.1.1 The negative duty of State officials to refrain from inflicting discriminatory violence

In cases where it is alleged that State agents were guilty of discriminatory violence, the Court applies stricter standards of scrutiny when determining whether the Convention was violated. It was already demonstrated in chapter 2 that in these cases the Court requires proof that a discriminatory motive was the causal factor in the killing or ill-treatment of an individual belonging to a certain group.[145] The motivation for the violence is the most significant aspect of discriminatory violence inflicted by State agents. It requires proof of the perpetrator's *discriminatory* thoughts and, therefore, falls under the scope of Article 14 of the Convention. If no discriminatory aspect at all were to be required in terms of proof, the violence would be assessed by the Court solely under Article 2 or 3 ECHR.[146]

The Court's case law reveals a dearth of cases in which a discriminatory motive was established and, thus, in which a violation of Article 14 read in conjunction with Article 2 or 3 was found in this context. *Prima facie* cases have only been established in a few judgments, most notably there where domestic criminal case files presented to the Court included witness statements that reported discriminatory remarks uttered by State officials while physically abusing victims from a disadvantaged group, or which at least disclosed discriminatory remarks that were uttered by State officials somewhere around the time of the violent events.[147] Discriminatory remarks – documented in the national case file – therefore play a crucial role in finding a *prima facie* case. Yet there may be other, additional, factors that could also lead to this result. This is illustrated by *Antayev*, where the Court took into consideration a combination of two factual elements to reach the conclusion that a *prima facie* case of discriminatory violence inflicted by State agents had been made, which included 'racist verbal abuse' and the recurrent reference to internal police instructions to treat suspects of Chechen ethnic

144 See section 2.4.1 and the reference to R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 213.

145 See section 2.2.1.

146 Compare N. Hall, *Hate Crime*, Abingdon: Routledge 2013, p. 127.

147 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 128-130; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.

origin in a particular (violent) manner.[148] Further, in *Begheluri*, the ECtHR recognised that all three types of violations in the context of discriminatory violence complaints were established on the basis of a number of factual elements. In that case, the Court recognised that the applicants – most of them being Jehovah's Witnesses – had become victims of religiously-motivated violence. As set out in subsection 2.2.1, the factual elements included the fact that the largest religious gatherings of the applicants were disrupted, with the direct involvement of various State officials or their acquiescence and connivance; the fact that the police refused to intervene to protect the applicants as soon as they learnt about their religious background; the fact that individual applicants were additionally subjected to religious insults when lodging their complaints with the police; and that the national authorities showed complete indifference towards the applicants' numerous complaints concerning various acts of aggression.[149] In addition to these factual elements, the Court also took into account information about numerous other incidents of attacks on Jehovah's Witnesses in Georgia, whether physical or verbal, which were reported by several international bodies and non-governmental organisations at the material time.[150]

Since such factual elements have hardly ever appeared in domestic case files in other cases on discriminatory violence, it has not been easy for the Court to establish a discriminatory motive. Consequently, a *prima facie* case is rarely established and the burden of proof rarely shifts to the respondent State.

Beside a lack of factual elements indicating the presence of a discriminatory motive, there are other potential reasons why shifting the burden of proof does not proceed smoothly with these types of complaints. The first reason is connected to some of the factors that influence both the distribution of the burden of proof and the standard of proof; these include the specificity of the facts, the nature of the allegation made and the Convention right at stake. In addition, it may be recalled that the Court has stated that it is attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights.[151] The Court has never explained how these factors may influence the distribution of the burden of proof or the standard of proof. However, it may be presumed that – particularly with regard to the last sentence concerning attentiveness 'to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights' – the Court aims to highlight that in cases involving serious matters, such as killings or ill-treatment, the burden ought not to shift so easily. The second reason is connected with the requirement of proving a discriminatory motive. In this regard it may be recalled that the Court has clarified that the burden of proof cannot easily shift to the respondent State, since

148 ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.
149 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 174.
150 Ibid., para. 175.
151 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.

"such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned."[152] This subjective attitude, in essence, refers to the motive or thoughts of the perpetrators. Obviously it is difficult for an applicant to deliver *prima facie* evidence that the reason behind the violence inflicted by a State agent was discriminatory. However, the Court recognises with that last quote that it is equally difficult for a Member State to prove the absence of such a reason for the violence.

Where an applicant, nevertheless, manages to establish a *prima facie* case, the burden of proof shifts to the respondent State. The Court's judgments, however, do not clearly show how a respondent State could refute a *prima facie* case. In its judgments so far, the Court has solely indicated that the government must explain the incidents in any other way or put forward any arguments to that end showing that the incidents did not result from bias towards the victims.[153] Where the respondent State fails to live up to this obligation, the ECtHR will draw inferences from this failure to put forward any arguments to show that the incident was not due to bias and on that basis will find that there was a violation of Article 14 of the Convention.[154] However, the Court has not further shown how these explanations or arguments may be presented by the government in order to lead to a finding that the Convention was not violated. The Court's judgments rather show that respondent States have never actually managed to provide an explanation capable of absolving them from the complaint that they violated Article 14, after the applicants established a *prima facie* case of discriminatory violence. Therefore, it is difficult to determine what a respondent State should put forward in order to defend the position that its officials did not act in a way which was discriminatory, once a *prima facie* case has been established.

In conclusion, a *prima facie* case establishing that a State agent has breached the duty to refrain from inflicting discriminatory violence can best be shown through domestic case files which report discriminatory remarks made by the State agents who inflicted the violence. In addition, it can be revealed by internal instructions that encourage State officials to inflict violence upon members of certain groups. Although the Court does not explicitly say as much, these factual elements raise a presumption that the violence was due to a discriminatory motive. After this, the burden of proof then shifts to the respondent State to disprove the allegations made. However, further explanation is needed from the Court to highlight specifically how the respondent State may disprove the allegations made.

152 Ibid., para. 157.
153 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), para. 131; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 128.
154 ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179.

5.5.1.2 *The positive duty of State officials to effectively investigate discriminatory violence and to identify and punish those responsible*

Questions regarding the distribution of the burden of proof are intricate in cases that concern the positive duty of State officials to effectively investigate discriminatory violence, and to identify and punish those responsible. This is because the Court hardly uses terms such as 'burden of proof', '*prima facie* case', 'presumptions' and/or 'inferences' in these cases. There are a few cases, however, which indicate that there is a certain division of tasks between parties with regard to the question of who must prove what. They can be found both in the context of allegations concerning discriminatory behaviour on the part of State officials during the investigation into a violent crime and in the context of allegations concerning an alleged failure by the State to conduct an effective investigation into discriminatory violence.

Under the specific type of claim that State agents acted in a discriminatory manner while conducting an investigation into a violent crime committed either by State agents or private individuals, the Court indeed first requires that the applicant establishes a *prima facie* case, and subsequently asks the government to justify the behaviour of the State agents.[155] In that regard it is useful to recall from chapter 2 the legal concept that must be proved through certain factual elements under these types of complaints. Specifically, in subsection 2.2.2 it was highlighted how the Court requires proof of a 'discriminatory attitude' on the part of the State agents involved in the relevant case. A 'discriminatory attitude' is different from a 'discriminatory motive'. As observed earlier, motive requires that the perpetrator's thoughts are revealed and thus asks why a perpetrator has committed certain wrongful acts. By contrast, a discriminatory attitude appears to have more of an external nature. It can be inferred from inappropriate and biased behaviour which indicates that State agents do not behave in a manner which is adequate when dealing with individuals from a certain group. In establishing a *prima facie* case that there is such a discriminatory attitude, the Court primarily considers the fact that throughout the investigation State agents made tendentious remarks in relation to the victim's origin.[156] In this context, it is unnecessary to prove why State officials behaved in such a manner throughout the investigation or how it affected subsequent behaviour; it is already sufficient to observe that they uttered discriminatory remarks and in that way acted inappropriately and not in line with their profession.

Once this has been established, the burden of proof shifts to the respondent State and the Court explicitly requires it to offer an explanation for the remarks made or provide context which negates the discriminatory character of such remarks.[157]

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155 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65.

156 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65.

157 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65.

When it is alleged that State agents failed to conduct an effective investigation into a domestic complaint of discriminatory violence inflicted by State agents or private persons, for whatever reason, the distribution of the burden of proof between the parties becomes less apparent. The rules on the distribution of the burden of proof in various ECtHR cases concerning this matter are inconsistent. For example, in *Nachova*, the Grand Chamber evaluated all the material documented in the case file, including witness statements about discriminatory remarks made by the State agent who killed the two Romani victims, reports from various organisations about the existence in Bulgaria of prejudice and hostility towards Roma, and the use of grossly excessive force against two unarmed and non-violent victims.[158] This led to the conclusion that the State agents were obliged to conduct an effective investigation "into possible racist overtones in the events that led to the death of the two men."[159] In that case, the Grand Chamber, however, did not identify the party holding the duty to prove certain assertions. It may even be wondered whether there was a distribution of the burden of proof at all, or whether the Court instead examined all the information documented in the case file, eventually to conclude that there was a violation of Article 14 read in conjunction with Article 2.

Something similar can be observed in the case *Mižigárová v. Slovakia*. There the Court first pointed to reports from the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the CPT, ECRI, US Department of State and the International Helsinki Federation for Human Rights, which concern allegations of police brutality towards Roma in Slovakia. Subsequently, it did not find that the positive duty to investigate discriminatory violence had been breached, due to a lack of concrete information that might have been sufficient to bring into play the State's obligation to investigate possible racist motives on the part of the perpetrators.[160] The Court did not further elaborate on whether the duty rested on the applicant to prove that the respondent State failed to investigate discriminatory violence or whether this was something that the Court verifies of its own motion. Strikingly, in that case, the Court acknowledged the possibility "that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive."[161] This is a very important acknowledgement, as, through this, the Court introduces a new possibility for establishing a violation of the positive duty to investigate discriminatory violence. Although this new possibility raises questions concerning the distribution of the burden of proof. For example, the question of which actor holds the duty to present the independent evidence of a systemic problem.

158 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 163-165.
159 Ibid., para. 166.
160 ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), paras. 122-123.
161 Ibid., para. 122. See also section 2.2.2.

If the duty rests on the applicant to do so, then the subsequent question may be what is the duty of the respondent State in this regard. For example, if the burden rests on the applicant to establish a *prima facie* case of a systemic problem in a country through independent evidence, does that mean that the respondent State will be subsequently required to prove that in the case in question there was an effective investigation or to provide a justification for the lack of an effective investigation? Thus, these are important questions that need to be elaborated on in the Court's case law.

There are nevertheless cases in which the Court was more explicit about the distribution of the burden of proof. For example, in *B.S.*, under the positive duty to carry out an investigation into discriminatory violence the Court highlighted that "the onus is on the Government to produce evidence establishing facts that cast doubt on the victim's account."[162] In that case it was established that the applicant had filed complaints, at the domestic level, about discriminatory remarks made by the police officers who allegedly beat her. According to the Court "[t]hose submissions were not examined by the courts dealing with the case, which merely adopted the contents of the reports by the Balearic Islands chief of police without carrying out a more thorough investigation into the alleged racist attitudes."[163] However, the Court did not clarify what the applicant and the respondent State respectively had to prove in these cases and at what point the burden of proof ought to shift.

Although it is not always easy to identify who should prove a certain issue under the positive duty to conduct an effective investigation, it can at least be said that a violation of the Convention is more easily found in this context. This results from the fact that less problematic legal concepts need to be demonstrated in comparison to the legal concept that needs to be proved in cases concerning discriminatory violence inflicted by State agents, for example. A discriminatory attitude on the part of State agents during an investigation, and/or a failure of the State to conduct an effective investigation into discriminatory violence as such, can be more easily verified by the Court through an examination of the case file.[164] Perhaps there is no clear distribution of the burden of proof because the Court can simply verify the facts of the case through the case file and determine whether they amount to a violation of the Convention. The legal concepts can then be established on the basis of several factual elements.

This subsection has highlighted a few cases in which discriminatory remarks uttered by State agents were mainly used eventually to establish violations under the positive duty to conduct an effective investigation. Although, as shown in subsection 2.2.2, there is an even wider variety of factual elements that may contribute to establishing a violation in this sphere,

162 ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 58. See also ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), paras. 125-126.

163 ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 61.

164 This was also discussed in section 2.2.

which may include the use of grossly excessive force by perpetrators against unarmed and non-violent victims belonging to certain groups, and evidence that the violence was committed by a skinhead group or a far-right group. Additionally, with respect to some groups, such as Roma, the Court has acknowledged that in the absence of any other evidence, the existence of independent evidence of a systemic problem could be sufficient to alert the authorities to the possible existence of a discriminatory motive.

5.5.1.3 The positive duty of State officials to take preventive measures against discriminatory violence

A distribution of the burden of proof is applied in cases concerning a failure of a Member State to take preventive measures against discriminatory violence, although the Court does not always clearly identify what has to be proved by whom. As shown in subsection 2.2.3, different legal concepts need to be demonstrated in this type of complaint, varying from case to case. Where it has been alleged that State agents failed to protect the applicants from discriminatory violence because they were biased against the members of the targeted group, the Court requires proof that the failure by State agents to prevent such violence was to a large extent the *corollary* of the victims' membership of a certain group.[165] In *Gldani*, a case concerning this issue, the Court recognised the existence of such a corollary, having "examined all the evidence in its possession."[166] That evidence included discriminatory comments made by State agents when receiving requests for protection from the victims.[167] The Court subsequently noted that the government had not adduced any counter-arguments or provided justification for this treatment.[168] By applying such reasoning, the Court has not provided a complete picture of the distribution of the burden of proof. Its reasoning raises the question of whether there was an obligation at all on the applicants to establish a *prima facie* case in this context, or whether the Court itself observed all the factual elements that were included in the domestic case file. The Court also did not identify what type of counter-arguments or justifications the respondent State must present to disprove the allegations made.[169]

A rather vague approach towards the distribution of the burden of proof is seen in the context of cases where it is alleged that State agents failed to take protective measures against discriminatory violence, but not necessarily because they were biased against the victims. In *Opuz*, the Court recognised that under this type of complaint, it is up to the applicant to show, supported by unchallenged statistics, the existence of a *prima facie* indica-

165 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 140.
166 Ibid.
167 See section 2.2.3.
168 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 141.
169 Ibid., paras. 140-141; ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), paras. 72-73.

tion that the violence affected a certain group and that the general and discriminatory judicial passivity in a Member State created a climate that was conducive to the violence inflicted on that particular group.[170] Hence, sometimes demonstrating a general and discriminatory judicial passivity in offering protection from discriminatory violence by State agents in a Member State is already sufficient to establish a *prima facie* case. As with some of the previously mentioned types of discriminatory violence complaints, under this duty to take preventive measures also it becomes less clear whether the burden of proof actually shifts to the respondent State and, if so, what the respondent State then must demonstrate to disprove an allegation. This appears again in *Opuz*, where, after establishing that the applicant had made out a *prima facie* case, the Court stated the following:

> "… The Court has established that the criminal-law system, as operated in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by H.O. against the personal integrity of the applicant and her mother and thus violated their rights under Articles 2 and 3 of the Convention.
> … Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence …."[171]

This quote rather indicates that the Court evaluated all the information and established on the basis of that information whether the *prima facie* case amounted to an actual violation of the Convention, instead of asking the government to refute the allegation.

In *Eremia*, where the Court required proof of the legal issue that gender-based violence was repeatedly condoned by State authorities and that there was a discriminatory attitude on the part of State agents towards the victim as a member of a certain disadvantaged group, the Court also did not clearly distinguish between the applicant's duty to establish a *prima facie* case and the subsequent duty of the respondent State to disprove the allegation.[172] It did, however, find a violation of the Convention by considering the relevant factual elements and evidentiary material, which included discriminatory remarks made by State officials and reports from international organisations.[173]

Hence, the Court's approach towards the distribution of the burden of proof in cases concerning the positive duty to take preventive measures against discriminatory violence is unclear and sometimes inconsistent. The duties of applicants and respondent States are hard to identify in this con-

170 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 198.
171 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 199-200.
172 See section 2.2.3.
173 ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), paras. 86-91.

text. Consequently, it is difficult to pinpoint the moment when the burden of proof shifts from one party to the other.

However, there is one unique feature inherent to these cases. In one case, *Opuz*, the Court explicitly recognised that a *prima facie* case may be established mainly on the basis of general information which reveals that State agents are generally passive in providing victims with protection from discriminatory violence in a Member State. This type of reasoning – where the Court exclusively relies on this type of evidentiary material in order to establish a *prima facie* case of a violation of Article 14 read in conjunction with Article 2 or 3 – is still awaited in other types of discriminatory violence complaints before the Court.

5.5.1.4 Interim conclusion

The purpose of this section was to outline the different circumstances in which the burden of proof shifts from one party to the other in cases of discriminatory violence. It became apparent that the Court does not consistently apply the rules regarding the burden of proof in all of these cases. The section has nevertheless attempted to show that the burden of proof – where it can be identified at least – shifts under certain circumstances, depending on the type of complaint. Especially with complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence, shifting the burden of proof to the respondent State does not proceed very easily. This is because the legal concept of motive needs to be proved which requires more concrete evidence before the burden of proof can be shifted.

With regard to the other two types of discriminatory violence complaints, it appears that the Court's approach to the distribution of the burden of proof is not very clear. Firstly, in some cases there are no indications whatsoever of how the Court distributes the burden of proof between the parties, while in others it can be observed that the Court does at least require a *prima facie* case to be established or that the government must offer an explanation or justification concerning the allegations. Secondly, the Court does not always clearly indicate how applicants can make out a *prima facie* case or how respondent States can disprove the allegations made. The vagueness surrounding these cases in relation to the distribution of the burden of proof could be resolved if the Court were to make more use of terms such as 'burden of proof', '*prima facie* case', 'presumptions' and 'inferences' in its judgments. It could use these terms in a similar way as they are used by the Court in the particular cases that were discussed in subsection 5.4.1. Thus, the Court could explicitly require that applicants demonstrate a *prima facie* case of a violation under one of the two positive duties. The applicants could do that by invoking a presumption that the investigation into the alleged discriminatory violence was ineffective or that there was a lack of protective measures against this wrongful conduct. After this has been established, the burden of proof can then shift to the respondent State. The government would then have to explain how they lived up to the terms of the Convention in this context or that the behaviour of its State agents can

be justified. If the government does not offer any explanation or justification in this context, the Court could draw inferences as to the well-foundedness of the applicants' allegations.

5.5.2 Exploring new criteria to shift the burden of proof in discriminatory violence cases

Since shifting the burden of proof from the applicant to the respondent State is most challenging in cases concerning an alleged breach of the negative duty of State agents to refrain from inflicting discriminatory violence, the question arises as to how this problem may be resolved. In other words, it may be asked whether the Court could introduce new ways to shift the burden of proof to the respondent State and to ease the applicant's position in this context. This section aims to provide an answer to that question.

The main obstacle in shifting the burden of proof in complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence lies in the requirement to prove the discriminatory motive. As observed earlier, this is a highly subjective legal concept which requires proof of a perpetrator's thoughts or state of mind. Consequently, it is very difficult to demonstrate. As was already revealed in chapter 2, by requiring proof of motive in these types of complaints, the Court views these complaints through the lens of formal equality and direct discrimination. It is valuable, however, to consider whether it would be possible in these types of complaints to suggest an approach to the distribution of the burden of proof that would serve substantive equality, rather than formal equality.

To that end, two proposals are offered in this study below. The first concerns the circumstances in which the Court could consider complaints regarding the duty of State agents to refrain from inflicting discriminatory violence as complaints of indirect discrimination, which is a form of substantive inequality. In this way, the Court would not have to require proof of a discriminatory motive, but the discriminatory effect of a provision, criterion or practice that has somehow created a situation in which State officials inflict violence upon members of a specific group. The second proposal is also to eliminate the requirement of proving a discriminatory motive in the remaining cases of these types of complaints, and to introduce the requirement of proof of a discriminatory attitude instead. Such an attitude should then not solely be derived from discriminatory remarks, for example, but also from a situation in which one violent incident inflicted by a State agent upon a member of a disadvantaged group, appears to be part of a pattern of numerous, similar complaints in the Member State concerned. This pattern of violence may then be derived from statistics or reports by intergovernmental organisations and NGOs.

The first suggestion includes a shift in the burden of proof in cases where allegations of discriminatory violence inflicted by State agents can be considered as matters of indirect discrimination. The burden of proof can ini-

tially be placed on the applicant to present a *prima facie* case. The applicant would then be obliged to put forward evidentiary material which reflects the disparate impact of a seemingly neutral provision, criterion or practice. Once the applicant succeeds in this, the burden of proof would then shift to the respondent State who would be expected to point out that there is no effect of violence of a discriminatory nature resulting from a provision, criterion or practice.[174] Arguably, it is difficult to present discriminatory violence as a matter of indirect discrimination: given that violence is inherently illegal, there is usually no provision, criterion or practice from which discriminatory violence may be derived. Nonetheless, two examples of discriminatory physical abuse are presented here that the Court could potentially recognise as an incidence of indirect discrimination.

The first concerns cases of sterilisation of Roma women in State hospitals. The case *V.C.* may serve as an illustration in this context. In *V.C.*, a 20-year old Roma woman was sterilised at the Hospital and Health Care Centre in Prešov, Slovakia, during the delivery of her second child. According to the applicant, the sterilisation was forced upon her since her consent was sought at a moment when she was heavily influenced by labour and pain. She was further told by medical staff that sterilisation was necessary as a subsequent pregnancy would lead either to her own death or that of the baby – information that she was unable to verify at that time. Before the ECtHR, she claimed that the sterilisation procedure was forced upon her because of her Romani background and because she is a woman. She relied on Article 14 taken in conjunction with Articles 3, 8 and 12. To substantiate her claim, she submitted a number of documents that both attested to a practice of forced sterilisation of Romani women in Slovakia, as well suggesting a widespread, general intolerance towards Roma. Moreover, V.C. claimed that her case formed part of these patterns by the fact the words "Patient is of Roma origin" appeared in her medical file.[175]

The Court examined the discrimination complaint solely in conjunction with Article 8. It rejected her complaint that the violation of her rights was motivated by her ethnicity, concluding that "the objective evidence is not sufficiently strong in itself to convince the Court that it [V.C.'s sterilisation] was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated."[176] It referred in this regard to the case *Mižigárová v. Slovakia*, an issue concerning the death of a Roma individual

174 D. Schiek, 'Indirect Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 323-475, p. 351.

175 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*). See also the similar case ECtHR 12 June 2012, 29518/10 (*N.B./ Slovakia*). See also my discussion of *V.C.* in J. Mačkić, 'Proving the Invisible: Addressing Evidentiary Issues in Cases of Presumed Discriminatory Abuse against Roma before the European Court of Human Rights through *V.C. v. Slovakia*' in: M. Goodwin & P. de Hert (eds.), *European Roma Integration Efforts – A Snapshot*, Brussels: Brussels University Press 2013, p. 51-75.

