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Proving discriminatory violence at the European Court of Human Rights

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Citation
Mačkić, J. (2017, May 23). *Proving discriminatory violence at the European Court of Human Rights*. *Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/49011

Version:	Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

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Title: Proving discriminatory violence at the European Court of Human Rights
Issue Date: 2017-05-23

6 Evidentiary material used to prove discriminatory violence at the ECtHR

6.1 Introduction

Having addressed the issues of standard of proof and the distribution of the burden of proof in cases concerning discriminatory violence, this penultimate chapter looks at the matter of the evidentiary material by which the three different types of discriminatory violence may be proved. It considers evidence that the Court has used to establish violations of the Convention in all three types of cases. It further explores how systemic discriminatory violence may be proved, particularly in the context of the negative obligation of State agents to refrain from inflicting discriminatory violence. As indicated earlier, the Court could come even closer to a substantive conception of equality than it already has, by no longer requiring applicants to prove a discriminatory motive under these types of complaints. Instead, it could require applicants to make a *prima facie* case by proving a discriminatory effect of specific legislation or a State policy that enables discriminatory violence by State agents in a country, or to deliver *prima facie* evidence of a discriminatory attitude on the part of State agents who have inflicted violence upon a member of a certain group. This chapter therefore concludes with the evidentiary material by which such a discriminatory effect or discriminatory attitude could be uncovered.

'Evidence' is understood in this study as information by which facts tend to be proved.[1] In domestic legal systems this term has several meanings.[2] It can be classified in terms of the form in which it may be presented in court (hence, as oral evidence, documentary evidence and things[3]), but also in terms of its substantive content, the purpose for which it is presented and the rules by which its admissibility is determined.[4]

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

2 H. Malek Q.C., 'Introduction', in: H.M. Malek (ed.) *Phipson on Evidence*, London: Thomson Reuters (Legal) Limited 2010, p. 1-51, p. 4.

3 'Things' are also referred to as 'real evidence' and usually take the form of a material object for inspection. Additionally, they may include the physical appearance of persons and animals, the demeanour of witnesses, the intonation of voices on a tape recording, inspections out of court of the *locus in quo* or of some object which is impossible or inconvenient to bring to court, and out-of-court demonstrations or re-enactments of acts or events into which the court is enquiring. See A. Keane & P. McKeown, *The Modern Law of Evidence*, New York: Oxford University Press 2014, p. 12.

4 Ibid., p. 10.

The ECtHR approaches the term 'evidence' in its own unique and autonomous way. Specifically, it understands it in light of the broad principle of 'free evaluation of evidence'.[5] This means that the Court enjoys absolute freedom in determining the admissibility of evidence and its value or importance in a particular case.[6] Furthermore, the term 'evidence', when it comes to the various forms in which it can be presented at the ECtHR, has a somewhat different meaning than in other – notably domestic – legal systems. For example, in most cases the Court finds information about the facts of a case through factual elements that have already been established in a national context and recorded in the case file. For this reason, in this study these factual elements from the case file fall under the umbrella of 'evidence', in addition to the evidentiary material that may actually become apparent or be presented to the Court, such as witness testimonies, expert evidence, statistics or reports from intergovernmental organisations or NGOs.

In order to highlight the evidentiary material through which the three types of discriminatory violence may be established, this chapter will consider the following aspects. The ECtHR's approach to the admissibility of evidence generally, with admissibility meaning "[t]he quality or state of being allowed to be entered into evidence in a hearing, trial, or other official proceeding" is set out in section 6.2.[7] Section 6.3 subsequently outlines the different factual elements – which have thus mainly been recorded in the domestic case file – through which the three different types of discriminatory violence may be proved at the Court. It particularly zooms in on discriminatory remarks which were uttered by State agents somewhere around the time of the violent events. Discriminatory remarks are analysed in more depth because they are expressed by the perpetrators in various terms. It is therefore interesting to note what types of remarks amount into a finding that Article 14 read in conjunction with Article 2 or 3 was violated, and what types of remarks are less successful in this context. Sections 6.4 and 6.5 turn to important evidentiary material, such as statistics and reports from intergovernmental organisations or NGOs. These two types of material may be particularly useful in revealing systemic discriminatory violence in a Member State, and thus for that reason deserve significant attention in this study. In this context, the conditions under which statistics and reports can be used by the Court to establish the various forms of discriminatory violence are discussed. The argument is made in these sections for a more progressive

5 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 12.

6 Ibid.

7 B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul: West Publishing Co. 2006, p. 18.

approach to be taken when using these types of evidentiary materials to prove discriminatory violence, particularly in the context of complaints concerning the negative duty of State agents to refrain from inflicting discriminatory violence.

6.2 Admissibility of evidence in ECtHR proceedings

There are no explicit provisions regulating the admissibility of evidence in proceedings before the ECtHR. Yet, the Court allows itself complete discretion when it comes to the admissibility and evaluation of evidence.[8] The Court's general approach in this regard so far has been to accept all kinds of evidence offered to it. This approach was embraced in *Ireland v. United Kingdom*, when the Court underlined that "[i]n order to satisfy itself, the Court is entitled to rely on evidence of every kind, including, insofar as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials."[9] In addition, the Court has established that in proceedings before it:

> "… there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions …."[10]

The 'free evaluation of evidence' principle thus entails that all relevant, legally obtained material may be accepted as evidence and that no person is barred from being a witness.[11] Consequently, evidence can be submitted to the Court in a variety of forms, including "decisions of national courts on issues of fact, statements incorporating the evidence of witnesses (whether in the form of sworn statements, or otherwise), expert reports and testimony (such as medical reports), official investigation reports and other documentary evidence such as video or photographic evidence."[12] Hearsay evidence is not prohibited and there are no fixed rules concerning illegally obtained

8 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 11.

9 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 209.

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

11 U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 73.

12 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 11.

evidence, privileged documents or perjury.[13] Yet, as stressed earlier, in practice, the Court relies mainly on information about the facts of a case as recorded in the case file.[14]

The Court also has broad discretion *not* to admit evidence. Two elements are considered to be influential in this regard. The first is related to questions of procedural equality. This means that the Court solely evaluates evidence or factual elements recorded in the case file which have been disclosed to all parties. The second concerns the Court's case load, which also influences the Court's ability to accept evidence submitted by the parties. Leach, Paraskeva and Uzelac observe in this regard a tendency on the part of the Court not to admit into the Court's files evidence which is not sought by the Court or which is submitted 'out of turn'. Evidence submitted 'out of turn' refers to situations in which evidence is "submitted by a party other than at a point in the proceedings when that party has been invited by the Court to make submissions."[15]

The rationale behind 'the free evaluation of evidence' principle lies in the fact that the ECtHR is very often located far from the countries where the violations allegedly occurred and that, in almost all cases, the Court has to use documents submitted by the parties. Hence, because evidence may be difficult to obtain, the Court refers to as much material as possible in order to establish the facts of a case.[16]

6.3 Factual elements from the domestic case file pointing to discriminatory violence

When determining whether a Member State has disregarded its duties under any of the three types of discriminatory violence complaints, the Court does not hear witnesses or experts or conduct any fact-finding missions for that purpose. Rather, it primarily turns to the domestic case file for its assessment of the facts. Certain factual elements will be recorded in the case file which have already been established by State officials in the national context and which may point to a violation of the Convention. Most of these elements were already mentioned in sections 2.2 and 5.5. The factual

13 Ibid.

14 K. Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context', 1 *International Humanitarian Legal Studies* (2010), p. 275-303, p. 279.

15 P. Leach, C. Paraskeva & G. Uzelac, *International human rights & fact-finding. An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights*, London Metropolitan University: Report by the Human Rights and Social Justice Research Institute 2009, p. 12.

16 Ibid., p. 13. See also U. Erdal, 'Burden and standard of proof in proceedings under the European Convention', 26 *European Law Review: Supp (Human rights survey)* (2001), p. 68-85, p. 73; O. Mjöll Arnardóttir, 'Non-discrimination Under Article 14 ECHR: the Burden of Proof', *Scandinavian Studies In Law*, p. 18 (online).

elements, and how they may contribute to finding that there was a violation of Article 14 read in conjunction with Article 2 or 3, are discussed in more detail below. Because most of these factual elements may be used by the Court to establish violations of all three duties in the context of discriminatory violence, they are not discussed per type of discriminatory violence complaint. Instead they are discussed below in order of persuasiveness, which means that those factual elements that provide the strongest indication of a violation in the context of the three types of discriminatory violence are discussed first.

