Proving discriminatory violence at the European Court of Human Rights

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

5.1 Introduction

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

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

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

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

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

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

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

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

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

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

5.2 Some general observations on the 'burden of proof'

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

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

5 See section 1.5.

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

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

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

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

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

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

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

10 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Cited in C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 202.

25 Ibid.

26 H.W.B. thoe Schwartzenberg, *Civiel bewijsrecht voor de rechtspraktijk*, Antwerp: Maklu-Uitgevers 2013, p. 73-75.

27 J.F. Nijboer, *Strafrechtelijk bewijsrecht*, Nijmegen: Ars Aequi Libri 2011, p. 159-166.

28 M. Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals*, The Hague: Kluwer Law International 1996, p. 367.

common law countries apply this concept in a different setting, i.e. in the relationship between the parties, the judge and the jury. The basic rule of the burden of proof that is recognised in international law is *actori incumbit probatio*, which means that the party alleging the occurrence of certain facts carries the burden of proof.[29] Rules related to the burden of proof are important in international courts, since it is the task of these courts to reach a decision on disputes put before them. So the burden of proof is intended to help ensure that a decision is reached in all cases.[30]

There are several factors underlying the rule on the burden of proof in international law. Firstly, the burden of proof helps to ensure the fairness of the proceedings, by dictating a rough equality between the parties and by requiring that each actor proves his or her own allegations.[31] As stressed earlier, this is a general principle which underlies rules on the burden of proof in each legal system. Secondly, specifically in the context of international law, the burden of proof upholds respect for the dignity of the States involved in a proceeding. This means that there is a presumption that all States are committed to the good of the community and all act consistently with the applicable norms ('presumption of compliance' as it is known).[32] So, "what is customary, normal or more probable is presumed and … anything to the contrary must be shown to exist by the party alleging it."[33] This presumption helps to protect States from unwarranted claims that they are in breach of their obligations. Thus, a claimant who alleges so must expect to bear the burden of proving the allegation.[34] Yet, there is still flexibility in the application of the rules related to the burden of proof where necessary. Departing from the rule *actori incumbit probatio* may be warranted when this approach would create such a level of inequality between the parties that it would affect the fairness of the proceedings.[35]

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29 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 185; M. Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals*, The Hague: Kluwer Law International 1996, p. 369. Various international tribunals apply the rule *actori incumbit probatio*. The ICJ, for example, once held that "each party has to prove its alleged title and the facts upon which it relies" (ICJ 17 November 1953, I.C.J. reports 1953, p. 52 (*Minquiers and Ecrehos Case (France/United Kingdom)*).

30 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 187.

31 Ibid., p. 189.

32 Ibid., p. 189-190.

33 C.F. Amerasinghe, *Evidence in International Litigation*, Leiden: Martinus Nijhoff Publishers 2005, p. 215-216.

34 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 190-192.

35 Ibid., p. 192-193.

Turning to the 'burden of proof' in ECtHR proceedings, it can be observed that the Court has never offered any definition of this expression. However, taking into consideration some of the Court's cases on Article 6 ECHR (right to a fair trial), in which the ECtHR has guided Member States on how to distribute the burden of proof in certain domestic proceedings, it appears that the Court understands this notion in the same way as other adjudicators do, thus as a mechanism for determining the outcome of an argument.[36] During the assessment of its own judgments, it generally first places the burden on the applicant who must deliver *prima facie* evidence of his or her version of the events. If the applicant succeeds in this, the burden then shifts to the respondent State who must disprove the allegations made.[37]

What has been said about the burden of proof in the context of international law generally also applies to the Court specifically. Concretely, this means that the ECtHR also applies the traditional rule of *actori incumbit probatio*.[38] As mentioned in section 5.1, however, the ECtHR does not stringently adhere to this rule of *actori incumbit probatio*. In certain cases it deviates from this traditional approach, emphasising that:

> " … the Court will not rely on the concept that the burden of proof is borne by one or other of the [parties] concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*."[39]

36 See also ECtHR 7 October 1988, 10519/83 (*Salabiaku/France*), para. 28. In that case, the Court underlined that Article 6 allows national rules which place the burden of proof on the accused to establish his or her defence, as long as the overall burden of establishing guilt remains with the prosecution. Other examples of cases in which the Court has instructed Member States on the use of the burden of proof include ECtHR 7 May 2002, 46311/99 (*McVicar/United Kingdom*), para. 87 and ECtHR 15 February 2005, 68416/01 (*Steel and Morris/United Kingdom*), para. 93.

37 ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), para. 165.

38 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160; ECtHR 10 May 2001, 25781/94 (*Cyprus/Turkey*) (GC), para. 113; ECtHR 24 April 2003, 24351/94 (*Aktaş/Turkey*), para. 291; ECtHR 24 March 2005, 21894/93 (*Akkum a.o./Turkey*), para. 210; ECtHR 24 May 2005, 25660/94 (*Süheyla Aydın/Turkey*), para. 147; ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 157; ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 179.

39 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160. This quote is, obviously, somewhat outdated, for the Commission ceased to exist. However, the Court essentially continues to apply the same approach in its case law. See, for example, the inter-State case ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), para. 95, in which it stressed that "[i]n establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates."

A departure from the rule *actori incumbit probatio* by the Court should be seen in light of its special function as a regional human rights court. Thus, the Court's task is *not* to reach a criminal conviction and *not* to treat the respondent State as if it is the accused in a criminal trial. So the respondent State need not receive the same protection as the accused in criminal proceedings and the applicant need not always be the party who has to demonstrate that what is alleged has occurred. It is also not the Court's task to rule on civil liability, but rather to establish State liability. Therefore, especially in cases where the applicant may suffer a significant disadvantage because of the burden of proof that is placed upon him or her, the Court may choose to depart from the rule *actori incumbit probatio*. One example of where this may occur is in a situation in which only the respondent State has access to information that can reveal whether or not that State violated the Convention.[40] As indicated earlier in section 3.3.2, in such situations Member States are principally obliged under Article 38 of the Convention, to furnish the Court with all necessary facilities in the process of resolving the matter. Where Member States are unwilling to cooperate with the Court, requesting the applicant to bear the burden of proof is regarded as unfair.[41] This fits well with Bentham's idea that the burden should be placed "on whom it would sit lightest."[42] In such situations, the Court would be obstructed from establishing the facts in a case and, thus, the protection afforded by the Convention would be undermined. This also applies to those cases where there was no effective domestic investigation into the allegations made by the applicant and in which the ECtHR had to establish the facts on the basis of certain documents, such as records of witness statements, forensic, police and military reports.[43]

In summary, it is clear that the Court takes a two-sided approach towards the burden of proof, as other international courts often do. The basic rule remains *actori incumbit probatio*, however, there is room for flexibility in the application of this rule where that is considered necessary. As in each legal system, the function of the burden of proof is straightforward: it indicates the party that must prove a certain issue. The burden need not remain on the alleging party, but may shift to the respondent State. The

40 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 62.

41 Ibid.

42 J. Bowring, *The Works of Jeremy Bentham (Vol. VI)*, Edinburgh: William Tait 1843, p. 136 and 139 cited in J.B. Thayer, 'The burden of proof', 4 *Harvard Law Review* (1890-1891), p. 45-69, p. 59 and in C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 206.

43 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 62. See also M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 218.

circumstances in which such a shift may occur, in particular, are worth exploring, because this can help to alleviate the applicant's task of proving a certain assertion. This chapter will therefore now turn to these circumstances by first introducing the meaning of the terms 'presumptions' and 'inferences', which are useful tools in shifting the burden of proof from the applicant to the respondent State (section 5.3). A number of cases concerning Article 2 and Article 3 allegations in which the Court has been willing to shift the burden of proof from the applicant to the respondent through the use of presumptions and inferences are then analysed. These concern "two most common inferences and presumptions of fact: state responsibility for a detainee's injury or death in custody, and specific harm where evidence discloses a general practice or modus operandi of harm in the context in which applicants allege they were harmed."[44] A variation of the first type concerns situations in which individuals allegedly became victims of enforced disappearances. 'A general practice or *modus operandi* of harm', hence, the second type, is referred to by the Court as an 'administrative practice', as shall be further considered below (in section 5.4). Finally, (in section 5.5.) the circumstances in which the Court shifted the burden of proof from the applicant to the respondent State in cases in which a *discriminatory nature* of violence was claimed are explored along with the potential circumstances in which the Court may do so in such cases in the future.

5.3 Presumptions and inferences

The Court can only establish violations of the Convention insofar as they are proved by evidence. In addition to direct evidence, the Court may rely on indirect or circumstantial evidence and presumptions in order to find that certain facts are proved or disproved.[45] Direct evidence is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."[46] In English law, this is sometimes referred to as 'direct testimony' and usually entails a witness's statement in which a witness describes that he or she observed a fact in issue with one of his or her five senses.[47] Direct evidence is often placed in contrast to indirect or circumstantial evidence, which may be described as "evidence based on inference and not on personal knowledge and observations" or "all evidence that is not given by eyewitness testimony."[48] In the absence of

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

45 This applies to international courts in general. See C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 234.

46 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 281.

47 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York; Oxford University Press 2014, p. 10.

48 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 280.

direct evidence, the Court may turn to presumptions to reach conclusions on issues of disputed fact. Further, it may draw inferences about the existence of certain facts where no direct proof of the relevant circumstances is available.[49] In *Ireland v. United Kingdom*, the Grand Chamber recognised the potential use of inferences and presumptions, by stressing that the Court adopts the standard of proof 'beyond reasonable doubt', but added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[50]

Presumptions and inferences are complex notions, since (clear) definitions of the two terms are lacking. Nonetheless, in an attempt to understand what they mean, some explanations have been derived from a few national jurisdictions and from a few scholars who have discussed the meaning of these terms in the context of the ECtHR. The concept of presumptions is generally known in common law and civil law and is applicable "where one fact is deemed to be proved on the basis of another."[51] Keane and McKeown, who discussed presumptions and inferences in the context of civil and criminal cases in England and Wales, stress that where a presumption operates, a certain conclusion may or must be drawn by a court in the absence of evidence in rebuttal. They explain that a presumption assists a party bearing a burden of proof. In addition, they highlight that "[p]resumptions are based on considerations of common sense and public policy but not necessarily those of logic."[52] With regard to the relationship between presumptions and inferences, they provide the following illustration:

> "if, after an operation, a swab is found to have been left in a patient's body, it seems reasonable enough to infer, in the absence of explanation by the surgeon, that the accident arose through his negligence.... If a surgeon uses proper care, such an accident does not, in the ordinary course of things, occur; negligence may be presumed."[53]

What this example illustrates is that negligence is *presumed* on the basis of a certain fact (a swab being found to have been left in a patient's body). Subsequently, in the absence of an explanation by the surgeon, negligence is *inferred*. It may be expressed, therefore, that a presumption is indeed a fact proved on the basis of another fact. An inference, on the other hand, is a conclusion that a trier may draw from a presumption.

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49 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 129-133.

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

51 C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality*, Cambridge: Cambridge University Press 2011, p. 234.

52 A. Keane & P. McKeown, *The Modern Law of Evidence*, New York; Oxford University Press 2014, p. 672.

53 Ibid.

It is hard to find proper descriptions of presumptions and inferences in the context of the ECtHR, as there is no unified approach concerning their meaning. The Court has never defined these terms, although it frequently communicates to the Member States under what conditions the use of presumptions and (adverse) inferences by their national authorities is acceptable under Article 6 ECHR.[54] Nonetheless, there are scholars who have attempted to clarify their meaning. Smith observes that presumptions are nothing more than inferences drawn by judges. This, according to him, explains why the term 'presumption' can be used interchangeably with the term 'inference', as it also appears to be used by the Court. He describes presumptions as "conclusions drawn from known facts about unknown facts", whereas inferences are "used to draw logical conclusions from available facts, based on circumstances that usually attend such facts."[55] O'Boyle and Brady do not offer any definitions of presumptions and inferences, however, they stress that presumptions form a basis for the Court to reach conclusions on issues of disputed facts. Presumptions of fact often arise in the following circumstances: in cases where a detainee is found injured or dead in custody; if evidence demonstrates that persons were last seen being taken into custody and then later disappeared, and; where killings occur in areas under the exclusive control of State authorities.[56] Additionally, they note that where the Court refers to inferences, this usually means that inferences are adverse to one side in the dispute. The authors provide as an example a failure by a respondent State to cooperate with the Court in the examination of the case, as required under Article 38 of the Convention. Such a failure may then result not only in a violation of Article 38 being established, but also lead to inferences being drawn concerning the substantive and procedural violations alleged by the applicant.[57] These circumstances, in which presumptions and inferences may be used to the benefit of the applicant's position, and in which they may influence the distribution of the burden of proof, are looked at in more detail in the next section.

There are two sides to the use of presumptions and inferences as fact-finding techniques. On the one hand, they can be a useful fact-finding tool for a regional human rights court such as the ECtHR, because they enable the Court to effectively enforce human rights. In cases where direct evidence is lacking or where respondent States are either unable or unwilling

54 ECtHR 7 October 1988, 10519/83 (*Salabiaku/France*), para. 28; ECtHR 8 February 1996, 18731/91 (*John Murray/United Kingdom*); ECtHR 20 March 2001, 33501/96 (*Telfner/Austria*).

55 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 214.

56 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 129-130.