176 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), para. 177.

in custody. In that case, the applicant alleged that the victim's ethnic origin was the reason he was killed by State agents and why no effective investigation into his killing was conducted.[177] Such a reference implies that the Court applied the same evidentiary rules in *V.C.* as in incidents of discriminatory killings or ill-treatment. The evidentiary material presented in *V.C.* indicated, according to the Court, that the practice of sterilisation of women affected not only Roma women but vulnerable individuals from other ethnic groups as well.[178] At the same time, however, the Court explicitly referred to materials from the Human Rights Commissioner and from ECRI that not only established serious shortcomings in the legislation and practice relating to sterilisation in Slovakia, but also provided views that the shortcomings were liable to particularly affect members of the Roma community. In addition, the Court acknowledged a report from a group of experts established by the Slovak Ministry of Health which pointed out the disproportionate correlation between sterilisations and being Roma, and recommended special measures to prevent this.[179] The Court found that Slovakia had failed "to comply with its positive obligation under Article 8 of the Convention to secure to the applicant a sufficient measure of protection enabling her, as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life in the context of her sterilisation."[180] Despite the evidence before it suggesting that the practice of non-consensual sterilisation in Slovakia disproportionally impacted on members of the Roma community, it dismissed the Article 14 claim.

The difficulty in proving discriminatory treatment in *V.C.* was, among other things, connected with the fact that this case, in terms of rules of evidence, was placed in the same category as direct discrimination. In finding that there was no violation of Article 14 read in conjunction with Article 8, the Court applied a different set of evidentiary rules than it displays in cases concerning indirect discrimination, such as *D.H.* Hence, in *V.C.* it applied the rules of evidence it has developed in cases of presumed discriminatory violence against Roma. This is clear from its reference in *V.C.* to *Mižigárová v. Slovakia*. It may be asked whether this approach is justified and whether the evidentiary rules as they have been applied in the Court's past case-law concerning the segregation of Romani children in education, would not have been more applicable in this case.

There was a way for the Court to have observed V.C.'s treatment as part of a pattern of violence against Roma in Slovakia. The legislative basis for sterilisations during the contested period can be found in the (Slovakian) 1972 Sterilisation Regulation. The annex to the Regulation stated that a woman's sterilisation could also be justified where a woman had had several children (four children for women under the age of 35 and three children

177 ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), para. 112.
178 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), para. 177.
179 Ibid., para. 178.
180 Ibid., para. 179.

for women over that age). Although this was not brought forward by the applicant or the Court in *V.C.*, it is tenable that this element might be an additional circumstance by which an indirect causal link could be established between the sterilisation and being of Romani origin. After all, if it appears that Romani women are statistically more likely to give birth to more children than other women in Slovakia and the sterilisation procedure is more frequently applied to them than other groups of women as a consequence, this would have provided concrete evidence of the practice of sterilisation affecting Romani women to a disproportionate degree.[181] Evidence which would demonstrate such a practice could have been used to establish a *prima facie* case of discriminatory sterilisation, following which the burden of proof would have shifted to the respondent State to justify the differential treatment or to disprove the applicant's complaint.

Another example of indirect discrimination occurs in the context of the lawful use of force by State agents. This is a context in which a general policy or general measures – that usually find their basis in national legislation – allow State agents to use force under certain circumstances. *High Jordan v. United Kingdom* illustrates this. In that case, Section 3 of the Criminal Law Act (Northern Ireland) 1967 stated that "[a] person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large."[182] The applicant submitted that between 1969 and March 1994, 357 people had been killed by members of the United Kingdom security forces on the basis of that rule, the overwhelming majority of whom were young men from the Roman Catholic or nationalist community. His (Catholic) son was among those killed. He compared these numbers to those killed from the Protestant community[183] and argued that the way in which lethal force was used was discriminatory towards the Catholic or nationalist community.[184] Additionally, he claimed that there had been relatively few prosecutions (31) and only a few convictions (four, at the date of his application).[185] Thus, according to the applicant, this showed that there was a discriminatory use of lethal force and a lack of legal protection for a section of the community on grounds of national origin or association with a national minority.[186]

The Court stressed that "[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[187] Subsequently, it argued that

181 Ibid., paras. 60-64.
182 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 59.
183 No information is given in the judgment on the number of those killed from the Protestant community.
184 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 152.
185 Ibid.
186 Ibid.
187 Ibid., para. 154.

even though statistically it may appear that the majority of people shot by the security forces were from the Catholic or nationalist community, it did not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. It underlined that there was no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.[188] Therefore, it found no violation of Article 14 of the Convention.[189]

Essentially, this is an example of an allegation of indirect discrimination because it is argued that an apparently neutral provision (Section 3 of the Criminal Law Act (Northern Ireland) 1967) put persons of a certain religious background (Catholics) at a particular disadvantage compared with other persons (Protestants). The Court, however, declined to recognise that the allegation amounted to actual differential treatment. If it had done so, it may have subsequently asked whether that provision could be objectively justified by a legitimate aim, as is customary in indirect discrimination complaints, and thus, whether it actually amounted to discrimination.

Interestingly, in a somewhat similar case, the IACtHR brought a complaint regarding discriminatory violence inflicted by State agents under the scope of indirect discrimination.[190] In *Nadege Dorzema a.o. v. Dominican Republic*, the IACtHR established discriminatory violence in a context of excessive use of force by Dominican border guards against a group of Haitians, in which seven people lost their lives and several more were injured. Use of force by State agents is permitted in the Dominican Republic on the grounds of Principle No. 9 of the Basic Principles on the Use of Force, which states the following:

> "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."[191]

188 Ibid.

189 Ibid., para. 155.

190 Regarding the Inter-American system, it is useful to first note that only Member States to the American Convention on Human Rights who have accepted the IACtHR's contentious jurisdiction and the Inter-American Commission may file complaints to the Inter-American Court. Individuals cannot turn directly to the IACtHR; they must first submit their petition to the Inter-American Commission. It is up to the Commission eventually to decide whether cases should be referred to the Inter-American Court (J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, New York: Cambridge University Press 2013, p. 83-85). These proceedings are, thus, slightly different from those before the ECtHR, since under the European human rights system, individuals may turn directly to the Court to complain about the conduct of Member States.

191 IACtHR 24 October 2012, (Ser. C.) No. 251 (*Nadege Dorzema et a./Dominican Republic*) (Merits, Reparations and Costs), para. 84.

The issue at stake was whether the force, which thus has its basis in Principle No. 9, was used by Dominican State agents towards the presumed victims owing to their condition as migrants of Haitian origin.

The Inter-American Commission alleged that this case revealed a context of racism, discrimination and 'anti-Haitian practices' in the Dominican Republic.[192] The IACtHR considered the following regarding the application of the notion of burden of proof:

> "... this Court acknowledges the difficulty for those who are the object of discrimination to prove racial prejudice, so that it agrees with the European Court [of Human Rights] that, in certain cases of human rights violations motivated by discrimination, the burden of proof falls on the State, which controls the means to clarify incidents that took place on its territory."[193]

In reality, this is an incorrect interpretation of ECtHR case law. The IACtHR made a reference to paragraph 179 of the *D.H.* case, where the ECtHR indeed highlighted that "[i]n certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[194] Subsequently, in that same paragraph, the ECtHR stated the following:

> "In *Nachova and Others* …, the Court did not rule out requiring a respondent government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services."[195]

Hence, the ECtHR did not recognise in *D.H.* that in cases where a discriminatory motive must be proved, the burden of proof can shift to the respondent State, as IACtHR claims. Quite the contrary, it recognised that shifting the burden of proof in such cases is difficult, in contrast to those cases where a discriminatory effect of a policy, decision or practice needs to be proved.

The IACtHR, subsequently, recognised the issue in *Nadege Dorzema* as one of indirect discrimination, since the norms, actions, policies and measures in question, although they are or appear to be neutral in their formulation, have a negative effect on Haitians.[196] The IACtHR did not have before it any concrete evidence which indicated that the violence was prejudice-based. Yet it found a discriminatory effect through reports from the United

192 Ibid., para. 219.
193 Ibid., para. 229.
194 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 179.
195 Ibid.
196 IACtHR 24 October 2012, (Ser. C.) No. 251 (*Nadege Dorzema et a./Dominican Republic*) (Merits, Reparations and Costs), paras. 235-238.

Nations Special Rapporteur on discrimination and its Independent Expert on minorities, as well as various international organisations reporting on historical practices of discrimination against Haitian migrants in the Dominican Republic.[197] Furthermore, it indicated that "States must abstain from taking any action that is directly or indirectly addressed, in any way, at creating situations of discrimination *de jure* or *de facto*" and that States are obliged to "take positive steps to reverse or to change discriminatory situations that exist in their societies to the detriment of a specific group of people."[198] Thus, it also concluded that in *Nadege Dorzema* there was an absence of preventive measures to adequately address situations relating to migratory control on the land border with Haiti.[199]

It is quite possible that cases similar to *Nadege Dorzema* may be presented (perhaps even sooner than expected) at the ECtHR. Some media have already reported on the violent treatment of migrants by border control guards, mostly in the context of the strict migration policy of the EU over the last couple of years.[200] If in the future it can be established that force, grounded in seemingly 'neutral' legislation or State policy, is disproportionately used by State agents towards a certain minority, this could lead to the finding of a negative effect of that legislation or policy in the relevant State and to a *prima facie* case of differential treatment. After a *prima facie* case has been established, the burden of proof could shift to the respondent State, which then holds the duty to offer an objective justification for that treatment. Where the respondent State fails to meet this duty, the Court may establish indirect discrimination. Because such violent conduct towards a minority group would then reflect "a general policy or measure that has disproportionately prejudicial effects on a particular group [although] it is not specifically aimed at that group."[201] In addition, and similar to the IACtHR, the ECtHR could require the Member State involved to take positive steps to eliminate the discriminatory nature of violence that it has conditioned through its legislation and/or border control policy.

Aside from the sterilisation cases and cases concerning the use of force by State agents, it may not always be easy to bring situations of discriminatory violence inflicted by State officials under the umbrella of indirect discrimi-

197 Ibid., para. 232.
198 Ibid., para. 236.
199 Ibid., para. 237.
200 See the following example: BGNNews.com, 'Yazidis fleeing ISIL beaten by Bulgarian police, freeze to death', 12 March 2015 (online). See also a recent article on the violent manner in which migrants are treated in Bulgaria: H. Kooijman, 'Bulgarije bewaakt angstvallig zijn grenzen. 'Ga er niet heen, je wordt vermoord'', 139/46 *Groene Amsterdammer* (2015), p. 14-17.
201 This is the ECtHR's definition of indirect discrimination, as recognised in ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 154; ECtHR 6 January 2005, 58641/00 (*Hoogendijk/The Netherlands*) (Admissibility Decision); ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 175.

nation. Therefore, it would be useful to find an additional way to facilitate a shift in the burden of proof to the respondent State in those cases where discriminatory violence is still viewed through the lens of direct discrimination.

Critics of the Court's approach propose that the burden ought to shift "when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic… ."[202] In addition to this, in the special context of violence against the Roma, Möschel observes that to enable a shift in the burden of proof, the Court could rely more on international NGO reports and official documents, instead of solely considering 'racial slur/insults'. Furthermore, he proposes that the Court could also 'simply' rely on its own case law and presume that the violence was racially motivated whenever the case involves a country that has often been a respondent in anti-Roma violence cases.[203]

Building on that approach, a solution which would make it easier to shift the burden of proof would be for the Court to stop requiring proof of motive in this type of case, but to require proof that a State agent's behaviour reflected a *discriminatory attitude* towards a victim during the killing or ill-treatment. Hence, the solution would be that the applicant must make out a *prima facie* case by showing a discriminatory attitude on the part of State agents during the physical abuse. A *prima facie* case may then be demonstrated by referring to discriminatory remarks uttered by State agents around the time the violence was inflicted or to internal instructions ordering State officials to treat individuals from a certain group in a violent manner. As shown above, these factual elements are already used in the Court's case law in establishing whether there was a discriminatory motive in cases of discriminatory violence inflicted by State agents. However, a *prima facie* case in this context – and thus the presence of a discriminatory attitude – may also be established in the following manner: in line with the above-mentioned proposals made by critics, it might already be sufficient to shift the burden of proof to the respondent State where an individual from a disadvantaged group has been treated in a violent manner by State agents, and statistics or reports from NGOs or other organisations show that persons from that disadvantaged group are systemically over-represented as victims of violence inflicted by State agents. Once this has been shown, the burden of proof could shift to the respondent State which must subsequently demonstrate that the less-favourable treatment in the case of that individual was not as a result of a discriminatory attitude and not part of the systemic violence which occurs in that Member State. Thus, in a case where it is alleged that a Roma victim was treated in a violent manner because of his or her ethnicity,

202 See introduction to section 5.5 and, in that context, most notably ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 18. See also section 2.4.2.

203 M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 501.

for example, it must be demonstrated – through statistics or reports – that Roma always or often suffer physical abuse inflicted by State officials for the burden of proof to be shifted.

In essence, through this proposal, cases regarding the negative duty of State agents to refrain from inflicting discriminatory violence will be approached in a similar manner to cases in which an administrative practice under Article 2 and Article 3 complaints is recognised.[204] Essentially, the proposal made here requires demonstration of a 'repetition of acts' of discriminatory violence by State agents in order for the burden of proof to shift to the respondent State. Hence, there must be (1) one particular kind of breach of the Convention (which is violence inflicted by a State agent upon an individual from a certain group); (2) a sufficient number of such breaches occurring in a country, and; (3) a connection between those breaches in such a way that they amount to a pattern.[205]

It is important to note that based on this proposal the burden of proof should not shift *automatically* in every case where it is established that a member from a disadvantaged group has been violently attacked by a State agent from the majority group in a society. Such a shift may only occur where there are clear signs that a State agent displayed a discriminatory attitude by, for example, making discriminatory remarks about the victim, or after it has been established that the violence inflicted by a State agent against the group to which the victim belongs is part of a *systemic practice*. If the Court were to derive a *prima facie* case of discriminatory violence solely based on the fact that an individual from a minority was attacked by a State agent who is member of the majority group, for example, that then may render Court's judgments as less credible and reduce the legitimacy of its case law. This applies particularly to *incidental* cases of discriminatory violence in which the facts indicate that something else may have been the reason for the violent behaviour of the State agent involved. And this applies even more where these cases concern countries in which complaints of discriminatory violence targeting one specific group are generally not frequent. In such cases it may be for example, that there was a personal dispute between a victim from a disadvantaged group and a State agent, who have known each other for quite some time.[206] In cases like these, the dispute may have potentially been the reason for the violence rather than some discriminatory attitude. Therefore, it would be inappropriate for the Court to establish discriminatory violence solely on the account of the groups to which the victims and the State agents belong, unless it can be established that State agents violently target victims from that particular group on a systemic basis.

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204 See section 5.4.2.

205 See section 5.4.2. M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 205.

206 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 152.

This issue of 'other reasons behind the crime' in incidental cases of discriminatory violence has also emerged in light of the 'whites only presumption', which was proposed as an option in criminal cases in the United States of America. This proposal entails that a presumption of racial motivation must arise in *any* case of violence committed by a Caucasian defendant against a member of a minority group. In practical terms, this means that once it has been proved that a Caucasian defendant has committed a crime against a victim belonging to a minority group, this ought to automatically trigger a presumption of racial motivation. The burden of proof to disprove the presence of a racial motive would then be placed on the defendant.[207]

This proposal has been strongly condemned. The main criticism is that the 'whites only presumption' could result in unwarranted convictions of those who were in fact *not* motivated by racism. If the 'whites only presumption' were to be applied in the case of a Caucasian defendant who wrongfully believed that a gang of African-American youths had threatened his life, for example, and for that reason, he had shot them unjustly, under this presumption the defendant would face the impossible burden of proving that racism was not the motivation for his actions.[208]

Thus, it is important to distinguish between allegations of discriminatory violence that appear to be incidental and allegations of discriminatory violence that fit into a pattern of numerous identical or similar allegations. The first type may only be recognised as discriminatory violence on the basis of concrete evidence, such as discriminatory comments made by State agents or through internal instructions to treat the victims in a violent manner. The second type can also be derived from statistics or reports which reveal that the violence against the group to which the victim belongs is systemic.

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207 'Combating Racial Violence: A Legislative Proposal', 101 *Harvard Law Review* (1987-1988), p. 1270-1286, p. 1271-1273 [Author Unknown]; M.L. Fleischauer, 'Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act', 17 *Florida State University Law Review* (1989-1990), p. 697-711. The concept of 'whites only presumption' was mentioned in J. Morsch, 'The Problem of Motive in Hate Crimes: the Argument against Presumptions of Racial Motivation', 82 *Journal of Criminal Law & Criminology* (1991-1992), p. 659-689, p. 674-675.

208 J. Morsch, 'The Problem of Motive in Hate Crimes: the Argument against Presumptions of Racial Motivation', 82 *Journal of Criminal Law & Criminology* (1991-1992), p. 659-689, p. 675-676. See also J.B. Jacobs & K. Potter, *Hate Crimes. Criminal Law and Identity Politics*, New York: Oxford University Press 1998, p. 17. Jacobs and Potter argue that no such presumption would be applied in inter-racial attacks by African-American perpetrators and underlined that enforcement of the proposal would amount to the argument that violent actions motivated by prejudice against Caucasians by minority group members would be more justified or understandable or that these crimes are less culpable or less destructive to the body politic than vice versa. The authors believe that such a view is difficult to follow and may even obstruct the Fourteenth Amendment's Equal Protection Clause.

In conclusion, this subsection suggested two new ways or circumstances under which the ECtHR could allow the burden of proof to shift from the applicant to the respondent State when it is alleged that a State agent has committed violence of a discriminatory nature. Both proposals, in essence, call for an elimination of the legal concept of motive as a requirement for recognising this type of discriminatory violence in the Court. The idea behind this is that requiring proof of a discriminatory *effect* (first proposal) or a discriminatory *attitude* (second proposal) would make it easier to shift the burden of proof from the applicant to the respondent State and increase the chances of finding a violation of Article 14. In this way, the injustice suffered by disadvantaged groups due to discriminatory violence inflicted by State agents can be more easily recognised.

Both these suggestions to some extent add to a more substantive conception of equality in the Court's case law. The first proposal, suggesting a way to approach the complaints at issue as matters of indirect discrimination, offers a way to recognise the existence of discriminatory violence even where this is not explicit. Hence, it acknowledges that discriminatory violence can follow from a neutral provision or State policy. In addition, it calls for positive action from the Member States concerned to correct this type of discrimination that is conditioned by their legislation or policy. The second proposal also adds to the substantive conception of equality, since, in line with that conception, it takes as its starting point that some persons, often because of their membership of a particular group, are systematically subjected to disadvantage, discrimination, exclusion or even oppression.[209] The proposal to require demonstration of a discriminatory attitude instead of a discriminatory motive would enable the Court to more easily recognise systemic discriminatory violence.

5.6 Conclusion

The notion of the 'burden of proof' has an important regulatory function in proceedings at the Court, since it indicates the party that must prove an assertion. The ECtHR, akin to domestic and other international courts, traditionally places the burden of proof on the complaining party, i.e. the applicant, who needs to deliver *prima facie* evidence of his or her version of the events. If the applicant succeeds in this, the burden of proof then shifts to the respondent State which must disprove the allegations made.

However, it may be quite a challenge for the applicant to prove an assertion before the Court, because the applicant is usually a citizen complaining about State conduct. As observed earlier, in many cases concerning Article 2 and Article 3 related issues, the applicant may be challenged in presenting *prima facie* evidence, as it is the Member State which holds all the crucial

209 See section 2.4.1.

information. Therefore, being aware of the somewhat 'weaker' position of the applicant facing a Member State as its 'opponent' in the proceedings, the Court sometimes deviates from its traditional approach in applying *actori incumbit probatio* and implements other ways to enable a shift in the burden of proof. In certain cases, for example, it highlights that it will examine all the material before it, whether originating from the parties or other sources, and, if necessary, that it will obtain material *proprio motu* (e.g. *Ireland/United Kingdom*). In other cases, it maintains the traditional rule that the applicant must make out a *prima facie* case, but uses presumptions and inferences in order to shift the burden to the respondent State and eventually to find a violation of the Convention under various circumstances (e.g. *Salman/Turkey*, *Al Nashiri/Poland*). In cases regarding numerous identical or similar complaints, it can presume the presence of an administrative practice of wrongful conduct of a certain kind, enabling it to infer a violation of the Convention (e.g. *Ireland/United Kingdom*).

Particularly challenging to prove are allegations concerning Article 14 read in conjunction with Articles 2 or 3 ECHR. These complaints take on a further dimension, because in addition to the violence itself, the aspect of a discriminatory nature of the violence is involved. The types of obstacles that an applicant may face under these complaints depend on the type of discriminatory violence alleged. Cases regarding the positive duties to effectively investigate discriminatory violence or to take preventive measures against such wrongful conduct, are generally easier to establish than complaints under which it is alleged that State agents inflicted discriminatory violence upon members of certain disadvantaged groups.

Under the two positive duties, other issues in relation to the burden of proof also arise. As shown earlier, it is not always clear whether the Court actually distributes the burden of proof between the parties or rather if on the basis of the domestic case file it verifies whether an effective investigation into discriminatory violence took place or whether sufficient protective measures were taken against this type of physical abuse. The Court could resolve this vagueness in its judgments by explicitly stating that it will examine the case file of its own motion and evaluate whether any errors in light of the positive duties were made by the respondent State. Otherwise, it could identify the applicant as the party that bears the burden of proof to make out a *prima facie* case and pinpoint the moment when the burden of proof shifts to the respondent State.

Despite this vagueness about who carries the burden of proof in cases concerning allegations of breaches of (one of) the two positive duties under Article 14 read in conjunction with Article 2 or 3 ECHR, the Court has frequently managed to establish violations of these provisions in this context. This may be due to the fact that, in contrast to cases where it is alleged that State agents had committed discriminatory violence, there is no need to prove a discriminatory motive. Consequently, complaints regarding both types of positive duties may be established on the basis of a wide variety of evidence and under a wide variety of circumstances, including solely on the

basis of evidence of a general systemic problem of discriminatory violence in a country. By acknowledging that the discriminatory nature of violence ought to be addressed with positive action, the Court has also introduced a substantive equality approach in this field of its case law.