The strongest indication of discriminatory violence is a confession by a perpetrator that he or she exhibited violent behaviour because for a discriminatory reason and the absence of any State action to address this. This type of factual element has so far only been raised in ECtHR cases concerning the failure of State agents to conduct an effective investigation into discriminatory violence. In *Angelova and Iliev*, regarding the beating and subsequent death of a Roma individual by seven Bulgarian teenagers, the Court noted that the discriminatory motives of the assailants in perpetrating the attack against the applicants' relative became known to the authorities at a very early stage of the investigation, when one of the assailants gave the reason for the attack.[17] The assailant explained to the police that "[t]he Gypsy had not provoked us in any way[,] neither with words nor with actions... We beat him because he was a Gypsy."[18] For the Court, it was 'completely unacceptable' that, following such a statement from the assailant, the authorities did not expeditiously complete the preliminary investigation against all the perpetrators and bring them to trial and, furthermore, failed to charge them with any 'racially motivated offences'.[19] So, if despite a confession that the violence was motivated by discrimination, the State authorities still refuse to conduct an effective investigation into the allegation, the Court may find that a Member State has breached the Convention on the basis of that factual element.

Another factual element, arising specifically in the context of the negative duty of State agents to refrain from inflicting discriminatory violence, is the existence of internal police or other official instructions to treat suspects from a certain group in a particular (violent) manner. In *Antayev*, the Court took this factual element into account to establish that Russian State agents had ill-treated the Chechen applicants for discriminatory reasons and, therefore, that Article 14 read in conjunction with Article 3 was violated. The Court noted that pursuant to internal instructions, the local police had called the Regional Department for Combating Organised Crime (RUBOP) and a group of armed special police officers to assist them in carrying out searches at the homes of the two applicant families to investigate only a

17 See ECtHR 26 July 2007, 55523/00 (*Angelova and Iliev/Bulgaria*), para. 116.
18 Ibid., para. 13.
19 Ibid., para. 116.

minor offence because the suspects were of Chechen origin. According to the Court, the ill-treatment that the applicants subsequently suffered at the hands of the local police, the ROBOP and the special police officers was inflicted on them intentionally and for no apparent reason.[20] In establishing discriminatory violence in *Antayev*, the Court also considered the "racist verbal abuse" to which the applicants had been subjected during their ill-treatment by the State agents involved,[21] hence, this was another factual element. While beating the applicants the agents had uttered "Why don't you go to Chechnya, to fight us there?"[22] and that they would not be able to "beget more Chechens."[23]

Thus, discriminatory remarks expressed by a State agent before, during or after his or her violent behaviour towards a victim from a certain group, constitute another important factual element indicating that the violence inflicted by that particular State agent was prompted by a discriminatory motive.[24] As demonstrated by the example of *Antayev*, such remarks may lead to the determination that there was an Article 14-related violation in combination with another factual element. However, discriminatory remarks on their own may already be sufficient for the Court to find that a State agent was guilty of discriminatory violence, thus, without reference to any additional factual elements.[25] For example, in *Stoica*, which concerned a dispute that arose between a number of Roma individuals and a group of Romanian police officers, the Court considered a number of witness testimonies claiming that a police officer had asked one of the Roma men, whether he was "Gypsy or Romanian". After the victim had answered that he was a "Gypsy", a deputy mayor asked the police officers and the public guards to teach him and the other Roma "a lesson". The Court additionally took into account that a police report referred to the behaviour of the Roma individuals who were involved in this case as "pure Gypsy". According to the Court, these statements were clearly stereotypical and proved that the State officials were "not racially neutral."[26]

Discriminatory remarks were further relied on by the Court in *Makhashevy v. Russia*. In that case, one of the applicants claimed that, among other things, Russian police officers shouted at him "You Chechens are all faggots. Why did you come over here? Go back to Chechnya..."[27], and "[i]f you or your brother try to complain, we will kill you right here. We will not be

20 ECtHR 3 July 2014, 37966/07 (*Antayev a.o./Russia*), para. 127.
21 Ibid.
22 Ibid., para. 12.
23 Ibid., para. 15.
24 See also ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 128-130; ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), paras. 176-179; M. Möschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?', 12 *Human Rights Law Review* (2012), p. 479-507, p. 489.
25 ECtHR 4 March 2008, 42722/02 (*Stoica/Romania*), paras. 128-132.
26 Ibid., paras. 7 and 128.
27 ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), para. 9.

held responsible for a Chechen,"[28] while beating him. Such remarks, some of which were confirmed by witnesses in this specific case, were sufficient to prove that the police officers acted violently on the basis of discriminatory motives.[29] So, a *prima facie* case of discriminatory violence inflicted by the police was established. The government did not submit any explanation for the police officers' conduct other than making a general statement to the effect that it was unsubstantiated.[30]

It is useful to observe in this regard that not all statements or remarks which appear to be tendentious or biased, necessarily amount to a *prima facie* case that the violence inflicted by State agents was prompted by a discriminatory motive. In *Nachova*, for example, the uttered words "you damn Gypsies" over the dead bodies of the two victims, did not amount to a *prima facie* case being established.[31] The reason why a remark 'works' in one case, and does not in another, depends not only on its substance, but also on the circumstances in which it was made. In *Makhashevy*, the Court explained that a *prima facie* case had been established in that case because no further explanation had been given by the government for the reasons which necessitated the authorities' intervention and the use of force against the Chechen applicants. The Court compared this case to *Nachova*, and stated why it had not established a *prima facie* case of discriminatory violence inflicted by State agents in the latter. This was because in *Nachova*, the authorities' actions were aimed at arresting two men who had escaped from detention while serving a prison sentence.[32] Therefore, in a case like *Makhashevy*, tendentious remarks may result in a finding that a State agent had committed discriminatory violence, since the violence was inflicted for no apparent reason. While in a case like *Nachova*, the violence may have been due to the circumstances under which the State agents were operating, which made the tendentious remarks less persuasive in terms of finding that there had been a violation of the Convention.

Not only does the Court rely on discriminatory remarks in order to establish violations in cases where the complaint is made that State agents themselves inflicted discriminatory violence, but the Court also draws on them to conclude that State officials failed to conduct an effective investigation into discriminatory violence, regardless of whether the violent act was committed by State agents or private individuals. As indicated earlier in subsection 2.2.2, discriminatory remarks may be an indicator that Article 14 read in conjunction with Article 2 or 3 was violated, because during an investigation into the violence inflicted on members of a certain group,

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28 Ibid., para. 11.
29 Ibid., para. 176.
30 Ibid.
31 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 153. In this case a witness had testified before the domestic authorities that a State agent had shouted out "you damn Gypsies", right after he had killed two Roma individuals.
32 ECtHR 31 July 2012, 20546/07 (*Makhashevy/Russia*), para. 178.

police officers, prosecutors or judges made discriminatory remarks about the applicants or – in the case of killings – about the deceased victims.[33] *Petropoulou-Tsakiris* provides a suitable example in this regard. In that case, the Court noted that throughout the investigation into the applicant's ill-treatment by the police a Greek Deputy Director of Police made tendentious general remarks concerning the applicant's Roma origin. In a report concerning the applicant's ill-treatment, he stated that complaints raised by Romani individuals were exaggerated and formed part of their "common tactic to resort to the extreme slandering of police officers with the obvious purpose of weakening any form of police control."[34] According to the Court, the failure of the authorities to investigate possible 'racial motives' for the applicant's ill-treatment, combined with their attitude during the investigation, constituted discrimination contrary to Article 14 taken in conjunction with Article 3.[35]

There are further examples which may be mentioned in this context. In *Cobzaru*, a military prosecutor who had to decide whether alleged anti-Roma violence required investigation, referred to the applicant and his father as "antisocial elements prone to violence and theft", who were in constant conflict with "fellow members of their ethnic group."[36] Moreover, the term 'Gypsy' was used on frequent occasions by the prosecutors. The Court labelled several of these remarks as 'tendentious' and stressed that they disclosed "a general discriminatory attitude [on the part] of the authorities."[37] In the previously-mentioned *Milanović* case too, where the Court had to decide whether Serbian authorities had failed to conduct a proper investigation into an attack by members of a right-wing organisation of Mr Milanović, the Court took into consideration tendentious remarks uttered by State agents during the investigation. The Court observed that during the national investigation into the attacks, the police officers referred to the "applicant's well-known religious beliefs, as well as his 'strange appearance', and apparently attached particular significance to 'the fact' that most of the attacks against him had been reported before or after a major orthodox religious holiday, which incidents the applicant subsequently publicised through the mass media in the context of his own religious affiliation."[38]

Where it has been alleged that discriminatory remarks have been uttered by perpetrators just before, during or after a violent act, and the authorities failed to investigate a possible discriminatory motive behind such acts, the Court has more quickly used such remarks to establish that the Member State breached the relevant positive duty in this context than in cases con-

33 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 100; ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 63-66.
34 ECtHR 6 December 2007, 44803/04 (*Petropoulou-Tsakiris/Greece*), paras. 64-65. See also para. 29.
35 Ibid., para. 66.
36 ECtHR 26 July 2007, 48254/99 (*Cobzaru/Romania*), para. 28.
37 Ibid., para. 100.
38 ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), para. 100.