57 Ibid., p. 131-133.

to provide information, the ECtHR seeks recourse to such 'creative' fact-finding techniques to establish State liability.[58] Consequently, the Court does not need direct evidence *per se* to establish the facts, but may turn to presumptions and inferences to ascertain the issues in a case. On the other hand, in certain cases, there need to be limits on the use of presumptions and inferences. For example, in cases where governments do not provide information concerning a certain allegation, the Court cannot always know why a government remains silent in response to that allegation. Obviously, the State may refuse to cooperate in order to conceal its own guilt for the alleged wrongful conduct. But there are several other possibilities which could explain the Member State's decision. Smith argues that the State may not want to lend any credence to the allegations by repeating them in the process of denying them. In addition, it may be that some Member States are plagued with unstable circumstances or lack systemic and reliable record-keeping at the moment when their cooperation is requested by the Court.[59] Smith further observes that the conclusion that a Member State has violated the Convention should not be made lightly, because establishing a violation can place a certain stigma on the respondent State.[60] Another reason why the Court should be cautious in the use of presumptions and inferences is connected to the applicants' authenticity and possible motivations for their allegations. The Court must take into account that there may be applicants who either consciously or unconsciously have incentives not to be truthful. This may occur when the applicant is an opponent of the State and aims to denounce the State.[61] Prisoners, in particular, may exaggerate their problems, either because they have little else to occupy their minds or to undermine criminal prosecutions, convictions or confessions.[62]

This section provided an introduction to the terms 'presumptions' and 'inferences'. The following section will analyse how these terms are used in cases concerning alleged State responsibility for a detainee's injury or death in custody, and in cases concerning a systemic or administrative practice of violent behaviour by State agents. It will especially highlight how presumptions and inferences influence the distribution of the burden of proof in such cases.

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58 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 210-216.

59 Ibid., p. 221. See also C.N. Brower, 'The Anatomy of Fact-Finding Before International Tribunals: an Analysis and a Proposal Concerning the Evaluation of Evidence', in: R.B. Lillich (ed.), *Fact-Finding Before International Tribunals*, Ardsley-on-Hudson, New York: Transnational Publishers, Inc. 1992, p. 147-151, p. 149.

60 M. Smith, 'The Adjudicatory fact-finding tools of the European Court of Human Rights', 2 *European Human Rights Law Review* (2009), p. 206-228, p. 221.

61 L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1995, p. 163.

62 D. Weissbrodt, 'International Factfinding in Regard to Torture', 57 *Nordic Journal of International Law* (1988), p. 151-196, p. 165.

5.4 The influence of presumptions and inferences on the distribution of the burden of proof in violence cases

As stated above, the Court is often inclined to place the burden of proof on the applicant to prove an asserted fact in accordance with the rule *actori incumbit probatio*. Yet, in specific cases concerning Article 2 and Article 3 complaints, the Court has applied certain methods that enable the burden to be shifted from the applicant to the respondent State. These methods include the use of presumptions and inferences in situations where a detainee has been injured or died in custody and situations where a victim allegedly disappeared while in hands of State agents. Presumptions and inferences are also used in situations where the evidence discloses a systemic practice or an administrative practice in which applicants claim that they or other victims were harmed. An analysis of these cases is useful, because it demonstrates the different ways that the Court has implemented the devices of inferences and presumptions in its case law to alleviate the applicant's position vis-à-vis the respondent State. A question which will eventually result from this analysis is whether these methods could be applied in cases in which violence of a discriminatory nature is alleged.

5.4.1 Cases in which individuals were injured, died or disappeared while in the hands of State agents

Presumptions and inferences are often applied by the Court in Article 2 and Article 3 related matters where individuals claim to have been injured or that family members were killed while in custody or while otherwise held under the control of State agents.[63] The ECtHR applies these two devices also in cases of enforced disappearances. As the following will show, these are useful tools that the Court has applied in its case law to shift the burden of proof from the applicant to the respondent State, because in the situations discussed below, it would otherwise be almost impossible for the applicants to prove State liability for the alleged violence. In this context, it is important to clearly delimit the boundaries between two important questions which are at stake during the assessment of such cases, because the two questions may influence the distribution of the burden of proof between the parties. As will be shown below, the first question in cases of alleged detention by State agents is whether an applicant can demonstrate that he or she or another victim was detained by State agents and was injured or died during detention. The applicant can succeed in this if he or she manages to raise a *presumption* that the alleged ill-treatment or killing indeed occurred during custody, upon which the burden of proof will shift to the

63 M. O'Boyle & N. Brady, 'Investigatory powers of the European Court of Human Rights', in: O. Chernishova & M. Lobov (eds.), *Russia and the European Court of Human Rights: A Decade of Change. Essays in honour of Anatoly Kovler, Judge of the European Court of Human Rights in 1999-2012*, Oisterwijk: Wolf Legal Publishers 2013, p. 121-141, p. 129-130.

respondent State. The second question is whether the respondent State can actually be held responsible for the alleged violence. During the assessment of that question, the Court requires the respondent State to offer an explanation for the alleged violence, otherwise the Court will draw *inferences* about how well-founded the applicant's allegations are. In cases relating killings, specifically, respondent States may be required to justify any use of lethal force by their agents. The drawing of inferences may eventually amount to a conclusion – usually to the threshold of 'beyond reasonable doubt' – that the respondent State violated Articles 2 or 3 of the Convention. With respect to cases of enforced disappearance, the two questions may be framed as follows: (1) whether, in the absence of a body, the alleged victim may be presumed dead, and (2) whether the evidence adduced is sufficient to establish State liability for the disappearance in question.[64] How presumptions and inferences impact on the distribution of the burden of proof in such cases is illustrated below, with an analysis of some examples of allegations of injuries and deaths during custody, and allegations of enforced disappearances, respectively.

When an applicant alleges that he or she was harmed by State agents during custody or that another victim died while in detention, the Court has recognised that persons in custody are in a vulnerable position and the authorities have a duty to protect them. For these reasons, the Court has accepted the general rule that "[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention."[65] Under such circumstances, the Court therefore presumes that the Member State was responsible for the alleged ill-treatment or killing. The Court places a particularly strict obligation on the Member State concerned to provide explanations for the treatment of an individual in custody where that individual has died.[66]

In the assessment of the first question above, the ECtHR requires that the applicant demonstrates that the individual in question was indeed taken into custody or was otherwise entirely held under the control of State agents during the alleged incidence of violence. An applicant is obliged to make a *prima facie* case at the ECtHR before the Court is prepared to shift the burden to the respondent government.[67] The Court has found applicants'

64 J. Barrett, 'Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights', 22 *Harvard Human Rights Journal* (2009), p. 133-143, p. 136.

65 ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 100.

66 Ibid., para. 99.

67 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. *Report. Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007 (online), para. 83. The report made reference to ECtHR 31 May 2005, 27601/95 (*Toğcu/Turkey*), para. 95.

allegations plausible on the basis of, among other things, medical reports or statements from forensic experts demonstrating that the individual involved suffered physical harm while he or she was held entirely under the control of the respondent State.[68] In assessing credibility, the Court has also taken into consideration any discrepancies in explanations provided by the State.[69] In cases where there were several applicants alleging the same type of ill-treatment at the same location, the ECtHR has also considered the fact that those applicants were unequivocal in their account that they had been assaulted by State officials.[70] All these elements may thus lead to a presumption that the alleged victims were deliberately beaten or killed by State officials and the presence of such a presumption may result in the burden of proof being shifted to the respondent State. Hence, if the applicant succeeds in making a *prima facie* case, the burden of proof shifts to the respondent State which is then under the obligation to provide a satisfactory and convincing explanation of how the harm was caused to the individual.[71]

This is where the second question arises which also plays throughout the assessment of this type of complaint. This question asks whether the respondent State can be held responsible for the alleged violence. If the respondent State does not satisfactorily establish that the individual's injuries or death were caused other than – entirely, mainly or partly – by the treatment he or she suffered while detained by State agents, the ECtHR establishes a violation of Article 2 or 3 ECHR.[72] As set out above, State responsibility for violent behaviour must generally be established to a threshold of 'beyond reasonable doubt'.[73]

Salman v. Turkey illustrates the Court's reasoning in this regard. In that case, the applicant alleged that her husband was taken into custody in apparent good health and without any pre-existing injuries or active illness, yet he died while in detention. She managed to present a *prima facie* case by relying on medical evidence which showed that the victim had been subjected to force during custody. For the Court, this was sufficient to shift the burden of proof to the respondent State and to require it to provide a plausible explanation for the victim's injuries and subsequent death. However,

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68 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), paras. 33-34; ECtHR 18 December 1996, 21987/93 (*Aksoy/Turkey*), para. 60; ECtHR 20 July 2004, 47940/99 *(Balogh/Hungary*), paras. 44-54.

69 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), paras. 33-34.

70 ECtHR 10 October 2000, 31866/96 (*Satık a.o./Turkey*), para. 57. The case concerned ten applicants who complained to the Court that they were beaten by prison warders and prison administrators with truncheons and wooden planks.

71 ECtHR 27 August 1992, 12850/87 (*Tomasi/France*), paras. 108-111; ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), para. 34; ECtHR 18 December 1996, 21987/93 (*Aksoy/Turkey*), para. 61; ECtHR 28 July 1999, 25803/94 (*Selmouni/France*) (GC), para. 87; ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 100; ECtHR 20 July 2004, 40154/98 (*Mehmet Emin Yüksel/Turkey*), paras. 25-31.

72 ECtHR 4 December 1995, 18896/91 (*Ribitsch/Austria*), paras. 34-40; ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 102-103.

73 ECtHR 27 June 2000, 21986/93 (*Salman/Turkey*) (GC), para. 100.

the respondent State did not provide any account for the victim's death, which led to the conclusion that the State could be held responsible for the violence and that it had violated Article 2.[74]

The Court has regularly facilitated a shift in the burden of proof to the respondent State in cases where there has been a lack of cooperation from the side of the respondent State in establishing the facts. This also occurred in the case *Akkum a.o. v. Turkey*, for example, which concerned the death of the applicants' relatives during a military operation. In that case, the victims had not died in custody, yet were found dead in an area under the exclusive control of the authorities of the State. The Court was unable to establish the accuracy of the applicants' allegations, due to the government's failure to submit certain documents to the Court. Under the circumstances, the Court found it 'inappropriate' to conclude that the applicants had failed to submit sufficient evidence in support of their allegations, but found that in such situations the burden of proof may be regarded as resting on the authorities to explain how the deaths of the victims were caused.[75] The Court stated that "in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise."[76]

Not all allegations concerning beatings or killings in custody necessarily lead to the conclusion that the State was responsible for the violence. Further, not in all cases does the Court clearly indicate how the burden of proof is distributed between the parties and how presumptions and/or inferences may influence the distribution of the burden of proof. The case *Sevtap Veznedaroğlu v. Turkey* illustrates both these issues. In that case, the applicant alleged that she had been ill-treated by State agents during police custody and supported her claims with three medical reports, two of which she managed to obtain while still in custody. During the assessment of the complaint, the Court made no use of presumptions to shift the burden of proof to the respondent government, nor did it draw inferences to find a violation. Overall, it did not expressly refer to terms such as '*prima facie* case', 'burden of proof', 'presumptions' and 'inferences'. It also did not discuss the following two questions separately: (1) whether the applicant had become injured during custody, and; (2) whether the State could be held responsible for her injuries. Instead, the Court discussed the two questions in an unstructured manner. Firstly, it noted that the government indeed did not deny that the applicant had suffered some injuries during her time

74 Ibid., paras. 102-103.
75 ECtHR 24 March 2005, 21894/93 (*Akkum a.o./Turkey*), paras. 209-210.
76 Ibid., para. 211.

in custody. Subsequently, it took into consideration the respondent State's claims that the injuries were minor and that such injuries could not have been inflicted by State officials.[77] The Court finally underlined that:

> "[it] finds it impossible to establish on the basis of the evidence before it whether or not the applicant's injuries were caused by the police or whether she was tortured to the extent claimed. It is not persuaded either that the hearing of witnesses by the Court would clarify the facts of the case or make it possible to conclude, beyond reasonable doubt …, that the applicant's allegations are substantiated."[78]

This type of reasoning raises the question of whether the Court has placed the burden of proof on any of the parties at all, or whether it has freely evaluated all the evidence that was presented to it. Judge Bonello, in a partly dissenting opinion, explains that the Court expected the applicant to prove her allegations 'beyond reasonable doubt', although it did not expressly assert that the applicant had an obligation to prove her allegations to that degree.[79] Bonello criticises that approach and argues that the Court should have applied a reasoning which says that "[w]here an individual, when taken in police custody, is in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."[80] According to Bonello, such circumstances were clearly present in this case and, therefore, the burden of proof should have shifted to the respondent State which would then have been obliged to provide a plausible explanation for the injuries.[81] Bonello stresses how the Court "after having established that the dearth of evidence is the defendant's fault, … visited the consequences of this failure on the applicant."[82] He argues that the applicant was penalised for not submitting evidence that the Convention requires the State to produce. This opinion found support in subsequent academic writing which stressed that the burden was laid squarely with the applicant.[83]

The Court has also used presumptions and inferences and redistributed the burden of proof in the context of a particular kind of allegation of ill-treatment during custody, in cases which are referred to as 'extraordinary rendition' cases. Extraordinary rendition is a strategy developed and refined

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77 ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), para. 30.
78 Ibid.
79 ECtHR 11 April 2000, 32357/96 (*Sevtap Veznedaroğlu/Turkey*), *partly dissenting opinion of Judge Bonello*, para. 10.
80 Ibid., para. 9.
81 Ibid.
82 Ibid., para. 19.
83 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 84; H. van der Wilt, case note on: ECtHR 11 April 2000, 32357/96, *EHRC Cases* 2000/48 (*Sevtap Veznedaroğlu/Turkey*).

by a series of US administrations. Numerous countries currently apply that strategy, including some Council of Europe Member States.[84] Weissbrodt and Bergquist describe it as follows:

> "Extraordinary rendition is a hybrid human rights violation, combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals. It involves the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation. As is the case with state-sponsored disappearances, extraordinary rendition appears to be a practice in which perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses."[85]

What this quote suggests is that evidentiary obstacles may arise for those complaining about extraordinary rendition, because States tend to deny any involvement in such operations. The applicant's claim in the case *El-Masri v. the Former Yugoslav Republic of Macedonia* provides a good example in this context. In that case, the applicant complained that he had been victim of a secret rendition operation during which he was arrested, held in isolation, questioned and ill-treated by Macedonian State agents and subsequently transferred to United States Central Intelligence Agency (CIA) agents who further subjected him to ill-treatment in Afghanistan. The respondent State entirely contested the allegations made by the applicant. So, a prominent issue in this case was whether, due to the firm denial by the government of any involvement in the extraordinary rendition, the burden of proof could be shifted from the applicant to the respondent State.[86]

Before turning to this issue, it is necessary to identify on whom the burden of proof was initially placed to demonstrate that the applicant had indeed become a victim of extraordinary rendition and that the Member State was somehow involved in that event. It becomes clear from the *El-Masri* judgment that the Court required *prima facie* evidence in favour of the applicant's version of events to be proved.[87] However, the judgment does not explicitly answer the question of whether the applicant was *exclusively* under a duty to present all the evidence – and thus carried the burden of proof – to establish a *prima facie* case of the respondent State's involvement in the alleged extraordinary rendition. The judgment suggests that the Court took into consideration evidentiary material collected through various avenues, and not just from the applicant, to reach the conclusion that a *prima facie* case had been made.