However, in the context of the negative duty of State agents to refrain from inflicting discriminatory violence, the ECtHR has made less effort to implement a substantive conception of equality. Therefore, this chapter has suggested a few ways to promote substantive equality under this specific duty by introducing two new circumstances that the Court may consider in order to shift the burden of proof from the applicant to the respondent State. Both circumstances allow the Court to address issues of systemic discriminatory violence. The first proposal requires the applicant to establish a *prima facie* case of a discriminatory effect of domestic legislation or State policy conditioning discriminatory violence in a Member State. In that sense, it is inspired by the Court's reasoning in cases concerning indirect discrimination. The second proposal requires the applicant to prove a discriminatory attitude on the part of State agents around the time that the violence was inflicted. Under both proposals, it is therefore unnecessary to demonstrate the presence of the challenging legal concept of discriminatory motive. The idea is that by implementing these proposals in ECtHR case law, the Court could more easily recognise that discriminatory violence was committed by State agents and that the respondent States concerned can be held responsible for it.

The next chapter looks at the types of evidence through which systemic discriminatory violence inflicted by State agents may be revealed. Most notably, it asks under what circumstances statistics and reports from intergovernmental organisations and NGOs may help to establish the presence of systemic discriminatory violence in a Member State.

6 Evidentiary material used to prove discriminatory violence at the ECtHR

6.1 Introduction

Having addressed the issues of standard of proof and the distribution of the burden of proof in cases concerning discriminatory violence, this penultimate chapter looks at the matter of the evidentiary material by which the three different types of discriminatory violence may be proved. It considers evidence that the Court has used to establish violations of the Convention in all three types of cases. It further explores how systemic discriminatory violence may be proved, particularly in the context of the negative obligation of State agents to refrain from inflicting discriminatory violence. As indicated earlier, the Court could come even closer to a substantive conception of equality than it already has, by no longer requiring applicants to prove a discriminatory motive under these types of complaints. Instead, it could require applicants to make a *prima facie* case by proving a discriminatory effect of specific legislation or a State policy that enables discriminatory violence by State agents in a country, or to deliver *prima facie* evidence of a discriminatory attitude on the part of State agents who have inflicted violence upon a member of a certain group. This chapter therefore concludes with the evidentiary material by which such a discriminatory effect or discriminatory attitude could be uncovered.

'Evidence' is understood in this study as information by which facts tend to be proved.[1] In domestic legal systems this term has several meanings.[2] It can be classified in terms of the form in which it may be presented in court (hence, as oral evidence, documentary evidence and things[3]), but also in terms of its substantive content, the purpose for which it is presented and the rules by which its admissibility is determined.[4]

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1 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 2.

2 H. Malek Q.C., 'Introduction', in: H.M. Malek (ed.) *Phipson on Evidence*, London: Thomson Reuters (Legal) Limited 2010, p. 1-51, p. 4.

3 'Things' are also referred to as 'real evidence' and usually take the form of a material object for inspection. Additionally, they may include the physical appearance of persons and animals, the demeanour of witnesses, the intonation of voices on a tape recording, inspections out of court of the *locus in quo* or of some object which is impossible or inconvenient to bring to court, and out-of-court demonstrations or re-enactments of acts or events into which the court is enquiring. See A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 12.

4 Ibid., p. 10.

The ECtHR approaches the term 'evidence' in its own unique and autonomous way. Specifically, it understands it in light of the broad principle of 'free evaluation of evidence'.[5] This means that the Court enjoys absolute freedom in determining the admissibility of evidence and its value or importance in a particular case.[6] Furthermore, the term 'evidence', when it comes to the various forms in which it can be presented at the ECtHR, has a somewhat different meaning than in other – notably domestic – legal systems. For example, in most cases the Court finds information about the facts of a case through factual elements that have already been established in a national context and recorded in the case file. For this reason, in this study these factual elements from the case file fall under the umbrella of 'evidence', in addition to the evidentiary material that may actually become apparent or be presented to the Court, such as witness testimonies, expert evidence, statistics or reports from intergovernmental organisations or NGOs.

In order to highlight the evidentiary material through which the three types of discriminatory violence may be established, this chapter will consider the following aspects. The ECtHR's approach to the admissibility of evidence generally, with admissibility meaning "[t]he quality or state of being allowed to be entered into evidence in a hearing, trial, or other official proceeding" is set out in section 6.2.[7] Section 6.3 subsequently outlines the different factual elements – which have thus mainly been recorded in the domestic case file – through which the three different types of discriminatory violence may be proved at the Court. It particularly zooms in on discriminatory remarks which were uttered by State agents somewhere around the time of the violent events. Discriminatory remarks are analysed in more depth because they are expressed by the perpetrators in various terms. It is therefore interesting to note what types of remarks amount into a finding that Article 14 read in conjunction with Article 2 or 3 was violated, and what types of remarks are less successful in this context. Sections 6.4 and 6.5 turn to important evidentiary material, such as statistics and reports from intergovernmental organisations or NGOs. These two types of material may be particularly useful in revealing systemic discriminatory violence in a Member State, and thus for that reason deserve significant attention in this study. In this context, the conditions under which statistics and reports can be used by the Court to establish the various forms of discriminatory violence are discussed. The argument is made in these sections for a more progressive

5 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 12.

6 Ibid.

7 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 18.

approach to be taken when using these types of evidentiary materials to prove discriminatory violence, particularly in the context of complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence.

6.2 Admissibility of evidence in ECtHR proceedings

There are no explicit provisions regulating the admissibility of evidence in proceedings before the ECtHR. Yet, the Court allows itself complete discretion when it comes to the admissibility and evaluation of evidence.[8] The Court's general approach in this regard so far has been to accept all kinds of evidence offered to it. This approach was embraced in *Ireland v. United Kingdom*, when the Court underlined that "[i]n order to satisfy itself, the Court is entitled to rely on evidence of every kind, including, insofar as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials."[9] In addition, the Court has established that in proceedings before it:

> "… there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions …."[10]

The 'free evaluation of evidence' principle thus entails that all relevant, legally obtained material may be accepted as evidence and that no person is barred from being a witness.[11] Consequently, evidence can be submitted to the Court in a variety of forms, including "decisions of national courts on issues of fact, statements incorporating the evidence of witnesses (whether in the form of sworn statements, or otherwise), expert reports and testimony (such as medical reports), official investigation reports and other documentary evidence such as video or photographic evidence."[12] Hearsay evidence is not prohibited and there are no fixed rules concerning illegally obtained

8 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 11.

9 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 209.

10 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.

11 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 73.

12 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 11.

evidence, privileged documents or perjury.[13] Yet, as stressed earlier, in practice, the Court relies mainly on information about the facts of a case as recorded in the case file.[14]

The Court also has broad discretion *not* to admit evidence. Two elements are considered to be influential in this regard. The first is related to questions of procedural equality. This means that the Court solely evaluates evidence or factual elements recorded in the case file which have been disclosed to all parties. The second concerns the Court's case load, which also influences the Court's ability to accept evidence submitted by the parties. Leach, Paraskeva and Uzelac observe in this regard a tendency on the part of the Court not to admit into the Court's files evidence which is not sought by the Court or which is submitted 'out of turn'. Evidence submitted 'out of turn' refers to situations in which evidence is "submitted by a party other than at a point in the proceedings when that party has been invited by the Court to make submissions."[15]

The rationale behind 'the free evaluation of evidence' principle lies in the fact that the ECtHR is very often located far from the countries where the violations allegedly occurred and that, in almost all cases, the Court has to use documents submitted by the parties. Hence, because evidence may be difficult to obtain, the Court refers to as much material as possible in order to establish the facts of a case.[16]

6.3 Factual elements from the domestic case file pointing to discriminatory violence

When determining whether a Member State has disregarded its duties under any of the three types of discriminatory violence complaints, the Court does not hear witnesses or experts or conduct any fact-finding missions for that purpose. Rather, it primarily turns to the domestic case file for its assessment of the facts. Certain factual elements will be recorded in the case file which have already been established by State officials in the national context and which may point to a violation of the Convention. Most of these elements were already mentioned in sections 2.2 and 5.5. The factual

13 Ibid.

14 K. Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context', 1 *International Humanitarian Legal Studies* (2010), p. 275-303, p. 279.

15 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 12.

16 Ibid., p. 13. See also U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 73; O. Mjöll Arnardóttir, 'Non-discrimination Under Article 14 ECHR: the Burden of Proof', *Scandinavian Studies In Law*, p. 18 (online).

elements, and how they may contribute to finding that there was a violation of Article 14 read in conjunction with Article 2 or 3, are discussed in more detail below. Because most of these factual elements may be used by the Court to establish violations of all three duties in the context of discriminatory violence, they are not discussed per type of discriminatory violence complaint. Instead they are discussed below in order of persuasiveness, which means that those factual elements that provide the strongest indication of a violation in the context of the three types of discriminatory violence are discussed first.

The strongest indication of discriminatory violence is a confession by a perpetrator that he or she exhibited violent behaviour because for a discriminatory reason and the absence of any State action to address this. This type of factual element has so far only been raised in ECtHR cases concerning the failure of State agents to conduct an effective investigation into discriminatory violence. In *Angelova and Iliev*, regarding the beating and subsequent death of a Roma individual by seven Bulgarian teenagers, the Court noted that the discriminatory motives of the assailants in perpetrating the attack against the applicants' relative became known to the authorities at a very early stage of the investigation, when one of the assailants gave the reason for the attack.[17] The assailant explained to the police that "[t]he Gypsy had not provoked us in any way[,] neither with words nor with actions... We beat him because he was a Gypsy."[18] For the Court, it was 'completely unacceptable' that, following such a statement from the assailant, the authorities did not expeditiously complete the preliminary investigation against all the perpetrators and bring them to trial and, furthermore, failed to charge them with any 'racially motivated offences'.[19] So, if despite a confession that the violence was motivated by discrimination, the State authorities still refuse to conduct an effective investigation into the allegation, the Court may find that a Member State has breached the Convention on the basis of that factual element.

Another factual element, arising specifically in the context of the negative duty of State agents to refrain from inflicting discriminatory violence, is the existence of internal police or other official instructions to treat suspects from a certain group in a particular (violent) manner. In *Antayev*, the Court took this factual element into account to establish that Russian State agents had ill-treated the Chechen applicants for discriminatory reasons and, therefore, that Article 14 read in conjunction with Article 3 was violated. The Court noted that pursuant to internal instructions, the local police had called the Regional Department for Combating Organised Crime (RUBOP) and a group of armed special police officers to assist them in carrying out searches at the homes of the two applicant families to investigate only a

17 See ECtHR 26 July 2007, 55523/00 (*Angelova and Iliev/Bulgaria*), para. 116.
18 Ibid., para. 13.
19 Ibid., para. 116.

minor offence because the suspects were of Chechen origin. According to the Court, the ill-treatment that the applicants subsequently suffered at the hands of the local police, the ROBOP and the special police officers was inflicted on them intentionally and for no apparent reason.[20] In establishing discriminatory violence in *Antayev*, the Court also considered the "racist verbal abuse" to which the applicants had been subjected during their ill-treatment by the State agents involved,[21] hence, this was another factual element. While beating the applicants the agents had uttered "Why don't you go to Chechnya, to fight us there?"[22] and that they would not be able to "beget more Chechens."[23]

Thus, discriminatory remarks expressed by a State agent before, during or after his or her violent behaviour towards a victim from a certain group, constitute another important factual element indicating that the violence inflicted by that particular State agent was prompted by a discriminatory motive.[24] As demonstrated by the example of *Antayev*, such remarks may lead to the determination that there was an Article 14-related violation in combination with another factual element. However, discriminatory remarks on their own may already be sufficient for the Court to find that a State agent was guilty of discriminatory violence, thus, without reference to any additional factual elements.[25] For example, in *Stoica*, which concerned a dispute that arose between a number of Roma individuals and a group of Romanian police officers, the Court considered a number of witness testimonies claiming that a police officer had asked one of the Roma men, whether he was "Gypsy or Romanian". After the victim had answered that he was a "Gypsy", a deputy mayor asked the police officers and the public guards to teach him and the other Roma "a lesson". The Court additionally took into account that a police report referred to the behaviour of the Roma individuals who were involved in this case as "pure Gypsy". According to the Court, these statements were clearly stereotypical and proved that the State officials were "not racially neutral."[26]

Discriminatory remarks were further relied on by the Court in *Makhashevy v. Russia*. In that case, one of the applicants claimed that, among other things, Russian police officers shouted at him "You Chechens are all faggots. Why did you come over here? Go back to Chechnya..."[27], and "[i]f you or your brother try to complain, we will kill you right here. We will not be

20 ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.
21 Ibid.
22 Ibid., para. 12.
23 Ibid., para. 15.
24 See also ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 128-130; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179; M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 489.
25 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 128-132.
26 Ibid., paras. 7 and 128.
27 ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), para. 9.

held responsible for a Chechen,"[28] while beating him. Such remarks, some of which were confirmed by witnesses in this specific case, were sufficient to prove that the police officers acted violently on the basis of discriminatory motives.[29] So, a *prima facie* case of discriminatory violence inflicted by the police was established. The government did not submit any explanation for the police officers' conduct other than making a general statement to the effect that it was unsubstantiated.[30]

It is useful to observe in this regard that not all statements or remarks which appear to be tendentious or biased, necessarily amount to a *prima facie* case that the violence inflicted by State agents was prompted by a discriminatory motive. In *Nachova*, for example, the uttered words "you damn Gypsies" over the dead bodies of the two victims, did not amount to a *prima facie* case being established.[31] The reason why a remark 'works' in one case, and does not in another, depends not only on its substance, but also on the circumstances in which it was made. In *Makhashevy*, the Court explained that a *prima facie* case had been established in that case because no further explanation had been given by the government for the reasons which necessitated the authorities' intervention and the use of force against the Chechen applicants. The Court compared this case to *Nachova*, and stated why it had not established a *prima facie* case of discriminatory violence inflicted by State agents in the latter. This was because in *Nachova*, the authorities' actions were aimed at arresting two men who had escaped from detention while serving a prison sentence.[32] Therefore, in a case like *Makhashevy*, tendentious remarks may result in a finding that a State agent had committed discriminatory violence, since the violence was inflicted for no apparent reason. While in a case like *Nachova*, the violence may have been due to the circumstances under which the State agents were operating, which made the tendentious remarks less persuasive in terms of finding that there had been a violation of the Convention.

Not only does the Court rely on discriminatory remarks in order to establish violations in cases where the complaint is made that State agents themselves inflicted discriminatory violence, but the Court also draws on them to conclude that State officials failed to conduct an effective investigation into discriminatory violence, regardless of whether the violent act was committed by State agents or private individuals. As indicated earlier in subsection 2.2.2, discriminatory remarks may be an indicator that Article 14 read in conjunction with Article 2 or 3 was violated, because during an investigation into the violence inflicted on members of a certain group,

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28 Ibid., para. 11.
29 Ibid., para. 176.
30 Ibid.
31 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 153. In this case a witness had testified before the domestic authorities that a State agent had shouted out "you damn Gypsies", right after he had killed two Roma individuals.
32 ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), para. 178.

police officers, prosecutors or judges made discriminatory remarks about the applicants or – in the case of killings – about the deceased victims.[33] *Petropoulou-Tsakiris* provides a suitable example in this regard. In that case, the Court noted that throughout the investigation into the applicant's ill-treatment by the police a Greek Deputy Director of Police made tendentious general remarks concerning the applicant's Roma origin. In a report concerning the applicant's ill-treatment, he stated that complaints raised by Romani individuals were exaggerated and formed part of their "common tactic to resort to the extreme slandering of police officers with the obvious purpose of weakening any form of police control."[34] According to the Court, the failure of the authorities to investigate possible 'racial motives' for the applicant's ill-treatment, combined with their attitude during the investigation, constituted discrimination contrary to Article 14 taken in conjunction with Article 3.[35]

There are further examples which may be mentioned in this context. In *Cobzaru*, a military prosecutor who had to decide whether alleged anti-Roma violence required investigation, referred to the applicant and his father as "antisocial elements prone to violence and theft", who were in constant conflict with "fellow members of their ethnic group."[36] Moreover, the term 'Gypsy' was used on frequent occasions by the prosecutors. The Court labelled several of these remarks as 'tendentious' and stressed that they disclosed "a general discriminatory attitude [on the part] of the authorities."[37] In the previously-mentioned *Milanović* case too, where the Court had to decide whether Serbian authorities had failed to conduct a proper investigation into an attack by members of a right-wing organisation of Mr Milanović, the Court took into consideration tendentious remarks uttered by State agents during the investigation. The Court observed that during the national investigation into the attacks, the police officers referred to the "applicant's well-known religious beliefs, as well as his 'strange appearance', and apparently attached particular significance to 'the fact' that most of the attacks against him had been reported before or after a major orthodox religious holiday, which incidents the applicant subsequently publicised through the mass media in the context of his own religious affiliation."[38]

Where it has been alleged that discriminatory remarks have been uttered by perpetrators just before, during or after a violent act, and the authorities failed to investigate a possible discriminatory motive behind such acts, the Court has more quickly used such remarks to establish that the Member State breached the relevant positive duty in this context than in cases con-

33 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 100; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 63-66.
34 ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65. See also para. 29.
35 Ibid., para. 66.
36 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 28.
37 Ibid., para. 100.
38 ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), para. 100.

cerning the negative duty of State agents to refrain from inflicting discriminatory violence, for example. In this regard, it is again irrelevant whether the perpetrators were State agents or private individuals.[39] According to the Court, the fact that such discriminatory remarks were made raises a suspicion of violence of a discriminatory nature that the State authorities should investigate.[40] Hence, the remark '[y]ou damn Gypsies', in *Nachova* did not lead to a finding that the negative duty had been breached by Bulgaria. However, the Court did establish in that case that such a statement, seen against the background of the many published accounts of the existence of prejudice and hostility towards Roma in Bulgaria, called for verification and thus a proper investigation.[41] Furthermore, the Court stated that:

> "... any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives."[42]

The Grand Chamber additionally considered that the grossly excessive force used by the State agent against two unarmed and non-violent men also called for a careful investigation.[43]

The Court also recognised that the following statements required further investigation into potential discriminatory motives: the words "get out of here you black whore" expressed towards a woman of Nigerian origin while violence was inflicted on her;[44] slurs such as "Negroes" and "[d]irty negroes, what are you doing here" uttered by skinheads towards two persons of Sudanese origin during the violence;[45] the question put by a perpetrator to three individuals about whether "[they] could not handle a dirty little gypsy" right before beating another individual of Roma origin, and subsequent remarks expressed on a social network right after the beatings, through which the perpetrator expressed that he "had been kicking in the head a gypsy lying on the ground when [he] was overcome by three of his buddies."[46]

Finally, discriminatory remarks may also be used as evidence in cases where an alleged failure by State officials to take protective measures against discriminatory violence has been put forward, although very few examples

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39 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 163-164; ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*), paras. 73-74; ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 61.

40 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 160.

41 Ibid., paras. 162-168.

42 Ibid., para. 164.

43 Ibid., para. 165.

44 ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), paras. 61-63.

45 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 49-53.

46 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), paras. 10-11 and paras. 60-76.

could be found to include here. *Gldani* may be recalled in this context, a case in which the Court took into consideration the fact that State agents made discriminatory remarks about the victims, who were Jehovah's Witnesses, while the victims were filing their requests for protection from violence inflicted by a group of Orthodox believers.[47] In this context, the Court noted how the head of the police station, after learning about the attacks, stated that "in the attackers' place, he would have given the Jehovah's Witnesses an even worse time!,"[48] instead of offering the requisite protection from violence to the victims. The Court further noted that three other police officers did not take action because, according to those officers, they "didn't get involved in that type of incident."[49] Another example can be found in the case *Eremia* in which the applicant allegedly suffered violence inflicted by her husband. In that case, the local police suggested that she should try reconciliation, as she was "not the first nor the last woman to be beaten up by her husband."[50] This statement, in combination with the authorities' failure to speed up the examination of her request for a divorce, to enforce a protection order in the applicant's name as well as general information on violence against women in Moldova, enabled the Court to conclude that there had been a violation of Article 14 in conjunction with Article 3.[51]

Finally, it should be noted that references to a victim's origin and/or characteristics alone are insufficient to find that a violation has taken place in the context of any type of allegation of discriminatory violence. Thus, referring to the victim as 'the Gypsy'[52] and State agents' reference to a person's 'dark colour of the skin'[53] are not considered by the Court to be discriminatory in nature.[54] Furthermore, in *Balogh*, the Court did not follow the applicant in his complaint that State agents had inflicted discriminatory violence upon him while he was in detention, despite the fact that a police officer had said to him "[t]ell the Miskolc gypsies that they had better not set foot in Orosháza."[55]

It seems reasonable that the Court does not automatically assume that a discriminatory aspect triggered the violence on the basis of mere references to a person's ethnicity (such as a Romani origin) or a physical characteristic (such as a dark skin colour), for example. After all, these may simply be

47 See, for example, ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 140. See also section 2.2.3.
48 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 28.
49 Ibid. See also paras. 44 and 140-142.
50 ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), para. 87.
51 Ibid., paras. 86-90.
52 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), para. 164. See also ECtHR 10 June 2010, 63106/00 (*Vasil Sashov Petrov/Bulgaria*), paras. 69-73 and ECtHR 22 February 2011, 24329/02 (*Soare a.o./Romania*), paras. 197-209.
53 ECtHR 18 May 2000, 41488/98 (*Velikova/Bulgaria*), para. 92.
54 Ibid., para. 94. ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), para. 168.
55 ECtHR 20 July 2004, 47940/99 *(Balogh/Hungary*), para. 75.

a means of identification or a description of a person's features. Although such expressions reveal that the perpetrator has spotted that there is something 'different' about his or her target, it remains hard to tell whether the perpetrator inflicted the violence because of these distinct features.[56] The discriminatory remarks that actually amounted to *prima facie* evidence under the three types of complaints of discriminatory violence and that have been discussed in this section, generally exhibit clearer expressions of hostility towards the group to which the victim belongs.

A further important factual element indicating that the violence was discriminatory in nature, lies in the establishment – or even in the very assumption – that the violence was committed by a group which by its nature is governed by an extremist and/or prejudice-based ideology, such as a skinhead group or a far-right group.[57] The perpetrators' alleged membership of such a group invokes a Member State's positive duty to effectively investigate the discriminatory nature of the violence or to take protective measures against this wrongful act. For example, in *Milanović*, the Court attached importance to the suspicion that the applicant, a leading member of the Hare Krishna community in Serbia, was attacked by members of an organisation called *Srpski vitezovi*, a local branch of a far-right organisation called *Obraz*.[58] In the Court's view, this required an effective investigation into a crime that had "most probably been motivated by religious hatred."[59] In *Sakir v. Greece*, the Court concluded that the Greek government had failed to effectively investigate whether the ill-treatment of an asylum seeker in Greece had been caused by racist attitudes ('*des attitudes racistes*'[60]) of the 15 to 20 private individuals who had beaten the victim. According to the Court, Mr Sakir's beating had to be viewed in the overall context of the phenomenon of racist violence which has been occurring in central Athens since 2009. The Court noted that there was a recurrent pattern of attacks on foreign-

56 See ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), *dissenting opinion of Judge Kjølbro*, para. 10. In the context of anti-Roma violence, the judge makes a difference between violence against a person who is of Roma origin, and violence against a person because of the person's Roma origin. Kjølbro indicates that in the first situation the ethnic origin of the victim is a statement of fact, in the other it is the cause of the violence.

