Proving discriminatory violence at the European Court of Human Rights

Mačkić, J.; Mackic J.

7 Conclusion

7.1 Introduction

Over a period of approximately the last 20 years, various legal scholars have discussed how the Court could more effectively recognise and acknowledge the issue of discriminatory violence in Council of Europe Member States. This study was particularly inspired by the dissenting opinion of former ECtHR Judge Bonello attached to the *Anguelova* case, who argued that greater recognition and acknowledgement of discriminatory violence in ECtHR case law could be brought about through less strict evidentiary rules. In his dissenting opinion, Bonello questioned the adequacy of the evidentiary rules that the Court applies in cases concerning discriminatory violence and offered some suggestions to render complaints on that matter easier to prove. His suggestions specifically aim to resolve the difficulty of proving a breach of the negative duty of State agents to refrain from inflicting discriminatory violence. These types of complaints require proof of a discriminatory motive which is a difficult legal issue to prove, as it essentially requires an explanation of why a perpetrator acted as he or she did. For that reason, most attention was devoted to these types of complaints in this study.

However, as this study has shown, Bonello's criticism is not justified on every point. In particular, in contrast to what Bonello argues, the ECtHR's application of the standard of proof 'beyond reasonable doubt', in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence is not at all inappropriate. The application of another standard of proof in these cases would not necessarily alter the outcome of a judgment concerning the Article 14 complaint. It has been very interesting to explore his criticism concerning the circumstances under which the burden of proof can shift from the applicant to the respondent State in such cases, thus "when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic."[1] This study has focused on a much broader context than solely environments where 'racial tensions' are high. It has focused on possible ways of demonstrating discriminatory violence inflicted by State agents upon a member of *any* group based on the fact that in a certain country members of that group are generally, systemically subjected to discriminatory violence.

---

1 See particularly sections 1.1 and 1.2.

This study has identified two circumstances in which this broader context of discriminatory violence in a Member State may be established. Both concern proposals to the Court to widen the substantive equality approach in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence. For both circumstances, it has been proposed that the Court should stop requiring proof of a discriminatory motive in such cases. Instead, in some cases, it should require proof of a *discriminatory effect* of a provision, criterion or practice, that brings about situations in which individuals from one particular group are singled out by State agents to be subjected to violence. In other cases, it should require proof of a *discriminatory attitude* on the part of State agents. Once such a discriminatory effect or discriminatory attitude has been established, the burden of proof should then shift to the respondent State. This study has further identified the types of evidence that may be particularly helpful in shifting the burden of proof under both these circumstances.

This final chapter offers an answer to the main question of this study. It therefore explains to what extent the evidentiary framework used by the ECtHR is suitable for cases of discriminatory violence. In addition, it answers the research questions set out in section 1.2.

The meaning of the notions 'discrimination' and 'discriminatory violence' in the Convention system are explained in section 7.2, together with the elements that need to be proved under the three different types of complaints of discriminatory violence. Subsequently, it is summarised in section 7.3 how the facts of a case are gathered at the Court, which actors play a prominent part in the gathering of facts, and what means of establishing facts could be most useful in establishing discriminatory violence. Section 7.4. turns to the heart of the matter; it therefore looks at the main question concerning the adequacy of the ECtHR evidentiary framework in cases of discriminatory violence. Firstly, it is explained why the Court's use of the 'beyond reasonable doubt' standard of proof in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence does not represent an obstacle to finding that violations have taken place in this area of ECtHR case law. In addition, it highlights why alternative standards of proof would not necessarily amount to finding violations under that negative duty. Thereafter, it sets out the circumstances under which the ECtHR may allow the burden of proof to be shifted from the applicant to the respondent State under the three different types of complaints of discriminatory violence. Finally, it surveys the factual elements and evidentiary material from which the existence of different forms of discriminatory violence may be derived.

Chapter 7 concludes with a call for the Court to become more assertive in dealing with complaints concerning discriminatory violence. Although in recent years the Court has been receptive to the finding of violations in the context of the positive duties of Member States to conduct an effective investigation into complaints of discriminatory violence and to protect victims

from such acts, it remains reticent in finding that violations have taken place in connection with the negative duty of State agents to refrain from inflicting discriminatory violence. There are also still cases in which the Court does not discuss the discriminatory nature of violence complaints at all. It is argued in the final part of this thesis that in this precarious time for human rights, the Court must take a firmer stance in dealing with discriminatory violence in all its forms, and that it must introduce better ways to recognise and acknowledge the incidence of discriminatory violence in Council of Europe Member States.

