Human Rights & Social Justice Research Institute

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INTERNATIONAL HUMAN RIGHTS & FACT-FINDING

An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights

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Introduction

It is fifty years since the European Court of Human Rights was first established as the body responsible for deliberating on states' compliance with the European Convention on Human Rights, a treaty adopted under the auspices of the Council of Europe in 1950. Since then, the Court has arguably established itself as one of the most effective human rights mechanisms in the world. Its jurisdiction now extends to 47 European states. Its judgments are legally binding on those states and have led directly to numerous changes in domestic law, policy and practice in a wide range of areas.[1] The standards and principles laid down in the text of the Convention itself have been augmented by a series of additional protocols, and the Court has continually demonstrated an innovative and flexible approach to its role of interpreting the Convention, reflecting the well-established principle that the Convention is considered to be a 'living instrument'.[2]

The Convention has acquired such an established and fundamental place in the European legal order that it has been described as "a constitutional instrument of European public order".[3] As Rolv Ryssdal, the former President of the Court has put it:

> As far as the democratic protection of individuals and institutions is concerned, the Convention has become the single most important legal and political denominator of the states of the continent of Europe in the widest geographical area.[4]

The Convention also served as a model for the American Convention on Human Rights (1969) and in certain respects also for the African Charter of Human and Peoples' Rights (1981).[5]

The European human rights system has been through several stages of development before crystallizing in its current form as a permanent court. The Convention established a mechanism whose mandate was "to ensure the observance of the engagements undertaken by the High Contracting Parties".[6] Three institutions were entrusted with this responsibility in the early years: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe. The Committee of Ministers originally had an adjudicative role, as well as being responsible for the supervision of the enforcement of the Court's judgments.

Since the 1980s, there has been a marked increase in the number of applications brought before the former European Commission and Court of Human Rights. The inexorable growth in the number of individual applications poses a serious threat to the effectiveness of the Convention system. Consequently a major challenge that the Court is facing is to handle applications within a reasonable time. As at 1 September 2008, there were 94,650 cases pending before the Court.[7] The Court's 'output' has also risen steeply: in 2007, the Court delivered 1,735 judgments and made 27,057 decisions on admissibility (or striking out). However, the output is still not keeping pace with the incoming cases, hence the continuing rise in the backlog. While it may often have been suggested that the Court has become a 'victim of its own success',[8] it can be more pertinently argued that the Court has become a victim of the failures of the member States.[9]

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1 See: Council of Europe, Directorate General of Human Rights, *Practical Impact of the Council of Europe human rights mechanisms in improving respect for human rights in member states*, H/Inf(2007)2, April 2007.

2 See *Tyrer v the United Kingdom*, No. 5856/72, 25.4.78, para. 30.

3 *Loizidou v Turkey* (preliminary objections), No. 15318/89, 23.3.95, para. 75.

4 Rolv Ryssdal, 'The Coming of Age of the European Convention on Human Rights' *European Human Rights Law Review* 1 1996, p. 22

5 Rolv Ryssdal, Rolv, *On the Road to a European Constitutional* Court, Winston Churchill Lecture, Florence, Italy, 21 June 1991.

6 Article 19 of the Convention.

7 The highest number of cases concerned: Russia (24,400), Turkey (10,600), Romania (10,150), Ukraine (8,200), Poland (4,100), Italy (3,900), Slovenia (3,300), Germany (2,700), France (2,650), and the Czech Republic (2,450). See: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/

8 See among others: L. Turnbull, 'A victim of its Own Success: The Reform of the European Court of Human Rights' *European Public Law* 1, 1995.

9 As was remarked by Bernard Kouchner, Foreign Minister of France, who was quoted by Terry Davis, Secretary General of the Council of Europe at the Stockholm Colloquy, 9-10 June 2008. See: http://www.regeringen.se/content/1/c6/10/42/61/34b907a0.pdf

Following the entry into force in November 1998 of Protocol No. 11 to the Convention, the part-time Commission and Court were replaced by a single permanent European Court of Human Rights.[10] The aim of Protocol No. 11 was to simplify the structure of the Convention mechanism with a view to shortening the length of the proceedings. It was also intended to strengthen the judicial character of the proceedings before the Court by abolishing the Committee of Ministers' adjudicative role and by making compulsory the right of individual petition.

Since the adoption of Protocol No. 11, further reforms have followed, as the caseload of the Court has continued to rise sharply. In 2004 the Committee of Ministers of the Council of Europe adopted – in Protocol No. 14 – a series of further changes designed to simplify and speed up the Court's processing of cases. However, at the time of writing, Protocol No. 14 had still not entered into force.[11] At the Warsaw Summit in 2005 the member states of the Council of Europe decided to commission an international panel of eminent personalities (the Group of Wise Persons)[12] to examine the issue of the long-term effectiveness of the Convention mechanism. Its report was published in November 2006 and the debate about its recommendations is still continuing.[13]

A. The European Court's fact-finding process

This research has focused on the fact-finding function of the European Court of Human Rights. In the vast majority of cases the Court is able to reach a judgment on the basis of the decisions made and documents created in the course of prior domestic proceedings. However, in exceptional situations, if the domestic authorities are either unable or unwilling to carry out an adequate fact-finding process, this function falls to the Court. Such a situation has occurred, for example, where a state of emergency has been declared, where there has been armed conflict or where an 'autonomous province' is testing the extent of its independence from central state control. Inevitably these are situations where the lack of accountability of, or oversight by, national authorities substantially increases the possibility of grave human rights violations occurring, by both state or non-state actors.

In such situations, the Court carries out its fact-finding role by sending judicial delegations to hear witnesses, or by conducting judicial on-the-spot investigations. For example, in the inter-state case of *Ireland v United Kingdom (1978)*, concerning the arrest and detention of IRA suspects by the British security forces, 119 witnesses were heard by the former European Commission. More recently, in a series of cases brought by individuals against Turkey from the mid-1990s, the former Commission and the new Court (since 1998) have held a series of fact-finding hearings in order to adjudicate on fundamental factual differences between the parties.

The excessive backlog of cases may mean increasing pressures on Court judges and officials not to sanction fact-finding processes because they are time-consuming and expensive.

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10 Protocol No. 11 to the Convention, 11th May 1994, entered into force on 1st November 1998.

11 Protocol No. 14 will come into force only once it has been ratified by all state parties to the Convention. It has, at the time of writing, been ratified by 46 of the Council of Europe 47 member states; Russia is the only member state not to have ratified it. As early as 2005 it was acknowledged by the Court that the reform measures in Protocol No. 14 would "not on their own be sufficient to close the gap between the level of incoming cases and the Court's output capacity" See: European Court of Human Rights. Memorandum. *Long-term Future of the Convention System*, Third Summit of the Council of Europe, 2005, para. 5. http://www.echr.coe.int/Eng/Press/2005/April/SummitCourtMemo.htm

12 The Group was made up of 11 members: Lord Woolf (United Kingdom), Veniamin Fedorovich Yakovlev (Russia), Rona Abray (Turkey), Fernanda Contri (Italy), Jutta Limbach (Germany), Marc Fischbach (Luxembourg), Gil Carlos Rodriguez Iglesias (Spain), Emmanuel Roucounas (Greece), Jacob Sodermann (Finland), Hanna Suchocka (Poland) and Pierre Truche (France).

13 See: Committee of Ministers. *The Report of the Group of Wise Persons to the Committee of Ministers*, CM (2006) 203, 15 November 2006. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2006)203&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

Nevertheless, the Court continues to receive cases from European 'trouble spots' in which particularly serious human rights violations are alleged (such as Russia (Chechnya),[14] Georgia,[15] Turkey,[16] Moldova,[17] Cyprus[18] etc).

The nature and gravity of such cases may mean that fact-finding hearings will be required, if there has been no prior effective fact-finding process before the national courts. Holding fact-finding hearings or on-the-spot investigations in such contexts poses significant challenges to the Court, not least arising from practical and logistical difficulties, which may impinge on its ability to ensure that its proceedings are fair to all parties.

B. Aims of this research

The main objective of this research project has been to analyse and to evaluate the effectiveness of the fact-finding hearings and on-the-spot investigations undertaken by the Court. It assesses what the process of fact-finding is intended to achieve. It questions what are the necessary limitations, and whether any obstacles are commonly encountered, and, if so, how they can be overcome. This research also considers the relationship between fact-finding and gross violations of human rights. It seeks to elucidate how the fact-finding process has impinged on the Court's final adjudication of the cases.

It assesses the respective roles of the various participants (Judges, Court Registry officials, parties' representatives, applicants and witnesses) in the fact-finding process. It considers whether the process is sufficiently accessible and whether it permits the parties to participate adequately. Furthermore, the research seeks to analyse whether the Court ensures there is equality of arms between the parties and whether it is fair in carrying out its fact-finding function. Finally, it highlights the strengths and weaknesses of the fact-finding process and puts forward recommendations for improvement.

C. Methodology

The research project comprised four stages:

- **Stage One:** the compilation of a database of all relevant Commission and Court decisions.
- **Stage Two:** an analysis of the attitudes and perceptions of personnel (judges, Court Registry staff, and parties' representatives) involved in the hearings about the fairness, rigour and effectiveness of the process, through a questionnaire.
- **Stage Three:** an analysis of the attitudes of a sample of key interlocutors through semi-structured interviews.
- **Stage Four:** a comparative analysis of fact-finding carried out by other international human rights mechanisms.

The four stages are summarized below, and a more detailed note on the methodology can be found at Appendix 2.

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[14] See: Parliamentary Assembly. Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights*, Introductory Memorandum: Mr Christos Pourgourides, AS/Jur (2008) 24, 26 May 2008, paras. 76-79. Available at: http://assembly.coe.int/CommitteeDocs/2008/20080526_ajdoc24_2008.pdf

[15] See *Shamayev and Others v Georgia and Russia*, No. 36378/02, 12.4.05. See also: European Court of Human Rights. Press Release, *2,700 applications received by the Court from South Ossetians against Georgia*, 10 October 2008. Available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=2700%20%7C%20Georgia&sessionid=17943368&skin=hudoc-pr-en

[16] See: Committee of Ministers. Interim Resolution ResDH(2008)69. *Executions of the judgments of the European Court of Human Rights – Actions of the security forces in Turkey, Progress achieved and outstanding issues, General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces, Follow-up to Interim Resolutions DH(99)434, DH(2002)98 and ResDH(2005)43, Adopted by the Committee of Ministers on 18 September 2008* at the 1035th meeting of the Ministers' Deputies. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResDH(2008)69&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

[17] See *Ilaşcu and Others v Moldova and Russia* (GC), No. 48787/99, 8.7.04

[18] See *Varnava and Others v Turkey*, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 10.1.08

I. Stage One

The first stage of the project involved a desk study of all Court (and former Commission) cases in which there have been fact-finding hearings and/or on-the-spot investigations, in order to analyse them according to various criteria: the nature of the case; the key issues at the heart of the dispute; the number and type of witnesses heard; the nature of the evidence taken; the manner in which evidence was taken; the length of the proceedings; and the consequential findings of the Court. The database also recorded the identities of the delegates who participated in the hearings.

There is no publicly available schedule of the cases in which the Court has carried out fact-finding hearings and on-the-spot investigations. Accordingly, the initial research identified and listed all such cases in a database, with the assistance of Court Registry staff. Rather than selecting a sample of the cases, this initial stage of the research collated data on all the cases that fulfilled our criteria, in order to enhance the validity and reliability of our findings.

In compiling the database, we ascertained that there have been 92 cases in which either the European Commission or the European Court of Human Rights has conducted a fact-finding hearing and/or an on-the-spot investigation (see the extract from the database at Appendix 1). We then carried out an analysis of the cases on the database using publicly available Commission and/or Court documents[19] with the aim of collecting the following information in order to be able to carry out analytical comparisons:

- Information about the nature of the case and its progression through the system (the nature and/or gravity of the case; the Convention provisions invoked; the timetable of the various stages of the case);
- Information about the fact-finding hearing or on-the-spot investigation (dates; location; judges; witnesses);
- Information about the witnesses summoned and/or heard (the number; issues relating to attendance and non-attendance; nature of the witness);
- The nature of the findings of the Court (a finding of a substantive violation of a provision of the Convention; a finding of a procedural violation of a provision of the Convention; no finding of a violation of the Convention).

Visit to the European Court of Human Rights

In July 2007 we visited the European Court of Human Rights in order to review a sample set of fact-finding case files and to discuss the project with officials from the Court and other Council of Europe bodies.

II. Stage Two

The second stage of the project involved a quantitative study, which elicited and analysed the opinions and perceptions of those who have been involved in the Court's fact-finding missions. For this stage, we obtained the opinions of the following groups of people:

- Former members of the European Commission who have conducted fact-finding hearings or on-the-spot investigations;
- Serving and former Judges of the Court (the majority of whom have conducted fact-finding hearings or on-the-spot investigations);
- Current and former Court Registrars and Court Registry lawyers;
- State representatives who have participated in fact-finding hearings or on-the-spot investigations.
- Applicants' representatives who have participated in fact-finding hearings or on-the-spot investigations.

[19] Reports on the merits of the cases produced by the former European Commission of Human Rights until 31 October 1999 (under former Article 31 of the Convention), and admissibility decisions, judgments and press releases of the European Court of Human Rights.

Taking into account the geographical distribution across Europe of the personnel involved, the project searched for wider perceptions through a postal questionnaire (see Appendix 3). Once the sampling frame was compiled, the questionnaire was distributed as widely as possible to those who have been involved in the fact-finding process. This survey investigated their perception of its strengths and weaknesses. There was a particular focus on the following issues: what the process is intended to achieve; what are the necessary limitations of the process; the obstacles encountered; whether the process is sufficiently accessible and permits applicants to participate adequately; the weaknesses of the system; whether the process ensures equality of arms as between the parties and whether it achieves "overall fairness"; how the fact-finding process has impinged on the Court's final adjudication of the case; what the notable successes have been, and why; and how the process could be improved.

The questionnaire was distributed to 128 people. We received completed questionnaires from 81 people – a response rate of 63%.

III. Stage Three

In order to achieve further insight into the respondents' perceptions about the process of fact-finding, the third stage of the project consisted of a series of semi-structured interviews with a smaller sample of those who have been involved in the fact-finding process - 28 interviewees from 13 Council of Europe member states.[20] Face to face interviews were carried out where practicable, including in Strasbourg, London, Diyarbakir (Turkey), Stockholm and Bakuriani (Georgia). Where this was not feasible, interviews were carried out by telephone. Interviewees included former members of the European Commission of Human Rights, serving and former Judges of the Court, current and former Court Registrars, Court Registry lawyers and state and applicants' representatives.

The main issues that were addressed in the semi-structured interviews were as follows:

- The factors that are relevant to the Court's decision to hold fact-finding hearings or on-the-spot investigations (case-related: procedures before the domestic courts; identity and conduct of the parties - and factors unrelated to the case: cost, time);
- The procedure for making the decision to hold fact-finding hearings or on-the-spot investigations (at what stage the decision is made, who makes the decision, whether a preparatory hearing is held);
- The selection of judges for the hearings or on-the-spot investigations (how many and how they are selected);
- The conduct of the preparatory stages (summoning of witnesses, documentation, and assessment of other forms of evidence);
- The conduct of the fact-finding hearing or on-the-spot investigation (languages used, attendance of witnesses, the questioning of witnesses, documentation);
- The conduct of proceedings after the fact-finding hearing or on-the-spot investigation (availability of transcripts, invitations to make further submissions or lodge further documents);
- The overall contribution of fact-finding hearings or on-the-spot investigations to the Court's adjudication of the cases.

The interviews with Judges and Registry staff sought in particular to elucidate the principles applied in selecting cases in which fact-finding hearings and on-the-spot investigations are deemed to be necessary.

[20] Croatia, Finland, Georgia, Germany, Greece, Ireland, Moldova, Netherlands, Poland, Portugal, Turkey, Ukraine and United Kingdom.

IV. Stage Four

In the fourth stage, comparisons were made with the fact-finding dimension of the other regional human rights mechanisms (the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights) through an analysis of theoretical and empirical literature.

V. Expert Advisory Panel

An Expert Advisory Panel provided advice and guidance at various stages of the project. The Panel comprised:

- Iain Christie, Barrister, 5 Raymond Buildings, Gray's Inn, London
- Professor Françoise Hampson, Department of Law, Essex University
- Dr Todd Landman, Reader in Politics, Essex University
- Professor Manfred Nowak, UN Special Rapporteur on Torture and Director of the Ludwig Boltzmann Institute of Human Rights
- The Rt. Hon. Lord Justice Sedley

D. Overview of this report

The report is divided into seven chapters. In order to set the Court's fact-finding function in its broader context, Chapter 1 analyses how the Court evaluates evidence. It considers: the admissibility of evidence; the principles it applies in assessing evidence; the standard and burden of proof; and the drawing of inferences.

Chapter 2 provides an overview of the European Court's fact-finding function and explains the usual stages of the procedure. It also briefly considers the fact-finding mechanisms of the Inter-American and African human rights systems.

Chapter 3 analyses the decision-making process leading to fact-finding missions. It seeks to explain how the decision is made and what factors are taken into account by the Court. Chapter 4 examines the process of setting up a fact-finding hearing and analyses its various stages and aspects. It considers: the selection of witnesses; preparatory meetings; the selection of the panel of Judges; the choice of the location; and technical and other facilities and the preparation of documents.

Chapters 5 and 6 consider the conduct of fact-finding hearings and on-the-spot investigations, respectively. Both chapters examine how fact-finding is conducted and analyse the various stages of the procedures followed.

Chapter 7 draws together the report's conclusions, highlights the strengths and weaknesses of the fact-finding process and puts forward various recommendations.

E. Note on terminology

For the purposes of this report the following terminology has been used:

Fact-finding mission

Where there are fundamental factual disputes between the parties, which cannot be resolved by considering documentary evidence only, the European Court is able to carry out fact-finding missions in order to establish the facts. A fact-finding mission, as a generic term, includes both fact-finding hearings and on-the-spot investigations. Some fact-finding missions include elements of both procedures.

Fact-finding hearing

This is a formal hearing process during which witnesses give evidence before a delegation of the Court and are subject to a process of examination and cross-examination.

On-the-spot investigation

Any fact-finding mission which does not involve a formal hearing process is referred to in this report as an on-the-spot investigation. They often involve inspections of prisons or other places of detention.

Interviewees

During Stage Three of the project a series of semi-structured interviews was carried out with a sample of people who have been involved in the fact-finding process. Interviewees included former members of the European Commission of Human Rights (referred to in this report as 'Member of the Commission'), serving and former Judges of the Court (referred to as 'Judge'), current and former Court Registrars (referred to as 'Registrar'), Court Registry lawyers (referred to as 'Registry Lawyer') and state and applicants' representatives (referred to as 'Government Lawyer' and 'Applicant Lawyer' respectively).

Chapter 1

The European Court's evaluation of evidence

In order to place this report's evaluation of the European Court's fact-finding process in its appropriate context, this first chapter discusses and analyses the Court's approach to the evaluation of evidence. It aims to provide a concise overview of the following issues: (1) the admissibility of evidence, (2) the principle of the free evaluation of evidence, (3) the standard of proof, (4) the burden of proof, and (5) the drawing of inferences.

In chapter 5, there is more detailed analysis of the Court's interpretation of the duty of respondent States to co-operate in the investigation of cases (under Article 38(1)(a) of the European Convention) and the Court's drawing of inferences, as a result of the particular problem of the non-attendance of witnesses at fact-finding hearings. Where relevant, we draw comparisons with the Inter-American and African human rights systems (see further, Chapter 2 – section 2.6).

1.1 Admissibility of evidence

International tribunals are generally reluctant to allow themselves to be restricted by rules of evidence which could limit their capability of ascertaining the facts in any case. As one commentator has put it:

> [I]nternational tribunals are, in general, pre-occupied with getting at the facts of the questions presented for their decisions and are, as a result, intolerant of any restrictive rules of evidence which might tend to confine the scope of the search after those facts.[1]

The predominant principle then, is the general acceptance of all forms of evidence which may be relevant to establishing the facts in a particular case.[2] Furthermore, within the Inter-American system, the possibility of applying *domestic* rules on the admissibility of evidence has expressly been rejected by the Inter-American Court of Human Rights.[3]

In the absence of any explicit provisions about the admissibility of evidence in the European Convention on Human Rights, the European Court also takes a flexible approach, allowing itself an absolute discretion when it comes to the admissibility and evaluation of evidence.[4] In its judgment in *Ireland v United Kingdom*, the Court emphasised that:

> [i]n the cases referred to it, the Court examines the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*.[5]

There are no procedural barriers to the admissibility of evidence, as the Grand Chamber of the Court reiterated in *Nachova v Bulgaria*.[6] Evidence can therefore be submitted to the Court in a variety of forms - the 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. There is no prohibition of hearsay evidence and no fixed rules concerning illegally obtained evidence, privileged documents or perjury.[7]

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1 Durward V. Sandifer, *Evidence before International Tribunals*, Procedural Aspects of International Law Series, University Press of Virginia, 1975, pp. 121-123.

2 See, for example: Charles N. Brower, 'The Anatomy of Fact-Finding Before International Tribunals' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1992, pp. 147-151 (149); Thomas Buergenthal and Dinah Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, 4th Ed., Engel, 1995, p. 224; Mojtaba Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals*, Brill, 1996, p.180; Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, p. 697.

3 Thomas Buergenthal, 'Judicial Fact-finding: Inter-American Human Rights Court' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1991, pp. 261-274 (270).

4 David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, p. 598

5 *Ireland v United Kingdom*, no. 5310/71, 18.1.78, Series A no. 25.

6 *Nachova v Bulgaria*, nos. 43577/98 and 43579/98, 6.7.05 ECHR 2005-VII, para. 147.

7 David J. Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Law of the European Convention on Human Rights*, 2nd Ed., Oxford University Press, forthcoming.

The evaluation process relies only upon those factual elements which have been disclosed to all of the parties, reflecting the principle of procedural equality between the parties.[8] There have been occasions where, in order not to breach this principle of procedural equality, the Strasbourg institutions have excluded evidence submitted by one of the parties. For example, in the inter-state case of *Cyprus v Turkey*[9] the Commission decided to admit to the case file all written submissions made by both Governments at the admissibility and merits stages up until 14 September 1998. In sticking to this deadline, the Commission subsequently rejected the respondent Government's request to have admitted to the file an *aide-mémoire* on "measures relating to the living conditions of Greek Cypriots and Maronites in the Turkish Republic of Northern Cyprus".[10] However the Court accepted the aide-mémoire, noting that:

> [A]lthough the Court must scrutinise any objections raised by the applicant Government to the Commission's findings of fact and its assessment of the evidence, (…), as regards documentary materials, both parties were given a full opportunity to comment on all such materials in their pleadings before the Court, including the above-mentioned *aide-mémoire*.[11]

As well as questions of procedural equality, the immense caseload of the Court is also impinging on the Court's ability to accept evidence submitted by the parties. Increasingly, the Court has a tendency *not* to admit into the Court files evidence which is not sought by the Court, or which is submitted 'out of turn', in other words, where it 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.

In summary, then, there is no form of evidence which is considered by the European Court to be inadmissible *per se*. Nevertheless, the Court retains a broad discretion not to admit evidence, where the Court deems it appropriate, and without adopting rigid categorisations. The Inter-American bodies adopt a similar approach to that of the European Court.[12]

1.2 Free evaluation of evidence

The Court's assessment of the admitted material in a case is governed by the broad principle of the free evaluation of evidence:

[I]n the proceedings before the Court, 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.[13]

According to this principle the Court enjoys absolute freedom in determining not only the admissibility of evidence, but also its value or importance in the particular case.[14] Thus, the Court may view the established facts differently to the positions of the parties, and it may also attribute to the facts a different meaning in law to that put forward by the parties.[15] This corresponds to the approach taken by other international tribunals, which have also tended to reserve a right to assess the available evidence at their discretion.[16]

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8 *Cyprus v Turkey*, no. 25781/94, 10.5.01, ECHR 2001-IV, paras. 105-106.

9 *Cyprus v Turkey*, no. 25781/94, 10.5.01, ECHR 2001-IV, para. 105.

10 *Ibid.*

11 *Cyprus v Turkey*, no. 25781/94, 10.5.01, ECHR 2001-IV, para. 106.

12 Inter-American Court, *Fairén Garbi and Solís Corrales*, para. 133; Inter-American Commission, Report 2/06, *Miguel Orlando Muños Guzmán v Mexico*, 28.2.06, paras. 22-28.

13 *Nachova v Bulgaria*, nos. 43577/98 and 43579/98, 6.7.05 ECHR 2005-VII, para. 147.

14 Kersten Rogge, 'Fact-Finding' in *Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds.), The European System for the Protection of Human Rights*, Martinus Nijhoff Puiblishers, 1993, pp. 677-702 (698).

15 See *Foti and Others v Italy*, nos. 7604/76; 7719/76; 7781/77; 7913/77, 10.12.82, Series A no. 56, para. 44. In the performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to be established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner; furthermore, they have to take account not only of the original application but also of the additional documents intended to complete the latter by eliminating initial omissions or obscurities.

16 See, for example: *Velásquez Rodríguez v Honduras*, 29.7.88, Inter-American Court of Human Rights (Ser. C) No. 4 (1988), paras. 127, 130; Thomas Buergenthal, 'Judicial Fact-finding: Inter-American Human Rights Court' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1991, pp. 261-274 (270); Héctor Faúndez Ledesma, The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects, Inter-American Institute of Human Rights, San Jose, 2008, pp. 405-406; Mojtaba Kazazi, Burden of Proof and Related Issues: A study on Evidence before International Tribunals, Brill, 1996, p. 82.

It has been argued that one of the reasons for this flexible approach towards the admission and assessment of evidence in international tribunals is that, in most cases, the tribunals are located in countries far from the places where the incidents in question took place, and also that, in almost all cases, they have to make do with the documents submitted to them by the parties.[17] This dislocation may also account for the Court's general reluctance to question findings of fact which have previously been made by domestic courts. As the Court has frequently reiterated:

> it is not normally within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them.[18]

Thus the tendency of the Court is to recognise its subsidiary role, and to defer to national courts which have had the opportunity of seeing and hearing the relevant witnesses and, thus, the chance to assess their credibility.[19] While the Court is not bound by the findings of fact of domestic courts, it will require "cogent elements" for it to depart from such findings.[20]

1.3 States' duty to cooperate [21]

Article 38(1)(a) of the Convention establishes a formal duty of the member state concerned to cooperate in the proceedings before the Court:

> If the Court declares the application admissible, it shall: pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities.

Using very similar wording, Article 48(1)(d) of the American Convention states as regards *in loco* investigations by the Inter-American Commission on Human Rights:

> If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.

Nevertheless, within the Inter-American system, states have frequently refused both to 'furnish all necessary facilities' and even to participate in proceedings before the Commission. Cassel has observed that:

> [d]uring the ten years of Commission Annual Reports from 1985-87 through 1995-96, states failed to participate in 122 of 218 published cases, in other words, more than half. Fortunately, the extent of defaults by states in their procedural obligations under the American Convention has dramatically declined. In the last five years of this period, state participation in published cases improved greatly to 80%. By the late 1990s, state participation reached nearly 100%. Still, experience shows that a state's formal participation in a case does not necessarily mean its readiness to supply information forthrightly.[22]

The European Court's case law has established that the obligation on the respondent state "to furnish all necessary facilities" incorporates the following requirements: to submit to the Court documentary evidence relating to the case; to identify, locate and ensure the attendance of witnesses; to comment on documents submitted to the Court; and to reply to questions posed by the Court. This list is not exhaustive, but is determined on a case-by-case basis.[23]

Although applicants are expected to submit to the Court evidence in support of their allegations, in circumstances where they are unable to obtain certain documents and where it is clear that such documents can only be obtained with the assistance of the national authorities, the Court may request the representatives of the respondent state to obtain them from the national authorities and make them

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17 Ugur Erdal, 'Burden and Standard of Proof in Proceedings under the European Convention' *European Law Review 26, Human Rights Survey* 2001, pp. 68-85.

18 See, for example, *Klaas v Germany*, no. 15473/89, 22.9.93, Series A no. 269, para. 29.

19 *Ibid.*, para. 30.

20 See, for example, *Tanli v Turkey*, no. 26129/95, 10.4.01, ECHR 2001-III (extracts), para. 110.

21 See chapter 5 for further analysis of the State's duty to co-operate in respect of the problem of the non-attendance of witnesses at fact-finding hearings.

22 Douglass Cassel, 'Fact-Finding in the Inter-American System' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 105-114 (107).

23 See, further: Parliamentary Assembly. Committee on Legal Affairs and Human Rights. Report. *Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007. http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11183.htm Last accessed: 10 January 2009.

available to the Court. Furthermore, in the light of the information already in its possession, the Court itself may also identify and request further documents from the respondent state.

Thus, although the Court will often request the respondent state to submit the complete domestic case files, it may also identify and request particular documents. It is clear that expurgating the file before submitting it to the Court cannot be reconciled with the Government's obligations under Article 38 (1) (a) of the Convention.[24] If the Government fails to submit the documents sought, or if they are not submitted within the requisite time, the Court expects the Government to provide a plausible explanation - clerical errors and problems of communications between national authorities will not suffice.[25]

The allegedly secret nature of a document is not, on its own, sufficient to absolve a state from its obligation of disclosure under Article 38 of the Convention. Thus, in the case of *Timurtaş v Turkey*, which concerned the disappearance of the applicant's son after he had been taken into custody by the security forces, the Court held that it was insufficient for the Government to rely on the allegedly secret nature of a document which,

> in the Court's opinion, would not have precluded it from having been made available to the Commission's delegates, none of whom are Turkish (...), so that they could have proceeded to a simple comparison of the two documents without actually taking cognisance of the contents.[26]

It is also not sufficient for a respondent Government to claim, in order to justify a failure to submit a particular document to the Court, that the document in question had been examined by the national authorities, which had established that the applicant's allegations were baseless. For example, in the case of *Çelikbilek v Turkey* the Court stressed that the evaluation of the evidence and the establishment of the facts was the responsibility of the Court, and that it was for the Court to decide on the evidential value of the documents requested.[27]

Furthermore, determining the relevance and importance of a particular witness or other evidence is a matter primarily for the Court to decide. In *İpek v Turkey* the Court carried out a fact-finding hearing in Turkey with a view to establishing the accuracy of the applicant's allegations that, during a military operation, his two sons had been taken into custody and had subsequently disappeared. Amongst the witnesses summoned by the Court was an army General who had overseen the military operation. The Government, however, refused to summon him, stating that the authorities did not deem it necessary for the General to attend the hearing. The Court, concluding that the Government had fallen short of its obligations under Article 38 (1) (a) of the Convention, considered it necessary to reiterate "in the clearest possible terms ... that it is for the Court to decide whether and to what extent a witness is relevant for its assessment of facts".[28]

1.4 The Court's standard of proof: "beyond reasonable doubt"

The Court's application of a standard of proof[29] is inextricably linked to the principle of the free evaluation of evidence (as discussed above). Neither the Convention nor the Rules of Court contain express provisions about the standard of proof required within the Convention system.[30] The absence of such explicit provisions corresponds with comparable regional human rights mechanisms, which also do not set down any specific standard in this respect. International human rights jurisprudence has tended to avoid establishing strict rules as to the quantity and quality of evidential material required as a basis for a judgment. Commentators have attributed the lack of a general definition of the requisite standard of proof in international procedures to the flexibility of international tribunals in matters related to the evaluation of evidence.[31]

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24 *Taniş and Others v Turkey*, no. 65899/01, 2.8.05 ECHR 2005–VIII, para. 164.

25 *Tepe v Turkey*, no. 27244/95, 9.5.03, ECHR 2003-II, para. 131 and *Tekdağ v Turkey*, no. 27699/95, 15.1.04, ECHR 2004-II, para. 60.

26 *Timurtaş v Turkey,* no. 23531/94, 13.6.00, ECHR 2000-I, para. 67.

27 *Çelikbilek v Turkey*, no. 27693/95, 31.5.05, ECHR 2005-II, para. 71.

28 *İpek v Turkey*, no. 25760/94, 17.2.04, ECHR 2004-II (extracts), para. 125.

29 "The term standard of proof, also known as the 'quantum of proof' refers to the degree of probability to which facts must be proved to be true." See: Ian Dennis, *The Law of Evidence*, 3rd Ed., Sweet & Maxwell, 2007, p. 438.

30 See also: Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (126); Joan Fitzpatrick, 'Human Rights Fact-Finding', in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 65-97 (74).

31 Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals*, Kluwer Law International, 1998, p. 325; Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, pp. 720-724.

Again in compliance with international judicial practice, Strasbourg has considered and assessed the standard of proof on a case-by-case basis.[32] It was in the Greek Case that the European Commission first held that the standard of proof it adopted when evaluating the material it had obtained was proof "beyond reasonable doubt".[33] The Commission defined this standard as

> not a doubt based merely on a theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be drawn from the facts presented.[34]

This standard was also adopted by the Court in the *Ireland v United Kingdom* judgment:

> … [t]o assess [the] evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact …[35]

The 'beyond reasonable doubt' standard has been confirmed in many subsequent cases[36] and was also accepted by the new Court after Protocol No. 11 came into effect in 1998.[37] However, the 'beyond reasonable doubt' may cause misunderstandings. This standard of proof is based on the common law evidential tradition, in which it is applied primarily in criminal proceedings,[38] while civil proceedings usually apply a standard of the "preponderance of evidence".[39] The European Court's adoption of the 'beyond reasonable doubt' standard of proof should not, however, be equated to the standard applied in criminal proceedings in the common law system.[40] It should, rather, be considered as having an independent meaning and content.[41] The Court has explained its particular application of the standard of proof by reference to its core function, according to the text of the European Convention on Human Rights:

> …it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof.[42]

In the same vein, the Inter-American Court in the Honduras Disappearance Cases observed that the Inter-American system does not have to meet the same evidentiary standards as domestic criminal courts. In the case of *Velásquez Rodríguez v Honduras*, it held:

> [T]he international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations but rather to protect the victims and to provide for the reparation of damages resulting from the acts of States responsible.[43]

At most, the Inter-American Commission can recommend, and the Inter-American Court can judge, a state to be responsible for a violation and to be liable to pay damages to the victim. Accordingly, Bayefsky has

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32 David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, p. 598.

33 *Denmark, Norway, Sweden and the Netherlands v Greece* (The Greek case), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission Report, 5.11.69, para. 30.

34 *Denmark, Norway, Sweden and the Netherlands v Greece* (The Greek case), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission Report of 5.11.69, para. 30. See also, *Ribitsch v Austria*, no. 18896/91, Commission Report 4.7.74, para. 104.

35 *Ireland v United Kingdom*, no. 5310/71, 18.1.78, Series A no. 25, para. 161.

36 See, by way of examples: *Aydin v Turkey*, no. 23178/94, 25.9.97, ECHR 1997-VI, para. 72; *Menteş and Others v Turkey*, no. 23186/94, 28.11.97, ECHR 1997-VIII, para. 66; *Kaya v Turkey*, no. 22729/93, 19.2.98, ECHR 1998-I, para. 38.

37 *Veznedaroğlu v Turkey*, no. 32357/96, 11.4.00, ECHR 2000-II, para. 30; *Çakici v Turkey*, no. 23657/94, 8.7.99, ECHR 1999-IV, para. 92; *Kiliç v Turkey*, no. 22492/93, 28.3.00, ECHR 2000-I, paras. 64, 92.

38 Loukis Loucaides, 'Standards of Proof in Proceedings under the European Convention on Human Rights' in *Présence Du Droit Public et des Droits de L'Homme : mélanges offerts à Jacques Vélu*, Vol. 3, Bruylant, 1992, pp. 1431-1443.

39 Bertrand G. Ramcharan, 'Introduction' in *idem (ed.), International Law and Fact-Finding in the Field of Human Rights*, Brill, 1982, pp. 1-26 (5); Mojtaba Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals*, Brill, 1996, p. 349.

40 Jochen Abr. Frowein, 'Fact-finding by the European Commission of Human Rights' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1992, pp. 237-260 (248).

41 Loukis Loucaides, 'Standards of Proof in Proceedings under the European Convention on Human Rights' in *Présence Du Droit Public et des Droits de L'Homme : mélanges offerts à Jacques Vélu*, Vol. 3, Bruylant, 1992, pp. 1431-1443.

42 *Nachova v Bulgaria*, nos. 43577/98 and 43579/98, 6.7.05 ECHR 2005-VII, para. 147.

43 *Velásquez Rodríguez v Honduras*, 29.7.88, Inter-American Court of Human Rights (Ser. C) No. 4 (1988), para. 134.

suggested that a lesser standard of proof, which can be met without full-blown trials, should suffice.[44] Consequently, the Inter-American bodies have referred to standards of "convincing proof",[45] a "tend[ency] to show",[46] or at times even "absolute certainty".[47] Within the African system there would appear to be a lesser degree of consistency with regard to the standard of proof required. The Commission's case law has indicated, for example, that allegations have to be "valid and logical",[48] that there is "compelling"[49] or "concrete"[50] evidence or that the facts are "pertinent".[51]

The European Court's standard of proof has often been the subject of criticism – from academic commentators, Strasbourg judges and state parties. It has been questioned whether the application of this "most restrictive standard"[52] is justified in the area of human rights protection.[53] In their partly dissenting opinion in the case of *Zubayrayev v Russia*, Judges Loucaides and Spielmann suggested that

> the phrase "reasonable doubt" has given rise to confusion as a result of courts' many attempts to define or explain its meaning.[54]

Furthermore, in the case of *Labita v Italy*,[55] eight judges, in a dissenting opinion, expressed their principled objections to the majority's application of the Court's standard of proof:

> [T]he standard used for assessing the evidence in this case is inadequate, possibly illogical and even unworkable since, in the absence of an effective investigation, the applicant was prevented from obtaining evidence and the authorities even failed to identify the warders allegedly responsible for the ill-treatment complained of. If States may henceforth count on the Court's refraining in cases such as the instant one from examining the allegations of ill-treatment for want of sufficient evidence, they will have an interest in not investigating such allegations, thus depriving the applicant of proof "beyond reasonable doubt". Even though we consider that in some cases a procedural approach may prove both useful and necessary, in the type of situation under consideration it could permit a State to limit its responsibility to a finding of a violation of the procedural obligation only, which is obviously less serious than a violation for ill-treatment.[56]

In the inter-state case brought by Ireland against the United Kingdom, concerning the detention and interrogation of IRA suspects by the British security forces, the applicant Irish Government criticised the Court's standard of proof as being "excessively rigid" in circumstances where a respondent state fails to provide co-operation. They argued that

> [T]he system of enforcement would prove ineffectual if, where there was a *prima facie* case of violation of Article 3…, the risk of a finding of such a violation was not borne by a State which fails in its obligation to assist the Commission in establishing the truth…[57]

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44 Anne F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 105-114.

45 *Velásquez Rodríguez v Honduras*, 29.7.88, Inter-American Court of Human Rights (Ser. C) No. 4 (1988), para. 10, noting Resolution 22/86 of the Commission, 18.4.86.

46 Godínez Crúz, para. 125.

47 *Ibid.*, para. 11.

48 Communication 44/90, Peoples' *Democratic Organisation for Independence and Socialism v The Gambia*, Tenth Activity Report 1996-1997, Annex X, para. 16.

49 Communication 212/98, para. 37.

50 Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Activity Report 1994-1995, Annex VI.

51 Report of the Mission of Good Offices to Senegal, p. 13.

52 Thomas Buergenthal and Dinah Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, 4th Ed., Engel, 1995, p. 223.

53 Loukis Loucaides, 'Standards of Proof in Proceedings under the European Convention on Human Rights' in *Présence Du Droit Public et des Droits de L'Homme : mélanges offerts à Jacques Vélu*, Vol. 3, Bruylant, 1992, pp. 1431-1443.

54 *Zubayrayev v Russia*, No. 67797/01, 10.1.08.

55 *Labita v Italy*, no. 26772/95, 6.4.00 ECHR 2000-IV.

56 *Labita v Italy*, no. 26772/95, 6.4.00 ECHR 2000-IV, Joint partly dissenting opinion of judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič.

57 *Ireland v United Kingdom*, no. 5310/71, 18.1.78, Series A no. 25, para. 161.

1.5 Burden of proof

The general rule, accepted by most international tribunals, is that it is for the party who asserts a proposition of fact to prove it (*ei incumbit probatio qui dicit, non qui negat*),[58] although it is also acknowledged that it is a rule which should not be rigidly applied.[59]

As with the *standard* of proof, the application of the concept of the *burden* of proof allows for a certain degree of flexibility. The key question as to how the burden of proof should be applied was highlighted by Judge Zekia in his dissenting opinion in *Ireland v United Kingdom*:

> [W]hat is material… is not whether a burden of proof does exist or not – it is an elementary rule of justice that it does exist… - but by whom and how … (the) onus should be discharged.[60]

This elasticity has also been emphasised by the post-Protocol 11 Court, as is illustrated by this extract from *Timurtas v Turkey:*

> [C]onvention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation)…[61]

The Court's application of the burden of proof needs to be viewed within the context of the broadly inquisitorial nature of its proceedings. Thus, in *Artico v Italy*, the respondent Government had failed to cooperate fully with the Commission and Court, when they sought to clarify the facts. Thus the Strasbourg institutions had to rely primarily on the documents produced by the applicant. Adopting the Court's previous finding in *Ireland v United Kingdom*, that neither of the Governments in that case, as such, bore the burden of proof, it applied the same principle to an individual application (especially in view of that fact that at that time – 1980 – neither the applicant nor the Commission had the status of a party before the Court). The applicant was found to have provided "sufficient *prima facie* evidence" to establish the facts which were the basis of his application. Two points were made about the Government's position. Firstly, the Government could not "simply formulate reservations" about the documents submitted by the applicant, and, secondly, the Court relied on the states' duty to co-operate with the Convention institutions "in arriving at the truth".[62]

At the admissibility stage, the applicant must have presented facts, which are supportive of the allegations by way of a "beginning of proof" (*commencement de prevue*).[63] The applicant has the initial burden of producing evidence in support of the application; the required standard of proof at this stage is to establish a *prima facie* case. In other words, there should be sufficient factual elements to enable the Court, at this initial stage, to conclude that the allegations are not groundless (or "manifestly ill-founded", as in the words of Article 35(3)).

The reluctance of the Court to accept that the burden of proof should be applied rigidly has also led it to shift the burden from the applicant to the respondent Government in particular circumstances, notably in order to reflect the vulnerability of people held in the custody of the state.

The first case in which the Court expressly shifted the burden on to the respondent Government to explain injuries allegedly caused during police custody was *Ribitsch v Austria*. In that case, it was not disputed that the applicant had suffered injuries while in police custody, but the respondent Government submitted that because of the requisite high standard of proof "it had not been possible during the domestic criminal proceedings to establish culpable conduct on the part of the policemen".[64] The Austrian Government went

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58 "The term burden of proof, also known as the onus of proof, refers to the legal obligation on a party to satisfy the fact-finder, to a specified standard of proof, that certain facts are true": Ian Dennis, *The Law of Evidence*, 3rd Ed., Sweet & Maxwell, 2007, p. 438.

59 See, further: Mojtaba Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals*, Brill, 1996, p. 117.

60 *Ireland v United Kingdom*, no. 5310/71, 18.1.78, Series A no. 25.

61 *Timurtaş v Turkey*, no. 23531/94, 13.6.00, ECHR 2000-I, para. 66.

62 *Artico v Italy*, no. 6694/74, 13.5.1980, Series A no. 37, paras. 29-30.

63 David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, p. 598.

64 *Ribitsch v Austria*, no. 18896/91, 4.12.95, Series A no. 336, para. 30.

on to argue that "for a violation of the Convention to be found, it was necessary for ill-treatment to be proved beyond reasonable doubt".[65] However, the Commission did not accept that argument, emphasising that:

> …[T]he authorities exercise full control over a person held in police custody and their way of treating a detainee must, therefore, be subjected to strict scrutiny under the Convention. Thus where injuries occurred in the course of police custody, it is not sufficient for the Government to point at other possible causes of such injuries, but it is incumbent on them to produce evidence showing facts which cast doubt on the account given by the victim, in particular if supported by medical evidence.[66]

The Court supported this position, finding the State to be morally responsible for any person in detention, and concluding in the particular case that "the Government have not satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody".[67]

In the case of *Akkum and others v Turkey* which concerned, *inter alia*, the killing of the applicants' relatives during a military operation, the Court was unable to establish the circumstances of a number of allegations made by the applicants. Noting that this failure emanated from the respondent Government's refusal to submit certain documents to the Court, the Court held as follows:

> [I]t is appropriate, therefore, that in cases such as the present one, where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts, it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise.[68]

Such express shifting of the burden of proof was also applied in the case of *Çelikbilek v Turkey*, which concerned the alleged killing of the applicant's brother during his detention in police custody. Thus, according to the well-established case law of the Court, where an applicant is taken into custody in good health but is found to be injured at the time of release, the state is required to provide a plausible explanation as to how those injuries were caused, failing which an issue will arise under Article 3 of the Convention.[69] The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.[70]

The shifting of the burden of proof does depend, however, on the applicant showing that the individual in question was indeed taken into custody. In *Çelikbilek* the applicant was unable to provide documentary evidence that his brother had been detained by police. The respondent Government were requested by the Commission, and subsequently by the Court, to submit custody records of the police station where, according to the applicant, his brother had been detained and killed. Despite a number of reminders, the respondent Government failed to do so. The Court, relying on the principle set out in *Akkum and others v Turkey*, concluded that the applicant's brother had indeed been arrested and detained by agents of the state. In the absence of any explanation from the Government as to how he was killed while he was in the hands of the security forces, the Court found a violation of Article 2 of the Convention.[71]

It is interesting to note that the African Commission has adopted a much more flexible approach as regards the burden of proof, and one which lays much greater onus on respondent Governments:

> [A]ccording to the Commission's long-standing practice, in cases of human rights violations, the burden of proof rests with the Government. If the Government provides [no] evidence to contradict an allegation of human rights … made against it, the Commission will take it as proven, or at least probable or plausible.[72]

Where, however, the respondent State does co-operate, the more the burden will be placed on the applicant to substantiate the allegations.[73]

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65 *Ibid.*
66 *Ribitsch v Austria*, no. 18896/91, Commission Report, 4.7.94, para. 104.
67 *Ribitsch v Austria*, no. 18896/91, 4.12.95, para. 34.
68 *Akkum and Others v Turkey*, no. 21894/93, 24.3.05, ECHR 2005-II (extracts), para. 211.
69 See, for example, *Selmouni v France*, no. 25803/94, 28.7.99, ECHR 1999-V, para. 87.
70 See, for example, *Salman v Turkey*, no.21986/93, 27.6.00, ECHR 2000-VII, para. 99.
71 *Çelikbilek v Turkey*, no. 27693/95, 31.5.05, ECHR 2005-II, paras. 70-72.
72 Communications 48/90, 50/91, 52/91 and 89/93.

1.6 Drawing of inferences

The drawing of inferences is a common feature of international proceedings. Indeed, it has been suggested that it is because of the relative freedom of international tribunals in determining the value of the evidence submitted, that their decisions can be based upon such inferences.[74]

The drawing of negative or adverse inferences against a party is also confirmed by Article 39 of the Rules of Procedure of the Inter-American Commission on Human Rights:

The facts alleged in the petition, the pertinent parts of which have been transmitted to the State in question, shall be presumed to be true if the State has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion.

In the *Honduras Disappearance Cases*, for example, the Inter-American Commission's acceptance of the facts was based on a procedural default by the respondent Honduran Government.[75] In one of those cases, *Velásquez Rodríguez v Honduras*,[76] the Inter-American Court emphasised that, in international human rights proceedings, a State could not claim that the applicant had failed to provide evidence, if that particular evidence could not be gathered without the cooperation of the State.[77]

Without using the term 'inferences', the African Commission – like the Inter-American Commission – has stated repeatedly that it will accept the facts as put forward by the complainant if the Government concerned does not respond at all:

> [W]here allegations of human rights abuse go uncontested by the Government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. […] Since the Government of Zaire does not wish to participate in a dialogue, the Commission must, regrettably, continue its consideration of the case on the basis of the facts and opinions submitted by the complainant alone.[78]

The international practice regarding the adoption of inferences had been acknowledged by the former Strasbourg organs, as well as the new European Court.[79] On numerous occasions, the European Court has drawn adverse inferences from a party's non-cooperation - usually from the uncooperative behaviour of respondent Governments. As one commentator has suggested, "…a violation of a duty to cooperate … generally weakens that party's position".[80] Drawing adverse inferences is arguably a logical consequence of the parties' duty to cooperate under the Convention. The European Court has also emphasised that, based on inferences and presumptions, the parties' *demeanour* can also be taken into account in its assessment of the facts.[81]

The European Commission, in the *Greek* case, drew negative inferences from the Greek Government's refusal to allow the questioning of certain witnesses whom the Commission had asked to hear. These were witnesses who could have provided evidence relevant to the allegations of torture and ill-treatment. What is more, the Government had also denied access to both the Averoff Prison in Athens and the detention centres on the island of Leros.[82]

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73 For example, in Communication 205/97, *Kazeem Aminu v Nigeria*, Thirteenth Activity Report 1999-2000, Annex V, the Commission found: "[I]n the absence of specific information on the nature of the acts complained of, the Commission is unable to find a violation."

74 Mojtaba Kazazi, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals*, Brill, 1996, pp. 240; 266. See also the *Corfu Channel Case*, ICJ Reports, 1947-1948, p. 15 (as regards the application of Article 53 of the Statute of the International Court of Justice).

75 Douglass Cassel, 'Fact-Finding in the Inter-American System' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 105-114 (107). See also: Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, p. 392.

76 *Velásquez Rodríguez v Honduras*, 29.7.88, Inter-American Court of Human Rights (Ser. C) No. 4 (1988).

77 *Velásquez Rodríguez v Honduras*, 29.7.88, Inter-American Court of Human Rights (Ser. C) No. 4 (1988), paras. 135 and 139.

78 Communications 137/94, 139/94, 154/96 and 161/97, para. 81.

79 *Timurtaş v Turkey*, No. 23531/94, 13.6.00, para. 66.

80 Juliane Kokott, T*he Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, Kluwer Law International, 1998, p. 154.

81 *Ireland v United Kingdom*, No. 5310/71, Judgment, 18.1.78, para. 161.

82 Kersten Rogge, 'Fact-Finding' in *Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds.), The European System for the Protection of Human Rights*, Martinus Nijhoff Puiblishers, 1993, pp. 677-702 (691).

The European Court held in its judgment in the inter-state case of *Ireland v United Kingdom* in 1978 that it would be appropriate in certain circumstances to draw inferences:

> [T]o assess [the] evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[83]

More recently, the Court elaborated on the principle in this way in the *Timurtaş* case:

> [I]t is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention…but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.[84]

In a number of individual applications, the European Commission also had to deal with the failure or refusal of states to provide relevant evidence or disclose the identity of public officials.[85] One example is the case of *Menteş v Turkey* in which the Court alluded to the Government's failure to cooperate, in that it had neither provided access to documents, nor to certain key witnesses.[86] Similarly, in *Ergi v Turkey* the Court drew negative inferences from the Government's failure to provide direct evidence about the planning and conduct of an operation carried out by the security forces.[87] It accordingly inferred that insufficient precautions had been taken to protect the lives of the civilian population.

In the case of *Taş v Turkey*, the Court drew "very strong inferences" from the Government's failure to provide any documentary evidence relating to the location of the applicant's son's detention and from the Government's inability to provide a satisfactory and plausible explanation as to what happened to him.[88] This adverse inference was sufficient to tip the scales in the applicant's favour and it enabled the Court to find that the applicant's son had died, following his detention by the security forces.

In its judgment in the case of *Tangiyeva v Russia*, the Court held that it was

> unable to benefit from the results of the domestic investigation due to the Government's failure to disclose documents from the file. It also found that it could draw inferences from the Government's conduct in respect of the investigation documents. The Court is satisfied that the applicant made a prima facie case that her relatives had been killed by the servicemen on the night of 10-11 January 2000 and that the Government failed to provide any other satisfactory and convincing explanation of the events.[89]

In such circumstances, the Court found it established that the applicant's relatives' deaths could be attributed to the State.[90]

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83 *Ireland v United Kingdom*, no. 5310/71, 18.1.78, para. 161.

84 *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 66.

85 See, for example, *Tekin v Turkey*, no. 22496/93, 9.6.1998, para. 23; *Çakici v Turkey*, no. 22492/93, 28.3.00, paras. 51-53; *Taş v Turkey*, no. 24396/94, 14.11.99, para. 54; *Ergi v Turkey*, no. 23818/94, 28.7.98, paras. 41, 64, 81; *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 267.

86 *Menteş v Turkey*, no. 23.11.97, para. 68.

87 *Ergi v Turkey*, no. 23818/94, 28.7.98, paras. 41, 64, 81.

88 *Taş v Turkey*, no. 24396/94, 14.11.00, para. 66.

89 *Tangiyeva v Russia*, no. 57935/00, 29.11.07, para. 82.

90 *Ibid.*, para. 83.

1.7 Summary

(i) The European Court takes a flexible approach towards the admissibility of evidence, allowing itself an absolute discretion. There is no form of evidence which is considered to be inadmissible *per se*.

(ii) The Court's assessment of the admitted material in a case is governed by the broad principle of the free evaluation of evidence

(iii) While the Court is not bound by the findings of fact of domestic courts, it will require "cogent elements" for it to depart from such findings.

(iv) In relation to the Court's investigation of an application, the obligation on the respondent state "to furnish all necessary facilities" (in accordance with Article 38(1)(a)) incorporates the following requirements: to submit to the Court documentary evidence relating to the case; to identify, locate and ensure the attendance of witnesses; to comment on documents submitted to the Court; and to reply to questions posed by the Court.

(v) If the Government fails to submit documents requested by the Court, or if they are not submitted within the requisite time, the Court expects the Government to provide a plausible explanation for the failure to submit the documents; clerical errors and problems of communications between national authorities will not suffice.

(vi) The standard of proof adopted by the Court when evaluating the available material is proof 'beyond reasonable doubt'. This standard should not, however, be equated to the standard applied in criminal proceedings in the common law system. It has an independent meaning and content, reflecting the fact that the Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibilities under the Convention.

(vii) The applicant has the initial burden of producing evidence in support of the application; the required standard of proof at this stage is to establish a *prima facie* case.

(viii) However, the Court will shift the burden from the applicant to the respondent Government in particular circumstances, notably in order to reflect the vulnerability of people held in the custody of the state.

(ix) The Court may draw adverse inferences from a party's non-cooperation. The drawing of inferences has occurred because of: the non-disclosure of documents; the non-attendance of witnesses; and the provision of insufficiently plausible explanations in respect of particular aspects of the case.

Chapter 2

The fact-finding function of the European Court

2.1 The function of judicial fact-finding processes

The establishment and verification of the relevant facts of a case is of course the necessary basis for its judicial determination, both in national and international jurisdictions. An assessment as to whether or not human rights have been respected or violated also necessarily involves questions of fact.[1] Fact-finding has therefore been described as being "at the heart of human rights activities" and "a significant weapon in the armory of the world order".[2] The finding of facts describes a process (which may consist of different phases) in which a court, or another investigation body, attempts to clarify an unclear or disputed fact or set of facts. Therefore fact-finding is a pre-condition to, and integral element of, any binding legal determination about the existence or non-existence of a rights violation.[3] A fact-finding process involves assessing admissible evidence in order to investigate past or present facts.[4]

Any fact-finding activity will be carried out in the specific context of the particular functions and principles of the organisation providing the investigative machinery.[5] Since fact-finding in the field of human rights can take many forms, there are currently few commonly accepted rules of evidence or procedure in international law and it has been argued that it would not be easy to establish common standards in the foreseeable future.[6] In spite of various proposals to establish procedural benchmarks over the years, there still is little consensus about an appropriate methodology for human rights fact-finding.[7] Instead, fact-finding organs have been given the authority to devise their own rules of procedure, which accordingly vary considerably.[8]

There does appear to be agreement that flexibility is an essential aspect of international fact-finding,[9] however, this does not of course mean absolute freedom, since if human rights fact-finding is to be regarded as a legal process, the investigating organ should be guided as far as possible by the relevant substantive and procedural rules of international law.[10]

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1 Bertrand G. Ramcharan, 'Introduction' in *idem (ed.), International Law and Fact-Finding in the Field of Human Rights* (1982), pp. 1-26 (1).

2 Thomas M. Franck and Fairley H. Scott, 'Procedural Due Process In Human Rights Fact-Finding By International Agencies' *American Journal of International Law* 74, 1980, pp. 308-345 (308).

3 Kersten Rogge, 'Fact-Finding' in *Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds.), The European System for the Protection of Human Rights*, Martinus Nijhoff Puiblishers, 1993, pp. 677-702 (677); Jochen Abr. Frowein, 'Fact-finding by the European Commission of Human Rights' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1992, pp. 237-260 (251).

4 Richard R. Bilder, 'The Fact/Law Distinction in International Adjudication' in *Richard Bonnot Lillich (ed.), Fact-Finding before International Tribunals*, Transnational Publishers, 1992, pp. 95-100 (95); Charles N. Brower, 'The Anatomy of Fact-Finding Before International Tribunals' in Richard Bonnot. Lillich (ed.), Fact-finding before International Tribunals, Transnational Publishers, 1992, pp. 147-151 (147).

5 Thomas M. Franck and Fairley H. Scott, 'Procedural Due Process In Human Rights Fact-Finding By International Agencies' *American Journal of International Law* 74, 1980, pp. 308-345 (308 *et seq.*).

6 Joan Fitzpatrick, 'Human Rights Fact-Finding' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 65-97 (65).

7 See e.g. the UN Secretary General's rules on 'Ad-hoc-Bodies of the United Nations entrusted with studies of the particular situations alleged to reveal a consistent pattern of violations of human rights', UN Doc. E/CN.4/1021/Rev. 1 (1974) or the International Law Association's 'Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions', both printed in Bertrand G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights*, 1982, Annex II and IV, pp. 239; 250.

8 Joan Fitzpatrick, 'Human Rights Fact-Finding' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 65-97 (67).

9 Dinah Shelton, in Thomas Buergenthal and Dinah Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, 4th Ed., Engel, 1995, p. 227; Klaus T. Samson, 'Procedural Law' in *Bertrand G. Ramcharan (ed.), International Law and Fact-Finding in the Field of Human Rights*, Brill, 1982, pp. 41-64 (47), Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (126).

10 Bertrand G. Ramcharan, 'Substantive Law Applicable' in *idem* (ed.), *International Law and Fact-Finding in the Field of Human Rights*, Brill,1982, pp. 26-41 (26 *et seq.*).