57 See ECtHR 31 May 2007, 40116/02 (*Šečić/Croatia*), para. 68; ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), para. 98; ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 49-50.
Using this type of evidence to raise a suspicion on discriminatory violence is quite common in other jurisdictions as well. For example, police officers investigating bias crimes in the United States of America often perform a background check on the perpetrators to examine whether they have some affiliation with any white supremacy group, since such affiliation may strongly point at a discriminatory motive (see United States Court of Appeals, Sixth Circuit, 28 May 1991, *United States/Gresser*, 935 F.2d 96 (6th Cir. 1991), para. 10; United States Court of Appeals, Tenth Circuit, 25 August 1989, *U.S./Lane*, 883 F.2d 1484 (10th Cir. 1989)).

58 ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), paras. 7-9 and 98.

59 Ibid., para. 99.

60 ECtHR 24 March 2016, 48475/09 (*Sakir/Greece*), para. 64.

ers, perpetuated by groups of extremists, often with ties to the 'neo-fascist' political party Golden Dawn. For this reason the authorities were obliged not only to properly investigate the case, but also, in particular, to make a connection between the assault on Mr Sakir and other similar incidents. In this context, they were under a duty to identify whether the perpetrators had links with extremist groups known to have committed racist attacks in Athens.[61]

The fact that the Court highlighted that these attackers' belong to a far-right group, is in line with the object and meaning of the Convention, which, in the Court's view, also includes the notion of pluralism. This implies that Member States must observe their positive duty to protect and safeguard pluralism in their societies and, arising from that, impose restrictions on groups that threaten this pluralism,[62] such as extremist groups, skinheads and similar.

The Court has to a lesser extent relied on some other factual elements to establish that State authorities failed to live up to specific duties in the context of discriminatory violence. For example, in *Yotova*, it held that State agents failed to conduct an effective investigation into discriminatory violence inflicted upon a Roma woman. The Court noted that three days before the incident involving the applicant occurred, there had been a series of violent clashes and intimidation in the applicant's neighbourhood which took place between a number of individuals of Roma origin and a number of individuals of Bulgarian origin. In the Court's view, such a clash between different ethnic groups is a possible indicator – i.e. a factual element – that the case of the applicant also involved an act of discriminatory violence that the national authorities were further obliged to investigate.[63] A few years later, in *Balázs*, the Court highlighted that an effective investigation should also be conducted by the national authorities "when it comes to offences committed to the detriment of members of particularly vulnerable groups,"[64] such as Roma.

This section has set out a variety of factual elements that the Court may use in order to establish whether a Member State has acted in accordance with its duties arising under the three types of complaints of discriminatory violence. Overall, it may be concluded that the strongest indicator of discriminatory violence is a confession from a perpetrator that a discriminatory motive was the reason for the violent behaviour. Until now, this type of factual element has been relied upon by the Court only in the context of complaints concerning the duty of the State to effectively investigate a potential act of discriminatory violence. It may be expected however that this type of

61 Ibid., paras. 64-73.
62 A.J. Nieuwenhuis, 'The Concept of Pluralism in the Case-law of the European Court of Human Rights', 3 *European Constitutional Law Review* (2007), p. 367-384, p. 368.
63 ECtHR 23 October 2012, 43606/04 (*Yotova/Bulgaria*), para. 106.
64 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), para. 53.

factual element could play a significant role in the Court's future case law when finding that State agents inflicted discriminatory violence themselves, i.e. if the State agents involved admit that their violent actions were motivated by bias. However, since confessions are rare, the Court mostly draws on other factual elements in order to establish a violation of Article 14 read in conjunction with Articles 2 or 3. Discriminatory remarks uttered by State agents or private individuals somewhere around the violent events, or the perpetrators' membership of a skinhead or far-right group, come closest to a confession, because they may indicate how a perpetrator views individuals from a certain group. In some cases, such as *Antayev*, this may amount to a finding that State officials acted violently on the basis of a discriminatory motive. In most cases the Court highlights these factual elements to indicate that they should have prompted a Member State to take action in a national context, by effectively investigating acts of discriminatory violence and by offering appropriate protection to victims of such.

6.4 Statistics

This section aims to highlight the potential for using statistics to prove complaints concerning discriminatory violence, particularly in the context of complaints concerning the negative duty of State agents to refrain from inflicting this wrongful conduct. The notion of 'statistics' includes both official and non-official statistics. Official statistics relate to numerical data collected and published by governments. By contrast, non-official statistics refer to numerical data collected and published by various public and private organisations.[65]

For the purpose of this section, it is necessary to recall the two ways that were introduced in chapter 5 to move towards a more substantive conception of equality in the context of a State agents' negative duty to refrain from inflicting discriminatory violence. The first way proposes how these types of complaints may be approached as issues of indirect discrimination. It will be demonstrated below that statistics can sometimes be used in this context to prove the discriminatory effect of a provision, criterion or practice that has created a situation in which State officials inflict violence upon members of a specific group. The Court has recognised that the negative effect of a provision, criterion or practice must be "disproportionately high"[66] or needs to have "considerably more impact"[67] on the disadvantaged group in order

65 See *Sociological Research Skills*, to be consulted via http://www.sociology.org.uk/methos.pdf (online).

66 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 193. See also ECtHR 16 March 2010, 15766/03 (*Oršuš a.o./Croatia*) (GC), para. 150 and ECtHR 29 January 2013, 11146/11 (*Horváth and Kiss/Hungary*), para. 105, where the Court mentions "disproportionately prejudicial effects" as a criterion to determine the adversity of the impact.

67 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 193.

to amount to differential treatment. Therefore, statistics can help to measure whether physical abuse inflicted on members from a certain group by State agents is indeed disproportionate. The common use of the term 'disproportionate' refers to the extent or degree to which something appears to be inappropriate or 'out of proportion' when compared to something else.[68]

The second way proposes that the Court could establish that State agents inflicted discriminatory violence on individuals from certain groups on the basis of a discriminatory attitude, rather than seeking a discriminatory motive. Under this umbrella, it has been suggested that a discriminatory attitude need not necessarily be derived from certain factual elements, such as discriminatory remarks,[69] it could also be established when it appears that an allegation of discriminatory violence inflicted by State agents fits into a pattern of numerous, similar complaints in a Member State. Statistics would then be useful in revealing the existence of such a pattern.[70]

Before exploring the potential usefulness of statistics as evidence in the context of ECtHR cases on discriminatory violence, some general views on the value of statistics in discrimination cases are first set out in subsection 6.4.1. EU law has been referred to in this context to indicate some of the advantages as well as some sensitive matters when statistics are used as evidence in anti-discrimination case law. Subsection 6.4.2 then surveys how the ECtHR has used statistics. The focus here was placed on cases of indirect discrimination, as the Court has laid down ground rules concerning the use of statistics in such cases. Subsection 6.4.3 highlights the Court's use of statistics in all three types of discriminatory violence cases so far, and further discusses the circumstances in which statistics may be useful in these cases at the Court. Notably, they can help to reveal a form of discriminatory violence that may be regarded as indirect discrimination or situations in which discriminatory violence is inflicted so often upon members of a certain group that it fits into a pattern of complaints in the Member State concerned. In the ECtHR context, however, whether or not statistics can be used in this manner depends on their availability. Such information is not always available. In this subsection therefore ways of enhancing the availability of such information are called for through setting up systems to gather statistics about discriminatory violence in Council of Europe Member States.

6.4.1 General views on statistics as evidence

Acts of discrimination are inherently subjective. For this reason it is difficult to provide direct evidence of discrimination. Ambrus argues that because of this difficulty, an applicant should merely invoke a presumption of dis-

68 B. Bowling & C. Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search', 70 *Modern Law Review* (2007), p. 936-961, p. 943-944.

69 This was, for example, the case in *Stoica* and *Makhashevy*.

70 See section 5.5.2.

crimination instead of having to prove that discrimination has taken place.[71] Such a presumption could be shown by using a comparison as means of evidence.[72] The comparison, in turn, could be demonstrated with statistics.

Statistics can be a useful tool in establishing discrimination, as they enable an adjudicator to compare the situation of different groups. They are particularly valuable in demonstrating the presence of indirect discrimination and systemic direct discrimination because in both cases statistics can reveal the effect of legislation, condition or a practice on a particular group.[73] Statistics have been used by other regional courts, such as the CJEU (Court of Justice of the European Union), in the field of anti-discrimination law. The CJEU preceded the ECtHR in using statistics in the context of indirect discrimination. For example, in its *Rinke* judgment, the CJEU stated that:

> "It is clear from the statistical data referred to by the Advocate General at points 36 and 37 of his Opinion that the percentage of women working part-time is much higher than that of men working on a part-time basis. That fact, which can be explained in particular by the unequal division of domestic tasks between women and men, shows that a much higher percentage of women than men wishing to train in general medicine have difficulties in working full-time during part of their training. Thus, such a requirement does in fact place women at a particular disadvantage as compared with men."[74]

How can statistics demonstrate a 'particular disadvantage' of legislation, condition or practice upon one group compared with another? Essentially, statistics can be used to compare two groups with one another: under EU law, they are sometimes referred to as the 'reference group' and the 'selected group'. The first represents the dominant group of individuals or the majority, while the second refers to a disadvantaged group or minority group. The distinction between the two categories is based on grounds such as sex or ethnic origin. Indirect discrimination occurs when people from the selected group find themselves at a particular disadvantage compared to the reference group.[75]

There are, however, a few conceptual and methodological issues in relation to statistics. Firstly, problems have been identified in the literature, specifically with regard to collecting data on racial or ethnic origin. In this

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71 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 105.

72 Cf. House of Lords (United Kingdom) 9 December 2004, *R. (on the application of the European Roma Rights Centre) v. Immigration Officer, Prague Airport*, [2004] UKHL 55, para. 73.

73 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 106.

74 CJEU 9 September 2003, C-25/02 (*Katharina Rinke/Ärztekammer Hamburg*), [2003] ECR I-08349, para. 35.

75 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 109.

context, it has been difficult to determine what racial or ethnic origin means. Similarly, it is difficult to determine how certain groups can be recognised as having a certain racial or ethnic origin. Secondly, it is hard to specify how a certain individual can be defined as belonging to a certain racial or ethnic group.[76] Finally, there is the problem of gathering statistics in general,[77] and this problem extends well beyond the characteristics race or ethnicity. Thus, for example, there are hardly any statistics with regard to persons at intersections of grounds, such as women from ethnic minority groups or lesbian Muslims. Statistics about sexual orientation are also often inadequate, due to people's reticence about revealing sexual orientation.[78]

The ECRI has tried to encourage Member States to collect "in accordance with European laws, regulations and recommendations on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, antisemitism and intolerance."[79] More specifically, ECRI has appealed to Member States to "ensure that accurate data and statistics are collected and published on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted."[80] Therefore, Council of Europe's Contracting Parties have a positive obligation to collect this data which could be used by applicants and respondent States in procedures at the European courts.[81]

If Member States were to implement suggestions such as those of the ECRI, this would facilitate the task of furnishing proof of indirect discrimination or systemic direct discrimination. As it is difficult to collect statistics about discrimination suffered by disadvantaged groups, it would be useful if Member States would indeed collect data and have statistics readily available. ECRI's recommendations, however, raise a number of questions concerning the collection and publication of such information. The first question that arises is what type of crimes should be classified as 'racist and xenophobic offences' and, following on from this, which groups of complainants should be regarded as targets or victims of racism or xenophobia? The second question is who should be responsible for gathering and subse-

76 Ibid., p. 117.
77 Ibid., p. 117-119.
78 D. Schiek, 'Indirect Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 398-399.
79 ECRI, *ECRI General Policy Recommendation No. 1: On Combating Racism, Xenophobia, Antisemitism and Intolerance*, Strasbourg: ECRI 1996, p. 6.
80 Ibid, p. 5.
81 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 118-119. Ambrus underlines this obligation particularly in relation to EU Member States.

quently publishing the statistics concerned: State authorities or a Council of Europe body (such as the ECRI itself) or another independent organ? The third question is how should the gathering and publication of statistics be carried out in practice? For example, would it be useful for the purpose of gathering statistics to record each separate racist or xenophobic offence that has been reported to the State authorities in a Member State in a certain database? If so, who should maintain that database and who should have access to it? Should the data on the number of offences in a specific Member State be accessible only to the State concerned or should it be accessible to a broader community, thus at Council of Europe level? Could potential applicants to the Court also have access to it? Another question concerns the accuracy of statistics: how can this be determined? These are just a few of the many questions that can be raised with regard to the ECRI proposal. If these questions can be resolved, it may become easier to implement the ECRI's suggestions. This would be desirable, since it might also enable the more effective gathering of statistics concerning discriminatory violence.

6.4.2 The ECtHR approach: statistics gaining ground as evidence in cases of indirect discrimination

The use of statistics as evidence by the ECtHR has gradually evolved since the year 2000, mainly in cases concerning indirect discrimination. The Court's jurisprudence reveals that in allegations of indirect discrimination the Court accepts both official and non-official statistical data to establish a disparate impact. The Court introduced the option of reliance on official statistics in an admissibility decision against the Netherlands, *Hoogendijk*. In that case, the applicant claimed that she was the victim of discrimination because of the introduction of an income requirement under the scheme formulated in the Dutch General Labour Disablement Benefits Act (*Algemene Arbeidsongeschiktheidswet*; AAW), which statistically affected more women than men. Ms Hoogendijk referred to the results of research carried out by the Social Insurance Council on the effect of the implementation of the AAW Reparation Act of 3 May 1989, demonstrating that a group of about 5,100 people had lost their entitlement to AAW benefits on account of a failure to meet the income requirement and that this group consisted of about 3,300 women and 1,800 men.[82]

The Court stressed that although statistics in themselves would not automatically be sufficient to disclose a practice which could be classified as discriminatory under Article 14 of the Convention, it nevertheless could not ignore these research results. Subsequently, it stated that when an applicant is able to demonstrate on the basis of 'undisputed official statistics', a *prima facie* indication of a disproportionate effect of a specific rule on a particular group, the burden of proof will shift to the government which

82 ECtHR 6 January 2005, 58641/00 (*Hoogendijk/The Netherlands*) (Admissibility Decision).

must then show that the effect has been created by objective factors unrelated to any discrimination on grounds of sex. The Court explained that "[i]f the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."[83]

Eventually, in *Hoogendijk*, the ECtHR established that the applicant had sufficiently demonstrated that the introduction of the income requirement in the AAW scheme had an indirect discriminatory effect, particularly with respect to married or divorced women having become incapacitated for work at a time when it was not common in the Netherlands for married women to earn their own income from work. Thereafter, the Court asked whether there was a reasonable and objective justification for the introduction of the income requirement under the AAW. This was the point where the applicant's complaint was rejected because the Court noted that the income requirement – applicable to both men and women irrespective of their marital status – was introduced in the AAW scheme in order to remove the discriminatory exclusion of married women from this scheme while seeking to keep the costs of the AAW scheme within acceptable limits. For the Court, this constituted a reasonable and objective justification. Hence, the applicant's complaint was rejected as manifestly ill-founded, pursuant to Article 35 § 3 and § 4 of the Convention.[84]

Having opened the door to the use of (official) statistics in the *Hoogendijk* decision, the Court took a step further in *D.H.*, when it accepted statistics collected through unofficial channels as evidence. In that case, 18 Romani applicants who had been placed in a special school in the town of Ostrava in the Czech Republic for all or part of their education, claimed that Romani children were overwhelmingly likely to be denied the opportunities of a regular education through placement in such schools. They supported their claim with unofficial statistics that were obtained by their legal representatives through questionnaires sent in 1999 to the head teachers of the eight special schools and 69 primary schools in Ostrava. According to those statistics, 56% of the pupils placed in special schools in Ostrava were Romani, while Romani pupils represented only 2.26% of the total of 33,372 primary-school pupils in that town. By contrast, only 1.8% of non-Roma pupils were placed in special schools.[85]

The Court took these statistics into consideration in order to establish a *prima facie* case of discrimination in the educational field. The statistics notably showed that the manner in which the legislation on placements in special schools was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools,

83 Ibid.
84 Ibid.
85 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 190.

and that such children were thereby placed at a significant disadvantage.[86] Because the respondent State was unable to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin, the Court established a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1.[87]

The government criticised the use of statistics in this case, indicating that they were not sufficiently conclusive as they merely reflected the subjective opinions of the head teachers. Furthermore, there was no official information on the ethnic origin of the pupils.[88] However, even though they were not entirely reliable, the statistics were still accepted by the Court as evidence, as they revealed a prevailing trend that was confirmed both by the Czech Republic and some independent supervisory bodies.[89] These independent supervisory bodies were: the Advisory Committee on the Framework Convention, ECRI, the Committee on the Elimination of Racial Discrimination and the European Monitoring Centre on Racism and Xenophobia, all which indicated that a disproportionately large number of Roma children were being placed in special schools in the Czech Republic.[90] Thus, it was a combination of unofficial statistics collected by the applicants' lawyers and these reports that led to the conclusion that the Czech educational system had a disparate impact on Roma children.[91] Hence, statistics have been used mainly as supporting evidence in indirect discrimination cases.

Finally, aside from the above findings in *D.H.*, it is interesting to note that the Court has – also in this case – offered some guidelines on the requirements that statistics must meet in order to be accepted as evidence. In *D.H.*, the Court noted:

> "... that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence."[92]

A few years later, in *A. v. Croatia*, the Court highlighted that statistics must be complete and supported by relevant analysis, allowing the Court to draw conclusions about the existence of a claimed disparate impact.[93]

In the next subsection, the use of statistics will be explored in the context of the three types of discriminatory violence cases. There, the question arises concerning the extent to which statistics can contribute to finding that viola-

86 Ibid., paras. 185-195.
87 Ibid., paras. 196-210.
88 Ibid., para. 190.
89 Ibid., para. 191.
90 Ibid., para. 192.
91 See also ECtHR 29 January 2013, 11146/11 (*Horváth and Kiss/Hungary*), paras. 110-116.
92 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 188.
93 ECtHR 14 October 2010, 55164/08 (*A./Croatia*), para. 103.

tions of the Convention have taken place. Cognizant of the fact that statistics on discriminatory violence may not always be available, a call is also made in the next subsection for greater efforts to be devoted to setting up systems in Council of Europe Member States to gather statistics about discriminatory violence that are 'reliable and significant'.

6.4.3 The use of statistics in cases of discriminatory violence

A final question to be raised regarding statistics concerns their use in cases of discriminatory violence. ECtHR jurisprudence reveals that the Court has hardly taken them into consideration under the three types of complaints of discriminatory violence. So far, the Court has mainly used them in a few cases to establish that State authorities failed to live up to their positive obligation to protect women from gender-based violence.[94] These cases are discussed first below. This subsection then looks into the potential for using statistics to establish the other two types of discriminatory violence complaints, thus a breach of the negative duty of State agents to refrain from inflicting discriminatory violence and a breach of the positive duty of State authorities to conduct an effective investigation into this type of wrongful conduct. It concludes by emphasising that statistics could be useful in establishing the three types of complaints of discriminatory violence, under the proviso that they are properly gathered and made available to the public. It further underlines that 'mutually reinforcing voices' must be present to indicate the existence of a particular form of discriminatory violence in a Member State. More concretely, this means that in order to establish that one of the three forms of discriminatory violence towards members of a particular group is systemic in a Member State, the Court must turn to more than one statistical source. This means that it must rely on more than one document which includes statistics and also turn to reports from international organisations and NGOs, all indicating that a particular form of discriminatory violence inflicted upon the group to which the victim belongs in a respondent State occurs repeatedly and systemically. This is necessary in order to gain an accurate impression of whether a certain type of discriminatory violence indeed occurs on a larger scale.

In the context of complaints concerning the duty of State agents to protect certain groups from discriminatory violence, the Court has been willing to establish violations of Article 14 read in conjunction with Articles 2 or 3 by relying on statistics. This has occurred in the context of gender-based violence. In the previous discussion of the *Opuz* case, the Court was able to establish, on the basis of 'unchallenged statistical information', "the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Tur-

94 See, for example, ECtHR 28 January 2014, 26608/11 (*T.M. and C.M./Moldova*), para. 62.

key created a climate that was conducive to domestic violence."[95] Statistics and reports in that particular case were provided by "two leading NGOs", i.e. the Diyarbakır Bar Association and Amnesty International.[96] The statistics primarily allowed the Court to conclude that the greatest number of reported victims of domestic violence originated from Diyarbakır, where the applicant lived at the relevant time, and that the victims were all women who had suffered mostly physical violence. The vast majority of these women were of Kurdish origin, illiterate or with a low level of education and generally without any independent means of support.[97] The reports also showed a lack of responsiveness by the national authorities in taking measures to protect victims from gender-based violence. For example, the police were reluctant to address and investigate family violence, including the violent deaths of women; prosecutors refused to open investigations into cases involving domestic violence or to order protective measures for women at risk from their family or community, while the police and courts did not ensure that men served with court orders, including protection orders, complied with them.[98]

The Court subsequently relied on statistics in *T.M. and C.M.* This case concerned two Moldovan nationals, a mother and a daughter, claiming that the Moldovan authorities had failed to protect them from acts of domestic violence by not enforcing protection orders against the applicants' husband and father, respectively. In finding a violation of Article 14 read in conjunction with Article 3, the Court used statistics as supporting evidence, alongside various factual elements, such as the fact that the authorities were well aware of the attacks against the applicants, and their subsequent refusal to act upon them, together with a report from the United Nations Special rapporteur on violence against women, its causes and consequences.[99] In this case, statistics were produced by the National Bureau of Statistics of the Republic of Moldova demonstrating an overwhelming number of violent attacks on women committed by their husbands or partners.[100]

Finally, in the recent case of *Halime Kılıç*, the Court also relied on statistics to establish a violation of Article 14 read in conjunction with Article 2. The applicant was the mother of a woman who suffered domestic violence and death threats from her husband. After lodging a fourth complaint with the national authorities, the victim was killed by her husband, who also killed himself. The Court stressed that by offering reports of Human Rights Watch and the Committee on the Elimination of Discrimination Against Women (CEDAW), and statistics on the number of women who have lost

95 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 198. See also paras. 92-97 of the judgment and section 2.2.3.
96 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 193.
97 Ibid., para. 194.
98 Ibid., paras. 94-106.
99 See, for example, ECtHR 28 January 2014, 26608/11 (*T.M. and C.M./Moldova*), paras. 57-63.
100 Ibid., paras. 26 and 62.

their lives due to violence, the applicant had presented *prima facie* evidence establishing that at the material time women did not enjoy effective protection from violence.[101]

With respect to cases where it is alleged that State agents inflicted violence based on discriminatory motives, the Court is more reluctant to establish violations solely on the basis of statistics. The Court has not relied on statistics in a single case concerning this duty, although the applicants sometimes referred to them. The *Kelly* case provides an example in this regard. Here, the Court did not accept that the circumstances under which the relatives of the applicants had been killed reflected discriminatory treatment. The applicants alleged that UK soldiers were more likely to use force against young men from Catholic or nationalist communities than from rival Protestant groups, and used statistics as evidence in support of their claims. The Court admitted that, indeed, statistics showed that most of the people shot by the British security forces belonged to Catholic or nationalist communities, but declined to accept "that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14."[102]

The Court did not further elaborate on the reasons why statistics were insufficient to establish a violation of Article 14. It may be that its unwillingness to accept them was connected with the fact that under these types of complaints the Court generally requires a discriminatory motive to be revealed as the causal factor for the killing or ill-treatment.[103] Statistics which may show a general context of discrimination in a Member State would then be less suited to demonstrating a discriminatory motive in a specific case. Or, it may be that the Court requires more supporting evidence before finding that there has been a violation of the discrimination principle, such as documents in the case file revealing that State agents uttered discriminatory remarks towards the victim while inflicting the violence.