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84 D. Weissbrodt & A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', 19 *Harvard Human Rights Journal* (2006), p. 123-160, p. 124.

85 Ibid., p. 127.

86 ECtHR 13 December 2012, 39630/09 (*El-Masri/The former Yugoslav Republic of Macedonia*) (GC), para. 154.

87 Ibid., para. 165.

The judgment in *El-Masri* reveals that the Court considered the applicant's description of the circumstances to be credible, by stating that his alleged ordeal was very detailed, specific and consistent throughout the whole period following his return to his home State, Germany.[88] The Court also referred to "other aspects of the case which enhance the applicant's credibility"[89] in order to establish a *prima facie* case. These other aspects included a substantial amount of indirect evidence obtained during international inquiries and the investigation by the German authorities, including aviation logs and flight logs monitoring the movements of the aircrafts which had transported the applicant to various locations, scientific testing of the applicant's hair follicles confirming that the applicant had spent time in a South Asian country and had been deprived of food for an extended period of time, geological records that confirmed the applicant's recollection of minor earthquakes during his alleged detention in Afghanistan, sketches that the applicant drew of the layout of the Afghan prison, which were immediately recognisable to another rendition victim who had been detained by US agents in Afghanistan and general information about the 'rendition programme' run by the US authorities at the time produced by various external actors, including the United Nations General Assembly, Amnesty International and Human Rights Watch. Additionally, the Court referred to a written statement provided by a person who was, at the relevant time, the Minister of the Interior of the respondent State and soon afterwards became Prime Minister. In that statement, which was the only direct evidence in *El-Masri*, the witness confirmed that the Macedonian law-enforcement authorities, acting upon a valid international arrest warrant issued by the US authorities, had subjected the applicant to the US rendition programme.[90] The Court found this statement from a high-ranking official to be particularly important, especially because that official had played a key role in the dispute in question and had acknowledged facts or conduct that put the authorities in an unfavourable light. According to the Court, such a statement could be construed as a form of admission.[91] On the basis of this evidence, the Court found that a *prima facie* case had been established and subsequently shifted the burden of proof to the respondent State.[92]

The government, in turn, was under a duty to provide a satisfactory and convincing explanation of how the events in question occurred. However, it failed to offer an explanation of the applicant's fate from the moment he was apprehended by Macedonian State agents. That allowed the ECtHR to draw inferences from the available material and the authorities' conduct and to eventually establish that applicant's allegations were sufficiently convincing

88 Ibid., para. 156.
89 Ibid.
90 Ibid., paras. 157-161.
91 Ibid., para. 163.
92 Ibid., para. 165.

to a 'beyond reasonable doubt' level of proof regarding the Member State's contribution to the extraordinary rendition.[93]

Even more challenging to prove were the allegations made in the cases *Al Nashiri* and *Husayn (Abu Zubaydah)*, because of an absence of any direct evidence that the respondent State (Poland) had contributed to the ill-treatment of the applicants. In these cases, the applicants claimed that they had been held at a CIA 'black site' in Poland, and that Poland had knowingly and, despite the real risk of further ill-treatment and incommunicado detention, intentionally enabled their transfer from Polish territory to a jurisdiction where they would be denied a fair trial. In both cases, the Court established that Poland had facilitated the process of rendition on its territory, had created the conditions for it to happen and had made no attempt to prevent it from occurring, with this violating Article 3 of the Convention.[94] The Court established such a violation despite the absence of any form of testimony of the events complained of by the applicants, even regarding the issue of whether the applicants had ever been in Poland. Such an absence was due to the fact that, from the moment of their arrest, the applicants had been continually held in the custody of the US authorities, initially in the hands of the CIA at an undisclosed detention centre at various black sites and then in the custody of US military authorities in Guantánamo. Both applicants were unable to communicate with the outside world, apart from the team of the International Committee of the Red Cross (ICRC), the military commission's members and their US counsels. These circumstances had a considerable impact on the applicants' ability to plead their case before the Court. So the Court had to establish Poland's alleged implication in the transfer of the applicants on the basis of circumstantial evidence, including a great deal of evidence obtained from international inquiries, redacted documents released by the CIA, other public sources and evidence from experts and one witness.[95]

In both cases, the Court first underlined the general rules that "it is for the applicant to make a *prima facie* case and adduce appropriate evidence"[96] and that "if the respondent Government in their response to his allegations fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred, strong inferences can be drawn."[97] Although the Court did not explicitly mention the term 'burden of proof', these quotes suggest that it in fact distributed the burden of proof between the parties,

93 Ibid., paras. 166-167.

94 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 401-519; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 401-514.

95 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 397-400; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 397-400.

96 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 395; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para 395.

97 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 395; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 395.

or planned to do so during the assessment of the allegations. Hence, from these quotes it appears that initially the Court placed the burden of proof on the applicants to establish a *prima facie* case of Poland's involvement in the extraordinary rendition and suggested that if the applicants succeed in this, then the burden could shift to the respondent State to rebut the allegations. However, the Court also underlined that 'strong' presumptions in respect of the applicants' injuries during detention may arise where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. The existence of such strong presumptions, according to the Court, leads to a shift in the burden of proof to the authorities to provide a satisfactory and convincing explanation of the events. If no such explanation is provided, the Court may draw inferences favourable to the applicants.[98] From this, it therefore appears that the burden was not strictly placed on the applicants.

When it turned to the assessment of the actual case, the ECtHR did not explicitly apply such a distribution of the burden of proof between parties through the use of presumptions and inferences. Rather, from the judgment it appears that it evaluated all the evidence collected through various channels to eventually establish that the applicants' allegations concerning their ill-treatment and secret detention in Poland and their transfer from Poland to other CIA black sites had been proved 'beyond reasonable doubt'.[99] The Court based its examination on documentary evidence which had mostly been supplied by the applicants and, to some extent, supplemented by the government. It further used the observations of the parties, material available in the public domain, the testimony of experts and a witness who gave oral evidence before the Court at a fact-finding hearing. During the hearing, the Court heard three expert witnesses, these were Mr. Giovanni Claudio Fava, in his capacity as the Rapporteur of the European Parliament's Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of Prisoners (the TDIP; the relevant inquiry also known as 'the Fava Inquiry'), Senator Dick Marty, in his capacity as the Parliamentary Assembly of the Council of Europe's Rapporteur in the inquiry into the allegations of CIA secret detention facilities in the Council of Europe's Member States (the Marty Inquiry), and Mr. J.G.S., in his capacity as an advisor to Senator Marty in the Marty Inquiry.[100] The documentary evidence included CIA reports describing transfer procedures of 'high-value detainees', flight plan messages by Euro Control and information provided by the Polish Border Guard and the Polish Air Navigation Services Agency (PANSA), the US Department of Justice Office of Professional Responsibility

98 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 396; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 396.

99 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 417; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 419.

100 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 42; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 42.

Report, entitled "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" (the 2009 DOJ Report), a report from the Center for Human Rights and Global Justice (CHRGJ), expert evidence reconstructing the chronology of rendition and detention of the applicants at the relevant time and statements and reports from international organisations about extraordinary rendition in general.[101] The Court did not specifically highlight the moment when the burden of proof shifted to the respondent State during its assessment of the case, but it did note that Poland had not offered any explanation for the nature of, the reasons for, or the purposes of rendition aircraft landing on its territory.[102] Owing to the lack of any explanation by the government and its refusal to disclose to the Court documents necessary for its examination of the case, the Court drew inferences to determine that the applicants' allegations that during the relevant period they were detained in Poland, were sufficiently convincing.[103]

Hence, in rendition cases, the Court initially, under the general rules, suggests that there is a certain distribution of the burden of proof between parties. The cases above indicate that the Court first requires from applicants to demonstrate a *prima facie* case that the respondent State somehow contributed to the extraordinary rendition of an applicant, following which the burden of proof shifts to the respondent State which must then prove that it was not involved in such an activity. However, once the Court turns to the actual assessment of the case, a clear distribution of the burden of proof between parties becomes less apparent. Instead, the Court evaluates all the evidence before it to establish State liability for the extraordinary rendition. This makes it difficult to indicate how much the applicant must demonstrate to establish a *prima facie* case and what exactly must be put forward by the respondent State to rebut such a case.

In cases concerning alleged enforced disappearances, again, two separate questions arise during the assessment of the cases. As indicated earlier, the first question is whether in the absence of a body, the alleged victim may be presumed dead. The second question is whether the evidence adduced is sufficient to establish State liability for the disappearance in question. In this study the term 'enforced disappearance' should be understood in the light of the definition formulated in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, thus as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the

101 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 406-416 and 418-443; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 406-418 and 420-445.

102 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), paras. 414; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), paras. 414.

103 ECtHR 24 July 2014, 28761/11 (*Al Nashiri/Poland*), para. 415; ECtHR 24 July 2014, 7511/13 (*Husayn (Abu Zubaydah)/Poland*), para. 415.

authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

In these cases, similar evidentiary issues may arise as in cases concerning extraordinary renditions, namely a lack of direct or other evidence indicating that the respondent State was responsible for the wrongful conduct and that the respondent State is unwilling to acknowledge such. Furthermore, respondent States may not wish to provide access to the relevant information that could resolve factual issues to the applicants or the Court.[104] With regard to the distribution of the burden of proof in these cases, Barrett distilled the following analysis from the Court's case law:

> "(1) if the applicant makes out a prima facie case concerning the state's responsibility for a detention and the Court is prevented from reaching a definitive conclusion concerning the issue because the state fails to provide the relevant criminal case file, then the burden of proof regarding the relevant events will shift to the state; and (2) in the absence of a plausible explanation concerning the apparent disappearance of the victim, the state will be held to have violated Article 2 of the Convention."[105]

Indeed, in some cases concerning enforced disappearances, the Court has distributed the burden of proof between parties in this way.[106] A few ECtHR cases show that applicants can make a *prima facie* case on the basis of witness statements which, for example, revealed that around the time of the disappearance of the presumed victim, armed men in uniform driving military vehicles were able to move freely through federal roadblocks during curfew hours or that they were checking identity papers and apprehended several persons in their homes in the area of a town.[107] A *prima facie* case has also been established on the basis of witness accounts of other detainees who were apprehended on the same date as the presumed victim and who stated that they were held together with that individual.[108] After establishing a *prima facie* case, the Court requires from the respondent State to submit the documents which are in its exclusive possession or to provide another plau-

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104 See, for example, ECtHR 9 November 2006, 7615/02 (*Imakayeva/Russia*), para. 124. See also P. Leach, 'The Chechen conflict: analysing the oversight of the European Court of Human Rights', 6 *European Human Rights Law Review* (2008), p. 732-761, p. 746, and M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 237.

105 J. Barrett, 'Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights', 22 *Harvard Human Rights Journal* (2009), p. 138-139.

106 ECtHR 29 May 2008, 37315/03 (*Betayev and Betayeva/Russia*), para. 69; ECtHR 3 July 2008, 12703/02 (*Musayeva/Russia*), paras. 100-101; ECtHR 3 July 2008, 12712/02 (*Ruslan Umarov/Russia*), paras. 92-93; ECtHR 3 July 2008, 32059/02 (*Akhiyadova/Russia*), paras. 61-62.

107 ECtHR 29 May 2008, 37315/03 (*Betayev and Betayeva/Russia*), para. 68; ECtHR 3 July 2008, 12703/02 (*Musayeva/Russia*), paras. 98-99 and 101; ECtHR 3 July 2008, 12712/02 (*Ruslan Umarov/Russia*), paras. 90-91 and 93.

108 ECtHR 3 July 2008, 12712/02 (*Ruslan Umarov/Russia*), para. 90.

sible explanation for the events in question. If the government fails to act accordingly, the Court draws inferences by establishing that the presumed victim was indeed apprehended by State agents and that the victim must be presumed dead 'beyond reasonable doubt' following unacknowledged detention by State servicemen.[109]

Although such a clear distribution of the burden is not apparent in every case regarding enforced disappearances. Generally, it is difficult to derive from some of these cases what the applicant must prove to make a *prima facie* case and what the respondent State must prove in return by way of rebuttal. This lack of clarity is caused by the fact that in certain enforced disappearance cases the Court has been inclined to analyse the two aforementioned questions together and to discuss them in an indistinguishable manner. For example, in *Bazorkina v. Russia*, the Court underlined that it would identify a number of crucial elements that should be taken into account when deciding whether the disappeared individual may be presumed dead and whether his death can be attributed to the authorities.[110] On the basis of a number of elements, which are briefly further set out below, and taking into consideration that no information has come to light concerning the whereabouts of the disappeared individual for more than six years, the Court was satisfied that he must be presumed dead following unacknowledged detention. On that basis, the Court determined that the responsibility of the respondent State had been engaged. Finally, noting that the authorities had not relied on any grounds of justification in respect of the use of lethal force by their agents, the Court established that liability was attributable to the respondent government.[111] From this analysis, it is difficult to trace the momentum of when the burden of proof shifted from the applicant to the respondent State. Furthermore, the analysis does not make clear what the applicant must demonstrate to establish a *prima facie* case and what explanations the respondent State must offer in order to rebut the allegation put forward by the applicant. Instead, it appears that the Court considered all the evidence that was before it to establish a presumption of State responsibility for an enforced disappearance. Subsequently, it offered a final opportunity for the Member State to justify the necessity for the use of lethal force on the victim and/or to provide other explanations as to what happened.