2.2 The fact-finding role of the European Court

The European Court, in the vast majority of cases, is able to establish the facts from the documentary evidence before it. In view of the Convention requirement to exhaust domestic remedies prior to bringing an application to the Court (reflecting the principle of subsidiarity)[11] in most cases the significant facts are no longer in dispute, following the decisions of the domestic courts. Both the former European Commission of Human Rights and the Court have therefore been able to rely not only on the facts as established by the national courts, but as a general rule also on the national courts' evaluation of those facts.[12]

Furthermore, the Court has frequently acknowledged that it is sensitive to the subsidiary nature of its role and that it must be cautious in taking on the role of a first instance tribunal of fact.[13] Both the former Commission and the Court have therefore left the primary fact-finding function to the domestic courts. This has been justified on the basis that the domestic courts are 'closer' to the particular case and the applicable law, and that they will often have heard directly from witnesses. Thus, national courts are usually considered to be in a better position to investigate and assess the facts and therefore also to ensure the effective application of the Convention.[14]

The Court will accordingly normally accept the facts as established and has indicated that it would require 'cogent elements' to lead it to depart from reasoned findings of fact reached by the national judicial authorities, which have had the benefit of seeing and examining the relevant witnesses. This has occurred where the fact-finding by the national courts has appeared to have serious deficiencies. For example, in relation to criminal proceedings against a number of Turkish police officers arising out of the deaths of five suspects in four separate arrest operations, the Court noted that there were serious deficiencies in the way in which the national court had established the facts. These related to the absence of any effective investigation into the planning of the arrest operations; the absence of any photographs or sketch plans of the scenes of the incidents; the lack of any fingerprints, ballistics or other forensic evidence and the lack of contemporary individual statements by the police officers who took part in the operations. In those circumstances the Court held that it should treat the findings of fact by the criminal court "with some caution".[15] It went on to find a violation of both the substantive and procedural obligations under Article 2 (the right to life).

Evidence is presented to the European Court in a variety of forms – the decisions of national courts on issues of fact, statements of witnesses, medical reports and testimony, official investigation reports and other forms of evidence such as video or photographic evidence.[16] There are no technical, procedural barriers, as such, to the admission of evidence before the European Court:

In the proceedings before the Court, 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.[17]

The case law reveals, however, a distinct approach to the burden of proof both as regards admissibility issues and issues of fact.[18] At the admissibility stage the applicant must present facts which are supportive (albeit not necessarily conclusive) of the allegations by way of a 'beginning of proof' (*commencement de preuve*).

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11 Article 35 (1) of the Convention.

12 Joan Fitzpatrick, 'Human Rights Fact-Finding' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 65-97. (68 *et seq.*); Dinah Shelton, 'Ensuring Justice with Deliberate Speed: Case Management in the European Court of Human Rights and the United States Court of Appeals' *Human Rights Law Journal* 21, 2000, pp. 337-348 (342 *et seq.*).

13 See e.g. *Bitiyeva and X v Russia*, nos. 57953/00 and 37392/03, 21.6.07, para. 130.

14 *Edwards v United Kingdom*, no. 13071/87, 16.12.92, para. 34; *Vidal v Belgium*, no. 12351/86, 22.4.92, para. 33; *Klaas v Germany*, no. 5029/71, 22.9.93, para. 29.

15 See *Erdoğan and Others v Turkey*, no. 19807/92, 25.4.06, paras. 71-73.

16 David J. Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Law of the European Convention on Human Rights*, 2nd Ed., Oxford University Press, forthcoming.

17 *Nachova v Bulgaria*, nos. 43577/98 and 43579/98, 6.7.05, para 147.

18 In *Ireland v the United Kingdom*, no. 5310/71, 18.1.78, para 160, the former Court made it clear that it would not rely on the concept that the burden of proof is borne by one of the two Governments appearing before it and that its approach was to examine all the material before it including material obtained *proprio motu*. Since under the former system the fact-finding had been carried out by the Commission this approach is understandable. But it was inevitable that the new Court, which must establish the facts for itself, would develop a different approach to the burden of proof.

There should be enough factual elements to enable the Court, at this initial stage, to conclude that the allegations are not completely groundless. At the merits stage, the approach to the burden of proof is subtle and context-dependent:

> the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights.[19]

The standard of proof applied is that of 'beyond reasonable doubt'. For the Court, such proof may follow "from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" as well as from the conduct of the parties when evidence is being taken.[20] The 'beyond reasonable doubt' standard does *not* correspond to the domestic criminal law standard of proof that is applied in many legal systems, as the European Court is not adjudicating upon individual criminal guilt (or civil liability), but rather assessing whether a state has breached its obligations under the European Convention on Human Rights.

2.3 Fact-finding hearings and on-the-spot investigations

In exceptional situations, if the domestic authorities are either unable or unwilling to carry out a fact-finding function, this falls to the European Court. Where there are fundamental factual disputes between the parties, which cannot be resolved by considering the documents before it, the Court is able to carry out fact-finding missions in order to establish the facts, by hearing evidence from witnesses or by conducting on-the-spot investigations.[21]

For the purposes of this research project, we compiled a database listing all cases in which fact-finding missions have taken place since the establishment of the Convention system (see Appendix One). An analysis of the Court's case law has established that, since 1957, there has been some form of fact-finding mission in 92 cases.[22] While fact-finding hearings have formed part of almost every investigatory mission (93% - 85 cases), the conduct of on-the-spot investigations has been much more limited (24% - 22 cases). Investigatory missions have sometimes involved both fact-finding hearings and on-the-spot investigations (19% - 17 cases).

The following 16 states have appeared as the respondents in the 92 fact-finding cases: Austria, Belgium, Croatia, Cyprus, Finland, Germany, Georgia, Russia, Greece, Italy, Lithuania, Moldova, Sweden, Turkey, Ukraine, and the United Kingdom. In two-thirds (66%) of the fact-finding cases, the respondent state was Turkey. In only 21% of the fact-finding cases the respondent states are current member states of the European Union (EU).

Cases involving fact-finding missions took an average of almost 6 years (2,185 days) to pass through the various stages of the Strasbourg process, from start to finish. The findings of this research suggest a statistically significant difference in the length of proceedings depending on whether the respondent state was a member of the EU or not.[23] While cases against EU states took only about 3 ½ years (1,327 days) on average, those against non-EU states lasted for approximately 6 ½ years (almost 2,405 days).

While cases involving fact-finding hearings do not show any statistical difference as regards EU membership,[24] there is a statistically significant difference in respect of on-the-spot investigations.[25] In cases where current EU members were the respondent states, on-the-spot investigations were held in 53% of them. On the other hand, only 17% of the cases against non-EU states involved on-the-spot investigations.

The case law analysis also showed that the average number of witnesses who appeared in fact-finding hearings is just over 15. Yet on average, almost twice as many witnesses appeared in cases concerning EU states (24) compared to an average of only 13 witnesses in cases against non-EU states.[26]

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19 *Nachova v Bulgaria*, nos. 43577/98 and 43579/98, 6.7.05, para 147.
20 First employed in *Ireland v United Kingdom*; see, *inter alia, Salman v Turkey*, no. 21986/93, 27.6.00, para. 100.
21 See Rule A1 (3) of the annex to the Rules of the Court.
22 Since the case of *Sands v United Kingdom* was unreported, our analysis for this report is based on the remaining 91 cases.
23 $t(86)=4.798$, $p<.001$.
24 $p>.05$; 89.5% of EU cases have hearing, and 96% of non-EU cases.
25 $\chi=10,361$, $p<.01$.
26 $t(77)=2.267$, $p<.05$.

Table 1: Comparison between EU and non-EU cases

	Average length of cases (in days)***	FF Hearings (% of cases)	On-the-Spot investigations (% of cases)**	Average number of witnesses appearing
EU countries	1,327	89.5	52.6	24
Non-EU countries	2,405	96	16.9	13

(Level of significance: *** =0.001, ** = 0.01, *= 0.05)

In summary, Table 1 above indicates that in cases against EU states: (1) on-the-spot investigations are more likely to occur; (2) more witnesses are likely to be heard; and (3) the time taken by the Court in processing the case is nevertheless only half the time required for cases against non-EU states.

The State's duty

The Convention requires the respondent state to provide "all necessary facilities" for any investigation (in whatever form it takes) carried out by the Court in order to establish the facts (Article 38(1)(a) of the Convention)[27] and the state may be specifically criticised by the Court under this provision if it fails to do so.[28] This requirement applies equally to the Court's fact-finding hearings and on-the-spot investigations.

The Court Rules

The annex to the Rules of the Court (Rules A1 to A8)[29] regulates the practice and procedure relating to investigations (see Appendix 7). In order to clarify the facts, the Court may adopt "any investigative measure", including requesting documentary evidence and hearing any person as a witness or expert (or in any other capacity) (Rule A1 (1)). The chamber may appoint any number of judges to conduct an inquiry, carry out an on-the-spot investigation or take evidence in any other way. This usually happens after a case has been declared admissible (although the Rules provide for it also to happen before admissibility in exceptional cases - Rule A1 (3)). It can also appoint external experts to assist the Court's delegation (Rule A1 (3)) and third parties may also be granted leave to participate in any investigative measure (Rule A1 (6)).

Both the respondent Government and the applicant are required to assist the Court in its measures for taking evidence (Rule A2 (1)). The respondent state is required to provide the Court delegation with "the facilities and co-operation necessary for the proper conduct of the proceedings" (Rule A2 (2)). The state is also obliged to ensure freedom of movement and adequate security for the Court delegation and all applicants, witnesses and experts, and "to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation" (Rule A2 (2)). The state is therefore obliged to co-operate fully with the Court in the conduct of its investigations.

The Convention and the Court Rules accordingly provide a degree of regulation of the conduct of investigatory measures, but they leave the Court with a considerable amount of discretion as to how to apply the regulations in practice. Like the 'old' Convention organs, the 'new' Court has made considerable use of this latitude. Its practice in conducting fact-finding must therefore largely be deduced from the steps it has taken in individual cases.

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[27] See chapter 5 for more detailed discussion of the Court's application of Article 38 regarding fact-finding hearings.
[28] See e.g. *Tanrikulu v Turkey*, no. 23763/94, 8.7.99, paras. 71 and 98.
[29] Adopted on 7.7.03.

2.4 An overview of fact-finding carried out by the European Commission and European Court

Prior to the entry into force of Protocol No. 11 to the Convention in 1998, it was primarily the role of the European Commission of Human Rights to establish the facts of a case. The Commission would then make a finding as to whether those facts revealed a violation of the Convention (in its Article 31 Report on the merits), before the case was referred on to the European Court, or exceptionally, the Committee of Ministers. Under the pre-Protocol No. 11 regime,[30] the Court in a number of cases recognised that the establishment and verification of the facts was primarily a matter for the European Commission, although it retained its prerogative to assess the facts found in a different manner from the Commission and also to consider developments that had occurred after the Commission had carried out its fact-finding.[31] In most cases, however, the Court not only adopted the Commission's findings of facts, but also the evaluation of the evidence as expressed by the Commission in its reports.[32] It is fair to say therefore that the 'old' Court was more than reluctant to instigate investigative measures - in fact in only one case did the former Court itself hear a number of witnesses.[33]

There was a considerable expansion of the Convention system in the 1990s when the majority of central and eastern European countries joined the Council of Europe and ratified the Convention (there were 23 member states of the Council of Europe at the end of 1989 and 47 by 2008). Before the accession of the 'new' member states to the Council of Europe the facts underlying a Convention application were usually largely undisputed, since they had already been dealt with before the national courts, so that the cases essentially involved questions of law.[34] It has therefore been suggested that the change in the nature of the cases resulting from the enlargement of the Council of Europe would have the impact of increasing the frequency of the Court's fact-finding missions.[35] However, as our statistical analysis of the cases in which there have been fact-finding missions confirms below, this prediction has not been proven correct. As this report shows, since 1998 the new Court has conducted fact-finding missions in only a small number of cases. The reason for this is explored throughout this report, particularly in Chapter 3.

During the 1990s the former Commission had to undertake extensive fact-finding missions and thus in many cases could be said to have acted as a *de facto* court of first instance. This was particularly true with regard to a series of cases brought against Turkey. This research has established that the former Commission and the new Court held fact-finding hearings in 60 cases brought by individuals against Turkey since the mid-1990s, in both Strasbourg and Turkey.[36] These cases concerned human rights violations committed by the security forces in south-east Turkey (which had been declared a state of emergency region) including extrajudicial killings, 'disappearances', torture and the destruction of villages. In many of these cases there was a failure by the domestic authorities to carry out any form of effective investigation into the allegations and accordingly there was no finding of fact by any domestic court.

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30 The pre-1998 Rules of Court (Rule 43) contained certain provisions for fact-finding missions by the Court itself.

31 See e.g. *Stocké v Germany*, no. 11755/85, 19.3.91, para. 53; *Cruz Varas and Others v Sweden*, no. 15576/89, 20.3.91, para. 74; *McCann and Others v the United Kingdom*, no.18984/91, 27.9.95; *Aksoy v Turkey*, no. 21987/93, 18.12.96, paras. 38-40; *Chahal v UK*, no. 22414/93, 15.11.96, para. 95; *Ergi v Turkey*, no. 23818/94, 28.7.98, para. 64; *Klaas v Germany*, no. 5029/71, 22.9.93, para. 29; *Akdivar and Others v Turkey*, no. 21893/93, 16.9.96, para. 78; *Aydin v Turkey*, no. 23178/94, 25.9.97, para. 70; as to the Commission as "fact-finder", see also Marc W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials*, Oxford University Press, 2000, p. 29; David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Butterworths, 1995, p. 678.

32 See, e.g., *Tekin v Turkey*, no. 22496/93, 9.6.98, para. 42 - but see also the dissenting opinion of Judge Gölcüklü who criticised the Commission's finding as unfounded and consequently rejected the Court's reliance upon them. Another example is the case of *Stocké v Germany*, no. 11755/85, 19.3.91, paras. 52 *et seq.*, where the Court, referring to the Commission's findings, expressly rejected a request by the applicant to hear witnesses whom the Commission did not hear.

33 *Brozicek v Italy*, no. 10964/84, 19.12.89, para. 7; see also Frédéric Sudre, *Droit International et Européen des Droits de L'Homme*, 3rd Ed., Presses Universitaires de France, 1997, p. 329.

34 Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (124)

35 Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (124)

36 In total, Turkish cases make up 66% of all fact-finding cases in the history of the Convention system.

As the Court itself confirmed in the case of *Imakayeva v Russia* in 2006:

> When faced with the task of establishing the facts in these cases, the Convention bodies regularly undertook fact-finding missions for the purpose of taking depositions from witnesses, in addition to assessing the parties' observations and the documentary evidence submitted by them. Thus, even when presented with conflicting accounts of the events or with the Government's eventual lack of cooperation, the Court, and before it the Commission [of] Human Rights, could draw factual conclusions [based] on those first-hand testimonies, to which particular importance was attached.[37]

This research has established that the European Commission of Human Rights conducted fact-finding hearings in a total of 74 cases. The legal basis for this competence of the Commission was found in former Articles 28 and 31 of the Convention. Former Article 28(1)(a) stipulated that the Commission, when accepting a petition, should "with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and if need be, an investigation". The states concerned were obliged to "furnish all necessary facilities" to ensure the effective conduct of any investigation. The Commission's report on the merits of the case (under former Article 31) stated "the facts found" and set out the Commission's opinion as to whether the facts disclosed a breach by the state concerned of its obligations under the Convention.

Since the entry into force of Protocol No. 11 in 1998 the task of investigating, verifying and evaluating the evidence now rests with the Court. However, partly because of its heavy caseload, it has conducted fact-finding hearings and on-the-spot investigations in only a relatively small number of cases. This research has established that fact-finding missions have been carried out by the new Court in only 18 cases. This is, in part, a consequence of the transitional provisions of Protocol No. 11.[38] Article 5 of the amending Protocol provided that "applications already declared admissible should be finalised by members of the Commission under the former system..." within a time limit of one year. Applications which could not be completed during the one year period were to be examined by the Court under the new system.[39] Consequently, a significant number of cases decided by the 'new' Court are based on applications which were lodged before 1998 and in which the Commission had already conducted an investigation. In 46 cases, the 'new' Court, like the 'old' Court, based its judgments on the findings of the facts made by the former Commission.[40] In many of these judgments, the 'new' Court noted that the Commission had exercised its task of establishing and evaluating the facts with the necessary care and that after its review it could not find any reasons to conclude that the Commission had not observed the established principles of the Convention system.

For the purposes of this analysis the cases considered are divided into three categories. The first category comprises cases in which the fact-finding mission was carried out by the former Commission. The second category, referred to as the 'transitional' category, consists of cases in which the 'new' Court published its judgments in cases in which the findings of fact had been made by the former Commission. Finally, the third category comprises cases in which the fact-finding mission was conducted by the 'new' Court.

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37 *Imakayeva v Russia*, no. 7615/02, 9.11.06, para. 117.

38 Article 5 of Protocol No. 11.

39 *Ibid.*

40 See for example, *Taş v Turkey*, no. 24396/94, 14.11.00, para. 53; *Bilgin v Turkey*, no. 23819/94, 16.11.00, paras. 91-96; *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 69; *Kiliç v Turkey*, no. 22492/93, 28.3.00, para. 50; *Peers v Greece*, no. 28524/95, 19.4.01, para. 70; *Cyprus v Turkey*, no. 25781/94, 10.5.01, para. 120.

Chart 1: Cases according to the system (Commission or Court)

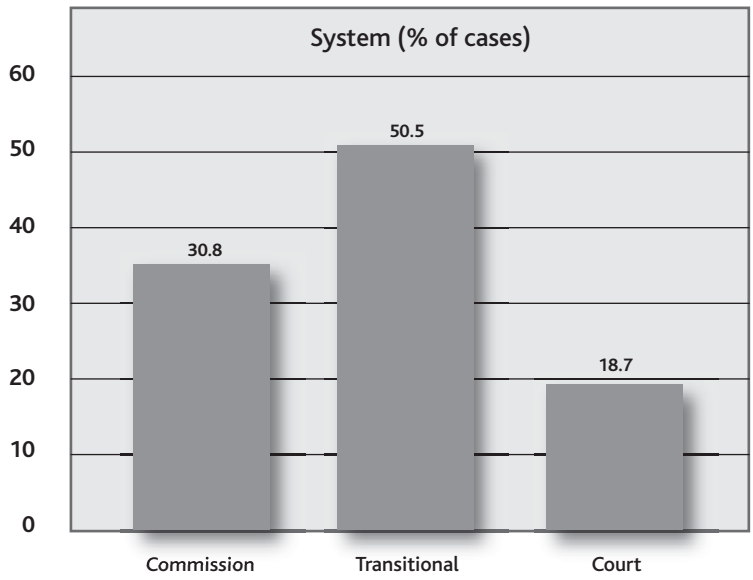


Chart 1 above shows that just over half of all cases involving fact-finding missions were delivered during the so-called transitional period. Of all the cases in which fact-finding missions took place, the former Commission dealt with 31% (or a total of 28) of them.

Our analysis has also shown (see Table 2 below) that the 'transitional cases' took almost twice the amount of time to be concluded (a mean of 2,824 days - just under 8 years) compared to those dealt with previously by the former Commission or subsequently by the new Court (on average, 1,336 – just over 3 ½ years - and 1,723 days – just over 4 ½ years - respectively).[41]

Between the three categories there is no significant statistical difference regarding the probability of there being a fact-finding hearing (as part of the fact-finding mission). However, as to the likelihood of on-the-spot investigations, a comparative analysis between the three categories suggests the following: the transitional category was far more likely not to hold on-the-spot investigations (only 13% of cases), while the 'new' Court category was more likely to have one (53% of the cases).[42] As regards the number of witnesses appearing in fact-finding hearings, the entry into force of Protocol No. 11 to the Convention had no statistically relevant effect whatsoever.

Table 2: Comparison between Commission, Court and transitional cases

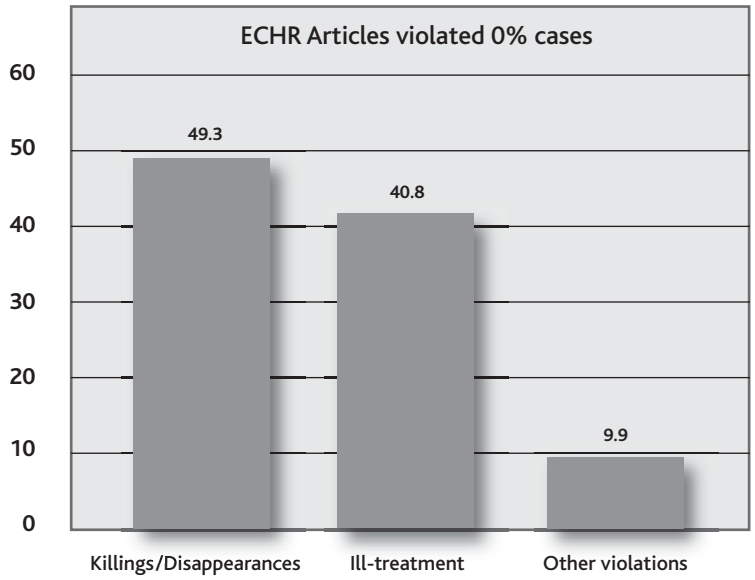
	Average length of cases (in days)***	FF Hearings (% of cases)	On-the-Spot investigations (% of cases)**	Average number of witnesses called
Comission	1,336	92.6	25.9	20
Transition Court	2,824 1,722	97.8 88.2	13.0 52.9	14 14

(Level of significance: *** =0.001, ** = 0.01, *=0.05)

[41] F(87,2)=45.981, p<.001.
[42] χ=10,744, p<.01.

As regards the eventual outcome of the cases, the findings of this research also show that in 71 of the cases in which a fact-finding mission took place, at least one violation of the Convention was found. Furthermore, in 8 cases, which involved fact-finding missions a friendly settlement was reached between the parties.[43] We also analysed the nature of the violations in these cases (see Chart 2 below). For the purposes of this research, cases featuring a violation of Article 2 of the Convention are referred to as 'Killings/Disappearances'. Cases in which a violation of Article 3 was found (without Article 2 also having been violated) are referred to as 'Ill-treatment' cases. Finally, cases without any violation of Articles 2 or 3, but in which other Articles of the Convention (or the Protocols) had been violated, are referred to as 'other violations'.

Chart 2: Articles of the ECHR violated



As Chart 2 shows, almost half of the 71 cases where a violation of the Convention was found, concerned a violation of Article 2 (Killings/Disappearances). A similarly significant percentage (41%) involved a violation of Article 3 (Ill-treatment), and in 10% of the cases there was a finding of other Convention Articles having been violated.

Table 3: Comparison between cases where different ECHR Articles were violated

	EU vs. non-EU cases**	Average length of cases (in days)***	FF Hearings (% of cases)	On-the-Spot investigations (% of cases)*	Average number of witnesses called
Killings Disappearances	0 vs. 35	2,637	100	5.7	14
Ill-treatment	7 vs. 22	2,174	93.1	34.5	16
Other	3 vs. 4	1,434	100	14.3	17

(Level of significance: *** =0.001, ** = 0.01, *=0.05)

[43] *Benzan v Croatia*, no. 62912/00, 8.11.02; *Cagirga v Turkey*, no. 21895/93, 7.7.95; *Mahmut Demir v Turkey*, no. 22280/93, 5.12.02; *France, Norway, Denmark, Sweden and The Netherlands v Turkey*, nos. 9940-9944/82, 6.12.83 (adm); *Haran v Turkey*, no. 25754/94, 26.3.02; *Hatami v Sweden*, no. 32448/96, 9.10.98; *Simon-Herold v Austria*, no. 4340/69, 19.12.72; *Siddik Yaşa v Turkey*, no. 22281/93, 27.6.02. Indeed, there is some evidence that holding a fact-finding mission might serve a collateral purpose of encouraging a friendly settlement between the parties. As noted in the Introduction to this report, as part of our research we visited the European Court in order to review a sample set of fact-finding case files. In a number of those cases, there was correspondence which indicated that settlement terms were being seriously considered at the time when the fact-finding hearing was being arranged or conducted.

Table 3, previous page, analyses the 71 cases in which fact-finding missions were held and in which at least one provision of the Convention was found to have been violated. The Table shows that in every case involving killings or disappearances (a violation of Article 2) the respondent state was not a member of the EU.[44] Seven of the 10 cases involving EU states concerned ill-treatment. In cases in which Articles 2 and 3 were violated, the proceedings before the Convention system took, on average, almost twice as long as those involving violations of other Articles.

2.5 The usual practice of the Court in conducting fact-finding missions

Once an application before the Court has been declared admissible, it is normally at that stage that the Court may then decide to undertake an investigation – if it is necessary.[45] The Court may decide to hold a fact-finding hearing of its own motion, but the parties can also request the Court to do so.[46]

If a party considers it necessary for the Court to conduct a fact-finding mission, it is possible to write to the Court after the admissibility decision has been taken, to provide reasons to justify why a fact-finding hearing is considered necessary. A list of proposed witnesses can be submitted to the Court, together with information about their relevance to the events in question. Any party making such a request to the Court would want to demonstrate that key witnesses were available to give evidence and that their evidence could be important in assisting the Court in establishing the facts. The Court has a discretion to decide to hear as a witness "any person whose evidence or statements seem likely to assist it in carrying out its tasks".[47] As well as the applicants, and eyewitnesses to relevant events, it is common in practice for the Court to hear a range of state officials, such as, depending upon the context of the case, public prosecutors, police officers and prison officials. Expert witnesses such as doctors who carried out medical examinations or autopsies can also be called to give evidence.[48]

The Court will inform the parties of its decision to take evidence, and may provide provisional dates for the mission. If not already provided, the Court will then require a brief outline or statement of the evidence, which it is anticipated each witness will give. The Court will provide a provisional list of witnesses after considering proposals from the parties as to the witnesses to be called. It may also request the parties to attend a pre-hearing (preparatory meeting) in Strasbourg in order to finalise the list of witnesses.[49] If held, such a preparatory hearing usually takes place before the delegation of judges who will conduct the full fact-finding hearing (together with the Section Registrar and Registry lawyers in attendance). At the pre-hearing the parties may be asked to confirm whether witnesses are still willing and able to attend the fact-finding hearing and there may be questions for the parties as to the evidence that witnesses are expected to provide.

The Court will provide a provisional timetable for the hearings and its list of witnesses and it will also provide witness summons to be served via the parties.[50]

At the hearing itself, the Court provides interpreters who will interpret from the national language into English and/or French and vice versa. The Court will usually require reasons to be given if any witness summoned does not attend. The hearings are usually conducted by a delegation of three (occasionally four) judges, with the Section Registrar and a Court Registry lawyer also in attendance. The head of the delegation of three judges will preside over the hearing. The head of the delegation may lead in questioning the witnesses, or other judges may be requested to do so.[51] For an 'applicant's witness', the applicant's representative will usually then be given the opportunity to question the witness, followed by the Government (with a 'state witness' the Government precedes the applicant). However, Court delegations do vary in the procedure they follow.

Following the hearing, the parties will receive the verbatim records of the hearing and may make corrections.[52] The verbatim record, once corrected, then constitutes certified matters of record.[53]

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44 This cross tabulation is not valid since 50% of cells have frequencies less than 5.
45 See article 38 (1)(a) of the Convention.
46 See Appendix 7, rule A1(1) of the annex to the Rules of the Court. For further commentary on the Court's practice, see: Philip Leach, *Taking a Case to the European Court of Human Rights*, 2nd Ed., Oxford University Press, 2005, pp. 65-71.
47 See Appendix 7, rule A1(1) of the annex to the Rules of the Court.
48 See Appendix 7, rules A1(1) and A1(2) of the annex to the Rules of the Court.
49 See Appendix 7, rule A4(2) of the annex to the Rules of the Court.
50 See Appendix 7, rule A5(1)(2) of the annex to the Rules of the Court.
51 See Appendix 7, rule A7(1) of the annex to the Rules of the Court.
52 See Appendix 7, rule A8(1)(2)(3) of the annex to the Rules of the Court.
53 See Appendix 7, rule A8(4) of the annex to the Rules of the Court.

2.6 The Inter-American and African human rights systems

As part of this research project, comparisons have been made with the fact-finding dimensions of the other regional human rights mechanisms - the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights.

Despite certain differences,[54] the strongest similarities with the European system of human rights protection, in terms of fact-finding missions, can be found in the Inter-American system. The Inter-American Commission and Court of Human Rights, both organs of the Organisation of American States (OAS), play a key role in the protection and promotion of human rights in North and South America. The two principal instruments at their disposal are the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969). The Inter-American Commission, located in Washington, DC, is a non-permanent body made up of seven independent expert Commissioners.[55] Its tasks include not only the examination of individual and state petitions, but also the general promotion of human rights as well as the production of reports on the human rights situation in OAS Member States. It is in this latter context that the Commission has frequently carried out on-site visits. This is a key difference to the European system, as the Inter-American Commission's in-country visits are usually carried out in order to examine allegations of systemic human rights violations within the target country.[56] However, as part of such visits, individual cases may be examined.[57] Indeed, the American Convention provides the Inter-American Commission with formal powers to carry out in loco investigations to verify the facts of an individual complaint.[58] On site investigations are carried out by a Special Commission appointed for that purpose.[59]

Established in 1979, the Inter-American Court of Human Rights, based in San José, Costa Rica, forms the second main pillar of human rights protection in the inter-American system. The Court consists of seven judges, nationals of OAS Member States. In accordance with Articles 62 and 64 of the American Convention, the Court has both contentious and advisory jurisdictions. Article 45 of its Rules of Procedure gives the Court ample powers to gather any additional evidence that it considers necessary. Those powers include hearing witnesses (including experts), requesting from the parties the production of certain evidence, requesting a report or opinion from a third party or commissioning its own Judges to hold a hearing at the seat of the Court or elsewhere. However, the Inter-American Court has in practice rarely utilised its fact-finding powers.

Similarly interesting from a comparative perspective is the African system for the protection of human rights. In 1987, the African Commission on Human and Peoples' Rights was set up – one year after the African Charter on Human and Peoples' Rights had entered into force. It is located in Banjul (in Gambia) and convenes twice a year (March/April and October/November). The African Commission has a very broad mandate in the area of human rights protection, which includes adjudicating on applications from States, as well as individuals or groups. The Commission has no authority, however, to issue legally binding decisions. This is one of the reasons for the establishment, in January 2006, of the African Court on Human and Peoples' Rights, comprising eleven judges elected by the African Union's General Assembly. The African Commission conducts fact-finding missions the purpose of which, however, is generally not to investigate an individual application, but rather to report on an overall human rights situation.

A schematic comparison conducted by Heyns, Padilla and Zwaak in 2005 found that while the African Commission had conducted a small number of fact-finding missions[60] and a larger number of promotional country visits, the Inter-American Commission had carried out 95 on-site fact-finding missions.[61]

In this report, where appropriate, we make reference to the fact-finding activities of both the Inter-American and African human rights systems.

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54 Proceedings before the Inter-American Court, for example, can be only taken by the Commission or by the OAS Member States that have accepted its jurisdiction. There is no possibility for individuals to directly lodge an application with the Court.

55 Despite the location of the Commission, the United States of America has not ratified the Convention.

56 See: Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, p. 398.

57 Dinah Shelton, *'The Inter-American Human Rights System' in Hurst Hannum (ed.), Guide to International Human Rights Practice*, 4th Ed., Transnational Publishers, 2005, pp. 127-141 (137).

58 See in particular Articles 41(f), 44-47 and 48(1)(d)&(e).

59 Article 51 of the Rules of Procedure of the Inter-American Commission on Human Rights.

60 Counts vary between 4, 5 and 10.

61 Christof Heyns, David Padilla and Leo Zwaak, 'A Schematic Comparison of Regional Human Rights System: An Update' *African Human Rights Law Journal* 5, 2005, pp. 308-320 (314).

2.7 Summary

(i) Where there are fundamental factual disputes between the parties, which cannot be resolved by considering the documents before it, the European Court of Human Rights is able to carry out hearings in order to establish the facts, and to conduct on-the-spot investigations.

(ii) The findings of this research show that fact-finding missions have been carried out by the European Commission or Court of Human Rights in a total of 92 cases, involving 16 states: Austria, Belgium, Croatia, Cyprus, Finland, Germany, Georgia, Russia, Greece, Italy, Lithuania, Moldova, Sweden, Turkey, Ukraine, and the United Kingdom. While fact-finding hearings have formed part of almost every fact-finding mission (93%), the conduct of on-the-spot investigations has been much more limited (24%). Occasionally, fact-finding missions have involved both fact-finding hearings and on-the-spot investigations (19%).

(iii) Prior to the entry into force of Protocol No. 11 to the Convention in 1998, it was primarily the role of the European Commission of Human Rights to establish the facts of a case. The European Commission of Human Rights conducted fact-finding hearings in a total of 74 cases. During the 1990s the Commission had to undertake extensive investigations and thus in many cases acted as a *de facto* court of first instance. This was particularly true with regard to a series of cases brought against Turkey.

(iv) The 'transitional cases' (pending cases which were concluded by the Commission within a year of Protocol No. 11 coming into force) took an average of just under 8 years to be concluded, compared to just over 3 ½ years for those dealt with previously by the former Commission or just over 4 ½ years for the cases dealt with by the new Court.

(v) Fact-finding missions have been carried out by the new Court in only 18 cases.

The following findings have been made about the cases which have involved fact-finding missions:

(vi) The cases have taken an average of almost 6 years to be processed by the Court (an average of about 3 ½ years for cases against EU states, and about 6 ½ years for cases against non-EU states).

(vii) Of the cases involving fact-finding missions where current EU members were the respondent states, on-the-spot investigations were held in 53% of them, whereas only 17% of the cases against non-EU states involved on-the-spot investigations.

(viii) The average number of witnesses who have appeared in fact-finding hearings is just over 15. On average, almost twice as many witnesses appeared in cases concerning EU states (24) compared to an average of only 13 witnesses in cases against non-EU states.

(ix) In 71 of the cases in which a fact-finding mission took place, at least one violation of the Convention was found. In 8 cases there was a friendly settlement.

(x) Almost half of the 71 cases where a violation of the Convention was found concerned a violation of Article 2 (49%); 41% involved ill-treatment, and in 10% of the cases there was a finding of a violation of other Convention Articles.

(xi) In every case involving killings or disappearances (amongst the 71 cases) the respondent was a non-EU member state.

(xii) Seven of the 10 cases in which fact-finding missions took place involving EU states concerned ill-treatment.

(xiii) In cases in which Articles 2 and 3 were violated, the proceedings took, on average, almost twice as long as those involving violations of other Articles.

Chapter 3

Fact-finding missions – when are they necessary?

3.1 Introduction

In spite of the significant decrease in the number of fact-finding missions which have been carried out by the Court since 1998, our respondents clearly considered that the missions are an important aspect of the procedure before the Court: 90% of the respondents to the questionnaire thought that in some cases fact-finding hearings are crucial in securing a fair judgment. Furthermore, 86% rejected the idea that a fact-finding hearing rarely assists the Court in deciding on the merits of a case. Similarly, 96% of the respondents disagreed that fact-finding missions are unnecessary *per se*. The vast majority of respondents (78%) were also convinced that fact-finding is more likely to be required in cases involving gross and systematic violations.

This research has shown that the procedure for instigating fact-finding hearings is considered to be rather nebulous. Indeed, over 60% of the respondents to the questionnaire expressed the view that more clarity is needed in this respect. Similarly, 56% did not consider that the Court has clear standards for assessing the available information and evidence in order to decide whether or not to hold a fact-finding hearing.

This chapter analyses the process undertaken by the Court in deciding whether or not a fact-finding mission should take place in a particular case. Firstly, we consider the procedural aspects (such as when, and by whom, the decision is taken). Secondly, we focus on the substantive dimensions of the decision, by considering the factors that are relevant to the decision.

3.2 Procedural aspects of the decision to hold a fact-finding mission

3.2.1 Timing

Issues of evidence – and therefore the need for fact-finding – can arise at any stage of European Court proceedings. It is, for example, not uncommon that oral hearings at the admissibility stage also involve a consideration of questions relating to the merits of the cases. Cases in which admissibility is in dispute may require further scrutiny of the facts at an early stage. Any perception, therefore, of fact-finding as being essentially a post-admissibility exercise is not strictly correct.

Nevertheless former Article 28(1)(a) of the Convention provided for fact-finding activities to be carried out by the Commission only "in the event of the Commission *accepting* a petition referred to it" (emphasis added). *Prima facie* this wording suggested that fact-finding missions were to be conducted exclusively after an admissibility decision had been taken. In practice, however, the Commission often asked the parties to submit relevant information or evidence prior to the admissibility decision.[1] Exceptionally, the Commission even conducted investigations at the pre-admissibility stage.[2] In *Sands v United Kingdom*,[3] for example, a Commission delegation visited Bobby Sands, a dying hunger striker, in the Maze prison in Northern Ireland, in order to find out whether he was willing to approve an application lodged by his sister (which he did not - the case was later struck out of the list). In *Ensslin, Baader, Raspe v Germany*[4] another pre-admissibility Commission delegation was sent to a German prison in Stuttgart-Stammheim in order to investigate the circumstances in which several inmates (members of the *Rote Armee Fraktion*) had died. This case in particular highlights the Commission's ability to respond swiftly when fact-finding was considered to be required. The delegation, led by a Vice-President of the Commission, began its on-the-spot investigation on the same day information about the deaths had become public.[5]

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1 Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (125 *et seq.*); Kersten Rogge, 'Fact-Finding' in *Ronald St. J. Macdonald, Franz Matscher and Herbert Petzold (eds.), The European System for the Protection of Human Rights*, Martinus Nijhoff Puiblishers, 1993, pp. 677-702 (687).

2 Stefan Trechsel, [Report on the former Article 28 ECHR] in *Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds.), La Convention Europeénne des Droits de L'Homme : Commentaire Article par Article*, 2nd Ed., Economica, 1999, pp. 649-659 (651).

3 *Sands v UK*, no. 93381/81 (unpublished).

4 *Ensslin, Baader, Raspe v Germany*, Nos. 7572/76, 7586/76 & 7587/76, 8.7.78.

5 Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (126).

Although the Convention itself did not explicitly provide the Commission with any fact-finding powers in the pre-admissibility phase, it was widely felt that as many relevant facts as possible had to be found and evaluated in order to arrive at an informed decision on the issue of admissibility. In view of the fact, in particular, that former Article 27(2) of the Convention allowed the Commission to declare inadmissible any manifestly ill-founded application, there was a general consensus that the complexity of a case (in terms of both factual and legal questions) needed to be assessed before the admissibility decision was taken.[6]

The potential significance of fact-finding problems in the pre-admissibility phase should not be underestimated. It is regrettable therefore that the 1998 reforms did not introduce more clarity in this respect. Article 38 (1)(a) of the Convention now reads as follows:

> If the Court declares the application admissible, it shall (a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation (…).

Again, this wording suggests that fact-finding missions take place only at the post-admissibility stage. The Explanatory Report to Protocol No. 11 (paragraphs 44 to 93) is silent as to the timing of fact-finding activities and merely confirms the general investigative competence of the Court. Rule 49(3)(a) of the Rules of Court, however, clearly permits pre-admissibility fact-finding, as the Rapporteur can request the parties at the pre-admissibility stage to submit further information about the facts in the form of documents or other material. The introduction in 2003 of the annex to the Rules of Court concerning investigations expressly acknowledges the occasional necessity of pre-admissibility fact-finding activities. According to Rule A1(3) the Chamber may appoint a fact-finding delegation "[A]fter a case has been declared admissible or, exceptionally, before the decision on admissibility…".

This research has established that the 'new' Court has conducted two fact-finding missions at the pre-admissibility stage. Both cases related to the conditions in which the applicants were being detained, for which on-the-spot investigations were deemed to be necessary. One case, *Kaja v Greece*,[7] concerned the conditions of the applicant's detention in the police detention centre in Larissa, prior to his deportation. The other case is recorded in our database as *Tekin Yildiz v Turkey*,[8] but was in fact one of a group of 53 similar cases in which the applicants had been imprisoned because of their membership of terrorist organisations. Their prison sentences had been suspended on medical grounds, as they were suffering from Wernicke-Korsakoff Syndrome as a result of their prolonged hunger strikes in prison (protesting against the use in Turkey of 'F-type' prisons). The judges who undertook the fact-finding mission were accompanied by a panel of medical experts whose task was to assess the medical fitness of the 53 applicants to serve their prison sentences.[9] In both cases the Court applied Article 29(3) of the Convention and combined the examination of the admissibility and the merits.[10] This provision was introduced as part of Protocol No. 11 in an effort to restructure and streamline the Convention machinery.[11] Both Article 29(3) of the Convention and Rule A1(3) of the annex to the Rules of Court make reference to the need for "exceptional circumstances" in order for the provisions to be applied.

3.2.2 How is the decision taken? The roles of the parties and the Court

(a) The relevance of parties' requests

The Court's decision to hold a fact-finding mission (or not to do so) is sovereign and unassailable. According to the clear wording of Rule A1(1) of the annex to the Rules of Court, it can be taken of its own motion, without there having been a request from either of the parties, and does not depend upon their consent. In contrast, the Inter-American Commission requires the consent of, or an invitation from, the

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6 Andrew Drzemczewski, 'Fact-Finding as Part of Effective Implementation: the Strasbourg Experience' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 115-136 (121); Stefan Trechsel, [Report on the former Article 28 ECHR] in *Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds.), La Convention Europeénne des Droits de L'Homme : Commentaire Article par Article*, 2nd Ed., Economica, 1999, pp. 649-659 (651).

7 *Kaja v Greece*, no. 32927/03, 27.7.06.

8 *Tekin Yildiz v Turkey*, no. 22913/04, 10.11.05.

9 *Ibid.*, para. 5.

10 Article 29(3) of the Convention reads as follows: "The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise."

11 See Article 1 of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

State concerned before undertaking a fact-finding mission.[12] In practice, states have often felt free to withhold such consent.[13] It has been argued that, in the African human rights system, fact-finding missions are unlikely to be conducted at all without at least one of the parties pressing for them.[14]

If an applicant's representative submits a request for a fact-finding mission to the European Court, according to 77% of the respondents to the questionnaire, it is crucial that they should clearly state the potential benefits of fact-finding in the particular case. Furthermore, more than half of the respondents considered a well-justified request for a fact-finding hearing from either of the parties' representatives to be an important element in the Court's decision-making. Registry Lawyer C decidedly supported this view:

> A very well prepared brief by the applicant's lawyer indicating or drawing similarities in past cases in which the Court had a fact-finding mission and the case at hand. (…)We do get requests sometimes from Turkish lawyers but because of a lack of experience they just simply say we are inviting the Court to come to Turkey and hear witnesses. So they don't say for example, the Court should come and hear these particular witnesses and because these particular people can potentially give evidence to the Court and reach the truth. Then we know whether the applicant's allegations are true. So if the Court receives requests like these the Court then will examine them more seriously and then of course it will still weigh the importance of it.

According to a majority of the respondents (51%), a party's request for a fact-finding hearing should not be considered without the presentation of a list of potential witnesses. This suggests that a list of witnesses should form an essential part of any such request in order for it to be seriously considered by the Court.

Although it is reasonably common for the parties to make requests to the Court that a fact-finding hearing be held, one commentator has argued that they can only be regarded as mere suggestions.[15] The Court may, and frequently does, reject any such initiative by a party, and without giving reasons. This occurred, for example, in the case of *McKerr v United Kingdom* where the applicant insisted that "[T]o the extent that the Court felt there were any issues to resolve, it should of its own motion obtain the necessary material by undertaking an investigation under Article 38(1)(a) of the Convention."[16] Nevertheless, the Court went on to decide the case on the merits without recourse to a fact-finding mission.

It is perhaps unsurprising therefore that the respondents' views, as to whether the Court should more frequently encourage the parties' representatives to submit requests for a fact-finding hearing, were rather inconclusive - 40% were against and 32% in favour of such an idea. This result suggests an interesting distinction in the perception of the Court's role in the decision. While some call for a more active role for the parties' representatives in the decision-making process, others are satisfied with the current *status quo*. This latter view is also supported by 66% of the respondents who considered that the parties' views should *not* be crucial for the Court in deciding whether or not to hold a fact-finding hearing. For them, the Court is still the appropriate forum, best equipped for identifying the need for, and potential of, a fact-finding mission in any given case.

Nevertheless, once a request for fact-finding has been made by one of the parties, the Court in practice at least considers the issue of fact-finding and may occasionally even give its reasons for rejecting it.[17] In *Stocké v Germany*, for example, the applicant had requested that the Commission should hear five particular witnesses, but four of them had not been heard by the Commission.[18] The Court ultimately agreed with the Commission's decision, invoking the Commission's primary responsibility for fact-finding and denying any further need to investigate the facts of the particular case.[19] In the case of *Colak v Germany*, concerned with

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12 Diego Rodríguez-Pinzón and Claudia Martin, *The Prohibition of Torture and Ill-treatment in the Inter-American Human Rights System: A Handbook for Victims and their Advocates*; OMCT Handbook Series 2, 2006, pp. 47; 91.

13 Douglass Cassel, 'Fact-Finding in the Inter-American System' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 105-114 (106 *et seq.*).

14 Rachel Murray, 'Evidence and Fact-Finding by the African Commission' in *Malcolm Evans and Rachel Murray (eds.), The African Charter on Human and Peoples' Rights*, 2nd Ed., Cambridge University Press, 2008, pp. 139-170 (145).

15 Jacques Vélu and Rusen Ergec, *La Convention Européenne des Droits de L'Homme*, Bruylant, 1990, p.1009, para. 1169.

16 *McKerr v The United Kingdom*, no. 28883/95, 4.8.01, para. 102.

17 Rebecca Schorm-Bernschütz, *Tatsachenfeststellung im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*; Juristische Schriftenreihe 237, 2004, p. 61.

18 While the delegate stated that the Commission had heard all the evidence needed for a decision, the Government raised objections against the requested witnesses (*Stocké v Germany*, no. 11755/85, 19.3.91, paras. 52).

19 *Stocké v Germany*, no. 11755/85, 19.3.91, paras. 53-54.

criminal proceedings in which the applicant had been charged with attempted homicide, the applicant claimed a violation of the right to a fair trial, and sought to challenge a conversation that had allegedly taken place outside the court room between the presiding judge and defence counsel. The Commission rejected the Government's request to conduct a fact-finding mission, concluding that a further investigation would not produce fresh evidence, especially because the presiding judge had stated that he had no recollection of the details of the conversation with the defence counsel.[20]

(b) The Court's decision-making process

According to Rule A1 (1) of the annex to the Rules of Court "[T]he Chamber may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case". Like any other Chamber decision, the decision on fact-finding requires a simple majority of the judges present.[21] Most respondents were generally supportive of the current *status quo* since they rejected the idea that the decision should instead be taken (a) by the President of the Chamber (82 %) or (b) by unanimous vote of the Chamber Judges (48%).

This research also places some emphasis on the practical dimensions of the decision-making process leading up to the Chamber decision. It appears that there is neither a systematic approach nor a common practice. Several interviewees suggested that the lack of procedural uniformity is a consequence, in part, of the decrease in the number of fact-finding missions in recent years and the resulting loss within the Court of relevant experience.

The Court Registry does not formally have a role in the decision-making process, as the Rules do not envisage the Registry making proposals to the Court. When discussing the matter of fact-finding for the first time during a session of one of the Court Sections, according to Judge D "the member of the Registry is a silent member, while the Judge Rapporteur is the one who really takes the initiative to propose things." Nevertheless, in practice 'behind the scenes', the suggestion as to a need for fact-finding often originates from within the Registry. Judge D acknowledged that

> [U]sually everything comes from the Registry. They have the file in their hands, they are the ones who think that they have inadequate information which does not allow them to conclude on a specific case, so probably most of the time they are the ones who propose to the Rapporteur the holding of a fact-finding.

The important role played in practice by the Registry was also emphasised by most Registrars and Registry Lawyers. For example, Registry Lawyer C suggested that it is the Registry Lawyer who, when dealing with the case, "because he is the first person to examine the file, properly realises that there is not enough evidence. Then the Registry Lawyer (…) talks (…) first to the Section Registrar perhaps and then to the Rapporteur and suggests that perhaps a fact-finding mission should be held. And then of course it is the Judge Rapporteur who proposes". At the same time the Rapporteur or "[M]embers of the Section can also suggest. Judges can say, look, we are not finding a violation because there is no evidence, but we can obtain such evidence perhaps if we hold a fact-finding mission. That's also possible."

This view suggests that there exists a certain 'trickle up' effect in the fact-finding decision-making: the first person to identify the need for fact-finding is often the Registry lawyer dealing with the case, who would then discuss the issue with the Section Registrar, but then it is the Judge Rapporteur who makes a formal proposal to the Chamber. Ultimately, then, the decision whether or not to hold a fact-finding hearing appears to be the result of complex interaction between various actors within the Court machinery. Indeed, Registrar C confirmed that "[I]t's teamwork: the Registry proposes, the Court decides."

Registrar C also highlighted the importance of the Judge Rapporteur's role as an intermediary between the Registry and Court:

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[20] *Colak v Germany*, no. 9999/82, 6.10.87, para. 148.
[21] Rule 23(1) of the Rules of Court.

So it's not the Registry Lawyer who can decide anything. They can certainly take the initiative and make a proposal to the Judge Rapporteur. And if you can get the Judge Rapporteur on board, then you put the proposal to the Chamber and the Chamber then discusses it. That's much stronger now in the 'new' Court than it was in the Commission (…) that it's the Judge Rapporteur who takes much more responsibility for the case. (…) And it's the Judge Rapporteur who takes the floor in the Chamber, not the Registry. The Registry is a silent pillar of legal knowledge in the actual deliberations.

(c) Right to fact-find — Duty to fact-find?

Where, in a particular case, there is a clear indication of the need for a fact-finding mission to be held, it is arguable that the Court's right to initiate fact-finding missions then turns into a legal obligation to do so. The wording of Article 38 (1)(a) of the Convention ("shall (…) if need be") and of Rule A1(1) of the annex to the Rules of Court ("may") might suggest that the decision on fact-finding entirely lies within the discretion of the Court. This interpretation would, however, be too narrow. Admittedly, the Convention system does not contain a provision equivalent to Article 53(2) of the ICJ-Statute according to which "[t]he Court must (…) satisfy itself (…) that the claim is well founded *in fact* and law (emphasis added)." Article 19 of the Convention obliges the Court "to ensure the observance of the engagements undertaken by the High Contracting Parties", which requires the comprehensive scrutiny of each application's admissibility and merits. If, therefore, the Court deems it necessary to hold a fact-finding mission because the facts cannot be established based on the parties' written submissions alone, it is arguable that it *must* then proceed with it, in order to be in line with its obligations under the Convention.[22]

3.3 The factors relevant to the decision to hold a fact-finding mission

This section analyses the substantive dimension to the decision to carry out a fact-finding mission. It is certainly not possible to identify one single decisive criterion leading the Court to decide for, or against, fact-finding. The decision itself is influenced by an amalgamation of factors that are directly related to the particular case and other factors, which are not directly related to the case in question. According to Judge B, in making such decisions, the Court largely relies upon instinct and experience. This absence of a clear position as to why, or when, the Court decides to initiate a fact-finding mission in one case and not in another, seems also to apply to the other regional human rights protection systems. One commentator has suggested that it is rather difficult to explain why the African Commission on Human Rights decides to visit one country and not another. Murray has argued that most fact-finding missions by the African Commission had "been prompted […] by recent events and lobbying by NGOs".[23] It should be remembered, however, that the general function of fact-finding within the African system is rather different to the European practice. Fact-finding missions are usually conducted "in order to try and settle matters amicably",[24] "to bring an end to the situation"[25] and "not to decide whether what was encountered was wrong or right, but above all, to listen to all sides with the objective of bringing clarification to the Commission in its contribution to the search for an equitable solution through dialogue."[26]

3.3.1 Case-related factors

According to Rule A1(1) of the annex to the Rules of Court the Chamber "may adopt any investigative measures which it considers capable of clarifying the facts of the case" and "decide to hear (…) any person whose evidence or statements seem likely to assist it in carrying out its task." The absence of clear facts, which are indispensable for the determination of the case, is therefore the *sine qua non* for a fact-finding hearing; their establishment being the main aim of fact-finding. This position was confirmed not only by the interviewees, but also by 69% of the respondents to the questionnaire, who took the view that fact-finding

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22 Rebecca Schorm-Bernschütz, *Tatsachenfeststellung im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte*, Juristische Schriftenreihe 237, 2004, pp. 60-61.

23 Rachel Murray, 'Evidence and Fact-Finding by the African Commission' in *Malcolm Evans and Rachel Murray (eds.), The African Charter on Human and Peoples' Rights*, 2nd Ed., Cambridge University Press, 2008, pp. 139-170 (146).

24 African Commission on Human and Peoples' Rights, Mauritius Plan of Action 1996-2001, April 1999, para. 38.

25 Ibid. p. 4.

26 Ibid. p. 6.

should only take place when there are fundamental factual disputes between the parties, which cannot be resolved by considering the available documents.

Aside from the general consensus about this basic precondition for the need for fact-finding, there is a lack of clarity about the other distinct factors shaping the decision. However, the case-related factors most often referred to in the interviews were: the nature or seriousness of the case; the insufficiency of attempts made within the national system to fully establish the facts; a *prima facie* view that the allegations made by the applicant could be true and that there were real prospects that a fact-finding hearing could be successful in establishing the facts; and the passage of time.

(a) The nature or seriousness of the case

This research has clearly established that most of the fact-finding missions have been undertaken in the context of cases alleging particularly 'serious' Convention violations. Both before and after the introduction of Protocol No. 11 cases raising issues under Article 2 (right to life) and Article 3 (prohibition of torture) predominate. Thus, 49% of the cases in which fact-finding missions were held concerned 'Killings/Disappearances', while 41% dealt with alleged 'Ill-treatment'.[27] The 'seriousness' of the human rights violations alleged also seems to be the main criterion in the fact-finding decision-making of the African Commission on Human Rights.[28]

According to Judge B the "concentration has intentionally been on Articles 2 and 3." Judge C had a similar view:

> [N]ormally the hearings were restricted to what you may call serious cases. Typically some operations by Turkish security forces in South Eastern Turkey, the average violation of human rights concerned very serious violations. Yes, you may say, Article 2 and 3. (…) Normally there was something that hinted [at] a violation of Articles 2 or 3 or created suspicion of such a violation.

An essentially identical position is to be found within the Registry. Thus, Registrar A stated that one factor was the "seriousness of allegations, and I think we talk in terms of Articles 2 and 3 of the Convention."

It is perhaps unsurprising that the respondents to the questionnaire had similar views. When asked whether, as a priority, fact-finding hearings should be held in cases concerning Articles 2 or 3 of the Convention the vast majority (71% and 73% respectively) responded in the affirmative.

Nevertheless, questions do arise as to how cases can be categorised as being 'serious' enough to justify a fact-finding mission. Of course, the Court can, and does, hold missions in cases concerning Articles of the Convention other than Articles 2 and 3. Indeed, Registrar A argued that "it's probably wrong just to limit fact-finding to complaints under Articles 2 and 3" and that it might also "be necessary, for example if there is an allegation of a practice of censorship or practice of failing to respect fair trial guarantees, for example." There may, therefore, be compelling arguments to make in favour of a fact-finding mission where there is evidence of Convention violations being carried out systematically, or where the violations have a systemic cause. Thus, fact-finding missions could be an important aspect of the Court's handling of cases considered to be suitable for pilot judgments.[29]

(b) Shortcomings of the national system in establishing the facts

According to the principle of subsidiarity, the Court (like the former Commission) primarily relies on the facts as established by the national authorities and courts. The Court has repeatedly held that, being closer to the concrete case and the applicable law, and as well as having had direct contact with witnesses, national courts are generally in a better position than the European Court to investigate and assess the facts and thus

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[27] See Chapter 2 where these terms are defined.

[28] Rachel Murray, 'On-Site Visits by the African Commission on Human and Peoples' Rights: A Case Study and Comparison with the Inter-American Commission on Human Rights' *African Journal of International and Comparative Law* 11, 1999, pp. 460-473.

[29] See, inter alia, Lech Garlicki, 'Broniowski and after: on the dual nature of "pilot judgments"' in *Lucius Caflisch et al. (eds.), Liber Amicorum Luzius Wildhaber: Human Rights - Strasbourg Views = Droits de l'homme - Regards de Strasbourg*, N.P. Engel, 2007, pp. 177-192; Costas Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home' *International Journal of Human Rights* 12, 2008, pp. 415-448.

ensure the effective application of the Convention.[30] However, where national authorities fail to fully establish the relevant facts of the case, this may be another important factor influencing the Court's decision as to the need for a fact-finding hearing.

It should be emphasised that such failings within the national system will often form part of the substantive element of the case before the European Court. The former Commission held many fact-finding missions in Turkish cases where there were domestic proceedings still pending against the alleged perpetrators (these were criminal proceedings which had terminated, at first instance at least, by the time the Court examined the applications). In those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective.[31] In contrast, the Court reiterated its position on subsidiarity in the case of *McKerr v United Kingdom*, concerning the fatal shooting by the police in Northern Ireland of Gervaise McKerr, and where there were still ongoing domestic proceedings. There, the Court considered,

> that in the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact-finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact-finding tribunals.[32]

Reiterating this complementary role of the Strasbourg Court *vis-à-vis* the Member States, Registrar C acknowledged that

> [I]n a way we resented to go in and fact find, because this is what the national authorities should be doing. But we have come across cases where there are domestic situations without sufficient investigation structures (…), so they were not going to look at allegations of torture.

More than half of the respondents to the questionnaire (58%) agreed that fact-finding hearings are more likely to be held when the Court considers that there is a *systematic* failure in the functioning of the domestic courts. Registry Lawyer D commented that where there were domestic findings of fact, which were "not very useful in general" or which "could not be regarded as reliable sources of evidence", this would increase the likelihood of the need for a fact-finding mission by the Court. In the same vein, Judge C stated that the Court stepped in

> when the fact-finding as conducted on the national level seemed to be unsatisfactory and something not to be relied on. (…) [V]ery often the situation was such that a complaint in a case, which *prima facie* seems to reveal some serious violation of human rights had not really led to any effective measures by the public prosecutor in the relevant area. So there was the need to establish facts and there were legitimate reasons to depart from the general principle, which is that you rely on the facts as established by national authorities and national courts.