7.2 'Discrimination' and 'discriminatory violence' in ECtHR case law: a call for a more substantive conception of equality in cases concerning discriminatory violence

The Court has taken considerable steps in broadening the protective scope of Article 14. The ECtHR now accepts discrimination cases based on a wide range of grounds.[2] It also views the concept of 'discrimination' through different perspectives. This means that the Court has recognised that this term in general means 'treating differently, without an objective or reasonable justification, persons in relevantly similar situations.' The Court interprets this principle in two ways. Firstly, it can consider it in light of the expression that 'equal cases must be treated equally', which is in line with the formal concept of equality and in line with the notion of 'direct discrimination'. Secondly, it can view discrimination in accordance with the substantive equality approach, thus meaning that 'unequal cases must be treated unequally, according to the degree of inequality'. Under this umbrella of substantive equality, the Court has extended the concept of discrimination to deal with the issue of indirect discrimination and to impose a positive duty on Member States to tackle discrimination.[3]

The Court's case law from the last decade shows that in the context of discriminatory violence complaints specifically, the Court has also widened the scope of State obligations and enhanced the potential for the enforcement of those obligations. An analysis of the Court's case law has shown that there are three types of duties in the context of complaints of discriminatory violence. The Court has acknowledged that there is a negative duty on the part of State agents to refrain from inflicting discriminatory violence. Complaints regarding this duty are the most challenging to prove, as they require demonstration of the legal issue that a discriminatory motive was the causal factor in the killing or the ill-treatment of an individual belonging to a certain group. According to the Court's case law, a discriminatory motive may be derived from the following factual elements: witness statements which were documented in domestic investigation files, with witnesses

2 Section 2.3.
3 Section 2.4.

claiming that State agents made offensive remarks on account of the victim being from a specific group, as well as internal government instructions that direct State agents to treat suspects from a certain group in a particular (violent) manner. Sometimes, the Court uses reports from intergovernmental organisations and NGOs as supporting evidence to establish violations under these types of complaints. Information documented in these reports therefore only supports and underlines the Court's finding that in a particular case discriminatory violence was inflicted because, in addition to other factors, there is also information which reveals that in the relevant Member State discriminatory violence is regularly inflicted on members of the group to which the victim belongs.[4]

Somewhat easier to prove is the second type of complaint of discriminatory violence, concerning the positive duty of State officials to effectively investigate complaints of discriminatory violence and to identify and punish those responsible. This type of complaint does not require proof of a discriminatory motive. In cases where it is alleged that the State authorities breached Article 14 read in conjunction with Articles 2 or 3, because the investigation into a violent incident was carried out in a discriminatory way, it is sufficient to prove a discriminatory attitude on the part of the State officials involved. Where it is alleged that there was an absence of an effective investigation into allegations of discriminatory violence in the domestic jurisdiction, it is sufficient to demonstrate the failure of a respondent State to act upon a suspicion that discriminatory attitudes induced an act of violence. The Court has been able to establish these issues of law on the basis of a wide variety of factual elements, such as biased comments expressed towards victims during the investigation or expressed somewhere around the violent events, or where violence was inflicted by a skinhead group or a far-right group which by its nature is driven by extremist or racist ideologies. Here too, reports by intergovernmental organisations and NGOs may be used as supporting evidence to establish violations.[5]

The third type of complaint, concerning the positive duty of State officials to take preventive measures against discriminatory violence, is also easier to prove, particularly compared with the negative duty of State agents to refrain from inflicting discriminatory violence. When it is alleged that State agents failed to protect victims from discriminatory violence, because the State agents themselves are biased towards the group to which the victims belong, the Court requires proof of the legal issue that the failure of State agents to prevent discriminatory violence was to a large extent the corollary of the victims' membership of a certain group. This type of failure may be accepted on the basis of factual elements that include biased comments made by the authorities after the victims filed requests for protection.

4 Section 2.2.1.
5 Section 2.2.2.

When it is alleged that State agents failed to prevent victims from being subjected to discriminatory violence, regardless of the motive for that omission, the Court has recognised that it must be proved that the failure to protect victims from discriminatory violence resulted from the attitude of the local authorities. In some cases, such as *Opuz*, it is sufficient to rely on general information, documented in reports and statistics from intergovernmental organisations and NGOs, which reveal that State agents in a certain country generally fail to take protective measures against discriminatory violence. In other cases, such as *Eremia*, the Court derives a failure on the part of State agents mostly from the facts of the case itself.[6]

It is thus evident that in the last two types of complaints, the Court has approved positive action taken by State authorities in the field of discriminatory violence. Through this, the Court inspires and encourages Member States to take appropriate steps to investigate discriminatory violence complaints and to protect people from becoming victims from this wrongful conduct. However, the Court has failed to promote a more substantive conception of equality under the negative duty of State officials to refrain from inflicting discriminatory violence. Implementation of such a conception in Court's case law would be desirable, since it would facilitate the better recognition of discriminatory violence inflicted by State agents. Furthermore, a substantive conception of equality in cases in which it is alleged that State agents inflict discriminatory violence creates awareness that there are flaws in a government system which somehow leads State agents to inflict violence on certain groups on a systemic basis: flaws that must be removed.