Two scenarios are presented here under which statistics may be used as supporting evidence, in addition to reports from international organisations or NGOs, for example, in cases where it is alleged that State agents were guilty of discriminatory violence. As stressed earlier in this study, under these types of complaints, the Court could consider removing from its case law the requirement of the legal issue of a discriminatory motive. Under the first scenario it could instead require proof of a discriminatory effect of a provision, criterion or practice that has created a situation in which State officials inflict violence upon members of a specific group. Under this argument, it could therefore approach some of these cases as examples of indi-

101 ECtHR 28 June 2016, 63034/11 (*Halime Kılıç/Turkey*), paras. 117-121

102 ECtHR 4 May 2001, 30054/96 (*Kelly a.o./United Kingdom*), para. 148. A similar rule was mentioned in ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 154, and in ECtHR 28 May 2002, *43290/98* (*McShane/United Kingdom*), para. 135.

103 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 146; ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*), para. 64.

rect discrimination. Statistics could then be used as supporting evidence to demonstrate that a disproportionately high number of members of a certain group are the victims of violence, due to some provision, criterion or practice that has a negative effect mainly on them.

Cases like these are and will be rare, due to the fact that discriminatory violence is inherently prohibited. Consequently, it is unlikely that a rule, practice or criterion will be encountered that at face value appears to be neutral but which then results in violence inflicted upon members of one specific group. However, the case *V.C.* offers a scenario where this may occur. The applicant in that case complained to the Court that her Romani background was a decisive factor in the decision by health practitioners at a State hospital in Prešov, Slovakia, to sterilise her. This complaint may have been established successfully if the applicant had been able to show – through statistics and reports – that her sterilisation was part of a wider sterilisation policy applied to Roma women in general in Slovakian State hospitals. The applicant actually attempted to demonstrate this by relying on statistics drawn from two studies conducted in 1990 and 1989. On the basis of this material, she argued that in the Prešov district in the period 1986-1987, 60% of the sterilisations performed were on Romani women, while they represented only 7% of the population in that district. The second study showed that in 1983 approximately 26% of the sterilised women were Romani, yet by 1987 this had increased to 36.6%.[104]

It is questionable, however, whether the statistics submitted by the applicant in *V.C.* would be of any use as they concerned information collected more than a decade before the intervention at issue in that case. The Court did not elaborate on this but, it is conceivable that statistics like this would only be useful in the assessment of allegations such as these provided that they meet certain criteria. For example, besides being 'reliable and significant', it may additionally be required that statistics are up-to-date before they may be of any use to the Court. It is unfortunate, therefore, that the Court did not say anything in *V.C.* about whether the statistics presented in that case were still relevant.

For future cases concerning sterilisations of Roma women in Council of Europe Member States it is important to explore whether the legislation and/or practice in the Member States concerned has a disparate impact on Roma women and whether such an impact can be proved through the use of statistics. In that sense, it may be useful to compare how many women from the majority group at a certain location during a certain period have been sterilised in a Member State. Thereafter, in order to measure the actual

104 See ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), and the reference it makes to R. Pellar & Z. Andrš, 'Statistical Evaluation of the Cases of Sexual Sterilisation of Romani Women in East Slovakia', in *Appendix to the Report on the examination in the problematic sexual sterilization of Romanies in Czechoslovakia* (1990); Dr med. Posluch & Dr med. Posluchová, 'The Problems of Planned Parenthood among Gypsy Fellow-citizens in the Eastern Slovakia Region', in *Zdravotnícka Pracovníčka*, p. 220-223 (No. 39/1989).

disparate impact of the legislation which prescribes sterilisations, it should be established how many Roma women have been sterilised at that same location during that same period and how many Roma women live in the relevant area.

Under the second scenario, the Court could require proof that State agents inflicted discriminatory violence upon individuals from certain groups on the basis of a discriminatory attitude, instead of a discriminatory motive. A discriminatory attitude could then be established when it appears from statistics that an allegation of discriminatory violence inflicted by State agents fits into a pattern of numerous, similar complaints in a Member State. Statistics could then serve as supporting evidence alongside additional reports from international organisations and NGOs, for example, which also show systemic discriminatory violence in a certain country. In the context of these cases, statistics may show that people from the group to which a victim belongs are systematically over-represented as targets of violence inflicted by State agents. For example, statistics could demonstrate that Roma in Bulgaria are the main targets of violence perpetrated by State agents in that Member State. From these statistics, which present a general picture of discriminatory violence inflicted upon members of that specific group, the Court could derive *prima facie* evidence of a violation of Article 14, e.g. in a case of discriminatory violence inflicted upon a Roma individual by a State agent.

The Court could also use statistics in cases regarding the duty to effectively investigate complaints of discriminatory violence in a national jurisdiction. Hence, when applicants argue that a Member State did not investigate an allegation of discriminatory violence, allegedly committed by either State agents or private individuals, the Court may rely on statistics as supporting evidence if they demonstrate that complaints from members of the group to which the applicant belongs are hardly ever investigated compared with other groups.

Thus, statistics may be useful in establishing all three types of complaints of discriminatory violence. With regard to the duty to take preventive measures against discriminatory violence, the Court has already used this type of evidence to establish a violation of Article 14. As shown previously, statistics could also serve the Court in the two remaining complaints of discriminatory violence. However, certain conditions need to be met before statistics can be used as evidence in establishing discriminatory violence.

Firstly, as has been set out repeatedly above, a single source which includes statistics cannot be sufficient to prove one of the three types of discriminatory violence. Hence, other, supporting evidence is needed to establish a violation of Article 14, such as reports from international organisations and NGOs. Supporting evidence in addition to statistics is necessary in this context, because numerical data cannot provide a complete picture of discriminatory violence in any given country. Statistics can classify individuals as members of a certain group. In the context of discriminatory violence,

they can give the impression of a clear cut situation in which State agents inflict violence upon members of a certain group based on a discriminatory motive and every victim from that group is a victim of discriminatory violence. However, discriminatory violence is not just about numbers; context is also important in determining whether Convention norms have been violated in this sphere. Therefore, for a finding of discriminatory violence to be credible it must also include other factual elements or evidentiary material in addition to the statistics.

It should be noted, finally, that the relevant statistics used for each type of complaint must be made available. The statistics that have been gathered must also be reliable and significant. In this respect, the same issues as those discussed in subsection 6.4.1 also apply in the specific context of cases of discriminatory violence. Consequently, in order to demonstrate that breaches have occurred in relation to the three types of complaints of discriminatory violence, it is necessary to find better ways of collecting, storing and publishing statistics on discriminatory violence in Council of Europe Member States. As indicated earlier, the ECRI has already called for improvements in this regard. However, Council of Europe bodies such as the ECRI could take even more progressive and concrete steps to encourage Member States to gather, store and publish statistics on these types of human rights abuses. One way would be to formulate more detailed guidelines for Member States on how the collection and publication of statistical data concerning discriminatory violence should be undertaken in practice. In addition, the Council of Europe could consider providing assistance to the national and local police offices and Public Prosecution Services in setting up a proper data collection and publication system and could even set up a system to monitor whether statistical data on discriminatory violence is accurately collected, recorded and published in the national context.

To enhance the methods for determining whether statistical data are reliable and significant, it may be useful to provide lawyers working at the Court with appropriate training to improve their professional skills in that regard. Additionally, the Court could formulate more precise requirements or guidelines regarding the admissibility of statistics. In this light, specific guidelines could be drawn up with regard to how the Court can determine whether statistics are necessary, whether they have been provided by experts that work in the relevant field, whether the author of the statistics is able to provide impartial, objective evidence on the matters within his or her field of expertise, and whether statistics meet a threshold of acceptable reliability, among other things.[105]

105 Inspiration was drawn from guidelines set by the Law Commission (LAW COM No 325), *Expert Evidence in Criminal Proceedings in England and Wales*, London: Crown copyright 2011.

6.5 Reports issued by intergovernmental organisations and NGOs

The three types of discriminatory violence complaints could also potentially be demonstrated through reports produced by intergovernmental organisations or NGOs. The Court has already attached some value to these reports under all three types of complaints of discriminatory violence. The Court has, for example, relied on reports as supporting evidence to establish that all three types of discriminatory violence occurred in the *Begheluri* case. In that case, a complaint was made about religiously-motivated violence inflicted by State agents and private individuals upon 99 Georgian nationals. These 99 victims were all, with one exception, Jehovah's Witnesses. The Court found that Article 14 read in conjunction with Articles 3 and 9 was violated, also on the basis of information regarding numerous other incidents of attacks on Jehovah's Witnesses in Georgia, which were reported by various international bodies and non-governmental organisations. The international materials that the Court turned to in order to ascertain the extent of the violence towards Jehovah's Witnesses in Georgia, were drawn up by the Parliamentary Assembly of the Council of Europe, the UN Human Rights Committee on Georgia, the UN Committee against Torture, the ECRI, the Chair of the delegation of the Parliamentary Committee on Cooperation between the European Union and Georgia, Human Rights Watch, Amnesty International and the Public Defender of Georgia, and others. All these bodies and organisations described the violence against minority religious groups in Georgia, such as Jehovah's Witnesses, expressed their concerns about this issue and offered recommendations.[106]

In the context also of complaints that specifically concern a breach of the duty to conduct an effective investigation into discriminatory violence, the Court has relied on reports to establish violations albeit, again, only as supporting evidence. In this context, the case of *Nachova* may be recalled. There, the Court established that the statement "You damn Gypsies", seen against the background of the many published accounts of prejudice and hostility towards Roma in Bulgaria, called for verification.[107] Another example is the case of *Abdu*, concerning two Sudanese nationals who had been involved in a fight with two Bulgarians. The applicant alleged that his attackers, two skinheads, had assaulted him based on discriminatory motives. The Court established a violation of Article 14 read in conjunction with Article 3, owing to the failure by State officials to effectively investigate the allegation. By way of supporting evidence, the Court took into consideration the findings of various national and international bodies concerning the failure of the Bulgarian authorities to effectively implement provisions punishing cases of 'racist violence'. It referred in this context to an ECRI report which noted that when complaints concerning racist assaults are filed "little action is

106 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), paras. 73-81.
107 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 163.

taken". In addition, the Court referred to a report from the UN Committee on the Elimination of Racial Discrimination, in which it was observed that "the criminal provisions relating to racist acts are still infrequently applied". Finally, it noted a call from the Ombudsman of the Republic of Bulgaria expressing his concern about the increasing numbers of racial hate crimes, and called on the authorities not to "reduce such acts to offences of public disorder... but to investigate possible hate crimes."[108]

Reports have had most impact in cases concerning the duty to take preventive measures against discriminatory violence. In *Opuz*, the Court significantly relied on reports – together with statistics which were also incorporated in these reports – in order to establish that the domestic violence in Turkey affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. The reports of the Diyarbakır Bar Association and Amnesty International 'suggested' that domestic violence is tolerated by State officials and that the remedies offered by the government are not effective.[109] In *Identoba*, the Court relied on reports as supporting evidence to establish that Georgia was under an obligation to offer heightened State protection to members of the LGBT community and its supporters during a march.[110] These reports, drawn up by the Commissioner for Human Rights of the Council of Europe and the ILGA, described a history of public hostility towards the LGBT community in Georgia.[111]

The Court could make more use of reports from intergovernmental organisations and NGOs to establish that the three different types of discriminatory violence occur on a systemic basis. It already did so in the case of *Opuz*, when it established that a State's failure to offer protection to a woman and her mother from violence could be derived from statistics and reports which demonstrate that there is a general failure on the part of State agents to protect women from this type of physical abuse in Turkey.

The Court could take a similar approach to cases regarding the duty to effectively investigate discriminatory violence. Thus, for example, if an individual alleges that he or she was ill-treated by State agents or private persons based on discriminatory motives, and the State refuses to investigate this allegation, the Court may then find that there was a violation of Article 14 solely on the basis of reports. It may do so if these reports show that State officials repeatedly fail to conduct an effective investigation into complaints of discriminatory violence lodged by members of the group to which the individual belongs.

Finally, the Court could also consider greater use of reports from intergovernmental organisations and NGOs in the context of the negative duty of State agents to refrain from inflicting discriminatory violence. As with

108 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), para. 52.
109 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 193-198.
110 ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), para. 72.
111 Ibid., paras. 37-39.

statistics, it could consider their use in the context of complaints concerning discriminatory violence inflicted by State agents that can be approached in the same way as cases of indirect discrimination. Reports could reveal that a neutral provision, criterion or practice in a Member State has a discriminatory effect upon members of a certain group in such a way that its application leads to disproportionate physical abuse towards individuals belonging to that group. Reports could also be used to demonstrate that there is a discriminatory attitude on the part of State agents inflicting violence on members of a particular group. This occurs when reports demonstrate that there is a pattern of numerous examples of discriminatory violence inflicted repeatedly and disproportionately on members of that group in a Member State.

Obviously, not every report on systemic discriminatory violence in a country must necessarily be accepted as evidence by the Court. It is desirable that reports meet certain standards of reliability and persuasiveness before they can be used by the Court. The wrongful use of such reports could lead to a loss of faith by respondent States' in the Court's judgments which could affect the legitimacy of the Court. So it is important that the Court does not accept reports which do not meet certain quality requirements.

An important consideration in this context, is whether the Court itself has already set any requirements that reports must meet before it may use them to establish facts. The Court stated in *Georgia v. Russia (I)* that reports need to be reliable. In that case, which concerned allegations of the wide scale expulsion of Georgians from Russian territory, the ECtHR facilitated a fact-find hearing and, on top of that, to support its own findings it drew on information concerning the circumstances surrounding the case obtained from reports by international governmental bodies and NGOs, such as the PACE Monitoring Committee, Human Rights Watch (HRW), the *Fédération internationale des droits de l'homme* (FIDH) and the 2006 annual report of the Human Rights Commissioner of the Russian Federation (Russian Ombudsman).[112] It underlined in that case that such reports must be reliable and that their reliability is determined according to the following criteria: the authority and reputation of their authors, the seriousness of the investigations behind them, the consistency of their conclusions and whether they are corroborated by other sources.[113] The Court has, however, hardly formulated any additional requirements that reports must meet in order to be accepted as evidence in the specific context of discriminatory violence. It is also unclear whether it applies the criteria that it has mentioned in *Georgia v. Russia (I)* in discriminatory violence cases.

112 ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), paras. 83-92.
113 Ibid., para. 138.

Only in *Opuz* did the Court highlight that the statistics from "two leading NGOs,"[114] i.e. the Diyarbakır Bar Association and Amnesty International, revealed that domestic violence mainly affected women. For the Court the statistics presented in reports from those two NGOs were sufficient to establish "the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."[115] The words "two leading NGOs" seem to highlight that reports could be of use to the Court as long as they have been submitted by NGOs that are 'leading'. But this then raises the question about what characteristics NGOs must possess in order to be regarded as such. What 'leading' means is not further explained by the Court. Furthermore, it does not appear explicitly from the Court's case law that there are distinct admissibility criteria for accepting reports from Council of Europe bodies, on the one hand, or reports submitted by bodies which do not operate under the authority of the Council of Europe, on the other hand.

In order to enhance the use of reports in all three types of cases of discriminatory violence, it may be useful to set up clearer guidelines by which the objectivity and significance of these reports can be evaluated. It might be useful in this regard for the Court to implement a system of quality control. Such a system could incorporate standards concerning the admissibility and credibility of evidence collected by the various bodies who produce such reports. Consequently, a system of quality control could enhance the quality of the evidentiary material. In this way, reports could become more reliable and useful to the ECtHR.[116] Within this framework, several measures could be taken to reach these goals.

For example, it may be desirable to develop distinct admissibility criteria for reports submitted by (i) Council of Europe bodies, (ii) other formal international organisations, such as UN-related bodies, and (iii) NGOs. Distinct admissibility criteria would seem to be warranted, when it is taken into consideration that these three types of organisations all operate on the basis of different mandates. Quality control would be especially necessary for reports produced by NGOs. It is argued that NGOs or similar organs "have their own sets of interests and motivations, have a tendency to make factual errors when dealing with difficult circumstances, and often are not subject to oversight or other forms of accountability."[117] The reports that NGOs produce therefore may not always be trustworthy and are often polit-

114 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 193.

115 Ibid., para. 198.

116 W. Kaleck & C. Terwindt, 'Non-Governmental Organisation Fact-Work: Not Only a Technical Problem', in: M. Bergsmo (ed.), *Quality Control in Fact-Finding*, Florence: Torkel Opsahl Academic EPublisher 2013, p. 403-426.

117 K.C. Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-finding', 25 *Connecticut Journal of International Law* (2009-2010), p. 127-151, p. 134.

ically coloured.[118] In *Opuz*, the Court mentioned that Amnesty International is a 'leader' in its branch, yet it should be borne in mind that Amnesty International's mandate differs from that of the Court and that this NGO is not subject to any formal regulation or other accountability mechanisms.[119] Concretely, the introduction of benchmarks to evaluate the methodologies that bodies use to establish facts could be considered, as well as a requirement that NGOs must be transparent about their funding.[120]

Finally, systemic violations of the duties under the three types of complaints of discriminatory violence may be proved not only through reports of NGOs or formal international bodies, but also through contributions from the Council of Europe Commissioner for Human Rights. As established in section 3.5, Article 36 § 3 ECHR emphasises that the Commissioner may submit written comments and take part in hearings in all cases before a Chamber or the Grand Chamber. It may be recalled from that section that the Commissioner visits all Member States to undertake a comprehensive review of the human rights situation. Following these visits, he publishes reports about the human rights situation in those countries and offers recommendations for improvement where necessary. This activity enables him also to observe whether certain types of human rights violations in Member States are systemic. The Commissioner may also come across situations in which one of the duties in the context of discriminatory violence is breached on a systemic basis by a Member State in relation to members of a certain group. Hence, the Commissioner, acting as an independent body at the Council of Europe, with his knowledge and expertise on the human rights situation in each Council of Europe Member State, could provide the Court with solid support in determining whether any of the three duties concerning discriminatory violence are systemically breached in a Member State.

6.6 Conclusion

This chapter has further built on the idea that the Court could implement a more substantive conception of equality in its case law, particularly in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence. Chapter 5 already suggested two circumstances in which the burden of proof may shift to the respondent State in order to achieve that end. Thus, the Court could require proof of *prima facie* evidence of a discriminatory effect of a certain neutral provision, criterion or practice which creates a situation whereby members of a particular group are subjected to discriminatory violence. Chapter 5 further proposed that proof that State agents' behaviour reflects a discriminatory attitude in the killing

118 Ibid., p. 128.
119 Ibid., p. 136-149.
120 G. Robertson, 'Human Rights Fact-Finding: Some Legal and Ethical Dilemmas', 3 *University College London Human Rights Review* 2010, p. 15-43, p. 21.

or ill-treatment of victims from a certain group should be sufficient to shift the burden of proof to the respondent State. The main idea presented in chapter 5 is that a discriminatory attitude may be derived from systemic violence inflicted upon members of a certain group. This chapter has further underlined that approach by highlighting the factual elements or evidentiary material that may be used to establish a discriminatory effect or discriminatory attitude.

Two types of evidentiary material stand out in this context: statistics and reports issued by intergovernmental organisations and NGOs. With regard to the positive obligation to conduct an effective investigation into allegations of discriminatory violence or protect citizens from such wrongful conduct, statistics and reports may be useful in uncovering fundamental deficiencies. With regard to the duty of State agents to refrain from inflicting discriminatory violence, evidence of this type may reveal the extent and the types of victims affected by this wrongful conduct and in that way help to determine whether the violence is systemic.

The Court could turn to these two types of evidentiary materials more often – even in the absence of other materials – if clearer guidelines were to be developed that would enable the credibility and significance of statistics and reports to be determined. With regard to statistics, the ECRI has taken steps through its recommendations concerning the collection and publication of data on the number of racist and xenophobic offences in the territories of Member States. Further guarantees should be put in place to ensure that data about crimes connected to discrimination and xenophobia are properly recorded and published, while detailed guidelines should be offered to Member States on how to meet their obligations in this regard. The Council of Europe could play a role in ensuring the availability of credible and significant data on discriminatory violence, and should have access to it.

Similar suggestions could also apply with regard to reports from intergovernmental organisations and NGOs. Various organisations frequently report on discriminatory violence in various Member States. Availability is therefore not really an issue here, but improvements should be made in terms of evaluating the quality of these reports. Therefore, a system of quality control which provides clear admissibility criteria for accepting reports as evidence is argued for in this context.

One final suggestion favours giving the Council of Europe Commissioner for Human Rights a more prominent role. Through the more active use of Article 36 § 3 ECHR, the Commissioner could play a more active role in combating discriminatory violence in Europe, by informing the Court that in some countries this type of violence occurs on a systemic basis.