cerning the negative duty of State agents to refrain from inflicting discriminatory violence, for example. In this regard, it is again irrelevant whether the perpetrators were State agents or private individuals.[39] According to the Court, the fact that such discriminatory remarks were made raises a suspicion of violence of a discriminatory nature that the State authorities should investigate.[40] Hence, the remark '[y]ou damn Gypsies', in *Nachova* did not lead to a finding that the negative duty had been breached by Bulgaria. However, the Court did establish in that case that such a statement, seen against the background of the many published accounts of the existence of prejudice and hostility towards Roma in Bulgaria, called for verification and thus a proper investigation.[41] Furthermore, the Court stated that:

> "... any evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives."[42]

The Grand Chamber additionally considered that the grossly excessive force used by the State agent against two unarmed and non-violent men also called for a careful investigation.[43]

The Court also recognised that the following statements required further investigation into potential discriminatory motives: the words "get out of here you black whore" expressed towards a woman of Nigerian origin while violence was inflicted on her;[44] slurs such as "Negroes" and "[d]irty negroes, what are you doing here" uttered by skinheads towards two persons of Sudanese origin during the violence;[45] the question put by a perpetrator to three individuals about whether "[they] could not handle a dirty little gypsy" right before beating another individual of Roma origin, and subsequent remarks expressed on a social network right after the beatings, through which the perpetrator expressed that he "had been kicking in the head a gypsy lying on the ground when [he] was overcome by three of his buddies."[46]

Finally, discriminatory remarks may also be used as evidence in cases where an alleged failure by State officials to take protective measures against discriminatory violence has been put forward, although very few examples

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39 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), paras. 163-164; ECtHR 13 December 2005, 15250/02 (*Bekos and Koutropoulos/Greece*), paras. 73-74; ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), para. 61.

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

41 Ibid., paras. 162-168.

42 Ibid., para. 164.

43 Ibid., para. 165.

44 ECtHR 24 July 2012, 47159/08 (*B.S./Spain*), paras. 61-63.

45 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 49-53.

46 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), paras. 10-11 and paras. 60-76.

could be found to include here. *Gldani* may be recalled in this context, a case in which the Court took into consideration the fact that State agents made discriminatory remarks about the victims, who were Jehovah's Witnesses, while the victims were filing their requests for protection from violence inflicted by a group of Orthodox believers.[47] In this context, the Court noted how the head of the police station, after learning about the attacks, stated that "in the attackers' place, he would have given the Jehovah's Witnesses an even worse time!,"[48] instead of offering the requisite protection from violence to the victims. The Court further noted that three other police officers did not take action because, according to those officers, they "didn't get involved in that type of incident."[49] Another example can be found in the case *Eremia* in which the applicant allegedly suffered violence inflicted by her husband. In that case, the local police suggested that she should try reconciliation, as she was "not the first nor the last woman to be beaten up by her husband."[50] This statement, in combination with the authorities' failure to speed up the examination of her request for a divorce, to enforce a protection order in the applicant's name as well as general information on violence against women in Moldova, enabled the Court to conclude that there had been a violation of Article 14 in conjunction with Article 3.[51]

Finally, it should be noted that references to a victim's origin and/or characteristics alone are insufficient to find that a violation has taken place in the context of any type of allegation of discriminatory violence. Thus, referring to the victim as 'the Gypsy'[52] and State agents' reference to a person's 'dark colour of the skin'[53] are not considered by the Court to be discriminatory in nature.[54] Furthermore, in *Balogh*, the Court did not follow the applicant in his complaint that State agents had inflicted discriminatory violence upon him while he was in detention, despite the fact that a police officer had said to him "[t]ell the Miskolc gypsies that they had better not set foot in Orosháza."[55]

It seems reasonable that the Court does not automatically assume that a discriminatory aspect triggered the violence on the basis of mere references to a person's ethnicity (such as a Romani origin) or a physical characteristic (such as a dark skin colour), for example. After all, these may simply be

47 See, for example, ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 140. See also section 2.2.3.
48 ECtHR 3 May 2007, 71156/01 (*Case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others/Georgia*), para. 28.
49 Ibid. See also paras. 44 and 140-142.
50 ECtHR 28 May 2013, 3564/11 (*Eremia/Moldova*), para. 87.
51 Ibid., paras. 86-90.
52 ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), para. 164. See also ECtHR 10 June 2010, 63106/00 (*Vasil Sashov Petrov/Bulgaria*), paras. 69-73 and ECtHR 22 February 2011, 24329/02 (*Soare a.o./Romania*), paras. 197-209.
53 ECtHR 18 May 2000, 41488/98 (*Velikova/Bulgaria*), para. 92.
54 Ibid., para. 94. ECtHR 13 June 2002, 38361/97 (*Anguelova/Bulgaria*), para. 168.
55 ECtHR 20 July 2004, 47940/99 *(Balogh/Hungary*), para. 75.

a means of identification or a description of a person's features. Although such expressions reveal that the perpetrator has spotted that there is something 'different' about his or her target, it remains hard to tell whether the perpetrator inflicted the violence because of these distinct features.[56] The discriminatory remarks that actually amounted to *prima facie* evidence under the three types of complaints of discriminatory violence and that have been discussed in this section, generally exhibit clearer expressions of hostility towards the group to which the victim belongs.

A further important factual element indicating that the violence was discriminatory in nature, lies in the establishment – or even in the very assumption – that the violence was committed by a group which by its nature is governed by an extremist and/or prejudice-based ideology, such as a skinhead group or a far-right group.[57] The perpetrators' alleged membership of such a group invokes a Member State's positive duty to effectively investigate the discriminatory nature of the violence or to take protective measures against this wrongful act. For example, in *Milanović*, the Court attached importance to the suspicion that the applicant, a leading member of the Hare Krishna community in Serbia, was attacked by members of an organisation called *Srpski vitezovi*, a local branch of a far-right organisation called *Obraz*.[58] In the Court's view, this required an effective investigation into a crime that had "most probably been motivated by religious hatred."[59] In *Sakir v. Greece*, the Court concluded that the Greek government had failed to effectively investigate whether the ill-treatment of an asylum seeker in Greece had been caused by racist attitudes ('*des attitudes racistes*'[60]) of the 15 to 20 private individuals who had beaten the victim. According to the Court, Mr Sakir's beating had to be viewed in the overall context of the phenomenon of racist violence which has been occurring in central Athens since 2009. The Court noted that there was a recurrent pattern of attacks on foreign-

56 See ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), *dissenting opinion of Judge Kjølbro*, para. 10. In the context of anti-Roma violence, the judge makes a difference between violence against a person who is of Roma origin, and violence against a person because of the person's Roma origin. Kjølbro indicates that in the first situation the ethnic origin of the victim is a statement of fact, in the other it is the cause of the violence.

57 See ECtHR 31 May 2007, 40116/02 (*Šečić/Croatia*), para. 68; ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), para. 98; ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), paras. 49-50.
Using this type of evidence to raise a suspicion on discriminatory violence is quite common in other jurisdictions as well. For example, police officers investigating bias crimes in the United States of America often perform a background check on the perpetrators to examine whether they have some affiliation with any white supremacy group, since such affiliation may strongly point at a discriminatory motive (see United States Court of Appeals, Sixth Circuit, 28 May 1991, *United States/Gresser*, 935 F.2d 96 (6th Cir. 1991), para. 10; United States Court of Appeals, Tenth Circuit, 25 August 1989, *U.S./Lane*, 883 F.2d 1484 (10th Cir. 1989)).

58 ECtHR 14 December 2010, 44614/07 (*Milanović/Serbia*), paras. 7-9 and 98.

59 Ibid., para. 99.

60 ECtHR 24 March 2016, 48475/09 (*Sakir/Greece*), para. 64.

ers, perpetuated by groups of extremists, often with ties to the 'neo-fascist' political party Golden Dawn. For this reason the authorities were obliged not only to properly investigate the case, but also, in particular, to make a connection between the assault on Mr Sakir and other similar incidents. In this context, they were under a duty to identify whether the perpetrators had links with extremist groups known to have committed racist attacks in Athens.[61]

The fact that the Court highlighted that these attackers' belong to a far-right group, is in line with the object and meaning of the Convention, which, in the Court's view, also includes the notion of pluralism. This implies that Member States must observe their positive duty to protect and safeguard pluralism in their societies and, arising from that, impose restrictions on groups that threaten this pluralism,[62] such as extremist groups, skinheads and similar.

The Court has to a lesser extent relied on some other factual elements to establish that State authorities failed to live up to specific duties in the context of discriminatory violence. For example, in *Yotova*, it held that State agents failed to conduct an effective investigation into discriminatory violence inflicted upon a Roma woman. The Court noted that three days before the incident involving the applicant occurred, there had been a series of violent clashes and intimidation in the applicant's neighbourhood which took place between a number of individuals of Roma origin and a number of individuals of Bulgarian origin. In the Court's view, such a clash between different ethnic groups is a possible indicator – i.e. a factual element – that the case of the applicant also involved an act of discriminatory violence that the national authorities were further obliged to investigate.[63] A few years later, in *Balázs*, the Court highlighted that an effective investigation should also be conducted by the national authorities "when it comes to offences committed to the detriment of members of particularly vulnerable groups,"[64] such as Roma.