7.3 Most notable means of gathering facts and evidence in the context of discriminatory violence complaints at the Court

Information about the facts of a case may reach the Court through various avenues. These include the contributions of the direct parties to the case, contributions from external actors and the activities that the Court itself may decide to undertake to establish the facts, which include fact-finding hearings and on-the-spot investigations. Extensive measures in relation to fact-finding are generally not necessary, as the facts are mostly not contested by the parties to the dispute or they have already been sufficiently clarified by the domestic case file and by the decisions of national judges. From the case file, the Court is then able to derive a number of factual elements which will allow it to determine whether or not the Convention has been violated by the respondent State.

A prominent question that arises here is what means of gathering facts would be most helpful in establishing the different forms of discriminatory violence. Breaches concerning the positive duties of State agents to effectively

6 Section 2.2.3.

investigate discriminatory violence or to take preventive measures against such wrongful conduct, may be established on the basis of the domestic case file. In most cases, the Court is able to verify on the basis of such a written document whether violations have occurred in relation to the two positive duties. However, breaches concerning the negative duty of State agents to refrain from inflicting discriminatory violence are harder to uncover. Often, there is a lack of evidence and the case file hardly reveals any factual elements from which this type of breach can be derived. However, since this study has consistently underlined that a breach of this negative duty could also be derived from information revealing that discriminatory violence towards the group to which the victim belongs in the relevant Member State is systemic, it was questioned in chapter 3 what fact-finding techniques would be most suitable in revealing this kind of systemic violence.

An effective tool in this context is that the Court can also draw on information from external bodies, most notably intergovernmental organisations and NGOs. Three ways of contributing to fact-finding were identified in this context. Firstly, intergovernmental organisations and NGOs may produce reports or opinions on the human rights situation in a country. For example, they may report that discriminatory violence is systemically inflicted by State agents on members from particular groups in a certain Member State. The Court may then take such general information into consideration when deciding on a case in which an individual complaint of discriminatory violence allegedly conducted by State agents has been put forward. The readiness of the Court to accept such a complaint from an individual will be greater if there is also general information about discriminatory violence that is regularly inflicted by State agents on members of the group to which the applicant belongs. Through reporting on the human rights situation in a country, external actors may contribute to fact-finding at the ECtHR also under the two remaining types of complaints of discriminatory violence. External actors could thus make a substantial contribution in findings of systemic violations of the duty of State agents to conduct an effective investigation into discriminatory violence at the domestic level and the duty to take preventive measures against this type of wrongful conduct. Secondly, intergovernmental organisations and NGOs may inform the Court about systemic breaches of the three types of discriminatory violence through third party interventions. Finally, the Council of Europe Commissioner for Human Rights could inform the Court about violations in the context of the different types of discriminatory violence complaints and whether or not these violations are systemic. This study calls for a greater involvement of the Commissioner in formal proceedings at the ECtHR, ideally by acting as a third party intervener. The Commissioner's role allows him to make country visits to all Member States to carry out a comprehensive evaluation of the human rights situation there, to engage in talks with government officials, as well as members of human rights protection institutions and civil society, and to visit various locations where human rights abuses may take place. Subsequently, he issues reports on these visits in which he sets out

his observations. The Commissioner is therefore well-equipped to establish whether violations in the context of discriminatory violence are taking place in certain Member States and whether these violations occur on a large scale.

7.4 The adequacy of the evidentiary framework in cases of discriminatory violence

The purpose of this study was to determine whether or not the evidentiary framework applied by the Court in cases of discriminatory violence is adequate, and if not, to offer suggestions for improvement. It may be recalled that this study takes as its starting point that an adequate evidentiary framework would allow the Court to recognise, address and condemn discriminatory violence against victims who are members of a certain group. At the same time, an adequate system would remain alert to the fact that the Court can only hold a Member State responsible for a violation of the Convention if it can be established that a violation occurred.[7] So, on the one hand, the Court must give proper consideration to complaints from applicants who allege that discriminatory violence occurred. On the other hand, the Court must not allow inadequately substantiated or unwarranted findings of violations of Member States to take place.

The following will consider the question of whether the three aspects of the evidentiary framework that are central in this study are applied by the Court in such a way that they achieve a proper balance between these two interests. It will therefore consider the standard of proof, the distribution of the burden of proof and the evidentiary material through which discriminatory violence may be proved, and establish whether these three aspects are applied by the Court in such a way that they are suitable for ECtHR case law on discriminatory violence.

7.4.1 Standard of proof

As set out in chapter 4, the Court has been criticised frequently for applying the 'beyond reasonable doubt' standard of proof in its case law. In the context of the negative duty of State agents to refrain from inflicting discriminatory violence, Judge Bonello even suggested that the standard of proof should be lowered to a threshold of a 'balance of probabilities' or a 'preponderance of the evidence'. However, this study has demonstrated that the Court's use of 'beyond reasonable doubt' in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence does not represent an obstacle to finding that violations have taken place in this area of ECtHR case law, and that lowering the standard of proof for this type of discriminatory violence cases will not alter the outcome of the judgments.

