Proving discriminatory violence at the European Court of Human Rights

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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.