This section has set out a variety of factual elements that the Court may use in order to establish whether a Member State has acted in accordance with its duties arising under the three types of complaints of discriminatory violence. Overall, it may be concluded that the strongest indicator of discriminatory violence is a confession from a perpetrator that a discriminatory motive was the reason for the violent behaviour. Until now, this type of factual element has been relied upon by the Court only in the context of complaints concerning the duty of the State to effectively investigate a potential act of discriminatory violence. It may be expected however that this type of

61 Ibid., paras. 64-73.
62 A.J. Nieuwenhuis, 'The Concept of Pluralism in the Case-law of the European Court of Human Rights', 3 *European Constitutional Law Review* (2007), p. 367-384, p. 368.
63 ECtHR 23 October 2012, 43606/04 (*Yotova/Bulgaria*), para. 106.
64 ECtHR 20 October 2015, 15529/12 (*Balázs/Hungary*), para. 53.

factual element could play a significant role in the Court's future case law when finding that State agents inflicted discriminatory violence themselves, i.e. if the State agents involved admit that their violent actions were motivated by bias. However, since confessions are rare, the Court mostly draws on other factual elements in order to establish a violation of Article 14 read in conjunction with Articles 2 or 3. Discriminatory remarks uttered by State agents or private individuals somewhere around the violent events, or the perpetrators' membership of a skinhead or far-right group, come closest to a confession, because they may indicate how a perpetrator views individuals from a certain group. In some cases, such as *Antayev*, this may amount to a finding that State officials acted violently on the basis of a discriminatory motive. In most cases the Court highlights these factual elements to indicate that they should have prompted a Member State to take action in a national context, by effectively investigating acts of discriminatory violence and by offering appropriate protection to victims of such.

6.4 Statistics

This section aims to highlight the potential for using statistics to prove complaints concerning discriminatory violence, particularly in the context of complaints concerning the negative duty of State agents to refrain from inflicting this wrongful conduct. The notion of 'statistics' includes both official and non-official statistics. Official statistics relate to numerical data collected and published by governments. By contrast, non-official statistics refer to numerical data collected and published by various public and private organisations.[65]

For the purpose of this section, it is necessary to recall the two ways that were introduced in chapter 5 to move towards a more substantive conception of equality in the context of a State agents' negative duty to refrain from inflicting discriminatory violence. The first way proposes how these types of complaints may be approached as issues of indirect discrimination. It will be demonstrated below that statistics can sometimes be used in this context to prove the discriminatory effect of a provision, criterion or practice that has created a situation in which State officials inflict violence upon members of a specific group. The Court has recognised that the negative effect of a provision, criterion or practice must be "disproportionately high"[66] or needs to have "considerably more impact"[67] on the disadvantaged group in order

65 See *Sociological Research Skills*, to be consulted via http://www.sociology.org.uk/methos.pdf (online).

66 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 193. See also ECtHR 16 March 2010, 15766/03 (*Oršuš a.o./Croatia*) (GC), para. 150 and ECtHR 29 January 2013, 11146/11 (*Horváth and Kiss/Hungary*), para. 105, where the Court mentions "disproportionately prejudicial effects" as a criterion to determine the adversity of the impact.

67 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 193.

to amount to differential treatment. Therefore, statistics can help to measure whether physical abuse inflicted on members from a certain group by State agents is indeed disproportionate. The common use of the term 'disproportionate' refers to the extent or degree to which something appears to be inappropriate or 'out of proportion' when compared to something else.[68]

The second way proposes that the Court could establish that State agents inflicted discriminatory violence on individuals from certain groups on the basis of a discriminatory attitude, rather than seeking a discriminatory motive. Under this umbrella, it has been suggested that a discriminatory attitude need not necessarily be derived from certain factual elements, such as discriminatory remarks,[69] it could also be established when it appears that an allegation of discriminatory violence inflicted by State agents fits into a pattern of numerous, similar complaints in a Member State. Statistics would then be useful in revealing the existence of such a pattern.[70]

Before exploring the potential usefulness of statistics as evidence in the context of ECtHR cases on discriminatory violence, some general views on the value of statistics in discrimination cases are first set out in subsection 6.4.1. EU law has been referred to in this context to indicate some of the advantages as well as some sensitive matters when statistics are used as evidence in anti-discrimination case law. Subsection 6.4.2 then surveys how the ECtHR has used statistics. The focus here was placed on cases of indirect discrimination, as the Court has laid down ground rules concerning the use of statistics in such cases. Subsection 6.4.3 highlights the Court's use of statistics in all three types of discriminatory violence cases so far, and further discusses the circumstances in which statistics may be useful in these cases at the Court. Notably, they can help to reveal a form of discriminatory violence that may be regarded as indirect discrimination or situations in which discriminatory violence is inflicted so often upon members of a certain group that it fits into a pattern of complaints in the Member State concerned. In the ECtHR context, however, whether or not statistics can be used in this manner depends on their availability. Such information is not always available. In this subsection therefore ways of enhancing the availability of such information are called for through setting up systems to gather statistics about discriminatory violence in Council of Europe Member States.

6.4.1 General views on statistics as evidence

Acts of discrimination are inherently subjective. For this reason it is difficult to provide direct evidence of discrimination. Ambrus argues that because of this difficulty, an applicant should merely invoke a presumption of dis-

68 B. Bowling & C. Phillips, 'Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search', 70 *Modern Law Review* (2007), p. 936-961, p. 943-944.

69 This was, for example, the case in *Stoica* and *Makhashevy*.

70 See section 5.5.2.

crimination instead of having to prove that discrimination has taken place.[71] Such a presumption could be shown by using a comparison as means of evidence.[72] The comparison, in turn, could be demonstrated with statistics.

Statistics can be a useful tool in establishing discrimination, as they enable an adjudicator to compare the situation of different groups. They are particularly valuable in demonstrating the presence of indirect discrimination and systemic direct discrimination because in both cases statistics can reveal the effect of legislation, condition or a practice on a particular group.[73] Statistics have been used by other regional courts, such as the CJEU (Court of Justice of the European Union), in the field of anti-discrimination law. The CJEU preceded the ECtHR in using statistics in the context of indirect discrimination. For example, in its *Rinke* judgment, the CJEU stated that:

> "It is clear from the statistical data referred to by the Advocate General at points 36 and 37 of his Opinion that the percentage of women working part-time is much higher than that of men working on a part-time basis. That fact, which can be explained in particular by the unequal division of domestic tasks between women and men, shows that a much higher percentage of women than men wishing to train in general medicine have difficulties in working full-time during part of their training. Thus, such a requirement does in fact place women at a particular disadvantage as compared with men."[74]

How can statistics demonstrate a 'particular disadvantage' of legislation, condition or practice upon one group compared with another? Essentially, statistics can be used to compare two groups with one another: under EU law, they are sometimes referred to as the 'reference group' and the 'selected group'. The first represents the dominant group of individuals or the majority, while the second refers to a disadvantaged group or minority group. The distinction between the two categories is based on grounds such as sex or ethnic origin. Indirect discrimination occurs when people from the selected group find themselves at a particular disadvantage compared to the reference group.[75]

There are, however, a few conceptual and methodological issues in relation to statistics. Firstly, problems have been identified in the literature, specifically with regard to collecting data on racial or ethnic origin. In this

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71 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 105.

72 Cf. House of Lords (United Kingdom) 9 December 2004, *R. (on the application of the European Roma Rights Centre) v. Immigration Officer, Prague Airport*, [2004] UKHL 55, para. 73.

73 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 106.