A question arising from this concerns the factors or the types of evidentiary material on the basis of which the Court decides whether there is sufficient evidence to conclude that Article 2 was violated by the respondent State. The Court has formulated the following general rule for this purpose, which states that:

109 ECtHR 29 May 2008, 37315/03 (*Betayev and Betayeva/Russia*), paras. 70 and 75; ECtHR 3 July 2008, 32059/02 (*Akhiyadova/Russia*), para. 65.

110 ECtHR 27 July 2006, 69481/01 (*Bazorkina/Russia*), para. 110.

111 Ibid., para. 111.

> "[w]hether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody."[112]

A further question arising from this is: under what circumstances are there 'concrete elements' present which allow the Court to determine that 'issues' may arise under Article 2. In *Bazorkina*, the Court attached importance to the fact that the government did not deny that the presumed victim was detained during a counter-terrorist operation in the village of Alkhan-Kala on 2 February 2000 and that there has been no reliable news of him from that moment on. *Bazorkina* was also one of the few cases in which direct evidence was available on the events, including a videotape showing that the presumed victim had been interrogated by a senior military officer who, at the end of the interrogation, said that he should be executed. This was confirmed by numerous witness statements in the criminal investigation file. That videotape and the witness statements provided the Court with sufficient basis to conclude that the presumed victim must have found himself in a life-threatening situation.[113]

In other cases, where no direct evidence was available, the Court has relied on circumstantial evidence to establish State responsibility for an enforced disappearance. This occurred for example in a case in which it was established that a person's abduction occurred at the same time and in the immediate vicinity of a military 'mopping-up' operation conducted by the respondent State. It was also established in that case that the victim's body had been discovered together with the bodies of other people with whom she had been detained and that the bodies found in the mass grave were wearing the same clothes as those worn by the individuals in question on the day of their detention.[114]

A relevant, though not decisive, factor that has been taken into account frequently in order to establish State responsibility for an enforced disappearance, is the period of time that has elapsed since the disappeared individual was placed in detention. The more time that has passed without any news of the detained person, the greater the likelihood that he or she is dead.[115] What has further played a role in establishing enforced disappearance are the fact that the applicant's official enquiries to the government about the disappeared person were met with denials, establishment that the disappeared person was taken to a place of detention by State officials and

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112 This rule was formulated in ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*), para. 82, and subsequently repeated also in ECtHR 18 June 2002, 25656/94 (*Orhan/Turkey*), para. 329 and ECtHR 2 August 2005, 65899/01 (*Taniş a.o./Turkey*), para. 200.

113 ECtHR 27 July 2006, 69481/01 (*Bazorkina/Russia*), para. 110.

114 ECtHR 9 November 2006, 69480/01 (*Luluyev a.o./Russia*), paras. 80-85.

115 ECtHR 13 June 2000, 23531/94 (*Timurtaş/Turkey*), para. 83.

the fact that the presumed victim was wanted by the authorities for certain activities. The Court has additionally taken into account – as supporting evidence – the general context of the situation in the respondent State, from which it was known that the unacknowledged detention of a specific suspect would be life-threatening to that person.[116] This last factor was taken into consideration in several cases against Turkey, where the Court referred to the general context of the situation in south-east Turkey in a relevant period when it was known that an unacknowledged detention of PKK suspects could amount to the deaths of the detainees.[117] The Court has made similar observations regarding disappearances in Chechnya, maintaining that, in the context of the Chechen conflict, when a person is detained by unidentified servicemen without any subsequent acknowledgement of that detention, this can be regarded as life-threatening to that individual.[118]

This subsection has shown that the Court has shifted the burden of proof from the applicant to the respondent State in a variety of Article 2 and Article 3-related cases. In order to be able to pronounce violations, the Court generally requires that applicants demonstrate a *prima facie* case by invoking a presumption about a certain type of violent State behaviour, following which the burden of proof shifts to the respondent State which must then explain how the alleged behaviour cannot be attributed to its State agents or, in Article 2-related claims specifically, that the lethal use of force by its agents was justified. If the respondent State fails this duty, the Court will draw inferences as to the well-foundedness of the applicant's allegations and establish that they occurred to a threshold of 'beyond reasonable doubt'. What these cases essentially demonstrate is that the Court has introduced certain ways to alleviate the applicants' burden in proving their allegations. Presumptions and inferences have enabled the burden of proof to be shifted from the applicant to the respondent State in cases where evidence about the alleged violence was scarce or inaccessible to applicants and sometimes even to the Court. In the next section (5.5) the question will be examined of whether the ECtHR should apply a similar approach to evidentiary issues in cases where violence of a discriminatory nature, inflicted by State agents, is alleged. More specifically, it is questioned whether an applicant could raise a presumption of violence of a discriminatory nature, following which the burden of proof could shift to the respondent State to explain that the violence was not prejudice-based and, if so, under what circumstances such a shift could take place.

116 Ibid., paras. 84-85.

117 Ibid., para. 85. See further ECtHR 31 May 2001, 23954/94 (*Akdeniz a.o./Turkey*), paras. 88-89. See also J. Chevalier-Watts, 'The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?', 11 *Human Rights Review* (2010), p. 469-489.

118 ECtHR 9 November 2006, 7615/02 (*Imakayeva/Russia*), para. 141. See also ECtHR 5 July 2007, 68007/01 (*Alikhadzhiyeva/Russia*), para. 61; ECtHR 4 December 2008, 27233/03 (*Bersunkayeva/Russia*), para. 101.

5.4.2 Presumptions and inferences in cases in which evidence discloses an administrative practice

Presumptions and inferences may also be used in cases which are mostly referred to as examples of an 'administrative practice'. This term gained meaning particularly in the context of widespread allegations of torture or other forms of ill-treatment allegedly committed by State agents in breach of Article 3. This type of complaint has also often been presented in inter-State procedures, with applicant States arguing that a certain respondent State subjected a large number of individuals to specific wrongful conduct of a violent nature.

The first complaints on this issue were submitted in the *Greek* case and in *Ireland v. United Kingdom*. The *Greek* case concerned numerous people who were taken prisoner during the Regime of the Colonels. The applicant States claimed that a large number of individuals had been subjected to ill-treatment or torture inflicted by State officials in Greece. The alleged conduct, according to the presumed victims, occurred in the form of *falanga*[119] and other severe beatings of all parts of the body in order to obtain a confession or other information.[120] The Commission defined the notion of 'administrative practice' for the first time in the *Greek* case, stressing that the term consists of two elements, these being: a 'repetition of acts' conducted by State agents, and an 'official tolerance' of certain behaviour by the Member State. It expressed that the first element refers to:

> "... a substantial number of acts of torture or ill-treatment which are the expression of a general situation. The pattern of such acts may be either, on the one hand, that they occurred in the same place, that they were attributable to the agents of the same police or military authority, or that the victims belonged to the same political category; or, on the other hand, that they occurred in several places or at the hands of distinct authorities, or were inflicted on persons of varying political affiliations."[121]

The second notion, that of 'official tolerance', was interpreted by the Commission as meaning:

> "... that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible though cognisant of such acts,

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119 The Commission described *falanga* or *bastinado* as follows: "a method of torture known for centuries. It is the beating of the feet with a wooden or metal stick or bar which, if skilfully done, breaks no bones, makes no skin lesions, and leaves no permanent and recognisable marks, but causes intense pain and swelling of the feet." See EcomHR 5 November 1969, 3321/67 (*Denmark/Greece*); 3322/67 (*Norway/Greece*); 3323/67 (*Sweden/Greece*); 3344/67 (*Netherlands/Greece*), published in: 'The Greek Case', 12 *Yearbook of the European Convention on Human Rights* (1972), p. 499.

120 Besides *falanga*, the detainees were subjected to electric shocks, squeezing the head in a vice, pulling out of hair from the head or pubic region, kicking of the male genital organs, dripping water on the head and intense noises to prevent sleep. Ibid., p. 500.

121 Ibid., p. 195.

> take no action to punish them or prevent their repetition; or that higher authority, in [the] face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied."[122]

A decade later, in *Ireland v. United Kingdom*, the Court explained that a repetition of acts is proved if it can be shown that a certain practice "consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches."[123] Vermeulen derives from this sentence three elements that must be proved before a repetition of acts can be established: first, the practice in question entails one particular type of breach; second, a sufficient number of breaches has occurred, and; third, the breaches are inter-connected in such a way that they amount to a pattern.[124] Vermeulen argues that an 'official tolerance' relates to State conduct and manifests itself in two ways: that firstly, the superiors of those responsible for the atrocities did not take the necessary measures to prevent the repetition of the wrongful acts, although they were aware of the atrocities; or secondly, the authorities refused to conduct an effective investigation into the case or the victims had no access to a fair hearing in judicial proceedings.[125]

The incidence of an administrative practice has also sometimes been alleged through individual applications at the ECtHR. In the context of Article 2 and Article 3 claims, this has specifically occurred in cases concerning enforced disappearances in Turkey.[126] The Court has not accepted an administrative practice in that context, owing to a lack of sufficient evidence attesting to such a practice.[127] An administrative practice has, however, been recognised in other individual applications. This occurred, for example, in numerous cases concerning a failure by the Italian civil courts to deliver judgments within a reasonable time. According to the ECtHR, there was an accumulation of identical breaches in these cases which were sufficiently numerous to amount to more than just isolated incidents. This accumulation of breaches accordingly resulted in a practice that is incompatible with Article 6 § 1 of the Convention.[128] Van der Velde points to the advantage

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122 Ibid., p. 196.
123 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para 159.
124 M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 205.
125 Ibid.
126 See, for example, ECtHR 19 February 1998, 158/1996/777/978 (*Kaya/Turkey*), paras. 114-117.
127 M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 205-206. Vermeulen referred in this context to ECtHR 25 May 1998, 15/1997/799/1002 (*Kurt/Turkey*), para. 112 and ECtHR 27 February 2001, 25704/94 (*Çiçek/Turkey*), paras. 152 and 155.
128 ECtHR 28 July 1999, 34884/97 (*Bottazzi/Italy*), paras. 22-23.

of recognising such practices; cases in which similar allegations are made can be dealt with relatively easily by the Court. In his view, establishing an administrative practice in this type of case essentially amounts to a shifting of the burden of proof. So, if a similar case is brought to the Court, a violation of Article 6 § 1 is presumed and the burden of proof shifts to the government. State liability will be established, unless the government can deliver proof which demonstrates that in this specific case there were special circumstances or that the case significantly differs from other cases.[129] Another example concerns the recognition of an administrative practice in Armenia in the period March-April 2004, which consisted of deterring and preventing opposition activists from taking part in demonstrations, or punishing them for having done so. The Court recognised the existence of such a practice in *Hakobyan a.o. v. Armenia* on the basis of reports from the PACE Committee on the Honouring of Obligations and Commitments by Members States of the Council of Europe, Human Rights Watch and the Armenian Ombudsman. It further noted the number of cases before it in which applicants made almost identical allegations.[130] In determining that the three applicants in that case were victims of such a practice, the Court also considered the fact that all three applicants were members of opposition political parties, that all three of them were individually taken to the same police department around the period when the protest rallies were being held in Armenia, and that they were subjected to two practically consecutive terms of administrative detention by the same court in strikingly similar circumstances.[131] According to the Court, the "similarities and coincidences, which can hardly be considered to have been of a purely accidental nature, point to the existence of a repetitive pattern of subjecting persons to administrative detention which fits into the description of the administrative practice mentioned above."[132] The Court eventually concluded, on the basis of all material before it, that it could "draw strong, clear and concordant inferences to the effect that the administrative proceedings against the applicants and their ensuing detention was a measure aimed at preventing or discouraging them from participating in the opposition rallies, which it is undisputed were peaceful, held in Yerevan at the material time."[133] Therefore, it established an interference with the applicants' right to freedom of peaceful assembly, guaranteed under Article 11 of the Convention.

In this type of case, the Court often does not explicitly state how the burden of proof is distributed between the parties or how presumptions and inferences may precisely influence the distribution of the burden. However,

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129 J. van der Velde, case note on: ECtHR 28 July 1999, 34884/97, *EHRC Cases* 1999/1 (*Bottazzi/Italy*).

130 ECtHR 10 April 2012, 34320/04 (*Hakobyan a.o./Armenia*), paras. 90-92. This was later confirmed, e.g., in ECtHR 2 October 2012, 40094/05 (*Virabyan/Armenia*), para. 203.

131 ECtHR 10 April 2012, 34320/04 (*Hakobyan a.o./Armenia*), paras. 93-96.

132 Ibid., para. 97.

133 Ibid., para. 99.

there are a few cases, most notably concerning inter-State procedures, in which the Court has emphasised that the burden of proof is not borne by one or other of the two governments concerned, but that rather it will study all the material before it from whatever source it originates. In addition, it has pointed out in such cases that the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account.[134] So it appears that the Court does not always place the burden of proof strictly on one party or the other in this context.

In certain cases, such as *Georgia v. Russia (I)*, the Court also made use of presumptions to draw conclusions about the facts. In this particular case, the Court concluded that there was an administrative practice in breach of Article 4 of Protocol No. 4 (prohibition of collective expulsions of aliens), and Articles 5 § 1 and 5 § 4 ECHR (concerning the right not to be subjected to unlawful detention and the right to an effective remedy against a judicial decision in this regard). The case concerned the arrest, detention and expulsion of a large number of Georgian individuals from Russian territory in the period between September 2006 and January 2007. The administrative practice was established on the basis of statistics presented by the Georgian government (which showed that 4634 expulsion orders had been issued against Georgian nationals, of whom 2380 had been detained and forcibly expelled, and 2254 had left the country of their own accord), circulars and instructions that were issued by the Russian government to deprive Georgian individuals of their rights under the aforementioned Convention provisions, international governmental and NGO reports, and on the basis of witness accounts.[135] The Court considered that because it had previously established that Russia had fallen short of its obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case and, therefore, had acted in violation of Article 38 ECHR, there was a strong *presumption* that the applicant government's allegations regarding the content of the circulars ordering the expulsion specifically of Georgian nationals were credible.[136] Russia's failure consisted of a refusal to provide the Court with a copy of the two relevant circulars.[137]

The cases in this subsection have revealed the option available to the Court to identify large-scale human rights abuses, this being an administrative practice of human rights violations. Such a practice may be established if it appears that a substantial number of identical or analogous human rights violations have taken place (such as the beating of numerous individuals by State agents in a certain period in a certain Member State), which is referred to as a *repetition of acts*. An administrative practice is also estab-

134 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), paras. 160-161; ECtHR 10 May 2001, 25781/94 (*Cyprus/Turkey*) (GC), para. 113; ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), para. 95.

