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## **Proving discriminatory violence at the European Court of Human Rights**

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## 2      Ordering discriminatory violence: three types of complaints

### 2.1      INTRODUCTION

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

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

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

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

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

4 See O’Connell (2009), *ibid.*

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

## 2.2 THREE TYPES OF DISCRIMINATORY VIOLENCE COMPLAINTS

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

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- 5 The term 'elements' used in this thesis was derived from other academic literature, in which the phrase 'constitutive elements of proof' has been used to indicate what issues should be proved in a discrimination case. See M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 23; G. Bindman, 'Proof and Evidence of Discrimination', in: B.A. Hepple & E.M. Szyszczak (eds.), *Discrimination: The Limits of Law*, London: Mansell Publishing Limited 1992, p. 50-66.
- 6 R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211-229, p. 212.

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

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

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

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

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

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

8 ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC); ECtHR 13 June 2002, 38361/97 (*Angelova/Bulgaria*); ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*).

9 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*).

10 ECtHR 4 September 2014, 40514/06 (*Rudiyak/Ukraine*), para. 59.

11 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 157.

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

13 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*).

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

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

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

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

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

17 *Ibid.*, para. 177.

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

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



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

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

20 See ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 126-132; ECtHR 31 July 2012, 20546/07 (*Makhashev/Russia*), paras. 176-179.

21 ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.

22 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 174.

23 Ibid., para. 175.



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

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

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

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

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24 Ibid., para. 179.

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

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

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

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

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

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

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

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

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

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

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

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

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

33 ECtHR 27 July 1998, 54/1997/838/1044 (*Güleç/Turkey*), paras. 81-82; ECtHR 20 May 1999, 21594/93 (*Öğür/Turkey*) (GC), paras. 91-92.

34 ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), para. 87.

35 ECtHR 20 May 1999, 21594/93 (*Öğür/Turkey*) (GC), para. 88.

36 ECtHR 2 September 1998, 63/1997/847/1054 (*Yaşa/Turkey*), paras. 102-104; ECtHR 28 March 2000, 22535/93 (*Mahmut Kaya/Turkey*), paras. 106-107.

37 ECtHR 27 July 1998, 54/1997/838/1044 (*Güleç/Turkey*), para. 78.

38 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 107.

39 ECtHR 27 July 1998, 54/1997/838/1044 (*Güleç/Turkey*), para. 79.

40 ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), para. 89.

41 Ibid. All these requirements evolved in the context of Article 2 case law and were subsequently written down in cases concerning Article 3 allegations. See, for example, ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), paras. 182-185.

42 See, for example, ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC); ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*); ECtHR 12 January 2016, 40355/11 (*Boacă a.o./Romania*).

43 See, for example, ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 Ibid.

57 Ibid. The Court stated the following:

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

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



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

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

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

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58 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), para. 53.

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

60 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 47 and 52.

61 ECtHR 12 April 2016, 12060/12 (*M.C. and A.C./Romania*), para. 121.



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

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

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

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

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

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

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

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

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

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

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

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

67 Ibid., para. 28.

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

was tolerated *de facto* and where judicial and administrative bodies granted impunity to the aggressors.<sup>69</sup>

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

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

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

69 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 119-121.

70 Ibid., para. 198. See also ECtHR 22 March 2016, 646/10 (*M.G./Turkey*), para. 116.

71 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 183 and 193.

72 Ibid., para. 193.

73 Ibid., paras. 195-196.

74 Ibid., para. 183.

75 Ibid., para. 192.

76 Ibid., paras. 199-202.

77 The other two applicants were first applicant’s daughters.

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

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

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

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78 ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), para. 87.

79 Ibid., para. 89.

80 Ibid.

81 An initialism that stands for Lesbian, Gay, Bisexual and Transgender.

82 ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), para. 72.

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

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

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

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

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83 Ibid.

84 Ibid., para. 74.

85 Ibid., para. 73.

### 2.3 GENERAL FEATURES OF ARTICLE 14 ECHR AND THEIR IMPACT ON DISCRIMINATORY VIOLENCE COMPLAINTS

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109 R. Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', 8 *Human Rights Law Review* (2008), p. 475-516, p. 515.

Indeed, it may be observed in certain judgments on discriminatory violence that the Court chooses to focus on the discriminatory factors solely under a substantive provision of the ECHR. This occurred, for example, in ECtHR 12 June 2012, 13624/03 (*Koky a.o./Slovakia*), a case in which applicants of Roma origin alleged that Slovakia omitted to conduct an effective investigation into their ill-treatment inflicted by a group of right-wing Slovaks (see paras. 216-240 and 244).

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

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

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

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

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

<sup>111</sup> ECtHR 3 July 2014, 18114/06 (*Amadayev/Russia*), para. 81.