It is therefore very clear that a failure to carry out adequate fact-finding at the domestic level is a significant factor taken into account by the Court. Indeed, the responses to the questionnaire indicate that 60% support the view that the decision whether to hold a fact-finding hearing greatly depends on the Court's assessment of the role played by the domestic courts in the particular case. Registrar A also underlined as an important aspect "the extent to which domestic authorities have tried to unravel what happened to the applicant or to the applicants, whether or not the dossier is more or less complete because we have well reasoned domestic decisions of prosecutors and domestic courts." According to Registrar A, fact-finding would be initiated if "there had been no attempt to uncover the facts or the facts were lacking or if the domestic courts' or the prosecutors' approach to the complaints was seriously deficient, and if the finding was particularly weak, and if the only option for the Court to find out what actually happened and to reach a decision was to take evidence."

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[30] See, e.g., *Edwards v United Kingdom*, no. 13071/87, 16.12.92, para. 34; *Vidal v Belgium*, no. 12351/86, 22.4.92, para. 33; *Klaas v Germany*, no. 5029/71, 22.9.93, para. 29.

[31] See, e.g., *Salman v Turkey*, no. 21986/93, 27.6.00, para. 107, where the police officers were acquitted of torture due to the lack of evidence resulting principally from a defective autopsy procedure; *Gül v Turkey*, no. 22676/93, 14.12.00, para. 89, where, *inter alia*, the forensic investigation at the scene and autopsy procedures hampered any effective reconstruction of events.

[32] *McKerr v The United Kingdom*, no. 28883/95, 4.05.01, para 117.

(c) Prospects of a successful fact-finding mission

If, on an initial review of the available evidence in a case, the Court takes the view that a fact-finding hearing might indeed lead to the establishment of a violation of the Convention, this is another important factor in the decision-making process. According to Judge C the Court must satisfy itself that there is "a kind of *prima facie* case, some *prima facie* suspicions that the allegations of the violation could be true." More than that though, it appears that the Court also needs to form a view that fact-finding could be successful and could help it in the establishment of the facts, so that it would then be in a better position to make a decision on the merits of the case. According to Judge B the decision "depended really on whether we thought that the circumstances were such that a fact-finding mission would actually help". Similarly, for Judge D the extent to which "there is a possibility of clarifying the facts through the fact-finding" was considered to be "of primary importance". Similarly, nearly 66% of the respondents to the questionnaire considered the anticipated relevance of witnesses' testimony to be the most influential factor in the Court's decision-making.

However, in contrast, where there is a manifest denial of responsibility by a Government, the Court may then dismiss the possibility of conducting a fact-finding mission at all. The case of *Imakayeva v Russia*[33], concerning enforced 'disappearances' in Chechnya, confirmed this line of thinking. In a number of the previous applications relating to serious human rights violations in Chechnya, where the facts were disputed, the Government had provided the Court with the necessary documentary evidence from the criminal investigation files, which then served as a basis for the judgments.[34] In *Imakayeva*, however, the Court was faced with a different situation:

> The applicant presents very serious allegations, supported by the evidence collected by her. The Government refused to disclose any documents, which could shed light on the fate of the applicant's son and husband and did not present any plausible explanation concerning their alleged detention or subsequent fate. In view of this patent denial of cooperation, the Court is obliged to take a decision on the facts of the case with the materials available.[35]

An important issue that was raised in the course of the research was the distinction between *substantive* and *procedural* findings of a violation of either Article 2 or Article 3. For example, the Court will reach a finding of a substantive violation of Article 2, if it is able to conclude that the state is in some way responsible for depriving a person of their life.[36] It may also reach a quite separate finding of a violation of Article 2 if there has been a failure on the part of the domestic authorities adequately to investigate the fatality in question (aside from the issue as to how the death was caused).[37] On the basis of an examination of the available case papers, it is frequently possible for the Court to reach a conclusion as to the adequacy, or otherwise, of a domestic investigation into a killing (and hence reach a finding as to a procedural violation of Article 2). It may be rather more difficult, on the papers alone, to make a finding as to whether or not there has been a substantive violation of Article 2. Therefore, a key question that was considered in the course of this research was to what extent the decision to undertake a fact-finding mission is influenced by the prospects of being able to make a finding of a *substantive* violation of the Convention.

The figures show a remarkably high success rate in reaching a finding of a substantive Convention violation. An analysis of the 33 'Killings/Disappearances'[38] cases in which Article 2 was found to have been violated reveals that a substantive violation was found in 24 cases (73%), and there was a procedural violation of Article 2 in 28 cases (85%). Of the 31 'Ill-treatment'[39] cases in which Article 3 was found to have been violated, there was a substantive violation in 29 cases (94%), and a procedural violation in just 3 cases (10%).[40]

This research has confirmed that the Court's evaluation of the prospects of establishing a substantive violation of the Convention will be a significant aspect of the decision-making process. Judge C stated that "nowadays it is very unlikely that you would go for a fact-finding just in order to find out whether there has

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33 *Imakayeva v Russia*, no. 7615/02, 9.11.06.

34 See e.g. *Khashiyev and Akayeva v Russia*, nos. 57942/00 and 57945/00, 24.2.05, paras. 138-139.

35 *Imakayeva v Russia*, no. 7615/02, 9.11.06, para. 119.

36 See e.g. *Aktaş v Turkey*, no. 24351/94, 24.4.03 and *Çiçek v Turkey*, no. 25704/94, 27.2.01.

37 See e.g. *Tepe v Turkey*, no. 27244/95, 9.5.03 and *Tanrikulu v Turkey*, no. 23763/94, 8.7.99.

38 For the purposes of this research, cases featuring a violation of Article 2 of the Convention are referred to as 'Killings/Disappearances' (see chapter 2).

39 For the purposes of this research, cases in which a violation of Article 3 was found (without Article 2 also having been violated) are referred to as 'Ill-treatment' cases (see chapter 2).

40 This rate of 10% in 'Ill-treatment' cases is surprisingly low – perhaps suggesting that the focus of the Court was very much on the possibility of establishing a substantive violation.

been a procedural violation". Judge C also said that if "the old fact-findings only led to a procedural violation (…) even then very often there was some indication that you might be able to establish a substantive violation".

Some interviewees acknowledged that the current Court, rather than holding fact-finding missions, had a tendency to find procedural violations, in order to save time and costs, when there was insufficient evidence to find a substantive violation, or where the evidence was held by the state. Registry Lawyer C suggested that:

> [U]nfortunately, the Court does that sometimes as compensation to the applicant. We don't have enough evidence, we know we can't have this evidence because it is in the hands of the state but we cannot go [to a country] each time there is no evidence. We have thousands of similar cases so each fact-finding mission costs tens of thousands of euros and a lot of time. We don't have the time or the money to hold fact-finding missions in each and every case and therefore we find a procedural violation.

Judge D, however, argued that the finding of a procedural violation should not be downplayed, and rejected any great distinction between procedural and substantive violations: "procedural violations do not necessarily mean procedural violations, properly speaking, in the sense that we consider that there is a responsibility of the state because of the inadequacy of investigation. But it also in a way implies in most of the cases that procedural violation denotes a responsibility of the state entering into the field of substantive violation".

(d) The passage of time

Another important factor which is taken into account by the Court in its decision whether or not to conduct a fact-finding mission, is the amount of time which has elapsed since the events in question took place. In the words of Judge D,

> a lapse of time of 9-10 years (…) makes any fact-finding prohibitive in the sense that it will be almost impossible for us to have any kind of meaningful examination of the case through the fact-finding and so we simply say we should content ourselves with what we have in our hands. Let's, say, make some effort to have written observations or even a hearing instead of fact-finding.

Judge E considered that as fact-finding missions frequently took place several years after the events, that meant they were less credible, more difficult to arrange and more open to manipulation. Judge B expressed a similar point of view:

> [W]e still have a backlog of cases dating back to the 1990s, I am sorry to say, and there the major element now is: can we really justify holding a fact-finding mission where the events date back to 1994, 1995, 1996? Are we likely to get anywhere with it? And consequently, in cases of killings we are now more likely to say: 'We will just have to be satisfied with a procedural violation rather than a substantive one.' It is not satisfactory, but I am afraid it is the reality. And it is true that it does become very much more difficult to conduct a satisfactory investigation some years after the event.

One of the cases from south-east Turkey in which there was no fact-finding mission was *Matyar v Turkey*, in which the applicant alleged that his house and other property had been destroyed by the security forces during an armed attack on his village.[41] Although the facts were disputed by the parties, the Court held:

> Having regard however to the length of time which had elapsed since those events and the nature of the documentary material submitted by the parties, the Court decided that a fact finding investigation, involving the hearing of witnesses, would not effectively assist in resolving the issues. It has proceeded to examine the applicant's complaints on the basis of the written submissions and documents provided by the parties.[42]

The Court found no violation of the Convention in *Matyar*:

> the evidence has not made it possible to reach any findings as to when the applicant's house was destroyed and by whom, or at what time he ceased living there and in what circumstances.[43]

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41 *Matyar v Turkey*, no. 23423/94, 21.2.02.
42 Ibid. para. 7.
43 Ibid. para. 145.

Nevertheless, in spite of the thinking within the Court about the impact of the passage of time, almost two thirds (65%) of the respondents did not agree that holding a fact-finding hearing was worthless if it took place several years after the incident in question. This would suggest that despite the problems which may arise in holding fact-finding missions some years after the events in question, the Court should not rule out holding such missions solely on this ground. Of course, most of the fact-finding missions which have been conducted by the Commission or Court took place several years after the events at issue.

A number of interviewees put forward the case of *Ilaşcu* as a good illustration of the Court's current thinking as regards the fact-finding decision-making process. For Judge B the importance of having had a fact-finding mission in that case was crystal-clear: "My own view very strongly is that where you have a case such as we had to decide in the *Ilaşcu* case, without taking evidence as to (….) whether Russia or Moldova both had responsibility for what had happened and was continuing to happen in Transnistria, I think it would have been crazy for the Court to reach a conclusion without taking evidence."

3.3.2 General factors unrelated to the specific case

(a) Time and cost

It is evident that in a number of cases where the question of a fact-finding mission arises, the Court makes the decision not to undertake a mission. To what extent do the problems currently facing the Court, notably its excessive backlog of cases (96,550 cases pending on 30 November 2008[44]) impinge upon this decision? Despite its arguably crucial role for the applicants in some cases, in securing redress from the Convention system, it does have to be acknowledged that the fact-finding hearing process is undoubtedly expensive and time-consuming for the Court.

According to Judge A, fact-finding missions by the Commission

> …used to cost about £60,000. They would no doubt be much more expensive now. And they also are a drain on resources, unquestionably… with the way… Sections are structured, it would mean effectively – certainly if you carry out a week-long mission – that you would have to basically abandon the Section meeting for that week (…) and it undoubtedly would be draining on the physical resources of the Court – quite apart from the expense.

Indeed the issues of cost and time for the Court appear to have more of a bearing on the decision to conduct a fact-finding hearing now, than was the case in the 1990s. For example, Judge C suggested that "nowadays the costs of the mission play a more important role". According to Judge C "in the first half of the 90s, when this fact-finding activity really started, I do not think we worried so much about the costs – but they certainly play a role today". The respondents to the questionnaire were divided as to whether financial considerations *should* be taken into consideration when deciding if a fact-finding hearing should be held (49% against - 31% in favour).

This research has shown that, for some within the Court, the increase in the Court's caseload and the consequential length of proceedings before the Court have meant that it is not practicable to carry out fact-finding hearings in all cases where to do so would be justified. Judge E suggested there was an interesting division of views within the Court: that the Judges made fact-finding decisions generally based only on the case itself, and that (only) the Registry voiced concerns about time and cost. Such a dichotomy was not, however, borne out by our findings. Indeed, it does seem very unlikely that Judges are so insulated from the practical considerations - after many years of debate about institutional reforms in Strasbourg, the Judges will be only too aware of the budgetary constraints that the Court faces. Only one interviewee, Registry Lawyer D, strongly disagreed with the notion that cost and time influences the decision-making process at all, arguing that "these are things that we budget for". Instead, Registry Lawyer D suggested that in quite a number of cases it was the hostility and evasiveness of respondent Governments, which had a negative influence on the fact-finding decision.

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[44] See European Court of Human Rights, Statistics 1.1.-30.11.2008, available at: http://www.echr.coe.int/NR/rdonlyres/A63F2A14-2C68-41F3-BFEF-49D3BF9D8C63/0/Statistics2008.pdf

In spite of any concerns there may be about time and expenses incurred, the respondents to the questionnaire indicated clear support for fact-finding: 83% disagreed with the statement that fact-finding hearings only contribute to further increasing the Court's case backlog. More significantly, the vast majority of the respondents (92%) disagreed with the idea that the costs involved in holding fact-finding hearings are not justified, when considering the possible benefits which may result from them.

(b) A presumption against fact-finding?

Beyond the impact of time and costs, this research also attempted to clarify whether there now exists a more general presumption *against* fact-finding within the Court. Registrar B seemed to confirm this analysis – in identifying a greater willingness within the Court to decide the case without a fact-finding hearing. Registrar B also described a culture within the Court which is not fact-finding friendly: "The last fact-finding that we had was a fact-finding into a prison in Ukraine. And before that? If you put all this on a map … [it] graphically illustrates the tendency."

Member of the Commission A, on the other hand suggested that, while there may be different views within the Court as to the value of fact-finding *per se*, there is no outright presumption against it. Member of the Commission A attributed the widespread scepticism to a certain extent to the Continental law background of some elements within the Court: "(…) I think the Anglo-Saxon system (…) places far too much emphasis on witnesses which are considered to be the most unreliable evidence in practically all continental proceedings. Documentary evidence and also evidence concerning a construction of facts by indications which leave no other answer is frequently seen as much more reliable."

Some of the interviewees clearly rejected any suggestion of the existence of a presumption against, or even certain scepticism towards, fact-finding. For example, Judge A and Applicant Lawyer G argued that the Court continues to carry out fact-finding whenever it is considered necessary. Judge A stated: "If we need to go, we go" – regardless of the caseload and other problems.

(c) Pedagogical function

Several interviewees suggested that the decision to initiate a fact-finding mission in a particular case could also be motivated, in part, by pedagogical intentions. Registrar B explained that this pedagogical dimension of fact-finding serves "the secondary purpose of engaging the attention of a lot of officials and in that way it is informing them about the Convention". Thus, this pedagogical function will be most relevant to the newer member states. This position was also supported by Registrar B who suggested that fact-finding was less likely if there had already been a mission to the same country in a similar type of case.

This would suggest that if an individual application relates to a problem in a newer member state that has not previously been considered by the Court, there is a greater chance of the Court holding a fact-finding mission. This factor would seem to go 'against the grain' of the Court providing a mechanism for the adjudication of individual cases (it is more in line with the notion of the European Court as providing a 'constitutional court' function). In any event, there is evidently a strong perception that personally exposing state representatives to the workings of the Court, and the principles of the Convention, through the holding of an in-country hearing, does have a positive effect. How far that goes may well depend upon the seniority of state officials involved, and the functions which they carry out. The extent to which a case receives publicity may be another important factor – while the hearings themselves are not open to the media, or the public, simply the fact that the hearing is taking place may in itself generate considerable media interest.

(d) Subsidiarity

In recognition of the principle of subsidiarity, fact-finding missions by the Court are by their very nature the exception rather than the rule – and always have been. What is more, any overly proactive approach in terms of the Court's fact-finding therefore seems not only highly unlikely, but would in fact be diametrically opposed to one of the core principles of the Convention.

The post-Protocol 11 Court indeed seems to have developed a certain tendency to invoke its subsidiary role as an argument (unrelated to the particular case) for not holding fact-finding missions. As noted above, one example is *McKerr v United Kingdom*,[45] where the Court stated that in the circumstances of the case it would be inappropriate, and in conflict with its subsidiary role under the Convention, even to attempt to conduct an investigation of its own and hear witnesses. It was said that to do so would merely replicate the proceedings before the civil courts, which were better equipped *per se* to act as fact-finding bodies.[46] This approach has been reiterated in a number of subsequent cases in which the Court has stated that "it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of facts, where this is not rendered unavoidable by the circumstances of a particular case."[47]

Although this strategy may be understandable to a certain extent in light of its vast and continuously growing backlog of cases, it is highly likely that because of particularly difficult situations and problems which will arise in the future within the *espace juridique* of the Council of Europe, the Court may again become more active in conducting fact-finding missions. Indeed, Judge Zupančič predicted as much in the course of his dissenting opinion in *Rehbock v Slovenia*:

> …in the future, owing to the impact of Protocol 11, such cases are going to recur. There is no Commission to perform the essential fact-finding function of the Court. It follows logically that the Court will have to adapt to this new situation. It will have to allow for situations in which, as in this case, its own hearings will be akin to first-instance hearings before national courts. The Court will have to hear witnesses, permit the cross-examination of hostile witnesses, directly examine evidence and evaluate material evidence, etc. The Court will have to establish its own evidentiary rules pertaining to the burden of proof, the risk of non-persuasion, the principle in *dubio pro reo*, etc.[48]

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45 *McKerr v The United Kingdom*, no. 28883/95, 4.8.01.

46 *McKerr v The United Kingdom*, no. 28883/95, 4.8.01, para. 117 *et seq.*

47 *Yüksel Erdoğan and Others v Turkey*, no. 57049/00, 15.02.07, para. 87; *Buldan v Turkey*, no. 28298/95, 20.4.04, para. 76; *Ağdaş v Turkey*, no. 34592/97, 27.7.04, para. 91.

48 *Rehbock v Slovenia*, no. 29462/95, 28.11.00, dissenting opinion of Judge Zupančič.

3.4 Conclusions

This research has shown that a very large majority of respondents consider fact-finding missions to be an important aspect of the procedure before the Court. The Court's decision whether or not to conduct a fact-finding mission in a particular case is determined by a complex amalgamation of both case-related and non-case related factors.

These are the main findings as to when fact-finding missions are considered necessary:

(i) While most fact-finding missions take place post-admissibility, they may exceptionally be held before a decision on admissibility has been made.

(ii) A well-justified request for a fact-finding hearing submitted by a party may have considerable influence on the Court's decision-making process.

(iii) A list of witnesses (including information about the relevance of their expected testimony) is an essential part of a well-argued request for a fact-finding mission.

(iv) The absence of clear facts, which are indispensable for the determination of the case, is the *sine qua non* for a fact-finding hearing.

(v) Where national authorities fail to fully establish the relevant facts of a case, this may be an important factor influencing the Court's decision as to the need for a fact-finding hearing. Fact-finding hearings are more likely to be held when the Court assesses that there is a *systematic* failure in the functioning of the domestic courts.

(vi) Where the Court can discern reasonable prospects that a fact-finding hearing might lead to the establishment of a violation of the Convention, this is another important factor in the decision-making process.

(vii) 90% of the cases in which there have been fact-findings hearings or on-the-spot investigations have concerned 'Killings/Disappearances' or 'Ill-treatment' cases.

(viii) The Court's evaluation of the likelihood of establishing a substantive violation of the Convention, as opposed to merely a *procedural* violation (e.g. of Article 2) will be a significant aspect in the decision-making process.

(ix) There has been a high success rate in reaching a finding of a substantive Convention violation, following a fact-finding mission: in 73% of 'Killings/Disappearances' cases and 94% of 'Ill-treatment' cases.

(x) A Government's effective denial of cooperation in a case will be a considerable disincentive for the Court to hold a fact-finding mission.

(xi) Another important factor taken into account by the Court in its decision whether or not to conduct a fact-finding mission is the amount of time which has elapsed since the events in question took place. However, despite the practical problems which may arise in fact-finding missions being held some years after the events in question, the Court should nevertheless not rule out holding such missions on this ground alone.

(xii) The Court has shown a more recent tendency not to carry out fact-finding missions, but to find procedural violations, in order to save time and costs. Cost and time factors act as considerable disincentives. The increase in the Court's caseload and the consequential length of proceedings before the Court have led to the conclusion that it is not practicable to carry out fact-finding hearings in all cases where they could otherwise be justified.

(xiii) 92% of respondents did *not* agree with the idea that the costs involved in holding fact-finding hearings are not justified, when considering the potential benefits of such hearings.

(xiv) The decision to initiate a fact-finding mission in a particular case may also be influenced by pedagogical intentions (in particular in respect of cases against the newer member states of the Council of Europe).

Chapter 4

Setting up fact-finding hearings

4.1 Introduction

Once the Court has decided to carry out a fact-finding hearing in a particular case, it will then proceed to make the necessary organisational arrangements. This chapter examines the process of setting up a fact-finding hearing and analyses its various stages and aspects. The chapter primarily focuses on: (1) the selection of witnesses; (2) preparatory meetings; (3) the selection of the delegation of Judges; (4) a specialised fact-finding chamber or unit; (5) the choice of the location; and (6) technical and other facilities and the preparation of documents.

The Court will inform the parties of its decision to take evidence, and it may also at that stage provide provisional dates. The Court will require a brief outline or statement of the evidence, which it is anticipated each witness will give (if that hasn't already been provided). The Court will produce a provisional list of witnesses after considering proposals from the parties as to the witnesses to be called. It may also request the parties' representatives to attend a pre-hearing in Strasbourg in order to finalise the list of witnesses (see Rule A4(2)).

The Court will subsequently provide a provisional timetable for the hearings and its lists of witnesses and it will also provide witness summons to be served via the parties.

4.2 The selection of witnesses

4.2.1 The process of summoning witnesses

According to Rule A5(1) of the annex to the Rules of Court, witnesses to be heard by the fact-finding delegation are to be summoned by the Court Registrar. The contracting state in whose territory the witness resides is responsible, in accordance with Rule 37(2) and Rule A5(4), for servicing any summons sent to it by the Chamber. The importance of the state's effective compliance with this obligation cannot be overstated since, according to 68% of the respondents to the questionnaire, there is little the Court itself can do if witnesses are untraceable or unavailable, even if they are summoned. Furthermore, all parties are obliged to provide, as far as possible, sufficient information to establish the identity and addresses of witnesses to be summoned (Rule A5(3)).

The Rules provide for witnesses to receive reimbursement of their expenses for attending the hearing (Rules A5(2)(c) and A5(6)). Indeed, the practical and logistical issues involved in ensuring the attendance of witnesses at the hearing may be considerably important in some cases. As well as questions of cost, the practical difficulties, for example, of travelling long distances from remote areas to the capital city, should not be underestimated. As Applicant Lawyer A recalled, in a number of cases applicants' lawyers have had to make prior financial arrangements to enable witnesses to attend fact-finding hearings:

> If we hadn't made the arrangements, including, but not limited to paying the tickets, they wouldn't have come. They wouldn't know how to set about getting a bus to the [fact-finding location]. Whereas, if someone said to them 'This is your bus ticket, this is the bus you get on and we'll meet at the other end – so you'll pay nothing and you're looked after' – not a problem. In some cases all they wanted to know is that they'd be reimbursed, but in others they didn't have enough money for that to do. They had to be paid up front by us.

Such factors which may influence the attendance, or non-attendance, of witnesses are discussed further in Chapter 5.

4.2.2 Factors governing the selection of witnesses

The Court enjoys a broad discretion as regards the selection of witnesses to be heard. Rule A1(1) of the annex to the Rules of Court states as follows:

> The Chamber may (…) decide to hear as a witness (…) any person whose evidence or statements seem likely to assist it in carrying out its tasks.

In contrast, the practice in the African human rights system suggests that when the Commission has heard witnesses, the parties themselves, rather than the Commission, called them.[1] According to Murray it is unclear "whether there has been any incident where the Commission itself has requested the attendance of a witness".[2]

As discussed in Chapter 3, the parties may propose that certain witnesses be heard by the Court – and they may do so at the request of the Court, or even on an unsolicited basis. In relation to each witness, a summary should be provided as to the evidence that that witness is expected to give, or, failing that, an indication should at least be given as to the areas which the witness is expected to cover. How much detail a party is able to go into will depend on whether, at that stage, it has access to witness statements, or any other documents, which set out the nature of that witness's evidence. Such information will enable the Court to assess the potential *relevance* of a witness's testimony, and, when taken together, to assess the *sufficiency* of the proposed witnesses' anticipated evidence.

As follows from Rule A1(1) of the annex to the Rules of the Court, the essential criterion for selecting a particular witness is the likely relevance of his or her testimony. As discussed in Chapter 2, the average number of witnesses who have given evidence in fact-finding hearings is just over 15. In practice, the Court is under pressure to limit the number of witnesses heard, since the delegation only has a relatively short amount of time to carry out a hearing. For example, Registry Lawyer D stated unequivocally:

> I had the feeling that we could have asked for more witnesses. But it was impossible to ask for more witnesses because we had to fit this particular number into 2½ days.

Judge C confirmed the existence of temporal and financial constraints on the Court in the current situation: "[b]ut in the early days, on the other hand, we were ready to continue for several days. I do not know whether the Court today can really afford it, but sometimes we spent a whole week (…). It even happened that we had several days for one single case."

The Court has also explicitly acknowledged these restrictions. For example, in the *Cyprus v Turkey* inter-state case it justified a reduction in the number of witnesses, arguing that the effective execution of its fact-finding role necessarily required it to conduct the proceedings in consideration of the temporal restrictions and the actual relevance of additional witnesses' accounts.[3] Furthermore, the Court noted that the delegates' decision could properly be justified with reference to their perception of the relevance and sufficiency of evidence at the time of the hearing of witnesses.[4]

Consideration of the sufficiency of witnesses' testimony will require continual assessment in any particular case. This may lead to the 'filtering out' of witnesses despite their having passed the Court's initial relevance test. Registry Lawyer E confirmed:

> (…) in principle we try to hear all the witnesses as long as their evidence is relevant to us, and if we are under a time pressure then it might be that some of them can be eliminated depending on [the relevance of] the information they are going to give. [I]f we have witnesses from the same place who witness the same thing it is unnecessary to bring them all, (…) then there is no point in bringing them all to give evidence.

In parallel with the review of the sufficiency of witnesses' testimony, and potentially the need to filter out 'repetitive' witnesses, a further practical constraint is that certain witnesses may prove to be either

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1 Rachel Murray, 'Evidence and Fact-Finding by the African Commission' in *Malcolm Evans and Rachel Murray (eds.), The African Charter on Human and Peoples' Rights*, 2nd Ed., Cambridge University Press, 2008, pp. 139-170 (145).

2 *Ibid.*

3 *Cyprus v Turkey*, no. 25781/94, 10.5.01, paras. 110, 339.

4 *Cyprus v Turkey*, no. 25781/94, 10.5.01, para. 339.

untraceable or unavailable. In particular, if it only becomes apparent shortly before a hearing, or even at the hearing itself, that a particular witness is unavailable to give evidence, this may of course be seriously detrimental. As a result there may be a real danger that certain links in the chain of evidence are lost and thus the factual basis for the Court's deliberations will be reduced. Acknowledging this weakness, Registrar B suggested:

> [i]t is better to call more witnesses than to take the risk. You don't know what's going to happen in a fact-finding [mission], it's a mysterious process. It can be all rather predictable on the day or you suddenly have a witness who turns everything around.

4.2.3 The utility of preparatory meetings

According to Rule A4(2) of the annex to the Rules of Court '[t]he head of the fact-finding delegation may decide to hold a preparatory meeting with the parties or their representatives prior to any proceedings taking place before the delegation'.

In practice, the Court has only occasionally held preparatory meetings.[5] Usually such meetings have taken place in Strasbourg before the full fact-finding delegation (of three or four judges), together with the Section Registrar and Court Registry lawyers in attendance, as well as the parties' representatives. The primary aim of such meetings has been to consider the relevance of the testimony of proposed witnesses and to ascertain their availability to give evidence. The parties' representatives are accordingly questioned by the delegation about the witnesses which they have proposed be called.

This research has established that neither before nor after the changes implemented by Protocol No. 11 in 1998, has there been a consistent practice as regards preparatory meetings. Judge B, a former member of the European Commission, did not recall any Commission practice of holding preparatory meetings with the parties. The Commission would invite the parties to propose witnesses by correspondence and from the pool of witnesses proposed the Commission would then select those witnesses who in their opinion had something useful and relevant to say. According to Judge B, preparatory meetings are still the exception rather than the rule.

An essential function of the preparatory meeting may be to confirm whether witnesses are still willing and able to attend the fact-finding hearing and there may be particular questions put to the parties as to the evidence that witnesses are expected to provide. Registrar A expressed a profound belief in the usefulness of such meetings, especially with a view to reducing the number of witnesses who need to be called to give evidence:

> [I]t is essential to have the representatives of the parties' views on the relevant witnesses. The judge says 'well, why are they relevant, what do they have to offer? You are already suggesting that we convene three people who will speak on the same subject, do you really believe that three are necessary? Is one not sufficient'? So, through the process of a preparatory meeting you can reduce the number of witnesses. Again, I think this confirms the essential relevance of the preparatory meeting, because it's for the parties to determine who may be a relevant witness and during the preparatory meeting the Government can suggest that they call 3, 4, 5 soldiers - but one soldier surely is enough, the other three soldiers will have nothing else useful to add to what one soldier will say.

This positive view about the usefulness of preparatory meetings was widely shared by the respondents to the questionnaire - 70% considered that a meeting or hearing of the Court with the parties' representatives to consider which witnesses to summon will be significantly beneficial in drawing up the final list of witnesses to be heard. Given the uncertainty in the Court's position, 63% saw an urgent need for the Court to establish a consistent practice in deciding whether to have preliminary meetings with the parties' representatives in order to finalise the list of witnesses. As regards the lack of consistency in the utilisation of pre-hearings, Registrar A noted:

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[5] The Court had such a meeting, for example, in the case of *Yöyler v Turkey*, no. 26973/95, 24.7.03.

> [I]f there is an inconsistency in the practice regarding preparatory meetings with the parties, then I think that inconsistency should be addressed. I do think that it should be an essential part of the process, to bring the parties' representatives to the court before the hearing, to have the list of witnesses, to have the explanations of why these witnesses are relevant and what you expect them to say to the judges.

Most interviewees also supported the need for preparatory meetings. They were considered to be especially useful in assisting in the organisation of the hearings, and in speeding up the fact-finding process itself. Some interviewees emphasised the importance of involving respondent Governments at an early stage in the proceedings. Registrar B stated:

> [I]t focuses everybody's attention, and it is one way of securing co-operation with the process. The first step of the process involves coming here to discuss practical questions - and provides a framework within which practical issues can be addressed (if there are witnesses who aren't coming - often key witnesses don't turn up). I think it [provides] practical, organisational added-value. Once the decision has been taken [to hold a fact-finding hearing]…you want to focus the parties' attention on what is going to happen: on the witnesses that should be called and to try and identify upstream any problems that are going to occur on the day.

Preparatory meetings may also serve to assist the Court in considering and resolving questions arising from the disclosure of documents by the parties. For example, Registrar B told us:

> There are some fact-finding hearings where there are knotty problems to be addressed. Like in one case, (...) we had asked for the investigation file, and we got a file which was heavily censored. We were told that it was blacked out in many parts for reasons of national security. A preparatory meeting would enable you to go into that a little bit, in a way which you could not do in correspondence. We did not have a preparatory meeting in that case, and the question of censored text was never resolved until we came to the judgment stage.

Judge C emphasised there should be a case-by-case approach to the question of the need for preparatory meetings, acknowledging that the broader political context may be significant: "in cases with strong political tensions it is good to have some advance contact - like the inter-state case in Cyprus".

Furthermore, the pedagogical function of fact-finding missions, which was discussed in chapter 3, may also be applicable to preparatory meetings. For example, Registry Lawyer A suggested that "certainly, for inexperienced Governments, if there is going to be a first hearing in the country, there should be a meeting".

Respondents considered that the main factors militating *against* holding preparatory meetings are the additional time and cost involved. Furthermore, there is a view that written correspondence may often be sufficient in order to assess the witnesses to be heard. Registry Lawyer D recalled one case in which the Judge Rapporteur proposed a pre-hearing, but "then we decided to skip it, because we just asked the parties to provide written statements from the witnesses". Registry Lawyer D said that the Court delegates were strongly against a pre-hearing in that case because it was considered it would slow down the case instead of speeding it up.

There is also a view that preparatory hearings for on-the-spot investigations, such as prison visits, have only limited usefulness. Registrar B confirmed this perception, stating: "if you are going to visit a prison you don't need a preparatory meeting. But if you are investigating a case…where there are lots of witnesses, then it is probably useful".

4.3 The selection of the delegation of Judges

The Rules give the Court a discretion as to the number of judges forming the fact-finding delegation. Rule A1(3) of annex to the Rules of Court provides for the appointment by the Chamber of "one or more of its members or of other judges of the Court, as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner".

In practice the delegation of the Court is usually composed of three judges, but occasionally the delegation is made up of four judges (as in the cases of *Adali v Turkey*[6], and *Ilaşcu and Others v Moldova and Russia*[7]) or of just two judges (e.g. *N. v Finland*[8]). In contrast, on-site visits carried out by the Inter-American Commission of Human Rights have usually involved all seven members. However, the more recent practice has been to carry out more focused and limited field visits, by a smaller number of Commissioners.[9]

Within the European system, the decision as to the selection of judges is that of the President of the Chamber, assisted by the Section Registrar. The Judge Rapporteur will usually be a member of the delegation, with the remaining delegates being selected from the Chamber.

This research project has sought to shed more light on the selection of judges to participate in fact-finding delegations. The research has established that their selection is based on various factors, including the judges' professional backgrounds, their previous experience of fact-finding, and also their personal willingness to participate in fact-finding.

The Judges of the Court have differing professional backgrounds[10] (for example, as academics, advocates, prosecutors or judges) and not all of them have had previous experience at the domestic level in conducting fact-finding hearings. Some judges may therefore be in a better position than others to take part in fact-finding delegations. Some will not have had any prior experience of questioning (or cross-examining) witnesses.

Thus, for Registrar B, "a background that lends itself to fact-finding would be the first criterion". According to Judge C, in the first Commission cases in the early 90s the policy "was to have one very experienced judge (…), one who is experienced in pleading as a barrister (…) and then it was felt to be good to have also somebody who had experience as a prosecutor (…). That was the combination." The significance of previous experience was also emphasized by the respondents to the questionnaire: 77% considered that judges without any previous experience of fact-finding processes should not take part in these hearings. Moreover, according to Registry Lawyer D,

> [i]t is important that the presiding judge is someone who knows the procedure well, who can guide the procedure, who can impose himself on the parties, stop questions at some point and restart questions, who is very authoritative. And it is quite important that it is somebody who is guiding the process really well.

At the same time, the research team was also told that judges who are not familiar with fact-finding should be encouraged to participate in fact-finding hearings in order to gain experience. Judge B considered that "one should be trying to encourage judges who have not got experience to also be part of the team, because that is the only way you can gain experience". Similarly, Judge D confirmed that "usually we make an effort to combine experienced with non-experienced judges in so far as fact-finding missions are concerned, namely those who have already participated in other missions but still we want to have new ones as well to get acquainted gradually with the system. We try to combine both categories - namely experienced and non-experienced".

Clearly, the interest and willingness of individual members of the Chamber to participate is another important factor which is taken into consideration. A number of interviewees stated that some judges are more willing to take part in fact-finding missions than others. In practice, therefore, only those judges who declare themselves to be willing to participate are considered in the process for the selection of judges. Judge D confirmed that one of the elements of

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6 *Adali v Turkey*, no. 38187/97, 31.3.05.

7 *Ilaşcu and Others v Moldova and Russia*, no. 48787/99, 8.7.04.

8 *N v Finland*, no. 38885/02, 26.7.05.

9 Diego Rodríguez-Pinzón and Claudia Martin, *The Prohibition of Torture and Ill-treatment in the Inter-American Human Rights System: A Handbook for Victims and their Advocates*; OMCT Handbook Series 2, 2006, p. 45. This development is also reflected in the Inter-American Commission's Rules of Procedure. According to Title II, Chapter IV of the Rules, entitled *On-Site Investigations*, in loco investigations should be undertaken by an *ad hoc* Special Commission. The latter may comprise just one member of the Commission (usually the Rapporteur for the country) and one staff attorney. See: Dinah Shelton, 'The Inter-American Human Rights System' in *Hurst Hannum (ed.), Guide to International Human Rights Practice*, 4th Ed., Transnational Publishers, 2005, pp. 127-141 (137).

10 See Nina-Louisa Arold, *The Legal Culture of the European Court of Human Rights*, Raoul Wallenberg Institute Human Rights Library, Brill, 2007; Jutta Limbach *et al.*, 'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights' *Interights* May 2003 http://www.interights.org/jud-ind-en/index.html

> the decision-making is of course the willingness of the judges to go there. Because sometimes we make offers and they do not accept. Or they themselves propose their own participation while we did not actually ask them. In that case it is very difficult for us to say 'No' to a judge.

There were significant differences in views as to the question of the participation of the so-called 'national judge' in fact-finding missions. In the European system, the participation of the national judge is a matter of the Court's discretion, whereas in the Inter-American system, Article 52 of the Commission's Rules of Procedure unequivocally disqualifies any nationals of, or residents in, the territory of the State visited from participating in the Special Commission which is appointed to carry out on-site observations.[11] While some interviewees considered that the involvement of the national judge gives the 'wrong impression', others were not against it *per se*, although they recognized that it might create problems. For example, Registrar C was strongly opposed to the participation of the national judges, citing one case where it caused linguistic difficulties: "you have the national judge talking in his national language all the time (…) his knowledge of the national language was a handicap, because he was going too fast for the transcript and for the understanding of the other members".

Aside from any practical difficulties, there are also more principled objections. Judge B expressed clear disagreement with the participation of national judges:

> [P]articularly in the sensitive cases (in the sense that they raise very grave violations of the Convention) to have the national judge sitting as one of the three of four members of the team is a mistake. I do not think it has happened very often, but it has happened, and I personally am against it.

However, Judge B distinguished fact-finding hearings from on-the-spot investigations, which were considered to be less of a problem. Taking a similar line, Registrar B noted:

> By tradition the national judge does not go on these missions. It has occurred once or twice, and it has been a mistake. A lot will depend on the type of mission. A prison visit mission is a different story….There, one's objections…fall away, because it is useful to have a national speaker – [a] Croatian speaker, [a] Greek speaker – [who] can understand what witnesses are saying at first hand, can talk to officials, speak to the wardens and so forth.

During the period when the European Commission carried out the fact-finding function, there was a consistent practice that the national judge would *not* participate. However, since 1998 there has been some relaxation of this principle. Nevertheless, according to Judge C "in those early days it was out of the question that for instance the Turkish judge would be in the delegation in Turkey".

The current practice is that the national judge may be a member of the delegation, particularly in on-the-spot investigations.[12] This research has shown that there has been a trend in 'prison condition' cases for the national judge to take part in on-the-spot investigations.[13] However, in the previous fact-finding hearings in the Turkish cases, on no occasion was the national judge a member of the delegation. This would suggest that in the more politically sensitive cases (and/or those which concern allegations of gross violations of the Convention) there is a presumption against the inclusion of the national judge. The particular nature and purpose of the fact-finding mission may also have a bearing on this question. For example, Judge C suggested that:

> [p]erhaps it is easier where you just go to inspect some physical facilities instead of participating in a hearing where the Government of your country may be arguing in a case, which has certain political implications (…) I think that if you foresee a situation in some countries where it is not such a good idea to send the national judge, then you should exercise restraint overall in order not to give the impression that you apply double standards.

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[11] Article 52 of the Inter-American Commission Rules of Procedures provides as follows: "A member of the Commission who is a national of or who resides in the territory of the State in which the on site observation is to be conducted shall be disqualified from participating in it."

[12] See e.g., *Kaja v Greece*, no. 32927/03, 27.7.06.

[13] See e.g. in the case of *Druzenko and Others v Ukraine*, nos. 17674/02 and 39081/02, 15.1.07, where a delegation of three Court Judges – Rait Maruste (Estonian), Renate Jaeger (German) and Volodymyr Butkevych (Ukrainian) – took evidence from witnesses in Khmelnytsky (Ukraine) from 25.-27.6.07 in Izyaslav Prison and held an on-the-spot investigation.

4.4 A specialised fact-finding chamber or unit?

4.4.1 A specialised fact-finding chamber.

In 2001, Professor Françoise Hampson (University of Essex) proposed the establishment of an additional independent fact-finding chamber within the Court, which could investigate *situations* where it was alleged that violations of human rights and humanitarian law had occurred.[14] Professor Hampson argued that such a body could

> investigate situations in which it is alleged that violations of human rights and humanitarian law are occurring and which could do so promptly. The members would need to be independent. The members would need to have a variety of expertise or else to have access to experts with the relevant expertise (police, military, medical, forensic etc).[15]

According to Hampson's proposal, the body would carry out fact-finding missions where bodies such as the Parliamentary Assembly or the Committee of Ministers requested it to do so.

While the Hampson report envisaged a specific body with the role of investigating broader situations, it was also suggested that it could carry out fact-finding on behalf of the Court in individual cases.[16] We therefore asked our respondents and interviewees if they saw the need for a specialised chamber to be established in order to conduct fact-finding in individual (or inter-state) applications. The findings of this research reveal a divergence of views about this proposal. When asked whether it would be beneficial for the Court to establish a specialised chamber to deal exclusively with fact-finding hearings, 51% supported the idea, but a significant number of the respondents (42%) disagreed.

The interviewees were similarly divided. Some recognised the potential value of a specialised fact-finding chamber. Applicant Lawyer A, for instance, showed strong support:

> It is a very interesting and valuable idea, because it would be a more professionalised mission on that issue, and secondly, the procedure would speed up.

For Registry Lawyer C, the creation of such a body depended largely on whether the Court started to hold fact-finding missions again more often. Only then the Court

> should really have it, because it is important that there are only certain judges who are specialised in that.

Similarly, Registry Lawyer A considered it "a very good idea, because these people would be experienced and I think we do still have plenty of cases where fact-finding could be very useful."

Government Lawyer A was strongly in favour of the Hampson proposal:

> In order to improve the process of fact-finding, I think it is essential to establish a specialised Section to deal with fact-finding hearings. A specialised Section will ensure the professionalism of its members who will have a better hold over the dossiers and also will overcome human sentimentalism.

A more sceptical position was taken by Member of the Commission C, who, although understanding the reasoning behind the establishment of a specialised fact-finding chamber, voiced the following concern:

> [W]hat is important is that the members of the panel of the fact-finding mission will be, first of all, members of the panel for the case - they participate in the case. It should be the Rapporteur. I cannot imagine that I am the Rapporteur of serious, complicated cases and I do not have the privilege to ask questions to people who by definition are considered crucial from the point of view of establishing the facts of the case.

Member of the Commission B raised similar objections:

> I do not think it would be a good idea if a section takes evidence and that would be transmitted then to the actual decision-making body, the chamber. I do not think it is right. It should be the body that decides the case that must take the evidence.

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[14] Françoise Hampson, Steering Committee for Human Rights (CDDH), *Study on Human Rights Protection during Situations of Armed Conflict, Internal Disturbances and Tensions*, CDDH (2001) 21 rev., October 31, 2001.
[15] *Ibid.*, para. 120.
[16] *Ibid.*, para. 121.

Registrar A suggested that, since, under the current system "cases are assigned, attributed to particular sections not because they lend themselves to fact-finding, but because the case follows the national judge" the creation of such a specialised body would be problematic for practical reasons. Registrar A added:

> I remember a similar idea was discussed at the beginning of the life of the new Court. Should we have chambers, which are specialised in free speech issues, chambers to which all the childcare issues should be assigned, chambers which should exclusively deal with the length of civil or criminal proceedings? But in practice that does not work.

Registrar B referred to the various proposals to establish a 'Specialist Article 41 Section' or a 'Friendly Settlement Section', adding that:

> I do not see that that is going to go anywhere. What we could think about is to select a variety of lawyers, mainly involved in fact-findings and to send them on trainings - that type of thing.

4.4.2 A specialised fact-finding unit

Although it seems that at present there is insufficient support for a specialised fact-finding chamber as such, the kernel of the idea – to bring together the Court's expertise and experience on fact-finding – is an important one.

We consider that it is vital that the current expertise within the Court is not lost, and a compelling argument can be made for the creation of a specialised 'fact-finding unit' within the Court Registry in order to gather, retain and build on the experience to date of conducting fact-finding missions (within both the former Commission and the Court). Those involved in the unit should include Judges, Registrars, Registry lawyers and administrative and support staff who have carried out fact-finding missions. The members of the unit would then be available to provide advice to Judges and other Registry staff who are involved in future fact-finding missions undertaken by the Court.

Consideration should be given to obtaining a video recording of a fact-finding hearing, in order that edited extracts could be used within the Court as a means of training.[17]

4.5 Choice of location

Fact-finding hearings usually take place in the territory of the respondent state in the case in question - but a number of hearings have also taken place in Strasbourg.[18] Many hearings have taken place in capital cities. For example, most of the hearings in Turkey have taken place in Ankara, but there have also been hearings in south-east Turkey – in Diyarbakir.[19] Rule A2 of the annex to the Rules of the Court provides that "the Contracting Party on whose territory on-site proceedings before a delegation take place shall extend to the delegation the facilities and co-operation necessary for the proper conduct of the proceedings".

The choice of the location where the hearing takes place appears to be of fundamental importance for the success of the fact-finding mission. A significant majority (90%) of the respondents to the questionnaire expressed the view that the Court should give priority to selecting a location for a fact-finding hearing where the witnesses feel most secure. 90% of respondents also agreed that it is important that the venue for the hearing is considered to be 'neutral' by the parties to the case. Furthermore, 77% of respondents held the view that the Court should also carefully consider the particular building in which the hearing takes place. Commission Member 2 confirmed that it was crucial for the Commission delegation to find an appropriate place for a hearing:

> [W]e had to find the right place; normally we tried to find a neutral place, which was agreed by both sides, which was not necessarily a Government building.

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[17] The prior consent of the parties and the witnesses would be needed in order to obtain such a recording of a hearing.

[18] See for example, *Salman v Turkey*, no. 21986/93, 27.6.00; *Brozicek v Italy*, No. 10964/84, 19.12.89.

[19] See for example, *Akdivar and Others v Turkey*, no. 21893/93, 30.8.96; *Gündem v Turkey*, no. 22275/93, 25.5.98.

The importance of the fact-finding location and its selection was also emphasised by Applicant Lawyer G, who criticised the capital-centrism in many of the Turkish cases, which resulted in travel difficulties and additional expenses for the witnesses and their lawyers:

> A big problem was the place, because the hearings always took place in Ankara. They did not come to the place where the events had happened so we had many difficulties. Everything had happened here in the Diyarbakir region. The witnesses were here but the Court went to Ankara and the witnesses and the applicants had to go there and spent altogether five to six days. The main principle for the fact-finding mission is to really find the facts in the place, what happened in the place. Instead they stayed in Ankara while the events had taken place somewhere else. So they did not get the whole picture of the events.

The various factors which can affect the attendance, or non-attendance, of witnesses are discussed further in Chapter 5. It is clear that the choice of location for a fact-finding hearing is a significant question which can have an impact on witnesses, and applicants. There may be considerable cost and logistical difficulties for some witnesses to travel out of their region. They may have to take time off work in order to do so. They may be travelling to a location for the first time, and they may be going from a rural setting to a very unfamiliar urban environment. These issues should not be underestimated – it may in any event be a very daunting experience for a witness to have to give evidence at a court hearing (even more so if they are giving evidence in support of an applicant, against the Government).

4.6 Technical and other facilities and the preparation of documents

The Court and the parties' representatives will need to give prior consideration as to the manner of presentation of particular types of evidence such as maps, photographs and film. The Court will need prior notice if special facilities are required such as equipment for showing film. In *Yöyler v Turkey*[20], for example, which concerned an attack on a village by Turkish security forces, the applicant's representatives requested in advance overhead projector facilities in order to show the applicant's hand-drawn map of his village, which witnesses then used at the hearing to identify houses which were burned. The Court will increasingly need to be alive to technological advances, allowing for the use, for example, of satellite imagery.[21]

It has usually not been the Court's practice to prepare, or to require the parties to prepare, agreed 'core bundles' of documents for fact-finding hearings. This can, however, cause problems when witnesses are requested to review particular documents. It is suggested that this is a practice that the Court should consider. It may therefore be helpful for the parties to agree a list of documents with the Court, prior to the hearing. According to Registrar A

> when the President says I would like to come back to what was said by witness e.g. No. 10 and that's recorded in document e.g. No. 53 then everybody can easily go to it. I don't know whether that is the practice but certainly that is something that desirably should be part of the preparation of the fact finding mission.

This idea was widely supported by the vast majority (85%) of the respondents to the questionnaire who considered that the Court should formulate an agreed schedule of all relevant documents in advance of the fact-finding hearing, in order to facilitate the process.

Respondents were less supportive of the idea that, for the purposes of conducting fact-finding hearings, the Court should provide the case documents in electronic format (48%). Nevertheless, the appropriate use of such technological means clearly could have the potential to improve the conduct of fact-finding hearings. Registrar A shared this view:

> Obviously, scanning the documents, emailing them, that would mean that the bundle will be put together more quickly, electronically, and made available to the other side as well.

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[20] *Yöyler v Turkey*, no. 26973/95, 24.7.03.

[21] See, for example, Human Rights Watch, *Collective Punishment – War Crimes and Crimes against Humanity in the Ogaden area of Ethiopia's Somali Regional State*, June 2008 – for which satellite images of villages (that had been reportedly burnt) were obtained by Human Rights Watch and the American Association for the Advancement of Science (AAAS) (available at: http://www.hrw.org/en/node/62175/section/1). In relation to Europe, see, for example, *Georgia – Satellite Images Show Destruction, Ethnic Attacks*, Human Rights Watch, 27.08.08 – concerning satellite images released by UNOSAT of villages in South Ossetia, following the Russian-Georgian conflict in August 2008 (available at: http://www.hrw.org/en/news/2008/08/27/georgia-satellite-images-show-destruction-ethnic-attacks).

Registrar B suggested that, to a certain extent, this is already existing practice within the Court:

> I think that is already done today. A lot of material will be scanned… I think we would avail ourselves of all of that technology… the IT department is extremely good in the Court and it is our plan to scan all the Governments' observations into an archive.

Issues relating to interpretation and the possibility of giving evidence by video-link are discussed below in Chapter 5.

4.7 Conclusions and recommendations

(i) The essential criterion for selecting witnesses is *relevancy*, coupled with the question of the *sufficiency* of the evidence, when considered as a whole.

(ii) The practical and logistical issues involved in ensuring the attendance of witnesses at the hearing may be considerably important in some cases.

(iii) The average number of witnesses who have appeared in fact-finding hearings is just over 15.

(iv) The Court does experience pressure, in practice, to limit the number of witnesses it hears, because of both time and cost. Consequently, there may be a risk that certain links in the chain of evidence are lost and thus the factual basis for the Court's deliberations will be reduced.

(v) There has not been a consistent practice as regards preparatory meetings. However, a meeting (or pre-hearing) of the Court with the parties' representatives to consider which witnesses to summon may be significantly beneficial. An essential function of the preparatory meeting will be to confirm which witnesses are required and whether witnesses are still willing and able to attend the fact-finding hearing. They may assist the organisation of the hearings and speed up the fact-finding process. They are also considered to be important in ensuring that respondent governments are engaged with the process early on. They can have a pedagogical function, and may be important where there is a particular political context to a case. The need for a preparatory meeting should therefore be carefully considered on a case-by-case basis.

(vi) The selection of the judges to take part in fact-finding delegations is based on various factors including their professional backgrounds, their previous experience of fact-finding, and also their willingness to participate in fact-finding.

(vii) There are divergent views about the participation of the national judge as a member of a fact-finding delegation. Their involvement in on-the-spot investigations has been more frequent than in fact-finding hearings. The involvement of the national judge in fact-finding missions should be very carefully assessed on a case by case basis.

(viii) Although there is insufficient support for a specialised fact-finding chamber as such, it is vital to bring together the Court's existing expertise and experience of fact-finding. A specialised 'fact-finding unit' within the Court Registry should be established in order to gather, retain and build on the experience to date (within both the former Commission and the Court) of conducting fact-finding missions.

(ix) The selection of the location for a fact-finding hearing may have significant implications for witnesses and for applicants. It is important that a 'neutral' venue is selected, and that careful consideration should be given to the logistical difficulties for witnesses.

(x) The Court will increasingly need to be alive to technological advances, allowing for the use, for example, of satellite imagery.

(xi) The documents relevant to the fact-finding hearing process should be identified and agreed in advance. Copies of the documents should be made available in electronic format.

Chapter 5

The conduct of fact-finding hearings

5.1 Introduction

The aim of this chapter is to examine how fact-finding hearings are conducted in practice and to analyse their various stages. The chapter considers the following aspects: (1) the process of questioning witnesses; (2) the non-attendance of witnesses; (3) the provision of support for witnesses; (4) giving evidence by video-link (5) interpretation, and (6) disclosure of documentation.

5.2 The process of questioning witnesses

The process of questioning witnesses is at the heart of the fact-finding hearing. The European Court has applied a reasonably flexible approach to the manner in which witnesses are questioned. The methods it has adopted reflect elements of both the Continental (inquisitorial) and common law (adversarial) legal systems. Yet, this research shows that there is a perception amongst our respondents of a need for the Court to have clearer procedures for the questioning of witnesses (78%) and also a need for the parties to be informed in advance as to how the witnesses will be questioned (70%).

In the early days of fact-finding, the Commission's questioning of witnesses to a great extent followed a case-by-case approach. In the inter-state case brought by Ireland against the United Kingdom, for example, the hearing of witnesses took place in a way that was familiar to parties and witnesses alike – following the common law adversarial approach. Both parties' representatives questioned the witnesses first and, only then, members of the Commission asked questions, if they found it necessary.[1] Member of the Commission A recalled that:

> [A] criminal law QC started his interrogation on behalf of the British Government (…) and used very typical British tactics. He thought it is important to show contradictions [by] witnesses….concerning completely unimportant details, and as soon as one contradiction is found this witness is incredible and cannot be relied upon. There was absolute consensus among the three of us - and this was shown in our report - that this sort of system of trying to attack credibility is, let me say, sometimes really ridiculous. Because what you will get there, is not at all a proper evaluation of credibility but a ridiculous play with words!

The Commission delegation, according to Member of the Commission A, responded in the following way:

> [W]hat we then did was really questioning in the way a German or French judge would do it. Sometimes taking up matters again which had been already dealt with and put in very specific questions (…) we were clearly not bound by any common law interrogation rules. We were bound by international law, Convention law and it's clear that Convention law does not refer as such to common law interrogation and I think, we did a very good job. The proof of that is, and this was not self-evident, when the matter came before the European Court of Human Rights, the UK Government accepted the fact-finding of the Commission 100 per cent. They did not dispute any of the facts established by the Commission.

While the *Ireland v United Kingdom* case may serve as an early example of the adoption of a common law approach to the questioning of witnesses, in many other cases, the Court's approach has been far closer to the continental style – with the Court delegates questioning the witnesses first, and only then the parties' representatives being given the opportunity to question the witnesses.

More recently, the process of questioning witnesses was clarified to a certain extent through the introduction of the annex to the Rules of Court in 2003 (see Appendix 7). Rule A4(1) provides that "[T]he

[1] Jochen Abr. Frowein, 'Fact-finding by the European Commission of Human Rights' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals,* Transnational Publishers, 1992, pp. 237-260 (242).

delegates shall exercise any relevant power conferred on the Chamber by the Convention or these Rules and shall have control of the proceedings taking place before the delegation". As discussed in Chapter 2, a hearing of witnesses will normally be held before a delegation of three Court judges (but sometimes four, and occasionally two). Rule A7(1) provides that "any delegate may put questions to the Agents, advocates or advisers to the parties, to the applicant, witnesses and experts, and to any other person appearing before the delegation". According to Rule A7(2) "witnesses, experts and other persons appearing before the delegation may, subject to the control of the head of the delegation, be examined by the Agents and advocates or advisers of the parties".

The usual approach adopted by the Court to the questioning of witnesses can be summarised as follows. First the head of the delegation establishes the identity of each witness and explains the nature of the proceedings, and of the investigation. Before testifying, the witness takes the oath or makes a solemn declaration: "that I shall speak the truth, the whole truth and nothing but the truth" (according to Rule A6(1) of the annex to the Rules of Court). One of the judges will then put questions to the witness in order to elicit their evidence. This role may be carried out by the head of the delegation, or any of the other delegates (one of whom may be the Judge Rapporteur in the case). Then, the floor is given to the parties' representatives with a view to following essentially an accusatorial system from there on. If the applicant proposed the witness, the applicant's representatives would have the first opportunity to question that witness, followed by the Government's representatives (and vice versa in respect of witnesses proposed by the Government). Once the floor is given to the parties' representatives, the delegates then, according to Judge B, adopt to a large extent a neutral stance.

Applicant Lawyer A considered the current practice of questioning witnesses as, by and large, satisfactory and appropriate:

> I do think it is helpful, the order in which they do it, so that if it is a state witness you start with the state asking questions, then the cross examination. And if it is an applicant's witness, it is the applicant first, then, providing there is a brief right of reply. That order makes sense, but who leads it, [I have] no strong views.

Once the parties have examined and cross-examined a witness, the Court delegates may require further clarification on various points, in which case they take the floor again in order to put further questions to the witness. After that, the parties' representatives may again be given the opportunity to ask any additional questions arising from the delegates' questioning. Thus the procedure can be characterised as a combination of continental and common law approaches – perhaps with the inquisitorial approach slightly dominating. Most respondents to the questionnaire were generally supportive of this approach: 58% agreed that the presiding judge should lead the questioning of witnesses, and 67% disagreed with the suggestion that the parties' representatives should do so.

In practice, the Registry lawyers play an important role in preparing, prior to the hearing, a detailed series of questions for the Court delegates. According to Registrar B:

> [T]he delegates will then use that paper as a basis to formulate their questions. Some will follow it slavishly; some will not follow it at all. And a good delegate knows that he must go with the flow, even if it's not scripted. So a good cross-examiner knows to have follow-up questions, which are sharply addressed.

Registrar C emphasised that a European Court fact-finding hearing should be distinguished from a domestic criminal trial:

> [W]itnesses were not to be treated as if they were suspected criminals. That has been a general approach, that this is an investigation, this is not a criminal accusation against anybody. People are expected to be civilized. So questions that go to the credibility of the witness in an emotional way, in an aggressive way, they are usually eliminated and stopped.