135 ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), paras. 128-146.

136 Ibid., para. 140.

137 Ibid., paras. 96 and 100-110.

lished if it can be shown that the numerous expressions of a specific type of human rights abuse (such as beatings by State agents) are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or prevent their repetition, or fail to investigate them. Such a situation is described as *official tolerance*. Hence, these types of breaches amount not just to isolated incidents, but occur in a more general context.

The finding of an administrative practice to some extent makes the Court's fact-finding task easier. Because once the Court has recognised its existence in a certain context, as it did in the Italian 'within a reasonable time' judgments,[138] it may presume that there has been a violation of the Convention in identical or analogous complaints that are submitted to it subsequently. So an administrative practice may enable the burden of proof to be shifted to the respondent State, who must then disprove that a complaint fits into the pattern of complaints that are part of the administrative practice.

5.4.3 Interim conclusion

The main purpose of this section was to demonstrate the various ways that enable the burden of proof to be shifted from the applicant to the respondent State in cases before the Court. In respect of Article 2 and Article 3 related matters where individuals claim to have been injured or claim that family members were killed while in custody or otherwise held under the control of State agents, it has shown how the mechanism of presumptions and inferences may influence how the burden of proof is distributed. In addition, it has shown that a violation of the Convention may be presumed in cases in which a complaint fits into a pattern or system of identical or analogous complaints. In other words, the violation may be presumed if the situation that is alleged forms part of an administrative practice.

The question may be raised of whether identical or similar mechanisms for shifting the burden of proof from the applicant to the respondent State may be applied in cases in which a violation of Article 14 read in conjunction with Article 2 or 3 is alleged. It is particularly important to consider these mechanisms in relation to complaints about State agents who have allegedly ill-treated or killed individuals based on discriminatory motives, as this type of complaint is the most difficult to prove. These cases are different from those discussed in this section, because here applicants claim an additional component, which is a *discriminatory nature* of the violence. The next section will explore whether presumptions and inferences can be used in order to establish violations of the Convention in that particular context. Furthermore, the following section will explore the possibility of shifting the burden of proof from the applicant to the respondent State in cases where there seems to be a systemic or administrative practice of State

138 See, again, ECtHR 28 July 1999, 34884/97 (*Bottazzi/Italy*), paras. 22-23.

agents inflicting discriminatory violence upon members of a disadvantaged group in a Member State.

5.5 The distribution of the burden of proof in cases in which a discriminatory nature of violence is alleged

Where the previous section has mainly analysed complaints concerning violent behaviour of State agents, this section focuses on complaints in which the *discriminatory nature* of violence is alleged. Usually in these cases, the Court has already established a separate violation of Article 2 or Article 3, and subsequently assesses whether one of these two provisions read in conjunction with Article 14 has been breached.[139]

In ECtHR case law in which complaints of discriminatory violence are made, the distribution of the burden of proof is regulated in the same way as in cases concerning Article 2 and Article 3 related issues, which do not feature an additional complaint concerning discrimination. In this regard, it is necessary to recall the three different types of discriminatory violence complaints from section 2.2. Under these three types, the applicant will bear the burden of proof to demonstrate to the Court a *prima facie* case (1) that State agents inflicted violence upon an individual based on discriminatory motives; (2) that State agents failed to conduct an effective investigation into a complaint where the discriminatory nature of violence was alleged, or; (3) that State agents failed to take preventive measures against violence of a discriminatory nature. Once the applicant succeeds in this, the burden of proof shifts to the respondent State to explain that it did not act in violation of the Convention. So for all three forms of discriminatory violence, the ECtHR allocates the burden of proof according to these principles.[140]

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139 See also ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC); ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*); ECtHR 22 April 2010, 2954/07 (*Stefanou/Greece*).

140 In the context of allegations that State agents ill-treated or killed individuals based on discriminatory motives, the Court formulated this rule also in the following judgments: ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), paras. 115 and 117; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 178-179; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 128. Regarding the duty to undertake an effective investigation, the notion of the burden of proof is virtually non-existent, regardless of whether it is argued by applicants that State officials omitted to conduct an effective investigation into allegations of discriminatory violence or whether it is alleged that State agents were biased while conducting an investigation into physical abuse of the victims. Nevertheless, there are cases from which it can be derived that even in this context, the Court regulates the rules on the burden of proof in accordance with what has been described here. See, for example, ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 58. The rules on the distribution of the burden of proof are applied also in cases regarding the duty to take preventive measures against discriminatory violence. See ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 183; ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 179.

The circumstances in which the burden of proof may shift from the applicant to the respondent State in cases concerning Article 14 read in conjunction with Article 2 or 3, also vary in accordance with the type of complaint of discriminatory violence. The analysis in section 2.2 on the different types of complaints becomes relevant here. This analysis revealed the legal issues that must be proven through various factual elements before a violation of Article 14 read in conjunction with Article 2 or 3 can be established. The following will show that once these legal issues have been proven through the relevant factual elements, a *prima facie* case of discriminatory violence can be established and the burden of proof shifts to the respondent State.

As shown in section 2.2, the degree of difficulty in establishing a *prima facie* case varies depending on the type of discriminatory violence, as some types are more difficult to prove than others. Complaints concerning ineffective investigations into discriminatory violence or a lack of preventive measures against the wrongful conduct are easier to establish than cases where a complaint is made that a State agent inflicted discriminatory violence based on a discriminatory motive. Therefore, the difficulties in shifting the burden of proof particularly arise under this last complaint. These types of complaints are different, for example, from allegations where an applicant 'solely' claims that he or she was harmed by State agents during custody or that another victim died while in detention without further alleging that a discriminatory motive on the part of a State agent led to the violence. As shown in the previous section, in such cases the Court has acknowledged the rule that 'where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention'. By contrast, in cases where violence of a discriminatory nature inflicted by State agents was alleged, the Court has underlined that it cannot easily shift the burden of proof, because "such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned."[141] Hence, there is a subjective aspect inherent to complaints concerning the discriminatory nature of violence inflicted by State agents, as opposed to the cases discussed in the previous section, that renders proving discriminatory violence more difficult. The subjectivity lies in the complex legal concept of 'motive' that must be proved in this type of complaint. Consequently, because it is difficult to prove a breach of the negative duty, critics argue that the ECtHR ought to shift the burden of proof to the respondent State whenever it is established that a member of a disadvantaged group suffered harm in an environment where tensions on the basis of some discriminatory ground are high, and State offenders are generally afforded impunity. In the critics' view, it would then be up to the respondent State to

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

prove that the violence was not due to discriminatory motives.[142] In respect to Roma cases specifically, Möschel further explains:

> "Following this approach, the Court would take into consideration the broader picture of racial violence against disadvantaged minority groups and of impunity of state actors and not just the narrow fact patterns and the presence or absence of racial slur/insults. Thus, 'outside' international NGO reports and official documents would become highly relevant in determining whether there are high racial tensions and impunity of state offenders. However, the ECtHR could also simply rely on its own case law and presume that the violence was racially motivated whenever the case involves one of those countries that have often been respondents in anti-Roma violence cases."[143]

This section is concerned with two aims. Firstly, the circumstances under which the burden of proof shifts from the applicant to the respondent State under all three forms of allegations of discriminatory violence are outlined in section 5.5.1. Some overlap with section 2.2 is inevitable here, because demonstrating the legal concepts and factual elements presented in that section essentially results in the burden being shifted from the applicant to the respondent State. Thereafter, section 5.5.2 explores the notion of whether there are alternative circumstances in which the burden of proof may shift from the applicant to the respondent State that the Court has not yet considered and which could offer a response to the aforementioned criticism of the Court's approach towards the burden of proof. In this regard, it attempts to resolve the difficulties in shifting the burden of proof in cases where a breach of the negative duty of State agents to refrain from inflicting discriminatory violence is alleged. It explores two possibilities that may more smoothly facilitate a shift in the burden of proof and, consequently, eventually lead to a recognition of discriminatory violence. Both relate to situations in which violence inflicted on members of certain groups appears to be systemic.

Firstly, it explores whether there are scenarios in which the Court could distribute the burden of proof under similar conditions as it has done in its case law on indirect discrimination. Secondly, in cases where it is not possible to take the same approach towards the distribution of the burden of proof as in indirect discrimination case law, this study attempts to find another way that makes it easier to shift the burden of proof. Concretely, it proposes that the Court should require proof of a discriminatory attitude, rather than a discriminatory motive, in order to enable a shift in the burden of proof. It may derive that such a discriminatory attitude exists from cases where violence inflicted upon a member of a certain group by State

142 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 18. See also the submission by the third party intervener, the European Roma Rights Centre (ERRC), in ECtHR 26 February 2004, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*), paras. 152-154.

143 M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 501.

agents is something that occurs systemically in the Member State concerned. Introducing these new ways of shifting the burden may eventually contribute to the implementation of a more substantive conception of equality in ECtHR case law, hence a conception which is "alive to the effects of structural inequality."[144]

5.5.1 The circumstances under which the burden of proof may shift

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

In cases where it is alleged that State agents were guilty of discriminatory violence, the Court applies stricter standards of scrutiny when determining whether the Convention was violated. It was already demonstrated in chapter 2 that in these cases the Court requires proof that a discriminatory motive was the causal factor in the killing or ill-treatment of an individual belonging to a certain group.[145] The motivation for the violence is the most significant aspect of discriminatory violence inflicted by State agents. It requires proof of the perpetrator's *discriminatory* thoughts and, therefore, falls under the scope of Article 14 of the Convention. If no discriminatory aspect at all were to be required in terms of proof, the violence would be assessed by the Court solely under Article 2 or 3 ECHR.[146]

The Court's case law reveals a dearth of cases in which a discriminatory motive was established and, thus, in which a violation of Article 14 read in conjunction with Article 2 or 3 was found in this context. *Prima facie* cases have only been established in a few judgments, most notably there where domestic criminal case files presented to the Court included witness statements that reported discriminatory remarks uttered by State officials while physically abusing victims from a disadvantaged group, or which at least disclosed discriminatory remarks that were uttered by State officials somewhere around the time of the violent events.[147] Discriminatory remarks – documented in the national case file – therefore play a crucial role in finding a *prima facie* case. Yet there may be other, additional, factors that could also lead to this result. This is illustrated by *Antayev*, where the Court took into consideration a combination of two factual elements to reach the conclusion that a *prima facie* case of discriminatory violence inflicted by State agents had been made, which included 'racist verbal abuse' and the recurrent reference to internal police instructions to treat suspects of Chechen ethnic

144 See section 2.4.1 and the reference to R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR', 29 *Legal Studies* (2009), p. 211–229, p. 213.

145 See section 2.2.1.

146 Compare N. Hall, *Hate Crime*, Abingdon: Routledge 2013, p. 127.

147 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 128-130; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.

origin in a particular (violent) manner.[148] Further, in *Begheluri*, the ECtHR recognised that all three types of violations in the context of discriminatory violence complaints were established on the basis of a number of factual elements. In that case, the Court recognised that the applicants – most of them being Jehovah's Witnesses – had become victims of religiously-motivated violence. As set out in subsection 2.2.1, the factual elements included the fact that the largest religious gatherings of the applicants were disrupted, with the direct involvement of various State officials or their acquiescence and connivance; the fact that the police refused to intervene to protect the applicants as soon as they learnt about their religious background; the fact that individual applicants were additionally subjected to religious insults when lodging their complaints with the police; and that the national authorities showed complete indifference towards the applicants' numerous complaints concerning various acts of aggression.[149] In addition to these factual elements, the Court also took into account information about numerous other incidents of attacks on Jehovah's Witnesses in Georgia, whether physical or verbal, which were reported by several international bodies and non-governmental organisations at the material time.[150]

Since such factual elements have hardly ever appeared in domestic case files in other cases on discriminatory violence, it has not been easy for the Court to establish a discriminatory motive. Consequently, a *prima facie* case is rarely established and the burden of proof rarely shifts to the respondent State.

Beside a lack of factual elements indicating the presence of a discriminatory motive, there are other potential reasons why shifting the burden of proof does not proceed smoothly with these types of complaints. The first reason is connected to some of the factors that influence both the distribution of the burden of proof and the standard of proof; these include the specificity of the facts, the nature of the allegation made and the Convention right at stake. In addition, it may be recalled that the Court has stated that it is attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights.[151] The Court has never explained how these factors may influence the distribution of the burden of proof or the standard of proof. However, it may be presumed that – particularly with regard to the last sentence concerning attentiveness 'to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights' – the Court aims to highlight that in cases involving serious matters, such as killings or ill-treatment, the burden ought not to shift so easily. The second reason is connected with the requirement of proving a discriminatory motive. In this regard it may be recalled that the Court has clarified that the burden of proof cannot easily shift to the respondent State, since

148 ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.
149 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), para. 174.
150 Ibid., para. 175.
151 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 147.

"such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned."[152] This subjective attitude, in essence, refers to the motive or thoughts of the perpetrators. Obviously it is difficult for an applicant to deliver *prima facie* evidence that the reason behind the violence inflicted by a State agent was discriminatory. However, the Court recognises with that last quote that it is equally difficult for a Member State to prove the absence of such a reason for the violence.