7 Section 1.2.

There are several reasons why applying a different standard of proof will not make it easier to prove cases of discriminatory violence. Firstly, there are no appropriate alternatives in other jurisdictions that the Court may apply instead of 'beyond reasonable doubt'. Secondly, the Court has demonstrated several times that it applies its own unique interpretation of 'beyond reasonable doubt', which is distinct from the meaning that this term has in domestic criminal proceedings. Finally, and most importantly, this study has shown that 'beyond reasonable doubt' has no practical meaning in ECtHR case law. The words which express that an asserted fact must be proved to the threshold of 'beyond reasonable doubt' do not assist the Court in establishing the facts. Such terminology does not indicate the type or amount of factual elements or evidentiary material that must be presented at the Court before a violation of the Convention can be established, for example. James Q. Whitman once stated when discussing the origins of 'beyond reasonable doubt' in criminal cases of common law systems, that rules of evidence are not like rules of science. A rule prescribing that an adjudicator must be persuaded to a level of 'beyond reasonable doubt' does not really guide that adjudicator in the search for the facts of a case.[8] Similarly, the ECtHR's use of 'beyond reasonable doubt' is not designed to help the Court to determine whether or not a violation of the Convention occurred.

Since 'beyond reasonable doubt' is not a fact-finding tool, it does not hinder the ECtHR in recognising, addressing and condemning discriminatory violence perpetrated on victims who are members of a certain group. It is difficult to see how this standard represents an obstacle to pronouncing violations of the Convention in the context of these complaints. Hence, an application of 'beyond reasonable doubt' does not stand in the way of the Court achieving maximum effectiveness in protecting those who have suffered from discriminatory violence.

So what is the function of this standard of proof? An indication by the Court that proof must be delivered to a 'beyond reasonable doubt' threshold seems to be the Court's way of indicating to the parties and the public at large that it has reached a certain conclusion with regard to a specific complaint only after careful and thorough consideration. This approach is well-suited for an institution such as the Court which operates on the basis of the subsidiarity principle. Based on this principle, the task of interpreting the Convention and ensuring respect for the rights enshrined therein lies primarily with the authorities of the Contracting States rather than with the Court. The subsidiarity principle therefore implies that if the Court aims to declare that domestic authorities have failed in meeting any of their duties in the context of discriminatory violence, the Court must offer a proper explanation of how the authorities did not properly fulfil their duties under the Convention. 'Beyond reasonable doubt' is thus one way in which the Court may justify a finding that a Member State has breached the Conven-

8 J.Q. Whitman, *The Origins of Reasonable Doubt. Theoretical Roots of the Criminal Trial*, New Haven & London: Yale University Press 2008, p. 25.

tion. In this way the Court expresses that it only establishes State responsibility if it is confident on the basis of the information before it, that discriminatory violence actually occurred. This enables it to uphold the credibility and legitimacy of its judgments. Viewed from this perspective, there is no reason for the Court to abandon the use of 'beyond reasonable doubt' in its case law.

7.4.2 Burden of proof

The burden of proof plays a significant role in Court's proceedings since it indicates the party who must prove an assertion. In ECtHR cases it is mainly placed on the applicant because this is the party who pleads that a certain violation of the Convention took place. However, strictly placing the burden of proof on the applicant may significantly weaken that party's position in Court's proceedings, especially as the applicant may not always have access to the relevant evidentiary material to successfully plead his or her case. Therefore, recognising the difficulties that an applicant may face in presenting proof, the Court has implemented several ways to alleviate that party's burden of proof. It has done so especially in cases related to Article 2 and Article 3 matters where it would otherwise be impossible for applicants to present all the relevant evidence to the Court that is required to shift the burden of proof to the respondent State.

Chapter 5 demonstrated that the Court has been willing to shift the burden of proof and eventually to establish State liability through the use of presumptions and inferences in cases concerning alleged violent behaviour by State agents during custody of a victim or in cases concerning enforced disappearances.[9] The ECtHR has also used presumptions and inferences to establish State liability for an administrative practice that is in violation of the Convention.[10] In some of these cases, it has held that it "will not rely on the concept that the burden of proof is borne by one or other of the [parties] concerned," but that it will examine all the material before it, originating from various sources.[11] In this way, it has indicated that it does not (always) strictly place the burden of proof on a particular party. In cases concerning an administrative practice in which it placed the burden of proof on the applicant in the initial stages of a proceeding, it has required proof of a substantial number of identical or similar human rights violations (such as State agents beating numerous individuals in a certain period in a certain Member State), hence proof of the repetition of acts, before finding that a violation of the Convention took place. Otherwise, it has required proof that numerous expressions of a specific type of human rights abuse (such as beatings by State agents) are tolerated by State officials in the sense that the superiors of those immediately responsible, though cognisant of such acts,

9 Section 5.4.1.
10 Section 5.4.2.
11 ECtHR 18 January 1978, 5310/71 (*Ireland/United Kingdom*) (GC), para. 160.

take no action to punish those involved or prevent their repetition, or fail to investigate them, and thus proof of official tolerance.