74 CJEU 9 September 2003, C-25/02 (*Katharina Rinke/Ärztekammer Hamburg*), [2003] ECR I-08349, para. 35.

75 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 109.

context, it has been difficult to determine what racial or ethnic origin means. Similarly, it is difficult to determine how certain groups can be recognised as having a certain racial or ethnic origin. Secondly, it is hard to specify how a certain individual can be defined as belonging to a certain racial or ethnic group.[76] Finally, there is the problem of gathering statistics in general,[77] and this problem extends well beyond the characteristics race or ethnicity. Thus, for example, there are hardly any statistics with regard to persons at intersections of grounds, such as women from ethnic minority groups or lesbian Muslims. Statistics about sexual orientation are also often inadequate, due to people's reticence about revealing sexual orientation.[78]

The ECRI has tried to encourage Member States to collect "in accordance with European laws, regulations and recommendations on data-protection and protection of privacy, where and when appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, antisemitism and intolerance."[79] More specifically, ECRI has appealed to Member States to "ensure that accurate data and statistics are collected and published on the number of racist and xenophobic offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted."[80] Therefore, Council of Europe's Contracting Parties have a positive obligation to collect this data which could be used by applicants and respondent States in procedures at the European courts.[81]

If Member States were to implement suggestions such as those of the ECRI, this would facilitate the task of furnishing proof of indirect discrimination or systemic direct discrimination. As it is difficult to collect statistics about discrimination suffered by disadvantaged groups, it would be useful if Member States would indeed collect data and have statistics readily available. ECRI's recommendations, however, raise a number of questions concerning the collection and publication of such information. The first question that arises is what type of crimes should be classified as 'racist and xenophobic offences' and, following on from this, which groups of complainants should be regarded as targets or victims of racism or xenophobia? The second question is who should be responsible for gathering and subse-

76 Ibid., p. 117.
77 Ibid., p. 117-119.
78 D. Schiek, 'Indirect Discrimination', in: D. Schiek, L. Waddington & M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Portland: Hart Publishing 2007, p. 398-399.
79 ECRI, *ECRI General Policy Recommendation No. 1: On Combating Racism, Xenophobia, Antisemitism and Intolerance*, Strasbourg: ECRI 1996, p. 6.
80 Ibid, p. 5.
81 M. Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection* (PhD Thesis Erasmus University Rotterdam), The Hague: Eleven International Publishing 2011, p. 118-119. Ambrus underlines this obligation particularly in relation to EU Member States.

quently publishing the statistics concerned: State authorities or a Council of Europe body (such as the ECRI itself) or another independent organ? The third question is how should the gathering and publication of statistics be carried out in practice? For example, would it be useful for the purpose of gathering statistics to record each separate racist or xenophobic offence that has been reported to the State authorities in a Member State in a certain database? If so, who should maintain that database and who should have access to it? Should the data on the number of offences in a specific Member State be accessible only to the State concerned or should it be accessible to a broader community, thus at Council of Europe level? Could potential applicants to the Court also have access to it? Another question concerns the accuracy of statistics: how can this be determined? These are just a few of the many questions that can be raised with regard to the ECRI proposal. If these questions can be resolved, it may become easier to implement the ECRI's suggestions. This would be desirable, since it might also enable the more effective gathering of statistics concerning discriminatory violence.

6.4.2 The ECtHR approach: statistics gaining ground as evidence in cases of indirect discrimination

The use of statistics as evidence by the ECtHR has gradually evolved since the year 2000, mainly in cases concerning indirect discrimination. The Court's jurisprudence reveals that in allegations of indirect discrimination the Court accepts both official and non-official statistical data to establish a disparate impact. The Court introduced the option of reliance on official statistics in an admissibility decision against the Netherlands, *Hoogendijk*. In that case, the applicant claimed that she was the victim of discrimination because of the introduction of an income requirement under the scheme formulated in the Dutch General Labour Disablement Benefits Act (*Algemene Arbeidsongeschiktheidswet*; AAW), which statistically affected more women than men. Ms Hoogendijk referred to the results of research carried out by the Social Insurance Council on the effect of the implementation of the AAW Reparation Act of 3 May 1989, demonstrating that a group of about 5,100 people had lost their entitlement to AAW benefits on account of a failure to meet the income requirement and that this group consisted of about 3,300 women and 1,800 men.[82]

The Court stressed that although statistics in themselves would not automatically be sufficient to disclose a practice which could be classified as discriminatory under Article 14 of the Convention, it nevertheless could not ignore these research results. Subsequently, it stated that when an applicant is able to demonstrate on the basis of 'undisputed official statistics', a *prima facie* indication of a disproportionate effect of a specific rule on a particular group, the burden of proof will shift to the government which

82 ECtHR 6 January 2005, 58641/00 (*Hoogendijk/The Netherlands*) (Admissibility Decision).

must then show that the effect has been created by objective factors unrelated to any discrimination on grounds of sex. The Court explained that "[i]f the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."[83]

Eventually, in *Hoogendijk*, the ECtHR established that the applicant had sufficiently demonstrated that the introduction of the income requirement in the AAW scheme had an indirect discriminatory effect, particularly with respect to married or divorced women having become incapacitated for work at a time when it was not common in the Netherlands for married women to earn their own income from work. Thereafter, the Court asked whether there was a reasonable and objective justification for the introduction of the income requirement under the AAW. This was the point where the applicant's complaint was rejected because the Court noted that the income requirement – applicable to both men and women irrespective of their marital status – was introduced in the AAW scheme in order to remove the discriminatory exclusion of married women from this scheme while seeking to keep the costs of the AAW scheme within acceptable limits. For the Court, this constituted a reasonable and objective justification. Hence, the applicant's complaint was rejected as manifestly ill-founded, pursuant to Article 35 § 3 and § 4 of the Convention.[84]

Having opened the door to the use of (official) statistics in the *Hoogendijk* decision, the Court took a step further in *D.H.*, when it accepted statistics collected through unofficial channels as evidence. In that case, 18 Romani applicants who had been placed in a special school in the town of Ostrava in the Czech Republic for all or part of their education, claimed that Romani children were overwhelmingly likely to be denied the opportunities of a regular education through placement in such schools. They supported their claim with unofficial statistics that were obtained by their legal representatives through questionnaires sent in 1999 to the head teachers of the eight special schools and 69 primary schools in Ostrava. According to those statistics, 56% of the pupils placed in special schools in Ostrava were Romani, while Romani pupils represented only 2.26% of the total of 33,372 primary-school pupils in that town. By contrast, only 1.8% of non-Roma pupils were placed in special schools.[85]

The Court took these statistics into consideration in order to establish a *prima facie* case of discrimination in the educational field. The statistics notably showed that the manner in which the legislation on placements in special schools was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools,

83 Ibid.
84 Ibid.
85 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 190.

and that such children were thereby placed at a significant disadvantage.[86] Because the respondent State was unable to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin, the Court established a violation of Article 14 read in conjunction with Article 2 of Protocol No. 1.[87]

The government criticised the use of statistics in this case, indicating that they were not sufficiently conclusive as they merely reflected the subjective opinions of the head teachers. Furthermore, there was no official information on the ethnic origin of the pupils.[88] However, even though they were not entirely reliable, the statistics were still accepted by the Court as evidence, as they revealed a prevailing trend that was confirmed both by the Czech Republic and some independent supervisory bodies.[89] These independent supervisory bodies were: the Advisory Committee on the Framework Convention, ECRI, the Committee on the Elimination of Racial Discrimination and the European Monitoring Centre on Racism and Xenophobia, all which indicated that a disproportionately large number of Roma children were being placed in special schools in the Czech Republic.[90] Thus, it was a combination of unofficial statistics collected by the applicants' lawyers and these reports that led to the conclusion that the Czech educational system had a disparate impact on Roma children.[91] Hence, statistics have been used mainly as supporting evidence in indirect discrimination cases.

Finally, aside from the above findings in *D.H.*, it is interesting to note that the Court has – also in this case – offered some guidelines on the requirements that statistics must meet in order to be accepted as evidence. In *D.H.*, the Court noted:

> "... that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence."[92]

A few years later, in *A. v. Croatia*, the Court highlighted that statistics must be complete and supported by relevant analysis, allowing the Court to draw conclusions about the existence of a claimed disparate impact.[93]

In the next subsection, the use of statistics will be explored in the context of the three types of discriminatory violence cases. There, the question arises concerning the extent to which statistics can contribute to finding that viola-

86 Ibid., paras. 185-195.
87 Ibid., paras. 196-210.
88 Ibid., para. 190.
89 Ibid., para. 191.
90 Ibid., para. 192.
91 See also ECtHR 29 January 2013, 11146/11 (*Horváth and Kiss/Hungary*), paras. 110-116.
92 ECtHR 13 November 2007, 57325/00 (*D.H. a.o./Czech Republic*) (GC), para. 188.
93 ECtHR 14 October 2010, 55164/08 (*A./Croatia*), para. 103.

tions of the Convention have taken place. Cognizant of the fact that statistics on discriminatory violence may not always be available, a call is also made in the next subsection for greater efforts to be devoted to setting up systems in Council of Europe Member States to gather statistics about discriminatory violence that are 'reliable and significant'.

6.4.3 The use of statistics in cases of discriminatory violence

A final question to be raised regarding statistics concerns their use in cases of discriminatory violence. ECtHR jurisprudence reveals that the Court has hardly taken them into consideration under the three types of complaints of discriminatory violence. So far, the Court has mainly used them in a few cases to establish that State authorities failed to live up to their positive obligation to protect women from gender-based violence.[94] These cases are discussed first below. This subsection then looks into the potential for using statistics to establish the other two types of discriminatory violence complaints, thus a breach of the negative duty of State agents to refrain from inflicting discriminatory violence and a breach of the positive duty of State authorities to conduct an effective investigation into this type of wrongful conduct. It concludes by emphasising that statistics could be useful in establishing the three types of complaints of discriminatory violence, under the proviso that they are properly gathered and made available to the public. It further underlines that 'mutually reinforcing voices' must be present to indicate the existence of a particular form of discriminatory violence in a Member State. More concretely, this means that in order to establish that one of the three forms of discriminatory violence towards members of a particular group is systemic in a Member State, the Court must turn to more than one statistical source. This means that it must rely on more than one document which includes statistics and also turn to reports from international organisations and NGOs, all indicating that a particular form of discriminatory violence inflicted upon the group to which the victim belongs in a respondent State occurs repeatedly and systemically. This is necessary in order to gain an accurate impression of whether a certain type of discriminatory violence indeed occurs on a larger scale.