Comparisons with the practice of the Inter-American Commission in respect of questioning witnesses are difficult because the Commission's lack of resources often precludes it from holding proceedings to hear witnesses. Furthermore, if the Commission does conduct a hearing, as a result of budgetary constraints, only the applicant and a relatively small number of witnesses are given the opportunity to address the Commission for a few minutes. The process of questioning within the Inter-American Commission is carried out by its members, since the parties' representatives are generally not allowed to put questions to witnesses.[2]

5.3 The non-attendance of witnesses

One of the most significant problems arising during fact-finding hearings is that a number of witnesses summoned fail to appear. For obvious reasons, non-attendance can have important consequences for the success of the mission, since the anticipated testimony of the missing witnesses may be highly significant. This research has shown that non-attendance of witnesses has occurred repeatedly in cases against Turkey. In *Ergi v Turkey*, for example, six witnesses failed to appear without any explanation being provided.[3] In the case of *Bilgin v Turkey*, five witnesses did not appear, of whom two had died, one had fallen ill and two were too afraid to testify.[4] After being pressured by the police, the applicant and one of the witnesses in *Kaya v Turkey* did not attend the fact-finding hearing.[5] In the same case, two prosecutors absented themselves from the proceedings, invoking, respectively, prior commitments and a self-perceived inability to contribute anything meaningful to the proceedings.[6] Non-attendance of witnesses also arose in the cases of *Çakici v Turkey*,[7] *Kiliç v Turkey*,[8] *Taş v Turkey*,[9] *Tekin v Turkey*,[10] and *Timurtaş v Turkey*.[11] The reasons given in those cases included timing problems (including holidays),[12] the inability to require a witness to attend,[13] the inability to locate the witness,[14] the old age of the witness,[15] insufficient financial means,[16] and the classified identities of the witnesses.[17]

The case of *Kiliç v Turkey*, concerning the killing of the applicant's brother, provides a good illustration of some of the reasons given for the non-attendance of witnesses in the cases against Turkey:

> Three other witnesses did not appear. Ahmet Fidan, the night watchman, could not be traced. Mr Hüseyin Fidanboy, the anlıurfa public prosecutor, was due to attend but his flight to Ankara was cancelled due to snow. Mr Ziyaeddin Akbulut, the governor of Şanlıurfa at the material time, was asked to attend the hearings on 4 February and 4 July 1997 but did not appear. After the first hearing, the Agent of the Government provided the explanation that Mr Akbulut had been taking his annual leave. Regarding the second hearing, the Agent submitted a letter from Mr Akbulut which stated that he could not remember being petitioned by Kemal Kılıç, that the allegations made were false and that he could not attend due to his annual leave.[18]

When asked about the most common reasons given for non-attendance of witnesses, the respondents to the questionnaire largely corroborated the findings of our case law analysis. Fear of potential consequences was perceived to be the most common reason for non-attendance (67%). However, 51% of respondents also believed that the reasons actually given for non-attendance were generally false.

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2 Douglass Cassel, 'Fact-Finding in the Inter-American System' in *Anne F. Bayefsky (ed.), The UN Human Rights Treaty System in the 21st Century*, Kluwer Law International, 2000, pp. 105-114 (107).
3 *Ergi v Turkey*, no. 23818/94, 28.7.98, para. 27.
4 *Bilgin v Turkey*, no. 23819/94, 16.11.00, para. 61.
5 *Kaya v Turkey*, no. 22729/93, 19.2.98, paras. 36/37.
6 *Ibid.*
7 *Çakici v Turkey*, no. 23657/94, 8.7.99, paras. 43, 44 and 245.
8 *Kiliç v Turkey*, no. 22492/93, 28.3.00.
9 *Taş v Turkey*, no. 24396/94, 14.11.00.
10 *Tekin v Turkey*, no. 22496/93, 9.6.98.
11 *Timurtaş v Turkey*, no. 23531/94, 13.6.00.
12 *Kiliç v Turkey*, no. 22492/93, 28.3.00, para. 35.
13 *Çakici v Turkey*, no. 23657/94, 8.7.99, para. 245.
14 *Çakici v Turkey*, no. 23657/94, 8.7.99, paras. 43/44; *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 39; *Taş v Turkey*, no. 24396/94, 14.11.00, para. 27; *Kiliç v Turkey*, no. 22492/93, 28.3.00, para. 35.
15 *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 267.
16 *Ibid.*
17 *Taş v Turkey*, no. 24396/94, 14.11.00, para. 27.
18 *Kiliç v Turkey*, no. 22492/93, 28.3.00, para. 35.

The results from our interviews drew a similar picture. Registrar A identified two main problems relating to the attendance of witnesses in fact-finding hearings:

> [W]e probably had problems concerning witnesses who are no longer contactable – they died or they are not willing to give evidence and we may encounter problems when we want to call, let's say, Government members of the security forces. The Government makes out the case that they have nothing to offer for the fact-finding process or that they are bound by confidentiality. So, I think that they are the two major problems – one, reluctance to convene the witnesses in response to the Court's summons, or the Court summons the witnesses, but the witnesses are not available.

Similarly, Registrar C raised serious concerns about the appropriateness of the state taking action to ensure the attendance of witnesses, in particular from the applicant's perspective:

> The applicants usually come forward, the eye-witnesses do not usually come forward from the applicant's side. And if you tell the Government to find them, then you are already dealing with people who are terrified and they have usually been primed by the Government what to say. So you are trying to get… around that and get them to say something that is really meaningful. And the other aspect from the Government's side is getting the judges and prosecutors to come along, because they basically think they are above the whole system, they are independent from the Government and there is no reason why they should come and explain their decisions.

This research also established clear distinctions between the reasons for non-attendance given by applicants' witnesses and by state witnesses. The reasons why applicants' witnesses fail to appear are usually related to issues of fear and pressure, whereas the explanations given for the non-attendance of state witnesses have been more diverse. Applicant Lawyer A recalled one particular case where this issue arose:

> We really needed a very important eye-witness and I said, 'look, you are one of the most important witnesses, if you agree to come before the Court and give your statement, it is really very important for this case. According to international law, you have legal protection'. But he had never before taken any kind of legal hearings; he had never given any statements about this case, not even in the local courts. But he said, he had a question – he said, 'if I say yes, tomorrow maybe someone will come and take me from my village; would you be able to stop him'? And I could not tell him anything, and he was afraid and did not come to the Court - he did not give the statement.

In another case, according to Applicant Lawyer C, a key witness could not attend the hearing because she had had an accident before the hearing. Applicant Lawyer C considered the circumstances to be suspicious:

> [A] couple of weeks before she had been hit with a blunt object and she had been hospitalized for a couple of weeks. Afterwards she said that there was a direct link between the hearing and this incident. She could not testify before the delegation of the Court. She wrote a letter to the Court explaining what happened to her and explaining her reasons for refusing to appear before the Court. But there were no other indirect proofs, which could show that in fact one of the Government agents was involved in this incident. She had been hospitalized for a couple of weeks. This is a crime, I mean, causing such injuries. However, there was no inquiry for this incident.

As a result of the problems which have been encountered as regards the failure of some witnesses to attend fact-findings hearings, 91% of the respondents to the questionnaire agreed that, where it appears necessary, the Court should take steps to ensure the safety and security of witnesses. Furthermore, 77% believed that those witnesses who are closely related or connected to the applicant (i.e. family or friends) are more likely to attend the hearing than other witnesses. As a result of the difficulties experienced by witnesses, 66% of respondents agreed that the Court should consider allowing third parties to attend the hearings, especially as a support for the applicant or witnesses. In the case of *Adali v Turkey*,[19] for example, the applicant had asked permission from the Court to be accompanied at the hearing by her daughter, as support for her. The case concerned the killing of the applicant's husband in northern Cyprus, and the applicant alleged the involvement of agents of the 'Turkish Republic of Northern Cyprus'. However, as a review of the case file established,[20] the Court refused to allow a third party to attend the hearing. We consider that it is especially in cases like *Adali* that a strong case can be made for a more flexible approach to the issue of third party attendance.

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[19] *Adali v Turkey*, no. 38187/97, 31.3.05.

[20] A review of a sample of 8 fact-finding case files was conducted during a visit to the European Court in July 2007.

State witnesses, on the other hand, have failed to attend fact-finding hearings for a variety of different reasons. Judge B explained that:

> [O]n the whole our problem has not been effectively non-attendance of applicants. It has been more Government witnesses and in particular the explanations that have [been] given there are varied. Sometimes we are told that the person is now doing national service and consequently is in some distant part of [the country] and cannot be reached. Sometimes in the case of prosecutors we are simply told that they have decided not to turn up without any reasons being given.

Applicant Lawyer A raised the issue of certain witnesses, such as prosecutors, who are considered to be 'independent' within the domestic legal order and do not therefore directly take orders, as such, from the Government. Applicant Lawyer A said that the Government

> needs to explain to them that whilst within the state they are independent, for the purposes of international law they are, in fact, state agents required to cooperate and all the Government is doing, is acting as a conduit.

54% of respondents to the questionnaire agreed that most state witnesses summoned believed that nothing would happen to them if they failed to attend the fact-finding hearing.

While, as a general rule, the list of witnesses to be heard is determined prior to the fact-finding hearing (see chapter 3), the Court delegation may consider it necessary to hear additional witnesses during the hearing on a more *ad hoc* basis. Indeed, Rule A5(5) of the Annex to the Rules of the Court provides:

> the head of the delegation may request the attendance of witnesses, experts and other persons during on-site proceedings before a delegation. The Contracting Party on whose territory such proceedings are held shall, if so requested, take all reasonable steps to facilitate that attendance.

Member of the Commission B confirmed that:

> [S]ometimes, but this was not the rule, the Commission wanted to hear a certain person who had been named in the evidence of another witness. We needed then to get in touch with this person - but this was normally done by the parties not by the Commission itself.

The role of the respondent state in the process of locating and summoning witnesses on an *ad hoc* basis is inevitably critical, but it appears that states often fail to take the appropriate steps in order to ensure the attendance of the witnesses. Our research established that more than two-thirds of the respondents to the questionnaire considered that if, during the hearing, the Court decides that additional witnesses should be summoned, too frequently the state takes inadequate steps to ensure their attendance.

The annex to the Rules of Court contains specific references to the issue of the non-attendance of witnesses. Rule A3 states:

> Where a party or any other person due to appear fails or declines to do so, the delegation may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless continue with the proceedings.

The introduction of the annex to the Rules in 2003 mirrored the position in the Inter-American system. Article 24 of the Rules of the Inter-American Court of Human Rights had already made specific reference to member states' obligations in relation to the attendance of witnesses:

> The State parties to a case have the obligation to cooperate so as to ensure that all notices, communications or summonses addressed to persons subject to their jurisdiction are duly executed. They shall also expedite compliance with summonses by persons who either reside or are present within their territory.

However, neither the Inter-American Court nor the European Court has any powers of compulsion or sanction. The European Court has no means to enforce the attendance of a witness - the Court does not hold witnesses who fail to appear in contempt or take any other specific measures against them. If such provisions were included within the Rules of Court, there would be real questions as to the Court's capability to enforce them, as the Rules of Court do not form part of the national legal order.

Registrar A informed us:

> [I]t would probably be wrong to give the Court a power to compel the attendance. What sanction would be applied in the event of disrespect of the connotation of the summons? I find it difficult to imagine the Court ordering the domestic legal system to impose a sanction on a certain witness. I think the situation which we currently have, which allows the Court to draw adverse inferences for the failure to produce witnesses is probably the best we can achieve.

Nevertheless, a high proportion the respondents to the questionnaire (72%) considered that the Court should have a means to compel witnesses to attend the hearings.

Applicant Lawyer A went further and argued for the possibility of (financial) sanctions in the event of non-attendance, in particular for state witnesses:

> In my view, given that there is a legal obligation to cooperate, there should be a penalty for non-cooperation. If it is a monetary penalty, it should go into some sort of kitty. Maybe it would depend on the form of the non-cooperation, but the Committee of Ministers, since the issue would be part of the judgment of the Court, should actually address it.

Rule A5(4) provides that "The Contracting Party shall (…) take all reasonable steps to ensure the attendance of persons summoned who are under its authority or control." This obligation accordingly imposes upon the member states a specific duty to adopt effective measures (which could be legislative or administrative) within their national legal systems to oblige witnesses to testify before the European Court. However, there is no evidence to suggest that member states have introduced such measures in order to prevent the problem of non-attendance before the Court. Article 52 of the Rules of Procedure of the Inter-American Court of Human Rights provides that the Court will inform the state when a witness fails to appear without good reason, "so that the appropriate action may be taken under the relevant domestic legislation".

Two-thirds of the respondents to the questionnaire agreed that in those cases where witnesses fail to attend a fact-finding hearing without good reason, the domestic legal system should take appropriate action. Registry Lawyer D suggested that:

> [t]here should be some sort of procedure by which you delegate this function to the state, and the state compels the person to come.

Various measures which could be taken in order to provide greater protection for witnesses are discussed further below (*The provision of support for witnesses*).

Within the Inter-American system, exceptionally the Court has appointed experts to represent the Court in overseeing the questioning of witnesses, in locations other than at the seat of the Court in Costa Rica. For example, in the *Caballero Delgado and Santana* case, for reasons of ill-health, the Commission requested that one of the witnesses be heard in Colombia by an academic, who was appointed by the President of the Court, with the consent of the Colombian Government.[21]

The European Court's response to the problem of non-attendance of witnesses has essentially been twofold: (i) to consider whether the respondent state has met its obligations under the Convention (under Article 38); and (ii) in assessing the evidence, to draw inferences from the failure of a witness to appear at the hearing. Both approaches are considered below.

5.3.1 Invoking Article 38

One consequence of the non-attendance of witnesses is that the Court may then consider the extent to which the respondent state has complied with its obligations under Article 38(1)(a) of the Convention,[22] which provides:

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[21] See, Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, pp. 699-700.

[22] Former Article 28(1)(a) of the Convention.

> If the Court declares the application admissible, it shall (a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation for the effective conduct of which the States concerned shall furnish all necessary facilities…

The phrase "necessary facilities" has been held by the Court to include identifying, locating and ensuring the attendance of witnesses.[23]

In *Taş v Turkey*, for example, a case concerning the disappearance of the applicant's son, Muhsin Taş , after allegedly being detained by the security forces, the Commission remarked that it was of "crucial importance" to hear three officers as witnesses to find out "what they saw and did".[24] The Court's judgment noted:

> The Delegates in requesting the Government's assistance in summoning them to give evidence emphasised that the Government should at the same time identify the officers who personally witnessed Muhsin Taş's escape as the Commission had experience that the signatories of reports did not necessarily have any direct knowledge of the contents. At the taking of evidence in May 1998, the Government Agent informed the Delegates that they had been unable to find the three officers who signed the report and that they had recently received information that the names used were code names. In reply to the Delegates' request for steps to be taken to identify the officers who used these code names in November 1993, the Government stated that it was not possible to identify the three officers. The Delegates also requested the other operation records or details which could cast light on the incident. The Government stated that no other records existed.[25]

As a result of the lack of any real explanation by the Government the Court found that it had breached the Convention:

> This delay deprived the Commission of the opportunity of summoning witnesses with potentially significant evidence. Consequently, it confirms the finding, reached by the Commission in its report, that in this case the Government fell short of their obligations under former Article 28 § 1 (a) to furnish all necessary facilities to the Commission in its task of establishing the facts.[26]

It is highly questionable whether the Court's utilisation of Article 38(1)(a) in this way can be said to fully 'compensate' for the effects on fact-finding proceedings of the non-attendance of important witnesses. More significant to the ultimate outcome of a case is the Court's consequential drawing of inferences, which is discussed below.

5.3.2 The drawing of inferences from the non-attendance of witnesses

In the event that a particular 'state' witness (such as, for example, a police officer or public prosecutor) does not appear, the Court will require the Government to provide reasons for non-attendance (either at the hearing itself, or following the hearing). The very important practice has developed in the course of the Court's fact-finding investigations, that where the Government fails to provide satisfactory or plausible explanations for the non-attendance of witnesses, the Court may draw inferences in the course of its assessment of the evidence in the case.

In its judgment in the case of *Timurtaş v Turkey*, the Court held for the first time that a respondent Government's failure to co-operate with the Court may justify the drawing of inferences as to the well-foundedness of the applicant's allegations.[27] While *Timurtaş* dealt with the respondent state's failure to provide documentary evidence, the case of *Orhan v Turkey* concerned the Court's ability to draw inferences specifically from non-attendance. There, the Court concluded that:

> [T]he Government have not advanced any, or any convincing, explanation for its delays and omissions in response to the Commission and Court's requests for relevant documents, information and witnesses. Accordingly, it finds that it can draw inferences from the Government's conduct in this respect. Furthermore, and referring to the

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[23] See for example *Çakici v Turkey*, no. 23657/94, 8.7.99, para. 245; *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 267; *Taş v Turkey*, no. 24396/94, 14.11.00, para. 54; *Kiliç v Turkey*, no. 22492/93, 28.3.00, paras. 51-53; *Tekin v Turkey*, no. 22496/93, 9.6.98, paras. 23 and 41. See also: Doc. 11183, Member states' duty to co-operate with the European Court of Human Rights, Committee on Human Rights and Legal Affairs, Rapporteur: Christos Pourgourides, Cyprus, Group of the European People's Party, 3.2.2007, para. 56.

[24] *Taş v Turkey*, no. 24396/94, 14.11.00, para. 27.

[25] *Ibid.*

[26] *Taş v Turkey*, no. 24396/94, 14.11.00, para. 54.

[27] *Timurtaş v Turkey*, no. 23531/94, 13.6.00, paras. 66 and 70.

> importance of a respondent Government's co-operation in Convention proceedings…and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature…the Court finds that the Government fell short of their obligations under Article 38 § 1(a) …of the Convention to furnish all necessary facilities to the Commission and Court in its task of establishing the facts.[28]

The Court's practice was reflected in an amendment to its Rules in 2004. Rule 44C provides:

> Where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate.

Therefore, if an explanation proffered by the Government is not considered plausible by the delegation, it may draw inferences from the unexplained absence of the witness. The extent of the inferences drawn is likely to depend on the nature of the evidence that the witness was expected to give, and also on the Court's assessment as to the potential importance of that witness in the particular circumstances of the case.

Registrar C informed us that:

> [W]e do not normally draw presumptions of anything from the applicant's side. It's usually from the Government's side. So, if the prosecutor is not going to turn up and tell us why he or she did not investigate, there is a presumption that there was no investigation. It's not a difficult conclusion to draw. And unless the Government produces the criminal investigation file, which shows all the prosecutor's documents other than a formal letter saying 'please, inform me what has been happening in the last 6 weeks or six months', or gendarme letters which say 'we have been looking but have found nothing', then it is not difficult to draw a presumption from that kind of lack of fact and lack of serious concern about the issue.

Registry Lawyer C referred to the case of *Suheyla Aydin v Turkey*[29] in 2005 concerning the disappearance of the applicant's husband:

> [H]er husband was brought to court by two police officers and then the judge ordered his release. And then nobody saw him again and then they found his body three days later. So those two police officers and the prosecutor were the last three people to see him alive. We questioned the prosecutor and the prosecutor said yes he ordered his release and the police officers must have released him at the door. But his family were waiting outside the door and they did not see him. The Government did not summon these police officers. So of course the Court used it against the state and said that the Government basically failed to discharge its burden of proving that the applicant's husband has been released.

Judge C explained the Court's practice in this way:

> [A]fter all, the system is an inter-state arrangement and one has to put some confidence in the good faith of the parties. But I think it should be and has been made clear that the Court can, when assessing the evidence, draw negative inferences from the unexplained absence of some Government witnesses who might even be a key witness best equipped to know some of the important things behind the case.

A report on *Member states' duty to co-operate with the European Court of Human Rights*, published in 2007 by the Committee on Legal Affairs and Human Rights (of the Parliamentary Assembly of the Council of Europe) advocated the strengthening of the Court's practice as regards the drawing of inferences, by adopting Rules equivalent to those in force in the Inter-American system[30] which permit the facts alleged to be accepted as being true if the state fails to respond. The report acknowledged that such a rule "should leave sufficient room for the Court's discretion, having regard to the plausibility and credibility of the applicant's allegations".[31]

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28 *Orhan v Turkey*, no. 25656/94, 18.6.02, para. 274.

29 *Süheyla Aydın v Turkey*, no. 25660/94, 24.5.05.

30 Rule 39 of the Rules of Procedure of the Inter-American Commission of Human Rights provides: "The facts alleged in the petition, the pertinent parts of which have been transmitted to the state in question, shall be presumed to be true if the state has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion." Rule 38 (2) of the Rules of Procedure of the Inter-American Court of Human Rights provides: "In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested."

31 Parliamentary Assembly. Committee on Legal Affairs and Human Rights. Report. *Member states' duty to co-operate with the European Court of Human Rights*, Rapporteur Mr. Christos Pourgourides, Doc. 11183, 9 February 2007. http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11183.htm, para. 91.

In the light of the grave problem of the non-attendance of witnesses which has been encountered within the Strasbourg system, we support this recommendation that the Court's Rules be strengthened in this way.

5.4 The provision of support for witnesses

The problem of non-attendance is closely linked to the issue of witness protection. As discussed above, in many cases non-attendance has clearly been a consequence of witnesses' fear of reprisals. In the case of *Kaya v Turkey*, concerning the killing of the applicant's brother and the alleged inadequacy of the investigation, the applicant refused to attend the hearing because he was afraid of retaliatory measures. Another witness in that case informed the Commission (in writing) that he and his family had been put under enormous pressure by the police in order to stop him from giving evidence and that he was therefore not going to participate in the hearing.[32] In the inter-state case of *Ireland v United Kingdom* a police constable was killed only a few weeks after he had given evidence. According to Jochen Frowein, the former Vice-President of the Commission, although there was no official evidence of a causal nexus, it was remarkable that it was this particular witness whose testimony was of paramount importance for the assessment of the evidence.[33]

Internationally there is an increasing awareness of the importance of witness protection measures, notably in the international criminal law arena. For example, Article 22 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) requires the Tribunal's rules to include measures for the protection of victims and witnesses, including *in camera* proceedings and measures aimed at the protection of the victim's identity.[34] Rule 69(A) of the ICTY's Rules of Procedure and Evidence enables the Prosecutor to apply to a judge to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the person is brought under the protection of the Tribunal. Furthermore, Rule 69(B) entitles the trial chamber to consult the ICTY's Victims and Witnesses Section in order to determine the requisite protective measures to be applied.[35]

A similar provision can be found in the Rome Statute of the International Criminal Court (ICC).[36] According to Article 68(1) of the ICC Statute on the protection of the victims and witnesses and their participation in the proceedings

> the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

In addition to *in camera* proceedings, Article 68(2) of the ICC Statute expressly refers to the possibility of presenting evidence "by electronic or other special means." A specialist "Victims and Witnesses Unit" of the ICC may also advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.[37]

Within the Inter-American system, Article 51 of the Inter-American Court's Rules of Procedure provides that states may not prosecute witnesses (or expert witnesses) or bring illicit pressure to bear on them or their families because of their statements or opinions before the Court. Furthermore, the Host Country

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[32] *Kaya v Turkey*, no. 22729/93, 19.2.98, para. 36.

[33] Jochen Abr. Frowein, 'Fact-finding by the European Commission of Human Rights' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1992, pp. 237-260 (246) (fn. 28).

[34] *Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by Resolution 827* [as amended 13 May 1998 by Resolution 1166; as amended 30 November 2000 by Resolution 1329] http://www.icls.de/dokumente/icty_statut.pdf

[35] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. *Rules of Procedure and Evidence*, Extraordinary Plenary Session 30 May 2006. http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf

[36] International Criminal Court, *Rome Statute of the International Criminal Court*, [circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002] http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf

[37] Furthermore, Article 68(6) of the ICC Statute provides that "[a] State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information." As at 31 August 2008, the annual budget of the Victims and Witnesses Unit (VWU) was more than € 6.2million – see: http://www.icc-cpi.int/library/asp/ICC-ASP-7-14_English.pdf (table 31, page 36). As to the measures which can be taken by the VWU, see International Criminal Court. The Appeals Chamber, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui*, No. ICC-01/04-01/07, 12 June 2008, paras 6-22, available at: http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-585-ENG.pdf

Agreement signed between Costa Rica and the Court in 1981[38] establishes various privileges and immunities for, *inter alios*, witnesses, experts, victims and complainants (and their representatives). Article 26 of the Agreement provides for the immediate grant of a visa for people in those categories.

Applicants and witnesses (and their representatives and advisers) taking part in hearings before the European Court are subject to a 1996 Council of Europe Convention – *the European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights*[39] – which guarantees immunity from legal process and free movement and travel. Beyond that, however, it does not deal in any more detail with the issue of witness protection. The Annex to the Court Rules concerning investigations provides that states are obliged to ensure freedom of movement and adequate security for, *inter alia*, all applicants, witnesses and experts, and "to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation" (Rule A2 (2)).

Acknowledging serious problems arising from states' failure to co-operate with the Court in various respects, a 2007 Resolution of the Parliamentary Assembly of the Council of Europe called upon all member states to:

> [T]ake positive measures to protect applicants, their lawyers or family members from reprisals by individuals or groups including, where appropriate, allowing applicants to participate in witness protection programmes, providing them with special police protection or granting threatened individuals and their families temporary protection or political asylum in an unbureaucratic manner.[40]

Accordingly, we recommend that further active consideration should be given by the Council of Europe and the Court to the question of witness protection. A particular focus should be to require states to establish effective, independent national mechanisms to ensure witness protection.

An additional important aspect of witness protection is the principle of the confidentiality of hearings. International fact-finding bodies commonly reserve the right to exclude the public when they deem it necessary for the protection of witnesses. Respondent Governments occasionally request closed hearings in order to ensure the security of state witnesses. This was the position, for example, in the first cases against Honduras before the Inter-American Court, and, as a result, the hearing took place at the San José Airport (with the parties' representatives present, but without the public). Faúndez Ledesma has noted that the Commission's lawyers had doubts about the identity of one of the army officers who was called to give evidence in that case, and has argued that the experience "has served to question, as a matter of principle, the holding of closed hearings and to underscore that they should be reserved for the most extraordinary circumstances".[41] The European Court has also taken specific steps in a number of cases in order to protect witnesses' identity or security. For example, in *Donnelly and others v United Kingdom*, the Government asked for special security measures for the questioning of members of the security forces in Northern Ireland, and as a result the witnesses were questioned at a secret location within the United Kingdom.[42]

As a rule, representatives of both parties will be present at the hearing of witnesses before a delegation of the European Court. However the former Commission had underlined that it was free to exclude the parties from a hearing of witnesses where it was considered necessary to establish the truth, and accordingly in a number of cases witnesses were heard only in the presence of members of the Commission. In the case of *Ireland v United Kingdom* it was stated that:

> [T]he Commission does not consider that [former Article 28] imposes on it any obligation to carry out its investigation together with the representatives of the parties. Whilst there may perhaps be some ambiguity in the English text, it is certainly clear from the French text that the Convention requires only that the examination of the petition should be carried out together with the representatives of the parties, not that the investigation into the facts should be so carried out. In the present case the parties have in any event been given the opportunity to participate in all stages of the Commission's investigation. The form of this participation is for the Commission or its delegates to decide. Whilst the Commission's Delegates decided to hear the evidence of the three witnesses in question in the absence of the representatives of the parties, each party was given the opportunity of submitting beforehand questions, which they wished to be put to the witnesses.[43]

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38 Agreement between the Government of Costa Rica and the Inter-American Court of Human Rights, 10 Sept 1981.

39 ETS No. 161, 5.3.96. As at 29.10.08 it had been ratified by 35 Council of Europe states.

40 Parliamentary Assembly. Resolution 1571(2007), *Council of Europe member states' duty to co-operate with the European Court of Human Rights*, available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1571.htm

41 Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, p. 699.

42 *Donnelly and others v United Kingdom*, no. 55777/72, 5583/72, 15.12.75, paras. 4 –15.

43 *Ireland v the United Kingdom*, no. 5310/71, Commission Report, 15.1.76, p. 157.

The Court is similarly entitled to exclude the parties' representatives. Rule A7(4) provides that:

> [t]he head of the delegation may make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where that is required for the proper administration of justice.

Furthermore, in the case of *Cyprus v Turkey*, the Commission allowed several witnesses to remain unidentified during the fact-finding hearings:

> Oral statements were taken by the delegates from a number of officials and other persons encountered during the visit to northern Cyprus including the Karpas peninsula. At the first hearing, ten witnesses proposed by the applicant Government gave evidence, three of whom remained unidentified. At the second hearing, the Commission delegates heard the evidence of twelve witnesses, seven of whom were proposed by the respondent Government and five by the applicant Government (including four unidentified witnesses). At the third hearing in London, the delegates heard five witnesses proposed by the applicant Government, four of whom remained unidentified.[44]

The findings of this research reveal substantial support for the Court having a discretion as to the manner of its hearing of witnesses: 77% of the respondents to the questionnaire agreed that the Court should retain its discretion to allow particular witnesses to give evidence anonymously.

5.5 Giving evidence by video link

During the course of our research we also sought to explore the potential for witnesses to give evidence to the European Court by means of a video link (where evidence is given from outside the courtroom and simultaneously relayed to the court via closed circuit television (CCTV)).[45]

The use of video link technology as part of a fact-finding process is generally considered to be advantageous for a number of reasons. It can provide a degree of protection to witnesses who are fearful of the consequences of testifying. In removing the need for victims and witnesses to be in the courtroom and allowing them to give evidence remotely to the court, this may reduce the stress which may be experienced when giving evidence in a court room. Research carried out on the use of video evidence for juvenile witnesses in criminal courts in England and Wales showed that, despite feeling nervous or embarrassed talking about the things that had happened to them, children considered that the use of video technology enabled them to tell the whole truth and have people believe them.[46] The use of a video link can help to obtain full and coherent evidence, while at the same time streamlining and speeding up the fact-finding proceedings themselves, and reducing the cost of fact-finding missions.

The origins of the use of video link technology can be found primarily in domestic proceedings. It is most frequently used in order to protect child witnesses, sexual assault complainants and witnesses fearful of negative ramifications. In England and Wales, for example, according to Part 32.3 of the Civil Procedure Rules 1998, "[t]he court may allow the witness to give evidence through a video link or by other means." In Australia, video links are frequently used in the process of taking evidence - primarily when a direct witness account is too costly, inconvenient or generally undesirable.[47] If, for example, a witness is living overseas[48] or is under arrest[49], the use of video link technology has become standard procedure in Australian courtrooms. South Korean procedural law has, since 1995, allowed for the use of video links. Not only amicable divorce proceedings, but also entire hearings are being conducted using video links.[50] Finally, the Japanese Code of Civil Procedure (JCCP) allows civil courts of first instance to hear a witness or party by utilising a videoconference system, where the person to be examined lives far from the court or is fearful of being

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44 *Cyprus v Turkey*, no. 25781/94, 10.5.01, para. 107.

45 By contrast, in the *Sawoniuk* case, the prosecution and defence submitted witnesses to examination and cross-examination in Belarus before local officials (subject to the local perjury laws), with the video-taped testimony being played back to the jury in a London courtroom.

46 Claire Wilson and Graham M. Davies, 'An Evaluation of the Use of videotaped evidence for juvenile witnesses in criminal courts in England and Wales' *European Journal on Criminal Policy and Research* 7, 1999, pp. 81-96 (90).

47 Australian Law Reform Commission, *Technology - what it means for federal dispute resolution*; Issues paper (Australian Law Reform Commission) 23, 1998, p. 41.

48 *Ibid.*, p. 37.

49 Practice Note No 2 of 1998 issued under Section 42Q of the Evidence Act 1958 (Victoria), Courts and Tribunals Practice Notes, *Law Institute Journal* 72 (5) 1998, p.71.

50 Rüssmann, Helmut, *Herausforderung Informationsgesellschaft: die Anwendung moderner Technologien im Zivilprozeß und anderen Verfahren Vorläufiger Generalbericht = The Challenge of information society: application of advanced technologies in civil litigation and other procedures.* The International Association of Procedural Law, 'Procedural Law on the Threshold of a New Millenium', Vienna, 23-28 August 1999. Available at: http://ruessmann.jura.uni-sb.de/grotius/generalb.htm

present in the courtroom. The witness or party may then appear at a local court and be questioned by the parties and the judges via simultaneous video link.[51]

An interesting development within the European Union in this context was the adoption, in 2001, of Council Regulation no. 1206/2001 on co-operation between the courts of the member states in the taking of evidence in civil or commercial matters.[52] Article 10 no. 4 of that Regulation states:

> The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference. The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.

Furthermore, Rule 81 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY) expressly provides for proceedings by video link:

> At the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.

According to the criteria set out by the ICTY trial chamber in the *Tadić* case, the testimony of a witness must in practice be shown to be sufficiently important to make it unfair to proceed without it and the witness is unable or unwilling to attend the proceedings.[53]

This brief *tour d'horizon* shows that the use of video link technology (as a procedural exception) is widely accepted in a number of domestic legal orders in Europe and worldwide, and is being utilised in the international arena. As yet, the European Court of Human Rights has not heard witnesses via video link. Nevertheless, this research established that 78% of the respondents supported the view that in cases where witnesses could give evidence by means other than at a fact-finding hearing (for example, by video link), the Court should consider it. Registrar B supported the idea of video link testimony in general:

> I think new technology now provides us with this other tool, and we have not explored that yet. Could we question the same witnesses via video link? Probably we would send someone there who sets it all up. Why not?

Taking a similar position, Registrar A stated:

> I think that is something that should be explored and promoted. (…). I think it is something that could help to fill the gaps: the missing witness who turns up, a video link could be one way of allowing that witness to give evidence and for the parties' representatives to question and cross-question the witness on his or her statements.

There was, however, some degree of consensus among interviewees that video link testimony should not replace the main fact-finding mission as such – rather, it should be used as a complement to such missions. Judge C said:

> One could say that in a case where you have had an ordinary fact-finding hearing and then the later development of the case shows that you should put a few more questions to witnesses A, B and C, then in those cases it might definitely be useful to video-conference instead of having these persons travel to Strasbourg or going back to whatever country it is.

Registry Lawyer A recalled a situation in which the use of video link technology could have proved helpful:

> I was involved in one hearing where we did decide to have another one in Strasbourg. We wanted to hear one or two more witnesses, and then it was easier to let them come here. So if there were just a few witnesses, then certainly videoconferencing would seem ideal.

The disadvantages of using video link technology include its potential to increase the difficulties in conducting a cross-examination, to distort the impact and import of the evidence, and detract from the judges' ability to get an accurate and complete picture of the witness' demeanour.[54]

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[51] See Supreme Court of Japan, Outline of Civil Litigation, Section II (B) no. 2 lit. f(2), available at http://www.courts.go.jp/english/proceedings/civil_suit.html#ii_b_2_f_2

[52] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:174:0001:0024:EN:PDF

[53] ICTY, Trial Chamber, no. IT-94-1-T (*Tadić*), 25.6.96, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link.

[54] See, for example, Carol Coulter, 'Expert highlights flaws in video-link evidence' *Irish Times* 24.11.08 http://www.irishtimes.com/newspaper/ireland/2008/1124/1227293467290.html

For Applicant Lawyer F, the lack of face-to-face contact was the decisive downside of video link testimony:

> [C]ertainly the direct contact with the witness helps you to get into his psychology. This is lost through video link.

Member of the Commission A also expressed doubts about video links:

> [w]hat you really need to get is…a full impression of the personality, of the way these people deal with the matter. I doubt very much whether this can be done through video link.

Nevertheless, Member of the Commission C, while recognising its weaknesses, still argued the case for the use of video link evidence in fact-finding missions, because victims and applicants' witnesses who were fearful of governmental reprisals, could in particular benefit from such a mechanism:

> Through these techniques they would not have such a physical, personal contact. I try to imagine what you would be losing having only such a hearing. What would be the advantage? I don't see very much to lose, if this is well done.

State-of-the-art video technology should be able to meet these concerns. In fact, it seems that the quality of modern video links allows judges to receive a similarly holistic impression as if they were examining the witness *in persona*. We conclude that this technology is a valuable resource which could enable more victims and witnesses of human rights abuses to provide evidence to the Court.[55] Accordingly, we advocate that the Court should give careful consideration to introducing video link technology as a procedural tool for the purposes of fact-finding. The experience of other international tribunals will be instructive. The ICTY, for example, was not authorised, originally, to use video link testimony - it was the ICTY judges who established the ability to hear evidence in this form due to the unwillingness or inability of some witnesses to attend the proceedings.[56] Ongoing training in the use of video link technology and technical support will be required.[57]

5.6 Interpretation

The Court's practice is to allow any witness to give evidence in their mother tongue, or any other language they choose, regardless of whether the language is officially recognised as a national language in the state in question. For example, in a number of the cases against Turkey, witnesses gave evidence in Kurdish. Rule 34(6) of the Rules of Court states:

> Any witness, expert or other person appearing before the Court may use his or her own language if he or she does not have sufficient knowledge of either of the two official languages. In that event the Registrar shall make the necessary arrangements for interpreting or translation.

An overwhelming majority of respondents to the questionnaire (90%) supported the position that witnesses should be able to give their evidence in any language in fact-finding hearings (even if it is not a national language).

Fact-finding hearings may therefore require highly sophisticated systems of simultaneous interpretation (involving interpretation between one or more 'national languages' and one or both of the Court's official languages – English and French). The Court's practice is to commission interpreters and also to provide its own interpretation equipment for fact-finding hearings.

Both the former Commission and the Court have repeatedly emphasised that they are well aware of the difficulties resulting from questioning witnesses via interpreters. They therefore treat these testimonies with the utmost care:

> In relation to the oral evidence, the Commission was aware of the difficulties attached to assessing evidence obtained orally through interpreters. It therefore paid careful attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its delegates.[58]

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[55] For example, the introduction of video technology into the criminal court system in England and Wales dramatically increased the numbers of children testifying. See, Claire Wilson, Graham M. Davies, 'An Evaluation of the Use of videotaped evidence for juvenile witnesses in criminal courts in England and Wales' *European Journal on Criminal Policy and Research* 7, 1999, pp. 81-96 (94).

[56] See Dominic McGoldrick, Peter Rowe and Eric Donnelly, *The Permanent International Criminal Court*; Studies in International Law 5, Hart Publishing, 2004, p. 310.

[57] See, for example, the work carried out by the Center for Legal and Court Technology (CLCT) in the US: http://courtroom21.net/training/index.html

[58] *Çakici v Turkey*, no. 23657/94, 8.7.99, para. 44; *Bilgin v Turkey*, no. 23819/94, 16.11.00, para. 66; *Timurtaş v Turkey*, no. 23531/94, 13.6.00, para. 40; *Ergi v Turkey*, no. 23818/94, 28.7.98, para. 29.

Our interviewees agreed that the professional competence of the interpreters has been of the highest quality. According to Judge B, interpreters were

> [u]tterly trustworthy and extraordinarily good at conveying not just what the applicant was saying but conveying the tone in which the applicant or the witness was saying it. So, first class!

Similarly, Registrar B informed us that

> [t]he interpretation would be organised with the Council of Europe and I think we have been very fortunate over the years in having very good… interpreters. We probably take it for granted, because it has been so good. But of course it is extremely important that we have proper interpretation.

Most of the Turkish fact-finding cases required interpretation from Turkish into English or French and at times even consecutive interpretation from Kurdish into Turkish and then into English or French. Registrar C identified several problems arising from the use of consecutive interpretation in such cases:

> We have done consecutive – it's a nightmare. It's triply exhausting. When you have gone from Turkish to Kurdish, to French, to English, to Kurdish to Turkish and back, and so you have got the Turkish interpretation being consecutive of the Kurdish, and not really understanding Kurdish anyway, so it's coming back pigeon-like and you waste an enormous amount of time like that. Basically, you double the time, if you have to do a consecutive. And you miss it, because by the time you are hearing what the interpreters are [saying] (even a summary of it, because it's not usually word for word) you have missed the gestures, the eye contact and everything that goes with simultaneous. You lose some of the credibility with the consecutive interpretation. You have to do it sometimes, but it's really most unsatisfactory. It's all right for a political party's speech to do a consecutive, but not for fact finding.

While Applicant Lawyer I was generally impressed by the level of the interpreters, there were examples of culturally-specific difficulties:

> Someone said something and it was translated as 'Mehmet in yellow boots' – we said 'Pardon, who's Mehmet in yellow boots?' And it turns out that what they'd done … there is in an expression in Turkish, I think there's an equivalent expression in English, but instead of using it they translated it literally, partly to stop us in our tracks. It turned out to mean 'any Tom, Dick or Harry', just any person.

5.7 Disclosure of documentation

One particular problem that was highlighted during the course of the research was that it is not uncommon for previously undisclosed documents to be produced immediately before, during or after the fact-finding hearing.

For example, Registry Lawyer C stated:

> It happened quite often that in the course of fact-finding missions we had Governments disclose some documents not disclosed previously. For example, in *Timurtaş v Turkey*, some very important documents were disclosed during the hearing. So you have to really be prepared for these things. Time is very limited and lawyers should read these documents in 5–10 minutes and then prepare their questions and answers. They have to change the line of questions. So that was one of the problems.

This would appear to be a reasonably common practice, even though full disclosure would have been required by the Court prior to the hearing. In such situations both the Court delegation and the parties' representatives have to study any such documents on very short notice and formulate any further questions in light of them. Furthermore, they need to consider whether further consequential disclosure is then required, and even whether additional witnesses are required to be heard.

5.8 Conclusions and recommendations

(i) The process of questioning witnesses reflects elements of both the continental (inquisitorial) and common law (adversarial) legal systems, with the Court delegates questioning the witnesses first, and then the parties' representatives being given the opportunity to question the witnesses.

(ii) The questioning process is satisfactory, but it is important that the Court should make it clearer to the parties and their representatives in advance of the hearing as to how the witnesses will be questioned.

(iii) One of the most significant problems arising during fact-finding hearings is that a number of witnesses summoned fail to attend. This may have significant detrimental consequences for the outcome of the fact-finding mission.

(iv) There are clear distinctions between the reasons for non-attendance of applicants' witnesses and state witnesses. The reasons why applicants' witnesses fail to appear are usually related to issues of fear and pressure, whereas the explanations for the non-attendance of state witnesses have been more diverse.

(v) 91% of the respondents to the questionnaire agreed that, where it appears necessary, the Court should take steps to ensure the safety and security of witnesses.

(vi) Further active consideration should be given by the Council of Europe and the Court to the question of witness protection. One focus should be to require states to establish effective, independent national mechanisms: two-thirds of the respondents to the questionnaire agreed that in those cases where witnesses fail to attend a fact-finding hearing without good reason, the domestic legal system should take appropriate action. In particular, states should be required to establish witness protection programmes.

(vii) The Court should consider allowing third parties to attend the hearings, especially as a support for vulnerable applicants or witnesses.

(viii) The European Court's response to the problem of non-attendance of witnesses has essentially been twofold: (i) to consider whether the respondent state has met its obligations under Article 38 of the Convention; and (ii) in assessing the evidence, to draw inferences from the failure of a witness to appear at the hearing. The very important practice has developed in the course of the Court's fact-finding investigations, that where the Government fails to provide satisfactory or plausible explanations for the non-attendance of witnesses, the delegation may draw inferences in the course of their assessment of the evidence in the case.

(ix) As regards the practice of drawing inferences, consideration should be given to clarifying, and strengthening, the Court's present practice by adopting rules equivalent to those in force in the Inter-American system which permit the facts alleged by an applicant to be accepted as being true if the state fails to respond adequately (including by failing to ensure that state witnesses attend fact-finding missions). Such rules should provide the Court with a discretion as to how and when such a presumption is to be applied.

(x) There is strong support (77% of the respondents) for the Court to retain its discretion to allow particular witnesses to give evidence anonymously.

(xi) There is substantial support for the use of video-link technology for the purposes of fact-finding: 78% of respondents agreed that the Court should consider it. The Court should therefore actively consider introducing video-link technology as a procedural tool in fact-finding missions.

(xii) The quality of the interpretation during fact-finding hearings has been very high. The Court is very aware of the difficulties of taking evidence orally through interpreters. Some problems have been encountered where interpretation is not done simultaneously, but is consecutive, because of the need to interpret between two national languages and one or both of the Court's official languages (English and French).

(xiii) It is problematic that it is common for previously undisclosed documents to be produced immediately before, during or after a fact-finding hearing.

Chapter 6

The conduct of on-the-spot investigations

6.1 The practice

A fact-finding mission which does not involve a formal hearing process (with the examination and cross-examination of witnesses) can be described as an on-the-spot investigation.[1] Like the fact-finding hearings, on-the-spot investigations are carried out by a delegation of the Court usually consisting of three judges,[2] and occasionally just two judges.[3] On-the-spot investigations are an important element of the Court's fact-finding activities. Their primary function is to provide the Court delegation with an opportunity to see the location in question for themselves and, if relevant, to inspect particular premises (often places of detention). The delegation may be accompanied by medical experts (or experts from other disciplines) who can assist the Court, for example, in assessing the state of health of detainees.[4]

This research has established that on-the-spot investigations have been carried out in only 24% of the cases which have involved fact-finding. In the majority of cases involving an on-the-spot investigation, there is also a fact-finding hearing (19%). On-the-spot investigations have been carried out in 22 cases involving 9 states: Austria, Belgium, Croatia, Germany, Greece, Lithuania, Turkey, Ukraine, and the United Kingdom (see the database extract in Appendix 1).

The former Commission initially conducted on-the-spot investigations primarily in inter-state cases.[5] For example, a comprehensive on-the-spot investigation was held during the course of an inter-state case against Turkey following the *coup d'état* in 1980 and the consequent militarisation of the Turkish political system.[6] In that case the applicant governments submitted that the Law on the Constitutional Order of 27 October 1980, and a number of laws and decrees made under it, had abrogated the constitutional protection of fundamental rights and they alleged breaches of Articles 3, 5, 6, 9, 10, 11 and 15(3) of the Convention.[7] The respondent government suggested that a visit to Turkey could facilitate a friendly settlement.[8] The Commission decided to send a delegation to Turkey in order to gather first hand information about the situation in the country at the time and, in accordance with former Article 28(1)(b) of the Convention, to "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter". During its visit the delegation met with the Minister of Justice and other members of the government, members of the Grand National Assembly, members of the Military Court of Appeal and with the Military Attorney-General. The delegates also spoke to practising lawyers, academics, trade unionists and journalists. Finally, they visited military detention centres in Diyarbakir, Istanbul and Ankara where, after an initial meeting with the military commanders, they met with prisoners in private.

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1 Evidence by on-site investigation is specifically referred to in Rule 19(2) of the Rules of Court and in Rules A1(3), A2(2), A5(5) and A5(6) of the annex to the Rules of Court. The Court judgments, however, refer to "on-the-spot investigations", which is the terminology used in this report.

2 See, for example, *Nazarenko v Ukraine*, no. 39483/98, 29.4.03 in which a Court Delegation visited Simferopol Prison on 4 October 1999. The Delegation was composed of Judges M. Pellonpää, J. Makarczyk and R. Maruste.

3 See, for example, *Peers v Greece*, no. 28524/95, 19.4.01. In that case the Commission decided to conduct a fact-finding mission to Koridallos prison and to hear the applicant in person. It appointed two Delegates for this purpose: Mr E. Busuttil and Mr L. Loucaides.

4 See, for example, *Tekin Yildiz v Turkey*, no. 22913/04, 10.11.05, paras. 5, 38-41. This was one of 53 related applications, each of which concerned the imprisonment of the applicants because of their membership of terrorist organisations. Their prison sentences were then suspended on medical grounds, as they were suffering from Wernicke-Korsakoff Syndrome, resulting from their prolonged hunger strikes while in prison (in protest against the introduction of 'F-type' prisons in Turkey). Several applications were struck out because the applicants had failed to attend medical examinations by the Court's panel of experts as part of the fact-finding mission (*Eğilmez*, no. 21798/04; *Hun*, no. 5142/04; *Mürrüvet Küçük*, no. 21784/04 and Gülü, no. 1889/04).

5 *Denmark, Norway, Sweden and the Netherlands v Greece* (The Greek case), nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5.11.69; *Greece v United Kingdom*, No. 176/56,20.4.58; *Cyprus v Turkey*, nos. 6780/74 and 6950/75, 10.7.76; *France, Norway, Denmark, Sweden and the Netherlands v Turkey*, nos. 9940/82 and 9944/82, 7.12.85.

6 *France, Norway, Denmark, Sweden and the Netherlands v Turkey*, nos. 9940/82 and 9944/82, 7.12.85.

7 *France, Norway, Denmark, Sweden and the Netherlands v Turkey*, nos. 9940/82 and 9944/82, 7.12.85, p. 145.

8 See also Chapter 2, Section 2.4, above, where we comment about the possibility that the fact-finding process may have the effect of encouraging friendly settlement.

The friendly settlement that was reached in this case was followed by regular monitoring reports, which again included several visits to Turkey.[9] Another more recent example is the on-the-spot investigation in *Cyprus v Turkey*,[10] which included several visits by Commission delegates to the northern part of Cyprus, in order to interview local officials and others.

The tendency to conduct on-the-spot investigations has increased in recent years – and also in the course of individual applications. Until 2000 there had been only 7 cases which involved on-the-spot investigations.[11] However, between 2001 and 2008 on-the-spot investigations took place in 15 cases.[12] This tendency has notably increased since the accession of Central and Eastern European states to the Council of Europe. Accordingly, the majority of the more recent on-the-spot investigations have taken place in proceedings initiated by individual complainants against those states.[13]

As is discussed in chapter 3, on-the-spot investigations have occasionally taken place during the pre-admissibility phase, as occurred in *Ensslin, Baader and Raspe v Germany*.[14] There, the Vice-President of the Commission and other delegates visited a prison near Stuttgart on the same day three German terrorists had been found dead in their cells. At that time these applicants already had a case about prison conditions pending before the Commission. When their application was lodged, Baader, Ensslin and Raspe had been in Stuttgart-Stammheim Prison for more than one and a half years and they remained there until their deaths. The possibility that their deaths could have been related to the alleged conditions appeared to be sufficient for the Commission to seek immediately to clarify the facts *in situ* in order to secure the evidence.[15] With the approval of the government, the delegates inspected the detention facilities, including the particular cells where the applicants had been detained, and questioned a number of the prison guards. The parties received a short report about the visit, which had been conducted without their representatives being present. Ultimately, the case was declared inadmissible as being manifestly ill-founded.[16]

Similarly, in *Sands v United Kingdom*,[17] a delegation of the Commission, at the pre-admissibility stage, visited a dying hunger striker in the Maze prison in Northern Ireland in order to verify whether he was willing to confirm an application his sister had lodged in his name. The visit took place in response to a telegram by Marcella Sands complaining about the conditions of the prison.

In *Hilton v United Kingdom* the Commission again undertook an on-the-spot investigation in the context of a complaint about prison conditions, which were allegedly in violation of Article 3. In Leeds, four Commission members interviewed sixteen witnesses, including wardens and members of staff, as well as the applicant and his mother. They also visited the prison and the particular areas of the prison which the applicant had referred to in his complaint.[18] In the case of *Zeidler-Kornmann v Germany*, the Commission carried out an on-the-spot investigation in order to clarify the facts of an alleged Article 3 violation.

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9 *France, Norway, Denmark, Sweden and the Netherlands v Turkey*, nos. 9940/82 and 9944/82, 7.12.85, paras. 31 *et seq.*, 38 *et seq.*

10 *Cyprus v Turkey*, no. 25781/94, 10.5.01, para. 37.

11 *Denmark, Norway, Sweden and the Netherlands v Greece* (The Greek case), nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5.11.69; *Dhoest v Belgium*, no. 10448/83, 14.5.87; *Donnelly and others v United Kingdom*, No. 55777/72, 5583/72, 5.4.73; *Ensslin, Baader, Raspe v Germany*, nos. 7572/76, 7586/76 & 7587/76, 8.7.78; *Greece v United Kingdom*, no. 176/56, 20.4.58; *Sands v United Kingdom*, no. 93381/81, Unreported; *Simon-Herold v Austria*, no. 4340/69, 2.2.71; *Zeidler-Kornmann v Germany*, no. 2656/65, 3.10.67.

12 *Aliev v Ukraine*, no. 41220/98, 29.4.03; *Benzan v Croatia*, no. 62912/00, 8.11.02; *Cenbauer v Croatia*, no. 73786/01, 9.3.06; *Cyprus v Turkey*, no. 25781/94, 10.5.01; *Dankevich v Ukraine*, no. 40679/98, 29.4.03; *Druzenko and Others v Ukraine*, nos. 17674/02 and 39081/02, 15.1.07; *Kaja v Greece*, no. 32927/03, 27.7.06; *Khokhlich v Ukraine*, no. 41707/98, 29.4.03; *Kuznetsov v Ukraine*, no. 39042/97, 29.4.03; *Naumenko v Ukraine*, no. 42023/98, 10.2.04; *Nazarenko v Ukraine*, no. 39483/98, 29.4.03; *Peers v Greece*, no. 28524/95, 19.4.01; *Poltoratskiy v Ukraine*, no. 38812/97, 29.4.03; *Valašinas v Lithuania*, no. 44558/98, 24.7.01; *Tekin Yildiz v Turkey*, no. 22913/04, 10.11.05.

13 See e.g. *Valašinas v Lithuania*, no. 44558/98, 24.7.01; *Benzan v Croatia*, no. 62912/00, 8.11.02; *Dankevich v Ukraine*, no. 40679/98, 29.4.03; *Naumenko v Ukraine*, no. 42023/98, 10.2.04.

14 *Ensslin, Baader, Raspe v Germany*, nos. 7572/76, 7586/76 & 7587/76, 8.7.78.

15 The President of the Commission had informed the German Government that in the interest of orderly proceedings it seemed appropriate to him to authorise a Commission delegation to visit the prison to make all the observations required in order to establish the facts, see *Ensslin, Baader, Raspe v Germany*, nos. 7572/76, 7586/76 & 7587/76, 8.7.78.

16 Jochen Abr. Frowein, 'Fact-finding by the European Commission of Human Rights' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1992, pp. 237-260 (244).

17 *Sands v United Kingdom*, no. 93381/81, unreported.

18 *Hilton v United Kingdom*, no. 5613/72, 5.3.76. In its Report the Commission reached the conclusion that no breach of Article 3 was disclosed in respect of the applicant's allegations of ill-treatment, and this outcome was confirmed by the Committee of Ministers in April 1979.

The delegation visited the Tegel prison in Berlin and interviewed sixteen witnesses (members of the prison staff and medical experts).

They also examined the prison where the alleged violations had taken place.[19]

On-the-spot investigations provide delegates with a unique opportunity to gain direct, first-hand impressions of the locations visited (notably detention centres), and accordingly to supplement their understanding of the situation gleaned previously from reviewing the pleadings and available documents in the case. It is clear that such visits can have a significant influence on the outcome of a case. An overwhelming majority of the respondents to the questionnaire considered that on-the-spot investigations are usually effective in producing relevant new evidence in a case (84%). In *Peers v Greece*,[20] for example, a delegation of the Commission inspected the Koridallos prison in Athens. The subsequent judgment on the merits explains how the delegation carried out the investigation, and also describes in detail the general atmosphere in the prison. The delegation inspected the various cells where the applicants had been detained, and confirmed the dimensions of the cells. Sanitary facilities, storage rooms and the prison kitchen were also examined.[21] This passage from the judgment illustrates how important and influential such on-the-spot investigations can be:

> The delegates of the Commission visited the segregation unit of the Delta wing where the applicant had been detained in cell no. 9. The description given by the applicant was on the whole accurate. All the cells were approximately the same size. Cell no. 9 measured 2.27 by 3 m. Given that there was practically no window, the cell was claustrophobic. At the time of the delegates' visit, the prisoners were locked in their cells. Cells where two persons were held were very cramped. Prisoners were virtually confined to their beds. There was no screen separating the toilet from the rest of the cell. The toilet was adjacent to the beds. Some prisoners had put up curtains themselves. The entire unit was very hot. Due to the lack of ventilation, the cells were unbearably hot, 'like ovens'. The air was stale and a stench came out of the cells. The cells were all in a state of disrepair and they were very dirty. Some prisoners complained about rats in the cells. There was no sink in cell no. 9. There was a tap. According to the applicant, who accompanied the delegates during their inspection, the tap had recently been installed. On the doors of some cells there were signs saying 'WC'. When asked, the prisoners said that the signs would be put up during the day when the cell doors were not locked to ensure that the cell-mate did not enter the cell while the toilet was being used. The applicant's cell could be compared to a medieval oubliette. The general atmosphere was repulsive.[22]

As well as providing important confirmation or clarification as to the prevalent conditions in a prison, an on-the-spot investigation may also allow the delegates to ascertain the physical and psychological state of detainees, by carrying out interviews both with prisoners and with the officials responsible for the detention facility. Conversations with inmates can be especially valuable and may allow a delegation to make findings, which would otherwise have been unattainable. They can be very significant in drawing conclusions as to how prisoners are being treated and as to the actual or likely incidence of torture and/or inhuman or degrading treatment. The interviews with officials in charge of prison facilities, which usually take place at the end of the investigation, can also play a decisive role.

Registrar B described his experience on a prison visit:

> There was [a] prison visit I remember being on, all the prisoners were complaining bitterly about the prison regime that was operating. [They said it was] severe…, they weren't allowed to do this, and they weren't allowed to speak to each other. When a prison official came they weren't allowed to look him in the eye. If they lifted their faces and looked at him, they got struck on the back with a stick. The consistency with which they described the harshness of these conditions was most striking – except for one [prisoner] who came in and said 'Everything's great. The food is good; the relations are excellent, access to cinema. No problem.' And he would be questioned extensively. There was always a very positive message coming from his testimony and he was the only one. So…there is a fair amount of manipulation…that's the point I'm making.

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19 *Zeidler-Kornmann v Germany*, nos. 2656/65, 3.10.67. The Commission came to the conclusion that there had been no breach of Article 3 of the Convention. The Committee of Ministers confirmed this finding, by Resolution DH (68) 1, adopted by the Ministers' Deputies on 28.6.68.

20 *Peers v Greece*, no. 28524/95, 19.4.01.

21 *Peers v Greece*, no. 28524/95, 19.4.01, paras. 53 *et seq.*

22 *Peers v Greece*, no. 28524/95, 19.4.01, para. 53.

In prison conditions cases the Court may also benefit from reports prepared by the Committee for the Prevention of Torture (CPT). The CPT visits places of detention (prisons and juvenile detention centres, police stations, holding centres for immigration detainees and psychiatric hospitals) to see how persons deprived of their liberty are treated and, if necessary, to recommend improvements to states.[23] Registrar A confirmed the enormous potential of CPT reports for the conduct of on-the-spot investigations by the Court:

> In the conditions of detention cases, where the facts may be unclear, what helps the Court are obviously the CPT visits to the same penitentiary institution and the recommendations and reports and the response even by the Government to the CPT reports. In many respects, that does dispense the Court from having to take evidence to determine whether or not the conditions complied with the Article 3 requirements. There was one case (I think it was *Peers v Greece*) where the Court was able to say: '… the CPT has been in that institution a year ago and these are the CPT findings and there is very little that has changed over the 12 months period so we can proceed to the finding on the merits.' I am sure the decision was wise to hold the fact-finding mission but I also wonder to what extent the Court had looked at the CPT reports.