In the context of cases where not only violence, but a *discriminatory nature* of the violence has been alleged, the Court has recognised fewer circumstances in which the burden of proof may be shifted from the applicant to the respondent State. This particularly applies in cases where it has been alleged that State officials inflicted violence upon individuals based on discriminatory motives. The other two types of complaints, regarding a failure to fulfil the positive duties to investigate discriminatory violence or take preventive measures against such acts, can be established more easily. In brief, it may be recalled that under the positive duty to conduct an effective investigation into discriminatory violence, *prima facie* evidence must be demonstrated that State agents exhibited a discriminatory attitude while conducting an investigation into a violent crime inflicted on an individual belonging to a certain group, or that they failed to respond further to a suspicion that discriminatory attitudes had induced a violent act. In the context of the positive duty to take preventive measures against discriminatory violence, the ECtHR may require *prima facie* evidence that the failure of State agents to prevent such violence was to a large extent due to the victims' membership of a certain group. Alternatively, the Court may require *prima facie* evidence that the violence generally affects the group to which the victim belongs and that there is a general and discriminatory judicial passivity towards taking preventive steps against such violence in a Member State. After *prima facie* evidence has been shown, the respondent State must then offer counter-arguments, to demonstrate that there was no violation of the Convention, or that there was a justification for the alleged State agents' conduct.

The complaints concerning the two positive duties raise fewer evidentiary issues. The Court can usually verify on the basis of the domestic case file whether these have been violated by a respondent State. Still, an issue arising in the context of the burden of proof here is that it is often not clear for these complaints whether the Court initially places the burden of proof on the applicants, and, if so, what the applicants must demonstrate before the burden of proof can shift to the respondent State. Furthermore, the Court has not specified how a respondent State may offer explanations or counter-arguments or justifications for the conduct of its agents under these types of complaints. Hence, these issues require more clarification from the Court in future cases.

In cases where it is alleged that State agents breached their negative duty to refrain from inflicting discriminatory violence, the Court has established that the applicant carries the burden to prove a *prima facie* case that a discriminatory motive was the causal factor in the killing or ill-treatment of an individual belonging to a certain group. The existence of such a motive has been recognised by the Court mainly on the basis of domestic case files which disclosed that witness statements reported discriminatory remarks uttered by State officials somewhere around the time of the violent events.

In addition to this factual element, the Court has sometimes considered other, additional factors, such as the fact that there were internal police instructions to treat suspects of a certain group in a particular (violent) manner. After a *prima facie* case has been made, the burden of proof shifts to the respondent State to disprove the allegation made.

The most important suggestion offered in this study is that the Court could add new circumstances which would enable it to shift the burden of proof from the applicant to the respondent State in this type of complaints concerning the negative duty. In essence, the burden of proof can more easily be shifted by implementing the following suggestions. Firstly, the Court should abandon the requirement of proof of a discriminatory motive under these types of complaints. Secondly, it should establish a *prima facie* case of a breach of the negative duty of State agents to refrain from inflicting discriminatory violence on the basis of information that reveals that violence is systemically inflicted by State agents on members of the group to which the victim belongs in the respondent State concerned. Two ways have been proposed by which the Court can implement an approach to discriminatory violence cases that is more akin to the model of substantive equality. The first proposal is to approach some of these cases in the same way as cases of indirect discrimination. Under this umbrella, the Court would then not have to require proof of a discriminatory motive, but *prima facie* evidence of the discriminatory effect of a provision, criterion or practice that has somehow created a situation in which State officials inflict violence on members of a specific group. The second is the proposal to require *prima facie* evidence of a discriminatory attitude as an alternative to the requirement of a discriminatory motive. Such an attitude should then not be derived solely from specific factual elements, such as discriminatory remarks, but also based on a situation in which one violent incident inflicted by a State agent on a member of a disadvantaged group appears to be part of a pattern of numerous, similar complaints in the Member State concerned.

These proposals are suitable for the Court, as they would enable the Court to recognise, address and condemn discriminatory violence inflicted by State agents on victims who are members of a certain group. Such recognition is particularly important in cases where discriminatory violence is alleged, as this type of human rights abuse tends to go unseen. That this type of discriminatory violence is 'invisible' is caused by the fact that the answer to the question why a violent act was committed can mostly be found inside the head of the perpetrator. Therefore, through these two proposals, this study attempts to make visible the discriminatory violence inflicted by State agents.