In the context of complaints concerning the duty of State agents to protect certain groups from discriminatory violence, the Court has been willing to establish violations of Article 14 read in conjunction with Articles 2 or 3 by relying on statistics. This has occurred in the context of gender-based violence. In the previous discussion of the *Opuz* case, the Court was able to establish, on the basis of 'unchallenged statistical information', "the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Tur-

94 See, for example, ECtHR 28 January 2014, 26608/11 (*T.M. and C.M./Moldova*), para. 62.

key created a climate that was conducive to domestic violence."[95] Statistics and reports in that particular case were provided by "two leading NGOs", i.e. the Diyarbakır Bar Association and Amnesty International.[96] The statistics primarily allowed the Court to conclude that the greatest number of reported victims of domestic violence originated from Diyarbakır, where the applicant lived at the relevant time, and that the victims were all women who had suffered mostly physical violence. The vast majority of these women were of Kurdish origin, illiterate or with a low level of education and generally without any independent means of support.[97] The reports also showed a lack of responsiveness by the national authorities in taking measures to protect victims from gender-based violence. For example, the police were reluctant to address and investigate family violence, including the violent deaths of women; prosecutors refused to open investigations into cases involving domestic violence or to order protective measures for women at risk from their family or community, while the police and courts did not ensure that men served with court orders, including protection orders, complied with them.[98]

The Court subsequently relied on statistics in *T.M. and C.M.* This case concerned two Moldovan nationals, a mother and a daughter, claiming that the Moldovan authorities had failed to protect them from acts of domestic violence by not enforcing protection orders against the applicants' husband and father, respectively. In finding a violation of Article 14 read in conjunction with Article 3, the Court used statistics as supporting evidence, alongside various factual elements, such as the fact that the authorities were well aware of the attacks against the applicants, and their subsequent refusal to act upon them, together with a report from the United Nations Special rapporteur on violence against women, its causes and consequences.[99] In this case, statistics were produced by the National Bureau of Statistics of the Republic of Moldova demonstrating an overwhelming number of violent attacks on women committed by their husbands or partners.[100]

Finally, in the recent case of *Halime Kılıç*, the Court also relied on statistics to establish a violation of Article 14 read in conjunction with Article 2. The applicant was the mother of a woman who suffered domestic violence and death threats from her husband. After lodging a fourth complaint with the national authorities, the victim was killed by her husband, who also killed himself. The Court stressed that by offering reports of Human Rights Watch and the Committee on the Elimination of Discrimination Against Women (CEDAW), and statistics on the number of women who have lost

95 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 198. See also paras. 92-97 of the judgment and section 2.2.3.
96 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 193.
97 Ibid., para. 194.
98 Ibid., paras. 94-106.
99 See, for example, ECtHR 28 January 2014, 26608/11 (*T.M. and C.M./Moldova*), paras. 57-63.
100 Ibid., paras. 26 and 62.

their lives due to violence, the applicant had presented *prima facie* evidence establishing that at the material time women did not enjoy effective protection from violence.[101]

With respect to cases where it is alleged that State agents inflicted violence based on discriminatory motives, the Court is more reluctant to establish violations solely on the basis of statistics. The Court has not relied on statistics in a single case concerning this duty, although the applicants sometimes referred to them. The *Kelly* case provides an example in this regard. Here, the Court did not accept that the circumstances under which the relatives of the applicants had been killed reflected discriminatory treatment. The applicants alleged that UK soldiers were more likely to use force against young men from Catholic or nationalist communities than from rival Protestant groups, and used statistics as evidence in support of their claims. The Court admitted that, indeed, statistics showed that most of the people shot by the British security forces belonged to Catholic or nationalist communities, but declined to accept "that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14."[102]

The Court did not further elaborate on the reasons why statistics were insufficient to establish a violation of Article 14. It may be that its unwillingness to accept them was connected with the fact that under these types of complaints the Court generally requires a discriminatory motive to be revealed as the causal factor for the killing or ill-treatment.[103] Statistics which may show a general context of discrimination in a Member State would then be less suited to demonstrating a discriminatory motive in a specific case. Or, it may be that the Court requires more supporting evidence before finding that there has been a violation of the discrimination principle, such as documents in the case file revealing that State agents uttered discriminatory remarks towards the victim while inflicting the violence.

Two scenarios are presented here under which statistics may be used as supporting evidence, in addition to reports from international organisations or NGOs, for example, in cases where it is alleged that State agents were guilty of discriminatory violence. As stressed earlier in this study, under these types of complaints, the Court could consider removing from its case law the requirement of the legal issue of a discriminatory motive. Under the first scenario it could instead require proof of a discriminatory effect of a provision, criterion or practice that has created a situation in which State officials inflict violence upon members of a specific group. Under this argument, it could therefore approach some of these cases as examples of indi-

101 ECtHR 28 June 2016, 63034/11 (*Halime Kılıç/Turkey*), paras. 117-121

102 ECtHR 4 May 2001, 30054/96 (*Kelly a.o./United Kingdom*), para. 148. A similar rule was mentioned in ECtHR 4 May 2001, 24746/94 (*Hugh Jordan/United Kingdom*), para. 154, and in ECtHR 28 May 2002, *43290/98* (*McShane/United Kingdom*), para. 135.

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

rect discrimination. Statistics could then be used as supporting evidence to demonstrate that a disproportionately high number of members of a certain group are the victims of violence, due to some provision, criterion or practice that has a negative effect mainly on them.

Cases like these are and will be rare, due to the fact that discriminatory violence is inherently prohibited. Consequently, it is unlikely that a rule, practice or criterion will be encountered that at face value appears to be neutral but which then results in violence inflicted upon members of one specific group. However, the case *V.C.* offers a scenario where this may occur. The applicant in that case complained to the Court that her Romani background was a decisive factor in the decision by health practitioners at a State hospital in Prešov, Slovakia, to sterilise her. This complaint may have been established successfully if the applicant had been able to show – through statistics and reports – that her sterilisation was part of a wider sterilisation policy applied to Roma women in general in Slovakian State hospitals. The applicant actually attempted to demonstrate this by relying on statistics drawn from two studies conducted in 1990 and 1989. On the basis of this material, she argued that in the Prešov district in the period 1986-1987, 60% of the sterilisations performed were on Romani women, while they represented only 7% of the population in that district. The second study showed that in 1983 approximately 26% of the sterilised women were Romani, yet by 1987 this had increased to 36.6%.[104]

It is questionable, however, whether the statistics submitted by the applicant in *V.C.* would be of any use as they concerned information collected more than a decade before the intervention at issue in that case. The Court did not elaborate on this but, it is conceivable that statistics like this would only be useful in the assessment of allegations such as these provided that they meet certain criteria. For example, besides being 'reliable and significant', it may additionally be required that statistics are up-to-date before they may be of any use to the Court. It is unfortunate, therefore, that the Court did not say anything in *V.C.* about whether the statistics presented in that case were still relevant.

For future cases concerning sterilisations of Roma women in Council of Europe Member States it is important to explore whether the legislation and/or practice in the Member States concerned has a disparate impact on Roma women and whether such an impact can be proved through the use of statistics. In that sense, it may be useful to compare how many women from the majority group at a certain location during a certain period have been sterilised in a Member State. Thereafter, in order to measure the actual

104 See ECtHR 8 November 2011, 18968/07 (*V.C./Slovakia*), and the reference it makes to R. Pellar & Z. Andrš, 'Statistical Evaluation of the Cases of Sexual Sterilisation of Romani Women in East Slovakia', in *Appendix to the Report on the examination in the problematic sexual sterilization of Romanies in Czechoslovakia* (1990); Dr med. Posluch & Dr med. Posluchová, 'The Problems of Planned Parenthood among Gypsy Fellow-citizens in the Eastern Slovakia Region', in *Zdravotnícka Pracovníčka*, p. 220-223 (No. 39/1989).

disparate impact of the legislation which prescribes sterilisations, it should be established how many Roma women have been sterilised at that same location during that same period and how many Roma women live in the relevant area.