While on-the-spot investigations are usually conducted in respect of complaints about prison conditions, they may also be undertaken in cases concerning conditions in psychiatric institutions. In the case of *Simon-Herold v Austria*,[24] a prisoner suffering from partial paralysis had been admitted to a psychiatric hospital for fourteen days where he was held with twenty violent mentally-ill detainees. He alleged that these conditions violated Article 3 of the Convention. Three delegates travelled to Austria where they interviewed 17 witnesses and inspected the Regional Court's prison in Wels and the psychiatric hospital in Linz.[25]

6.2 The problem of non-cooperation

To be as effective as possible, on-the-spot investigations need to be arranged and carried out with the full co-operation of the respondent state. However, problems have arisen in the context of on-the-spot investigations, primarily as a result of the reluctance, and, at times, unwillingness, of the national authorities to support the delegation. There have been incidents where the investigations have effectively been boycotted.

Visits to prisons and other institutions have not always enjoyed the full co-operation of the state. For example, on occasions, despite clear indications as to the existence of certain cells, prison staff have tried to conceal their existence from the delegates.[26] In *Kaja v Greece*, in which a delegation of Court judges conducted an on-the-spot investigation in order to ascertain the conditions of the police detention centre in Larissa, the Court noted that the detention centre had been meticulously cleaned and freshly re-painted prior to the mission.[27]

Jochen Frowein, the former Vice-President of the Commission, has argued that it is extremely important for the effectiveness of an on-the-spot investigation that delegates are able to inspect the particular premises in their entirety. He has suggested that in such difficult circumstances, delegates must find ways to carry out their fact-finding role and they must be ready to function effectively in spite of any tense atmosphere in the premises which they are inspecting.[28]

A serious example of non-co-operation occurred in the first two *Cyprus v Turkey* inter-state cases, where the respondent government refused on principle even to participate in the proceedings. In both cases the Commission delegation was denied entry into Turkey. Furthermore, during an investigation in the northern part of Cyprus co-operation was also refused.[29] Similar difficulties also arose in the Greek case.[30] After having heard several dozens of witnesses in Strasbourg, the Commission sent a delegation to Greece in order to carry out further interviews about allegations of torture and to visit particular premises. However, the

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[23] See: Council of Europe. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment http://www.cpt.coe.int/en/about.htm

[24] *Simon-Herold v Austria*, no. 4340/69, 2.2.71.

[25] *Simon-Herold v Austria*, no. 4340/69, 2.2.71; see also Hans-Christian Krüger, *The Experience of the European Commission of Human Rights*, in Bertrand G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights*, 1982, p. 155.

[26] Jochen Abr. Frowein, 'Fact-finding by the European Commission of Human Rights' in *Richard Bonnot Lillich (ed.), Fact-finding before International Tribunals*, Transnational Publishers, 1992, pp. 237-260 (245).

[27] *Kaja v Greece*, no. 32927/03, 27.7.06, para. 47.

[28] *Ibid.*

[29] *Cyprus v Turkey*, nos. 6780/74 and 6950/75, 26.5.75 *et seq.*, Commission Report of 10.7.76; Resolution of the Committee of Ministers DH(79)1 of 10.1.79; *Cyprus v Turkey*, no. 8007/77, 4.10.83, 5 *et seq.*

[30] *Denmark, Norway, Sweden and the Netherlands v Greece*, (The Greek case) nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5.11.69.

delegates were denied access to a detention centre on the island of Leros and the Averoff-prison in Athens, and the hearing of further witnesses was prevented. The delegation therefore decided to end its visit to Greece. In its report, the Commission found substantial violations of the Convention, notably of Article 3.

While the Convention system does not require the Court to obtain the consent of the respondent state to carry out a fact-finding mission,[31] there may be grave difficulties in practice if a state is not willing to co-operate. This is illustrated by the case of *Shamayev v Georgia and Russia*[32] which concerned the extradition of the Chechen applicants from Georgia to Russia. In that case the Court's plans to conduct a fact-finding mission in Russia, in order, *inter alia*, to visit the extradited applicants in their cells in a pre-trial detention centre, had to be abandoned in the face of prevarication by the Russian Government.

In the cases described above, the states are acting in violation of the Convention itself (Article 38(1)(a)). They are also in breach of the Court Rules relating to the states' obligations as regards investigative measures. Rule A2(2) provides:

> 1. The applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures.
>
> 2. The Contracting Party on whose territory on-site proceedings before a delegation take place shall extend to the delegation the facilities and co-operation necessary for the proper conduct of the proceedings. These shall include, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. It shall be the responsibility of the Contracting Party concerned to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation.

Other forms of international fact-finding mechanisms incorporate detailed pre-conditions to their missions. The Committee for the Prevention of Torture (CPT) is entitled to carry out visits to any place within a state's jurisdiction where persons are deprived of their liberty by a public authority.[33] It must notify the government concerned of its intention to carry out a visit.[34] The state is then obliged to provide the CPT with the following facilities to carry out its task:

(a) access to its territory and the right to travel without restriction;

(b) full information on the places where persons deprived of their liberty are being held;

(c) unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;

(d) other information available to the [state] which is necessary for the [CPT] to carry out its task. In seeking such information, the [CPT] shall have regard to applicable rules of national law and professional ethics.[35]

Within the UN system, the Special Procedure mechanisms carry out country visits to investigate human rights situations. Mandate holders will seek the permission of the government to visit the country, and a visit can only take place if the government consents. The standard terms of reference for fact-finding missions by Special Procedures are as follows:

(a) Freedom of movement in the whole country, including facilitation of transport, in particular to restricted areas;

(b) Freedom of inquiry, in particular as regards:

(i) Access to all prisons, detention centres and places of interrogation;

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[31] In relation to the Inter-American system, Faúndez Ledesma has suggested that "although the consent of a State is a prerequisite for the Commission to carry out an on-site visit, it does not appear that the State has the right to deny arbitrarily this consent since the Convention imposes on the State parties the obligation to collaborate with the Commission and to furnish it all the facilities necessary to carry out its investigation": Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, p. 397.

[32] *Shamayev v Georgia and Russia*, no. 36378/02, 12.4.05, paras 26-49.

[33] Article 2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[34] Article 8 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[35] Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

(ii) Contacts with central and local authorities of all branches of government;

(iii) Contacts with representatives of non-governmental organizations, other private institutions and the media;

(iv) Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the special rapporteur; and

(v) Full access to all documentary material relevant to the mandate;

(c) Assurance by the Government that persons, whether officials or private individuals, who have been in contact with the special rapporteur/representative in relation to the mandate, will not, as a result, suffer threats, harassment or punishment or be subjected to judicial proceedings;

(d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above;

(e) Extension of the same guarantees and facilities mentioned above to the appropriate United Nations staff who will assist the special rapporteur before, during and after the visit.[36]

Furthermore, the Inter-American Commission on Human Rights when conducting on-site visits[37] operates under similarly detailed pre-conditions, stipulated in Article 55 of its Rules of Procedures:

- the Special Commission or any of its members shall be able to interview any persons, groups, entities or institutions freely and in private;
- the State shall grant the necessary guarantees to those who provide the Special Commission with information, testimony or evidence of any kind;
- the members of the Special Commission shall be able to travel freely throughout the territory of the country, for which purpose the State shall extend all the corresponding facilities, including the necessary documentation;
- the State shall ensure the availability of local means of transportation;
- the members of the Special Commission shall have access to the jails and all other detention and interrogation sites and shall be able to interview in private those persons imprisoned or detained;
- the State shall provide the Special Commission with any document related to the observance of human rights that the latter may consider necessary for the presentation of its reports;
- the Special Commission shall be able to use any method appropriate for filming, photographing, collecting, documenting, recording, or reproducing the information it considers useful;
- the State shall adopt the security measures necessary to protect the Special Commission;
- the State shall ensure the availability of appropriate lodging for the members of the Special Commission;
- the same guarantees and facilities that are set forth in this article for the members of the Special Commission shall also be extended to the staff of the Executive Secretariat.

It is important to acknowledge that the context in which these various mechanisms carry out their fact-finding functions are, of course, quite different. Nevertheless, consideration should be given to amending the Court's Rules in order to incorporate a number of the more specific provisions which are discussed above. Such changes could help ensure that the Court's on-the-spot investigations receive states' full co-operation.

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[36] Terms of reference for fact-finding missions by Special Rapporteurs / Representatives (E/CN.41998/45 Appendix V). See: http://www2.ohchr.org/english/bodies/chr/special/visits.htm

[37] In contrast, when conducting in loco investigations in order to verify the facts of an individual petition the scope of the Inter-American Commission's powers seem somewhat more limited. Article 48(1)(d) of the American Convention states: *"If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities."* See further: Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San Jose, 2008, pp. 397-398.

6.3 Conclusions and recommendations

(i) On-the-spot investigations are an important element of the Court's fact-finding activities. They provide Court delegates with a unique opportunity to gain direct, first-hand impressions of the locations visited (notably detention centres), and accordingly to supplement their understanding of the situation gleaned previously from reviewing the pleadings and available documents in the case.

(ii) An overwhelming majority of the respondents to the questionnaire considered that on-the-spot investigations are usually effective in producing relevant new evidence in a case (84%).

(iii) On-the-spot investigations have been carried out in only 24% of the cases which involved fact-finding. In the majority of cases involving an on-the-spot investigation, there is also a fact-finding hearing (19%). On-the-spot investigations have been carried out in 22 cases involving 9 states: Austria, Belgium, Croatia, Germany, Greece, Lithuania, Turkey, Ukraine, and the United Kingdom.

(iv) The former Commission initially conducted on-the-spot investigations primarily in inter-state cases.

(v) The tendency to conduct on-the-spot investigations has increased in recent years – and also in the course of individual applications. Until 2000 there had been only 7 cases which involved on-the-spot investigations. However, between 2001 and 2008 on-the-spot investigations took place in 15 cases. This tendency has notably increased since the accession of central and eastern European states to the Council of Europe.

(vi) As well as providing important confirmation or clarification as to the prevalent conditions in a prison, an on-the-spot investigation may also allow the delegates to ascertain the physical and psychological state of detainees, by carrying out interviews both with prisoners and with the officials responsible for the detention facility.

(vii) To be as effective as possible, on-the-spot investigations need to be arranged and carried out with the full co-operation of the respondent state. However, problems have arisen in the context of on-the-spot investigations, primarily as a result of the reluctance, and, at times, unwillingness of the national authorities to support the delegation.

(viii) Consideration should be given to amending the Court's Rules in order to incorporate more specific pre-conditions concerning the assistance and facilities to be provided by the state to the Court delegation when it conducts on-the-spot investigations. Such changes could help ensure that the Court's on-the-spot investigations receive states' full co-operation.

Chapter 7

Conclusions and recommendations

Chapter 1: The European Court's evaluation of evidence

Summary

1(i) The European Court takes a flexible approach towards the admissibility of evidence, allowing itself an absolute discretion. There is no form of evidence which is considered to be inadmissible *per se*.

1(ii) The Court's assessment of the admitted material in a case is governed by the broad principle of the free evaluation of evidence.

1(iii) While the Court is not bound by the findings of fact of domestic courts, it will require "cogent elements" for it to depart from such findings.

1(iv) In relation to the Court's investigation of an application, the obligation on the respondent state "to furnish all necessary facilities" (in accordance with Article 38(1)(a)) incorporates the following requirements: to submit to the Court documentary evidence relating to the case; to identify, locate and ensure the attendance of witnesses; to comment on documents submitted to the Court; and to reply to questions posed by the Court.

1(v) If the Government fails to submit documents requested by the Court, or if they are not submitted within the requisite time, the Court expects the Government to provide a plausible explanation for the failure to submit the documents – clerical errors and problems of communications between national authorities will not suffice.

1(vi) The standard of proof adopted by the Court when evaluating the available material is proof 'beyond reasonable doubt'. This standard should not, however, be equated to the standard applied in criminal proceedings in the common law system. It has an independent meaning and content, reflecting the fact that the Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibilities under the Convention.

1(vii) The applicant has the initial burden of producing evidence in support of the application; the required standard of proof at this stage is to establish a *prima facie* case.

1(viii) However, the Court will shift the burden from the applicant to the respondent Government in particular circumstances, notably in order to reflect the vulnerability of people held in the custody of the state.

1(ix) The Court may draw adverse inferences from a party's non-cooperation. The drawing of inferences has occurred because of: the non-disclosure of documents; the non-attendance of witnesses; and the provision of insufficiently plausible explanations in respect of particular aspects of the case.

Chapter 2: The fact-finding function of the European Court

Summary

2(i) Where there are fundamental factual disputes between the parties, which cannot be resolved by considering the documents before it, the European Court of Human Rights is able to carry out hearings in order to establish the facts, and to conduct on-the-spot investigations.

2(ii) The findings of this research show that fact-finding missions have been carried out by the European Commission or Court of Human Rights in a total of 92 cases, involving 16 states: Austria, Belgium, Croatia, Cyprus, Finland, Germany, Georgia, Russia, Greece, Italy, Lithuania, Moldova, Sweden, Turkey, Ukraine and the United Kingdom. While fact-finding hearings have formed part of almost every fact-finding mission (93%), the conduct of on-the-spot investigations has been much more limited (24%). Occasionally, fact-finding missions have involved both fact-finding hearings and on-the-spot investigations (19%).

2(iii) Prior to the entry into force of Protocol No. 11 to the Convention in 1998, it was primarily the role of the European Commission of Human Rights to establish the facts of a case. The European

Commission of Human Rights conducted fact-finding hearings in a total of 74 cases. During the 1990s the Commission had to undertake extensive investigations and thus in many cases acted as a de facto court of first instance. This was particularly true with regard to a series of cases brought against Turkey.

2(iv) The 'transitional cases' (pending cases which were concluded by the Commission within a year of Protocol No. 11 coming into force) took an average of just under 8 years to be concluded, compared to just over 3 ½ years for those dealt with previously by the former Commission or just over 4 ½ years for the cases dealt with by the new Court.

2(v) Fact-finding missions have been carried out by the new Court in only 18 cases.

The following findings have been made about the cases which have involved fact-finding missions:

2(vi) The cases have taken an average of almost 6 years to be processed by the Court (an average of about 3 ½ years for cases against EU states, and about 6 ½ years for cases against non-EU states).

2(vii) Of the cases involving fact-finding missions where current EU members were the respondent states, on-the-spot investigations were held in 53% of them, whereas only 17% of the cases against non-EU states involved on-the-spot investigations.

2(viii) The average number of witnesses who have appeared in fact-finding hearings is just over 15. On average, almost twice as many witnesses appeared in cases concerning EU states (24) compared to an average of only 13 witnesses in cases against non-EU states.

2(ix) In 71 of the cases in which a fact-finding mission took place, at least one violation of the Convention was found. In 8 cases there was a friendly settlement.

2(x) Almost half of the 71 cases where a violation of the Convention was found concerned a violation of Article 2 (49%); 41% involved ill-treatment, and in 10% of the cases there was a finding of a violation of other Convention Articles.

2(xi) In every case involving killings or disappearances (amongst the 71 cases) the respondent was a non-EU member state.

2(xii) Seven of the 10 cases in which fact-finding missions took place involving EU states concerned ill-treatment.

2(xiii) In cases in which Articles 2 and 3 were violated, the proceedings took, on average, almost twice as long as those involving violations of other Articles.

Chapter 3: Fact-finding missions – when are they necessary?

Conclusions

This research has shown that a very large majority of respondents consider fact-finding missions to be an important aspect of the procedure before the Court. The Court's decision whether or not to conduct a fact-finding mission in a particular case is determined by a complex amalgamation of both case-related and non-case related factors.

These are the main findings as to when fact-finding missions are considered necessary:

3(i) While most fact-finding missions take place post-admissibility, they may exceptionally be held before a decision on admissibility has been made.

3(ii) A well-justified request for a fact-finding hearing submitted by a party may have considerable influence on the Court's decision-making process.

3(iii) A list of witnesses (including information about the relevance of their expected testimony) is an essential part of a well-argued request for a fact-finding mission.

3(iv) The absence of clear facts, which are indispensable for the determination of the case, is the *sine qua non* for a fact-finding hearing.

3(v) Where national authorities fail to fully establish the relevant facts of a case, this may be an important factor influencing the Court's decision as to the need for a fact-finding hearing. Fact-finding hearings are more likely to be held when the Court assesses that there is a systematic failure in the functioning of the domestic courts.

3(vi) Where the Court can discern reasonable prospects that a fact-finding hearing might lead to the establishment of a violation of the Convention, this is another important factor in the decision-making process.

3(vii) 90% of the cases in which there have been fact-findings hearings or on-the-spot investigations have concerned 'Killings/Disappearances' or 'Ill-treatment' cases.

3(viii) The Court's evaluation of the likelihood of establishing a substantive violation of the Convention, as opposed to merely a procedural violation (e.g. of Article 2) will be a significant aspect in the decision-making process.

3(ix) There has been a high success rate in reaching a finding of a substantive Convention violation, following a fact-finding mission: in 73% of 'Killings/Disappearances' cases and 94% of 'Ill-treatment' cases.

3(x) A Government's effective denial of cooperation in a case will be a considerable disincentive for the Court to hold a fact-finding mission.

3(xi) Another important factor taken into account by the Court in its decision whether or not to conduct a fact-finding mission is the amount of time which has elapsed since the events in question took place. However, despite the practical problems which may arise in fact-finding missions being held some years after the events in question, the Court should nevertheless not rule out holding such missions on this ground alone.

3(xii) The Court has shown a more recent tendency not to carry out fact-finding missions, but to find procedural violations, in order to save time and costs. Cost and time factors act as considerable disincentives. The increase in the Court's caseload and the consequential length of proceedings before the Court have led to the conclusion that it is not practicable to carry out fact-finding hearings in all cases where they could otherwise be justified.

3(xiii) 92% of respondents did *not* agree with the idea that the costs involved in holding fact-finding hearings are not justified, when considering the potential benefits of such hearings.

3(xiv) The decision to initiate a fact-finding mission in a particular case may also be influenced by pedagogical intentions (in particular in respect of cases against the newer member states of the Council of Europe).

Chapter 4: Setting up fact-finding hearings

Conclusions and recommendations

4(i) The essential criterion for selecting witnesses is relevancy, coupled with the question of the sufficiency of the evidence, when considered as a whole.

4(ii) The practical and logistical issues involved in ensuring the attendance of witnesses at the hearing may be considerably important in some cases.

4(iii) The average number of witnesses who have appeared in fact-finding hearings is just over 15.

4(iv) The Court does experience pressure, in practice, to limit the number of witnesses it hears, because of both time and cost. Consequently, there may be a risk that certain links in the chain of evidence are lost and thus the factual basis for the Court's deliberations will be reduced.

4(v) There has not been a consistent practice as regards preparatory meetings. However, a meeting (or pre-hearing) of the Court with the parties' representatives to consider which witnesses to summon may be significantly beneficial. An essential function of the preparatory meeting will be to confirm which witnesses are required and whether witnesses are still willing and able to attend the fact-finding hearing. They may assist the organisation of the hearings and speed up the fact-finding process. They are also considered to be important in ensuring that respondent governments are engaged with the process early on. They can have a pedagogical function, and may be important where there is a particular political context to a case. The need for a preparatory meeting should therefore be carefully considered on a case-by-case basis.

4(vi) The selection of the judges to take part in fact-finding delegations is based on various factors including their professional backgrounds, their previous experience of fact-finding, and also their willingness to participate in fact-finding.

4(vii) There are divergent views about the participation of the national judge as a member of a fact-finding delegation. Their involvement in on-the-spot investigations has been more frequent than in fact-finding hearings. The involvement of the national judge in fact-finding missions should be very carefully assessed on a case-by-case basis.

4(viii) Although there is insufficient support for a specialised fact-finding chamber as such, it is vital to bring together the Court's existing expertise and experience of fact-finding. A specialised 'fact-finding unit' within the Court Registry should be established in order to gather, retain and build on the experience to date (within both the former Commission and the Court) of conducting fact-finding missions.

4(ix) The selection of the location for a fact-finding hearing may have significant implications for witnesses and for applicants. It is important that a 'neutral' venue is selected, and that careful consideration should be given to the logistical difficulties for witnesses.

4(x) The Court will increasingly need to be alive to technological advances, allowing for the use, for example, of satellite imagery.

4(xi) The documents relevant to the fact-finding hearing process should be identified and agreed in advance. Copies of the documents should be made available in electronic format.

Chapter 5: The conduct of fact-finding hearings

Conclusions and recommendations

5(i) The process of questioning witnesses reflects elements of both the continental (inquisitorial) and common law (adversarial) legal systems, with the Court delegates questioning the witnesses first, and then the parties' representatives being given the opportunity to question the witnesses.

5(ii) The questioning process is satisfactory, but it is important that the Court should make it clearer to the parties and their representatives in advance of the hearing as to how the witnesses will be questioned.

5(iii) One of the most significant problems arising during fact-finding hearings is that a number of witnesses summoned fail to attend. This may have significant detrimental consequences for the outcome of the fact-finding mission.

5(iv) There are clear distinctions between the reasons for non-attendance of applicants' witnesses and state witnesses. The reasons why applicants' witnesses fail to appear are usually related to issues of fear and pressure, whereas the explanations for the non-attendance of state witnesses have been more diverse.

5(v) 91% of the respondents to the questionnaire agreed that, where it appears necessary, the Court should take steps to ensure the safety and security of witnesses.

5(vi) Further active consideration should be given by the Council of Europe and the Court to the question of witness protection. One focus should be to require states to establish effective, independent national mechanisms: two-thirds of the respondents to the questionnaire agreed that in those cases where witnesses fail to attend a fact-finding hearing without good reason, the domestic legal system should take appropriate action. In particular, states should be required to establish witness protection programmes.

5(vii) The Court should consider allowing third parties to attend the hearings, especially as a support for vulnerable applicants or witnesses.

5(viii) The European Court's response to the problem of non-attendance of witnesses has essentially been twofold: (i) to consider whether the respondent state has met its obligations under Article 38 of the Convention; and (ii) in assessing the evidence, to draw inferences from the failure of a witness to appear at the hearing. The very important practice has developed in the course of the Court's fact-finding investigations, that where the Government fails to provide satisfactory or plausible explanations for the non-attendance of witnesses, the delegation may draw inferences in the course of their assessment of the evidence in the case.

5(ix) As regards the practice of drawing inferences, consideration should be given to clarifying, and strengthening, the Court's present practice by adopting Rules equivalent to those in force in the Inter-American system which permit the facts alleged by an applicant to be accepted as being true if the state fails to respond adequately (including by failing to ensure that state witnesses attend fact-finding missions). Such Rules should provide the Court with a discretion as to how and when such a presumption is to be applied.

5(x) There is strong support (77% of the respondents) for the Court to retain its discretion to allow particular witnesses to give evidence anonymously.

5(xi) There is substantial support for the use of video-link technology for the purposes of fact-finding: 78% of respondents agreed that the Court should consider it. The Court should therefore actively consider introducing video-link technology as a procedural tool in fact-finding missions.

5(xii) The quality of the interpretation during fact-finding hearings has been very high. The Court is very aware of the difficulties of taking evidence orally through interpreters. Some problems have been encountered where interpretation is not done simultaneously, but is consecutive, because of the need to interpret between two national languages and one or both of the Court's official languages (English and French).

5(xiii) It is problematic that it is common for previously undisclosed documents to be produced immediately before, during or after a fact-finding hearing.

Chapter 6: The conduct of on-the-spot investigations

Conclusions and recommendations

6(i) On-the-spot investigations are an important element of the Court's fact-finding activities. They provide Court delegates with a unique opportunity to gain direct, first-hand impressions of the locations visited (notably detention centres), and accordingly to supplement their understanding of the situation gleaned previously from reviewing the pleadings and available documents in the case.

6(ii) An overwhelming majority of the respondents to the questionnaire considered that on-the-spot investigations are usually effective in producing relevant new evidence in a case (84%).

6(iii) On-the-spot investigations have been carried out in only 24% of the cases which involved fact-finding. In the majority of cases involving an on-the-spot investigation, there is also a fact-finding hearing (19%). On-the-spot investigations have been carried out in 22 cases involving 9 states: Austria, Belgium, Croatia, Germany, Greece, Lithuania, Turkey, Ukraine, and the United Kingdom.

6(iv) The former Commission initially conducted on-the-spot investigations primarily in inter-state cases.

6(v) The tendency to conduct on-the-spot investigations has increased in recent years – and also in the course of individual applications. Until 2000 there had been only 7 cases which involved on-the-spot investigations. However, between 2001 and 2008 on-the-spot investigations took place in 15 cases. This tendency has notably increased since the accession of central and eastern European states to the Council of Europe.

6(vi) As well as providing important confirmation or clarification as to the prevalent conditions in a prison, an on-the-spot investigation may also allow the delegates to ascertain the physical and psychological state of detainees, by carrying out interviews both with prisoners and with the officials responsible for the detention facility.

6(vii) To be as effective as possible, on-the-spot investigations need to be arranged and carried out with the full co-operation of the respondent state. However, problems have arisen in the context of on-the-spot investigations, primarily as a result of the reluctance, and, at times, unwillingness of the national authorities to support the delegation.

6(viii) Consideration should be given to amending the Court's Rules in order to incorporate more specific pre-conditions concerning the assistance and facilities to be provided by the state to the Court delegation when it conducts on-the-spot investigations. Such changes could help ensure that the Court's on-the-spot investigations receive states' full co-operation.

Appendix 1:

Database of cases for which there have been fact-finding hearings

Case title	Respondent	App. No.	Date Lodged	Date Admissible	Comm. Merits	Court Judgment	Articles found violated	Art.41
ADALI	TURKEY	38187/97	12/9/97	31/01/2002		31/03/2005	2, 11, 13	EUR 20,000 non-pecuniary
AKDENIZ & OTHERS	TURKEY	23954/94	05/04/1994	03/04/1995	10/09/1999	31/05/2001	2, 3, 5, 13, f25	GBP 380,200 pecuniary GBP 220,000 non-pecuniary
AKDIVAR & OTHERS	TURKEY	21893/93	3/5/93	19/10/94	26/10/95	30/8/96	8, f25	GBP 115,063 pecuniary GBP 56,000 non-pecuniary
AKKOÇ	TURKEY	22947/93 & 22948/93	01/11/1993 & 22/11/1993	11/10/1994	23/04/1999	10/10/00	2, 3, 13, f25	GBP 30,000 pecuniary GBP 40,000 non-pecuniary
AKKUM & OTHERS	TURKEY	21894/93	04/05/1993	05/03/1996		24/03/2005	2, 3, 13, 38, A1P1	EUR 57,300 pecuniary EUR 60,000 non-pecuniary
AKSOY	TURKEY	21987/93	20/5/93	19/10/94	23/10/95	26/11/96	3, 5, 5(3), 13	TRL 4,283,450,000 pecuniary and non-pecuniary
AKTAŞ	TURKEY	24351/94	08/06/1994	04/09/1995	25/10/1999	24/04/2003	2, 3, 13, 38	EUR 226,065 pecuniary EUR 62,000 non-pecuniary
ALIEV	UKRAINE	41220/98	31/03/1998	25/05/1999		29/4/03	3, 8	EUR 2,000 non-pecuniary
ALTUN	TURKEY	24561/94	30/06/1994	11/09/1995		1/6/04	3, 8, 13, A1P1	EUR 22,000 pecuniary EUR 14,500 non-pecuniary
ASLAN & ASLAN	TURKEY	22491/93 & 22497/93	9/8/93	20/2/95	22/5/97		NONE FOUND	N/A
AVŞAR (H)	TURKEY	25657/94	10/10/1994	14/10/1996		10/7/01	2, 13	GBP 40,000 pecuniary GBP 22,500 non-pecuniary
AYDER & OTHERS	TURKEY	23656/94	20/04/1994	15/05/1995	21/10/1999	8/1/04	3, 8, 13, A1P1	EUR 113,008.90 pecuniary EUR 72,500 non-pecuniary
AYDIN (SUHEYLA)	TURKEY	25660/94	04/10/1994	12/01/1998		24/5/05	2, 3, 13, 38	EUR 30,000 pecuniary EUR 24,500 non-pecuniary
AYDIN (SUKRUN)	TURKEY	23178/94	21/12/1993	28/11/1994	07/03/1996	25/9/97	3, 13	GBP 25,000 non-pecuniary
BENZAN	CROATIA	62912/00	02/10/2002	16/05/2002		8/11/02	Friendly Settlement	EUR 12,000 ex gratia as part of friendly settlement
BERKTAY	TURKEY	22493/93	30/7/93	11/10/94		1/3/01	3, 5, 13	GBP 57,500 non-pecuniary
BİLGİN	TURKEY	23819/94	24/03/1994	15/5/95	21/10/99	16/11/00	3, 8, 13, f25, A1P1	GBP 12,000 pecuniary GBP 10,000 non-pecuniary
BİLGİN (İRFAN)	TURKEY	25659/94	17/10/1994	30/06/1997		17/7/01	2, 5, 13	FF 225,000 non-pecuniary
BROZICEK	ITALY	10964/84	7/5/84	11/3/87	2/3/88	19/12/89	6, 6(1), 6(3)	NONE

Circumstances of the case	FF dates and locations	H / OTS	FF Delegates	Ct / Cm	No. of witnesses
The applicant alleged the killing of her husband by Turkish and/or "TRNC" agents and the inadequacy of the investigation by the "TRNC" authorities, which allegedly harrassed, intimidated and discriminiated against her.	08/10/2002 (STRASBOURG) 23-24/06/2003 (NICOSIA)	H	TULKENS, LORENZEN, TÜRMEN & VAJIC	Ct	7
The applicants alleged the disappearance of eleven of their relatives at the time security forces were carrying out an operation in their area.	30/09-04/10/1997 (ANKARA) 04-09/05/1998 (ANKARA)	H	LIDDY, LORENZEN, PELLONPÄÄ	Cm	14
The applicants alleged that State security forces attacked their village, burnt down nine houses, including their homes, and forced the immediate evacuation of the entire village.	13-14/03/1995 (DIYARBAKIR) 12-14/04/1995 (ANKARA)	H	BRATZA, CABRAL BARRETO & DANELIUS	Cm	14
The applicant alleged that she had been subjected to disciplinary sanctions after publishing an article, that she had been deprived of an effective remedy after her husband had been killed by the authorities, that she had been tortured by the police in custody and that she had been intimidated in respect of her application to the Commission.	05/07/1996 (ANKARA)	H	BRATZA, CABRAL BARRETO, PELLONPÄÄ	Cm	8
The applicants alleged that their relatives had been killed by the security forces	10-13/03/1997 (ANKARA)	H	LIDDY, NOWICKI & BRATZA	Cm	19
The late applicant alleged that he had been tortured during his detention and denied access to a court and an effective remedy. The applicant was murdered, allegedly as a direct consequence of his application to the Commission.	13-14/03/1995 (DIYARBAKIR) 12-14/04/1995 (ANKARA)	H	BRATZA, CABRAL BARRETO & DANELIUS	Cm	11
The applicant alleged that his brother had been killed in detention as a result of torture by the security forces.	19-20/11/1997 (ANKARA)	H	BRATZA, CABRAL BARRETO & DANELIUS	Cm	6
The applicant alleged that the conditions of his detention amounted to inhuman and degrading treatment .	04/10/1999 (SIMFEROPOL PRISON)	H & OTS	MAKARCZYK, MARUSTE, PELLONPÄÄ	Ct	5
The applicant alleged the destruction of his house and property by state security forces.	28/06-02/07/1999 (ANKARA)	H	LIDDY, NOWICKI, THUNE	Cm	13
The applicant alleged that he had been subjected to severe physical ill-treatment and the lack of effective remedies against the alleged actions of security forces and police officers.	06-07/02/1996 (ANKARA)	H	BRATZA, KONSTANTINOV, THUNE	Cm	Unknown
The applicant alleged that his brother had been kidnapped and killed by village guards acting with the knowledge and under the auspices of the authorities.	04-06/10/1999 (ANKARA)	H	ARABADJIEV, BRATZA, DANELIUS	Cm	20
The applicants alleged that their homes and property had been destroyed during an operation by security forces.	16-20/06/1997 (ANKARA)	H	BRATZA, DANELIUS, HERNDL	Cm	15
The applicant alleged that she and her husband had been subjected to inhuman and degrading treatment as well as torture while in police custody. She also alleged that her husband had been killed by state agents and that there had been no effective investigation.	17/09/1999 (STRASBOURG) 22-24/09/1999 (ANKARA)	H	GEUS, NOWICKI, AMIGÓ	Cm	12
The applicant alleged that, while in police custody, she had been tortured and raped, after which she had been beaten to prevent her from reporting the incidents.	12-14/07/1995 (ANKARA) 19/10/1995 (STRASBOURG)	H	BRATZA, LIDDY, THUNE	Cm	9
The applicant alleged that the conditions of his detention amounted to inhuman and degrading treatment.	01/07/2002 (LEPOGLAVA PRISON)	OTS	LORENZEN, TULKENS, VAJI	Ct	N/A
The first applicant alleged having been forced by the police to sign a statement incriminating his son which led to his son's home being searched. The second applicant alleged having been thrown from the balcony of his flat by police officers who unlawfully searched his home.	17-19/11/1997 (ANKARA)	H	LIDDY, NOWICKI, THUNE	Cm	10
The applicant alleged that his house and other possessions had been destroyed by security forces.	13-14/03/1997 (ANKARA)	H	BRATZA, LIDDY, NOWICKI	Cm	7
The applicant alleged that his brother had disappeared after being detained, that he had probably been killed by the police during interrogation, and that there had been no effective remedy.	17/09/1999 (STRASBOURG) 20-22/09/1999 (ANKARA)	H	GEUS, NOWICKI, AMIGÓ	Cm	16
The applicant alleged that he had been tried in absentia and not been informed in a language which he understood of the nature and the cause of the accusation against him.	23/04/1989 (STRASBOURG) 28/04/1989 (STRASBOURG)	H	MATSCHER, PETTITI	Ct	Unknown

H / OTS = Fact-finding hearing / On-the-spot investigation

Case title	Respondent	App. No.	Date Lodged	Date Admissible	Comm. Merits	Court Judgment	Articles found violated	Art.41
CAGIRGA	TURKEY	21895/93	3/5/93	19/10/94	7/7/95	N/A	Friendly Settlement	FF 150,000 ex gratia as part of friendly settlement
ÇAKICI	TURKEY	23657/94	02/05/1994	15/5/95	12/3/98	8/7/99	2, 3, 5, 13	GBP 11,534.29 pecuniary GBP 27,500 non-pecuniary
CENBAUER	CROATIA	73786/01	14/1/97	5/2/04		9/3/06	3	EUR 3,000 non-pecuniary
ÇİÇEK	TURKEY	25704/94	08/11/1994	26/02/1996		27/2/01	2, 3, 5, 13	GBP 10,000 pecuniary GBP 40,000 non-pecuniary
CRUZ VARAS & OTHERS	SWEDEN	15576/89	05/10/1989	7/12/89	07/06/1990	20/3/91	NONE FOUND	N/A
CYPRUS	TURKEY	25781/94	22/11/94	28/6/96	4/6/99	10/5/01	2, 3, 5, 6, 7, 8, 9,10, 13, 14, A1P1	N/A
DANKEVICH	UKRAINE	40679/98	20/02/1998	25/5/99		29/4/03	3, 8, 13	EUR 2,000 non-pecuniary
DEMIR (MAHMUT)	TURKEY	22280/93	21/6/93	9/1/95		5/12/02	Friendly Settlement	GBP 116,000 ex gratia as part of friendly settlement
DENIZCI & OTHERS	CYPRUS	25316-25321/94 & 27207/95	12/09/1994	20/01/1998		23/5/01	3, 5, 5(1), A2P4	CYP 180,000 non-pecuniary
DENMARK, NORWAY, SWEDEN AND THE NETHERLANDS – 'THE GREEK CASE'	GREECE	3321/67 to 3323/67 & 3344/67	20/9/67	24/1/68	5/11/69	N/A	5, 6, 7, 8, 9, 10, 13	N/A
DHOEST	BELGIUM	10448/83	24/6/83	12/7/84	14/5/87	N/A	NONE FOUND	N/A
DONNELLY & OTHERS	UNITED KINGDOM	5577/72 to 5583/72	1972	05/04/1973 (admissible) 15/12/1975 (inadmissible)	N/A	N/A	N/A	N/A
DRUZENKO & OTHERS	UKRAINE	17674/02 39081/02	24/3/02	15/1/07		Pending	N/A	N/A
DULAŞ	TURKEY	25801/94	02/05/1994	23/05/1996	06/09/1999	30/1/01	3, 8, 13, f25, A1P1	GBP 12,600 pecuniary GBP10,000 non-pecuniary
EGMEZ	CYPRUS	30873/96	26/3/96	18/5/98	21/10/99	21/12/00	3, 13	GBP 10,000 non-pecuniary
ELÇI & OTHERS	TURKEY	23145/93 & 25091/94	21/12/1993 28/04/1994	2/12/96		13/11/03	3, 5(1), 8	EUR 25,240 pecuniary EUR 225,400 non-pecuniary
ENSSLIN, BAADER & RASPE	FEDERAL REPUBLIC OF GERMANY	7572/76, 7586/76 & 7587/76	1/7/76	08/07/1978 (inadmissible)	N/A	N/A	N/A	N/A

Circumstances of the case	FF dates and locations	H / OTS	FF Delegates	Ct / Cm	No. of witnesses
The applicant alleged that State authorities were responsible for an explosion in his home, killing seven family members and injuring another seven, and that the incident had not been investigated properly.	19/10/1994 (STRASBOURG)	H	BRATZA, CABRAL BARRETO, DANELIUS	Cm	unknown
The applicant alleged that his brother had been taken into custody by the security forces and had been disappeared.	03-05/07/1996 (ANKARA), 04/12/1996 (STRASBOURG)	H	BRATZA, CABRAL BARRETO, PELLONPÄÄ	Cm	11
The applicant alleged that the conditions of his detention amounted to inhuman and degrading treatment.	01/07/2002 (LEPOGLAVA PRISON)	OTS	LORENZEN, TULKENS, VAJI	Ct	N/A
The applicant alleged that state authorities had disappeared her two sons and grandson.	16-20/06/1997 (ANKARA) 15-19/06/1998 (ANKARA)	H	BRATZA, DANELIUS, HERNDL	Cm	8
The applicants alleged that expulsion to Chile would involve the risk of torture and unlawfully separate the family and that there were certain procedural defects.	07/12/1989 (unknown))	H	unknown	Cm	1
The complaints raised in the case arose out of the Turkish military operations in the northern part of Cyprus in July and August 1974 and the continuing occupation of northern Cyprus.	27-28/11/1997 (STRASBOURG) 21-24/02/1998 (CYPRUS) 22/04/1998 (LONDON)	H & OTS	JÖRUNDSSON, PELLONPÄÄ, TRECHSEL	Cm	27
The applicant alleged that the conditions of his detention amounted to inhuman and degrading treatment.	06/10/1999 (ZAPOROZHIE PRISONS NO. 1 & 2, UKRAINE)	H & OTS	PELLONPÄÄ, MAKARCZYK, MARUSTE	Ct	5
The applicant alleged that the security forces had thrown hand grenades to his father's house, killing his father and two nieces, and that they had then burnt down the house.	18/11/1996 (ANKARA)	H	BRATZA, LORENZEN, RESS	Cm	5
All applicants alleged they had been ill-treated by the Greek Cypriot police and unlawfully expelled to the northern part of Cyprus. Two applicants alleged that the government were responsible for their sons' death.	31/08-04/09/1998 (NICOSIA)	H	BRATZA, LIDDY, LORENZEN	Cm	21
On 21 April 1967 a military dictatorship was established in Greece. The Parliament was dissolved and important provisions of the Constitution were suspended. The applicant governments alleged that Greece had violated Articles 5, 6, 8, 9, 10, 11, 13 and 14 of the Convention. Furthermore, they alleged that the invocation of Article 15 of the Convention by the Greek military government was not justified.	23-24/01/1968, 28-31/05/1968, 23-27/09/1968, 25-30/11/1968, 10-20/03/1969, 09-10/06/1969 (STRASBOURG & ATHENS)	H & OTS	unknown	Cm	46
The applicant alleged that he had been unlawfully detained, that the conditions of his detention amounted to inhuman and degrading treatment and that the authorities had failed to order his release on probation.	21/06/1985 (TOURNAI DETENTION CENTRE)	OTS	DANELIUS, SCHERMERS, VANDENBERGHE	Cm	N/A
The applicants alleged that they had been taken into custody by members of the British Army or the Royal Ulster constabulary (RUC) and subjected to interrogation under torture and inhuman and degrading treatment.	01-06/11/1974 (STRASBOURG) 23-28/06/1975 (THE MAZE PRISON, N. IRELAND & "ANOTHER LOCATION IN THE UNITED KINGDOM")	H & OTS	DAVER, FROWEIN, NÓRGAARD, OPSAHL	Cm	42
The applicants alleged that they had been ill-treated by police forces, that the conditions of their detention amounted to inhuman and degrading treatment, and that there were no effective remedies.	3 days in June 2007 (SOUTH UKRAINE)	H & OTS	BUTKEVYCH, JAEGER, MARUSTE	Ct	22
The applicant alleged that her home and property had been destroyed by gendarmes.	07/02/1997 (ANKARA)	H	JÖRUNDSSON, CONFORTI & BRATZA	Cm	3
The applicant alleged that he had been kidnapped and tortured by the authorities, that he had not been granted access to a judge and that there was no effective remedy.	22-26/03/1999 (CYPRUS)	H	TRECHSEL, JÖRUNDSSON & NOWICKI	Cm	unknown
The applicants alleged that they had been taken into detention by law enforcement officers, because they had represented clients before the State Security Court in human rights cases.	7-11/12/1998 (ANKARA)	H	DANELIUS, LIDDY & ARABADJIEV	Cm	33
The applicants alleged that their representation at the conduct of their trial had been insufficient and that they had been subjected to conditions of detention which caused them considerable physical and psychological suffering.	19-20/10/1977 (STUTTGART-STAMMHEIM)	OTS	NÓRGAARD & TRECHSEL	Cm	N/A

H / OTS = Fact-finding hearing / On-the-spot investigation

Case title	Respondent	App. No.	Date Lodged	Date Admissible	Comm. Merits	Court Judgment	Articles found violated	Art.41
ERGI	TURKEY	23818/94	29/3/94	2/3/95	20/05/1997	28/7/98	2, 13, f25	GBP 6,000 non-pecuniary
ERTAK	TURKEY	20764/92	01/10/1992	04/12/1995	04/12/1998	9/5/00	2	GBP 17,500 pecuniary GBP 20,000 non-pecuniary
FRANCE, NORWAY, DENMARK, SWEDEN & THE NETHERLANDS	TURKEY	9940-9944/82	1/7/82	6/12/83			Friendly Settlement	N/A
GREECE	UNITED KINGDOM	176/56	7/5/56	2/6/56	26/9/58	N/A	NONE FOUND	N/A
GÜL (MEHMET)	TURKEY	22676/93	25/08/1993	03/04/1995	27/10/1999	14/12/2000	2, 13	GBP 35,000 pecuniary GBP30,000 non-pecuniary
GÜLEÇ	TURKEY	21593/93	16/03/1993	30/8/94	17/4/97	27/07/1998	2	FF 50,000 non-pecuniary
GÜNDEM	TURKEY	22275/93	07/07/1993	09/01/1995	03/09/1996	25/05/1998	NONE FOUND	N/A
HARAN	TURKEY	25754/94	11/11/94	26/2/96		26/3/02	Friendly Settlement	N/A
HATAMI	SWEDEN	32448/96	22/7/96	23/1/97	23/4/98	9/10/98	Friendly Settlement	N/A
HILTON	UNITED KINGDOM	5613/72	4/5/72	05/03/1976	6/3/78	09/06/94 (Committee of Ministers)	6	NONE
İKİNCİSOY	TURKEY	26144/95	19/5/94	26/2/96		27/7/04	2, 5(3), 5(4), 5(5), 13, f25	EUR 25,000 pecuniary EUR 11,000 non-pecuniary
ILAŞCU & OTHERS	MOLDOVA AND RUSSIA	48787/99	05/04/1999	04/07/2001		08/07/2004	3, 5, 34	EUR 760,000 pecuniary & non-pecuniary
İLHAN (NASIR)	TURKEY	22277/93	24/6/93	22/5/95	23/4/99	27/6/00	3, 13	GBP 80,600 pecuniary GBP 25,000 non-pecuniary
ILHAN (HASAN)	TURKEY	22494/93	23/7/93	17/10/94		9/11/04	3, 8, 13, A1P1	EUR 33,500 pecuniary EUR 14,500 non-pecuniary
İPEK	TURKEY	25760/94	18/11/1994	14/05/2002		17/02/2004	2, 3, 5, 13, 38, A1P1	EUR 43,400 pecuniary EUR 15,000 non-pecuniary
IRELAND	UNITED KINGDOM	5310/71	16/12/71	1/10/72	25/1/76	18/01/1978	3	N/A

Circumstances of the case	FF dates and locations	H / OTS	FF Delegates	Ct / Cm	No. of witnesses
The applicant alleged that his sister had been killed by security forces and that there was no effective remedy.	07-08/02/1996 (ANKARA)	H	THUNE, BRATZA & KONSTANTINOV	Cm	4
The applicant alleged that his son had disappeared and probably been killed while being detained.	05-07/02/1997 (ANKARA)	H	JÖRUNDSSON, CONFORTI & BRATZA	Cm	11
The complaints in this case had arisen out of the coup d'état in 1980 and the consequent militarisation of the Turkish political system. The applicant Governments submitted that the Law on the Constitutional Order of 27 October 1980 and a number of laws and decrees made under it had abrogated the constitutional protection of fundamental rights and they alleged breaches of Article 3, 5, 6, 9, 10, 11 and 15(3) of the Convention.	Unknown	Unknown	Unknown	Cm	Unknown
It was alleged that a series of emergency laws and regulations introduced in Cyprus by the British Government were incompatible with the Convention.	13-27/01/1958 (NICOSIA, PYLA, FAMAGUSTA, MILIKOURI, LIMASSOL, APHANIA, PARALIMNI, PHRENAROS)	H & OTS	SORENSEN, WALDOCK, EUSTATHIADES, SUSTERHENN, CROSBIE & DOMINEDO	Cm	67
The applicant alleged that his son had been killed by police officers and that he had no effective access to court or a remedy.	15-19/02/1999 (ANKARA)	H	THUNE, LIDDY & LORENZEN	Cm	25
The applicant alleged that his son had been killed by security forces.	2-6/10/1995 (ANKARA) 06/03/1996 (STRASBOURG)	H	DANELIUS, NOWICKI & CABRAL BARRETO	Cm	19
The applicant alleged that his home and possessions were damaged by security forces.	07-08/11/1995 (DIYARBAKIR) 07-08/03/1996 (STRASBOURG)	H	DANELIUS & CONFORTI	Cm	7
The applicant alleged that his son had been unlawfully killed by security forces.	16-20/06/1997 (ANKARA) 15/06/1998 (ANKARA)	H	DANELIUS, BRATZA & HERNDL	Cm	unknown
The applicant alleged that he would face inhuman treatment if deported to Iran.	12/05/1997 (STOCKHOLM)	H	TRECHSEL, JÖRUNDSSON & LOUCAIDES	Cm	1
The applicant alleged that the conditions of his detention amounted to inhuman and degrading treatment and that prison authorities had interfered with his application.	23/04/1976 (COUNCIL OF EUROPE, PARIS) 19-21/07/1976 (LEEDS)	H	TRIANTAFYLLIDES, TRECHSEL, KIERMAN & KLECKER	Cm	18
The applicants alleged that their son/brother had been killed in circumstances engaging the responsibility of the respondent Government.	28/06-02/07/1999 (ANKARA)	H	THUNE, LIDDY & NOWICKI	Cm	10
The applicants alleged that they had been convicted without a fair trial, that they had been detained under conditions amounting to inhuman and degrading treatment and that Mr Ilaşcu had been sentenced to death unlawfully.	10-15/03/2003 (CHISINAU, STAVROPOL)	H	RESS, BRATZA, CASADEVALL & LEVITS,	Ct	43
The applicant alleged that his brother had been beaten and severely injured by gendarmes and that he had no access to court nor any effective remedy.	29-30/09/1997 (ANKARA) 04/05/1998 (ANKARA)	H	PELLONPÄÄ, LIDDY & LORENZEN	Cm	11
The applicant alleged that security forces burnt down his house and set fire to his vineyards and orchards.	17-19/04/1996 (ANKARA)	H	JÖRUNDSSON, LIDDY & RESS	Cm	11
The applicant alleged that his two sons had been disappeared while in custody and that the family home and property had been destroyed by security forces.	18-20/11/2002 (ANKARA)	H	COSTA, JÖRUNDSSON & BUTKEVYCH	Ct	8
The authorities in Northern Ireland had exercised from August 1971 until December 1975 a series of extrajudicial powers of arrest, detention and internment. The proceedings were concerned with the scope and the operation in practice of those measures as well as the alleged ill-treatment of persons thereby deprived of their liberty.	26/11-01/12/1973 (STRASBOURG) 25/02-01/03/1974 (STRASBOURG) 02-11/05/1974 (NORWAY) 12-15/06/1974 (NORWAY) 22-25/07/1974 (STRASBOURG) 28-30/10/1974 (STRASBOURG) 13-25/01/1975 (NORWAY) 20/02/1975 (LONDON)	H	SPERDUTI, OPSAHL, POLAK, ERMACORA, JÖRUNDSSON, KELLBERG, DAVER, FROWEIN, NÓRGAARD	Cm	119

H / OTS = Fact-finding hearing / On-the-spot investigation

Case title	Respondent	App. No.	Date Lodged	Date Admissible	Comm. Merits	Court Judgment	Articles found violated	Art.41
KAJA	GREECE	32927/03	10/10/03	27/7/06		27/7/06	3	EUR 5,000 non-pecuniary
KAYA	TURKEY	22729/93	23/09/1993	20/02/1995	24/10/96	19/02/1998	2, 13	GBP 10,000 non-pecuniary
KAYA	TURKEY	22535/93	20/10/93	9/1/95	23/10/98	28/3/00	2, 3, 13	GBP 17,500 non-pecuniary
KHOKHLICH	UKRAINE	41707/98	9/2/98	25/05/1999		29/04/2003	3, 8	EUR 2,000 non-pecuniary
KILIÇ	TURKEY	22492/93	13/08/1993	9/1/95	23/10/1998	28/03/2000	2, 13	GBP 17,500 non-pecuniary
KURT	TURKEY	24276/94	11/05/1994	25/05/1995	05/12/1996	25/05/1998	3, 5, 13, f25	GBP 25,000 non-pecuniary
KUZNETSOV	UKRAINE	39042/97	25/11/1997	30/10/98	26/10/99	29/04/2003	3, 8, 9	EUR 2,000 non-pecuniary
MENTEŞ & OTHERS	TURKEY	23186/94	20/12/93	9/1/95	7/3/96	28/11/97	8, 13	GBP 68,000 pecuniary GBP 32,000 non-pecuniary
N.	FINLAND	38885/02	31/10/2002	23/09/2003		26/07/2005	3	NONE
NAUMENKO	UKRAINE	42023/98	25/2/98	7/5/02		10/2/04	NONE FOUND	N/A
NAZARENKO	UKRAINE	39483/98	12/09/1997	25/5/99		29/04/2003	3, 8	EUR 2,000 non-pecuniary
O.	TURKEY	28497/95	26/7/95	20/5/97		15/7/04	2	EUR 25,000 non-pecuniary
OĞUR	TURKEY	21594/93	16/03/1993	30/8/94	30/10/97	20/05/1999	2	FF 100,000 non-pecuniary
ÖNEN (ŞEMSI)	TURKEY	22876/93	15/09/1993	15/05/1995	09/10/1999	14/05/2002	2, 13	EUR 29,000 non-pecuniary
ORHAN	TURKEY	25656/94	24/11/94	7/4/97		18/6/02	2, 3, 5, 8, 13,34, A1P1	GBP 30,000 pecuniary EUR 60,900 non-pecuniary
ÖZKAN & OTHERS	TURKEY	21689/93	8/4/93	16/01/1996		06/04/2004	2, 3, 5, 5(1), 5(3), 7	EUR 207,190 pecuniary EUR 643,700 non-pecuniary
PEERS	GREECE	28524/95	10/09/1994	21/5/98	4/6/99	19/04/2001	3, 8	GRD 5,000,000 non-pecuniary
POLTORATSKIY	UKRAINE	38812/97	19/09/1997	30/10/98	26/10/1999	29/04/2003	3, 8, 9	EUR 2,000 non-pecuniary
SALMAN	TURKEY	21986/93	20/05/1993	20/02/1995	01/03/1999	27/06/2000	2, 3, 13, f25	GBP 39,320.64 pecuniary GBP 35,000 non-pecuniary
SANDS	UNITED KINGDOM	93381/81	Unknown	N/A	N/A	N/A	N/A	N/A

Circumstances of the case	FF dates and locations	H / OTS	FF Delegates	Ct / Cm	No. of witnesses
The applicant complained of poor prison conditions (overcrowding, inadequate sanitary facilities, absence of windows, no exercise).	31/03-01/04/2006 (LARISSA)	H & OTS	ROZAKIS, STEINER, JEBENS	Ct	4
The applicant alleged that his brother had been unlawfully killed by security forces and that it had not been adequately investigated by the State authorities.	09/11/1995 (DIYARBAKIR)	H	DANELIUS, CONFORTI & MUCHA	Cm	5
The applicant alleged that his brother had been kidnapped, tortured and killed by, or with connivance of, state agents.	20/01/1997 (STRASBOURG) 04-05/02/1997 (ANKARA) 05/07/1997 (STRASBOURG)	H	JÖRUNDSSON, CONFORTI & BRATZA	Cm	11
The applicant alleged that the conditions he was subjected to on death row amounted to inhuman and degrading treatment.	07-08/10/1999 (KHMELNITSKIY PRISON)	H & OTS	MARUSTE, PELLONPÄÄ & MAKARCZYK	Ct	5
The applicant alleged that his brother had been killed by or with the connivance of State agents and that there had been no effective investigation, redress or remedy for his complaints.	04-05/02/1997 (ANKARA) 04/07/1997 (STRASBOURG)	H	JÖRUNDSSON, CONFORTI & BRATZA	Cm	4
The applicant complained that her son had been taken into custody by the security forces and had been disappeared.	8-9/02/1996 (ANKARA)	H	THUNE, BRATZA & KONSTANTINOV	Cm	6
The applicant alleged that the conditions he was subjected to on death row amounted to inhuman and degrading treatment.	23 & 26/11/1998 (KIEV) 24-25/11/1998 (IVANO-FRANKIVSK)	H & OTS	TRECHSEL, NOWICKI & ARABADJIEV	Cm	19
The applicants alleged that their homes had been burnt and they had been expelled from their village by security forces. The fourth applicant also alleged that her prematurely born twins had died as a result of the expulsion from her home.	10-12/07/1995 (ANKARA)	H	THUNE, LIDDY & BRATZA	Cm	11
The applicant alleged that he would face inhuman treatment if deported to Congo.	18-19/03/2004 (HELSINKI)	H	GARLICKI & FURA-SANDSTROM	Ct	4
The applicant alleged inhuman and degrading treatment amounting to torture during his detention and that there was no effective remedy.	26-27/09/2002 (ZHYTOMYR PRISON)	H & OTS	BAKA, LOUCAIDES & MULARONI	Ct	10
The applicant alleged that the conditions he was subjected to on death row amounted to inhuman and degrading treatment.	04/10/1999 (SIMFEROPOL PRISON)	H & OTS	PELLONPÄÄ, MAKARCZYK & MARUSTE	Ct	5
The applicant alleged that his son had been the victim of an extrajudicial execution by the security forces and that there had been no effective remedy.	12-16/04/1999 (ANKARA) 02/06/1999 (ANKARA)	H	TRECHSEL, GEUS & AMIGÓ	Cm	20
The applicant alleged that her son had been killed unlawfully during an operation by the security forces.	04-06/10/1995 (ANKARA)	H	DANELIUS, NOWICKI & CABRAL BARRETO	Cm	8
The applicant alleged that his parents and brother had been killed by armed members of the village guards and that there had not been a proper investigation of these incidents.	30/03/1998 (ANKARA) 01-02/04/1998 (ANKARA)	H	JÖRUNDSSON, BRATZA & RESS	Cm	13
The applicant alleged that soldiers had burnt and evacuated his hamlet and killed his two brothers and his son.	06-08/10/1999 (ANKARA)	H	DANELIUS, BRATZA & ARABADJIEV	Cm	13
The applicants alleged that a military raid led to the death of two children, the taking into detention of all male villagers, where they were kept under inhuman and degrading conditions which caused the death of one villager.	02-04/04/1998 (ANKARA) 05-10/10/1998 (ANKARA)	H	BRATZA, RESS & NOWICKI	Cm	48
The applicant alleged that the conditions he was subjected to on death row amounted to inhuman and degrading treatment.	22/06/1998 (KORYDALLOS PRISON, GREECE)	H & OTS	BUSUTTIL, LOUCAIDES	Cm	4
The applicant alleged that the conditions he was subjected to in detention amounted to inhuman and degrading treatment.	23 & 26/11/1998 (KIEV) 24-25/11/1998 (IVANO-FRANKIVSK)	H & OTS	TRECHSEL, NOWICKI & ARABADJIEV	Cm	16
The applicant alleged that her husband had died as a result of torture while in police custody.	01-03/07/1996 (ANKARA) 04/12/1996 (STRASBOURG) 04/07/1997 (STRASBOURG)	H	PELLONPÄÄ, CABRAL BARRETO & BRATZA	Cm	16
Hunger strike in Maze Prizon in Northern Ireland	unknown	unknown	unknown	Cm	unknown