The two proposals will not affect the credibility and legitimacy of Court's case law. Obviously, they offer ways by which a breach of the negative duty of State agents to refrain from inflicting discriminatory violence may be more easily recognised than in current ECtHR case law. However, the proposals are not that far-reaching that they could lead to inadequately substantiated or unwarranted findings of violations of the Convention by

Member States in this sphere. Essentially they emphasise the idea that an allegation of discriminatory violence in a single case may be accepted if there is proof that violence inflicted by State agents on members from the group to which the victim belongs is systemic. However, this systemic violence can only be derived from credible sources that have thoroughly and accurately investigated the situation in the relevant Member State.

Furthermore, the Court's special task must not be forgotten in this regard: the Court holds Member States responsible for breaches of their obligations under the Convention and does not serve criminal justice, nor does it aim to establish civil liability. By judging on discriminatory violence inflicted by State agents, the Court does not convict the perpetrator. However, it holds Member States answerable for their actions, for creating or allowing a system in which State agents feel free to violently target the members of disadvantaged groups.

7.4.3 Evidentiary material

Before ECtHR judges can be persuaded that a form of discriminatory violence has taken place, they must have sufficient factual elements or evidentiary material presented to them which enables them to conclude that a violation of the Convention has occurred. The factual elements indicating that State agents have ill-treated or killed a victim due to a discriminatory motive or that State agents have failed to live up to their positive duties to effectively investigate discriminatory violence or to take preventive measures against such wrongful conduct, are recorded in the case file. The strongest indicator in this regard is a confession by a perpetrator that he or she displayed violent behaviour based on a discriminatory motive. The ECtHR has recognised that, in principle, such a confession must prompt a Member State to conduct an effective investigation into potential discriminatory violence. Other strong indicators that the violence was inspired by discrimination include the existence of internal police or other instructions to treat suspects from a certain group in a particular (violent) manner or evidence of discriminatory remarks uttered by a State agent or private individual before, during or after his or her violent behaviour towards a victim from a certain group. They assist the Court in establishing all three types of discriminatory violence. In the context of the positive duties, the fact or even the assumption that the violence was committed by a group which by its nature is governed by an extremist or prejudiced ideology, such as a skinhead group or a far-right group, plays an important role in the finding that a respondent State should have investigated or taken appropriate protective measures against such discriminatory violence.

Taking into account that these factual elements do not always become apparent from the case file, this study has explored how statistics and reports by intergovernmental organisations and NGOs may assist the Court in uncovering failures by Member States to live up to their three duties in the context of discriminatory violence.

As shown in section 6.4, the Court has hardly used statistics in all three types of complaints concerning discriminatory violence. However, it was demonstrated in the *Opuz* case that they can significantly contribute to the finding of a violation in this sphere. In that case, statistics enabled the Court to establish the existence of a *prima facie* indication that gender-based violence occurred in Turkey, and that Turkey had taken insufficient action to protect women from this type of physical abuse. This study encourages greater use of statistics, also in finding violations of the Convention concerning the other two types of complaints of discriminatory violence, provided that they are used in addition to other evidentiary material pointing to the presence of discriminatory violence in a country. With regard to the negative duty of State officials to refrain from inflicting discriminatory violence, statistics can show the discriminatory effect of a provision, criterion or practice that has created a situation in which State officials feel free to inflict violence upon members of a specific group. Thus, they can help the Court in determining that because of some domestic provision, criterion or practice, members of a certain group are targeted by State agents for violent behaviour and that as victims of violence they outnumber other groups in the same context. Alternatively, statistics can help the Court to establish that State agents inflict violence on members of a certain group due to a discriminatory attitude also in relation to these negative complaints. Such an attitude can be derived from statistics when these statistics can demonstrate that a single allegation of discriminatory violence inflicted by State agents fits into a pattern of numerous, similar complaints in a Member State. Finally, the Court could use statistics in the context of the duty of State officials to effectively investigate complaints of discriminatory violence in the national context. Thus, when applicants argue that a Member State did not investigate an allegation of discriminatory violence, allegedly committed either by State agents or private individuals, the Court may rely on statistics if they demonstrate that complaints from members of the group to which the applicant belongs are hardly ever investigated compared with other groups. However, for statistics to be of any use to the Court in determining whether one of the three types of discriminatory violence occurred, it will be necessary to find better ways of collecting, storing and publishing statistics on discriminatory violence in the Council of Europe Member States.

Reports of intergovernmental organisations or NGOs may be used in a similar manner to prove the three types of discriminatory violence. However, it is also desirable in this context for the Court to set out clear quality requirements that reports must meet before they can be accepted as evidence. To this end, this study proposed that a system of quality control be introduced at the Court which could include standards concerning the admissibility and credibility of evidence collected by the various organisations and bodies that produce such reports.