7 Conclusion

7.1 Introduction

Over a period of approximately the last 20 years, various legal scholars have discussed how the Court could more effectively recognise and acknowledge the issue of discriminatory violence in Council of Europe Member States. This study was particularly inspired by the dissenting opinion of former ECtHR Judge Bonello attached to the *Anguelova* case, who argued that greater recognition and acknowledgement of discriminatory violence in ECtHR case law could be brought about through less strict evidentiary rules. In his dissenting opinion, Bonello questioned the adequacy of the evidentiary rules that the Court applies in cases concerning discriminatory violence and offered some suggestions to render complaints on that matter easier to prove. His suggestions specifically aim to resolve the difficulty of proving a breach of the negative duty of State agents to refrain from inflicting discriminatory violence. These types of complaints require proof of a discriminatory motive which is a difficult legal issue to prove, as it essentially requires an explanation of why a perpetrator acted as he or she did. For that reason, most attention was devoted to these types of complaints in this study.

However, as this study has shown, Bonello's criticism is not justified on every point. In particular, in contrast to what Bonello argues, the ECtHR's application of the standard of proof 'beyond reasonable doubt', in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence is not at all inappropriate. The application of another standard of proof in these cases would not necessarily alter the outcome of a judgment concerning the Article 14 complaint. It has been very interesting to explore his criticism concerning the circumstances under which the burden of proof can shift from the applicant to the respondent State in such cases, thus "when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic."[1] This study has focused on a much broader context than solely environments where 'racial tensions' are high. It has focused on possible ways of demonstrating discriminatory violence inflicted by State agents upon a member of *any* group based on the fact that in a certain country members of that group are generally, systemically subjected to discriminatory violence.

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1 See particularly sections 1.1 and 1.2.

This study has identified two circumstances in which this broader context of discriminatory violence in a Member State may be established. Both concern proposals to the Court to widen the substantive equality approach in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence. For both circumstances, it has been proposed that the Court should stop requiring proof of a discriminatory motive in such cases. Instead, in some cases, it should require proof of a *discriminatory effect* of a provision, criterion or practice, that brings about situations in which individuals from one particular group are singled out by State agents to be subjected to violence. In other cases, it should require proof of a *discriminatory attitude* on the part of State agents. Once such a discriminatory effect or discriminatory attitude has been established, the burden of proof should then shift to the respondent State. This study has further identified the types of evidence that may be particularly helpful in shifting the burden of proof under both these circumstances.

This final chapter offers an answer to the main question of this study. It therefore explains to what extent the evidentiary framework used by the ECtHR is suitable for cases of discriminatory violence. In addition, it answers the research questions set out in section 1.2.

The meaning of the notions 'discrimination' and 'discriminatory violence' in the Convention system are explained in section 7.2, together with the elements that need to be proved under the three different types of complaints of discriminatory violence. Subsequently, it is summarised in section 7.3 how the facts of a case are gathered at the Court, which actors play a prominent part in the gathering of facts, and what means of establishing facts could be most useful in establishing discriminatory violence. Section 7.4. turns to the heart of the matter; it therefore looks at the main question concerning the adequacy of the ECtHR evidentiary framework in cases of discriminatory violence. Firstly, it is explained why the Court's use of the 'beyond reasonable doubt' standard of proof in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence does not represent an obstacle to finding that violations have taken place in this area of ECtHR case law. In addition, it highlights why alternative standards of proof would not necessarily amount to finding violations under that negative duty. Thereafter, it sets out the circumstances under which the ECtHR may allow the burden of proof to be shifted from the applicant to the respondent State under the three different types of complaints of discriminatory violence. Finally, it surveys the factual elements and evidentiary material from which the existence of different forms of discriminatory violence may be derived.

Chapter 7 concludes with a call for the Court to become more assertive in dealing with complaints concerning discriminatory violence. Although in recent years the Court has been receptive to the finding of violations in the context of the positive duties of Member States to conduct an effective investigation into complaints of discriminatory violence and to protect victims

from such acts, it remains reticent in finding that violations have taken place in connection with the negative duty of State agents to refrain from inflicting discriminatory violence. There are also still cases in which the Court does not discuss the discriminatory nature of violence complaints at all. It is argued in the final part of this thesis that in this precarious time for human rights, the Court must take a firmer stance in dealing with discriminatory violence in all its forms, and that it must introduce better ways to recognise and acknowledge the incidence of discriminatory violence in Council of Europe Member States.

7.2 'Discrimination' and 'discriminatory violence' in ECtHR case law: a call for a more substantive conception of equality in cases concerning discriminatory violence

The Court has taken considerable steps in broadening the protective scope of Article 14. The ECtHR now accepts discrimination cases based on a wide range of grounds.[2] It also views the concept of 'discrimination' through different perspectives. This means that the Court has recognised that this term in general means 'treating differently, without an objective or reasonable justification, persons in relevantly similar situations.' The Court interprets this principle in two ways. Firstly, it can consider it in light of the expression that 'equal cases must be treated equally', which is in line with the formal concept of equality and in line with the notion of 'direct discrimination'. Secondly, it can view discrimination in accordance with the substantive equality approach, thus meaning that 'unequal cases must be treated unequally, according to the degree of inequality'. Under this umbrella of substantive equality, the Court has extended the concept of discrimination to deal with the issue of indirect discrimination and to impose a positive duty on Member States to tackle discrimination.[3]

The Court's case law from the last decade shows that in the context of discriminatory violence complaints specifically, the Court has also widened the scope of State obligations and enhanced the potential for the enforcement of those obligations. An analysis of the Court's case law has shown that there are three types of duties in the context of complaints of discriminatory violence. The Court has acknowledged that there is a negative duty on the part of State agents to refrain from inflicting discriminatory violence. Complaints regarding this duty are the most challenging to prove, as they require demonstration of the legal issue that a discriminatory motive was the causal factor in the killing or the ill-treatment of an individual belonging to a certain group. According to the Court's case law, a discriminatory motive may be derived from the following factual elements: witness statements which were documented in domestic investigation files, with witnesses

2 Section 2.3.
3 Section 2.4.

claiming that State agents made offensive remarks on account of the victim being from a specific group, as well as internal government instructions that direct State agents to treat suspects from a certain group in a particular (violent) manner. Sometimes, the Court uses reports from intergovernmental organisations and NGOs as supporting evidence to establish violations under these types of complaints. Information documented in these reports therefore only supports and underlines the Court's finding that in a particular case discriminatory violence was inflicted because, in addition to other factors, there is also information which reveals that in the relevant Member State discriminatory violence is regularly inflicted on members of the group to which the victim belongs.[4]

Somewhat easier to prove is the second type of complaint of discriminatory violence, concerning the positive duty of State officials to effectively investigate complaints of discriminatory violence and to identify and punish those responsible. This type of complaint does not require proof of a discriminatory motive. In cases where it is alleged that the State authorities breached Article 14 read in conjunction with Articles 2 or 3, because the investigation into a violent incident was carried out in a discriminatory way, it is sufficient to prove a discriminatory attitude on the part of the State officials involved. Where it is alleged that there was an absence of an effective investigation into allegations of discriminatory violence in the domestic jurisdiction, it is sufficient to demonstrate the failure of a respondent State to act upon a suspicion that discriminatory attitudes induced an act of violence. The Court has been able to establish these issues of law on the basis of a wide variety of factual elements, such as biased comments expressed towards victims during the investigation or expressed somewhere around the violent events, or where violence was inflicted by a skinhead group or a far-right group which by its nature is driven by extremist or racist ideologies. Here too, reports by intergovernmental organisations and NGOs may be used as supporting evidence to establish violations.[5]

The third type of complaint, concerning the positive duty of State officials to take preventive measures against discriminatory violence, is also easier to prove, particularly compared with the negative duty of State agents to refrain from inflicting discriminatory violence. When it is alleged that State agents failed to protect victims from discriminatory violence, because the State agents themselves are biased towards the group to which the victims belong, the Court requires proof of the legal issue that the failure of State agents to prevent discriminatory violence was to a large extent the corollary of the victims' membership of a certain group. This type of failure may be accepted on the basis of factual elements that include biased comments made by the authorities after the victims filed requests for protection.

4 Section 2.2.1.
5 Section 2.2.2.

When it is alleged that State agents failed to prevent victims from being subjected to discriminatory violence, regardless of the motive for that omission, the Court has recognised that it must be proved that the failure to protect victims from discriminatory violence resulted from the attitude of the local authorities. In some cases, such as *Opuz*, it is sufficient to rely on general information, documented in reports and statistics from intergovernmental organisations and NGOs, which reveal that State agents in a certain country generally fail to take protective measures against discriminatory violence. In other cases, such as *Eremia*, the Court derives a failure on the part of State agents mostly from the facts of the case itself.[6]

It is thus evident that in the last two types of complaints, the Court has approved positive action taken by State authorities in the field of discriminatory violence. Through this, the Court inspires and encourages Member States to take appropriate steps to investigate discriminatory violence complaints and to protect people from becoming victims from this wrongful conduct. However, the Court has failed to promote a more substantive conception of equality under the negative duty of State officials to refrain from inflicting discriminatory violence. Implementation of such a conception in Court's case law would be desirable, since it would facilitate the better recognition of discriminatory violence inflicted by State agents. Furthermore, a substantive conception of equality in cases in which it is alleged that State agents inflict discriminatory violence creates awareness that there are flaws in a government system which somehow leads State agents to inflict violence on certain groups on a systemic basis: flaws that must be removed.

7.3 Most notable means of gathering facts and evidence in the context of discriminatory violence complaints at the Court

Information about the facts of a case may reach the Court through various avenues. These include the contributions of the direct parties to the case, contributions from external actors and the activities that the Court itself may decide to undertake to establish the facts, which include fact-finding hearings and on-the-spot investigations. Extensive measures in relation to fact-finding are generally not necessary, as the facts are mostly not contested by the parties to the dispute or they have already been sufficiently clarified by the domestic case file and by the decisions of national judges. From the case file, the Court is then able to derive a number of factual elements which will allow it to determine whether or not the Convention has been violated by the respondent State.

A prominent question that arises here is what means of gathering facts would be most helpful in establishing the different forms of discriminatory violence. Breaches concerning the positive duties of State agents to effectively

6 Section 2.2.3.

investigate discriminatory violence or to take preventive measures against such wrongful conduct, may be established on the basis of the domestic case file. In most cases, the Court is able to verify on the basis of such a written document whether violations have occurred in relation to the two positive duties. However, breaches concerning the negative duty of State agents to refrain from inflicting discriminatory violence are harder to uncover. Often, there is a lack of evidence and the case file hardly reveals any factual elements from which this type of breach can be derived. However, since this study has consistently underlined that a breach of this negative duty could also be derived from information revealing that discriminatory violence towards the group to which the victim belongs in the relevant Member State is systemic, it was questioned in chapter 3 what fact-finding techniques would be most suitable in revealing this kind of systemic violence.

An effective tool in this context is that the Court can also draw on information from external bodies, most notably intergovernmental organisations and NGOs. Three ways of contributing to fact-finding were identified in this context. Firstly, intergovernmental organisations and NGOs may produce reports or opinions on the human rights situation in a country. For example, they may report that discriminatory violence is systemically inflicted by State agents on members from particular groups in a certain Member State. The Court may then take such general information into consideration when deciding on a case in which an individual complaint of discriminatory violence allegedly conducted by State agents has been put forward. The readiness of the Court to accept such a complaint from an individual will be greater if there is also general information about discriminatory violence that is regularly inflicted by State agents on members of the group to which the applicant belongs. Through reporting on the human rights situation in a country, external actors may contribute to fact-finding at the ECtHR also under the two remaining types of complaints of discriminatory violence. External actors could thus make a substantial contribution in findings of systemic violations of the duty of State agents to conduct an effective investigation into discriminatory violence at the domestic level and the duty to take preventive measures against this type of wrongful conduct. Secondly, intergovernmental organisations and NGOs may inform the Court about systemic breaches of the three types of discriminatory violence through third party interventions. Finally, the Council of Europe Commissioner for Human Rights could inform the Court about violations in the context of the different types of discriminatory violence complaints and whether or not these violations are systemic. This study calls for a greater involvement of the Commissioner in formal proceedings at the ECtHR, ideally by acting as a third party intervener. The Commissioner's role allows him to make country visits to all Member States to carry out a comprehensive evaluation of the human rights situation there, to engage in talks with government officials, as well as members of human rights protection institutions and civil society, and to visit various locations where human rights abuses may take place. Subsequently, he issues reports on these visits in which he sets out

his observations. The Commissioner is therefore well-equipped to establish whether violations in the context of discriminatory violence are taking place in certain Member States and whether these violations occur on a large scale.

7.4 The adequacy of the evidentiary framework in cases of discriminatory violence

The purpose of this study was to determine whether or not the evidentiary framework applied by the Court in cases of discriminatory violence is adequate, and if not, to offer suggestions for improvement. It may be recalled that this study takes as its starting point that an adequate evidentiary framework would allow the Court to recognise, address and condemn discriminatory violence against victims who are members of a certain group. At the same time, an adequate system would remain alert to the fact that the Court can only hold a Member State responsible for a violation of the Convention if it can be established that a violation occurred.[7] So, on the one hand, the Court must give proper consideration to complaints from applicants who allege that discriminatory violence occurred. On the other hand, the Court must not allow inadequately substantiated or unwarranted findings of violations of Member States to take place.

The following will consider the question of whether the three aspects of the evidentiary framework that are central in this study are applied by the Court in such a way that they achieve a proper balance between these two interests. It will therefore consider the standard of proof, the distribution of the burden of proof and the evidentiary material through which discriminatory violence may be proved, and establish whether these three aspects are applied by the Court in such a way that they are suitable for ECtHR case law on discriminatory violence.

7.4.1 Standard of proof

As set out in chapter 4, the Court has been criticised frequently for applying the 'beyond reasonable doubt' standard of proof in its case law. In the context of the negative duty of State agents to refrain from inflicting discriminatory violence, Judge Bonello even suggested that the standard of proof should be lowered to a threshold of a 'balance of probabilities' or a 'preponderance of the evidence'. However, this study has demonstrated that the Court's use of 'beyond reasonable doubt' in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence does not represent an obstacle to finding that violations have taken place in this area of ECtHR case law, and that lowering the standard of proof for this type of discriminatory violence cases will not alter the outcome of the judgments.

7 Section 1.2.

There are several reasons why applying a different standard of proof will not make it easier to prove cases of discriminatory violence. Firstly, there are no appropriate alternatives in other jurisdictions that the Court may apply instead of 'beyond reasonable doubt'. Secondly, the Court has demonstrated several times that it applies its own unique interpretation of 'beyond reasonable doubt', which is distinct from the meaning that this term has in domestic criminal proceedings. Finally, and most importantly, this study has shown that 'beyond reasonable doubt' has no practical meaning in ECtHR case law. The words which express that an asserted fact must be proved to the threshold of 'beyond reasonable doubt' do not assist the Court in establishing the facts. Such terminology does not indicate the type or amount of factual elements or evidentiary material that must be presented at the Court before a violation of the Convention can be established, for example. James Q. Whitman once stated when discussing the origins of 'beyond reasonable doubt' in criminal cases of common law systems, that rules of evidence are not like rules of science. A rule prescribing that an adjudicator must be persuaded to a level of 'beyond reasonable doubt' does not really guide that adjudicator in the search for the facts of a case.[8] Similarly, the ECtHR's use of 'beyond reasonable doubt' is not designed to help the Court to determine whether or not a violation of the Convention occurred.

Since 'beyond reasonable doubt' is not a fact-finding tool, it does not hinder the ECtHR in recognising, addressing and condemning discriminatory violence perpetrated on victims who are members of a certain group. It is difficult to see how this standard represents an obstacle to pronouncing violations of the Convention in the context of these complaints. Hence, an application of 'beyond reasonable doubt' does not stand in the way of the Court achieving maximum effectiveness in protecting those who have suffered from discriminatory violence.

So what is the function of this standard of proof? An indication by the Court that proof must be delivered to a 'beyond reasonable doubt' threshold seems to be the Court's way of indicating to the parties and the public at large that it has reached a certain conclusion with regard to a specific complaint only after careful and thorough consideration. This approach is well-suited for an institution such as the Court which operates on the basis of the subsidiarity principle. Based on this principle, the task of interpreting the Convention and ensuring respect for the rights enshrined therein lies primarily with the authorities of the Contracting States rather than with the Court. The subsidiarity principle therefore implies that if the Court aims to declare that domestic authorities have failed in meeting any of their duties in the context of discriminatory violence, the Court must offer a proper explanation of how the authorities did not properly fulfil their duties under the Convention. 'Beyond reasonable doubt' is thus one way in which the Court may justify a finding that a Member State has breached the Conven-

8 J.Q. Whitman, *The Origins of Reasonable Doubt. Theoretical Roots of the Criminal Trial*, New Haven & London: Yale University Press 2008, p. 25.

tion. In this way the Court expresses that it only establishes State responsibility if it is confident on the basis of the information before it, that discriminatory violence actually occurred. This enables it to uphold the credibility and legitimacy of its judgments. Viewed from this perspective, there is no reason for the Court to abandon the use of 'beyond reasonable doubt' in its case law.

7.4.2 Burden of proof

The burden of proof plays a significant role in Court's proceedings since it indicates the party who must prove an assertion. In ECtHR cases it is mainly placed on the applicant because this is the party who pleads that a certain violation of the Convention took place. However, strictly placing the burden of proof on the applicant may significantly weaken that party's position in Court's proceedings, especially as the applicant may not always have access to the relevant evidentiary material to successfully plead his or her case. Therefore, recognising the difficulties that an applicant may face in presenting proof, the Court has implemented several ways to alleviate that party's burden of proof. It has done so especially in cases related to Article 2 and Article 3 matters where it would otherwise be impossible for applicants to present all the relevant evidence to the Court that is required to shift the burden of proof to the respondent State.

Chapter 5 demonstrated that the Court has been willing to shift the burden of proof and eventually to establish State liability through the use of presumptions and inferences in cases concerning alleged violent behaviour by State agents during custody of a victim or in cases concerning enforced disappearances.[9] The ECtHR has also used presumptions and inferences to establish State liability for an administrative practice that is in violation of the Convention.[10] In some of these cases, it has held that it "will not rely on the concept that the burden of proof is borne by one or other of the [parties] concerned," but that it will examine all the material before it, originating from various sources.[11] In this way, it has indicated that it does not (always) strictly place the burden of proof on a particular party. In cases concerning an administrative practice in which it placed the burden of proof on the applicant in the initial stages of a proceeding, it has required proof of a substantial number of identical or similar human rights violations (such as State agents beating numerous individuals in a certain period in a certain Member State), hence proof of the repetition of acts, before finding that a violation of the Convention took place. Otherwise, it has required proof that numerous expressions of a specific type of human rights abuse (such as beatings by State agents) are tolerated by State officials in the sense that the superiors of those immediately responsible, though cognisant of such acts,

9 Section 5.4.1.
10 Section 5.4.2.
11 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160.

take no action to punish those involved or prevent their repetition, or fail to investigate them, and thus proof of official tolerance.

In the context of cases where not only violence, but a *discriminatory nature* of the violence has been alleged, the Court has recognised fewer circumstances in which the burden of proof may be shifted from the applicant to the respondent State. This particularly applies in cases where it has been alleged that State officials inflicted violence upon individuals based on discriminatory motives. The other two types of complaints, regarding a failure to fulfil the positive duties to investigate discriminatory violence or take preventive measures against such acts, can be established more easily. In brief, it may be recalled that under the positive duty to conduct an effective investigation into discriminatory violence, *prima facie* evidence must be demonstrated that State agents exhibited a discriminatory attitude while conducting an investigation into a violent crime inflicted on an individual belonging to a certain group, or that they failed to respond further to a suspicion that discriminatory attitudes had induced a violent act. In the context of the positive duty to take preventive measures against discriminatory violence, the ECtHR may require *prima facie* evidence that the failure of State agents to prevent such violence was to a large extent due to the victims' membership of a certain group. Alternatively, the Court may require *prima facie* evidence that the violence generally affects the group to which the victim belongs and that there is a general and discriminatory judicial passivity towards taking preventive steps against such violence in a Member State. After *prima facie* evidence has been shown, the respondent State must then offer counter-arguments, to demonstrate that there was no violation of the Convention, or that there was a justification for the alleged State agents' conduct.

The complaints concerning the two positive duties raise fewer evidentiary issues. The Court can usually verify on the basis of the domestic case file whether these have been violated by a respondent State. Still, an issue arising in the context of the burden of proof here is that it is often not clear for these complaints whether the Court initially places the burden of proof on the applicants, and, if so, what the applicants must demonstrate before the burden of proof can shift to the respondent State. Furthermore, the Court has not specified how a respondent State may offer explanations or counter-arguments or justifications for the conduct of its agents under these types of complaints. Hence, these issues require more clarification from the Court in future cases.

In cases where it is alleged that State agents breached their negative duty to refrain from inflicting discriminatory violence, the Court has established that the applicant carries the burden to prove a *prima facie* case that a discriminatory motive was the causal factor in the killing or ill-treatment of an individual belonging to a certain group. The existence of such a motive has been recognised by the Court mainly on the basis of domestic case files which disclosed that witness statements reported discriminatory remarks uttered by State officials somewhere around the time of the violent events.

In addition to this factual element, the Court has sometimes considered other, additional factors, such as the fact that there were internal police instructions to treat suspects of a certain group in a particular (violent) manner. After a *prima facie* case has been made, the burden of proof shifts to the respondent State to disprove the allegation made.

The most important suggestion offered in this study is that the Court could add new circumstances which would enable it to shift the burden of proof from the applicant to the respondent State in this type of complaints concerning the negative duty. In essence, the burden of proof can more easily be shifted by implementing the following suggestions. Firstly, the Court should abandon the requirement of proof of a discriminatory motive under these types of complaints. Secondly, it should establish a *prima facie* case of a breach of the negative duty of State agents to refrain from inflicting discriminatory violence on the basis of information that reveals that violence is systemically inflicted by State agents on members of the group to which the victim belongs in the respondent State concerned. Two ways have been proposed by which the Court can implement an approach to discriminatory violence cases that is more akin to the model of substantive equality. The first proposal is to approach some of these cases in the same way as cases of indirect discrimination. Under this umbrella, the Court would then not have to require proof of a discriminatory motive, but *prima facie* evidence of the discriminatory effect of a provision, criterion or practice that has somehow created a situation in which State officials inflict violence on members of a specific group. The second is the proposal to require *prima facie* evidence of a discriminatory attitude as an alternative to the requirement of a discriminatory motive. Such an attitude should then not be derived solely from specific factual elements, such as discriminatory remarks, but also based on a situation in which one violent incident inflicted by a State agent on a member of a disadvantaged group appears to be part of a pattern of numerous, similar complaints in the Member State concerned.