<sup>112</sup> *Ibid.*, para. 91.

tigated a potential link between the pattern of discriminatory violence and the assault on the applicant.<sup>113</sup>

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

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

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

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

See also P. Leach, 'The Chechen conflict: analysing the oversight of the European Court of Human Rights', 6 *European Human Rights Law Review* (2008), p. 732-761, p. 734 and p. 739.

115 ECtHR 24 May 2007, 17060/03 (*Zeliloff/Greece*); ECtHR 5 July 2007, 21449/04 (*Celniku/Greece*); ECtHR 6 January 2009, 65354/01 (*Tokmak/Turkey*) (Admissibility decision); ECtHR 18 November 2010, 310/04 (*Seidova a.o./Bulgaria*), paras. 67-74; ECtHR 14 February 2012, 45383/07 (*Puky/Slovakia*) (Admissibility decision); ECtHR 31 July 2012, 40020/03 (*M. a.o./Italy and Bulgaria*), paras. 175-181; ECtHR 25 June 2013, 6978/08 (*Gheorghe Cobzaru/Romania*), paras. 77-80. See also for this last case J. Mačkić, case note on: ECtHR 25 June 2013, 6978/08, *EHRC Cases 2013/192* (*Gheorghe Cobzaru/Romania*).

Some complaints of discriminatory violence were also declared inadmissible by the Court because of certain procedural shortcomings, such as a failure by the applicants to exhaust all domestic remedies: ECtHR 6 June 2000, 42584/98 (*Durmaz/Turkey*) (Admissibility decision); ECtHR, 5 October 2004, 42572/98 (*İmret/Turkey*) (Admissibility decision); ECtHR 24 January 2006, 46412/99 (*Yaşar/Turkey*), para. 74; ECtHR 4 May 2006, 16926/03 (*Gergel/Slovakia*) (Admissibility decision); ECtHR 6 March 2007, 13252/02 (*Dzeladinov a.o./The former Yugoslav Republic of Macedonia*) (Admissibility decision); ECtHR 6 February 2007, 29703/05 (*Petrie a.o./United Kingdom*) (Admissibility decision); ECtHR 6 March 2012, 54415/09 (*Deari a.o./The former Yugoslav Republic of Macedonia*) (Admissibility decision).

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

#### 2.4 FURTHER IMPORTANT TAXONOMIES THAT INFLUENCE PROVING THE THREE TYPES OF COMPLAINTS OF DISCRIMINATORY VIOLENCE

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

##### 2.4.1 Formal and substantive equality

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

116 ECtHR 20 June 2006, 17209/02 (*Zarb Adami/Malta*), para. 71.

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

118 *Ibid.*, p. 213.



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

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

119 Ibid.

120 Ibid., p. 227.

121 Ibid., p. 212.

122 R. Rubio-Marín & M. Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism', 26 *European Journal Of International Law* (2015), p. 881-899, p. 883-884. See also S. Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights', 16 *Human Rights Law Review* (2016), p. 273-301.

123 ECtHR 6 April 2000, 34369/97 (*Thlimmenos/Greece*) (GC), para. 44.

124 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 175.



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

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

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

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

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

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

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

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

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

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

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

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

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

#### 2.4.2 Direct and indirect discrimination

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

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

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

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

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

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

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

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

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

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

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

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

137 Ibid., p. 399.

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

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

The EU law approach towards indirect discrimination is virtually identical to the manner in which this notion is interpreted in US and UK case law. See Supreme Court (United States) 8 March 1971, *Willie S. Griggs et al. Petitioners/Duke Power Co.*, 401 U.S. 424 (1971); House of Lords (United Kingdom) 17 February 2000, *R. v. Secretary of State for Employment Ex. p. Seymour-Smith (No. 2)*, [2000] UKHL 12; [2000] 1 All ER 857; [2000] 1 WLR 435. See for the CJEU equivalent of this case: CJEU 9 February 1999, C-167/97 (*Regina/Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*) ECR 1999 I-00623.

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

141 Ibid., p. 185.

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

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

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

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

143 ECtHR 10 March 2011, 2700/10 (*Kiyutin/Russia*), para. 60.

144 Ibid., paras. 62-74.

145 J.H. Gerards, case note on: ECtHR 10 March 2011, 2700/10, *EHRC Cases 2011/84 (Kiyutin/Russia)*, para. 1.

146 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 175. See also ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 154; ECtHR 6 January 2005, 58641/00 (*Hoogendijk/The Netherlands*) (Admissibility Decision); ECtHR 24 May 2016, 38590/10 (*Biao/Denmark*) (GC), para. 103.

147 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 184.

148 R. O’Connell, ‘Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR’, 29 *Legal Studies* (2009), p. 211–229, p. 213.

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

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

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

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

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

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



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

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

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

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

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



## 2.5 CONCLUSION

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

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

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

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

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

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