7.4.4 Synopsis: a final response to Bonello's dissenting opinion in *Anguelova*

In delivering a final answer to the main question in this study, it is unavoidable to offer a response to the dissenting opinion of Judge Bonello attached to *Anguelova*. Bonello and some other legal scholars have argued that the standard of proof 'beyond reasonable doubt' is the main obstacle facing the Court in establishing discriminatory violence inflicted by State agents. However, as this study has shown, 'beyond reasonable doubt' does not obstruct the Court in finding that violations of Article 14 read in conjunction with Article 2 or 3 have taken place. In that sense, the standard of proof applied by the Court in such cases is not inappropriate.

However, this study has identified that another aspect of the evidentiary framework deployed by the ECtHR in cases concerning the negative duty of State agents to refrain from inflicting discriminatory violence makes it difficult to prove these types of allegations. That is the requirement of proving discriminatory motive. Therefore, proposals have been made in this study to abandon this requirement in the Court's case law. In essence, the Court should require that applicants demonstrate the discriminatory effect of a provision, criterion or practice that has created a situation in which State officials inflict violence on members of a specific group. Alternatively, it should require proof that State agents have expressed a discriminatory attitude towards the victims. These proposals would enable the Court to uncover systemic discriminatory violence. Implementing these suggestions would render the evidentiary framework in these types of cases more suitable for ECtHR proceedings, especially in view of the Court's task, which is to determine State liability for violations of the Convention. These proposals can reveal systemic flaws in a government system which result in the disproportionate use of violence against members of certain groups.

7.5 Epilogue and outlook: the ECtHR as the guardian of the rights of disadvantaged groups

A growing body of literature documents that disadvantaged groups such as immigrants, people with disabilities and the LGBT community, are becoming more apparent and active in European societies. It is argued that their growing visibility and dynamics sometimes result in violence towards them.[12] In addition, it appears that there is more extensive media coverage of the issue of discriminatory violence, particularly in relation to Europe's current migrant crisis. Several EU countries have taken steps in an attempt

12 B. Perry, 'Counting – and Countering – Hate Crime in Europe', 18 *European Journal of Crime, Criminal Law and Criminal Justice* (2010), p. 349-367, p. 349. See also R.M. Dancygier & D.D. Laitin, 'Immigration into Europe: Economic Discrimination, Violence, and Public Policy', 17 *Annual Review of Political Sci*ence (2014), p. 43–64 (online).

to reduce the number of immigrants entering EU territory. Formal steps include, for example, constructing fences along their borders.[13] But even more striking are the informal methods that are being used to prevent immigrants from entering the EU, such as the use of violence by State agents and 'push-backs' into neighbouring States.[14]

Further, it may be said that discriminatory violence is no longer an issue that is raised mostly with regard to Central and Eastern European States.[15] In the aftermath of the BREXIT referendum,[16] a growing number of 'hate crimes' has been observed in the UK.[17] In the Netherlands too, there is a growing level of media reporting on the subject of discriminatory violence. A prominent example concerns the death of a 42-year-old man of Aruban descent that was caused by Dutch-Caucasian police officers. His death aroused much anger among several Dutch minority groups claiming that the Dutch police more often violently attack individuals simply because they are not Caucasian.[18] Some other examples have occurred in the context of the migration crisis. There are frequent reports of asylum seekers from the LGBT community claiming that they have been physically abused or threatened because of their sexual orientation in asylum centres in the Netherlands.[19] Dutch asylum centres have also been violently attacked by right-wing opponents who wish the refugees to leave the Netherlands.[20]

At the same time, Europe is undergoing another type of change, i.e. the rise of far-right, populist parties. The politicians of these parties blame newcomers, such as refugees and other already marginalised groups for the problems faced by contemporary Europe. They foment fear against 'others' or 'outsiders' and place the interests of the indigenous population above all

13 B. Tasch & M. Nudelman, 'This map shows how much the refugee crisis is dividing Europe', *Business Insider UK* (1 March 2016) (online). See also D. Sim, 'Fortress Europe: Hungary builds fence to stop migrants crossing into the EU', *International Business Times* (5 August 2015) (online); 'Hungary closes border with Serbia and starts building fence to bar migrants', *The Guardian* (17 June 2015) (online).

14 D. Breen, 'Abuses at Europe's borders', *Forced Migration Review* (January 2016), p. 21-23; M. Popp, 'Europe's Deadly Borders: An Inside Look at EU's Shameful Immigration Policy', *Spiegel Online International* (11 September 2014) (online).

15 See section 1.1. which shows that cases concerning discriminatory violence first appeared after the Central and Eastern European States became Contracting Parties to the Convention.

16 BREXIT is the popular term for the UK's intention to withdraw from the EU. On 23 June 2016, 52% of UK voters voted in a referendum to leave the EU.