Where an applicant, nevertheless, manages to establish a *prima facie* case, the burden of proof shifts to the respondent State. The Court's judgments, however, do not clearly show how a respondent State could refute a *prima facie* case. In its judgments so far, the Court has solely indicated that the government must explain the incidents in any other way or put forward any arguments to that end showing that the incidents did not result from bias towards the victims.[153] Where the respondent State fails to live up to this obligation, the ECtHR will draw inferences from this failure to put forward any arguments to show that the incident was not due to bias and on that basis will find that there was a violation of Article 14 of the Convention.[154] However, the Court has not further shown how these explanations or arguments may be presented by the government in order to lead to a finding that the Convention was not violated. The Court's judgments rather show that respondent States have never actually managed to provide an explanation capable of absolving them from the complaint that they violated Article 14, after the applicants established a *prima facie* case of discriminatory violence. Therefore, it is difficult to determine what a respondent State should put forward in order to defend the position that its officials did not act in a way which was discriminatory, once a *prima facie* case has been established.

In conclusion, a *prima facie* case establishing that a State agent has breached the duty to refrain from inflicting discriminatory violence can best be shown through domestic case files which report discriminatory remarks made by the State agents who inflicted the violence. In addition, it can be revealed by internal instructions that encourage State officials to inflict violence upon members of certain groups. Although the Court does not explicitly say as much, these factual elements raise a presumption that the violence was due to a discriminatory motive. After this, the burden of proof then shifts to the respondent State to disprove the allegations made. However, further explanation is needed from the Court to highlight specifically how the respondent State may disprove the allegations made.

152 Ibid., para. 157.
153 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), para. 131; ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 128.
154 ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179.

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

Questions regarding the distribution of the burden of proof are intricate in cases that concern the positive duty of State officials to effectively investigate discriminatory violence, and to identify and punish those responsible. This is because the Court hardly uses terms such as 'burden of proof', '*prima facie* case', 'presumptions' and/or 'inferences' in these cases. There are a few cases, however, which indicate that there is a certain division of tasks between parties with regard to the question of who must prove what. They can be found both in the context of allegations concerning discriminatory behaviour on the part of State officials during the investigation into a violent crime and in the context of allegations concerning an alleged failure by the State to conduct an effective investigation into discriminatory violence.

Under the specific type of claim that State agents acted in a discriminatory manner while conducting an investigation into a violent crime committed either by State agents or private individuals, the Court indeed first requires that the applicant establishes a *prima facie* case, and subsequently asks the government to justify the behaviour of the State agents.[155] In that regard it is useful to recall from chapter 2 the legal concept that must be proved through certain factual elements under these types of complaints. Specifically, in subsection 2.2.2 it was highlighted how the Court requires proof of a 'discriminatory attitude' on the part of the State agents involved in the relevant case. A 'discriminatory attitude' is different from a 'discriminatory motive'. As observed earlier, motive requires that the perpetrator's thoughts are revealed and thus asks why a perpetrator has committed certain wrongful acts. By contrast, a discriminatory attitude appears to have more of an external nature. It can be inferred from inappropriate and biased behaviour which indicates that State agents do not behave in a manner which is adequate when dealing with individuals from a certain group. In establishing a *prima facie* case that there is such a discriminatory attitude, the Court primarily considers the fact that throughout the investigation State agents made tendentious remarks in relation to the victim's origin.[156] In this context, it is unnecessary to prove why State officials behaved in such a manner throughout the investigation or how it affected subsequent behaviour; it is already sufficient to observe that they uttered discriminatory remarks and in that way acted inappropriately and not in line with their profession.

Once this has been established, the burden of proof shifts to the respondent State and the Court explicitly requires it to offer an explanation for the remarks made or provide context which negates the discriminatory character of such remarks.[157]

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155 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65.

156 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65.

157 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 98; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65.

When it is alleged that State agents failed to conduct an effective investigation into a domestic complaint of discriminatory violence inflicted by State agents or private persons, for whatever reason, the distribution of the burden of proof between the parties becomes less apparent. The rules on the distribution of the burden of proof in various ECtHR cases concerning this matter are inconsistent. For example, in *Nachova*, the Grand Chamber evaluated all the material documented in the case file, including witness statements about discriminatory remarks made by the State agent who killed the two Romani victims, reports from various organisations about the existence in Bulgaria of prejudice and hostility towards Roma, and the use of grossly excessive force against two unarmed and non-violent victims.[158] This led to the conclusion that the State agents were obliged to conduct an effective investigation "into possible racist overtones in the events that led to the death of the two men."[159] In that case, the Grand Chamber, however, did not identify the party holding the duty to prove certain assertions. It may even be wondered whether there was a distribution of the burden of proof at all, or whether the Court instead examined all the information documented in the case file, eventually to conclude that there was a violation of Article 14 read in conjunction with Article 2.

Something similar can be observed in the case *Mižigárová v. Slovakia*. There the Court first pointed to reports from the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the CPT, ECRI, US Department of State and the International Helsinki Federation for Human Rights, which concern allegations of police brutality towards Roma in Slovakia. Subsequently, it did not find that the positive duty to investigate discriminatory violence had been breached, due to a lack of concrete information that might have been sufficient to bring into play the State's obligation to investigate possible racist motives on the part of the perpetrators.[160] The Court did not further elaborate on whether the duty rested on the applicant to prove that the respondent State failed to investigate discriminatory violence or whether this was something that the Court verifies of its own motion. Strikingly, in that case, the Court acknowledged the possibility "that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive."[161] This is a very important acknowledgement, as, through this, the Court introduces a new possibility for establishing a violation of the positive duty to investigate discriminatory violence. Although this new possibility raises questions concerning the distribution of the burden of proof. For example, the question of which actor holds the duty to present the independent evidence of a systemic problem.

158 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 163-165.
159 Ibid., para. 166.
160 ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), paras. 122-123.
161 Ibid., para. 122. See also section 2.2.2.

If the duty rests on the applicant to do so, then the subsequent question may be what is the duty of the respondent State in this regard. For example, if the burden rests on the applicant to establish a *prima facie* case of a systemic problem in a country through independent evidence, does that mean that the respondent State will be subsequently required to prove that in the case in question there was an effective investigation or to provide a justification for the lack of an effective investigation? Thus, these are important questions that need to be elaborated on in the Court's case law.

There are nevertheless cases in which the Court was more explicit about the distribution of the burden of proof. For example, in *B.S.*, under the positive duty to carry out an investigation into discriminatory violence the Court highlighted that "the onus is on the Government to produce evidence establishing facts that cast doubt on the victim's account."[162] In that case it was established that the applicant had filed complaints, at the domestic level, about discriminatory remarks made by the police officers who allegedly beat her. According to the Court "[t]hose submissions were not examined by the courts dealing with the case, which merely adopted the contents of the reports by the Balearic Islands chief of police without carrying out a more thorough investigation into the alleged racist attitudes."[163] However, the Court did not clarify what the applicant and the respondent State respectively had to prove in these cases and at what point the burden of proof ought to shift.

Although it is not always easy to identify who should prove a certain issue under the positive duty to conduct an effective investigation, it can at least be said that a violation of the Convention is more easily found in this context. This results from the fact that less problematic legal concepts need to be demonstrated in comparison to the legal concept that needs to be proved in cases concerning discriminatory violence inflicted by State agents, for example. A discriminatory attitude on the part of State agents during an investigation, and/or a failure of the State to conduct an effective investigation into discriminatory violence as such, can be more easily verified by the Court through an examination of the case file.[164] Perhaps there is no clear distribution of the burden of proof because the Court can simply verify the facts of the case through the case file and determine whether they amount to a violation of the Convention. The legal concepts can then be established on the basis of several factual elements.

This subsection has highlighted a few cases in which discriminatory remarks uttered by State agents were mainly used eventually to establish violations under the positive duty to conduct an effective investigation. Although, as shown in subsection 2.2.2, there is an even wider variety of factual elements that may contribute to establishing a violation in this sphere,

162 ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 58. See also ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), paras. 125-126.

163 ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 61.

164 This was also discussed in section 2.2.

which may include the use of grossly excessive force by perpetrators against unarmed and non-violent victims belonging to certain groups, and evidence that the violence was committed by a skinhead group or a far-right group. Additionally, with respect to some groups, such as Roma, the Court has acknowledged that in the absence of any other evidence, the existence of independent evidence of a systemic problem could be sufficient to alert the authorities to the possible existence of a discriminatory motive.

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

A distribution of the burden of proof is applied in cases concerning a failure of a Member State to take preventive measures against discriminatory violence, although the Court does not always clearly identify what has to be proved by whom. As shown in subsection 2.2.3, different legal concepts need to be demonstrated in this type of complaint, varying from case to case. Where it has been alleged that State agents failed to protect the applicants from discriminatory violence because they were biased against the members of the targeted group, the Court requires proof that the failure by State agents to prevent such violence was to a large extent the *corollary* of the victims' membership of a certain group.[165] In *Gldani*, a case concerning this issue, the Court recognised the existence of such a corollary, having "examined all the evidence in its possession."[166] That evidence included discriminatory comments made by State agents when receiving requests for protection from the victims.[167] The Court subsequently noted that the government had not adduced any counter-arguments or provided justification for this treatment.[168] By applying such reasoning, the Court has not provided a complete picture of the distribution of the burden of proof. Its reasoning raises the question of whether there was an obligation at all on the applicants to establish a *prima facie* case in this context, or whether the Court itself observed all the factual elements that were included in the domestic case file. The Court also did not identify what type of counter-arguments or justifications the respondent State must present to disprove the allegations made.[169]

A rather vague approach towards the distribution of the burden of proof is seen in the context of cases where it is alleged that State agents failed to take protective measures against discriminatory violence, but not necessarily because they were biased against the victims. In *Opuz*, the Court recognised that under this type of complaint, it is up to the applicant to show, supported by unchallenged statistics, the existence of a *prima facie* indica-

165 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 140.
166 Ibid.
167 See section 2.2.3.
168 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 141.
169 Ibid., paras. 140-141; ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), paras. 72-73.

tion that the violence affected a certain group and that the general and discriminatory judicial passivity in a Member State created a climate that was conducive to the violence inflicted on that particular group.[170] Hence, sometimes demonstrating a general and discriminatory judicial passivity in offering protection from discriminatory violence by State agents in a Member State is already sufficient to establish a *prima facie* case. As with some of the previously mentioned types of discriminatory violence complaints, under this duty to take preventive measures also it becomes less clear whether the burden of proof actually shifts to the respondent State and, if so, what the respondent State then must demonstrate to disprove an allegation. This appears again in *Opuz*, where, after establishing that the applicant had made out a *prima facie* case, the Court stated the following:

> "… The Court has established that the criminal-law system, as operated in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by H.O. against the personal integrity of the applicant and her mother and thus violated their rights under Articles 2 and 3 of the Convention.
> … Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence …."[171]

This quote rather indicates that the Court evaluated all the information and established on the basis of that information whether the *prima facie* case amounted to an actual violation of the Convention, instead of asking the government to refute the allegation.

In *Eremia*, where the Court required proof of the legal issue that gender-based violence was repeatedly condoned by State authorities and that there was a discriminatory attitude on the part of State agents towards the victim as a member of a certain disadvantaged group, the Court also did not clearly distinguish between the applicant's duty to establish a *prima facie* case and the subsequent duty of the respondent State to disprove the allegation.[172] It did, however, find a violation of the Convention by considering the relevant factual elements and evidentiary material, which included discriminatory remarks made by State officials and reports from international organisations.[173]

Hence, the Court's approach towards the distribution of the burden of proof in cases concerning the positive duty to take preventive measures against discriminatory violence is unclear and sometimes inconsistent. The duties of applicants and respondent States are hard to identify in this con-

170 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 198.
171 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 199-200.
172 See section 2.2.3.
173 ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), paras. 86-91.

text. Consequently, it is difficult to pinpoint the moment when the burden of proof shifts from one party to the other.

However, there is one unique feature inherent to these cases. In one case, *Opuz*, the Court explicitly recognised that a *prima facie* case may be established mainly on the basis of general information which reveals that State agents are generally passive in providing victims with protection from discriminatory violence in a Member State. This type of reasoning – where the Court exclusively relies on this type of evidentiary material in order to establish a *prima facie* case of a violation of Article 14 read in conjunction with Article 2 or 3 – is still awaited in other types of discriminatory violence complaints before the Court.

5.5.1.4 Interim conclusion

The purpose of this section was to outline the different circumstances in which the burden of proof shifts from one party to the other in cases of discriminatory violence. It became apparent that the Court does not consistently apply the rules regarding the burden of proof in all of these cases. The section has nevertheless attempted to show that the burden of proof – where it can be identified at least – shifts under certain circumstances, depending on the type of complaint. Especially with complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence, shifting the burden of proof to the respondent State does not proceed very easily. This is because the legal concept of motive needs to be proved which requires more concrete evidence before the burden of proof can be shifted.

With regard to the other two types of discriminatory violence complaints, it appears that the Court's approach to the distribution of the burden of proof is not very clear. Firstly, in some cases there are no indications whatsoever of how the Court distributes the burden of proof between the parties, while in others it can be observed that the Court does at least require a *prima facie* case to be established or that the government must offer an explanation or justification concerning the allegations. Secondly, the Court does not always clearly indicate how applicants can make out a *prima facie* case or how respondent States can disprove the allegations made. The vagueness surrounding these cases in relation to the distribution of the burden of proof could be resolved if the Court were to make more use of terms such as 'burden of proof', '*prima facie* case', 'presumptions' and 'inferences' in its judgments. It could use these terms in a similar way as they are used by the Court in the particular cases that were discussed in subsection 5.4.1. Thus, the Court could explicitly require that applicants demonstrate a *prima facie* case of a violation under one of the two positive duties. The applicants could do that by invoking a presumption that the investigation into the alleged discriminatory violence was ineffective or that there was a lack of protective measures against this wrongful conduct. After this has been established, the burden of proof can then shift to the respondent State. The government would then have to explain how they lived up to the terms of the Convention in this context or that the behaviour of its State agents can

be justified. If the government does not offer any explanation or justification in this context, the Court could draw inferences as to the well-foundedness of the applicants' allegations.

5.5.2 Exploring new criteria to shift the burden of proof in discriminatory violence cases

Since shifting the burden of proof from the applicant to the respondent State is most challenging in cases concerning an alleged breach of the negative duty of State agents to refrain from inflicting discriminatory violence, the question arises as to how this problem may be resolved. In other words, it may be asked whether the Court could introduce new ways to shift the burden of proof to the respondent State and to ease the applicant's position in this context. This section aims to provide an answer to that question.

