# Proving discriminatory violence at the European Court of Human Rights

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# 4 The standard of proof in cases of discriminatory violence

## 4.1 Introduction

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

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

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

2 See section 1.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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12 Ibid., p. 1119-1120.

13 Ibid., p. 1118-1120.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 4.3 Standards of proof in ECtHR case law

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

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

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

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

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

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

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

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

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

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

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

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

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

30 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 4.4 'Beyond reasonable doubt' in ECtHR case law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

66 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

77 Ibid., para. 210.

78 Ibid., para. 319.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 4.5 Conclusion

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

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

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

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

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

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

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