17 M. Versi, 'Brexit has given voice to racism – and too many are complicit', *The Guardian* (27 June 2016) (online); G. Langendorff, 'Brexit wakkert 'explosie van haat' aan', *Algemeen Dagblad* (29 July 2016) (online).

18 See, for example, K. Bos & L. Wismans, 'We worden harder gestraft omdat we niet wit zijn', *NRC Next* (1 July 2015), p. 4-5.

19 G. Hablous, 'COC: incidenten LHBT-vluchtelingen lopen uit de hand', *Volkskrant* (7 February 2016) (online).

20 E. Jorritsma, 'Aanval op azc Woerden: incident of begin trend?', *nrc.nl* (12 October 2015) (online).

others. Their ideas, however irrational and unsubstantiated they may be, are increasingly becoming part of mainstream thinking.[21]

The tensions that are currently being created between the 'others' and the indigenous people of European countries have the potential to threaten the principles of pluralism and equality, and the rights of disadvantaged groups. If incidents of violence against certain disadvantaged groups take on larger proportions in the future, they could even threaten peace in the territories of the Council of Europe Member States. Therefore, while these 'winds of change' are blowing across Europe, it is important to note that there are individuals, bodies and ideas that run counter to the mainstream. In a recently published book, Ernst Hirsch Ballin argues that especially in times which are precarious for human rights, it is important to maintain those rights and the fundamental freedoms arising from them and not to succumb to ideas that promote fear or even hate.[22]

The ECtHR could be just such an institution that goes against populist opinions in contemporary Europe, in which several Contracting Parties are also progressively condoning discriminatory violence.[23] The Court must therefore become a major player in the prevention and condemnation of this type of violence. Although the ECtHR is not in a position to penalise Council of Europe Member States or the agents employed by them for this type of wrongful conduct, the ECtHR could nonetheless play a more vocal role in addressing the issue of discriminatory violence in Europe. This task of the Court is particularly necessary in those Council of Europe Contracting Parties where the domestic authorities fail to conduct effective investigations into discriminatory violence or fail to take preventive measures against such wrongful conduct. The Court can highlight cases of discriminatory violence in a certain Member State, create more awareness of the existence of such, and condemn this type of conduct by discussing it under the heading of Article 14 of the Convention read in conjunction with Article 2 or Article 3, and by establishing violations of those provisions, where appropriate.

The Court's extraordinary position in Europe means that it can contribute to the condemnation of discriminatory violence in different ways. The Court could, for example, in each case concerning Article 14 read in conjunction with Article 2 or Article 3, evaluate whether a complaint concerns violent conduct which occurs on a more pervasive, systemic basis. In such a case, the Court could pronounce that there is an alarming situation in a Contracting Party which requires immediate attention and effective measures to address it. This fits in well with the Court's *alarm bell function*. In addition,

21 J. Mijs, 'Populisme wordt gevoed door sociale uitsluiting', *Volkskrant* (26 March 2016) (online); J. van Raalte, 'In deze landen maakt rechts-populisme zijn opmars', *Volkskrant* (23 May 2016) (online).

22 E. Hirsch Ballin, *Tegen de stroom. Over mensen en ideeën die hoop geven in benarde tijden*, Amsterdam/Antwerp: Em. Querido's Uitgeverij BV 2016.

23 See M. Versi, 'Brexit has given voice to racism – and too many are complicit', *The Guardian* (27 June 2016) (online), where the author argues that politicians, as well as media organisations, have fuelled religious, racial and ethnic tensions to further their 'petty agendas'.

through its judgments the ECtHR could put the issue of discriminatory violence high on the regulative or policy agendas of national legislatures and executive bodies, in accordance with its *agenda-setting function*. There may be various reasons why discriminatory violence is not properly addressed at a domestic level. Irrespective what those reasons may be, the Court, acting as a supervisory human rights body for the whole of Europe, could help to bring about changes in domestic hate crime legislation or policies. Now that the Court is for a larger part *constitutional* in nature, it should prioritise issues related to discriminatory violence as a matter of special concern, and offer more detailed and considered adjudication in this field of its case law.[24]

In practical terms, this means that in future case law the Court should not ignore issues related to discriminatory violence where the human rights abuses appear to be part of a systemic practice. Apart from exposing the flaws existing in the governance of a Member State in that context, judgments where the systemic nature of discriminatory violence is recognised can offer support to the victims who often already feel that they have been let down by their domestic authorities. The Court should also become more responsive with regard to discriminatory violence complaints that are not necessarily part of a systemic practice, but where there are still clear indications of discriminatory violence that may be linked to the individual case.

Effective protection of the rights of disadvantaged groups can only be offered where there is recognition that acts such as discriminatory violence are legal wrongs. Especially at this time, the ECtHR needs to introduce ways of making this legal wrong transparent. This would then enhance the potential of ECtHR case law to offer protection to those who have the most to lose in these uncertain times.

24 The various functions of the Court were outlined in section 1.4.