H / OTS = Fact-finding hearing / On-the-spot investigation

Case title	Respondent	App. No.	Date Lodged	Date Admissible	Comm. Merits	Court Judgment	Articles found violated	Art.41
ŞARLI	TURKEY	24490/94	23/06/1994	28/11/1995	21/10/1999	22/05/2001	13, f25	GBP 5,000 non-pecuniary
SELÇUK & ASKER	TURKEY	23184/94 & 23185/94	15/12/1993	28/11/1994 (23185/94) & 03/04/1995 (23184/94)	28/11/1996	24/04/1998	3, 8, 13, A1P1	GBP 40,168.80 pecuniary GBP 20,000 non-pecuniary
ŞEN (NURAY) (NO. 2)	TURKEY	25354/94	4/4/94	5/3/96		30/3/04	2, 13	EUR 14,500 non-pecuniary
SHAMAYEV & OTHERS	GEORGIA & RUSSIA	36378/02	4/10/02	16/9/03		12/4/05	3 (in conjunction with 2), 5, 5(2), 5(4), 13, 34, 38	EUR 78,000 non-pecuniary
SIMON-HEROLD	AUSTRIA	4340/69	07/11/1969	2/2/71	19/12/72	N/A	Friendly Settlement	N/A
STOCKÉ	FEDERAL REPUBLIC OF GERMANY	11755/85	23/09/1985	09/07/1987	12/10/88	18/2/91	NONE FOUND	N/A
TANIŞ AND OTHERS	TURKEY	65899/01	09/02/2001	11/09/2001		2/8/05	2, 3, 5, 13, 38	EUR 90,000 pecuniary EUR 80,000 non-pecuniary
TANRIBILIR	TURKEY	21422/93	6/2/93	28/11/94		16/11/00	NONE FOUND	N/A
TANRIKULU	TURKEY	23763/94	25/02/1994	28/11/1995	15/04/1998	8/7/99	2, 13, f25	GBP 15,000 non-pecuniary
TAŞ	TURKEY	24396/94	07/06/1994	05/03/1996	09/09/1999	14/11/00	2, 3, 5, 5(1), 5(3), 5(4), 5(5), 13	GBP 30,000 non-pecuniary
TEKDAĞ	TURKEY	27699/95	26/06/1995	25/11/1996		15/1/04	2, 13, 38	EUR 14,000 non-pecuniary
TEKİN	TURKEY	22496/93	14/07/1993	20/02/1995	17/04/1997	9/6/98	3, 13	GBP 10,000 non-pecuniary
TEPE	TURKEY	27244/95	04/05/1995	25/11/1996		9/5/03	2, 13, 38	EUR 14,500 non-pecuniary
TİMURTAŞ	TURKEY	23531/94	09/02/1994	11/09/1995	29/10/1998	13/6/00	2, 3, 5, 13	GBP 30,000 non-pecuniary
VALAŠINAS	LITHUANIA	44558/98	14/05/1998	14/3/00		24/7/01	3, 8	LTL 6,000 non-pecuniary
YAŞA	TURKEY	22281/93	21/6/93	3/4/95		27/6/02	Friendly Settlement	GBP 89,000 ex gratia as part of friendly settlement

Circumstances of the case	FF dates and locations	H / OTS	FF Delegates	Ct / Cm	No. of witnesses
The applicant alleged that her son and daughter had been disappeared by security forces.	04/10/1997 (ANKARA) 04-06/05/1998 (ANKARA)	H	LIDDY, PELLONPÄÄ & LORENZEN	Cm	15
The applicants alleged that their homes and property had been burnt and that they had been expelled from their village.	05-06/02/1996 (ANKARA)	H	THUNE, BRATZA & KONSTANTINOV	Cm	10
The applicant alleged that her husband had been abducted and murdered by State officials.	16-18/06/1996 (ANKARA)	H	DANELIUS, THUNE & BRATZA	Cm	11
The applicants alleged that after crossing the Russian-Georgian border they had been unlawfully detained and/or extradited to Russia.	23-25/02/2004 (TBILISI)	H	COSTA, BAKA & BUTKEVYCH	Ct	18
The applicant alleged that he had been (1) treated as a criminal while being detained on remand, (2) beaten up during his detention, and (3) treated in an inhuman/degrading , or life-threatening way during his detention.	OCTOBER 1971 (LINZ & WELS)	H & OTS	FAWCETT, ERMACORA & DE GAAY	Cm	17
The applicant alleged that the circumstances of his arrest made it and his detention both on remand and after conviction unlawful and that there had been no fair trial.	04/07/1988 (STRASBOURG) 15/09/1988 (STRASBOURG) 16/10/1988 (STRASBOURG)	H	VEITZEL, FROWEIN & VANDENBERGHE	Cm	9
The applicants alleged that their two relatives had been the victims of an extrajudicial execution in custody, despite the authorities' assertion that they had not been detained.	28-30/04/2003 (ANKARA)	H	BRATZA, PELLONPÄÄ & MARUSTE	Ct	25
The applicant alleged that his son had been killed while being detained by the gendarmerie.	07-08/07/1997 (STRASBOURG)	H	DANELIUS, CABRAL BARRETO & SVABY	Cm	8
The applicant alleged that her husband had been killed by the security forces, that the event had not been adequately investigated , and that she had been hindered in the exercise of her right of individual petition.	21-22/11/1996 (ANKARA)	H	BRATZA, RESS & LORENZEN	Cm	6
The applicant alleged that his son had disappeared after being apprehended by the security forces.	07-08/05/1998 (ANKARA)	H	LIDDY, PELLONPÄÄ & LORENZEN	Cm	11
The applicant alleged that her husband had been disappeared.	09-14/10/2000 (ANKARA)	H	BAKA, LORENZEN & FISCHPOOL	Ct	9
The applicant alleged that he had been ill-treated while being detained and that this event had not been adequately investigated.	08/11/1995 (DIYARBAKIR) 07/03/1996 (STRASBOURG)	H	DANELIUS, BRATZA & MUCHA	Cm	7
The applicant alleged that his son had been abducted and killed by undercover agents of the State.	09-14/10/2000 (ANKARA)	H	BAKA, LORENZEN & FISCHPOOL	Ct	24
The applicant alleged that his son had been disappeared in circumstances engaging the responsibility of the respondent State.	21-23/11/1996 (ANKARA)	H	BRATZA, RESS & LORENZEN	Cm	6
The applicant alleged that the conditions he was subjected to on death row amounted to inhuman and degrading treatment.	25/05/2000 (VILNIUS) 26/05/2000 (PRAVIENISKES)	H & OTS	LOUCAIDES, K RIS	Ct	3
The applicant alleged that members of the security forces had thrown a grenade into his house, killing his wife and child, and that he also lost his home and possessions.	18/11/1996 (ANKARA)	H	BRATZA, LORENZEN & RESS	Cm	Unknown

H / OTS = Fact-finding hearing / On-the-spot investigation

Case title	Respondent	App. No.	Date Lodged	Date Admissible	Comm. Merits	Court Judgment	Articles found violated	Art.41
YILDIZ (TEKIN)*	TURKEY	22913/04	7/6/04	10/11/05		10/11/05	3	EUR 10,000 non-pecuniary
YILMAZ, OVAT, SAHIN & DÜNDAR	TURKEY	23179/94 & 23180/94 & 23181/94 & 23182/94	20/12/93	3/4/95	9/9/97		13	NONE
YÖYLER	TURKEY	26973/95	04/04/1995	13/01/1997		24/7/03	3, 8, 13, A1P1	EUR 25,000 pecuniary EUR 14,500 non-pecuniary
ZEIDLER-KORNMANN	FEDERAL REPUBLIC OF GERMANY	2686/65	4/9/65	13/12/66	3/10/67		NONE FOUND	N/A

* Tekin Yildiz forms part of a group of 53 similar cases each of which concerned the imprisonment of the applicants because of their membership of terrorist organisations. Their prison sentences were then suspended on medical grounds, as they were suffering from Wernicke-Korsakoff Syndrome, resulting from their prolonged hunger strikes while in prison (in protest against the introduction of 'F-type' prisons in Turkey).: Tamer TUNCER (no 14445/02), Turan TALAY (no 4824/03), Ergül ÇİÇEKLER (no 14899/03), Bekir BALYEMEZ (no 32495/03), Ferhan GÜLLÜ (no 1889/04), Ahmet ARSLAN (no 5114/04), Hacı Aziz HUN (no 5142/04), Serkan AYDOĞAN (no 7018/04), Sinan EREN (no 8062/04), Sait Oral UYAN (no 7454/04), Aslıhan GENÇAY (no 10057/04), İsmet ÖZDEMİR (no 10911/04), Kemal AKYÜZ (no 11244/04), Ayhan OHANCAN (no 13565/04), Necati ÖNDER (no 13449/04), Kemal BOLAT (no 13570/04), Zülfikar TARAF (no 14292/04), Tülin DAĞ (no 16827/04), Eylem ÇEVİK (no 17175/04), Elif ATEŞ (no 14390/04), Muhammet ŞAHİN (no 20767/04), Hüseyin AKIŞ (NO 21294/04), Cemalettin GÜRZOĞLU (no 21862/04), Cengiz KUMANLI (no 24187/04), Fatime AKALIN (no 21844/04), Halit GÜNER (no 21827/04), Hasan Basri ÜNLÜ (no 22938/04), Mürüvvet KÜÇÜK (no 21784/04), Ayşe EĞİLMEZ (no 21798/04), Hüsne DAVRAN (no 21807/04), Hakkı ALPAN (no 22731/04), Murat KARAKUŞ (no 21780/04), Levent Can YILMAZ (no 24030/04), Günnaz KURUÇAY (no 24040/04), Savaş ERBEKTAŞ (no 24135/04), Cafer GÜRBÜZ (no 26050/04), Baki YAŞ (no 25514/04), Savaş KÖR (no 27151/04), Mesut DENİZ (no 27186/04), Yavuz ATEŞ (no 27370/04), Ali Musa AYDIN (no 27324/04), Hasan GÜLBAHAR (no 27375/04), Ali Rıza SEÇİK (no 28979/04), Murat BAHÇELİ (no 28915/04), Çiğdem Diren KIRKOÇ (no 28275/04), Dursun BÜTÜNER (no 28854/04), Menderes SADIKOĞULLARI (no 28904/04), Kasım AKSAKA (no 28895/04), Hüseyin ŞIKTAŞ (no 28925/04), Alişan YILMAZ (no 28967/04), İhsan CİBELİK (no 29223/04), Tahir ÖZGÜR (no 28480/04).

Circumstances of the case	FF dates and locations	H / OTS	FF Delegates	Ct / Cm	No. of witnesses
The applicant alleged that being reimprisoned after receiving medical treatment following a long-term hunger strike against the conditions of his detention constituted a violation of Article 5 of the Convention.	06-13/09/2004 (TEKIRDAĞ, KOCAELI, ISTANBUL)	OTS	CABRAL BARRETO, TSATSA-NIKOLOVSKA & TRAJA	Ct	0
The applicants alleged that as a result of a raid on their village by security forces their property had been destroyed.	16-17/04/1996 (ANKARA)	H	JÖRUNDSSON, LIDDY & RESS	Cm	6
The applicant alleged that State security forces had destroyed his house.	02-05/04/2001 (ANKARA)	H	PASTOR RIDVUEJO, PELLONPÄÄ & BOUTOUCHAROVA	Ct	30
The applicant alleged that he had been ill-treated by prison officers.	23-26/04/1967 (WEST BERLIN)	H & OTS	FAWCETT, SUSTERHENN, BALTA, WOLTER, O'DONOGHUE, JANSSEN-PEVTSCHIN & SPERDUTI	Cm	15

H / OTS = Fact-finding hearing / On-the-spot investigation

Appendix 2:

Note on Methodology

The research involved three main stages and methods of data collection:

(i) the compilation of a **database** of all relevant Commission and Court decisions;

(ii) an analysis of the attitudes and perceptions of personnel involved in the hearings about the effectiveness of the process, through a **questionnaire**; and

(iii) an analysis of the attitudes of such key personnel through **semi-structured interviews**.

(i) Database

The first stage of the project involved a systematic study of all Court (and former Commission) decisions in which there have been fact-finding missions (either hearings or on-the-spot investigations). The information about the cases and their main characteristics were compiled using the HUDOC system of the ECtHR. Further information was obtained through interviews with the personnel involved and with the assistance of Court Registry staff at the ECtHR. This stage of the research collected information on 92 cases in which fact-finding missions took place. One of these cases (*Sands v United Kingdom*) is unreported and hence was excluded from further analysis.

The data was codified according to various relevant criteria: the nature of the case; the key issues at the heart of the dispute; the number and type of witnesses heard; the nature of the evidence taken; the manner in which evidence was taken; the length of the proceedings; and the consequential findings of the Court. The database also records the names of the Judges and the parties' legal representatives who participated in the hearings, where the information was available.

The Institute created an Excel database of all cases in which the European Court (or the former Commission) has held a fact-finding hearing and/or an on-the-spot investigation. Where appropriate, the data was coded and a quantitative SPSS data file created. The analysis of this data was conducted in several stages:

1) basic univariate analyses (frequency distributions, measures of central tendency and measures of dispersion) were undertaken where levels of measurement, data validity and appropriateness of data for further analysis were determined;

2) the main characteristics of the cases that involved fact-finding hearings were ascertained by applying the appropriate univariate methods of analysis (percentages, measures of central tendencies and graphical presentations);

3) possible relationships between the above listed factors were analysed by applying relevant bivariate analyses (correlation, simple regression analysis and crosstabulation, depending on levels of variables of measurement);

4) whether certain characteristics of these cases determined different procedures related to fact-finding hearings was analysed by applying appropriate bivariate methods (t-tests and ANOVAs, depending on levels of variables of measurement);

5) all the results were presented in tabular or graphical ways, and the relevant statistics are mainly given in footnotes.

(ii) Questionnaire

The second stage of the project involved a quantitative study seeking to discover and analyse the opinions and perceptions of personnel who have been involved in the Court's fact-finding processes, as to its utility and effectiveness.

As the first stage of this research a database listing all relevant personnel was created. Based on information gathered in the database of cases, the list consisted of:

- former members of the European Commission and past and present Judges of the Court who have conducted fact-finding missions and/or those who have participated in deliberations as to whether such hearings were required;
- state representatives who have participated in fact-finding missions; and
- applicants' representatives who have participated in fact-finding missions.

This list consisted of 128 people.

Taking into account the geographical distribution across Europe of the personnel involved, the project decided that the most appropriate method of survey administration was a postal questionnaire. The questionnaire was distributed to all personnel listed in our database - 81 of whom responded (a 63% response rate).

The survey sought to investigate their perception of the strengths and weaknesses of the fact-finding process. There was a particular focus on the following issues: what the process is intended to achieve; what are the necessary limitations of the process; the obstacles encountered; whether the behaviour of the participants (Judges, Court officials, representatives, applicants and witnesses) has been 'appropriate' in the context of a fact-finding process; whether the process is sufficiently accessible and permits applicants to participate adequately; the weaknesses of the system; how the fact-finding process has impinged on the Court's final adjudication of the case; what the notable successes have been, and why; and how the process could be improved.

As this part of the research was aimed at investigating respondents' opinions and attitudes, the questionnaire primarily consisted of sets of relevant statements using the Likert five point scale (where 1 = absolutely agree, 2 = agree, 3 = neither agree nor disagree, 4 = disagree and 5 = absolutely disagree) which enabled us to obtain and then assess higher levels of the measurement of variables.

The data set was coded and inputed into an SPSS database. Data analysis was conducted in three stages:

1) Basic univariate analyses (frequency distributions, measures of central tendency and measures of dispersion) were conducted in order to determine levels of measurement, data validity and appropriateness for further analysis.

2) Bivariate analyses were used in order to search for possible associations (crosstabulation, correlation or simple regression analysis, depending on levels of variables of measurement) and differences (t-test, ANOVA) between the key socio-demographic variables of different groups of personnel and case procedures.

3) Multivariate analyses were used in order to construct models of causal relationships and interactions between sets of predictors and the dependent variables (utility and effectiveness of the Court's fact-finding hearings) on several levels:

    a) Principal component analysis was used in order to determine the existence of latent variables and explore structures of the defined set of variables (attitudes towards obstacles and limitations, weaknesses and successes of the process, behaviour of participants, accessibility of the process, and recommendations for improving the process). The initial

solutions for all principal component analyses were rotated by application of Varimax rotation with Kaiser Normalization. The appropriateness of all scales for these analyses was tested by Cronbach's, KMO, and Bartlett's test of sphericity.

b) Possible relationships between the latent variables were analysed through the application of a hierarchical principle component analysis, conducted on the respondents' z-scores on each of the latent variables.

c) Multiple regression analysis and logistic regression analysis (depending on levels of variables of measurement) were used in order to investigate the extent to which the latent variables determined levels of respondents' satisfaction with the fact-finding process.

The results of these analyses were presented in tabular and graphical form, and the relevant statistics are mainly provided in footnotes.

(iii) Semi-structured interviews

In order to gain further insight into perceptions of the effectiveness of the process of fact-finding, the third stage of the project consisted of a series of semi-structured interviews with a sample of 28 of the personnel involved in the process. Face to face interviews were carried out where practicable (in two cases, due to the respondents' geographical location, interviews were carried out over the telephone). All interviews were recorded and on average lasted for around 45 minutes. These recordings were transcribed and a content analysis on these transcripts was conducted.

The interviews aimed in particular to elucidate the principles which are applied in selecting cases in which fact-finding hearings and missions are deemed necessary.

More specifically the issues addressed in the semi-structured interviews were as follows:

a) factors that are relevant to the decision to hold fact-finding hearings (case-related - procedures before the domestic courts, identity and conduct of the parties - and factors unrelated to the case - cost, time, etc.)

b) the procedure for making the decision to hold fact-finding hearings (at what stage the decision is made, who makes the decision, whether a preparatory hearing is held etc.);

c) the selection of judges (how many and how they are selected);

d) the conduct of preparatory stages (summoning of witnesses, documentation, and assessment of other forms of evidence);

e) the conduct of the fact-finding hearing (attendance, the languages used, non-attendance of witnesses, the questioning of witnesses, documentation, etc.)

f) the conduct of proceedings after the fact-finding hearing (availability of transcripts, invitations to make further submissions, to lodge further documents, etc.).

Appendix 3:

Questionnaire

International human rights & fact-finding: An analysis of fact-finding hearings of the European Court of Human Rights

Research Project Summary

This research project is being conducted by the Human Rights and Social Justice (HRSJ) Research Institute at London Metropolitan University. It is funded by the Nuffield Foundation under its *Access to Justice* programme. The objectives of the research are to critically evaluate the effectiveness of the fact-finding hearings and on-the-spot missions undertaken by the European Court of Human Rights, to assess the strengths and weaknesses of the fact-finding process and to make recommendations for reform. The research incorporates both qualitative and quantitative methods, carried out by way of a postal questionnaire and semi-structured interviews of those who have been involved in the fact-finding process, including European Court judges, former members of the European Commission, Court Registry personnel, and the parties' legal representatives. Four hundred copies of the research report will be printed and disseminated to participants and Council of Europe personnel. It is expected that this research will provide a deepened understanding of fact-finding in the context of the application of international human rights norms and will represent an important resource for those involved in European Court litigation and for Court personnel involved in implementing fact-finding mechanisms.

Project Team and Advisory panel

The research project is being conducted by a team from the HRSJ Research Institute: Professor Philip Leach (Director of the Institute), Gordana Uzelac (senior lecturer in quantitative sociology) and Costas Paraskeva (research assistant and PhD candidate). The project is supported by an advisory panel comprising: Iain Christie, barrister, Five Raymond Buildings; Professor Francoise Hampson, Essex University; Dr. Todd Landman, Essex University; Professor Manfred Nowak, UN Special Rapporteur on Torture; and the Rt. Hon Lord Justice Stephen Sedley.

Definitions

The Court/ECtHR – the European Court of Human Rights

ECHR – European Convention on Human Rights

Fact-finding hearings – hearings conducted by the European Court of Human Rights (and formerly the European Commission of Human Rights) in which witnesses give evidence to a delegation of Court Judges. The hearings are usually held in-country, and are occasionally held in Strasbourg.

On-the-spot investigations – investigation missions carried out by a delegation of the Court at a particular site or location (e.g. at a prison).

Ethics

The research project has been approved by the University's Research Ethics Committee. The postal questionnaires will not contain the names of respondents (unless voluntarily given by the respondents). The questionnaires will be kept in a secure place, the collected database will only be available to the researchers, and all results of data analysis will be presented so that no identification of individual respondents will be possible. Recipients of this questionnaire are in no way obliged to volunteer if there is any personal reason (which they are under no obligation to divulge) why they should not participate in the project and they may withdraw from the project at any time, without disadvantage to themselves and without being obliged to give any reason.

1. Please tell us to what extent you consider the particular stages of the ECtHR's proceedings to be effective.

Please tick only one relevant box next to each statement where:

1 = very ineffective; 2 = ineffective; 3 = neither; 4 = effective; 5 = very effective; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The functioning of the Court itself.	☐	☐	☐	☐	☐	☐
2	The process of the appointment of judges.	☐	☐	☐	☐	☐	☐
3	The period for which judges are appointed.	☐	☐	☐	☐	☐	☐
4	The procedure for lodging an application with the Court.	☐	☐	☐	☐	☐	☐
5	The adjudication of admissibility.	☐	☐	☐	☐	☐	☐
6	The functioning of the Court Registry.	☐	☐	☐	☐	☐	☐
7	The provision of redress by the Court.	☐	☐	☐	☐	☐	☐
8	Measures for the enforcement of Court judgments.	☐	☐	☐	☐	☐	☐
9	The formal procedures for establishing the facts.	☐	☐	☐	☐	☐	☐
10	The actual practices adopted for establishing the facts.	☐	☐	☐	☐	☐	☐

2.How effective do you consider the ECtHR's fact-finding process to be?

Please tick only one relevant box next to each statement where:

1 = very ineffective; 2 = ineffective; 3 = neither; 4 = effective; 5 = very effective; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The Court's decision-making procedure as to the need for a fact-finding hearing in a particular case.	☐	☐	☐	☐	☐	☐
2	The process of summoning witnesses.	☐	☐	☐	☐	☐	☐
3	The procedures for acquiring relevant documents from the parties.	☐	☐	☐	☐	☐	☐
4	The questioning of witnesses at hearings, in general.	☐	☐	☐	☐	☐	☐
5	The questioning of witnesses at hearings through interpreters.	☐	☐	☐	☐	☐	☐
6	The conduct of on-the-spot investigations.	☐	☐	☐	☐	☐	☐
7	The organisation of on-the-spot investigations.	☐	☐	☐	☐	☐	☐

3. To what extent do you agree or disagree with the following statements regarding the ECtHR fact-finding process?

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	A fact-finding hearing is crucial in securing a fair judgment in some cases.	☐	☐	☐	☐	☐	☐
2	The current organisational structure of the Court prevents it from dealing effectively with fact-finding hearings.	☐	☐	☐	☐	☐	☐
3	It would be highly beneficial for the Court to establish a specialised section to deal exclusively with fact-finding hearings.	☐	☐	☐	☐	☐	☐
4	A fact-finding hearing is an effective means of encouraging friendly settlement between the parties.	☐	☐	☐	☐	☐	☐

	Statement	1	2	3	4	5	6
5	Cases involving gross and systematic violations of the European Convention on Human Rights are more likely than other cases to require a fact-finding hearing.	☐	☐	☐	☐	☐	☐
6	As a priority, fact-finding hearings should be held in cases concerning killings and disappearances (Article 2).	☐	☐	☐	☐	☐	☐
7	As a priority, fact-finding hearings should be held in cases concerning torture (Article 3).	☐	☐	☐	☐	☐	☐
8	A fact-finding hearing should always take place when there has been no finding of facts by the domestic courts.	☐	☐	☐	☐	☐	☐
9	A fact-finding hearing should only take place when there are fundamental factual disputes between the parties, which cannot be resolved by considering the available documents.	☐	☐	☐	☐	☐	☐
10	A fact-finding hearing rarely assists the Court in deciding on the merits of a case.	☐	☐	☐	☐	☐	☐
11	The costs involved in holding fact-finding hearings are not justified even considering the possible benefits which may result from them.	☐	☐	☐	☐	☐	☐
12	Fact-finding hearings take up too much of the Court's valuable time.	☐	☐	☐	☐	☐	☐
13	Fact-finding hearings are unnecessary.	☐	☐	☐	☐	☐	☐
14	A fact-finding hearing is often necessary for the applicant to satisfy the Court's standard of proof (to prove the case beyond reasonable doubt).	☐	☐	☐	☐	☐	☐

4. The following set of statements deals with the process of deciding whether the Court should hold a fact-finding hearing. Please tell us to what extent you agree or disagree with them.

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The Court should more frequently encourage the parties' representatives to submit requests for a fact-finding hearing.	☐	☐	☐	☐	☐	☐
2	A well-justified request for a fact-finding hearing from the parties' representatives is a decisive factor in the Court's decision whether to hold such a hearing.	☐	☐	☐	☐	☐	☐
3	The anticipated relevance of witnesses' testimony is the most influential factor in deciding whether to hold such a hearing.	☐	☐	☐	☐	☐	☐
4	The Court's final list of witnesses to be heard depends to a great extent on the parties' representatives' submissions.	☐	☐	☐	☐	☐	☐
5	It happens too frequently that the Court decides not to have a fact-finding hearing because witnesses are not available.	☐	☐	☐	☐	☐	☐
6	A request from one of the parties for a fact-finding hearing should not be considered without the presentation of a clear list of possible witnesses.	☐	☐	☐	☐	☐	☐
7	It is crucial that the applicant's representative should clearly state the potential benefits of a fact-finding hearing in the particular case.	☐	☐	☐	☐	☐	☐
8	Currently, the procedure for instigating fact-finding hearings is not clear enough.	☐	☐	☐	☐	☐	☐
9	The applicant's representative should be able to make submissions to the Court as to the 'state witnesses' to be summoned.	☐	☐	☐	☐	☐	☐

	Statement	1	2	3	4	5	6
10	In an Article 2 case, the Court should hold a fact-finding hearing in every case where it may be able to establish that it is state officials who killed the victim(s).	☐	☐	☐	☐	☐	☐
11	The Court should meet the parties' representatives prior to deciding on the need for a fact-finding hearing.	☐	☐	☐	☐	☐	☐
12	A meeting or hearing of the Court with the parties' representatives to consider which witnesses to summon will be significantly beneficial in drawing up the final list of witnesses.	☐	☐	☐	☐	☐	☐
13	The parties' views should not be crucial for the Court in deciding whether or not to hold a fact-finding hearing.	☐	☐	☐	☐	☐	☐
14	There is an urgent need for the Court to set up a consistent practice in deciding whether to have preliminary meetings with both parties' representatives in order to finalise the list of witnesses.	☐	☐	☐	☐	☐	☐
15	From the existing evidence in the case file, it is always clear whether there is a need to hold a fact-finding hearing.	☐	☐	☐	☐	☐	☐
16	The Court has clear standards for assessing the information and evidence submitted in deciding whether to hold a fact-finding hearing.	☐	☐	☐	☐	☐	☐
17	The decision whether to hold a fact-finding hearing should be that of the President of the Chamber.	☐	☐	☐	☐	☐	☐
18	The decision whether to hold a fact-finding hearing should be taken unanimously by all chamber judges involved.	☐	☐	☐	☐	☐	☐
19	Holding a fact-finding hearing is valueless if it takes place several years after the incident(s) in question.	☐	☐	☐	☐	☐	☐
20	Fact-finding hearings really only contribute to further increasing the Court's case backlog.	☐	☐	☐	☐	☐	☐
21	The costs incurred by the Court have to be taken into consideration when deciding whether to hold a fact-finding hearing.	☐	☐	☐	☐	☐	☐
22	Fact-finding hearings put a considerable burden on the Court's budget.	☐	☐	☐	☐	☐	☐
23	If more time and resources are allocated to fact-finding hearings, other Court functions will suffer.	☐	☐	☐	☐	☐	☐
24	Fact-finding hearings are more likely to be held when the Court assesses that there is a systematic failure in the functioning of the domestic courts.	☐	☐	☐	☐	☐	☐
25	The decision whether to hold a fact-finding hearing greatly depends on the Court's assessment of the role played by the domestic courts in the particular case.	☐	☐	☐	☐	☐	☐
26	It is more likely that the Court will decide to hold a fact-finding hearing when the respondent state is notorious for its previous ECHR violations.	☐	☐	☐	☐	☐	☐
27	Sometimes the identity of the respondent state is more influential on the decision to hold a fact-finding hearing, than the nature of the evidence in the case.	☐	☐	☐	☐	☐	☐
28	Fact-finding hearings should not be held in cases emanating from politically unstable regions within states.	☐	☐	☐	☐	☐	☐

5. In this section please tell us your opinions about the process of setting up a fact-finding hearing.

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The number of judges involved in the fact-finding hearing has no impact on the outcome of the case.	☐	☐	☐	☐	☐	☐
2	Only those judges with expertise in the subject matter of the case should be involved in the fact-finding hearing.	☐	☐	☐	☐	☐	☐
3	Judges' familiarity with the national/local language should be relevant to their appointment as a member of the fact-finding hearing delegation.	☐	☐	☐	☐	☐	☐
4	It is of crucial importance that judges selected for the fact-finding hearing are familiar with the legal system of the respondent state.	☐	☐	☐	☐	☐	☐
5	Judges without any previous experience of fact-finding processes should not take part in these hearings.	☐	☐	☐	☐	☐	☐
6	Only judges with sufficient prior experience as a European Court judge should be involved in fact-finding hearings.	☐	☐	☐	☐	☐	☐
7	Only those judges who are so willing should be involved in fact-finding hearings.	☐	☐	☐	☐	☐	☐
8	The process by which the parties are required to summon their respective witnesses is ineffective.	☐	☐	☐	☐	☐	☐
9	There is little the Court can do if witnesses are untraceable or unavailable even if they are summoned.	☐	☐	☐	☐	☐	☐
10	The Court should formulate an agreed schedule of all relevant documents in advance of the fact-finding hearing, in order to facilitate the process.	☐	☐	☐	☐	☐	☐
11	At the fact-finding hearing the Court should provide all the case documents in electronic format.	☐	☐	☐	☐	☐	☐
12	The effectiveness of a fact-finding hearing would be greatly improved by sending a list of questions to witnesses in advance.	☐	☐	☐	☐	☐	☐
13	Fact-findings hearings lack sufficient technical support to adequately consider certain forms of evidence, e.g. photographs, audio and video materials, maps, plans, etc.	☐	☐	☐	☐	☐	☐
14	Prior to fact-finding hearings, it is difficult for the Court to consider whether expert evidence is needed.	☐	☐	☐	☐	☐	☐
15	The location of the venue for a fact-finding hearing usually has a crucial impact on the quality of the evidence given.	☐	☐	☐	☐	☐	☐
16	The Court should carefully consider even in which building the fact-finding hearing should take place.	☐	☐	☐	☐	☐	☐
17	The Court should give priority to selecting the location for a fact-finding hearing where the witnesses feel most secure.	☐	☐	☐	☐	☐	☐
18	The Court rarely fails to respect the principle of equality of arms in preparing for fact-finding hearings.	☐	☐	☐	☐	☐	☐
19	In cases where witnesses could give evidence by means other than at a fact-finding hearing, the Court should consider it (e.g. by video link).	☐	☐	☐	☐	☐	☐
20	It is important that the venue for the fact-finding hearing is considered as neutral by the parties in the case.	☐	☐	☐	☐	☐	☐

6. The set of statements below relates to the conduct of fact-finding hearings. Please tell us to what extent you agree or disagree with these statements.

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	Due to issues of time and cost, every fact-finding hearing must limit the number of witnesses it can summon.	☐	☐	☐	☐	☐	☐
2	One of the most worrying problems of fact-finding hearings is the small number of summoned witnesses who actually attend.	☐	☐	☐	☐	☐	☐
3	In general, witnesses who are state officials are more likely to attend the hearing than witnesses summoned by the applicant.	☐	☐	☐	☐	☐	☐
4	The Court needs to have a means to compel witnesses to attend the hearings.	☐	☐	☐	☐	☐	☐
5	The strongest incentive for witnesses to attend the hearing is their belief in the importance of the protection of human rights.	☐	☐	☐	☐	☐	☐
6	Those witnesses who are closely related to the applicant (i.e. family or friends) are more likely to attend the hearing than other witnesses.	☐	☐	☐	☐	☐	☐
7	Most of the 'state witnesses' summoned believe that nothing will happen to them if they fail to attend the fact-finding hearing.	☐	☐	☐	☐	☐	☐
8	The Court should carefully consider allowing third parties to attend the hearings, especially as a support for the applicant or witnesses.	☐	☐	☐	☐	☐	☐
9	Witnesses in fact-finding hearings are frequently very reluctant to appear as witnesses against their own state.	☐	☐	☐	☐	☐	☐
10	It is common knowledge that witnesses in cases involving particular states are less likely to attend the hearing than witnesses in cases concerning other states.	☐	☐	☐	☐	☐	☐
11	In those cases where witnesses fail to attend a fact-finding hearing without good reason, the witnesses' domestic legal system should take appropriate action.	☐	☐	☐	☐	☐	☐
12	Where it appears necessary, the Court should take steps to ensure the safety and security of witnesses.	☐	☐	☐	☐	☐	☐
13	In effect, there are no consequences sufficiently severe which can be imposed on respondent Governments which fail to attend a fact-finding hearing.	☐	☐	☐	☐	☐	☐
14	Witnesses should be able to give their evidence in any language in fact-finding hearings, even if it is not a 'national' language.	☐	☐	☐	☐	☐	☐
15	It is a very common problem that the reasons given for a witness's non-attendance are false.	☐	☐	☐	☐	☐	☐
16	The Court usually faces serious problems in securing competent interpreters for the purposes of fact-finding hearings.	☐	☐	☐	☐	☐	☐
17	It happens too often that the parties challenge the quality of the interpretation.	☐	☐	☐	☐	☐	☐
18	Difficulties in interpretation very often lead to difficulties in understanding what is being said by the witness.	☐	☐	☐	☐	☐	☐
19	It is important for the Court to take further steps to prevent witnesses being rehearsed in their evidence.	☐	☐	☐	☐	☐	☐

7. In your experience, how serious are the following problems related to interpretation in fact-finding hearings:

Please tick only one relevant box next to each statement where:

1 = not at all serious; 2 = not serious; 3 = not sure; 4 = serious; 5 = very serious; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	Witnesses speaking in a particular dialect.	☐	☐	☐	☐	☐	☐
2	Witnesses speaking with a strong accent.	☐	☐	☐	☐	☐	☐
3	Witnesses using culturally specific terms or references.	☐	☐	☐	☐	☐	☐
4	Interpreters' knowledge of technical terminology.	☐	☐	☐	☐	☐	☐
5	Interpreters' knowledge of legal terminology.	☐	☐	☐	☐	☐	☐
6	Interpreters' cultural or ethnic background.	☐	☐	☐	☐	☐	☐
7	Interpreters' own political convictions.	☐	☐	☐	☐	☐	☐
8	Interpreters' personal or cultural sensitivities.	☐	☐	☐	☐	☐	☐
9	Interpreters being influenced by either of the parties.	☐	☐	☐	☐	☐	☐

In your opinion, are there any further serious problems related to interpretation in fact-finding hearings that are not listed above? Please specify:

8. In your opinion, how important are the following as disincentives for witnesses' attendance at fact-finding hearings:

Please tick only one relevant box next to each statement where:

1 = not at all important; 2 = not important; 3 = neither; 4 = important; 5 = very important; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The time required to attend hearings.	☐	☐	☐	☐	☐	☐
2	Concern about the potential costs.	☐	☐	☐	☐	☐	☐
3	The distance they have to travel.	☐	☐	☐	☐	☐	☐
4	The practical organisation of travel arrangements.	☐	☐	☐	☐	☐	☐
5	The possibility of pressure from their government.	☐	☐	☐	☐	☐	☐
6	The possibility of pressure from their social environment (e.g. family, neighbours, friends, local community).	☐	☐	☐	☐	☐	☐
7	The risk of confidential/private matters being made public.	☐	☐	☐	☐	☐	☐
8	Lack of familiarity with the Court's processes.	☐	☐	☐	☐	☐	☐
9	Fear of having to give evidence before a court.	☐	☐	☐	☐	☐	☐
10	Fear for their own life.	☐	☐	☐	☐	☐	☐
11	Fear of their professional failings being exposed.	☐	☐	☐	☐	☐	☐
12	A general lack of support for witnesses.	☐	☐	☐	☐	☐	☐

9. **What are, to your knowledge, the most common reasons given for non-attendance of witnesses?**

Please tick only one relevant box next to each statement where:

1 = not common at all; 2 = not common; 3 = neither; 4 = common; 5 = very common; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The witness's illness.	☐	☐	☐	☐	☐	☐
2	The witness's death.	☐	☐	☐	☐	☐	☐
3	The witness cannot be located.	☐	☐	☐	☐	☐	☐
4	The witness is experiencing some sort of emotional strain.	☐	☐	☐	☐	☐	☐
5	The witness is afraid of prosecution by the authorities.	☐	☐	☐	☐	☐	☐
6	The witness does not have the same professional position as at the time of the incident in question.	☐	☐	☐	☐	☐	☐
7	The witness has no relevant evidence to give.	☐	☐	☐	☐	☐	☐
8	The witness does not want to attend (for unspecified reasons).	☐	☐	☐	☐	☐	☐
9	The witness is afraid of the potential consequences.	☐	☐	☐	☐	☐	☐

In your opinion, are there any other reasons commonly given for the non-attendance of witnesses? Please specify:

10. **In this section, we would like to ask about your opinions of the conduct of fact-finding hearings.**

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The Court should have a set of clear procedures for the questioning of witnesses.	☐	☐	☐	☐	☐	☐
2	The presiding judge should lead the questioning of witnesses.	☐	☐	☐	☐	☐	☐
3	The parties' representatives should lead the questioning of witnesses.	☐	☐	☐	☐	☐	☐
4	It should be left to the discretion of the Court as to who should lead the questioning of witnesses.	☐	☐	☐	☐	☐	☐
5	The parties should be informed in advance as to how the witnesses will be questioned.	☐	☐	☐	☐	☐	☐
6	The Court should allow particular witnesses to give evidence anonymously, if they so require.	☐	☐	☐	☐	☐	☐
7	In no circumstances should a witness be questioned in the absence of either of the parties' representatives.	☐	☐	☐	☐	☐	☐
8	If, during the hearing, the Court decides that additional witnesses should be summoned, too frequently the State takes inadequate steps to ensure their attendance.	☐	☐	☐	☐	☐	☐

	Statement	1	2	3	4	5	6
9	If a fact-finding hearing takes place a considerable period of time after the date when the alleged violation of the ECHR occurred, this significantly reduces the reliability of witnesses' accounts.	☐	☐	☐	☐	☐	☐
10	Witnesses who are illiterate or who have a low level of education are more likely to be perceived as unreliable.	☐	☐	☐	☐	☐	☐
11	Fact-finding hearings are not equipped to deal well with illiterate witnesses.	☐	☐	☐	☐	☐	☐
12	It is frequently a problem that relevant documents (not previously submitted to the Court) are produced by either of the parties during the hearing itself.	☐	☐	☐	☐	☐	☐
13	Fact-finding hearings rarely produce any relevant documents that were not available to the Court before the hearing.	☐	☐	☐	☐	☐	☐
14	The Court needs to have more clearly defined powers of compulsion when the parties fail to produce relevant documents.	☐	☐	☐	☐	☐	☐
15	The Court has no means to enforce compulsion in respect of those who fail to produce relevant documents.	☐	☐	☐	☐	☐	☐

16. The annex to the Court rules concerning investigations (rules A1 to A8) were inserted by the Court on 7th July 2003. Please tell us to what extent you are aware of the details of the amended rules.

☐ 1 = Fully Aware ☐ 2 = Aware ☐ 3 = Not aware (if ticked 3 please go on to section 11)

Statement	1	2	3	4	5	6
17 The annex to the Court rules concerning investigations is an adequate rule basis for fact-finding.	☐	☐	☐	☐	☐	☐
18 The absence of the annex to the rules had a negative effect on previous fact-finding hearings.	☐	☐	☐	☐	☐	☐
19 The rules in the annex relating to the fact-finding hearing procedure are still insufficiently detailed.	☐	☐	☐	☐	☐	☐

11. In this section, we would like to ask about your opinions of the conduct of on-the-spot investigations.

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	On-the-spot investigations are usually effective in producing relevant new evidence in the case.	☐	☐	☐	☐	☐	☐
2	The decision to hold an on-the-spot investigation is greatly influenced by the political situation in the region concerned.	☐	☐	☐	☐	☐	☐
3	On-the-spot investigations should not be held in zones of conflict.	☐	☐	☐	☐	☐	☐
4	The security of the judges should be the main concern when deciding whether an on-the-spot investigation should be held.	☐	☐	☐	☐	☐	☐
5	The effectiveness of an on-the-spot investigation is mainly determined by the events on the ground as they happen.	☐	☐	☐	☐	☐	☐
6	The Court's delegation is too often denied access to relevant sites and premises during on-the-spot investigations.	☐	☐	☐	☐	☐	☐
7	The Court's delegation involved in on-the-spot investigations often faces major problems in contacting relevant officials.	☐	☐	☐	☐	☐	☐
8	The Court's delegation in an on-the-spot investigation rarely has access to the necessary technical support, e.g. means of communication, photocopiers, technicians, etc.	☐	☐	☐	☐	☐	☐

	Statement	1	2	3	4	5	6
9	The Courts' delegation conducting an on-the-spot investigation should always consider including relevant experts – e.g. Doctors, Psychologists.	☐	☐	☐	☐	☐	☐

12.To what extent do you agree or disagree with the following statements regarding the role of the parties' representatives:

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	It is very rare that the parties' representatives are fully familiar with the procedures of the ECtHR.	☐	☐	☐	☐	☐	☐
2	The Court does not provide sufficient guidance to the parties' representatives in relation to the conduct of fact-finding hearings	☐	☐	☐	☐	☐	☐
3	There are too few legal representatives specialised in ECHR law and practice in Council of Europe countries.	☐	☐	☐	☐	☐	☐
4	Applicants' representatives usually face great obstacles in contacting relevant witnesses for the purposes of the fact-finding hearings.	☐	☐	☐	☐	☐	☐
5	In some Council of Europe states, many applicants' representatives fear retribution from the state.	☐	☐	☐	☐	☐	☐
6	The Court has no power to ensure the safety of applicants' representatives.	☐	☐	☐	☐	☐	☐
7	Some form of web casting by the Court of a fact-finding hearing would significantly improve representatives' understanding of the process.	☐	☐	☐	☐	☐	☐

13. Please tell us your opinions about the role of the State in fact-finding hearings.

Please tick only one relevant box next to each statement where:

1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree; 6 = no relevant experience

	Statement	1	2	3	4	5	6
1	The level of cooperation of a respondent state in the fact-finding hearing process is mainly dependent on its own political interests.	☐	☐	☐	☐	☐	☐
2	It is only a minority of states that fail to cooperate fully in fact-finding hearings.	☐	☐	☐	☐	☐	☐
3	States always ensure that they are represented by the most qualified lawyers.	☐	☐	☐	☐	☐	☐
5	In only a few Council of Europe states, giving evidence against that state may endanger the witness.	☐	☐	☐	☐	☐	☐
6	Respondent states will only produce relevant documents at a fact-finding hearing if compelled to do so.	☐	☐	☐	☐	☐	☐
7	States are fully aware that the ECtHR has no means of compelling them to cooperate in fact-finding hearings.	☐	☐	☐	☐	☐	☐
8	A state's failure to cooperate in a fact-finding hearing should have an important bearing on the Court's assessment whether the applicant has proved the case beyond reasonable doubt.	☐	☐	☐	☐	☐	☐

14. If you would like to make any further comments about any of the issues covered in this questionnaire, please do so here:

15. We would be extremely grateful if you would please answer a few questions about yourself. Please note that this information will be kept strictly confidential and all results will be presented in generalised form.

What was your age on your last birthday? ☐

Your gender: F ☐ M ☐

What is your nationality? ☐

What is your highest academic qualification:

1. Secondary school degree or equivalent ☐
2. BA/BSc/LLB or equivalent ☐
3. MA/MSc/LLM or equivalent ☐
4. PhD ☐

In what type of institution do you currently work (please tick all that apply)?

1. The ECtHR ☐ (if ticked, please go to **question 5a**)
2. Lawyer in private practice ☐
3. Lawyer in NGO ☐
4. Academic lawyer ☐
5. State civil servant ☐
6. In-house lawyer ☐
7. Retired ☐
8. Other ☐

If other, please specify: ☐

5a. What is your position in relation to the ECtHR?

1. Judge of the ECtHR ☐
2. Court Registrar ☐
3. Court Registry lawyer ☐
4. Other, please specify: ☐

Have you ever participated in a fact-finding mission in a ECtHR case?

1. Yes ☐ 2.No ☐

The HRSJ research team is planning to hold semi-structured interviews with a number of the respondents to this questionnaire. These interviews are intended to give you an opportunity to discuss the issues covered in this questionnaire further, and to elaborate on your views. Would you be interested in participating in such an interview?

1. Yes ☐ 2.No ☐

If Yes, please give us your name and contact details:

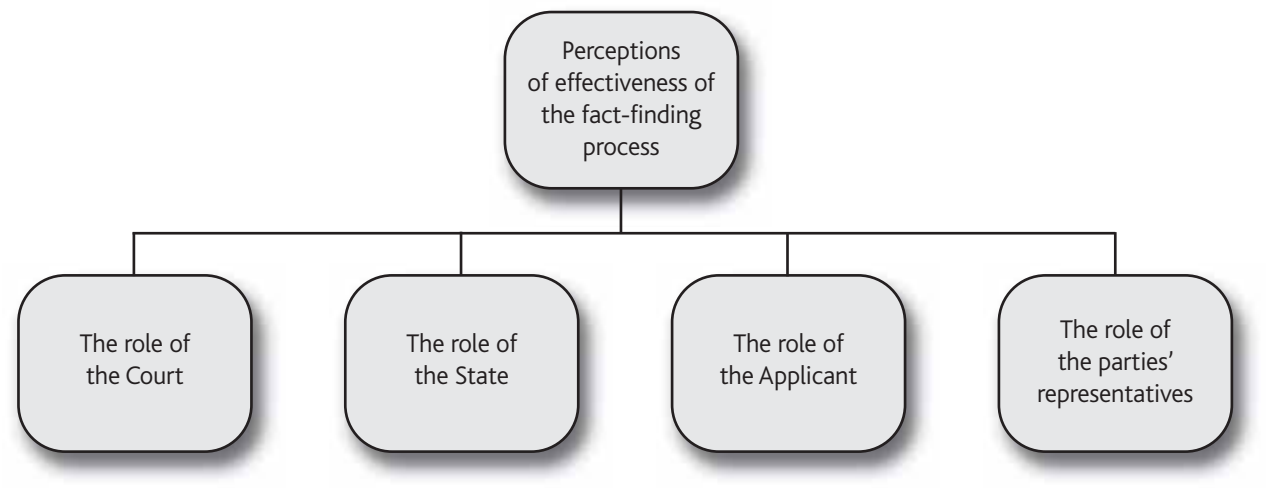
Thank you very much indeed for your co-operation!

Appendix 4:

Analysis of the responses to the Questionnaires

In this section we present the detailed results of the survey obtained through the responses to the questionnaire. As indicated in the Methodology section of the Introduction, the main aim of the questionnaire was to investigate perceptions of the effectiveness of the fact-finding process among those who have been engaged in the proceedings of the European Court of Human Rights (ECtHR). The questionnaire examined not only respondents' attitudes toward the current practice of fact-finding missions, but also offered them an opportunity to express their views as to how such missions should be conducted.

Figure 1: General structure of the questionnaire



With these aims and objectives in mind, the questionnaire was structured around four main topics: the roles of the Court, the state, the applicant and the parties' representatives in the fact-finding missions.

The attitudes toward **the role of the Court** included examining respondents' attitudes towards:

- the procedures involved in deciding whether the Court should hold a fact-finding hearing;
- the decision-making procedures and factors that influence that process;
- the setting up and conduct of fact-finding hearings
  - Disincentives for witnesses' attendance at fact-finding
  - The most common reasons given for the non-attendance of witnesses
  - Problems related to interpretation in fact-finding
  - Annex to the Court Rules (Rules A1 to A8)
- the conduct of on-the-spot investigations.

The role of the State was examined through respondents' attitudes towards:

- the need for security for the applicants, witnesses and on-the-spot investigation delegations;
- access to state institutions, documents, officials, applicants and witnesses;
- the significance of political and cultural factors within the state; and
- possible sanctions for a state's lack of cooperation with the Court.

The role of the applicant was analysed through:

- the possibility of finding adequate representation;
- general facilities available to the applicants (such as access to witnesses and documentation);
- the possible impact of cultural factors (such as language, traditions and support).

Finally, **the role of parties' representatives** was examined in relation to the Court and the State. In relation to the Court, the issue of representatives' role in the Court procedures was examined. In relation to the State, the issues around accessibility of witnesses, documentation and state officials, and their security were investigated.

All of the above topics were operationalised through a set of variables, each in the form of a statement with an attached Likert scale through which respondents could express the level of their agreement or disagreement with the statement.[1] Thus, in this section, each set of variables will be analysed:

- first, through the application of various univariate and multivariate methods. The average acceptance of each statement will be presented through percentages and means. A principle component analysis will be applied to each set of variables in order to investigate the existence of different concepts among the respondents in relation to the topic in question.[2] To what extent these concepts are determined by various profiles of our respondents is investigated by the application of linear regression analysis, the analysis of variance and the t-test depending on the level of measurement of variables.
- secondly, the possible relationships between the concepts will be examined through a hierarchical principle component analysis.
- thirdly, the extent to which these concepts determine respondents' views about the effectiveness of the fact-finding missions is investigated using multivariate regression analysis.

The next section (*Sample*) will firstly describe our respondents.

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1 There is a copy of the questionnaire at Appendix 3.

2 The initial solutions for all PC analyses are rotated by application of Varimax rotation with Kaiser Normalization. The appropriateness of all scales for these analyses is tested by Cronbach's, KMO, Bartlett's test of sphericity.

1. Sample

The two significant factors in the selection of the respondents were their position in relation to the ECtHR and their experience of fact-finding hearings.

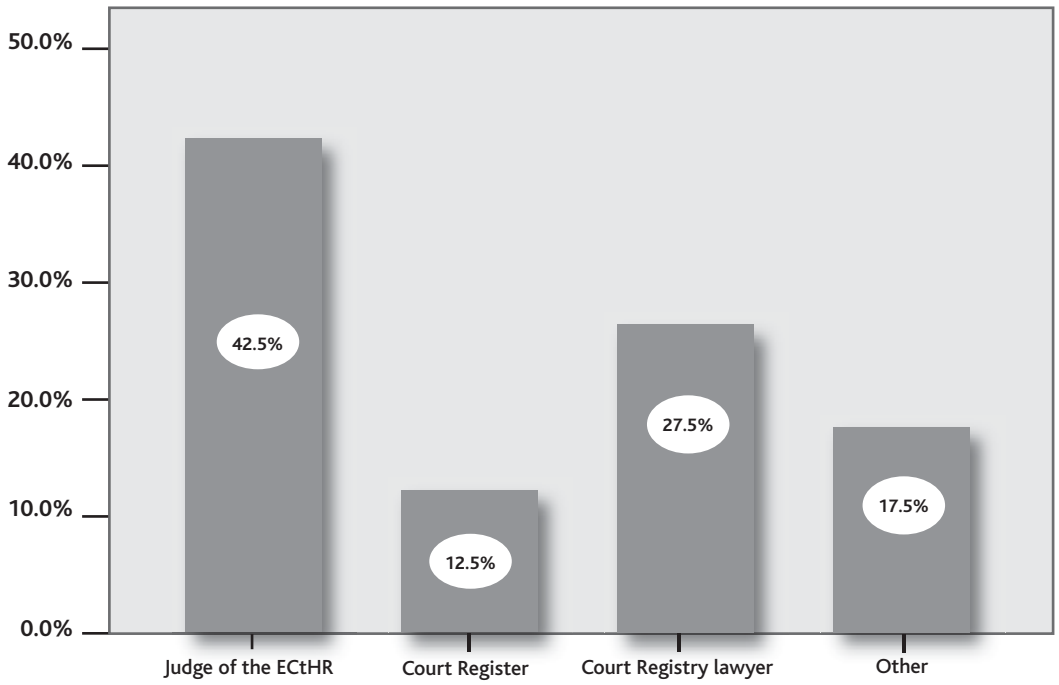
Table 1.1: In what type of institution do you currently work?

	Institution	Frequency	Percentage
1	The ECtHR	35	43.2
2	Lawyer in private practice	26	32.1
3	Lawyer in NGO	12	14.8
4	Academic lawyer	11	13.6
5	State civil servant	7	8.6
6	In-house lawyer	1	1.2
7	Retired	3	3.7

Almost half of our respondents were currently working in the ECtHR, while others included lawyers in private practice (32.1%), in NGOs (14.8%), and in academia (13.6%). Out of 81 respondents 7 were State civil servants.

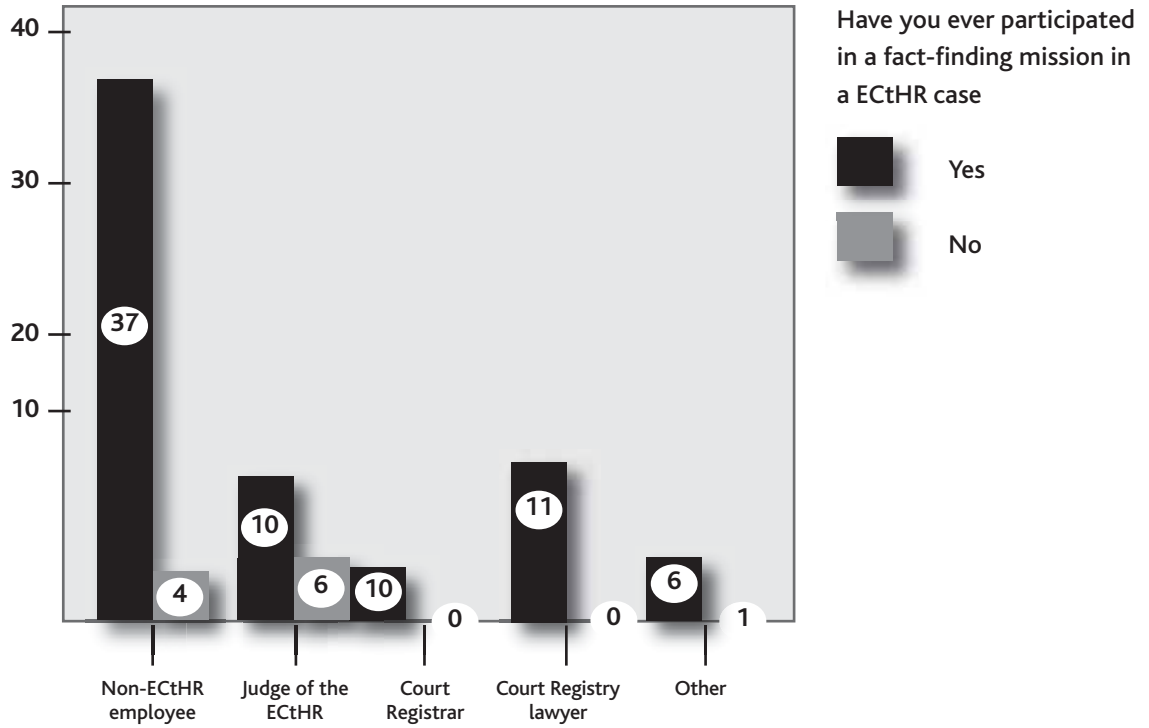
Of those who were working in the ECtHR, the majority were Court judges (42.5%).

Chart 1.1: What is your position in relation to the ECtHR?



86.3% of respondents said they had participated in fact-finding hearings of the ECtHR, in different roles.

Chart 1.2: Participation in fact-finding hearings by position in relation to the ECtHR



While all Court Registrars and Court Registry lawyers who responded to our questionnaire had participated in fact-finding hearings, just 10 out of 16 judges had done so.

Regarding respondents' socio-demographic characteristics, the average age of the respondents was 47.25 years, and two-thirds (66.7%) were male. All of them had had higher education, a quarter of them having obtained PhDs. There were 27 different nationalities represented within our respondents. The most represented nationalities were Turkish (16 respondents) and British (10 respondents).

2. The effectiveness of the fact-finding process

As a first stage of the analysis of respondents' attitudes towards the fact-finding hearings, a set of seven variables was offered for their evaluation. In the table below (Table 2.1) these statements are ranked according to the level of respondents' assessment of the effectiveness of different aspects of fact-finding hearings. The means of respondents' answers reveal that overall all stages of the process were considered to be effective (all means higher than 3). On average, the respondents expressed the highest confidence in the questioning of witnesses in general or in questioning conducted through an interpreter – around 90% of respondents saw them as effective processes. Yet the most controversial stage of the fact-finding process seems to be the Court's decision-making procedure as to the need for a fact-finding hearing in a particular case. Whereas 50 % of the respondents saw this procedure as being effective, the other half was either undecided (21.4%) or expressed some doubt as to its effectiveness (overall around 27%). Hence even this basic analysis points to the need for a more thorough examination of the current procedures relating to this decision-making process.

Table 2.1: Percentages and means – the effectiveness of the fact-finding process

	Statement	1*	2	3	4	5	mean
FFEff4	The questioning of witnesses at hearings, in general.	1.4	1.4	5.6	55.6	36.1	4.24
FFEff5	The questioning of witnesses at hearings through interpreters.	1.4	1.4	17.8	61.6	17.8	3.93
FFEff6	The conduct of on-the-spot investigations.	1.7	6.7	16.7	46.7	28.3	3.93
FFEff7	The organisation of on-the-spot investigations.	1.8	8.8	19.3	50.9	19.3	3.77
FFEff3	The procedures for acquiring relevant documents from the parties.	18.4	10.5	65.8	5.3	3.58	
FFEff2	The process of summoning witnesses.	2.8	14.1	22.5	53.5	7.0	3.48
FFEff1	The Court's decision-making procedure as to the need for a fact-finding hearing in a particular case.	4.3	22.9	21.4	42.9	8.6	3.29

***1 = very ineffective; 2 = ineffective; 3 = neither; 4 = effective; 5 = very effective**

An examination of means and percentages presented in Table 2.1 above cannot tell us whether the same respondents regarded all aspects of the fact-finding process as being effective. In order to investigate the existence of different concepts of effectiveness among the respondents a principle component analysis was conducted on this set of variables. The analysis[3] extracted three significant components that explained 79.7% of total variance (Table 2.2).

The first extracted component (FFEff_Component1) consists of three variables with high factor loadings. Respondents who were more attached to this component were more likely to express their satisfaction with the effectiveness of on-the-spot investigations and are inclined to see the process of summoning witnesses as effective.

[3] Cronbach's =.762, KMO=.592, Bartlett's test of sphericity significant at p<.001 level.

Those respondents more attached to the second component (FFEff_Component2) tended to view the procedures for decision-making as to the need for a fact-finding hearing, for acquiring relevant documents from the parties and the process of summoning witnesses as being effective. Hence, we can say that they were more likely to express their **overall satisfaction with the effectiveness of the fact-finding procedures**.

The third extracted component (FFEff_Component3) relates solely to the **effectiveness of the questioning of witnesses**.