These proposals are suitable for the Court, as they would enable the Court to recognise, address and condemn discriminatory violence inflicted by State agents on victims who are members of a certain group. Such recognition is particularly important in cases where discriminatory violence is alleged, as this type of human rights abuse tends to go unseen. That this type of discriminatory violence is 'invisible' is caused by the fact that the answer to the question why a violent act was committed can mostly be found inside the head of the perpetrator. Therefore, through these two proposals, this study attempts to make visible the discriminatory violence inflicted by State agents.

The two proposals will not affect the credibility and legitimacy of Court's case law. Obviously, they offer ways by which a breach of the negative duty of State agents to refrain from inflicting discriminatory violence may be more easily recognised than in current ECtHR case law. However, the proposals are not that far-reaching that they could lead to inadequately substantiated or unwarranted findings of violations of the Convention by

Member States in this sphere. Essentially they emphasise the idea that an allegation of discriminatory violence in a single case may be accepted if there is proof that violence inflicted by State agents on members from the group to which the victim belongs is systemic. However, this systemic violence can only be derived from credible sources that have thoroughly and accurately investigated the situation in the relevant Member State.

Furthermore, the Court's special task must not be forgotten in this regard: the Court holds Member States responsible for breaches of their obligations under the Convention and does not serve criminal justice, nor does it aim to establish civil liability. By judging on discriminatory violence inflicted by State agents, the Court does not convict the perpetrator. However, it holds Member States answerable for their actions, for creating or allowing a system in which State agents feel free to violently target the members of disadvantaged groups.

7.4.3 Evidentiary material

Before ECtHR judges can be persuaded that a form of discriminatory violence has taken place, they must have sufficient factual elements or evidentiary material presented to them which enables them to conclude that a violation of the Convention has occurred. The factual elements indicating that State agents have ill-treated or killed a victim due to a discriminatory motive or that State agents have failed to live up to their positive duties to effectively investigate discriminatory violence or to take preventive measures against such wrongful conduct, are recorded in the case file. The strongest indicator in this regard is a confession by a perpetrator that he or she displayed violent behaviour based on a discriminatory motive. The ECtHR has recognised that, in principle, such a confession must prompt a Member State to conduct an effective investigation into potential discriminatory violence. Other strong indicators that the violence was inspired by discrimination include the existence of internal police or other instructions to treat suspects from a certain group in a particular (violent) manner or evidence of discriminatory remarks uttered by a State agent or private individual before, during or after his or her violent behaviour towards a victim from a certain group. They assist the Court in establishing all three types of discriminatory violence. In the context of the positive duties, the fact or even the assumption that the violence was committed by a group which by its nature is governed by an extremist or prejudiced ideology, such as a skinhead group or a far-right group, plays an important role in the finding that a respondent State should have investigated or taken appropriate protective measures against such discriminatory violence.

Taking into account that these factual elements do not always become apparent from the case file, this study has explored how statistics and reports by intergovernmental organisations and NGOs may assist the Court in uncovering failures by Member States to live up to their three duties in the context of discriminatory violence.

As shown in section 6.4, the Court has hardly used statistics in all three types of complaints concerning discriminatory violence. However, it was demonstrated in the *Opuz* case that they can significantly contribute to the finding of a violation in this sphere. In that case, statistics enabled the Court to establish the existence of a *prima facie* indication that gender-based violence occurred in Turkey, and that Turkey had taken insufficient action to protect women from this type of physical abuse. This study encourages greater use of statistics, also in finding violations of the Convention concerning the other two types of complaints of discriminatory violence, provided that they are used in addition to other evidentiary material pointing to the presence of discriminatory violence in a country. With regard to the negative duty of State officials to refrain from inflicting discriminatory violence, statistics can show the discriminatory effect of a provision, criterion or practice that has created a situation in which State officials feel free to inflict violence upon members of a specific group. Thus, they can help the Court in determining that because of some domestic provision, criterion or practice, members of a certain group are targeted by State agents for violent behaviour and that as victims of violence they outnumber other groups in the same context. Alternatively, statistics can help the Court to establish that State agents inflict violence on members of a certain group due to a discriminatory attitude also in relation to these negative complaints. Such an attitude can be derived from statistics when these statistics can demonstrate that a single allegation of discriminatory violence inflicted by State agents fits into a pattern of numerous, similar complaints in a Member State. Finally, the Court could use statistics in the context of the duty of State officials to effectively investigate complaints of discriminatory violence in the national context. Thus, when applicants argue that a Member State did not investigate an allegation of discriminatory violence, allegedly committed either by State agents or private individuals, the Court may rely on statistics if they demonstrate that complaints from members of the group to which the applicant belongs are hardly ever investigated compared with other groups. However, for statistics to be of any use to the Court in determining whether one of the three types of discriminatory violence occurred, it will be necessary to find better ways of collecting, storing and publishing statistics on discriminatory violence in the Council of Europe Member States.

Reports of intergovernmental organisations or NGOs may be used in a similar manner to prove the three types of discriminatory violence. However, it is also desirable in this context for the Court to set out clear quality requirements that reports must meet before they can be accepted as evidence. To this end, this study proposed that a system of quality control be introduced at the Court which could include standards concerning the admissibility and credibility of evidence collected by the various organisations and bodies that produce such reports.

7.4.4 Synopsis: a final response to Bonello's dissenting opinion in *Anguelova*

In delivering a final answer to the main question in this study, it is unavoidable to offer a response to the dissenting opinion of Judge Bonello attached to *Anguelova*. Bonello and some other legal scholars have argued that the standard of proof 'beyond reasonable doubt' is the main obstacle facing the Court in establishing discriminatory violence inflicted by State agents. However, as this study has shown, 'beyond reasonable doubt' does not obstruct the Court in finding that violations of Article 14 read in conjunction with Article 2 or 3 have taken place. In that sense, the standard of proof applied by the Court in such cases is not inappropriate.

However, this study has identified that another aspect of the evidentiary framework deployed by the ECtHR in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence makes it difficult to prove these types of allegations. That is the requirement of proving discriminatory motive. Therefore, proposals have been made in this study to abandon this requirement in the Court's case law. In essence, the Court should require that applicants demonstrate the discriminatory effect of a provision, criterion or practice that has created a situation in which State officials inflict violence on members of a specific group. Alternatively, it should require proof that State agents have expressed a discriminatory attitude towards the victims. These proposals would enable the Court to uncover systemic discriminatory violence. Implementing these suggestions would render the evidentiary framework in these types of cases more suitable for ECtHR proceedings, especially in view of the Court's task, which is to determine State liability for violations of the Convention. These proposals can reveal systemic flaws in a government system which result in the disproportionate use of violence against members of certain groups.

7.5 Epilogue and outlook: the ECtHR as the guardian of the rights of disadvantaged groups

A growing body of literature documents that disadvantaged groups such as immigrants, people with disabilities and the LGBT community, are becoming more apparent and active in European societies. It is argued that their growing visibility and dynamics sometimes result in violence towards them.[12] In addition, it appears that there is more extensive media coverage of the issue of discriminatory violence, particularly in relation to Europe's current migrant crisis. Several EU countries have taken steps in an attempt

12 B. Perry, 'Counting – and Countering – Hate Crime in Europe', 18 *European Journal of Crime, Criminal Law and Criminal Justice* (2010), p. 349-367, p. 349. See also R.M. Dancygier & D.D. Laitin, 'Immigration into Europe: Economic Discrimination, Violence, and Public Policy', 17 *Annual Review of Political Sci*ence (2014), p. 43–64 (online).

to reduce the number of immigrants entering EU territory. Formal steps include, for example, constructing fences along their borders.[13] But even more striking are the informal methods that are being used to prevent immigrants from entering the EU, such as the use of violence by State agents and 'push-backs' into neighbouring States.[14]

Further, it may be said that discriminatory violence is no longer an issue that is raised mostly with regard to Central and Eastern European States.[15] In the aftermath of the BREXIT referendum,[16] a growing number of 'hate crimes' has been observed in the UK.[17] In the Netherlands too, there is a growing level of media reporting on the subject of discriminatory violence. A prominent example concerns the death of a 42-year-old man of Aruban descent that was caused by Dutch-Caucasian police officers. His death aroused much anger among several Dutch minority groups claiming that the Dutch police more often violently attack individuals simply because they are not Caucasian.[18] Some other examples have occurred in the context of the migration crisis. There are frequent reports of asylum seekers from the LGBT community claiming that they have been physically abused or threatened because of their sexual orientation in asylum centres in the Netherlands.[19] Dutch asylum centres have also been violently attacked by right-wing opponents who wish the refugees to leave the Netherlands.[20]

At the same time, Europe is undergoing another type of change, i.e. the rise of far-right, populist parties. The politicians of these parties blame newcomers, such as refugees and other already marginalised groups for the problems faced by contemporary Europe. They foment fear against 'others' or 'outsiders' and place the interests of the indigenous population above all

13 B. Tasch & M. Nudelman, 'This map shows how much the refugee crisis is dividing Europe', *Business Insider UK* (1 March 2016) (online). See also D. Sim, 'Fortress Europe: Hungary builds fence to stop migrants crossing into the EU', *International Business Times* (5 August 2015) (online); 'Hungary closes border with Serbia and starts building fence to bar migrants', *The Guardian* (17 June 2015) (online).

14 D. Breen, 'Abuses at Europe's borders', *Forced Migration Review* (January 2016), p. 21-23; M. Popp, 'Europe's Deadly Borders: An Inside Look at EU's Shameful Immigration Policy', *Spiegel Online International* (11 September 2014) (online).

15 See section 1.1. which shows that cases concerning discriminatory violence first appeared after the Central and Eastern European States became Contracting Parties to the Convention.

16 BREXIT is the popular term for the UK's intention to withdraw from the EU. On 23 June 2016, 52% of UK voters voted in a referendum to leave the EU.

17 M. Versi, 'Brexit has given voice to racism – and too many are complicit', *The Guardian* (27 June 2016) (online); G. Langendorff, 'Brexit wakkert 'explosie van haat' aan', *Algemeen Dagblad* (29 July 2016) (online).

18 See, for example, K. Bos & L. Wismans, 'We worden harder gestraft omdat we niet wit zijn', *NRC Next* (1 July 2015), p. 4-5.

19 G. Hablous, 'COC: incidenten LHBT-vluchtelingen lopen uit de hand', *Volkskrant* (7 February 2016) (online).

20 E. Jorritsma, 'Aanval op azc Woerden: incident of begin trend?', *nrc.nl* (12 October 2015) (online).

others. Their ideas, however irrational and unsubstantiated they may be, are increasingly becoming part of mainstream thinking.[21]

The tensions that are currently being created between the 'others' and the indigenous people of European countries have the potential to threaten the principles of pluralism and equality, and the rights of disadvantaged groups. If incidents of violence against certain disadvantaged groups take on larger proportions in the future, they could even threaten peace in the territories of the Council of Europe Member States. Therefore, while these 'winds of change' are blowing across Europe, it is important to note that there are individuals, bodies and ideas that run counter to the mainstream. In a recently published book, Ernst Hirsch Ballin argues that especially in times which are precarious for human rights, it is important to maintain those rights and the fundamental freedoms arising from them and not to succumb to ideas that promote fear or even hate.[22]

The ECtHR could be just such an institution that goes against populist opinions in contemporary Europe, in which several Contracting Parties are also progressively condoning discriminatory violence.[23] The Court must therefore become a major player in the prevention and condemnation of this type of violence. Although the ECtHR is not in a position to penalise Council of Europe Member States or the agents employed by them for this type of wrongful conduct, the ECtHR could nonetheless play a more vocal role in addressing the issue of discriminatory violence in Europe. This task of the Court is particularly necessary in those Council of Europe Contracting Parties where the domestic authorities fail to conduct effective investigations into discriminatory violence or fail to take preventive measures against such wrongful conduct. The Court can highlight cases of discriminatory violence in a certain Member State, create more awareness of the existence of such, and condemn this type of conduct by discussing it under the heading of Article 14 of the Convention read in conjunction with Article 2 or Article 3, and by establishing violations of those provisions, where appropriate.

The Court's extraordinary position in Europe means that it can contribute to the condemnation of discriminatory violence in different ways. The Court could, for example, in each case concerning Article 14 read in conjunction with Article 2 or Article 3, evaluate whether a complaint concerns violent conduct which occurs on a more pervasive, systemic basis. In such a case, the Court could pronounce that there is an alarming situation in a Contracting Party which requires immediate attention and effective measures to address it. This fits in well with the Court's *alarm bell function*. In addition,

21 J. Mijs, 'Populisme wordt gevoed door sociale uitsluiting', *Volkskrant* (26 March 2016) (online); J. van Raalte, 'In deze landen maakt rechts-populisme zijn opmars', *Volkskrant* (23 May 2016) (online).

22 E. Hirsch Ballin, *Tegen de stroom. Over mensen en ideeën die hoop geven in benarde tijden*, Amsterdam/Antwerp: Em. Querido's Uitgeverij BV 2016.

23 See M. Versi, 'Brexit has given voice to racism – and too many are complicit', *The Guardian* (27 June 2016) (online), where the author argues that politicians, as well as media organisations, have fuelled religious, racial and ethnic tensions to further their 'petty agendas'.

through its judgments the ECtHR could put the issue of discriminatory violence high on the regulative or policy agendas of national legislatures and executive bodies, in accordance with its *agenda-setting function*. There may be various reasons why discriminatory violence is not properly addressed at a domestic level. Irrespective what those reasons may be, the Court, acting as a supervisory human rights body for the whole of Europe, could help to bring about changes in domestic hate crime legislation or policies. Now that the Court is for a larger part *constitutional* in nature, it should prioritise issues related to discriminatory violence as a matter of special concern, and offer more detailed and considered adjudication in this field of its case law.[24]

In practical terms, this means that in future case law the Court should not ignore issues related to discriminatory violence where the human rights abuses appear to be part of a systemic practice. Apart from exposing the flaws existing in the governance of a Member State in that context, judgments where the systemic nature of discriminatory violence is recognised can offer support to the victims who often already feel that they have been let down by their domestic authorities. The Court should also become more responsive with regard to discriminatory violence complaints that are not necessarily part of a systemic practice, but where there are still clear indications of discriminatory violence that may be linked to the individual case.

Effective protection of the rights of disadvantaged groups can only be offered where there is recognition that acts such as discriminatory violence are legal wrongs. Especially at this time, the ECtHR needs to introduce ways of making this legal wrong transparent. This would then enhance the potential of ECtHR case law to offer protection to those who have the most to lose in these uncertain times.

24 The various functions of the Court were outlined in section 1.4.

Samenvatting (Summary in Dutch)

Het bewijzen van discriminatoir geweld voor het Europees Hof voor de Rechten van de Mens

Discriminatie bewijzen is lastig, aangezien het vaak 'ongrijpbaar' en 'onzichtbaar' is. Dit is ook het geval bij het fenomeen 'discriminatoir geweld', hetgeen betrekking heeft op geweldsdelicten toegebracht met een onderliggend discriminatoir motief. Prominente Europese instellingen en organisaties – waaronder het Bureau voor de grondrechten (FRA) en de Europese Commissie tegen Racisme en Intolerantie (ECRI) – berichten over dit type geweld in verschillende Europese staten. Zo wordt geregeld gerapporteerd over geweld tegen de Roma, de LHBT's (lesbiennes, homoseksuelen, biseksuelen en transgenders), joden en moslims. Sinds enkele jaren wordt ook vaker gerapporteerd over staatsagenten van de EU-lidstaten die op een hardnekkige – en soms op een gewelddadige – wijze belemmeren dat migranten de Schengen-zone van de Europese Unie betreden. Bovendien stellen sommige instellingen en organisaties dat migranten die in de EU lidstaten verblijven geregeld worden onderworpen aan fysiek geweld, dat al dan niet zou zijn toegebracht door individuen die extreemrechtse ideologieën erop nahouden. Discriminatie, stereotypen en vooroordelen zouden vaak ten grondslag liggen aan een dergelijke bejegening.

Klachten omtrent discriminatoir geweld worden in beginsel afgehandeld door de nationale strafrechter. Indien klagers menen dat zij door de overheidsinstanties onvoldoende in hun klachten zijn gehoord, kunnen zij – voor zover de desbetreffende overheidsinstanties onderdeel uitmaken van één van de 47 lidstaten van de Raad van Europa – zich richten tot het Europees Hof voor de Rechten van de Mens (EHRM). Zij kunnen dan een beroep doen op art. 14 (verbod van discriminatie) in samenhang met art. 2 (recht op leven) of art. 3 (verbod van foltering) van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM).

Dit proefschrift onderzoekt hoe klachten omtrent discriminatoir geweld voor het EHRM kunnen worden bewezen. Meer specifiek behandelt dit proefschrift de vraag of het kader van bewijsregels dat wordt gehanteerd door het EHRM in zaken van discriminatoir geweld adequaat is. Waar dit niet het geval is, doet het aanbevelingen voor alternatieve bewijsregels die beter aansluiten bij een regionaal mensenrechten hof. Om tot een antwoord op de onderzoeksvraag te komen, analyseert deze studie drie bouwelementen binnen het bewijsrechtelijk kader die het Hof inzet in zaken van discriminatoir geweld: (1) de bewijsstandaard; (2) de omstandigheden waaronder de bewijslast verschuift van de klager naar de lidstaat, en; (3) het bewijsmateriaal met behulp waarvan discriminatoir geweld kan worden vastgesteld. Onderzocht wordt of aan de hand van de bestaande bewijsregels het Hof

in staat is discriminatoir geweld vast te stellen opdat maximale effectieve bescherming kan worden geboden aan de slachtoffers van dit type geweld. Tegelijkertijd verliest de studie niet uit het oog dat de bewijsregels die het Hof toepast in zaken van discriminatoir geweld niet mogen leiden tot onvoldoende onderbouwde of ongegronde bevindingen van schendingen door de lidstaten. Om zijn geloofwaardigheid en legitimiteit te behouden, dient het Hof schendingen niet lichtvaardig uit te spreken. Per slot van rekening, 's Hofs uitspraken dienen voor zowel de klager als voor de lidstaat aanvaardbaar te zijn.

Aanleiding voor dit onderzoek vormde de *dissenting opinion* van rechter Bonello in de zaak *Anguelova t. Bulgarije*. Hier klaagde mevrouw Anguelova voor het EHRM dat haar zoon, een Roma, gedood was door een Bulgaarse politieagent vanwege zijn etniciteit en dat de Bulgaarse autoriteiten hadden nagelaten een effectief onderzoek naar dit incident te verrichten. Het Hof wees haar klacht af, daarbij stellend dat niet 'buiten redelijke twijfel' is vast komen te staan dat de politieagent in kwestie had gehandeld vanuit een discriminatoir motief. Daarop stelde Bonello, teleurgesteld met de uitkomst van de zaak, dat de bewijsregels die het Hof hanteert in zaken omtrent discriminatoir geweld een obstakel vormen bij het vaststellen dat art. 14 EVRM in samenhang met art. 2 of art. 3 is geschonden. Zijn kritiek richt zich met name tot de door het Hof gehanteerde bewijsstandaard 'buiten redelijke twijfel'. Volgens Bonello zou een dergelijke hoge bewijsstandaard – die zijn oorsprong vindt in strafzaken uit de zogenaamde '*common law*' landen – ongepast zijn voor een regionaal mensenrechten hof. Bovendien stelde hij dat het Hof ten onrechte weigert om de bewijslast te doen verschuiven van klager naar lidstaat om te bewijzen dat een geweldsdelict *geen* onderliggend discriminatoir motief had in die zaken waarin het slachtoffer toebehoort tot een benadeelde groep wiens leden met regelmaat worden onderworpen aan discriminatoir geweld in de desbetreffende lidstaat. Hierbij komt de prangende vraag op in hoeverre Bonello's kritiek terecht is.

Bij de beantwoording van de onderzoeksvraag wordt rekening gehouden met de functies van het EHRM en de doelen die dit mensenrechten hof nastreeft. Het Hof is namelijk een bijzondere instelling. Gelet op het feit dat het vlak na de Tweede Wereldoorlog is opgericht, is het aanvankelijk beschouwd als een soort 'alarmbel': dit houdt in dat het de lidstaten van de Raad van Europa door middel van zijn uitspraken behoort te waarschuwen indien een andere lidstaat totalitaire trekken vertoont. In het verlengde hiervan kan worden gesteld dat het Hof er ook alert op moet zijn of in een lidstaat bepaalde groeperingen worden onderworpen aan systemisch discriminatoir geweld. Zelfs daar waar enkel incidenten van discriminatoir geweld de kop opsteken, dient het Hof in de gaten te houden of deze incidenten escaleren en lidstaten erop te wijzen om hun mensenrechtensituatie binnen die context te verbeteren.

Door de jaren heen zijn de functies van het Hof uitgebreid. Zo behoort tot één van de taken van het Hof het plaatsen van belangrijke mensenrechtenthema's op de regulerende- of beleidsagenda's van de lidstaten. Door het

wijzen van arresten, kan het Hof specifieke problemen die zich voordoen in een lidstaat in het kader van de mensenrechtensituatie aldaar signaleren en aanbevelingen doen ter verbetering waar noodzakelijk. Ook in gevallen van discriminatoir geweld kan het Hof dienen als een 'barometer', door aan te duiden of een gevaarlijk niveau van populisme of een vijandige behandeling van individuen behorende tot zekere groepen is bereikt. Voorts heeft het Hof een constitutionele aard, hetgeen inhoudt dat het de verantwoordelijkheid draagt om die zaken onder aandacht te brengen die de meest serieuze mensenrechtenschendingen met zich meebrengen en deze te veroordelen. Gelet op het feit dat zaken van discriminatoir geweld de meest fundamentele rechten van de mens aantasten, kan worden gesteld vanuit deze constitutionele benadering dat het Hof de bijzondere taak heeft om dit soort zaken in het bijzonder uit te lichten in zijn jurisprudentie.