The main obstacle in shifting the burden of proof in complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence lies in the requirement to prove the discriminatory motive. As observed earlier, this is a highly subjective legal concept which requires proof of a perpetrator's thoughts or state of mind. Consequently, it is very difficult to demonstrate. As was already revealed in chapter 2, by requiring proof of motive in these types of complaints, the Court views these complaints through the lens of formal equality and direct discrimination. It is valuable, however, to consider whether it would be possible in these types of complaints to suggest an approach to the distribution of the burden of proof that would serve substantive equality, rather than formal equality.

To that end, two proposals are offered in this study below. The first concerns the circumstances in which the Court could consider complaints regarding the duty of State agents to refrain from inflicting discriminatory violence as complaints of indirect discrimination, which is a form of substantive inequality. In this way, the Court would not have to require proof of a discriminatory motive, but the discriminatory effect of a provision, criterion or practice that has somehow created a situation in which State officials inflict violence upon members of a specific group. The second proposal is also to eliminate the requirement of proving a discriminatory motive in the remaining cases of these types of complaints, and to introduce the requirement of proof of a discriminatory attitude instead. Such an attitude should then not solely be derived from discriminatory remarks, for example, but also from a situation in which one violent incident inflicted by a State agent upon a member of a disadvantaged group, appears to be part of a pattern of numerous, similar complaints in the Member State concerned. This pattern of violence may then be derived from statistics or reports by intergovernmental organisations and NGOs.

The first suggestion includes a shift in the burden of proof in cases where allegations of discriminatory violence inflicted by State agents can be considered as matters of indirect discrimination. The burden of proof can ini-

tially be placed on the applicant to present a *prima facie* case. The applicant would then be obliged to put forward evidentiary material which reflects the disparate impact of a seemingly neutral provision, criterion or practice. Once the applicant succeeds in this, the burden of proof would then shift to the respondent State who would be expected to point out that there is no effect of violence of a discriminatory nature resulting from a provision, criterion or practice.[174] Arguably, it is difficult to present discriminatory violence as a matter of indirect discrimination: given that violence is inherently illegal, there is usually no provision, criterion or practice from which discriminatory violence may be derived. Nonetheless, two examples of discriminatory physical abuse are presented here that the Court could potentially recognise as an incidence of indirect discrimination.

The first concerns cases of sterilisation of Roma women in State hospitals. The case *V.C.* may serve as an illustration in this context. In *V.C.*, a 20-year old Roma woman was sterilised at the Hospital and Health Care Centre in Prešov, Slovakia, during the delivery of her second child. According to the applicant, the sterilisation was forced upon her since her consent was sought at a moment when she was heavily influenced by labour and pain. She was further told by medical staff that sterilisation was necessary as a subsequent pregnancy would lead either to her own death or that of the baby – information that she was unable to verify at that time. Before the ECtHR, she claimed that the sterilisation procedure was forced upon her because of her Romani background and because she is a woman. She relied on Article 14 taken in conjunction with Articles 3, 8 and 12. To substantiate her claim, she submitted a number of documents that both attested to a practice of forced sterilisation of Romani women in Slovakia, as well suggesting a widespread, general intolerance towards Roma. Moreover, V.C. claimed that her case formed part of these patterns by the fact the words "Patient is of Roma origin" appeared in her medical file.[175]

The Court examined the discrimination complaint solely in conjunction with Article 8. It rejected her complaint that the violation of her rights was motivated by her ethnicity, concluding that "the objective evidence is not sufficiently strong in itself to convince the Court that it [V.C.'s sterilisation] was part of an organised policy or that the hospital staff's conduct was intentionally racially motivated."[176] It referred in this regard to the case *Mižigárová v. Slovakia*, an issue concerning the death of a Roma individual

174 D. Schiek, 'Indirect Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 323-475, p. 351.

175 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*). See also the similar case ECtHR 12 June 2012, 29518/10 (*N.B./ Slovakia*). See also my discussion of *V.C.* in J. Mačkić, 'Proving the Invisible: Addressing Evidentiary Issues in Cases of Presumed Discriminatory Abuse against Roma before the European Court of Human Rights through *V.C. v. Slovakia*' in: M. Goodwin & P. de Hert (eds.), *European Roma Integration Efforts – A Snapshot*, Brussels: Brussels University Press 2013, p. 51-75.

176 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), para. 177.

in custody. In that case, the applicant alleged that the victim's ethnic origin was the reason he was killed by State agents and why no effective investigation into his killing was conducted.[177] Such a reference implies that the Court applied the same evidentiary rules in *V.C.* as in incidents of discriminatory killings or ill-treatment. The evidentiary material presented in *V.C.* indicated, according to the Court, that the practice of sterilisation of women affected not only Roma women but vulnerable individuals from other ethnic groups as well.[178] At the same time, however, the Court explicitly referred to materials from the Human Rights Commissioner and from ECRI that not only established serious shortcomings in the legislation and practice relating to sterilisation in Slovakia, but also provided views that the shortcomings were liable to particularly affect members of the Roma community. In addition, the Court acknowledged a report from a group of experts established by the Slovak Ministry of Health which pointed out the disproportionate correlation between sterilisations and being Roma, and recommended special measures to prevent this.[179] The Court found that Slovakia had failed "to comply with its positive obligation under Article 8 of the Convention to secure to the applicant a sufficient measure of protection enabling her, as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life in the context of her sterilisation."[180] Despite the evidence before it suggesting that the practice of non-consensual sterilisation in Slovakia disproportionally impacted on members of the Roma community, it dismissed the Article 14 claim.

The difficulty in proving discriminatory treatment in *V.C.* was, among other things, connected with the fact that this case, in terms of rules of evidence, was placed in the same category as direct discrimination. In finding that there was no violation of Article 14 read in conjunction with Article 8, the Court applied a different set of evidentiary rules than it displays in cases concerning indirect discrimination, such as *D.H.* Hence, in *V.C.* it applied the rules of evidence it has developed in cases of presumed discriminatory violence against Roma. This is clear from its reference in *V.C.* to *Mižigárová v. Slovakia*. It may be asked whether this approach is justified and whether the evidentiary rules as they have been applied in the Court's past case-law concerning the segregation of Romani children in education, would not have been more applicable in this case.

There was a way for the Court to have observed V.C.'s treatment as part of a pattern of violence against Roma in Slovakia. The legislative basis for sterilisations during the contested period can be found in the (Slovakian) 1972 Sterilisation Regulation. The annex to the Regulation stated that a woman's sterilisation could also be justified where a woman had had several children (four children for women under the age of 35 and three children

177 ECtHR 14 December 2010, 74832/01 (*Mižigárová/Slovakia*), para. 112.
178 ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), para. 177.
179 Ibid., para. 178.
180 Ibid., para. 179.

for women over that age). Although this was not brought forward by the applicant or the Court in *V.C.*, it is tenable that this element might be an additional circumstance by which an indirect causal link could be established between the sterilisation and being of Romani origin. After all, if it appears that Romani women are statistically more likely to give birth to more children than other women in Slovakia and the sterilisation procedure is more frequently applied to them than other groups of women as a consequence, this would have provided concrete evidence of the practice of sterilisation affecting Romani women to a disproportionate degree.[181] Evidence which would demonstrate such a practice could have been used to establish a *prima facie* case of discriminatory sterilisation, following which the burden of proof would have shifted to the respondent State to justify the differential treatment or to disprove the applicant's complaint.

Another example of indirect discrimination occurs in the context of the lawful use of force by State agents. This is a context in which a general policy or general measures – that usually find their basis in national legislation – allow State agents to use force under certain circumstances. *High Jordan v. United Kingdom* illustrates this. In that case, Section 3 of the Criminal Law Act (Northern Ireland) 1967 stated that "[a] person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large."[182] The applicant submitted that between 1969 and March 1994, 357 people had been killed by members of the United Kingdom security forces on the basis of that rule, the overwhelming majority of whom were young men from the Roman Catholic or nationalist community. His (Catholic) son was among those killed. He compared these numbers to those killed from the Protestant community[183] and argued that the way in which lethal force was used was discriminatory towards the Catholic or nationalist community.[184] Additionally, he claimed that there had been relatively few prosecutions (31) and only a few convictions (four, at the date of his application).[185] Thus, according to the applicant, this showed that there was a discriminatory use of lethal force and a lack of legal protection for a section of the community on grounds of national origin or association with a national minority.[186]

The Court stressed that "[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[187] Subsequently, it argued that

181 Ibid., paras. 60-64.
182 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 59.
183 No information is given in the judgment on the number of those killed from the Protestant community.
184 ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 152.
185 Ibid.
186 Ibid.
187 Ibid., para. 154.

even though statistically it may appear that the majority of people shot by the security forces were from the Catholic or nationalist community, it did not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. It underlined that there was no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.[188] Therefore, it found no violation of Article 14 of the Convention.[189]

Essentially, this is an example of an allegation of indirect discrimination because it is argued that an apparently neutral provision (Section 3 of the Criminal Law Act (Northern Ireland) 1967) put persons of a certain religious background (Catholics) at a particular disadvantage compared with other persons (Protestants). The Court, however, declined to recognise that the allegation amounted to actual differential treatment. If it had done so, it may have subsequently asked whether that provision could be objectively justified by a legitimate aim, as is customary in indirect discrimination complaints, and thus, whether it actually amounted to discrimination.

Interestingly, in a somewhat similar case, the IACtHR brought a complaint regarding discriminatory violence inflicted by State agents under the scope of indirect discrimination.[190] In *Nadege Dorzema a.o. v. Dominican Republic*, the IACtHR established discriminatory violence in a context of excessive use of force by Dominican border guards against a group of Haitians, in which seven people lost their lives and several more were injured. Use of force by State agents is permitted in the Dominican Republic on the grounds of Principle No. 9 of the Basic Principles on the Use of Force, which states the following:

> "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."[191]

188 Ibid.

189 Ibid., para. 155.

190 Regarding the Inter-American system, it is useful to first note that only Member States to the American Convention on Human Rights who have accepted the IACtHR's contentious jurisdiction and the Inter-American Commission may file complaints to the Inter-American Court. Individuals cannot turn directly to the IACtHR; they must first submit their petition to the Inter-American Commission. It is up to the Commission eventually to decide whether cases should be referred to the Inter-American Court (J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, New York: Cambridge University Press 2013, p. 83-85). These proceedings are, thus, slightly different from those before the ECtHR, since under the European human rights system, individuals may turn directly to the Court to complain about the conduct of Member States.

191 IACtHR 24 October 2012, (Ser. C.) No. 251 (*Nadege Dorzema et a./Dominican Republic*) (Merits, Reparations and Costs), para. 84.

The issue at stake was whether the force, which thus has its basis in Principle No. 9, was used by Dominican State agents towards the presumed victims owing to their condition as migrants of Haitian origin.

The Inter-American Commission alleged that this case revealed a context of racism, discrimination and 'anti-Haitian practices' in the Dominican Republic.[192] The IACtHR considered the following regarding the application of the notion of burden of proof:

> "... this Court acknowledges the difficulty for those who are the object of discrimination to prove racial prejudice, so that it agrees with the European Court [of Human Rights] that, in certain cases of human rights violations motivated by discrimination, the burden of proof falls on the State, which controls the means to clarify incidents that took place on its territory."[193]

In reality, this is an incorrect interpretation of ECtHR case law. The IACtHR made a reference to paragraph 179 of the *D.H.* case, where the ECtHR indeed highlighted that "[i]n certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[194] Subsequently, in that same paragraph, the ECtHR stated the following:

> "In *Nachova and Others* …, the Court did not rule out requiring a respondent government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services."[195]

Hence, the ECtHR did not recognise in *D.H.* that in cases where a discriminatory motive must be proved, the burden of proof can shift to the respondent State, as IACtHR claims. Quite the contrary, it recognised that shifting the burden of proof in such cases is difficult, in contrast to those cases where a discriminatory effect of a policy, decision or practice needs to be proved.

The IACtHR, subsequently, recognised the issue in *Nadege Dorzema* as one of indirect discrimination, since the norms, actions, policies and measures in question, although they are or appear to be neutral in their formulation, have a negative effect on Haitians.[196] The IACtHR did not have before it any concrete evidence which indicated that the violence was prejudice-based. Yet it found a discriminatory effect through reports from the United

192 Ibid., para. 219.
193 Ibid., para. 229.
194 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 179.
195 Ibid.
196 IACtHR 24 October 2012, (Ser. C.) No. 251 (*Nadege Dorzema et a./Dominican Republic*) (Merits, Reparations and Costs), paras. 235-238.

Nations Special Rapporteur on discrimination and its Independent Expert on minorities, as well as various international organisations reporting on historical practices of discrimination against Haitian migrants in the Dominican Republic.[197] Furthermore, it indicated that "States must abstain from taking any action that is directly or indirectly addressed, in any way, at creating situations of discrimination *de jure* or *de facto*" and that States are obliged to "take positive steps to reverse or to change discriminatory situations that exist in their societies to the detriment of a specific group of people."[198] Thus, it also concluded that in *Nadege Dorzema* there was an absence of preventive measures to adequately address situations relating to migratory control on the land border with Haiti.[199]

It is quite possible that cases similar to *Nadege Dorzema* may be presented (perhaps even sooner than expected) at the ECtHR. Some media have already reported on the violent treatment of migrants by border control guards, mostly in the context of the strict migration policy of the EU over the last couple of years.[200] If in the future it can be established that force, grounded in seemingly 'neutral' legislation or State policy, is disproportionately used by State agents towards a certain minority, this could lead to the finding of a negative effect of that legislation or policy in the relevant State and to a *prima facie* case of differential treatment. After a *prima facie* case has been established, the burden of proof could shift to the respondent State, which then holds the duty to offer an objective justification for that treatment. Where the respondent State fails to meet this duty, the Court may establish indirect discrimination. Because such violent conduct towards a minority group would then reflect "a general policy or measure that has disproportionately prejudicial effects on a particular group [although] it is not specifically aimed at that group."[201] In addition, and similar to the IACtHR, the ECtHR could require the Member State involved to take positive steps to eliminate the discriminatory nature of violence that it has conditioned through its legislation and/or border control policy.