Table 2.2: Rotated component matrix – the effectiveness of the fact-finding process

		Components			
Variables		**1**	**2**	**3**	**Com.**
FFEff1	The Court's decision-making procedure as to the need for a fact-finding hearing in a particular case.		.738		.668
FFEff2	The process of summoning witnesses.	.496	.660		.682
FFEff3	The procedures for acquiring relevant documents from the parties.		.848		.741
FFEff4	The questioning of witnesses at hearings, in general.			.865	.839
FFEff5	The questioning of witnesses at hearings through interpreters.			.930	.873
FFEff6	The conduct of on-the-spot investigations.	.905			.893
FFEff7	The organisation of on-the-spot investigations.	.929			.886
	Eigenvalue	**2.110**	**1.793**	**1.678**	

Regression analysis[4] shows that age was a significant predictor for the first extracted component (FFEff_Component1). Older respondents were more likely to emphasise the effectiveness of on-the-spot investigations.[5]

Those who were currently working within the ECtHR were (on average) more inclined to stress the overall effectiveness of the fact-finding procedures (FFEff_Component2) than other respondents.[6]

The effectiveness of the questioning of witnesses (FFEff_Component3) was (on average) supported to a greater extent by respondents of Turkish nationality than non-Turkish respondents,[7] but was less supported by those who have never taken part in a fact-finding mission (in comparison with those who have done[8]), by employees of the ECtHR rather than non-employees[9] and, finally, by the ECtHR judges more than other respondents.[10]

4 All bivariate analyses are conducted on respondents' z-scores on each latent variable, factor scores have been saved using Anderson-Rubin method.

5 beta=.333, F(46).5.601, p<.05.

6 Mean for ECtHR employees=.328, mean for others = =-.288, t(39)=2.268, p<.01.

7 Mean for Turkish respondents=.771, mean for non-Turkish respondents=-.065. t(42)=2.628, p<.05.

8 Mean for those without FF experience=-.990, mean for those with FF experience=.084, t(44)=2.109, p<.05.

9 Mean for ECtHR employees=-.490, mean for non-ECtHR employees=.431, t(45)=-3.522, p<.05.

10 Mean for ECtHR judges=-.947, mean for others=.224, t(45)=-3..534, p<.05.

3. The effectiveness of European Court proceedings

Besides examining the effectiveness of the fact-finding hearings, the respondents were also asked to evaluate to what extent the Court proceedings in general are effective. The frequency distribution table (Table 3.1) reveals that on average all proceedings were seen as reasonably effective. The respondents expressed higher levels of satisfaction with the procedure for lodging an application with the Court (mean=4.10) and with the functioning of the Court Registry (mean=4.05).

However, the most controversial aspects of the Court's proceedings were measures relating to the enforcement of Court judgments (mean=3.02) and the process of the appointment of judges (mean=3.02). Enforcement measures were considered to be ineffective by almost a third of respondents (and in addition 26% of them were undecided). A remarkably high figure of 40% of our respondents were equally undecided as regards the process of the appointment of judges. Only a third of them saw this proceeding as being effective.

Table 3.1: Percentages and means - Effectiveness of European Court proceedings

	Statement	1*	2	3	4	5	mean
Effect4	The procedure for lodging an application with the Court.		5.2	7.8	58.4	28.6	4.10
Effect6	The functioning of the Court Registry.	1.3	9.2	5.3	51.3	32.9	4.05
Effect1	The functioning of the Court itself.		8.9	8.9	60.8	21.5	3.95
Effect5	The adjudication of admissibility.	1.3	14.5	11.8	57.9	14.5	3.70
Effect9	The formal procedures for establishing the facts.	1.3	18.2	18.2	50.6	11.7	3.53
Effect3	The period for which judges are appointed.	1.5	21.2	24.2	47.0	6.1	3.35
Effect10	The actual practices adopted for establishing the facts	4.2	19.4	27.8	38.9	9.7	3.31
Effect7	The provision of redress by the Court.	2.7	28.8	20.5	34.2	13.7	3.27
Effect8	Measures for the enforcement of Court. judgments	9.3	22.7	26.7	37.3	4.0	3.04
Effect2	The process of the appointment of judges.	6.1	21.2	40.9	28.8	3.0	3.02

***1 = very ineffective; 2 = ineffective; 3 = neither; 4 = effective; 5 = very effective**

In a similar way as above, a principle component analysis was conducted in order to look for possible relationships between these variables. This analysis conducted on the above set of variables[11] extracted four components that explained 78.193% of total variance.

[11] Cronbach's α=.765, KMO=.688, Bartlett's test of sphericity significant at p<.001 level.

Table 3.2: Rotated component matrix – Effectiveness of the ECtHR proceedings

		Components				
Variables		**1**	**2**	**3**	**4**	**Com.**
Effect1	The functioning of the Court itself.	.821				.752
Effect2	The process of the appointment of judges.	.545			.653	.789
Effect3	The period for which judges are appointed.				.866	.817
Effect4	The procedure for lodging an application with the Court.		.894			.866
Effect5	The adjudication of admissibility.		.669			.610
Effect6	The functioning of the Court Registry.		.703			.756
Effect7	The provision of redress by the Court.	.630				.672
Effect8	Measures for the enforcement of Court judgments.	.784				.733
Effect9	The formal procedures for establishing the facts.			.924		.909
Effect10	The actual practices adopted for establishing the facts.	.931			.915	
	Eigenvalue	**2.272**	**2.095**	**1.992**	**1.460**	

The first extracted latent variable (Effect_Component1) consists of four variables that emphasise the effectiveness as to how the Court functions, measures for the enforcement of Court judgments, the provision of redress by the Court and the process of the appointment of judges. It seems that respondents more attached to this component tended to be more inclined to express satisfaction with the **effectiveness of the Court in general**. The second latent variable (Effect_Component2) consists of three variables, each of which stresses the **effectiveness of the Court's administrative procedures**. These include the procedure for lodging an application with the Court, the functioning of the Court Registry and the adjudication of admissibility. The component Effect_Component3 consists of two variables only, both of which emphasise the **effectiveness of practices for establishing the facts**. Finally, the last component (Effect_Component4) is concerned with the **effectiveness of practices regarding the appointment of judges**.

The analysis shows that the ECtHR judges were, on average, more inclined to be satisfied with the effectiveness of the Court (Effect_Component1) itself than other respondents.[12] The second component (Effect_Component2) which stresses the effectiveness of the Court's administrative procedures was, on average, supported more by employees of the ECtHR than other respondents.[13] Finally, the effectiveness of practices regarding the appointment of judges (Effect_Component4) was more emphasised by those who are not ECtHR employees than those who are.[14]

In order to examine possible relationships between respondents' views about the effectiveness of fact-finding missions and the effectiveness of the Court's proceedings, a bivariate correlation analysis was conducted (Table 3.3).

[12] Mean for judges=.513, mean for others=-.175, $t(53)=2.311$, $p<.05$.
[13] Mean for ECtHR employees=.245, mean for others=-.316, $t(32)=1.978$, $p<.05$.
[14] Mean for non ECtHR employees=.354, mean for ECtHR employees=-.274. $t(53)=-2.412$, $p<.05$.

Table 3.3: Correlations (r) between effectiveness of the ECtHR and FF

	FFEff_Component1	FFEff_Component2	FFEff_Component3
Effect_Component1	-.035	.490**	.173
Effect_Component2	-.128	.266	.008
Effect_Component3	.158	.235	.213
Effect_Component4	-.106	-.076	.281

**** significant at p<.01 level**

The value of Pearson's correlation coefficient indicates that the effectiveness of the Court in general (Effect_Component1) was positively related to the satisfaction with the effectiveness of the fact-finding procedures (FFEff_Component2) (r=.490).

4. The criteria for deciding whether the Court should hold a fact-finding mission

After assessing respondents' general views as to the effectiveness of fact-finding hearings and the Court proceedings, the research focused on investigating respondents' views about particular stages of fact-finding missions. To begin with, we were interested to find out which criteria relating to the Court's decision to hold a fact-finding mission were considered to be crucial by the respondents. With that aim, a set of fourteen statements were offered for the respondents' evaluation.

Table 4.1: Percentages and means – Criteria for holding a fact-finding mission

	Statement	1*	2	3	4	5	mean
Proc1	A fact-finding hearing is crucial in securing a fair judgment in some cases.		3.7	4.9	30.9	60.5	4.48
Proc5	Cases involving gross and systematic violations of the European Convention on Human Rights are more likely than other cases to require a fact-finding hearing.	1.2	9.9	11.1	39.5	38.3	4.04
Proc6	As a priority, fact-finding hearings should be held in cases concerning killings and disappearances (Article 2).	2.5	8.8	17.5	32.5	38.8	3.96
Proc7	As a priority, fact-finding hearings should be held in cases concerning torture (Article 3).	2.5	8.6	16.0	35.8	37.0	3.96
Proc9	A fact-finding hearing should only take place when there are fundamental factual disputes between the parties, which cannot be resolved by considering the available documents.	3.8	13.8	13.8	42.5	26.3	3.74
Proc14	A fact-finding hearing is often necessary for the applicant to satisfy the Court's standard of proof (to prove the case beyond reasonable doubt).	2.5	13.9	19.0	54.4	10.1	3.56
Proc3	It would be highly beneficial for the Court to establish a specialised section to deal exclusively with fact-finding hearings.	7.8	29.9	11.7	19.5	31.2	3.36
Proc2	The current organisational structure of the Court prevents it from dealing effectively with fact-finding hearings.		32.4	19.7	36.6	11.3	3.27

Proc8	A fact-finding hearing should always take place when there has been no finding of facts by the domestic courts.	7.5	26.3	25.0	15.0	26.3	3.26
Proc4	A fact-finding hearing is an effective means of encouraging friendly settlement between the parties.	10.5	21.1	34.2	23.7	10.5	3.03
Proc12	Fact-finding hearings take up too much of the Court's valuable time.	28.6	44.2	14.3	11.7	1.3	2.13
Proc10	A fact-finding hearing rarely assists the Court in deciding on the merits of a case.	47.4	38.5	3.8	10.4		1.77
Proc11	The costs involved in holding fact-finding hearings are not justified even considering the possible benefits which may result from them.	37.5	54.7	5.3	1.3	1.3	1.75
Proc13	Fact-finding hearings are unnecessary.	66.7	29.6	2.5	1.2		1.38

***1 = strongly disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = strongly agree**

Table 4.1 sets out percentages and means of respondents' views. From these results it can be easily concluded that respondents found that in some cases fact-finding hearings are crucial to secure a fair judgement (over 91% of agreement). This statement was further supported by more than 95% of respondents who rejected the idea that fact-finding hearings are unnecessary. What is more, there was a clearer consensus about the necessity of fact-finding hearings in relation to cases involving gross and systematic violations of the ECHR in general and those concerning violations of Articles 2 and 3 of the ECHR. In all of these cases around 70% of respondents considered fact-finding hearings to be necessary.

Whether a fact-finding hearing is an effective means of encouraging friendly settlement between the parties seemed to be an issue around which the respondents were divided (mean=3.03). With a third of the sample undecided, almost equal numbers of respondents agreed and disagreed with the statement.

In order to investigate the existence of concepts relating to criteria for holding fact-finding hearings, a principal components analysis was conducted.[15]

[15] Cronbach's α=.652, KMO=.679, Bartlett's test of sphericity significant at p<.001 level. The analysis extracted four significant components (la>1) that explain 69.561% of total variance.

Table 4.2: Rotated component matrix – Criteria for holding FF mission

Variables		Components 1	2	3	4	Com.
Proc1	A fact-finding hearing is crucial in securing a fair judgment in some cases.	.691				.598
Proc2	The current organisational structure of the Court prevents it from dealing effectively with fact-finding hearings.	.553				.395
Proc3	It would be highly beneficial for the Court to establish a specialised section to deal exclusively with fact-finding hearings.	.592				.576
Proc4	A fact-finding hearing is an effective means of encouraging friendly settlement between the parties.	.574				.440
Proc5	Cases involving gross and systematic violations of the European Convention on Human Rights are more likely than other cases to require a fact-finding hearing.	.703				.681
Proc6	As a priority, fact-finding hearings should be held in cases concerning killings and disappearances (Article 2).		.949			.939
Proc7	As a priority, fact-finding hearings should be held in cases concerning torture (Article 3).		.942			.930
Proc8	A fact-finding hearing should always take place when there has been no finding of facts by the domestic courts.				.698	.638
Proc9	A fact-finding hearing should only take place when there are fundamental factual disputes between the parties, which cannot be resolved by considering the available documents.				.658	.444
Proc10	A fact-finding hearing rarely assists the Court in deciding on the merits of a case.			.796		.698
Proc11	The costs involved in holding fact-finding hearings are not justified even considering the possible benefits which may result from them.			.597		.379
Proc12	Fact-finding hearings take up too much of the Court's valuable time.				-.698	.578
Proc13	Fact-finding hearings are unnecessary.			.807		.696
Proc14	A fact-finding hearing is often necessary for the applicant to satisfy the Court's standard of proof (to prove the case beyond reasonable doubt).	.592				.528
	Eigenvalue	**2.535**	**2.184**	**1.998**	**1.804**	

The first component (Proc_Component1) consists of six statements with factor loadings of higher than 0.3. The respondents more attached to this concept emphasised that cases more likely to require a fact-finding hearing were those involving gross and systematic violations of the European Convention (Proc5). They saw fact-finding hearings as possibly crucial in securing a fair judgment (Proc1), as encouraging friendly settlements between the parties (Proc4) and as often necessary for the applicant to satisfy the Court's standard of proof (Proc14). Nevertheless, while emphasising the potential positive impact of these hearings, these respondents were also aware of problems emanating from the current organisational structure of the Court (Proc2) and were inclined to agree that the Court should establish a specialized section to deal exclusively with fact-finding hearings (Proc3). Hence the Proc_Component1 emphasises **a positive view of fact-finding hearings with a negative view of their current organisation**. Employees of the ECtHR were on average less supportive of this than other respondents.[16]

The second extracted component (Proc_Component2) consists of just two statements - both related to the nature of cases. The respondents more attached to this component considered that, as a priority, fact-finding hearings should be held in cases where Articles 2 and 3 of the ECHR are invoked. Hence, the main criteria for holding a fact-finding hearing in this concept is whether the case relates **to gross violations of the Convention**. While those respondents with higher educational qualifications were less likely[17] to support the idea that fact-finding should be focused on these cases, on average, respondents of Turkish nationality more firmly supported this view[18] than other respondents.

The statement with the highest factor loading in the third component regarded fact-finding hearings as unnecessary (Proc 13). This view is supported with the statement according to which fact-finding hearings rarely assist the Court in deciding on the merits of a case (Proc10) where the costs involved are not justified, even considering the possible benefits which may result from them. The Proc_Component3 clearly emphasises **a negative view of fact-finding missions**. This negative view is more readily expressed by Turkish respondents (mean=.448, t(54=2.038, p<.05) than other respondents (mean=-.180).[19]

The respondents who were more attached to the fourth component (Proc_Component4) thought that the decision as to whether a fact-finding hearing should be held, or not, should primarily be based on the assessment of the effectiveness of the domestic courts - including cases where there has been no finding of facts by the domestic courts (Proc8) and where factual disputes between the parties cannot be resolved by considering the available documents (Proc9). In these cases, according to these respondents, the time invested in fact-finding hearings cannot be seen as wasted. Hence, it can be said that the main criteria for deciding on fact-finding hearings within the Proc_Component4 are **the inadequacies of domestic courts**.

This concept is rejected by both those respondents with higher qualifications[20] and employees of the ECtHR, in comparison with other respondents.[21]

5. The procedures for deciding whether the Court should hold a fact-finding mission

After enquiring about respondents' views about important factors in deciding whether a fact-finding hearing should be conducted, this section focuses on their attitudes towards, first, the decision-making procedures and, secondly, factors that influence the decision-making process.

5.1 The decision-making procedure for holding fact-finding missions

Over 60% of our respondents saw the procedure for instigating fact-finding hearings as not being clear enough (Dec8). In addition, not a single respondent strongly agreed, and only 15% agreed, that the Court has clear standards for assessing the information and evidence submitted in deciding whether to hold a fact-finding hearing (Dec16). This section seeks to investigate respondents' attitudes about the current decision-making procedure for holding fact-finding hearings, as well as their views on how this procedure should be improved. According to the percentage values presented in the table below (Table 5.1), our

16 Mean for ECtHR employees=-.283, mean for others=.247, t(58)=-2.106, p<.05.
17 beta=-.272, F(54)=4.240, p<.05.
18 Mean for Turkish respondents=.605, mean for others=-.204, t(54)=2.563, p<.05.
19 Mean for Turkish respondents=.448, mean for others=-.180, t(54)=2.038, p<.05.
20 beta=-.410, F(54)=10.724, p<.01.
21 Mean for ECtHR employees=-.304, mean for others=.266, t(58)=-2.278, p<.05.

respondents emphasised the need for the greater involvement of applicants' representatives in the decision-making process. Around 80% of them agreed that applicants' representatives should be able to make submissions to the Court as to the 'state witnesses' to be summoned and should be able to make submissions on the potential benefits of a fact-finding hearing in the particular case. In addition, around 70% of respondents emphasised a need for greater cooperation between the Court and parties' representatives in finalising the list of witnesses (Dec12). However, the issue of whether the Court should more frequently encourage parties' representatives to submit requests for a fact-finding hearing (Dec1) was clearly a point of dispute among our respondents (mean=3.00). While around 40% of them expressed some level of disagreement, 28% were undecided and almost a third agreed with this statement. A similar lack of consensus was evident when respondents were asked to assess whether a fact-finding hearing should be held in every case where the Court may be able to establish that it was state officials who killed the victim(s) (Dac10, mean=3.05). Over 45% disagreed with this statement, and more than 22% expressed strong agreement.

As for the issue of who should make the decision as to whether to hold a fact-finding hearing in a particular case, around 35% respondents favoured a unanimous decision by all chamber judges involved (Dec18), and only 6% considered it should be the decision of the President of the Chamber (Dec17).

Table 5.1: Percentages and means – The decision-making procedure for holding fact-finding missions

	Statement	1*	2	3	4	5	mean
Dec9	The applicant's representative should be able to make submissions to the Court as to the 'state witnesses' to be summoned.	1.3	9.1	6.5	54.5	28.6	4.00
Dec7	It is crucial that the applicant's representative should clearly state the potential benefits of a fact-finding hearing in the particular case.	2.6	9.1	11.7	57.1	19.5	3.82
Dec4	The Court's final list of witnesses to be heard depends to a great extent on the parties' representatives' submissions.		9.5	17.6	63.5	9.5	3.73
Dec12	A meeting or hearing of the Court with the parties' representatives to consider which witnesses to summon will be significantly beneficial in drawing up the final list of witnesses.	2.6	14.5	13.2	59.2	10.5	3.61
Dec14	There is an urgent need for the Court to set up a consistent practice in deciding whether to have preliminary meetings with both parties' representatives in order to finalise the list of witnesses.		22.9	14.3	50.0	12.9	3.53
Dec8	Currently, the procedure for instigating fact-finding hearings is not clear enough.	1.4	21.9	16.4	45.2	15.1	3.51
Dec3	The anticipated relevance of witnesses' testimony is the most influential factor in deciding whether to hold such a hearing.	1.4	15.5	25.4	49.3	8.5	3.48
Dec13	The parties' views should not be crucial for the Court in deciding whether or not to hold a fact-finding hearing.	2.5	23.8	7.5	58.8	7.5	3.45
Dec2	A well-justified request for a fact-finding hearing from the parties' representatives is a decisive factor in the Court's decision whether to hold such a hearing.	4.2	20.8	26.4	43.1	5.6	3.25

Dec11	The Court should meet the parties' representatives prior to deciding on the need for a fact-finding hearing.	3.9	29.9	20.8	32.5	13.0	3.21
Dec6	A request from one of the parties for a fact-finding hearing should not be considered without the presentation of a clear list of possible witnesses.	7.9	32.9	7.9	43.4	7.9	3.11
Dec10	In an Article 2 case, the Court should hold a fact-finding hearing in every case where it may be able to establish that it is state officials who killed the victim(s).	7.63	38.0	19.0	12.7	22.8	3.05
Dec1	The Court should more frequently encourage the parties' representatives to submit requests for a fact-finding hearing.	5.1	34.6	28.2	19.2	12.8	3.00
Dec18	The decision whether to hold a fact-finding hearing should be taken unanimously by all chamber judges involved.	12.7	35.4	16.5	27.8	7.8	2.82
Dec15	From the existing evidence in the case file, it is always clear whether there is a need to hold a fact-finding hearing.	5.1	42.3	24.4	26.9	1.3	2.77
Dec5	It happens too frequently that the Court decides not to have a fact-finding hearing because witnesses are not available.	11.4	36.4	31.8	13.6	6.8	2.68
Dec16	The Court has clear standards for assessing the information and evidence submitted in deciding whether to hold a fact-finding hearing.	12.5	43.8	28.1	15.6		2.47
Dec17	The decision whether to hold a fact-finding hearing should be that of the President of the Chamber.	15.8	65.8	13.2	3.9	1.3	2.09

***1 = strongly disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = strongly agree**

A principle component analysis conducted on the set of variables above[22] extracted five significant components which explained 69.561% of total variance.

[22] Variable Dec2, 7 and 13 have been excluded from this analysis due to their too low communalities. The reminding set showed Cronbach's =.693, KMO=.530, Bartlett's test of sphericity significant at p<.001 level

Table 5.2: Rotated component matrix – Decision-making procedures

Variables		Components 1	2	3	4	5	Com.
Dec1	The Court should more frequently encourage the parties' representatives to submit requests for a fact-finding hearing.	.694					.661
Dec3	The anticipated relevance of witnesses' testimony is the most influential factor in deciding whether to hold such a hearing.					.602	.583
Dec4	The Court's final list of witnesses to be heard depends to a great extent on the parties' representatives' submissions.			.733			.721
Dec5	It happens too frequently that the Court decides not to have a fact-finding hearing because witnesses are not available.			.628			.556
Dec6	A request from one of the parties for a fact-finding hearing should not be considered without the presentation of a clear list of possible witnesses.				.758		.668
Dec8	Currently, the procedure for instigating fact-finding hearings is not clear enough.		-.731				.759
Dec9	The applicant's representative should be able to make submissions to the Court as to the 'state witnesses' to be summoned.	.634					.630
Dec10	In an Article 2 case, the Court should hold a fact-finding hearing in every case where it may be able to establish that it is state officials who killed the victim(s).	.828					.716
Dec11	The Court should meet the parties' representatives prior to deciding on the need for a fact-finding hearing.	.762					.782
Dec12	A meeting or hearing of the Court with the parties' representatives to consider which witnesses to summon will be significantly beneficial in drawing up the final list of witnesses.	.565				.446	.767
Dec14	There is an urgent need for the Court to set up a consistent practice in deciding whether to have preliminary meetings with both parties' representatives in order to finalise the list of witnesses.	.743				.471	.824
Dec15	From the existing evidence in the case file, it is always clear whether there is a need to hold a fact-finding hearing.		.612				.489
Dec16	The Court has clear standards for assessing the information and evidence submitted in deciding whether to hold a fact-finding hearing.		.905				.843

Dec17	The decision whether to hold a fact-finding hearing should be that of the President of the Chamber.				.747		.742
Dec18	The decision whether to hold a fact-finding hearing should be taken unanimously by all chamber judges involved.					.760	.692
	Eigenvalue	**3.278**	**2.148**	**1.97**	**1.676**	**1.635**	

The first extracted component (DecP_Component1) consists of six variables with high factor loadings that indicate that respondents more strongly attached to this component advocated **a stronger cooperation between the Court and the parties' representatives** in deciding whether to hold a fact-finding hearing. According to this view, the Court should more frequently encourage parties' representatives in submitting requests for a fact-finding hearing (Dec1); it should meet them prior to making this decision (Dec11) and involve them more actively in finalising the list of witnesses (Dec 12 and 14). These respondents also emphasised that in an Article 2 case, the Court should hold a fact-finding hearing in every case where it may be able to establish that it is state officials who killed the victim(s) (Dec10). On average, this view was supported more clearly by Turkish respondents[23] than non-Turkish ones and those who are not employees of the ECtHR rather than those who are.[24]

The second component (DecP_Component2) consists of three variables only and expresses a clear support for **the Court's ability to reach a decision** on whether to hold a fact-finding hearing. According to this view, the Court has clear standards for assessing the information and evidence submitted in deciding whether to hold a fact-finding hearing (Dec16), and this decision can easily be made on the basis of the existing evidence in the case file (Dec15). Respondents more strongly attached to this concept, also rejected the idea that the procedure for instigating fact-finding hearings is not clear enough (Dec8). Female respondents were, on average, more reluctant to trust the Court's ability to make the decision than male respondents.[25]

Component DecP_Component3 consists of two variables only - both advocate the view that the decision as to whether to hold a fact-finding hearing should be based on the **availability of witnesses** (Dec 4 and 5).

The importance of a clear list of witnesses is emphasised in the fourth extracted concept (DecP_Component4) which sees it as the basis for the **decision of the President of the Chamber** as to whether to hold a fact-finding hearing.

Variables with high factor loadings in DecP_Component5 indicate that respondents more strongly attached to this component supported the view that chamber judges should unanimously reach a decision as to whether to hold a fact-finding hearing based on an **assessment of the anticipated relevance of the available witnesses' testimonies,** and that the Court should adopt more clearly defined procedures regarding summoning the witnesses and assessing their relevance. This concept is more supported by those respondents who have had no previous experience in conducting fact-finding hearings, than those who have done so.[26]

[23] Mean for Turkish=1.06, mean for other =-.172, t(33)=3.219, p<.05.
[24] Mean for non-employees of the ECtHR=.657, mean for employees=-.368, t(37)=-3.491, p<.05.
[25] Mean for female=-.497, mean for male=.233, t(36)=-2.127, p<.05.
[26] Mean for no-experience=1.48, mean for experienced=-.150, t(36)=-2.975, p<.01.

5.2 Factors influencing the decision-making process

As well as assessing the decision-making procedures, respondents were also asked to evaluate the extent to which 'external' factors affect the decision whether to hold a fact-finding hearing.

When these factors are assessed, the strongest consensus among the respondents was evident when asked whether fact-finding hearings should be held in politically unstable regions (Dec28). A huge majority - over 92% of respondents - rejected the idea that political instability should influence this decision. They also rejected the notion that the decision is influenced by the identity of the respondent state (Dec27). However, the respondents were divided on the issue of whether fact-finding hearings are more likely to be held when the respondent state is notorious for its previous ECHR violations (Dec26). While almost 45% of respondents saw that as a crucial factor, almost 20% were undecided and 35% disagreed with this notion. The assessment of the role played by the domestic courts was seen as a crucial factor by around 60% of our respondents (Dec 24 and 25).

Table 5.3: Percentages and means – Decision-making procedure for holding fact-finding missions

	Statement	1*	2	3	4	5	mean
Dec25	The decision whether to hold a fact-finding hearing greatly depends on the Court's assessment of the role played by the domestic courts in the particular case.	2.9	11.8	25.0	50.0	10.3	3.53
Dec24	Fact-finding hearings are more likely to be held when the Court assesses that there is a systematic failure in the functioning of the domestic courts.	2.8	18.1	20.8	43.1	15.3	3.50
Dec22	Fact-finding hearings put a considerable burden on the Court's budget.	11.1	22.2	17.5	41.3	7.6	3.13
Dec26	It is more likely that the Court will decide to hold a fact-finding hearing when the respondent state is notorious for its previous ECHR violations.	4.2	31.9	19.4	40.3	4.2	3.08
Dec23	If more time and resources are allocated to fact-finding hearings, other Court functions will suffer.	8.8	27.9	25.0	35.3	2.9	2.96
Dec21	The costs incurred by the Court have to be taken into consideration when deciding whether to hold a fact-finding hearing.	19.2	29.5	20.5	29.5	1.3	2.64
Dec19	Holding a fact-finding hearing is valueless if it takes place several years after the incident(s) in question.	12.8	52.6	16.7	14.1	3.8	2.44
Dec27	Sometimes the identity of the respondent state is more influential on the decision to hold a fact-finding hearing, than the nature of the evidence in the case.	15.6	43.8	25.0	14.1	1.6	2.42
Dec20	Fact-finding hearings really only contribute to further increasing the Court's case backlog.	33.3	50.0	11.5	5.1		1.88
Dec28	Fact-finding hearings should not be held in cases emanating from politically unstable regions within states.	44.2	48.1	6.5	1.3		1.65

***1 = strongly disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = strongly agree**

A principle component analysis[27] conducted on this set of variables extracted four significant components that explain 70.585% of total variance.

Table 5.4: Rotated component matrix – Factors that influence decision making process

		Components				
Variables		**1**	**2**	**3**	**4**	**Com.**
Dec19	Holding a fact-finding hearing is valueless if it takes place several years after the incident(s) in question.			.686		.494
Dec20	Fact-finding hearings really only contribute to further increasing the Court's case backlog.			.827		.730
Dec21	The costs incurred by the Court have to be taken into consideration when deciding whether to hold a fact-finding hearing.	.870				.767
Dec22	Fact-finding hearings put a considerable. burden on the Court's budget	.723				.698
Dec23	If more time and resources are allocated to fact-finding hearings, other Court functions will suffer.	.824				.748
Dec24	Fact-finding hearings are more likely to be held when the Court assesses that there is a systematic failure in the functioning of the domestic courts.		.842			.754
Dec25	The decision whether to hold a fact-finding hearing greatly depends on the Court's assessment of the role played by the domestic courts in the particular case.		.811			.733
Dec26	It is more likely that the Court will decide to hold a fact-finding hearing when the respondent state is notorious for its previous ECHR violations.		.622		.545	.686
Dec27	Sometimes the identity of the respondent state is more influential on the decision to hold a fact-finding hearing, than the nature of the evidence in the case.				.929	.868
Dec28	Fact-finding hearings should not be held in cases emanating from politically unstable regions within states.			.672		.579
	Eigenvalue	**2.096**	**1.872**	**1.768**	**1.323**	

[27] Cronbach's α=.605, KMO=.547, Bartlett's test of sphericity significant at p<.001 level.

The first component (DecF_Component1) emphasises the issue of the Court's **available resources** as being important in the decision-making process. According to this view, the time and costs incurred through fact-finding hearings and their burden on the Court's budget should be taken into consideration when deciding whether these hearings should be held. On average, this view was more supported by respondents of non-Turkish nationality, than Turkish respondents[28] and by those who are not employees of the ECtHR, more than employees.[29]

A second extracted component (DecF_Component2) consists of three variables with high factor loadings and stresses the importance of the assessment of **the role played by the domestic courts** in making decisions whether to hold fact-finding hearings. Systematic failures in the functioning of these courts and the previous record of a state's violations of the ECHR are, here, seen as crucial factors.

The negative consequences of fact-finding hearings on the Court's work is emphasised by those respondents more strongly attached to the DecF_Component3. According to this view, fact-finding hearings are increasing the Court's case backlog, and are seen as valueless when held years after the incident(s) in question. These respondents also showed reluctance about holding fact-finding hearings in politically unstable regions.

Finally, DecF_Component4 stresses **the influence of political factors** on decision-making procedures as to whether to hold a fact-finding hearing. These respondents emphasised that sometimes the identity of the respondent state and its notoriety for previous ECHR violations are more influential on the decision, than the nature of the evidence in the case. This view is more clearly rejected by the ECtHR judges than other respondents.[30]

In order to examine possible relationships between concepts of decision-making procedures (ConP) and factors that influence this decision-making process (ConF) a hierarchical principle component analysis was conducted. It extracted four significant (la>1) components of the second order that explained 62.809% of total variance. While these results should be viewed with a degree of caution[31] it can still provide some indication of possible relationships between these views.

To recapitulate, the analyses on procedures and factors that influence the decision-making process as to whether to hold fact-finding hearings revealed nine concepts:

- DecP_Com1 – co-operation between the Court and the parties' representatives
- DecP_Com2 – the Court's ability to reach a decision
- DecP_Com3 – a decision based on the availability of witnesses
- DecP_Com4 – a decision of the President of the Chamber based on a clear list of witnesses
- DecP_Com5 – a decision of chamber judges based on an assessment of the anticipated relevance of the available witnesses
- DecF_Com1 – a decision based on the availability of the Court's resources
- DecF_Com2 – a decision based on an assessment of the role played by the domestic courts
- DecF_Com3 – the negative consequences of fact-finding hearings on the Court's work
- DecF_Com4 – the influence of political factors

[28] Mean for non-Turkish=.105, mean for Turkish=-.387, t(46)=-2.249, p<.05.
[29] Mean for non-ECtHR employees=.333, mean for employees=-.387, t(50)=2.572, p<.01.
[30] Mean for judges=-.536, mean for others=.197, t(50)=-2.457, p<.05.
[31] Due to rather a small sample, the second order analysis was conducted on just 34 respondents. This is also reflected in low values of Cronbach's α=.389, KMO=.444, and Bartlett's test of sphericity is not significant (p>.05). Nevertheless, the results point to possible relationships that need further investigation

Table 5.5: Rotated component matrix – Hierarchical component analysis of decision components

Variables		Components 1	2	3	4	Com.
1	DecP_Component1	.794				.838
2	DecP_Component2	.432				.443
3	DecP_Component3				.731	.557
4	DecP_Component4			.776		.740
5	DecP_Component5		.723			.569
6	DecF_Component1			-.714		.589
7	DecF_Component2	.805				.736
8	DecF_Component3		.783			.713
9	DecF_Component4				.664	.468
	Eigenvalue	**1.535**	**1.515**	**1.400**	**1.202**	

The results of the hierarchical component analysis shows that respondents more strongly attached to the view that the Court and parties' representatives should cooperate to a greater extent in the decision-making process (DecP_Com1) will also be more likely to trust the Court's ability to make an appropriate decision (DecP_Com2), where the main factor influencing that decision should be the assessment of the role played by the domestic courts (DecF_Com2).

Respondents who considered that the decision as to whether to hold fact-finding hearings should by made by the chamber judges, based on clear procedures (DecP_Com5), were more inclined to emphasise the negative consequences of fact-finding hearings on the Court's work (DecF_Com3).

Those respondents who thought that the decision should be made by the President of the Chamber, based on a clear witness list (DecP_Com4), were more likely to reject the notion that this decision should take into account the availability of the Court's resources (DecF_Com1).

Finally, those respondents who stressed the importance of the availability of witnesses in the decision-making process (DecP_Com3) were more likely to emphasise the impact of political factors (DecF_Com4) on that decision.

6. Setting up the fact-finding mission

The respondents were also asked to evaluate the setting up and the organisation of the fact-finding missions. These issues included the location of the hearing, the selection of judges, the preparations of relevant documents, and technical support for the missions.

Judging from the data presented in Table 6.1, respondents demonstrated the highest level of consensus in relation to the location and venue of fact-finding hearing. Around 90% of them considered the security of witnesses and neutrality as crucial factors in selecting the location. Over 80% also stressed the importance of carefully selecting the buildings where fact-finding hearings should take place.

More diverse views were expressed regarding the technical support for fact-finding missions. Only 13.2% of the respondents rejected the possibility of using means other than fact-finding hearings (e.g. taking evidence by video link) where possible. 30% were undecided and around a quarter disagreed with the suggestion that it should be possible to submit relevant documents in an electronic format. The possible reason for this could be found in the respondents' diverse views on whether fact-finding hearings lack sufficient technical support to adequately consider certain forms of evidence (e.g. photographs, audio and video materials, maps, plans, etc). While 43% of respondents saw this as a problem, 35% did not.

Probably the most controversial issue as to the setting up of fact-finding hearings is the selection of judges. The respondents were divided around the number of judges in the mission as much as the relevant criteria for the selection of judges. Around 40% of respondents rejected the notion that the number of judges

involved in the fact-finding hearing has no impact on the outcome of the case. Almost half of the respondents disagreed that the judges in the delegation should be familiar with the legal system of the respondent state and that only those judges with expertise in the subject matter of the case should be involved in the fact-finding hearing. 45% of the respondents considered that only those judges who are so willing should be involved in fact-finding hearings. The suggestion that judges without any previous experience of fact-finding should not take part in these hearings was supported by only 14% of the respondents.

Table 6.1: Percentages and means – Setting FF mission

	Statement	1*	2	3	4	5	mean
Set17	The Court should give priority to selecting the location for a fact-finding hearing where the witnesses feel most secure.		2.5	7.6	54.4	35.4	4.23
Set20	It is important that the venue for the fact-finding hearing is considered as neutral by the parties in the case.	1.3	2.5	6.3	63.3	26.6	4.11
Set10	The Court should formulate an agreed schedule of all relevant documents in advance of the fact-finding hearing, in order to facilitate the process.		9.0	6.4	62.8	21.8	3.97
Set16	The Court should carefully consider even in which building the fact-finding hearing should take place.		9.0	14.1	61.5	15.4	3.83
Set19	In cases where witnesses could give evidence by means other than at a fact-finding hearing, the Court should consider it (e.g. by video link).		13.2	9.2	61.8	15.8	3.80
Set18	The Court rarely fails to respect the principle of equality of arms in preparing for fact-finding hearings.	2.8	9.7	19.4	51.4	16.7	3.69
Set9	There is little the Court can do if witnesses are untraceable or unavailable even if they are summoned.	2.8	16.7	12.5	54.2	13.9	3.60
Set15	The location of the venue for a fact-finding hearing usually has a crucial impact on the quality of the evidence given.		27.6	14.5	47.4	10.5	3.41
Set11	At the fact-finding hearing the Court should provide all the case documents in electronic format.	1.3	21.1	30.3	38.2	9.2	3.33
Set3	Judges' familiarity with the national/ local language should be relevant to their appointment as a member of the fact-finding hearing delegation.	6.3	22.5	15.0	48.8	7.5	3.29
Set13	Fact-finding hearings lack sufficient technical support to adequately consider certain forms of evidence, e.g. photographs, audio and video materials, maps, plans, etc.		35.4	21.5	40.0	3.1	3.11
Set7	Only those judges who are so willing should be involved in fact-finding hearings.	5.2	32.5	16.9	39.0	6.5	3.09

Set14	Prior to fact-finding hearings, it is difficult for the Court to consider whether expert evidence is needed.	51.4	41.1	26.0	30.1	2.7	2.95
Set1	The number of judges involved in the fact-finding hearing has no impact on the outcome of the case.	1.4	38.9	29.2	26.4	4.2	2.93
Set4	It is of crucial importance that judges selected for the fact-finding hearing are familiar with the legal system of the respondent state.	8.8	41.3	8.8	31.3	10.0	2.93
Set8	The process by which the parties are required to summon their respective witnesses is ineffective.	2.9	42.0	24.6	26.1	4.3	2.87
Set2	Only those judges with expertise in the subject matter of the case should be involved in the fact-finding hearing.	11.4	39.2	11.4	29.1	8.9	2.85
Set6	Only judges with sufficient prior experience as a European Court judge should be involved in fact-finding hearings.	7.4	50.6	19.8	14.8	7.4	2.64
Set12	The effectiveness of a fact-finding hearing would be greatly improved by sending a list of questions to witnesses in advance.	17.7	51.9	16.5	12.7	1.3	2.28
Set5	Judges without any previous experience of fact-finding processes should not take part in these hearings.	17.7	59.5	8.9	8.9	5.1	2.24

***1 = strongly disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = strongly agree**

In order to investigate whether more structured sets of views about the setting up of fact-finding hearings existed among our respondents, a principle components analysis was conducted on this set of variables[32] which extracted six components that together explain 69.158% of variance.

[32] Variables Se1 and 9 were excluded from the analysis due to low communalities. Cronbach's =.599, KMO=.548, Bartlett's test of sphericity significant at p<.001 level

Table 6.2: Rotated component matrix – Setting FF missions

Variables		Components 1	2	3	4	5	6	Com.
Set2	Only those judges with expertise in the subject matter of the case should be involved in the fact-finding hearing.		.872					.815
Set3	Judges' familiarity with the national/local language should be relevant to their appointment as a member of the fact-finding hearing delegation.			.539				.506
Set4	It is of crucial importance that judges selected for the fact-finding hearing are familiar with the legal system of the respondent state.		.625		.480	.428		.841
Set5	Judges without any previous experience of fact-finding processes should not take part in these hearings.		.786					.668
Set6	Only judges with sufficient prior experience as a European Court judge should be involved in fact-finding hearings.						.724	.655
Set7	Only those judges who are so willing should be involved in fact-finding hearings.				-.814			.758
Set8	The process by which the parties are required to summon their respective witnesses is ineffective.			-.403	.418	.530		.693
Set10	The Court should formulate an agreed schedule of all relevant documents in advance of the fact-finding hearing, in order to facilitate the process.	.637				.466		.742
Set11	At the fact-finding hearing the Court should provide all the case documents in electronic format.					.613	.481	.704
Set12	The effectiveness of a fact-finding hearing would be greatly improved by sending a list of questions to witnesses in advance.					.797		.654
Set13	Fact-finding hearings lack sufficient technical support to adequately consider certain forms of evidence, e.g. photographs, audio and video materials, maps, plans, etc.		.518	-.413				.569
Set14	Prior to fact-finding hearings, it is difficult for the Court to consider whether expert evidence is needed.				.645			.756
Set15	The location of the venue for a fact-finding hearing usually has a crucial impact on the quality of the evidence given.	.693						.628
Set16	The Court should carefully consider even in which building the fact-finding hearing should take place.	.811						.833
Set17	The Court should give priority to selecting the location for a fact-finding hearing where the witnesses feel most secure.	.749						.655

Set18	The Court rarely fails to respect the principle of equality of arms in preparing for fact-finding hearings.			.843			.763
Set19	In cases where witnesses could give evidence by means other than at a fact-finding hearing, the Court should consider it (e.g. by video link).	.606					.640
Set20	It is important that the venue for the fact-finding hearing is considered as neutral by the parties in the case.	.622					.570
	Eigenvalue	**3.037**	**2.524**	**1.784**	**1.781**	**1.666**	**1.656**

The first extracted component (Set_Component1) consists of six variables with high factor loadings. The great majority of these variables **relate to the importance of choosing an appropriate venue** for fact-finding missions. This is based on the view that the choice of location of the venue for a fact-finding mission, even the building in which the hearing is to be held, may have a significant impact on the quality of the evidence given. For that reason, those respondents more strongly attached to this concept considered that the Court should carefully consider a location where witnesses would feel most secure, and which would be considered as neutral by all parties involved. These respondents also supported the idea that where witnesses could give evidence by means other than at a fact-finding hearing, the Court should consider it (e.g. by video link). The analysis reveals that the different profiles of the respondents do not significantly differ in their view on the importance of choosing an adequate venue.

Set_Component2 consists of four variables, three of which emphasise **the importance of selecting judges according to their expertise and experience.** Expertise in the subject matter of the case and the legal system of the respondent state were seen as important criteria for selecting judges. The respondents more strongly attached to this concept were also more likely to support the idea that judges without any previous experience in the fact-finding process should not be selected for fact-finding hearings. These respondents were also more likely to agree that fact-finding hearings lack sufficient technical support to adequately consider certain forms of evidence. The analysis reveals that this concept was more likely to be supported by younger respondents[33] and those of Turkish nationality.[34]

The respondents more closely attached to the third extracted factor (Set_Component3) were in general inclined to stress **the Court's effectiveness in setting up fact-finding missions.** They thought that the Court rarely fails to respect the principle of equality of arms in preparing for fact-finding hearings, and tended to reject the notion that fact-findings hearings lack sufficient technical support to adequately consider certain forms of evidence, or that the process by which the parties are required to summon their respective witnesses is ineffective. At the same time they stressed the importance that judges selected for a fact-finding hearing should be familiar with the national/local language. This concept was more likely to be supported by respondents with higher qualifications[35] and by the ECtHR judges.[36]

[33] Beta=-.436, F(50)=11.472, p<.01.
[34] Mean for Turkish respondents=.494, mean for others=-.187, t(46)=2.156, p<.05.
[35] Beta=.364, F(46)=6.880, p<.05.
[36] Mean for judges=.614, mean for others=-.169, t(49)=2.407, p<.05.

The fourth extracted component (Set_Component4) emphasises **the importance of improving pre-hearing procedures.** These respondents rejected the idea that only those judges who are so willing should be involved in fact-finding hearings, but stressed the importance of judges' familiarity with the legal system of the respondent state. The major obstacles in setting up a fact-finding hearing were considered to be the inability of the Court to consider whether expert evidence is needed prior to the hearing and the ineffectiveness of the process by which the parties are required to summon their respective witnesses. These views were, on average, more supported by those who are not ECtHR employees, than those who are.[37]

The respondents more strongly attached to Set_Component5 stressed **measures for the improvement of pre-hearing preparations.** They saw the process by which the parties are required to summon their respective witnesses as ineffective, but were in support of particular measures that could, in their view, improve the effectiveness of the fact-finding hearings in general. These respondents supported sending a list of questions to witnesses in advance, and that relevant documents should be submitted in electronic format. They also considered that the Court should formulate an agreed schedule of all relevant documents in advance of the fact-finding hearing, and that judges selected for the fact-finding hearing should be familiar with the legal system of the respondent state. This concept was more supported by those respondents with higher qualifications[38] and of non-Turkish nationality.[39]

The sixth extracted component (Set_Component6) should be viewed with some caution since it consists of only two variables with higher factor loading. The most relevant issue according to this view is **the importance of the selection of highly experienced judges.** These respondents also supported the idea that the Court should provide all the case documents in electronic format. This concept was, on average, more supported by respondents of Turkish nationality than others.[40]

7. The conduct of fact-finding missions

The next set of questions was aimed at investigating respondents' views about how fact-finding hearings are conducted. This section focused on various issues regarding the witnesses' safety, attendance, and problems with cultural differences. The table below (Table 7.1) ranks respondents' views according to the mean of the variable.

Table 7.1: Percentages and means – The conduct of fact-finding missions

	Statement	1*	2	3	4	5	mean
Con12	Where it appears necessary, the Court should take steps to ensure the safety and security of witnesses	1.3	1.3	6.4	43.6	47.4	4.35
Con14	Witnesses should be able to give their evidence in any language in fact-finding hearings, even if it is not a 'national' language.	1.3	5.1	3.8	48.1	41.8	4.24
Con6	Those witnesses who are closely related to the applicant (i.e. family or friends) are more likely to attend the hearing than other witnesses.	1.4	1.4	20.3	59.3	17.4	3.90
Con4	The Court needs to have a means to compel witnesses to attend the hearings.	13.5	14.9	56.8	14.9	3.73	
Con13	In effect, there are no consequences sufficiently severe which can be imposed on respondent Governments which fail to attend a fact-finding hearing.	1.5	17.9	16.4	41.8	22.4	3.66

[37] Mean for non-employees=.342, mean for ECtHR employees=-.329, t(49)=-2.520, p<.05.
[38] Beta=.354, F(46)=6.439, p<.05.
[39] Mean for non-Turkish respondents=.185, mean for Turkish respondents=-.547, t(46)=-2.228, p<.05.
[40] Mean for Turkish respondents=.597, mean for non-Turkish=-.152, t(46)=2.311 p<.05.

Con8	The Court should carefully consider allowing third parties to attend the hearings, especially as a support for the applicant or witnesses.	4.1	10.8	18.9	50.0	16.2	3.64
Con19	It is important for the Court to take further steps to prevent witnesses being rehearsed in their evidence.		5.5	34.2	54.8	5.5	3.60
Con11	In those cases where witnesses fail to attend a fact-finding hearing without good reason, the witnesses' domestic legal system should take appropriate action.	2.7	20.5	11.0	52.1	13.7	3.53
Con7	Most of the 'state witnesses' summoned believe that nothing will happen to them if they fail to attend the fact-finding hearing.	1.5	21.2	22.7	43.9	10.6	3.41
Con15	It is a very common problem that the reasons given for a witness's non-attendance are false.	1.9	13.2	34.0	47.2	3.8	3.38
Con5	The strongest incentive for witnesses to attend the hearing is their belief in the importance of the protection of human rights.	3.9	19.7	22.4	44.7	9.2	3.36
Con10	It is common knowledge that witnesses in cases involving particular states are less likely to attend the hearing than witnesses in cases concerning other states.	4.3	19.1	23.4	48.9	4.3	3.30
Con9	Witnesses in fact-finding hearings are frequently very reluctant to appear as witnesses against their own state.	5.6	23.9	22.5	42.3	5.6	3.18
Con18	Difficulties in interpretation very often lead to difficulties in understanding what is being said by the witness.		34.3	23.9	37.3	4.5	3.12
Con1	Due to issues of time and cost, every fact-finding hearing must limit the number of witnesses it can summon.	6.3	32.5	10.0	47.5	3.5	3.10
Con2	One of the most worrying problems of fact-finding hearings is the small number of summoned witnesses who actually attend.	1.6	40.3	22.6	30.6	4.8	2.97
Con3	In general, witnesses who are state officials are more likely to attend the hearing than witnesses summoned by the applicant.	8.1	31.1	21.6	33.8	5.4	2.97
Con16	The Court usually faces serious problems in securing competent interpreters for the purposes of fact-finding hearings.	7.3	41.8	23.6	23.6	3.6	2.75
Con17	It happens too often that the parties challenge the quality of the interpretation.	3.7	46.3	35.2	14.8		2.61

***1 = strongly disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = strongly agree**

While almost all respondents agreed that where it appears necessary, the Court should take steps to ensure the safety and security of witnesses, more than 70% also considered that the Court should have a means to compel witnesses to attend the hearings.

A more contentious issue among respondents is which witnesses are more likely to attend hearings. Close to 80% said that witnesses who are closely related to the applicant are more likely to attend the hearings. Only half of the respondents were certain that the protection of human rights should be a sufficient incentive for their attendance. The respondents were also divided about whether state officials are more likely to appear in front of the Court as witnesses than others (Con3), though the majority of them (over 50%) agreed that witnesses in cases involving particular states are less likely to attend the hearing than witnesses in cases concerning other states. 48% of the respondents also thought that witnesses will be reluctant to testify against their own states.

The problem of witnesses' failure to attend the hearings was emphasised by many respondents. Nevertheless, only a third considered that one of the most worrying problems of fact-finding hearings is the small number of summoned witnesses who actually attend. Though, when it happens, more than half agreed that the reasons given for a witness's non-attendance are false. There was a level of consensus (63%) among the respondents that in that situation, the domestic legal system should take appropriate action.

An overwhelming majority of over 90% of respondents said that witnesses should be able to give their evidence in any language in fact-finding hearings, even if it is not a 'national' language. Securing competent interpreters and the parties' challenging the quality of interpretation were seen as a problem by only a minority of respondents (26 and 15% respectively), yet 42% agreed that difficulties in interpretation very often led to difficulties in understanding what is being said by the witness, while 35% disagreed.

A principle component analysis conducted on these variables[41] extracted three significant components (la>1) that explain 65.129% of total variance.

The first extracted factor (Con_Component 1) mainly consists of statements that emphasise **problems related to summoning witnesses.** The statements with the highest factor loadings are those that address the problem of witnesses' willingness to testify against their own state. The respondents who agreed with this concept were hence advocating for the Court to take further steps to prevent witnesses being rehearsed in their evidence and to allow third parties to attend the hearings, especially as a support for the applicant or witnesses. The analysis shows that younger respondents were more likely to agree with this concept (beta=-.588), unlike the ECtHR judges (beta=-.360) who more readily rejected it.[42]

Table 7.2: Rotated component matrix - The conduct of fact-finding missions

		Components			
Variables		**1**	**2**	**3**	**Com.**
Con2	One of the most worrying problems of fact-finding hearings is the small number of summoned witnesses who actually attend.	.721			.562
Con3	In general, witnesses who are state officials are more likely to attend the hearing than witnesses summoned by the applicant.	.405		-.463	.465
Con4	The Court needs to have a means to compel witnesses to attend the hearings.			.787	.772
Con6	Those witnesses who are closely related to the applicant (i.e. family or friends) are more likely to attend the hearing than other witnesses.			.755	.591
Con7	Most of the 'state witnesses' summoned believe that nothing will happen to them if they fail to attend the fact-finding hearing.	.534		.577	.737
Con8	The Court should carefully consider allowing third parties to attend the hearings, especially as a support for the applicant or witnesses.	.729			.637

[41] Variables Con1 and Con5 have been excluded from analysis based on results of scale's reliability where exclusion of these variables significantly increased Cronbach's. Variables Con12 and Con14 are also excluded from this analysis due to too high value of their mean. Overall Cronbach's for the rest of the scale is .881, KMO=.664 and Bartlett's test is significant on .001 level.

[42] F(25)=4.389, p<.01, R2=52.3%.

Con9	Witnesses in fact-finding hearings are frequently very reluctant to appear as witnesses against their own state.	.847			.772
Con10	It is common knowledge that witnesses in cases involving particular states are less likely to attend the hearing than witnesses in cases concerning other states.	.799			.699
Con11	In those cases where witnesses fail to attend a fact-finding hearing without good reason, the witnesses' domestic legal system should take appropriate action.	.554			.473
Con13	In effect, there are no consequences sufficiently severe which can be imposed on respondent Governments which fail to attend a fact-finding hearing.	.436			.319
Con15	It is a very common problem that the reasons given for a witness's non-attendance are false.	.856			.750
Con16	The Court usually faces serious problems in securing competent interpreters for the purposes of fact-finding hearings.	.704	.510		.756
Con17	It happens too often that the parties challenge the quality of the interpretation.		.736		.645
Con18	Difficulties in interpretation very often lead to difficulties in understanding what is being said by the witness.		.979		.960
Con19	It is important for the Court to take further steps to prevent witnesses being rehearsed in their evidence.	.684			
	Eigenvalue	**5.214**	**2.344**	**2.212**	

Con_Component2 gathered statements that emphasise **problems related to interpretation.** Those respondents more strongly attached to this component more readily stressed difficulties in interpretation that often led to difficulties in understanding witnesses' statements. For that reason, the parties challenge the quality of interpretation and the Court faces problems in securing competent interpreters. The analysis suggests that the ECtHR judges were more likely to emphasise these problems (beta=.522) than other respondents.[43]

Respondents more strongly attached to the third extracted component (Con_Component 3) stressed the problems with **the Court's ability to summon witnesses.** They placed particular emphasis on the fact that the Court should have a means to compel witnesses to attend the hearings, especially in respect of 'state witnesses'.

In order to examine more closely the problems related to the process of summoning and questioning witnesses, respondents were asked to evaluate various possible disincentives for witnesses attending, the most common reason given for witnesses' non-attendance and general problems with interpretation.

[43] F(25)=2.112, p<.05, R2=44.5%.

7.1. Disincentives for witnesses' attendance at fact-finding hearings

According to the values of mean (Table 7.3) the strongest disincentive for witnesses' attending fact-finding hearings is the possibility of pressure from their government (87% considered this important or very important) and their social environment (71%). The least important factor for their non-attendance is perceived to be the time required to attend.

Table 7.3: Percentages and means – Disincentives for witnesses' attendance at fact-finding hearings

	Statement	1*	2	3	4	5	mean
Att5	The possibility of pressure from their government.	1.4	8.5	2.8	42.3	45.1	4.21
Att6	The possibility of pressure from their social environment (e.g. family, neighbours, friends, local community).	1.5	9.2	12.3	52.3	24.6	3.89
Att7	The risk of confidential/private matters being made public.	2.9	15.9	10.1	52.2	18.8	3.68
Att3	The distance they have to travel.	2.7	13.5	8.1	68.9	6.8	3.64
Att10	Fear for their own life.	1.5	17.9	20.9	37.3	22.4	3.61
Att12	A general lack of support for witnesses.	1.5	13.6	24.2	54.5	6.1	3.50
Att11	Fear of their professional failings being exposed.		17.9	26.9	43.3	11.9	3.49
Att4	The practical organisation of travel arrangements.	2.8	22.5	14.1	52.1	8.5	3.41
Att9	Fear of having to give evidence before a court.	1.4	22.5	18.3	49.3	8.5	3.41
Att2	Concern about the potential costs.	4.1	24.7	8.2	58.9	4.1	3.34
Att8	Lack of familiarity with the Court's processes.	2.7	25.7	17.6	48.6	5.4	3.28
Att1	The time required to attend hearings.	2.9	30.0	14.3	48.6	4.3	3.21

***1 = not at all important; 2 = not important; 3 = neither; 4 = important; 5 = very important**

A principle component analysis was conducted in order to discover respondents' views about possible disincentives for witnesses' attendance at fact-finding hearings. The analysis of 10 variables[44] extracted three significant components (la > 1) that together explained 73.43% of variance.

[44] Communality for variables 1 and 11 were lower than .6. Since the sample size is lower than 100, these two variables have been excluded from analysis. After exclusion of these variables the scale was tested for reliability (Cronbach's = .870), sample adequacy (KMO=.809), and sphericity (Bartlett's test p<.001) while Anti-image correlation matrix shows all values for individual variables greater than .7. The initial solutions are rotated by application of Varimax rotation with Kaiser Normalization.

Table 7.4: Rotated component matrix - Disincentives for witnesses' attendance of FF

		Components			
Variables		**1**	**2**	**3**	**Com.**
Att2	Concern about the potential costs.			.796	.753
Att3	The distance they have to travel.			.820	.717
Att4	The practical organisation of travel arrangements.		.487	.701	.728
Att5	The possibility of pressure from their government.	.774			.729
Att6	The possibility of pressure from their social environment (e.g. family, neighbours friends, local community).	.869			.801
Att7	The risk of confidential/private matters being made public.	.599	.460		.672
Att8	Lack of familiarity with the Court's processes.		.873		.813
Att9	Fear of having to give evidence before a court.		.608	.446	.690
Att10	Fear for their own life.	.806			.721
Att12	A general lack of support for witnesses.		.760		.718
	Eigenvalue	**2.760**	**2.410**	**2.173**	

The first extracted component (Att_Component1) **views external pressures on witnesses** as the most important disincentives for attending. Pressures from their social environment and fear for their own life, as much as the possible pressure from their government, were seen as crucial for witnesses' non-attendance.

Respondents more attached to the second concept (Att_Component2) emphasised **pressures resulting from the Court process**: witnesses' lack of familiarity with the Court processes, a general lack of support, fear of giving evidence before a court and of making their confidential/private matters public.

Finally, the last component (Att_Component3) regards **other subjective reasons** as the most important disincentives: witnesses' time, costs and practical travel arrangements.

The analysis shows no significant relations between respondents' socio-demographic variables and these three components, except that respondents with higher educational qualifications to a certain extent tended to emphasise the importance of witnesses' other subjective reasons (Att_Component3).[45]

7.2 The most common reasons given for non-attendance of witnesses

According to the respondents, the most common reasons given for the non-attendance of witnesses is that they cannot be located (around 82% considered that to be a common or very common reason). Only a slightly smaller percentage of respondents said that witnesses' fear of the potential consequences of giving evidence and of prosecution by the authorities were common. The least common reasons were said to be changes in the witnesses' professional position and the witnesses' death.