Under the second scenario, the Court could require proof that State agents inflicted discriminatory violence upon individuals from certain groups on the basis of a discriminatory attitude, instead of a discriminatory motive. A discriminatory attitude could then be established when it appears from statistics that an allegation of discriminatory violence inflicted by State agents fits into a pattern of numerous, similar complaints in a Member State. Statistics could then serve as supporting evidence alongside additional reports from international organisations and NGOs, for example, which also show systemic discriminatory violence in a certain country. In the context of these cases, statistics may show that people from the group to which a victim belongs are systematically over-represented as targets of violence inflicted by State agents. For example, statistics could demonstrate that Roma in Bulgaria are the main targets of violence perpetrated by State agents in that Member State. From these statistics, which present a general picture of discriminatory violence inflicted upon members of that specific group, the Court could derive *prima facie* evidence of a violation of Article 14, e.g. in a case of discriminatory violence inflicted upon a Roma individual by a State agent.

The Court could also use statistics in cases regarding the duty to effectively investigate complaints of discriminatory violence in a national jurisdiction. Hence, when applicants argue that a Member State did not investigate an allegation of discriminatory violence, allegedly committed by either State agents or private individuals, the Court may rely on statistics as supporting evidence if they demonstrate that complaints from members of the group to which the applicant belongs are hardly ever investigated compared with other groups.

Thus, statistics may be useful in establishing all three types of complaints of discriminatory violence. With regard to the duty to take preventive measures against discriminatory violence, the Court has already used this type of evidence to establish a violation of Article 14. As shown previously, statistics could also serve the Court in the two remaining complaints of discriminatory violence. However, certain conditions need to be met before statistics can be used as evidence in establishing discriminatory violence.

Firstly, as has been set out repeatedly above, a single source which includes statistics cannot be sufficient to prove one of the three types of discriminatory violence. Hence, other, supporting evidence is needed to establish a violation of Article 14, such as reports from international organisations and NGOs. Supporting evidence in addition to statistics is necessary in this context, because numerical data cannot provide a complete picture of discriminatory violence in any given country. Statistics can classify individuals as members of a certain group. In the context of discriminatory violence,

they can give the impression of a clear cut situation in which State agents inflict violence upon members of a certain group based on a discriminatory motive and every victim from that group is a victim of discriminatory violence. However, discriminatory violence is not just about numbers; context is also important in determining whether Convention norms have been violated in this sphere. Therefore, for a finding of discriminatory violence to be credible it must also include other factual elements or evidentiary material in addition to the statistics.

It should be noted, finally, that the relevant statistics used for each type of complaint must be made available. The statistics that have been gathered must also be reliable and significant. In this respect, the same issues as those discussed in subsection 6.4.1 also apply in the specific context of cases of discriminatory violence. Consequently, in order to demonstrate that breaches have occurred in relation to the three types of complaints of discriminatory violence, it is necessary to find better ways of collecting, storing and publishing statistics on discriminatory violence in Council of Europe Member States. As indicated earlier, the ECRI has already called for improvements in this regard. However, Council of Europe bodies such as the ECRI could take even more progressive and concrete steps to encourage Member States to gather, store and publish statistics on these types of human rights abuses. One way would be to formulate more detailed guidelines for Member States on how the collection and publication of statistical data concerning discriminatory violence should be undertaken in practice. In addition, the Council of Europe could consider providing assistance to the national and local police offices and Public Prosecution Services in setting up a proper data collection and publication system and could even set up a system to monitor whether statistical data on discriminatory violence is accurately collected, recorded and published in the national context.

To enhance the methods for determining whether statistical data are reliable and significant, it may be useful to provide lawyers working at the Court with appropriate training to improve their professional skills in that regard. Additionally, the Court could formulate more precise requirements or guidelines regarding the admissibility of statistics. In this light, specific guidelines could be drawn up with regard to how the Court can determine whether statistics are necessary, whether they have been provided by experts that work in the relevant field, whether the author of the statistics is able to provide impartial, objective evidence on the matters within his or her field of expertise, and whether statistics meet a threshold of acceptable reliability, among other things.[105]

105 Inspiration was drawn from guidelines set by the Law Commission (LAW COM No 325), *Expert Evidence in Criminal Proceedings in England and Wales*, London: Crown copyright 2011.

6.5 Reports issued by intergovernmental organisations and NGOs

The three types of discriminatory violence complaints could also potentially be demonstrated through reports produced by intergovernmental organisations or NGOs. The Court has already attached some value to these reports under all three types of complaints of discriminatory violence. The Court has, for example, relied on reports as supporting evidence to establish that all three types of discriminatory violence occurred in the *Begheluri* case. In that case, a complaint was made about religiously-motivated violence inflicted by State agents and private individuals upon 99 Georgian nationals. These 99 victims were all, with one exception, Jehovah's Witnesses. The Court found that Article 14 read in conjunction with Articles 3 and 9 was violated, also on the basis of information regarding numerous other incidents of attacks on Jehovah's Witnesses in Georgia, which were reported by various international bodies and non-governmental organisations. The international materials that the Court turned to in order to ascertain the extent of the violence towards Jehovah's Witnesses in Georgia, were drawn up by the Parliamentary Assembly of the Council of Europe, the UN Human Rights Committee on Georgia, the UN Committee against Torture, the ECRI, the Chair of the delegation of the Parliamentary Committee on Cooperation between the European Union and Georgia, Human Rights Watch, Amnesty International and the Public Defender of Georgia, and others. All these bodies and organisations described the violence against minority religious groups in Georgia, such as Jehovah's Witnesses, expressed their concerns about this issue and offered recommendations.[106]

In the context also of complaints that specifically concern a breach of the duty to conduct an effective investigation into discriminatory violence, the Court has relied on reports to establish violations albeit, again, only as supporting evidence. In this context, the case of *Nachova* may be recalled. There, the Court established that the statement "You damn Gypsies", seen against the background of the many published accounts of prejudice and hostility towards Roma in Bulgaria, called for verification.[107] Another example is the case of *Abdu*, concerning two Sudanese nationals who had been involved in a fight with two Bulgarians. The applicant alleged that his attackers, two skinheads, had assaulted him based on discriminatory motives. The Court established a violation of Article 14 read in conjunction with Article 3, owing to the failure by State officials to effectively investigate the allegation. By way of supporting evidence, the Court took into consideration the findings of various national and international bodies concerning the failure of the Bulgarian authorities to effectively implement provisions punishing cases of 'racist violence'. It referred in this context to an ECRI report which noted that when complaints concerning racist assaults are filed "little action is

106 ECtHR 7 October 2014, 28490/02 (*Begheluri a.o./Georgia*), paras. 73-81.
107 ECtHR 6 July 2005, 43577/98 and 43579/98 (*Nachova a.o./Bulgaria*) (GC), para. 163.

taken". In addition, the Court referred to a report from the UN Committee on the Elimination of Racial Discrimination, in which it was observed that "the criminal provisions relating to racist acts are still infrequently applied". Finally, it noted a call from the Ombudsman of the Republic of Bulgaria expressing his concern about the increasing numbers of racial hate crimes, and called on the authorities not to "reduce such acts to offences of public disorder... but to investigate possible hate crimes."[108]

Reports have had most impact in cases concerning the duty to take preventive measures against discriminatory violence. In *Opuz*, the Court significantly relied on reports – together with statistics which were also incorporated in these reports – in order to establish that the domestic violence in Turkey affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. The reports of the Diyarbakır Bar Association and Amnesty International 'suggested' that domestic violence is tolerated by State officials and that the remedies offered by the government are not effective.[109] In *Identoba*, the Court relied on reports as supporting evidence to establish that Georgia was under an obligation to offer heightened State protection to members of the LGBT community and its supporters during a march.[110] These reports, drawn up by the Commissioner for Human Rights of the Council of Europe and the ILGA, described a history of public hostility towards the LGBT community in Georgia.[111]

The Court could make more use of reports from intergovernmental organisations and NGOs to establish that the three different types of discriminatory violence occur on a systemic basis. It already did so in the case of *Opuz*, when it established that a State's failure to offer protection to a woman and her mother from violence could be derived from statistics and reports which demonstrate that there is a general failure on the part of State agents to protect women from this type of physical abuse in Turkey.

The Court could take a similar approach to cases regarding the duty to effectively investigate discriminatory violence. Thus, for example, if an individual alleges that he or she was ill-treated by State agents or private persons based on discriminatory motives, and the State refuses to investigate this allegation, the Court may then find that there was a violation of Article 14 solely on the basis of reports. It may do so if these reports show that State officials repeatedly fail to conduct an effective investigation into complaints of discriminatory violence lodged by members of the group to which the individual belongs.