Aside from the sterilisation cases and cases concerning the use of force by State agents, it may not always be easy to bring situations of discriminatory violence inflicted by State officials under the umbrella of indirect discrimi-

197 Ibid., para. 232.
198 Ibid., para. 236.
199 Ibid., para. 237.
200 See the following example: BGNNews.com, 'Yazidis fleeing ISIL beaten by Bulgarian police, freeze to death', 12 March 2015 (online). See also a recent article on the violent manner in which migrants are treated in Bulgaria: H. Kooijman, 'Bulgarije bewaakt angstvallig zijn grenzen. 'Ga er niet heen, je wordt vermoord'', 139/46 *Groene Amsterdammer* (2015), p. 14-17.
201 This is the ECtHR's definition of indirect discrimination, as recognised in ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 154; ECtHR 6 January 2005, 58641/00 (*Hoogendijk/The Netherlands*) (Admissibility Decision); ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 175.

nation. Therefore, it would be useful to find an additional way to facilitate a shift in the burden of proof to the respondent State in those cases where discriminatory violence is still viewed through the lens of direct discrimination.

Critics of the Court's approach propose that the burden ought to shift "when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic… ."[202] In addition to this, in the special context of violence against the Roma, Möschel observes that to enable a shift in the burden of proof, the Court could rely more on international NGO reports and official documents, instead of solely considering 'racial slur/insults'. Furthermore, he proposes that the Court could also 'simply' rely on its own case law and presume that the violence was racially motivated whenever the case involves a country that has often been a respondent in anti-Roma violence cases.[203]

Building on that approach, a solution which would make it easier to shift the burden of proof would be for the Court to stop requiring proof of motive in this type of case, but to require proof that a State agent's behaviour reflected a *discriminatory attitude* towards a victim during the killing or ill-treatment. Hence, the solution would be that the applicant must make out a *prima facie* case by showing a discriminatory attitude on the part of State agents during the physical abuse. A *prima facie* case may then be demonstrated by referring to discriminatory remarks uttered by State agents around the time the violence was inflicted or to internal instructions ordering State officials to treat individuals from a certain group in a violent manner. As shown above, these factual elements are already used in the Court's case law in establishing whether there was a discriminatory motive in cases of discriminatory violence inflicted by State agents. However, a *prima facie* case in this context – and thus the presence of a discriminatory attitude – may also be established in the following manner: in line with the above-mentioned proposals made by critics, it might already be sufficient to shift the burden of proof to the respondent State where an individual from a disadvantaged group has been treated in a violent manner by State agents, and statistics or reports from NGOs or other organisations show that persons from that disadvantaged group are systemically over-represented as victims of violence inflicted by State agents. Once this has been shown, the burden of proof could shift to the respondent State which must subsequently demonstrate that the less-favourable treatment in the case of that individual was not as a result of a discriminatory attitude and not part of the systemic violence which occurs in that Member State. Thus, in a case where it is alleged that a Roma victim was treated in a violent manner because of his or her ethnicity,

202 See introduction to section 5.5 and, in that context, most notably ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), *partly dissenting opinion of Judge Bonello*, para. 18. See also section 2.4.2.

203 M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 501.

for example, it must be demonstrated – through statistics or reports – that Roma always or often suffer physical abuse inflicted by State officials for the burden of proof to be shifted.

In essence, through this proposal, cases regarding the negative duty of State agents to refrain from inflicting discriminatory violence will be approached in a similar manner to cases in which an administrative practice under Article 2 and Article 3 complaints is recognised.[204] Essentially, the proposal made here requires demonstration of a 'repetition of acts' of discriminatory violence by State agents in order for the burden of proof to shift to the respondent State. Hence, there must be (1) one particular kind of breach of the Convention (which is violence inflicted by a State agent upon an individual from a certain group); (2) a sufficient number of such breaches occurring in a country, and; (3) a connection between those breaches in such a way that they amount to a pattern.[205]

It is important to note that based on this proposal the burden of proof should not shift *automatically* in every case where it is established that a member from a disadvantaged group has been violently attacked by a State agent from the majority group in a society. Such a shift may only occur where there are clear signs that a State agent displayed a discriminatory attitude by, for example, making discriminatory remarks about the victim, or after it has been established that the violence inflicted by a State agent against the group to which the victim belongs is part of a *systemic practice*. If the Court were to derive a *prima facie* case of discriminatory violence solely based on the fact that an individual from a minority was attacked by a State agent who is member of the majority group, for example, that then may render Court's judgments as less credible and reduce the legitimacy of its case law. This applies particularly to *incidental* cases of discriminatory violence in which the facts indicate that something else may have been the reason for the violent behaviour of the State agent involved. And this applies even more where these cases concern countries in which complaints of discriminatory violence targeting one specific group are generally not frequent. In such cases it may be for example, that there was a personal dispute between a victim from a disadvantaged group and a State agent, who have known each other for quite some time.[206] In cases like these, the dispute may have potentially been the reason for the violence rather than some discriminatory attitude. Therefore, it would be inappropriate for the Court to establish discriminatory violence solely on the account of the groups to which the victims and the State agents belong, unless it can be established that State agents violently target victims from that particular group on a systemic basis.

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204 See section 5.4.2.

205 See section 5.4.2. M.L. Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (PhD Thesis Utrecht University), Utrecht: Intersentia 2011, p. 205.

206 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 152.

This issue of 'other reasons behind the crime' in incidental cases of discriminatory violence has also emerged in light of the 'whites only presumption', which was proposed as an option in criminal cases in the United States of America. This proposal entails that a presumption of racial motivation must arise in *any* case of violence committed by a Caucasian defendant against a member of a minority group. In practical terms, this means that once it has been proved that a Caucasian defendant has committed a crime against a victim belonging to a minority group, this ought to automatically trigger a presumption of racial motivation. The burden of proof to disprove the presence of a racial motive would then be placed on the defendant.[207]

This proposal has been strongly condemned. The main criticism is that the 'whites only presumption' could result in unwarranted convictions of those who were in fact *not* motivated by racism. If the 'whites only presumption' were to be applied in the case of a Caucasian defendant who wrongfully believed that a gang of African-American youths had threatened his life, for example, and for that reason, he had shot them unjustly, under this presumption the defendant would face the impossible burden of proving that racism was not the motivation for his actions.[208]

Thus, it is important to distinguish between allegations of discriminatory violence that appear to be incidental and allegations of discriminatory violence that fit into a pattern of numerous identical or similar allegations. The first type may only be recognised as discriminatory violence on the basis of concrete evidence, such as discriminatory comments made by State agents or through internal instructions to treat the victims in a violent manner. The second type can also be derived from statistics or reports which reveal that the violence against the group to which the victim belongs is systemic.

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207 'Combating Racial Violence: A Legislative Proposal', 101 *Harvard Law Review* (1987-1988), p. 1270-1286, p. 1271-1273 [Author Unknown]; M.L. Fleischauer, 'Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act', 17 *Florida State University Law Review* (1989-1990), p. 697-711. The concept of 'whites only presumption' was mentioned in J. Morsch, 'The Problem of Motive in Hate Crimes: the Argument against Presumptions of Racial Motivation', 82 *Journal of Criminal Law & Criminology* (1991-1992), p. 659-689, p. 674-675.

208 J. Morsch, 'The Problem of Motive in Hate Crimes: the Argument against Presumptions of Racial Motivation', 82 *Journal of Criminal Law & Criminology* (1991-1992), p. 659-689, p. 675-676. See also J.B. Jacobs & K. Potter, *Hate Crimes. Criminal Law and Identity Politics*, New York: Oxford University Press 1998, p. 17. Jacobs and Potter argue that no such presumption would be applied in inter-racial attacks by African-American perpetrators and underlined that enforcement of the proposal would amount to the argument that violent actions motivated by prejudice against Caucasians by minority group members would be more justified or understandable or that these crimes are less culpable or less destructive to the body politic than vice versa. The authors believe that such a view is difficult to follow and may even obstruct the Fourteenth Amendment's Equal Protection Clause.

In conclusion, this subsection suggested two new ways or circumstances under which the ECtHR could allow the burden of proof to shift from the applicant to the respondent State when it is alleged that a State agent has committed violence of a discriminatory nature. Both proposals, in essence, call for an elimination of the legal concept of motive as a requirement for recognising this type of discriminatory violence in the Court. The idea behind this is that requiring proof of a discriminatory *effect* (first proposal) or a discriminatory *attitude* (second proposal) would make it easier to shift the burden of proof from the applicant to the respondent State and increase the chances of finding a violation of Article 14. In this way, the injustice suffered by disadvantaged groups due to discriminatory violence inflicted by State agents can be more easily recognised.

Both these suggestions to some extent add to a more substantive conception of equality in the Court's case law. The first proposal, suggesting a way to approach the complaints at issue as matters of indirect discrimination, offers a way to recognise the existence of discriminatory violence even where this is not explicit. Hence, it acknowledges that discriminatory violence can follow from a neutral provision or State policy. In addition, it calls for positive action from the Member States concerned to correct this type of discrimination that is conditioned by their legislation or policy. The second proposal also adds to the substantive conception of equality, since, in line with that conception, it takes as its starting point that some persons, often because of their membership of a particular group, are systematically subjected to disadvantage, discrimination, exclusion or even oppression.[209] The proposal to require demonstration of a discriminatory attitude instead of a discriminatory motive would enable the Court to more easily recognise systemic discriminatory violence.

5.6 Conclusion

The notion of the 'burden of proof' has an important regulatory function in proceedings at the Court, since it indicates the party that must prove an assertion. The ECtHR, akin to domestic and other international courts, traditionally places the burden of proof on the complaining party, i.e. the applicant, who needs to deliver *prima facie* evidence of his or her version of the events. If the applicant succeeds in this, the burden of proof then shifts to the respondent State which must disprove the allegations made.

However, it may be quite a challenge for the applicant to prove an assertion before the Court, because the applicant is usually a citizen complaining about State conduct. As observed earlier, in many cases concerning Article 2 and Article 3 related issues, the applicant may be challenged in presenting *prima facie* evidence, as it is the Member State which holds all the crucial

209 See section 2.4.1.

information. Therefore, being aware of the somewhat 'weaker' position of the applicant facing a Member State as its 'opponent' in the proceedings, the Court sometimes deviates from its traditional approach in applying *actori incumbit probatio* and implements other ways to enable a shift in the burden of proof. In certain cases, for example, it highlights that it will examine all the material before it, whether originating from the parties or other sources, and, if necessary, that it will obtain material *proprio motu* (e.g. *Ireland/United Kingdom*). In other cases, it maintains the traditional rule that the applicant must make out a *prima facie* case, but uses presumptions and inferences in order to shift the burden to the respondent State and eventually to find a violation of the Convention under various circumstances (e.g. *Salman/Turkey*, *Al Nashiri/Poland*). In cases regarding numerous identical or similar complaints, it can presume the presence of an administrative practice of wrongful conduct of a certain kind, enabling it to infer a violation of the Convention (e.g. *Ireland/United Kingdom*).

Particularly challenging to prove are allegations concerning Article 14 read in conjunction with Articles 2 or 3 ECHR. These complaints take on a further dimension, because in addition to the violence itself, the aspect of a discriminatory nature of the violence is involved. The types of obstacles that an applicant may face under these complaints depend on the type of discriminatory violence alleged. Cases regarding the positive duties to effectively investigate discriminatory violence or to take preventive measures against such wrongful conduct, are generally easier to establish than complaints under which it is alleged that State agents inflicted discriminatory violence upon members of certain disadvantaged groups.

Under the two positive duties, other issues in relation to the burden of proof also arise. As shown earlier, it is not always clear whether the Court actually distributes the burden of proof between the parties or rather if on the basis of the domestic case file it verifies whether an effective investigation into discriminatory violence took place or whether sufficient protective measures were taken against this type of physical abuse. The Court could resolve this vagueness in its judgments by explicitly stating that it will examine the case file of its own motion and evaluate whether any errors in light of the positive duties were made by the respondent State. Otherwise, it could identify the applicant as the party that bears the burden of proof to make out a *prima facie* case and pinpoint the moment when the burden of proof shifts to the respondent State.

Despite this vagueness about who carries the burden of proof in cases concerning allegations of breaches of (one of) the two positive duties under Article 14 read in conjunction with Article 2 or 3 ECHR, the Court has frequently managed to establish violations of these provisions in this context. This may be due to the fact that, in contrast to cases where it is alleged that State agents had committed discriminatory violence, there is no need to prove a discriminatory motive. Consequently, complaints regarding both types of positive duties may be established on the basis of a wide variety of evidence and under a wide variety of circumstances, including solely on the

basis of evidence of a general systemic problem of discriminatory violence in a country. By acknowledging that the discriminatory nature of violence ought to be addressed with positive action, the Court has also introduced a substantive equality approach in this field of its case law.

However, in the context of the negative duty of State agents to refrain from inflicting discriminatory violence, the ECtHR has made less effort to implement a substantive conception of equality. Therefore, this chapter has suggested a few ways to promote substantive equality under this specific duty by introducing two new circumstances that the Court may consider in order to shift the burden of proof from the applicant to the respondent State. Both circumstances allow the Court to address issues of systemic discriminatory violence. The first proposal requires the applicant to establish a *prima facie* case of a discriminatory effect of domestic legislation or State policy conditioning discriminatory violence in a Member State. In that sense, it is inspired by the Court's reasoning in cases concerning indirect discrimination. The second proposal requires the applicant to prove a discriminatory attitude on the part of State agents around the time that the violence was inflicted. Under both proposals, it is therefore unnecessary to demonstrate the presence of the challenging legal concept of discriminatory motive. The idea is that by implementing these proposals in ECtHR case law, the Court could more easily recognise that discriminatory violence was committed by State agents and that the respondent States concerned can be held responsible for it.

The next chapter looks at the types of evidence through which systemic discriminatory violence inflicted by State agents may be revealed. Most notably, it asks under what circumstances statistics and reports from intergovernmental organisations and NGOs may help to establish the presence of systemic discriminatory violence in a Member State.