In deze studie wordt eerst een basis gelegd om het raamwerk van bewijsregels in EHRM zaken van discriminatoir geweld beter te begrijpen. In de eerste plaats wordt een ordening aangebracht in de typen klachten van discriminatoir geweld die zich voordoen onder art. 14 EVRM in samenhang met art. 2 of art. 3. Hierbij wordt geanalyseerd welke elementen onder elk type klacht dienen te worden bewezen en bij welke van deze klachten bewijsproblemen zich vooral voordoen (*hoofdstuk 2*). In de tweede plaats wordt geanalyseerd hoe het Hof informatie verzamelt over de feiten van een zaak, welke actoren het Hof daarbij in het bijzonder behulpzaam zijn en wordt nagegaan welke wijzen van feitenvaststelling het meest zinvol zijn bij het vaststellen van discriminatoir geweld (*hoofdstuk 3*). Nadat deze basis is gelegd, wordt het raamwerk van bewijsregels in zaken van discriminatoir geweld onder de loep genomen. Eerst wordt onderzocht of de bewijsstandaard 'buiten redelijke twijfel' die het Hof in sommige zaken van discriminatoir geweld toepast een obstakel vormt voor het vaststellen van schendingen van het EVRM en of alternatieve bewijsstandaarden door het Hof zouden moeten worden toegepast (*hoofdstuk 4*). Vervolgens wordt geanalyseerd onder welke omstandigheden het Hof een bewijslastverschuiving van klager naar lidstaat zou kunnen toestaan onder de verschillende typen klachten van discriminatoir geweld (*hoofdstuk 5*). Tot slot wordt nagegaan welke feitelijke elementen en welke typen bewijsmateriaal het Hof zou kunnen gebruiken om de verschillende typen van discriminatoir geweld vast te stellen (*hoofdstuk 6*). In het onderstaande wordt een overzicht geboden van de resultaten die dit onderzoek heeft opgeleverd.

Het ordenen van klachten omtrent discriminatoir geweld in drie typen

Hoofdstuk 2 brengt een onderverdeling aan in de verschillende typen klachten omtrent discriminatoir geweld waarbij klagers een beroep doen op een schending van art. 14 EVRM in samenhang met art. 2 of art. 3. Het eerste type klacht is een vermeende schending van de negatieve verplichting van staatsagenten om zich niet schuldig te maken aan discriminatoir geweld. In wezen wordt hierbij gesteld dat de lidstaat het EVRM heeft geschonden via

zijn staatsagenten: de staatsagenten hebben dan vermoedelijk aan een individu die tot een zekere groep behoort letsel toegebracht dan wel een individu gedood en hebben deze strafbare feiten uit een discriminatoir motief begaan. Voordat het Hof een schending van het EVRM onder dit type klacht kan vaststellen, dient eerst vast komen te staan dat de staatsagenten daadwerkelijk hebben gehandeld vanuit een discriminatoir motief. Klachten die betrekking hebben op de negatieve plicht van staatsagenten om discriminatoir geweld niet te begaan zijn het lastigst om te bewijzen, aangezien een ongrijpbaar, subjectief element dient te worden bewezen, namelijk hetgeen zich in het hoofd van de dader heeft afgespeeld ten tijde van het plegen van de misdaad. Vaak ontbreekt dan ook het bewijsmateriaal dat de achterliggende reden voor het plegen van het geweld bloot kan leggen. In de schaarse hoeveelheid zaken waarin het Hof tot nu een schending heeft vastgesteld bij dit soort klachten, heeft het een discriminatoir motief meestal afgeleid uit getuigenverklaringen waarbij werd beweerd dat de staatsagenten zich op een discriminatoire wijze uitten tegenover de slachtoffers ergens rondom het moment dat zij het geweld pleegden. Daarbij is het Hof ook bereid geweest om als ondersteunend bewijsmateriaal gebruik te maken van rapporten van intergouvernementele organisaties en non-gouvernementele organisaties (NGOs) die algemene informatie verschaffen over discriminatoir geweld in de betrokken lidstaat.

Onder het tweede type klacht wordt gesteld dat de lidstaat de positieve verplichting om discriminatoir geweld effectief te onderzoeken en om de plegers van het geweld te identificeren en te bestraffen heeft verwaarloosd. Deze plicht rust op de lidstaten ongeacht of de daders staatsagenten dan wel privé burgers zijn. Hierbij kunnen klagers naar voren brengen dat het onderzoek op een discriminatoire wijze is verricht door de betrokken staatsagenten of dat een effectieve opsporing, vervolging of berechting in een zaak van discriminatoir geweld überhaupt ontbrak. In tegenstelling tot de klachten waarbij wordt beweerd dat staatsagenten zich schuldig hebben gemaakt aan discriminatoir geweld, hoeft onder dit type klachten het discriminatoire motief niet te worden bewezen. Waar wordt beweerd dat het onderzoek op een discriminatoire wijze is verricht, vereist het Hof bewijs van een discriminatoire instelling (*attitude*) aan de kant van de staatsagenten die betrokken waren bij het onderzoek. Dit kan worden aangetoond door te verwijzen naar eventuele tendentieuze opmerkingen die de betrokken politieagenten, officieren van justitie of rechters gedurende het onderzoek hebben gemaakt over de afkomst of over de karakteristieken van slachtoffers, waardoor bij klagers de indruk is gewekt dat het onderzoek niet op een objectieve wijze is verricht. En waar door klagers wordt gesteld dat een effectief onderzoek naar discriminatoir geweld überhaupt ontbrak, is het al voldoende om aan te tonen dat een vermoeden van discriminatoir geweld bestond, maar dat de lidstaat in kwestie desondanks heeft nagelaten de klacht omtrent dit type geweld adequaat te onderzoeken. De aanwezigheid van een dergelijk vermoeden, die de lidstaat zou hebben genegeerd, leidt het Hof af van verschillende feitelijke elementen die blijken uit het lande-

lijk dossier, waaronder discriminatoire uitingen tegenover de slachtoffers en geweld toegebracht door extreemrechtse groeperingen. Ook hier kan het Hof leunen op rapporten van intergouvernementele organisaties en NGOs.

Het derde type klacht heeft betrekking op het door de lidstaten niet naleven van de positieve verplichting om preventieve maatregelen te treffen tegen discriminatoir geweld. Ook deze plicht rust op de lidstaten ongeacht of de daders staatsagenten dan wel privé burgers zijn. Indien klagers beweren dat de vereiste bescherming ontbrak omdat de staatsagenten zelf discriminatoire opvattingen jegens de groep waartoe de slachtoffers behoren er op nahielden, vereist het Hof bewijs dat het verzuim van staatsagenten om dergelijk geweld te voorkomen voor een groot deel het gevolg was van het toebehoren van de slachtoffers tot de desbetreffende groep. Ook wanneer niet wordt gesteld dat de staatsagenten vanuit discriminatoire overwegingen weigerden bescherming te bieden aan de slachtoffers, is het Hof bereid geweest om schendingen te constateren onder dit type klacht. Hier vereist het Hof echter wel dat wordt aangetoond dat dit verzuim is veroorzaakt door een verkeerde instelling van de staatsagenten. Wat dit type klacht afzondert van de andere twee klachten is dat het Hof hier bereid is geweest om schendingen te constateren alleen al op basis van rapporten van intergouvernementele organisaties en NGOs, die aanduiden dat het type discriminatoir geweld waartegen volgens klagers geen preventieve maatregelen door de betrokken lidstaat zijn getroffen, vaker in die lidstaat voorkomt.

Dit overzicht van de typen klachten binnen het kader van discriminatoir geweld toont aan dat het Hof welwillend is geweest om niet alleen schendingen te constateren waar klachten zijn geuit over discriminatoir geweld veroorzaakt door de staatsagenten zelf. Het Hof is juist ook bereid geweest om de verplichtingen van de lidstaten binnen dit kader op te rekken door hen te wijzen op het belang van het ondernemen van positieve acties, hetgeen inhoudt dat zij dit type geweld dienen te onderzoeken en te voorkomen. In hoofdstuk 2 wordt geobserveerd hoe het Hof hiermee in wezen een bredere interpretatie aan het fenomeen discriminatoir geweld heeft gehecht. Het is deze problematiek niet alleen gaan beschouwen door de lens van formele discriminatie (het gelijk behandelen van vergelijkbare gevallen), een begrip dat vooral wordt gekoppeld aan de negatieve verplichting van staatsagenten om zich niet schuldig te maken aan discriminatoir geweld. Inmiddels beziet het discriminatoir geweld ook vanuit de lens van materiële discriminatie (het ongelijk behandelen van niet vergelijkbare gevallen), door aan lidstaten positieve verplichtingen op te leggen om slachtoffers van discriminatoir geweld juist meer tegemoet te treden dan slachtoffers van geweld waar geen discriminatoir motief aan is gekoppeld. Opgemerkt wordt in hoofdstuk 2 dat het Hof ook onder de negatieve verplichting meer zou moeten toeleven naar een materiële begrip van gelijkheid. In hoofdstuk 5 worden de manieren geïntroduceerd waarop het Hof dit zou kunnen bewerkstelligen.

Het verzamelen van bewijs en het vaststellen van de feiten van het geval in zaken van discriminatoir geweld: een pleidooi voor een grotere betrokkenheid van externe actoren

Informatie over de feiten van een zaak kan het Hof bereiken via verschillende wegen. Zo kan het EHRM de feiten achterhalen via de (directe) partijen in de zaak en via bijdragen van externe actoren. In uitzonderlijke gevallen kan het Hof zelf actie ondernemen om de feiten vast te stellen door *fact-finding* hoorzittingen en *on-the-spot investigations* te organiseren. Laatstgenoemde, meer vergaande maatregelen ten aanzien van feitenvaststelling zijn over het algemeen overbodig, aangezien de feiten in een zaak door de partijen over het algemeen niet worden betwist of aangezien het Hof in staat is deze reeds vast te stellen op grond van het landelijk dossier en de uitspraken van de nationale rechters.

Een prominente vraag die zich hierbij voordoet is welke middelen van feitenverzameling het nuttigst kunnen zijn bij het vaststellen van de verschillende typen van discriminatoir geweld. Deze vraag werpt zich met name op ten aanzien van de negatieve verplichting van staatsagenten om af te zien van het toebrengen van discriminatoir geweld, aangezien dit type schending het lastigst is om te constateren.

In hoofdstuk 3 wordt naar voren gebracht dat het Hof onder dit type klacht zich in toenemende mate zou moeten richten tot informatie afkomstig van externe actoren, met name intergouvernementele organisaties en NGO's. Hun bijdragen – in de vorm van statistieken of rapporten – kunnen het Hof helpen om vast te stellen of discriminatoir geweld incidenteel voorkomt, of dat het zich juist op grotere schaal voordoet in de desbetreffende lidstaat en dat het telkens dezelfde groep individuen – waartoe ook het slachtoffer behoort – raakt. Met andere woorden, intergouvernementele organisaties en NGO's kunnen het Hof helpen vaststellen of het discriminatoir geweld dat door klager naar voren is gebracht onderdeel uitmaakt van systemisch discriminatoir geweld. Waar dit het geval blijkt te zijn, kan het Hof sneller een *prima facie* zaak van discriminatoir geweld aannemen en de bewijslast verplaatsen naar de verwerende lidstaat om te bewijzen dat zich géén schending van het EVRM in dit kader heeft voorgedaan.

Tot slot wordt in hoofdstuk 3 gepleit voor een prominentere rol voor een bijzondere externe actor, namelijk de Commissaris voor de Rechten van de Mens. Gesteld wordt dat hij wat meer op de voorgrond zou kunnen treden in zaken betreffende discriminatoir geweld. Dit kan hij doen door zich (vaker) formeel als derde partij in een zaak te voegen en daarbij schriftelijke conclusies in te dienen en aan hoorzittingen deel te nemen. De Commissaris heeft de mogelijkheid om bezoeken af te leggen in alle lidstaten om de mensenrechtensituatie aldaar uitgebreid te evalueren, om in gesprek te treden met overheidsfunctionarissen, alsmede de leden van de mensenrechteninstellingen, en om bezoeken af te leggen aan diverse locaties waar potentiële mensenrechtenschendingen plaatsvinden. Zijn bevindingen stelt hij vast in rapporten. Deze taken stellen de Commissaris dus ook in staat om in het

kader van discriminatoir geweld schendingen te constateren in bepaalde lidstaten en te bepalen of die schendingen systemisch van aard zijn. Middels schriftelijke conclusies of tijdens de hoorzittingen kan hij het Hof dan ook informeren over de stand van zaken in de betrokken lidstaat omtrent discriminatoir geweld.

Het raamwerk van bewijsregels in zaken van discriminatoir geweld: in hoeverre is er sprake van een adequaat bewijsstelsel?

Het doel van deze studie is te bepalen of het raamwerk van bewijsregels dat door het Hof wordt toegepast in zaken van discriminatoir geweld adequaat is en om, waar nodig, verbeteringen voor te stellen. Met andere woorden: zijn de bewijsregels omtrent de bewijsstandaard, de bewijslast en het accepteren en beoordelen van bewijsmateriaal dusdanig opgezet dat ze aan het Hof mogelijk maken om discriminatoir geweld vast te stellen, maar tegelijkertijd niet leiden tot onvoldoende onderbouwde of ongegronde bevindingen van schendingen door de lidstaten?

Hoofdstuk 4 analyseert de toepasselijkheid van de bewijsstandaard 'buiten redelijke twijfel', die door het Hof expliciet wordt toegepast in klachten betreffende de negatieve verplichting van staatsagenten om af te zien van het plegen van discriminatoir geweld. Critici zoals Bonello hebben geuit dat 'buiten redelijke twijfel' een te hoog gegrepen bewijsstandaard is die het vrijwel onmogelijk maakt voor het Hof om dit type discriminatoir geweld vast te stellen. Zij pleiten voor het toepassen van alternatieve bewijsstandaarden, zoals '*balance of probabilities*' of '*preponderance of the evidence*'. Deze studie toont echter aan dat de bestaande bewijsstandaard 'buiten redelijke twijfel' in zaken omtrent de negatieve verplichting van staatsagenten om af te zien van het toebrengen van discriminatoir geweld geen belemmering vormt voor het vinden van een schending van het EVRM, en dat het verlagen van de bewijsstandaard onder dit type klacht de uitkomst van 's Hofs uitspraken niet zal veranderen.

Dit blijkt uit verschillende bevindingen in deze studie. Ten eerste zijn geen passende alternatieven aan te wijzen in andere jurisdicties die het Hof zou kunnen toepassen in plaats van de gebruikelijke 'buiten redelijke twijfel'. Ten tweede heeft het Hof meerdere malen benadrukt dat het een eigen, unieke interpretatie toedicht aan de betekenis van 'buiten redelijke twijfel', die verschilt van de betekenis die deze term heeft in nationale strafzaken. Ten slotte heeft dit onderzoek laten zien dat 'buiten redelijke twijfel' geen praktische betekenis heeft in de jurisprudentie van het EHRM. De woorden die uitdrukken dat een klacht 'buiten redelijke twijfel' dient te worden bewezen assisteren het Hof niet bij het vaststellen van feiten. Een dergelijke term geeft bijvoorbeeld niet het type of de hoeveelheid feiten of bewijsmateriaal aan die nodig zijn voordat het Hof een schending van het EVRM kan vaststellen.

Overigens is het vereiste van overtuigingskracht tot op het niveau van 'buiten redelijke twijfel' niet overbodig in de jurisprudentie van het EHRM. Het is een toepasselijke manier van het Hof om aan de partijen en aan een

breder publiek duidelijk te maken dat het Hof eventuele schendingen vaststelt pas na een zorgvuldige en grondige overweging. Deze aanpak is zeer geschikt voor een instelling als het Hof, die opereert op basis van het subsidiariteitsbeginsel. Dit houdt in dat het Hof pas schendingen zal constateren daar waar de nationale autoriteiten niet op de juiste wijze zijn tegemoetgekomen aan de rechten van slachtoffers van discriminatoir geweld. 'Buiten redelijke twijfel' is dus een manier waarop het Hof de conclusie dat een lidstaat het EVRM heeft geschonden kan rechtvaardigen. Op die manier laat het EHRM zien dat het slechts staatsaansprakelijkheid vaststelt als het ervan overtuigd is dat discriminatoir geweld daadwerkelijk heeft plaatsgevonden. Dit biedt het Hof de mogelijkheid om de geloofwaardigheid en de legitimiteit van zijn arresten te handhaven. Vanuit dit perspectief, is er geen reden voor het Hof om het toepassen van 'buiten redelijke twijfel' in zijn rechtspraak te verlaten.

Hoofdstuk 5 verdiept zich in de wijze waarop het Hof de bewijslast doet verschuiven in zaken van discriminatoir geweld van klager naar lidstaat. Daarin wordt geobserveerd dat met name in zaken waarin wordt gesteld dat staatsagenten zich schuldig hebben gemaakt aan discriminatoir geweld – dus de zaken die de negatieve verplichting betreffen – het Hof het meest terughoudend is geweest in het verschuiven van de bewijslast naar de lidstaat. In die gevallen heeft het Hof vastgesteld dat in beginsel op de klager de bewijslast rust om een *prima facie* zaak aannemelijk te maken, hetgeen inhoudt dat de klager moet aantonen dat een discriminatoir motief de achterliggende oorzaak van het geweld was. Nadat een *prima facie* zaak is vastgesteld, verschuift de bewijslast naar de lidstaat om dit te weerleggen.

De belangrijkste aanbeveling in deze studie houdt in dat het Hof onder twee nieuwe omstandigheden de bewijslast zou kunnen verschuiven van klager naar lidstaat bij klachten van discriminatoir geweld waarin een schending van de negatieve verplichting in het geding is. Hierdoor zou een meer materiële begrip van gelijkheid in 's Hofs uitspraken kunnen worden geïmplementeerd. Het eerste voorstel is om sommige van deze gevallen op dezelfde wijze te benaderen als gevallen van indirecte discriminatie. In plaats van te eisen dat een discriminatoir motief voor het toebrengen van het geweld moet worden vastgesteld, zou het Hof binnen dit kader *prima facie* bewijs kunnen vergen van een disproportioneel effect van een bepaling, maatstaf of overheidspraktijk die op de één of andere manier een handelswijze in het leven heeft geroepen waarin staatsagenten uitgerekend leden van een benadeelde groep selecteren om hen te onderwerpen aan geweld. In de tweede plaats wordt voorgesteld om *prima facie* bewijs te vereisen van een discriminerende houding of attitude aan de kant van de staatsagenten als een alternatief voor het vereiste van een discriminatoir motief. Het idee achter deze voorstellen is om het onzichtbare discriminatoire geweld dat wordt toegepast door staatsagenten zichtbaarder te maken.

Hoofdstuk 6 geeft ten slotte een overzicht weer van de verschillende typen bewijsmateriaal aan de hand waarvan discriminatoir geweld kan worden bewezen. Hiervoor is in de meeste gevallen het verzamelen van

bewijs niet eens nodig: de landelijke dossiers geven vaak al voldoende feiten weer op grond waarvan kan worden bepaald of art. 14 EVRM in samenhang met art. 2 of art. 3 is geschonden. In dit proefschrift wordt met name opgeroepen tot een extensiever gebruik van statistieken en rapporten van intergouvernementele organisaties en NGO's om de verschillende typen van discriminatoir geweld vast te stellen. Zij kunnen met name bruikbaar zijn om systemisch discriminatoir geweld te onthullen. Echter, statistieken over de verschillende typen van discriminatoir geweld in de lidstaten van de Raad van Europa ontbreken vooralsnog. Daarom roept deze studie op tot het ontwikkelen van methoden omtrent het verzamelen, opslaan en publiceren van statistieken. Ten aanzien van rapporten wordt geconcludeerd dat heldere criteria ontbreken aan de hand waarvan kan worden bepaald of ze kunnen worden geaccepteerd als bewijs. Daarom beveelt deze studie aan om een systeem van kwaliteitscontrole in te voeren bij het EHRM waarbinnen standaarden kunnen worden geïmplementeerd om de ontvankelijkheid en betrouwbaarheid van dit type bewijs te kunnen vaststellen.

Het EHRM als bewaker van de rechten van benadeelde groepen

Een groeiende hoeveelheid aan literatuur toont aan dat zekere benadeelde groepen in Europa, zoals immigranten en LHBT's, steeds zichtbaarder voor hun rechten opkomen. Beweerd wordt weleens dat daardoor het geweld tegen deze groepen zou toenemen. De mate van discriminatoir geweld zou zich bovendien op een stijgende koers bevinden vanwege de toenemende vluchtelingenstroom in de lidstaten van de Raad van Europa en vanwege de toenemende populariteit van populistische en extreemrechtse politieke partijen. Anno 2017 is er een spanningslijn tussen diegenen die een meer nationalistische koers op varen en de 'anderen'. Een dergelijke spanning zou op termijn de potentie kunnen hebben om de beginselen van pluralisme en gelijkheid in Europa te ondermijnen en de rechten van benadeelde groepen aan te tasten. Derhalve is het noodzakelijk dat individuen of instellingen bestaan die 'tegen de stroom' ingaan. Het EHRM zou een belangrijke speler binnen dit kader kunnen zijn, door met name in de gaten te houden in hoeverre discriminatoir geweld tegen bepaalde groepen mensen incidenteel dan wel systemisch voorkomt. Het Hof zou dan als het ware als een bewaker van de rechten van benadeelde groepen kunnen optreden. Met name daar waar het discriminatoir geweld systemisch blijkt te zijn, kan het Hof als een 'alarmbel' optreden door bekend te maken dat zich een alarmerende situatie voordoet in een lidstaat die dringende aandacht behoeft en vraagt om het treffen van effectieve maatregelen. Het Hof zou bovendien middels zijn uitspraken discriminatoir geweld op de regulerende- of beleidsagenda's van de lidstaten kunnen plaatsen. Tot slot, aangezien het Hof tot op zekere hoogte constitutioneel is, kan het zaken omtrent discriminatoir geweld met prioriteit behandelen en deze kwestie op een gedetailleerde en weloverwogen wijze in zijn jurisprudentie bespreken.

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III. Court of Justice of the European Union

IV. International Court of Justice

V. Inter-American Court of Human Rights

VI. National courts

Australia

United Kingdom

United States of America

Curriculum Vitae

Jasmina Mačkić was born in Čapljina, Bosnia and Herzegovina, on 27 April 1984. In September 1993, she fled war in Bosnia and Herzegovina together with her parents and sister and brother. She attended the Alfrink College Zoetermeer, The Netherlands, where she graduated in 2003. She finished her Masters in Criminal law and criminal procedure (2008) and European law (2009) in Leiden. After her graduation she taught the course 'European Convention on Human Rights' at the Europa Institute in Leiden and worked for the Council of State of the Netherlands. In 2010 she has been awarded a Mozaïek subsidy from the Netherlands Organisation for Scientific Research (NWO) to carry out PhD research at the Europa Institute in Leiden. During her research period, she has conducted a two-month internship in Strasbourg at the Council of Europe's Roma Support Team, a body within the Council of Europe dedicated to a variety of issues concerning the Roma. Additionally, she stayed for five months as a Visiting Research Scholar at the University of Michigan Law School in Ann Arbor in 2013. Between September 2015 and December 2016, she has been working as a lecturer for the Institute of Criminal Law and Criminology, the Moot Court Department (both at Leiden Law School) and the University of Applied Sciences in Leiden. Since January 2017 she has been working as a lecturer and researcher at the Europa Institute at Leiden Law School.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2016 and 2017:

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