Finally, the Court could also consider greater use of reports from intergovernmental organisations and NGOs in the context of the negative duty of State agents to refrain from inflicting discriminatory violence. As with

108 ECtHR 11 March 2014, 26827/08 (*Abdu/Bulgaria*), para. 52.
109 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), paras. 193-198.
110 ECtHR 12 May 2015, 73235/12 (*Identoba a.o./Georgia*), para. 72.
111 Ibid., paras. 37-39.

statistics, it could consider their use in the context of complaints concerning discriminatory violence inflicted by State agents that can be approached in the same way as cases of indirect discrimination. Reports could reveal that a neutral provision, criterion or practice in a Member State has a discriminatory effect upon members of a certain group in such a way that its application leads to disproportionate physical abuse towards individuals belonging to that group. Reports could also be used to demonstrate that there is a discriminatory attitude on the part of State agents inflicting violence on members of a particular group. This occurs when reports demonstrate that there is a pattern of numerous examples of discriminatory violence inflicted repeatedly and disproportionately on members of that group in a Member State.

Obviously, not every report on systemic discriminatory violence in a country must necessarily be accepted as evidence by the Court. It is desirable that reports meet certain standards of reliability and persuasiveness before they can be used by the Court. The wrongful use of such reports could lead to a loss of faith by respondent States' in the Court's judgments which could affect the legitimacy of the Court. So it is important that the Court does not accept reports which do not meet certain quality requirements.

An important consideration in this context, is whether the Court itself has already set any requirements that reports must meet before it may use them to establish facts. The Court stated in *Georgia v. Russia (I)* that reports need to be reliable. In that case, which concerned allegations of the wide scale expulsion of Georgians from Russian territory, the ECtHR facilitated a fact-find hearing and, on top of that, to support its own findings it drew on information concerning the circumstances surrounding the case obtained from reports by international governmental bodies and NGOs, such as the PACE Monitoring Committee, Human Rights Watch (HRW), the *Fédération internationale des droits de l'homme* (FIDH) and the 2006 annual report of the Human Rights Commissioner of the Russian Federation (Russian Ombudsman).[112] It underlined in that case that such reports must be reliable and that their reliability is determined according to the following criteria: the authority and reputation of their authors, the seriousness of the investigations behind them, the consistency of their conclusions and whether they are corroborated by other sources.[113] The Court has, however, hardly formulated any additional requirements that reports must meet in order to be accepted as evidence in the specific context of discriminatory violence. It is also unclear whether it applies the criteria that it has mentioned in *Georgia v. Russia (I)* in discriminatory violence cases.

112 ECtHR 3 July 2014, 13255/07 (*Georgia/Russia I*) (GC), paras. 83-92.
113 Ibid., para. 138.

Only in *Opuz* did the Court highlight that the statistics from "two leading NGOs,"[114] i.e. the Diyarbakır Bar Association and Amnesty International, revealed that domestic violence mainly affected women. For the Court the statistics presented in reports from those two NGOs were sufficient to establish "the existence of a *prima facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence."[115] The words "two leading NGOs" seem to highlight that reports could be of use to the Court as long as they have been submitted by NGOs that are 'leading'. But this then raises the question about what characteristics NGOs must possess in order to be regarded as such. What 'leading' means is not further explained by the Court. Furthermore, it does not appear explicitly from the Court's case law that there are distinct admissibility criteria for accepting reports from Council of Europe bodies, on the one hand, or reports submitted by bodies which do not operate under the authority of the Council of Europe, on the other hand.

In order to enhance the use of reports in all three types of cases of discriminatory violence, it may be useful to set up clearer guidelines by which the objectivity and significance of these reports can be evaluated. It might be useful in this regard for the Court to implement a system of quality control. Such a system could incorporate standards concerning the admissibility and credibility of evidence collected by the various bodies who produce such reports. Consequently, a system of quality control could enhance the quality of the evidentiary material. In this way, reports could become more reliable and useful to the ECtHR.[116] Within this framework, several measures could be taken to reach these goals.

For example, it may be desirable to develop distinct admissibility criteria for reports submitted by (i) Council of Europe bodies, (ii) other formal international organisations, such as UN-related bodies, and (iii) NGOs. Distinct admissibility criteria would seem to be warranted, when it is taken into consideration that these three types of organisations all operate on the basis of different mandates. Quality control would be especially necessary for reports produced by NGOs. It is argued that NGOs or similar organs "have their own sets of interests and motivations, have a tendency to make factual errors when dealing with difficult circumstances, and often are not subject to oversight or other forms of accountability."[117] The reports that NGOs produce therefore may not always be trustworthy and are often polit-

114 ECtHR 9 June 2009, 33401/02 (*Opuz/Turkey*), para. 193.

115 Ibid., para. 198.

116 W. Kaleck & C. Terwindt, 'Non-Governmental Organisation Fact-Work: Not Only a Technical Problem', in: M. Bergsmo (ed.), *Quality Control in Fact-Finding*, Florence: Torkel Opsahl Academic EPublisher 2013, p. 403-426.

117 K.C. Sadeghi, 'The European Court of Human Rights: The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-finding', 25 *Connecticut Journal of International Law* (2009-2010), p. 127-151, p. 134.

ically coloured.[118] In *Opuz*, the Court mentioned that Amnesty International is a 'leader' in its branch, yet it should be borne in mind that Amnesty International's mandate differs from that of the Court and that this NGO is not subject to any formal regulation or other accountability mechanisms.[119] Concretely, the introduction of benchmarks to evaluate the methodologies that bodies use to establish facts could be considered, as well as a requirement that NGOs must be transparent about their funding.[120]

Finally, systemic violations of the duties under the three types of complaints of discriminatory violence may be proved not only through reports of NGOs or formal international bodies, but also through contributions from the Council of Europe Commissioner for Human Rights. As established in section 3.5, Article 36 § 3 ECHR emphasises that the Commissioner may submit written comments and take part in hearings in all cases before a Chamber or the Grand Chamber. It may be recalled from that section that the Commissioner visits all Member States to undertake a comprehensive review of the human rights situation. Following these visits, he publishes reports about the human rights situation in those countries and offers recommendations for improvement where necessary. This activity enables him also to observe whether certain types of human rights violations in Member States are systemic. The Commissioner may also come across situations in which one of the duties in the context of discriminatory violence is breached on a systemic basis by a Member State in relation to members of a certain group. Hence, the Commissioner, acting as an independent body at the Council of Europe, with his knowledge and expertise on the human rights situation in each Council of Europe Member State, could provide the Court with solid support in determining whether any of the three duties concerning discriminatory violence are systemically breached in a Member State.

6.6 Conclusion

This chapter has further built on the idea that the Court could implement a more substantive conception of equality in its case law, particularly in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence. Chapter 5 already suggested two circumstances in which the burden of proof may shift to the respondent State in order to achieve that end. Thus, the Court could require proof of *prima facie* evidence of a discriminatory effect of a certain neutral provision, criterion or practice which creates a situation whereby members of a particular group are subjected to discriminatory violence. Chapter 5 further proposed that proof that State agents' behaviour reflects a discriminatory attitude in the killing

118 Ibid., p. 128.
119 Ibid., p. 136-149.
120 G. Robertson, 'Human Rights Fact-Finding: Some Legal and Ethical Dilemmas', 3 *University College London Human Rights Review* 2010, p. 15-43, p. 21.

or ill-treatment of victims from a certain group should be sufficient to shift the burden of proof to the respondent State. The main idea presented in chapter 5 is that a discriminatory attitude may be derived from systemic violence inflicted upon members of a certain group. This chapter has further underlined that approach by highlighting the factual elements or evidentiary material that may be used to establish a discriminatory effect or discriminatory attitude.

Two types of evidentiary material stand out in this context: statistics and reports issued by intergovernmental organisations and NGOs. With regard to the positive obligation to conduct an effective investigation into allegations of discriminatory violence or protect citizens from such wrongful conduct, statistics and reports may be useful in uncovering fundamental deficiencies. With regard to the duty of State agents to refrain from inflicting discriminatory violence, evidence of this type may reveal the extent and the types of victims affected by this wrongful conduct and in that way help to determine whether the violence is systemic.

The Court could turn to these two types of evidentiary materials more often – even in the absence of other materials – if clearer guidelines were to be developed that would enable the credibility and significance of statistics and reports to be determined. With regard to statistics, the ECRI has taken steps through its recommendations concerning the collection and publication of data on the number of racist and xenophobic offences in the territories of Member States. Further guarantees should be put in place to ensure that data about crimes connected to discrimination and xenophobia are properly recorded and published, while detailed guidelines should be offered to Member States on how to meet their obligations in this regard. The Council of Europe could play a role in ensuring the availability of credible and significant data on discriminatory violence, and should have access to it.

Similar suggestions could also apply with regard to reports from intergovernmental organisations and NGOs. Various organisations frequently report on discriminatory violence in various Member States. Availability is therefore not really an issue here, but improvements should be made in terms of evaluating the quality of these reports. Therefore, a system of quality control which provides clear admissibility criteria for accepting reports as evidence is argued for in this context.

One final suggestion favours giving the Council of Europe Commissioner for Human Rights a more prominent role. Through the more active use of Article 36 § 3 ECHR, the Commissioner could play a more active role in combating discriminatory violence in Europe, by informing the Court that in some countries this type of violence occurs on a systemic basis.