[45] Spearman's =.377, p<.01

Table 7.4: Percentages and means – The most common reasons given for non-attendance

	Statement	1*	2	3	4	5	mean
Rea3	The witness cannot be located.		13.5	3.8	55.8	26.9	3.96
Rea9	The witness is afraid of the potential consequences.		12.1	8.6	67.2	12.1	3.79
Rea5	The witness is afraid of prosecution by the authorities.	1.8	21.1	8.8	57.9	10.5	3.54
Rea8	The witness does not want to attend (for unspecified reasons).		20.0	16.4	58.2	5.5	3.49
Rea1	The witness's illness.	6.0	26.0	8.0	46.0	14.0	3.36
Rea7	The witness has no relevant evidence to give.	3.7	35.2	16.7	40.7	3.7	3.06
Rea4	The witness is experiencing some sort of emotional strain.	5.7	34.0	34.0	24.5	1.9	2.83
Rea6	The witness does not have the same professional position as at the time of the incident in question.	10.6	36.2	19.1	31.9	2.1	2.79
Rea2	The witness's death.	16.3	55.1	18.4	10.2		2.22

***1 = not common at all; 2 = not common; 3 = neither; 4 = common; 5 = very common**

A principle component analysis was conducted on a set of 6 variables[46] and extracted two components that together explained 57.64 % of total variance.

Table 7.5: Rotated component matrix - Reasons for non-attendance of witnesses

		Components		
Variables		**1**	**2**	**Com.**
Rea1	The witness's illness.		.700	.542
Rea4	The witness is experiencing some sort of emotional strain.	.720		.596
Rea5	The witness is afraid of prosecution by the authorities.	.899		.808
Rea6	The witness does not have the same professional position as at the time of the incident in question.		.736	.574
Rea7	The witness has no relevant evidence to give.		.848	.719
Rea9	The witness is afraid of the potential consequences.	.756		.654
	Eigenvalue	**1.982**	**1.912**	

[46] Communality for variables 2, 3 and 8 were too low (below .5) for this reason these three variables have been excluded from analysis. After exclusion of these variables the scale was tested for reliability (Cronbach's = .536), and still produced a questionable reliability. This is confirmed by low value of KMO (.569), though Bartlett's test of sphericity proved significant (p<.001). Anti-image correlation matrix shows all values for individual variables greater than .5.

Respondents more attached to the first extracted component (Rea_Component1) stressed **witnesses' fear** – of prosecution, the potential consequences or emotional strain – as the most common reasons for non-attendance.

The second extracted component (Rea_Component2) mainly emphasised reasons related to the **witnesses' relevance to the case**: when they are said to have no relevant evidence to give or when they no longer have the same professional position as at the time of the incident in question.

While most of the socio-demographic variables did not prove to be significant predictors of these concepts, a t-test revealed that judges of the ECtHR, more than other respondents, were inclined to see witnesses' relevance to the case as the major reasons for their non-attendance.[47]

7.3 Problems related to interpretation in fact-finding hearings

In comparison with the problem of witnesses' non-attendance, interpretation of witnesses' testimony was not seen by our respondents as problematic. The main problems emphasised were interpreters' knowledge of legal and technical terminology. Respondents were divided in their opinion as to what extent witnesses speaking a particular dialect and their cultural and ethnic background are problematic. The least significant problems with interpretation were considered to be the possible influence of either of the parties over the interpreters and witnesses speaking with a strong accent.

Table 7.6: Percentages and means – Problems related to interpretation in fact-finding hearings

	Statement	1*	2	3	4	5	mean
Int5	Interpreters' knowledge of legal terminology.	4.3	24.3	10.0	45.7	15.7	3.44
Int4	Interpreters' knowledge of technical terminology.	1.5	27.9	19.1	42.6	8.8	3.29
Int1	Witnesses speaking in a particular dialect.	3.4	37.9	19.0	31.0	8.6	3.03
Int6	Interpreters' cultural or ethnic background.	6.5	30.6	29.0	27.4	6.5	2.97
Int8	Interpreters' personal or cultural sensitivities.	7.8	29.7	32.8	23.4	6.3	2.91
Int7	Interpreters' own political convictions.	12.9	29.0	24.2	24.2	9.7	2.89
Int3	Witnesses using culturally specific terms or references.	3.2	44.4	20.6	31.7		2.81
Int9	Interpreters being influenced by either of the parties.	19.0	27.6	22.4	15.5	15.5	2.81
Int2	Witnesses speaking with a strong accent.	7.9	52.4	17.5	22.2		2.54

***1 = not at all serious; 2 = not serious; 3 = not sure; 4 = serious; 5 = very serious**

A principle component analysis on the set of variables examined respondents' views about problems related to interpretation in fact-finding[48] and it extracted two significant components (la > 1) that together explained 70.69% of variance.

[47] t (40)=2.979, p<.05.

[48] Communalities for all variables were higher than .6. The scale was tested for reliability (Cronbach's = .879), sample adequacy (KMO=.781), and sphericity (Bartlett's test p<.001) while Anti-image correlation matrix shows all values for individual variables greater than .65.

Table 7.7: Rotated component matrix - Problems related to interpretation in fact-finding

Variables		Components 1	2	Com.
Int1	Witnesses speaking in a particular dialect.		.844	.714
Int2	Witnesses speaking with a strong accent.		.807	.748
Int3	Witnesses using culturally specific terms or references.		.792	.642
Int4	Interpreters' knowledge of technical terminology.	.704	.429	.680
Int5	Interpreters' knowledge of legal terminology.	.820		.714
Int6	Interpreters' cultural or ethnic background.	.827		.742
Int7	Interpreters' own political convictions.	.817		.683
Int8	Interpreters' personal or cultural sensitivities.	.872		.779
Int9	Interpreters being influenced by either of the parties.	.813		.661
	Eigenvalue	**4.055**	**2.308**	

While the first extracted factor (Int_Component1) emphasised the **problems related to interpreters** (their social background or lack of familiarity with legal and technical terminology), the second component (Int_Component2) emphasised **problems related to witnesses** (their speaking in a particular dialect or with a strong accent, or their cultural background). The analysis[49] (beta=-.388) suggests that younger respondents were more likely to identify problems with interpreters.

8. The conduct of fact-finding hearings

The questions related to respondents' attitudes towards the conduct of fact-finding hearings addressed several distinct issues. The first issue concerned the questioning of witnesses, which was examined in a set of eleven statements, as set out in Table 8.1 below. The values of means show that the respondents mostly agreed with the necessity of protecting witnesses' identity and stressed the need for clearer procedures for the questioning of witnesses. Overall, 67.4% of respondents expressed some level of agreement that the State fails to fully support the Court's requests for additional witnesses. Over two thirds of respondents did not think that illiteracy amongst witnesses presents a major problem for the conduct of hearings. There were some differences amongst the respondents as regards who should lead the questioning of witnesses (Hea2, 3 and 4).

[49] F(47)=8,141, p<.01.

Table 8.1: Percentages and means – Questioning the witnesses at FF hearings

	Statement	1*	2	3	4	5	mean
Hea6	The Court should allow particular witnesses to give evidence anonymously, if they so require.		17.7	5.1	49.4	27.8	3.87
Hea 1	The Court should have a set of clear procedures for the questioning of witnesses.		11.3	11.3	58.8	18.8	3.85
Hea 8	If, during the hearing, the Court decides that additional witnesses should be summoned, too frequently the State takes inadequate steps to ensure their attendance.	2.2	8.7	21.7	50.0	17.4	3.72
Hea 7	In no circumstances should a witness be questioned in the absence of either of the parties' representatives.		26.6	10.1	39.2	24.1	3.61
Hea 5	The parties should be informed in advance as to how the witnesses will be questioned.	2.5	19.0	8.9	57.0	12.7	3.58
Hea 9	If a fact-finding hearing takes place a considerable period of time after the date when the alleged violation of the ECHR occurred, this significantly reduces the reliability of witnesses' accounts	1.3	25.3	19.0	46.8	7.6	3.34
Hea 2	The presiding judge should lead the questioning of witnesses.	3.7	27.2	11.1	51.9	6.2	3.30
Hea 4	It should be left to the discretion of the Court as to who should lead the questioning of witnesses.	7.8	24.7	13.0	45.5	9.1	3.23
Hea 3	The parties' representatives should lead the questioning of witnesses.	10.3	56.4	11.5	20.5	1.3	2.46
Hea 11	Fact-finding hearings are not equipped to deal well with illiterate witnesses.	6.8	55.9	23.7	13.6		2.44
Hea 10	Witnesses who are illiterate or who have a low level of education are more likely to be perceived as unreliable.	11.4	54.3	18.6	15.7		2.39

***1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree**

The potential influence of socio-demographic variables on these views was also examined. These analyses show no significant impact of respondents' age or sex on these variables, nor as a result of respondents' personal experience in fact-finding proceedings. However, when attitudes of respondents who are employed in the ECtHR are contrasted with attitudes of those who are not employed by the ECtHR, some significant differences were found.[50] ECtHR employees were on average (mean=3.60) more inclined to agree that the presiding judge should lead the questioning (Hea2) than other respondents (mean=3.07). In support of this conclusion, a t-test[51] showed that employees of the ECtHR are on average (mean=2.16) more inclined to disagree that the parties' representatives should lead the questioning of witnesses, than other respondents

[50] $t(79)=2.385$, $p<.05$.
[51] $t(76)=-2.479$, $p<.05$.

who are not employed by the ECtHR (mean=2.67). Interestingly, a similar analysis on the same variables showed that there was no significant difference (in respect of these issues) between ECtHR judges and other respondents (p>.05).

On the other hand, nationality as a socio-demographic characteristic proved to be a significant factor in respect of views as to who should lead the questioning of witnesses. As explained in section 1 above (Sample), among the 27 nationalities that were represented in our sample, only the group of respondents of Turkish nationality was of a significant size. For that reason, and taking into account the number of fact-finding missions that have been conducted in cases from Turkey, the analysis tested the possible differences in views about leading the questioning of witnesses between respondents of Turkish and all other nationalities. The differences were found to be significant for all three statements. On average, respondents of non-Turkish nationality were more inclined to agree (mean=3.40) that the presiding judge should lead the questioning of witnesses[52] than their Turkish colleagues (mean=2.81). While non-Turkish respondents were on average inclined to disagree that the leading role in questioning the witnesses should be taken by the parties' representatives (mean=2.25),[53] Turkish respondents were divided on this issue (mean=3.13). Finally, on average, Turkish respondents were less inclined to leave the issue of who should lead the questioning of witnesses to the Court (mean=2.69)[54] than those of non-Turkish nationality (mean=3.39).

In order to examine whether different conceptions about the questioning of witnesses existed among the sample, a principle component analysis was conducted on the above set of statements.[55] The four extracted factors explain 65.99% of total variance.

Table 8.2: Rotated component matrix – Questioning witnesses at FF hearings

		Components				
Variables		**1**	**2**	**3**	**4**	**Com.**
Hea1	The Court should have a set of clear procedures for the questioning of witnesses.	.466		.698		.708
Hea3	The parties' representatives should lead the questioning of witnesses.	.629			-.606	.768
Hea4	It should be left to the discretion of the Court as to who should lead the questioning of witnesses.		.795			.647
Hea5	The parties should be informed in advance as to how the witnesses will be questioned.		.511	.403		.490
Hea6	The Court should allow particular witnesses to give evidence anonymously, if they so require.				.876	.822
Hea7	In no circumstances should a witness be questioned in the absence of either of the parties' representatives.			.795		.703
Hea9	If a fact-finding hearing takes place a considerable period of time after the date when the alleged violation of the ECHR occurred, this significantly reduces the reliability of witnesses' accounts.		.756			.682

[52] t(74)=-1.998, p<.05.

[53] t(19.64)=2.863, p<.01. It should be noted that Levane's test shows that homogeneity of variance in this test cannot be assumed, p<.05.

[54] t(70)=-2.161, p<.05.

[55] Due to the low communalities variables Hea2 and Hea8 have been excluded for this analysis. Still, even after this correction, the analysis proves this scale not to have an adequate level of reliability (α=.388). This is somehow confirmed with KMO=.509 though Bartlett's test is significant (p<.05).

Hea10	Witnesses who are illiterate or who have a low level of education are more likely to be perceived as unreliable.	.783				.666
Hea11	Fact-finding hearings are not equipped to deal well with illiterate witnesses.	.783				.455
	Eigenvalue	**1.841**	**1.496**	**1.345**	**1.258**	

The respondents more strongly attached to the first extracted factor (QW_Component1) expressed their **concern with witnesses' reliability**, especially in relation to their levels of literacy. As well as believing that the Court should have a set of clear procedures for the questioning of witnesses, they advocated that the parties' representatives should lead the questioning.

The second extracted component (QW_Component2) emphasises **a concern with the Court's procedures**, but did not support any particular solutions. According to this view, the Court should set the rules for questioning, but respondents were concerned that the timing of the hearings could significantly affect the reliability of witnesses' accounts.

While the respondents more attached to the third component (QW_Component3) were concerned with the lack of clear procedures for questioning witnesses, they also emphasised **the role of the parties' representatives**. In addition, they supported the idea that the parties' representatives should be informed in advance as to how witnesses would be questioned.

By contrast, the respondents more attached to the last component (QW_Component4) were more likely to emphasise concern about **the protection of witnesses** rather than the rights of the parties' representatives.

While regression analyses on QWComponents 1-3 as dependent variables found no significant predictors among respondents' socio-demographic characteristics, the same set showed some significant relations with the QW_Component4.[56] The predictor set explains 37.9% of the dependent variable's variance. Being an employee of the ECtHR was the strongest predictor (beta=.422) for this component, where the concern for the protection of witnesses was paramount. Younger respondents (beta=-.324) and those of non-Turkish nationality (beat=-.339) were also more likely to support this view.

Four variables in this set of statements dealt with the issue of the availability of relevant documents in fact-finding hearings. The values of means showed some level of consensus among the respondents about the Court's lack of power to impose either clear rules about the submission of documents or to enforce compulsion in respect of those who fail to produce relevant documents. While the great majority of the respondents recognised the ability of fact-finding hearings to collect new evidence, almost a quarter agreed that fact-finding hearings rarely produce any relevant documents that were not available to the Court before the hearing (Hea13).

[56] Durbin Watson value of 2.524 signifies that the assumption of independent errors is tenable. $F(46)=3.397$, $p<.01$

Table 8.3: Percentages and means – Availability of documents

	Statement	1*	2	3	4	5	mean
Hea14	The Court needs to have more clearly defined powers of compulsion when the parties fail to produce relevant documents.	1.4	6.8	20.3	45.9	25.7	3.88
Hea12	It is frequently a problem that relevant documents (not previously submitted to the Court) are produced by either of the parties during the hearing itself.		19.6	17.9	46.4	16.1	3.59
Hea15	The Court has no means to enforce compulsion in respect of those who fail to produce relevant documents.	2.8	18.3	15.5	47.9	15.5	3.55
Hea13	Fact-finding hearings rarely produce any relevant documents that were not available to the Court before the hearing.	6.6	57.4	11.5	23.0	1.6	2.56

***1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree**

While the age and qualifications of respondents proved to be non-significant predictors for these attitudes, a set of t-tests showed some significant differences in attitudes relating to the submission of relevant documents in fact-finding hearings amongst some profiles of respondents. Those respondents who were not ECtHR judges were more inclined to agree (mean=3.72)[57] with the statement that it is frequently a problem that relevant documents (not previously submitted to the Court) are produced by either of the parties during the hearing itself (Hea12) than ECtHR judges who were divided in their opinions on this issue (mean=3.00). The ECtHR judges were also less supportive of the view that the Court needs to have more clearly defined powers of compulsion when the parties fail to produce relevant documents (mean=3.21)[58] than other respondents who, on average (mean=4.03), tended to agree with this statement. This division is enforced when the views about this statement of ECtHR employees and other respondents are compared. Those who are not employees of the ECtHR are more inclined to agree (mean=4.10) than their ECtHR colleagues (mean=3.59).[59]

The nationality of the respondents appeared to be a significant factor when the respondents assessed the ability of fact-finding hearings to elicit any relevant documents that were not available to the Court before the hearing (Hea13). While non-Turkish respondents, on average, disagreed with this statement (mean=2.38), Turkish respondents were divided in their opinions on this issue (mean=3.17).[60] Similarly, while non-Turkish respondents were, on average, more likely to agree (mean=3.74)[61] that the Court has no means to enforce compulsion in respect of those who fail to produce relevant documents (Hea15), Turkish respondents showed a greater inclination to disagree with this statement (mean=2.85).

Taking into account the number of variables that deal with the issue of documents in fact-finding hearings, a principle component analysis on this set of variables was carried out to extract a single component.

[57] $t(54)=-2.151$, $p<.05$.
[58] $t(72)=-3.178$, $p<.01$.
[59] $t(72)=2.276$, $p<.05$.
[60] $t(55)=2.593$, $p<.05$.
[61] $t(65)=-2.872$, $p<.01$.

Table 8.4: Rotated component matrix – Availability of documents

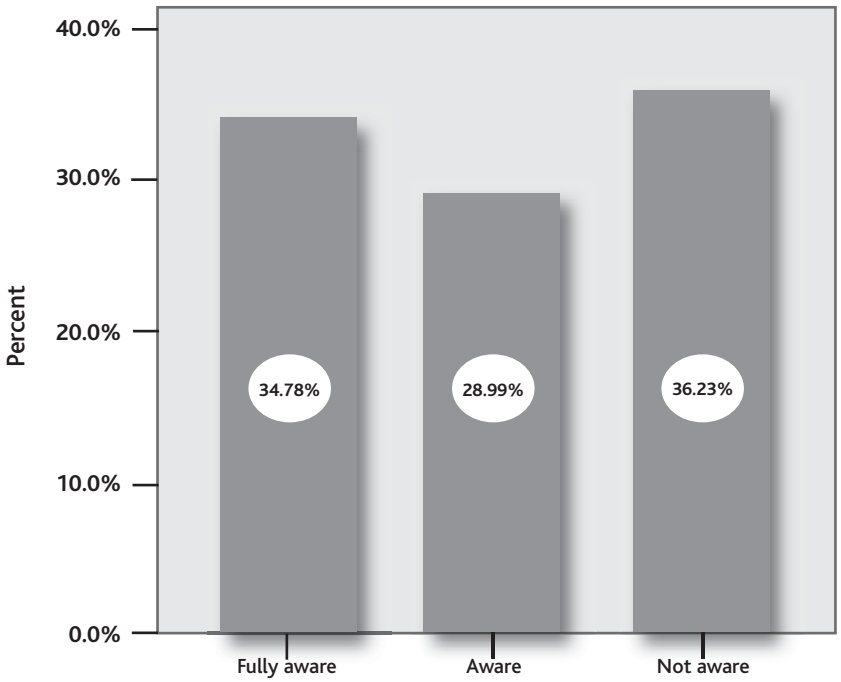
Variables		Component 1	Com.
Hea12	It is frequently a problem that relevant documents (not previously submitted to the Court) are produced by either of the parties during the hearing itself.	.759	.576
Hea13	Fact-finding hearings rarely produce any relevant documents that were not available to the Court before the hearing.	-.742	.550
Hea14	The Court needs to have more clearly defined powers of compulsion when the parties fail to produce relevant documents	.687	.472
Hea15	The Court has no means to enforce compulsion in respect of those who fail to produce relevant documents.	.610	.372
	Eigenvalue	**1.971**	

Respondents more strongly attached to this concept (Doc_Component1) emphasised the **positive influence of fact-finding hearings in obtaining relevant documents**, but they also expressed concern about the Court's lack of powers of compulsion when parties fail to produce relevant documents.

8.1. Annex to the Court Rules (rules A1 to A8)

Out of all the respondents, 30.9% were not aware of the details of the provisions of the annex to the Court Rules concerning investigations, and 14.8% failed to provide an answer. Hence, only around 55% expressed some level of awareness of the details.

Chart 8.1: Awareness of the annex to the Court Rules concerning investigations (A1 to A8)



Multiple regression analysis was used in order to examine the profile of respondents that are more likely to be aware of these annex rules. The set of predictors explained 27.0% of total variance of the dependent variable.[62] The results show that those respondents with higher educational qualifications were more likely to be aware of the Annex to the Court Rules (A1 and A8) (beta=-.311), just as those who work within the ECtHR (beta=-.403).

A set of three variables was designed in order to investigate respondents' attitudes towards the effectiveness of these rules. Overall, around a third of the respondents who expressed some level of awareness of these rules could not express any firm view (value 3 = neither agree nor disagree). More than half of these respondents considered the annex to the Court Rules to be an adequate basis for fact-finding (Hea17), yet a similar percentage did not think that the absence of these rules in the past had a negative effect on previous hearings (Hea19). Just under a quarter of respondents still considered these rules to be insufficiently detailed (Hea18).

Table 8.5: Percentages and means – Annex to the Court rules

	Statement	*1	2	3	4	5	mean
Hea17	The annex to the Court rules concerning investigations is an adequate rule basis for fact-finding.	5.4	19.6	23.2	51.8		3.21
Hea19	The rules in the annex relating to the fact-finding hearing procedure are still insufficiently detailed.		43.4	32.1	22.6	1.9	2.83
Hea18	The absence of the annex to the rules had a negative effect on previous fact-finding hearings.	2.2	48.9	33.3	13.3	2.2	2.64

***1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree**

A t-test analysis revealed that on the issue of the adequacy of these rules there was a statistically significant difference between those who claimed to be fully aware and those who were just aware of the annex to the Rules (Hea16 as a predictor).[63] On average, those who were fully aware of their details were more inclined to agree that the rules are an adequate basis for fact-finding (mean=3.67) than those who had a lower level of awareness (mean=3.20). Linear regression analyses showed a significant impact of age on some of these views. Hence, younger respondents were more likely to agree that the previous absence of these rules had a negative impact on fact-finding hearings (Hea18),[64] and that the rules were still insufficiently detailed (Hea19).[65]

While respondents' sex, level of qualifications, and experience in fact-finding cases proved to be non-significant factors, a set of t-tests showed some significant differences between, on the one hand, employees of the ECtHR and those not employed in the ECtHR,[66] and, on the other, between ECtHR judges and all others[67] as to whether the rules are insufficiently detailed (Hea19). On average, both groups – ECtHR employees (mean=2.55) and ECtHR judges (mean=2.47) – were more inclined to disagree with the statement than the others (mean=3.23 and mean=2.97 respectively).

62 R=.520; F960)=4.078, p<.01
63 t(42)=2.104, p<.05.
64 Beta=-.449, F(44)=10.841, p<.01, R2=.201.
65 Beta=-.292, F(52)=4.799, p<.05, R2=.085.
66 t(51)=-3.097, p<.01.
67 t(51)=-2.016, p<.05.

9. The conduct of on-the-spot investigations

A set of nine variables was constructed with the aim of investigating respondents' attitudes to the proceedings, and effectiveness, of on-the-spot investigations. According to the mean values, there appeared to be a high level of consensus among the respondents about the effectiveness of on-the-spot investigations (mean=3.98). More than 50% of the respondents also recognised the major influence of 'events on the ground' on their effectiveness (Spo5).

Table 9.1: Percentages and means – The conduct of on-the-spot investigations

	Statement	1*	2	3	4	5	mean
Spo1	On-the-spot investigations are usually effective in producing relevant new evidence in the case.		3.3	13.1	65.6	18.0	3.98
Spo9	The Courts' delegation conducting an on-the-spot investigation should always consider including relevant experts – e.g. Doctors, Psychologists.	3.1	15.6	18.8	46.9	15.6	3.56
Spo5	The effectiveness of an on-the-spot investigation is mainly determined by the events on the ground as they happen.	3.4	17.2	24.1	48.3	6.9	3.38
Spo4	The security of the judges should be the main concern when deciding whether an on-the-spot investigation should be held.	4.5	35.8	19.4	28.4	11.9	3.07
Spo2	The decision to hold an on-the-spot investigation is greatly influenced by the political situation in the region concerned.	1.8	42.9	23.2	30.4	1.8	2.88
Spo7	The Court's delegation involved in on-the-spot investigations often faces major problems in contacting relevant officials.	2.3	44.2	27.9	25.6		2.77
Spo6	The Court's delegation is too often denied access to relevant sites and premises during on-the-spot investigations.	5.4	43.2	29.7	18.9	2.7	2.70
Spo3	On-the-spot investigations should not be held in zones of conflict.	7.8	51.6	14.1	20.3	6.3	2.66
Spo8	The Court's delegation in an on-the-spot investigation rarely has access to the necessary technical support, e.g. means of communication, photocopiers, technicians, etc.	2.3	54.5	22.7	20.5		2.61

***1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree**

There was much less consensus as to specific issues relating to on-the-spot investigations. The respondents were particularly divided about the question of the security of judges (Spo4) and the impact of the political situation on the decision to hold such an investigation (Spo7). While, on average, 50% of respondents did

not see particular problems as regards making contact with relevant officials, accessing relevant premises and obtaining technical support, about a quarter of respondents did see these issues as being problematic. Hence, further analysis was carried out to investigate whether the respondents' positions or their experience significantly influences these views.

The only significant impact of socio-demographic variables could be found in respect of Spo6 – *The Court's delegation is too often denied access to relevant sites and premises during on-the-spot investigations* – where younger respondents were more likely to agree with the statement (beta=-.459).[68]

A principle component analysis conducted on eight variables[69] extracted three significant components that explained 66.034% of total variance.

Table 9.2: Rotated component matrix - The conduct of on-the-spot investigations

		Components			
Variables		**1**	**2**	**3**	**Com.**
Spo2	The decision to hold an on-the-spot investigation is greatly influenced by the political situation in the region concerned.	.600		.546	.682
Spo3	On-the-spot investigations should not be held in zones of conflict.	.718			.520
Spo4	The security of the judges should be the main concern when deciding whether an on-the-spot investigation should be held.	.887			.810
Spo5	The effectiveness of an on-the-spot investigation is mainly determined by the events on the ground as they happen.			.867	.776
Spo6	The Court's delegation is too often denied access to relevant sites and premises during on-the-spot investigations.		.829		.700
Spo7	The Court's delegation involved in on-the-spot investigations often faces major problems in contacting relevant officials.		.633	-.570	.855
Spo8	The Court's delegation in an on-the-spot investigation rarely has access to the necessary technical support, e.g. means of communication, photocopiers, technicians, etc.		.842		.787
Spo9	The Courts' delegation conducting an on-the-spot investigation should always consider including relevant experts – e.g. Doctors, Psychologists.	.835			.707
	Eigenvalue	**2.538**	**1.833**	**1.572**	

The respondents more strongly attached to the first component (Spo_Component1) were primarily **concerned with the issue of safety**. They considered that the decision as to whether to hold an on-the-spot investigation should take account of the political situation in the relevant region, and they were not inclined to support such investigations in conflict zones. In addition, they advocated always considering including relevant experts.

[68] F(36)=9.318, p<.01.

[69] Variable Spo1 was excluded from the analysis due to low commonality. The scale without Spo1 showed some level of reliability (=.639), where KMO=.513 and Bartlett's test of sphericity was significant (p<.001).

The three statements that formed the second component (Spo_Component2) all relate to **problems of access** during on-the-spot investigations – either to sites and premises, or to technical support or relevant officials.

Finally, the last extracted component (Spo_Component3) focused on **the impact of external factors** on the conduct of on-the-spot investigations. Here, the effectiveness of on-the-spot investigations was seen as dependent on events on the ground as they happen and the political situation of the particular region. By contrast, the lack of availability of relevant officials was not considered to be an important problem.

The only significant influence of socio-demographic characteristics on these concepts was the impact of age on Component 2. Regression analysis[70] showed that younger respondents were more likely to stress the problem of access as being the major issues as regards on-the-spot investigations (beta=-.401).

10. The conduct of fact-finding hearings

The analysis of different aspects relating to the conduct of fact-finding hearings (conduct of fact-finding hearings, attendance of witnesses, reasons for their attendance, issues related to interpretation, questioning of witnesses, obtaining relevant documentation, and conduct of on-the-spot investigations) extracted eighteen components which recorded differences in respondents' perceptions of these issues. These concepts included:

Conduct of FF missions

- Con_Component1 - problems related to summoning witnesses
- Con_Component2 - problems related to interpretation
- Con_Component3 - the Court's ability to summon witnesses

Disincentives for witnesses' attendance at FF

- Att_Component1 - external pressures on witnesses
- Att_Component2 - pressures resulting from the Court process
- Att_Component3 – other subjective reasons

Reasons given for non-attendance of witnesses

- Rea_Component1 – reasons related to witnesses' fear
- Rea_Component2 – reasons related to witnesses' relevance to the case

Problems related to interpretation in fact-finding hearings

- Int_Component1 - problems related to interpreters
- Int_Component2 - problems related to witnesses

Questioning witnesses at fact-finding hearings

- QW_Component1 - concern with witnesses' reliability
- QW_Component2 - concern with the Court procedures
- QW_Component3 - the role of the parties' representatives
- QW_Component4 - concern with the protection of witnesses

Availability of documents in fact-finding hearings

Doc_Component1 - the positive influence of fact-finding hearings in obtaining relevant documents

[70] $F(30)=5.551$, $p<.05$.

The conduct of on-the-spot investigations

- Spo_Component1 - concern with the issue of safety
- Spo_Component2 - problems of access
- Spo_Component3 - the impact of external factors

Taking into account the factor scores of all of these components, and with the aim of examining whether respondents exhibit more general views on the conduct of fact-finding hearings, a hierarchical principle component analysis was conducted, where these factor scores were treated as interval variables.[71] This analysis sought to identify the possible relationships between these concepts. The analysis extracted seven significant components of the second order which together explained 85.475% of variance.

Table 10.1 – Structure of HPCA_Component1

HPCA – Component 1	
Att_Component2 – pressures resulting from the Court process	.914
Rea_Component1 – reasons related to witnesses' fear	.785
QW_Component2 – concern with the Court procedures	-.684
Con_Component1 – problems related to summoning witnesses	.554
QW_Component3 – the role of the parties' representatives	-.530
Att_Component3 – witnesses' subjective reasons	-.453

Those respondents more strongly attached to this view (HPCA_Component1, Table 10.1) mainly focused on issues related to the summoning of witnesses in the course of fact-finding missions. Their primary concern was that witnesses' attendance is affected, not by subjective reasons, but by their perception of the Court as unfamiliar and intimidating and that the main reason given for their non-attendance is their fear. These respondents were less inclined to express concerns about the Court's procedures in questioning the witnesses.

Table 10.2 – Structure of HPCA_Component2

HPCA – Component 2	
QW_Component1 – concern with witnesses' reliability	.839
Int_Component2 – problems related to witnesses	.543
Con_Component1 – problems related to summoning witnesses	.516

The second extracted component (HPCA_Component2, Table 10.2) also focused on the role of witnesses in the fact-finding hearing. Unlike the previous component, respondents more attached to this component emphasised the 'quality' of witnesses as their major concern. They saw witnesses' cultural backgrounds as being a possible obstacle to effective questioning, especially witnesses' levels of literacy, their use of a specific dialect or a strong accent, but they also (Con_component1) expressed their concern about the reluctance of witnesses to testify against their own state. Hence, these respondents advocated for the Court to allow third parties to attend the hearings, as support for applicants or witnesses, and for the introduction of a clearer set of rules for the questioning of witnesses.

[71] The scale showed relative high level of reliability (Cronbach's =.620). As it could be expected, due to already discussed issues of sampling, KMO proves too low (.195) and hence does not allow us to generate conclusions on wider population. Bartlett's test of sphericity is significant on .001 level and all variables in this analysis show a high level of communality.

Table 10.3 – Structure of HPCA_Component3

HPCA – Component 3	
Con_Component2 – problems related to interpretation	.916
Spo_Component1 – concerns with the issue of safety	.758
Rea_Component2 – reasons related to witnesses' relevance to the case	.631
Int_Component1 – problems related to interpreters	.633

The third extracted component of the second level (Table 10.3) consisted of four concepts with high factor loadings. Respondents more attached to this view tended to see issues related to the quality of interpretation as one of the most important issues related to the conduct of fact-finding hearings. They were also more likely to say that the main reason for witnesses' non-attendance was that they had no relevant evidence to give or were no longer in the same professional positions as at the time of the incident in question. Finally, as to on-the-spot investigations, these respondents were concerned about holding them in conflict zones or in areas that are politically unstable.

Table 10.4 – Structure of HPCA_Component4

HPCA – Component 4	
Att_Component1 – external pressure on witnesses	.924
Int_Component1 – problems related to interpreters	.564
Att_Component3 – witnesses' subjective reasons	.515
Doc_Component1 – the positive role of fact-finding hearings on obtaining relevant documents	.461

While respondents more strongly attached to the fourth component (Table 10.4) recognised the positive role of fact-finding hearings in obtaining relevant documents, they also stressed, as the main reason for witnesses' non-attendance, that witnesses were usually exposed to external pressures from their state or as a result of their social surroundings. They were concerned about witnesses' other subjective reasons for not attending. The quality of interpretation was also seen as a potential problem in questioning witnesses.

Table 10.5 – Structure of HPCA_Component5

HPCA – Component 5	
QW_Component4 – concern with witnesses' protection	.924
Att_Component3 – witnesses' subjective reasons	.577
Doc_Component1 – a positive role of FF hearings on obtaining relevant documents	.478

Table 10.5 reveals that those respondents who expressed their concern with witnesses' safety and who advocated the possibility of testifying anonymously (QW_Component4), considered that the main reason for witnesses' non-attendance were their subjective reasons. These respondents were also more likely to recognise the positive role of fact-finding hearings in securing relevant documents.

Table 10.6 – Structure of HPCA_Component6

HPCA – Component 6	
Spo_Component3 – impact of external factors	.801
QW_Component3 – concern with the role of parties' representatives	.683
Int_Component2 – problems related to witnesses	-.451

Those respondents more attached to the sixth extracted component (Table 10.6) were more concerned with the lack of clear procedures for questioning witnesses, and supported a more active role for the parties' representatives (QW_Component3). Potential problems with interpretation due to the witnesses' cultural background was rejected as being a significant factor. They also saw the effectiveness of on-the-spot investigations as being dependent on events 'on the ground' as they happen and on the political situation of the particular region (Spo_Component3).

Table 10.7 – Structure of HPCA_Component7

HPCA – Component 7	
Spo_Component2 – problems of access	.904
Con_Component3 – problems of the Court's ability to summon witnesses	.611

The last extracted component of the second level (Table 10.7) consisted of just two components. Respondents more attached to this view saw access to documents, sites or relevant officials as the main problem for on-the-spot investigations and were more likely to question the Court's ability to summon witnesses. They considered that the Court has no effective means to compel witnesses to attend, especially in respect of 'state' witnesses.

11. The role of the parties' representatives in fact-finding missions

After examining the respondents' views on the role of the Court in fact-finding missions, our attention turned to their views about the role of parties' representatives. Table 11.1 reveals a rather worrying consensus among our respondents about a general lack of safety for applicants' representatives. Around three quarters of the respondents said that in some Council of Europe states, many applicants' representatives fear retribution from the state and considered that the Court was unable to ensure their safety. There was also some level of agreement as regards the availability of legal representatives who are specialised in ECHR law and practice (Rol3), but the respondents were more divided about representatives' familiarity with the procedures of the ECtHR (Rol1) or the availability of clear guidance. Nevertheless, around 58% of respondents supported the idea that some form of web casting by the Court of a fact-finding hearing would significantly improve representatives' understanding of the process.

Table 11.1: Percentages and means – The role of parties' representatives

	Statement	1*	2	3	4	5	mean
Rol5	In some Council of Europe states, many applicants' representatives fear retribution from the state.		16.7	7.4	63.0	13.0	3.72
Rol6	The Court has no power to ensure the safety of applicants' representatives.		15.7	10.0	67.1	7.1	3.66
Rol3	There are too few legal representatives specialised in ECHR law and practice in Council of Europe countries.	1.3	21.3	9.3	61.3	6.7	3.51
Rol4	Applicants' representatives usually face great obstacles in contacting relevant witnesses for the purposes of the fact-finding hearings.		16.1	28.6	46.4	8.9	3.48

Rol7	Some form of web casting by the Court of a fact-finding hearing would significantly improve representatives' understanding of the process.	2.7	16.2	23.0	50.0	8.1	3.45
Rol1	It is very rare that the parties' representatives are fully familiar with the procedures of the ECtHR.	2.7	37.8	13.5	41.9	4.1	3.07
Rol2	The Court does not provide sufficient guidance to the parties' representatives in relation to the conduct of fact-finding hearings.	1.4	48.6	16.7	33.3		2.82

***1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree**

A principle component analysis was conducted in order to examine whether respondents expressed more structured views on this issue. The analysis extracted three significant components (la>1) that explained 63.331% of total variance.

Table 11.2: Rotated component matrix – The role of parties' representatives

		Components			
Variables		**1**	**2**	**3**	**Com.**
Rol1	It is very rare that the parties' representatives re fully familiar with the procedures of the ECtHR.	.726			.533
Rol2	The Court does not provide sufficient guidance to the parties' representatives in relation to the conduct of fact-finding hearings.	.507	.401	-.457	.627
Rol3	There are too few legal representatives specialised in ECHR law and practice in Council of Europe countries.	.766			.617
Rol4	Applicants' representatives usually face great obstacles in contacting relevant witnesses for the purposes of the fact-finding hearings.	.460		.475	.498
Rol5	In some Council of Europe states, many applicants' representatives fear retribution from the state.			.875	.767
Rol6	The Court has no power to ensure the safety of applicants' representatives.		.843		.738
Rol7	Some form of web casting by the Court of a fact-finding hearing would significantly improve representatives' understanding of the process.		.782		.652
	Eigenvalue	**1.648**	**1.559**	**1.225**	

The first extracted component (Rol_Component1) gathered four variables that relate to the problem of the **lack of expertise of parties' representatives**. Respondents held the view that there are too few legal representatives who specialise in ECHR law and practice and who are familiar with the ECtHR procedures. They also thought that the Court itself does not provide sufficient guidance to the parties' representatives.

The respondents more strongly attached to the second component (Rol_Component2) more clearly emphasised **the Court's lack of support for parties' representatives**, either being ineffective in ensuring representatives' safety or in providing adequate guidance.

The analysis showed that younger respondents (beta=-.428)[72] were more inclined to support this view, just as those who were not employed by the ECtHR (mean=.230),[73]

The last component (Rol_Component3) consisted of three statements that clearly express the **vulnerability of the parties' representatives**. They were seen as fearing retribution from the state and as facing great obstacles in contacting relevant witnesses. Thus for these respondents the main obstacles arose as a result of the conduct of the state parties, rather than from any lack of guidance from the Court (Rol2). This view was, on average, more supported by respondents of Turkish nationality (mean=.199)[74] than other respondents (mean=-.686).

12. The role of the State in fact-finding missions

Finally, the respondents were asked to evaluate a set of statements focusing on the role of the State in fact-finding missions. The highest level of consensus among the respondents was in respect of the state's failure to cooperate in fact-finding hearings. Over 80% of respondents considered that the failure of the state to co-operate should have an important bearing on the Court's assessment as to whether the applicant has proved the case beyond reasonable doubt. It seems that a great majority of respondents were able to identify certain states as being non-cooperative (Sta2 and 5). The respondents were more divided as to whether a certain level of pressure should be imposed on states in order to ensure co-operation (Sta6).

Table 12.1: Percentages and means – The role of the state in FF hearings

	Statement	1*	2	3	4	5	mean
Sta8	A state's failure to cooperate in a fact-finding hearing should have an important bearing on the Court's assessment whether the applicant has proved the case beyond reasonable doubt.	1.3	3.8	13.9	50.6	30.4	4.05
Sta2	It is only a minority of states that fail to cooperate fully in fact-finding hearings.	1.8	10.7	7.1	71.4	8.9	3.75
Sta5	In only a few Council of Europe states, giving evidence against that state may endanger the witness.		11.3	14.5	66.1	8.1	3.71
Sta7	States are fully aware that the ECtHR has no means of compelling them to cooperate in fact-finding hearings.		12.0	24.0	49.3	14.7	3.67
Sta1	The level of cooperation of a respondent state in the fact-finding hearing process is mainly dependent on its own political interests.	1.3	19.7	22.4	38.2	18.4	3.53
Sta6	Respondent states will only produce relevant documents at a fact-finding hearing if compelled to do so.	1.4	28.4	32.4	35.1	2.7	3.09
Sta3	States always ensure that they are represented by the most qualified lawyers.	3.9	42.1	22.4	28.9	2.6	2.84

***1 = absolutely disagree; 2 = disagree; 3 = neither; 4 = agree; 5 = absolutely agree**

A principle component analysis[75] conducted on this set of statements extracted two significant components that explain 46.679 % of total variance.

[72] F(80)=17.686, p<.001, R2=.183.
[73] t(79)=-2.352, p<.05.
[74] t(74)=-2.373, p<.05.
[75] Results of this PCA should be taken with a great reserve since the value of Cronbach's α (.262) indicates non-reliable scale, where Bartlett's test of sphericity is not significant, and some variables have too low communality. Still, KMO of .647 points at some level of sampling adequacy.

Table 12.2: Rotated component matrix – The role of the State

Variables		Components 1	2	Com.
Sta1	The level of cooperation of a respondent state in the fact-finding hearing process is mainly dependent on its own political interests.	.688		.535
Sta2	It is only a minority of states that fail to cooperate fully in fact-finding hearings.		.758	.591
Sta3	States always ensure that they are represented by the most qualified lawyers.	-.471		.370
Sta5	In only a few Council of Europe states, giving evidence against that state may endanger the witness.		.798	.650
Sta6	Respondent states will only produce relevant documents at a fact-finding hearing if compelled to do so.	.591		.392
Sta7	States are fully aware that the ECtHR has no means of compelling them to cooperate in fact-finding hearings.	.554		.334
Sta8	A state's failure to cooperate in a fact-finding hearing should have an important bearing on the Court's assessment whether the applicant has proved the case beyond reasonable doubt.	.606		.394
	Eigenvalue	**1.756**	**1.518**	

The respondents more attached to the first component (Sta_Component1) expressed a view that there was a **general lack of cooperation from all states**. The level of cooperation was seen as dependent on states' political interests. These respondents would advocate for more strict rules and means of compulsion for the Court in securing states' cooperation.

On the other hand, the respondents more attached to the second component (Sta_Component2) were more likely to stress the **lack of cooperation of only some states**.

While Turkish respondents tended, on average, to support Sta_Component1 (mean=.538),[76] non-Turkish respondents' (mean=-.121), and employees of the ECtHR were more inclined to support the second component (mean=.285).[77]

[76] t(74)=2.380, p<.05.
[77] t(79)=2.200, p<.05.

13. Predictors of perceptions of the effectiveness of fact-finding missions

As the final stage of the analysis, we were interested in examining to what extent respondents' views of the roles of the Court, the parties' representatives and states were determinative of their views about the effectiveness of fact-finding missions. With this aim, a multiple regression analysis was conducted where the predictor set consisted of all the extracted components and the dependent variables were the three components of the effectiveness of fact-finding.

Table 13.1: Significant predictors on FFEff_C1

FFEff_Component1 – effectiveness of on-the-spot investigations				
	beta	**R2**	**(df) F**	**P**
Int_C2 – interpretation problems related to witnesses	-.358	.128	(33) 4.695	.05
DecP_C3 – decision based on availability of witnesses	-.617	.381	(26) 15.359	.01

Respondents who were more satisfied with the effectiveness of on-the-spot investigations tended to be those who rejected the idea that the decision to hold a fact-finding hearing should be based on witnesses' availability and who did not see a problem with the interpretation of witnesses' testimony.

Table 13.2: Significant predictors on FFEff_C2

FFEff_Component2 – overall effectiveness of the fact-finding procedures				
	beta	**R2**	**(df) F**	**P**
Effect_C1 – effectiveness of the Court itself	.490	.240	(36) 11.04	.01
DecP_C1 – stronger cooperation between the Court and parties' representatives	-.516	.266	(26) 9.08	.01
DecP_C2 – the Court's ability to reach a decision	.563	.317	(26) 9.08	.01
Set_C3 – the Court's effectiveness in setting up fact-finding missions	.395	.156	(37) 6.64	.05
Set_C6 – the importance of the selection of experienced judges	-.326	.106	(37) 4.27	.05
Rol_C3 – vulnerability of parties' representatives	.313	.098	(46) 4.89	.05

The overall effectiveness of the fact-finding procedures tended to be emphasised more by those who were satisfied by the Court's ability to reach decision whether to hold a fact-finding hearing, who were satisfied by the effectiveness of the Court itself, who stressed the Court's ability to set up hearings appropriately and who were aware of problems related to the vulnerability of parties' representatives. Those respondents who were less satisfied with the overall effectiveness of the fact-finding procedures were those who considered that the decision to hold a fact-finding hearing should be reached through a closer cooperation between the Court and the parties' representatives, and who stressed the importance of the selection of experienced judges for fact-finding hearings.

Table 13.3: Significant predictors on FFEff_C3

FFEff_Component3 – effectiveness of the questioning of witnesses				
	beta	**R2**	**(df) F**	**P**
Con_C3 - problems with the Court's ability to summon witnesses	.579	.335	(21) 10.09	.01
DecP_C1 - decision through cooperation between the Court and the parties' representatives	.382	.146	(26) 4.28	.05

Those respondents who emphasised problems with the Court's ability to summon relevant witnesses and who were more likely to support the idea that the decision to hold a fact-finding hearing should be reached with closer cooperation between the Court and the parties' representatives, were also more likely to be satisfied with the effectiveness of the questioning of witnesses in a fact-finding hearing.

Appendix 5:

Interview Questions

1 The process of deciding whether the Court should hold a fact-finding hearing

1.1 What are the greatest problems that you have come across in relation to the Court fact-finding hearing process?

1.2 By whom is the decision to hold a fact-finding hearing made – the President of the chamber alone, or are all the chamber judges involved?

1.3 What (case-related) factors are relevant to the Court's decision to hold a fact-finding hearing? How does the Court decide to go on a fact-finding mission?

1.4 To what extent does the Court take into account the identity of the respondent state? Is it more likely that the Court will decide to hold a fact-finding hearing when the respondent state is "notorious" for its previous ECHR violations?

1.5 Have you ever in your practice/experience had specific problems with issues of deciding whether to hold a fact-finding hearing?

1.6 What other factors unrelated to the specific case are relevant to the decision to hold a fact-finding hearing? To what extent is fact-finding a burden for the ECtHR? (issues of cost and time).

1.7 Is it correct that the Court is more likely to agree to hold a fact-finding hearing if it considers that the additional evidence obtained at the hearing could lead to a decision in which the respondent Government is found to be directly responsible for a violation of e.g. Art 2, rather than merely an indirect violation, which it could assess purely on the papers? [i.e. that it will be possible to establish that the state was responsible for killing the victim, over and above the state's responsibility under Art 2 for failing to investigate the death adequately]?

1.8 What is the involvement of the registry lawyers in the process of deciding whether the Court should hold a fact-finding hearing?

1.9 Should the Court more frequently encourage the parties' representatives to submit requests for a fact-finding hearing?

1.10 When there are very similar cases, what are the decisive factors which would lead the Court to go, or not, on a fact-finding hearing?

1.11 Is there now a presumption against holding fact-finding missions?

1.12 What is the impact of the growing backlog of the Court on the decision whether to hold a fact-finding hearing?

2 Setting the fact-finding hearings

2.1 The Court has in the past occasionally held a preparatory hearing (pre-hearing) in Strasbourg, during which the parties' representatives are asked to give their reasons for proposing witnesses. How often are such hearings held? How useful are they?

2.2 How are the judges selected for a fact-finding hearing?

2.3 In the process of selecting judges, what relevance has the judge's

2.3.1 familiarity with the case or subject matter?

2.3.2 familiarity with the particular language?

2.3.3 familiarity with the particular legal system?

2.3.4 experience of fact-finding?

2.3.5 experience as a European Court judge?

2.4 Are judges considered to have specialisations (in areas of substantive law) – if so, is that a relevant factor?

2.5 Is there any system of 'rotation', or otherwise of sharing the functions involved in conducting fact-finding hearings?

3 Conduct of fact-finding hearings

Summoning witnesses

3.1 What problems arise during the process of summoning witnesses?

3.2 Due to issues of time and cost, is every fact-finding hearing limited as to the number of witnesses which can be summoned?

3.3 What assumptions or conclusions, if any, can the Court draw if a witness or witnesses fail to turn up?

3.4 Does the Court need to have powers of compulsion in respect of the attendance of witnesses? Would such a power be enforceable and/or practicable?

3.5 Is one of the most worrying problems of fact-finding hearings the low number of summoned witnesses who actually attend?

3.6 Where a lack of evidence is attributable to the respondent Government, is it important that disadvantage to the applicant is avoided?

Interpretation

3.7 Have difficulties in interpretation ever led to difficulties in understanding what is being said by the witness?

3.8 In your experience, have challenges ever been made by the parties to the quality of the interpretation?

Questioning

3.9 Will the presiding judge lead the questioning of the witness, before the parties' representatives are invited to do so? Or will the parties be invited to lead the questioning, before the judges will do so? Is this entirely at the discretion of the delegation of judges?

3.10 Does the way in which witnesses give evidence vary according to the national legal system (e.g. common law or continental system) and/or national traditions/cultural familiarity? If so, how does it vary and how does the Court take account of the variations?

4 Future of fact-finding hearings/ Suggestions for improvement

4.1 Following the entry into force of Protocol No. 11 in 1998, how did the new Court develop the fact-finding procedure?

4.2 How could the process of fact-finding be improved? Suggestions, recommendations for improvement?

4.3 In the ongoing debates about reforming the Court, is fact-finding taken into account?

4.4 Do you consider that it would be beneficial for the Court to establish a specialised section to deal exclusively with fact-finding hearings?

Appendix 6:

Glossary

African Commission	African Commission on Human and Peoples' Rights.
African Court	African Court on Human and Peoples' Rights
Court or European Court	European Court of Human Rights.
ECHR or Convention	European Convention on Human Rights.
European Commission	European Commission of Human Rights.
Fact-finding hearing	A formal hearing process during which witnesses give evidence before a delegation of the Court and are subject to a process of examination and cross-examination.
Fact-finding mission	A fact-finding mission, as a generic term, includes both fact-finding hearings and on-the-spot investigations. Some fact-finding missions include elements of both procedures.
Inter-American Commission	Inter-American Commission of Human Rights.
Inter-American Court	Inter-American Court of Human Rights.
Member of the Commission	Former members of the European Commission of Human Rights.
OAS	Organisation of American States.
On-the-spot investigation	Any fact-finding mission which does not involve a formal hearing process is referred to in this report as an on-the-spot investigation. They often involve inspections of prisons or other places of detention.

Appendix 7:

Annex to the Rules of the Court (concerning investigations)

Rule A1
(Investigative measures)

1. The Chamber may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case. The Chamber may, *inter alia*, invite the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks.
2. The Chamber may also ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case.
3. After a case has been declared admissible or, exceptionally, before the decision on admissibility, the Chamber may appoint one or more of its members or of the other judges of the Court, as its delegate or delegates, to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. The Chamber may also appoint any person or institution of its choice to assist the delegation in such manner as it sees fit.
4. The provisions of this Chapter concerning investigative measures by a delegation shall apply, *mutatis mutandis*, to any such proceedings conducted by the Chamber itself.
5. Proceedings forming part of any investigation by a Chamber or its delegation shall be held *in camera*, save in so far as the President of the Chamber or the head of the delegation decides otherwise.
6. The President of the Chamber may, as he or she considers appropriate, invite, or grant leave to, any third party to participate in an investigative measure. The President shall lay down the conditions of any such participation and may limit that participation if those conditions are not complied with.

Rule A2
(Obligations of the parties as regards investigative measures)

1. The applicant and any Contracting Party concerned shall assist the Court as necessary in implementing any investigative measures.
2. The Contracting Party on whose territory on-site proceedings before a delegation take place shall extend to the delegation the facilities and co-operation necessary for the proper conduct of the proceedings. These shall include, to the full extent necessary, freedom of movement within the territory and all adequate security arrangements for the delegation, for the applicant and for all witnesses, experts and others who may be heard by the delegation. It shall be the responsibility of the Contracting Party concerned to take steps to ensure that no adverse consequences are suffered by any person or organisation on account of any evidence given, or of any assistance provided, to the delegation.

Rule A3
(Failure to appear before a delegation)

Where a party or any other person due to appear fails or declines to do so, the delegation may, provided that it is satisfied that such a course is consistent with the proper administration of justice, nonetheless continue with the proceedings.

Rule A4
(Conduct of proceedings before a delegation)

1. The delegates shall exercise any relevant power conferred on the Chamber by the Convention or these Rules and shall have control of the proceedings before them.

2. The head of the delegation may decide to hold a preparatory meeting with the parties or their representatives prior to any proceedings taking place before the delegation.

Rule A5
(Convocation of witnesses, experts and of other persons to proceedings before a delegation)

1. Witnesses, experts and other persons to be heard by the delegation shall be summoned by the Registrar.

2. The summons shall indicate
(a) the case in connection with which it has been issued;
(b) the object of the inquiry, expert opinion or other investigative measure ordered by the Chamber or the President of the Chamber;
(c) any provisions for the payment of sums due to the person summoned.

3. The parties shall provide, in so far as possible, sufficient information to establish the identity and addresses of witnesses, experts or other persons to be summoned.

4. In accordance with Rule 37 § 2, the Contracting Party in whose territory the witness resides shall be responsible for servicing any summons sent to it by the Chamber for service. In the event of such service not being possible, the Contracting Party shall give reasons in writing. The Contracting Party shall further take all reasonable steps to ensure the attendance of persons summoned who are under its authority or control.

5. The head of the delegation may request the attendance of witnesses, experts and other persons during on-site proceedings before a delegation. The Contracting Party on whose territory such proceedings are held shall, if so requested, take all reasonable steps to facilitate that attendance.

6. Where a witness, expert or other person is summoned at the request or on behalf of a Contracting Party, the costs of their appearance shall be borne by that Party unless the Chamber decides otherwise. The costs of the appearance of any such person who is in detention in the Contracting Party on whose territory on-site proceedings before a delegation take place shall be borne by that Party unless the Chamber decides otherwise. In all other cases, the Chamber shall decide whether such costs are to be borne by the Council of Europe or awarded against the applicant or third party at whose request or on whose behalf the person appears. In all cases, such costs shall be taxed by the President of the Chamber.

Rule A6
(Oath or solemn declaration by witnesses and experts heard by a delegation)

1. After the establishment of the identity of a witness and before testifying, each witness shall take the oath or make the following solemn declaration:

   "I swear" – or "I solemnly declare upon my honour and conscience" – "that I shall speak the truth, the whole truth and nothing but the truth."

   This act shall be recorded in minutes.

2. After the establishment of the identity of the expert and before carrying out his or her task for the delegation, every expert shall take the oath or make the following solemn declaration:

   "I swear" – or "I solemnly declare" – "that I will discharge my duty as an expert honourably and conscientiously."

   This act shall be recorded in minutes.

Rule A7
(Hearing of witnesses, experts and other persons by a delegation)

1. Any delegate may put questions to the Agents, advocates or advisers of the parties, to the applicant, witnesses and experts, and to any other persons appearing before the delegation.
2. Witnesses, experts and other persons appearing before the delegation may, subject to the control of the head of the delegation, be examined by the Agents and advocates or advisers of the parties. In the event of an objection to a question put, the head of the delegation shall decide.
3. Save in exceptional circumstances and with the consent of the head of the delegation, witnesses, experts and other persons to be heard by a delegation will not be admitted to the hearing room before they give evidence.
4. The head of the delegation may make special arrangements for witnesses, experts or other persons to be heard in the absence of the parties where that is required for the proper administration of justice.
5. The head of the delegation shall decide in the event of any dispute arising from an objection to a witness or expert. The delegation may hear for information purposes a person who is not qualified to be heard as a witness or expert.

Rule A8
(Verbatim record of proceedings before a delegation)

1. A verbatim record shall be prepared by the Registrar of any proceedings concerning an investigative measure by a delegation. The verbatim record shall include:
   (a) the composition of the delegation;
   (b) a list of those appearing before the delegation, that is to say Agents, advocates and advisers of the parties taking part;
   (c) the surname, forenames, description and address of each witness, expert or other person heard;
   (d) the text of statements made, questions put and replies given;
   (e) the text of any ruling delivered during the proceedings before the delegation or by the head of the delegation.
2. If all or part of the verbatim record is in a non-official language, the Registrar shall arrange for its translation into one of the official languages.
3. The representatives of the parties shall receive a copy of the verbatim record in order that they may, subject to the control of the Registrar or the head of the delegation, make corrections, but in no case may such corrections affect the sense and bearing of what was said. The Registrar shall lay down, in accordance with the instructions of the head of the delegation, the time-limits granted for this purpose.
4. The verbatim record, once so corrected, shall be signed by the head of the delegation and the Registrar and shall then constitute certified matters of record.

Appendix 8:

List of Cases

A v the United Kingdom, no. 6840/74, Commission Report, 16.6.80

Adali v Turkey, no. 38187/97, 31.3.05, ECHR 2005-I

Ağdaş v Turkey, no. 34592/97, 27.7.04, ECHR 2004-IV

Akdivar and Others v Turkey, no. 21893/93, 16.9.96, ECHR 1996-IV

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Assenov v Bulgaria, no. 24760/94, 28.10.98, ECHR 1998-VIII

Aydin v Turkey, no. 23178/94, 25.9.1997, ECHR 1997-VI

Benzan v Croatia, no. 62912/00, 8.11.02, ECHR 2002-I

Bilgin v Turkey, no. 23819/94, 16.11.00, ECHR 2000-II

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Cyprus v Turkey, nos. 6780/74 and 6950/75, 10.7.76

Cyprus v Turkey, no. 8007/77, 4.10.83

Dankevich v Ukraine, no. 40679/98, 29.4.03, ECHR 2003-IV

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Dhoest v Belgium, no.10448/83, 14.5.87

Donnelly and Others v United Kingdom, nos. 5577/72, 5583/72, 5.4.73

Druzenko and Others v Ukraine, nos. 17674/02, 39081/02, 15.1.07, ECHR 2007-V

Edwards v UK, no. 13071/87, 16.12.92, Series A No. 247-B

Ensslin, Baader, Raspe v Germany, nos. 7572/76, 7586/76 & 7587/76, 8.7.78

Erdoğan and Others v Turkey, no. 19807/92, 25.4.06, ECHR 1993-IV

Ergi v Turkey, no. 23818/94, 28.7.98, ECHR 1998-IV

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Foti and Others v Italy, nos. 7604/76, 7719/76, 7781/77, 7913/77, 10.12.82, Series A no. 56

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Kaya v Turkey, no. 22729/93, 19.2.98, ECHR 1998-I

Kazeem Aminu v Nigeria, African Commission on Human and Peoples' Rights, Comm. 205/97 (2000)

Khashiyev and Akayeva v Russia, nos. 57942/00, 57945/00, 24.2.05, ECHR 2005-I

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Appendix 10:

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