THE ESTABLISHMENT OF FACTS

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11.1 Summary

In the preceding section's discussion of the negative obligation, Article 3 cases were examined as belonging to three groups, namely those in which 1) ill-treatment was intentionally inflicted by law enforcement officers, 2) ill-treatment was caused as a consequence of a lawful or unlawful act carried out by State agents, and finally, 3) ill-treatment emanated from State agents' omissions. It is particularly in the first type of cases that the facts will most often be in dispute and where they will need to be established by the Court. In the second and third categories of cases, facts will not usually be disputed but the applicants will need to satisfy the Court that the ill-treatment they allege reached the minimum threshold and that the use of force by State agents was not warranted in the circumstances of the case. The second and third category cases have already been discussed above (see Section 2.2.4, on the "well-foundedness" of the application) and further regard may be had to Appendix No. 10 where the Court's Article 3 jurisprudence is examined in detail in all three categories of cases. For purposes of examining the way in which the Court establishes the facts in an Article 3 case, the present section will predominantly deal with the first category of cases, i.e. where ill-treatment is intentionally inflicted by State officials. Reference will be made to judgments which concerned not only ill-treatment but also violations of Article 2 (violations of the right to life) since considerations pertaining to the establishment of facts are generally applicable in both types of cases.

Before the Court can reach a finding under Article 3 on an allegation of ill-treatment, it must first establish the facts of the case, i.e. the accuracy of the applicant's allegations and the circumstances surrounding those allegations. In establishing the facts, the Court has adopted a system of free evaluation of evidence whereby no evidence is inadmissible and no witness is incompetent to testify.[602] Furthermore, although the Court will expect the applicant to adduce evidence in support of his or her allegations, in circumstances where the applicant is unable to do so, the Court may obtain such evidence of its own motion, either by asking the respondent Government to provide it or by taking evidence *in situ*.

The types of evidence which may be adduced in order to substantiate allegations of ill-treatment include – but are not limited to – medical and forensic reports, x-rays and other similar medical records, witness statements, photographs, custody records, reports compiled by inter-governmental and non-governmental organisations, and documents showing that the applicant's

602 See *Nachova and Others v. Bulgaria*, cited above, § 147.

allegations of ill-treatment have been brought to the attention of the domestic authorities.

The Court, in assessing the evidence before it, employs a very high standard of proof, i.e. the "beyond reasonable doubt" standard.[603] Nevertheless, it should be noted that this high standard is to a certain extent mitigated by the Court's reliance on inferences[604] and the fact that the Court will under certain circumstances shift the burden of proof to the respondent Government.[605]

In cases involving allegations of ill-treatment, the burden to disprove the applicant's allegations will shift to the Government in two circumstances. Firstly, if the applicant has been detained in good health but is found to be injured upon release, the respondent Government must explain those injuries.[606] Secondly, if the Government withholds evidence that the Court believes has a bearing on the applicant's case, the Government will be required to show that the documents do not corroborate the applicant's allegations.[607]

11.2 The Court's Powers in the Establishment of Facts

In most instances, the facts of a case will already have been established by national courts. The duty of the Strasbourg Court will then usually be limited to examining whether or not those factual findings "entail a result compatible with the requirements of the Convention".[608] The Court has often made it clear that it is:

> "sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them. Though the Court is not bound by the findings of domestic courts, in nor-

603 See *Ireland v. the United Kingdom*, cited above, § 161.
604 See Section 11.5.2 below.
605 See Section 11.5 below.
606 See *Selmouni v. France*, cited above, § 87.
607 See *Akkum and Others v. Turkey*, cited above, § 211. As will be seen below, the Court may, instead of shifting the burden to the Government, prefer to draw inferences from the Government's failure to co-operate with the Court; see *Timurtaş v. Turkey*, cited above, § 66.
608 See P. Mahoney, "Determination and Evaluation of Facts in Proceedings Before the Present and Future European Court of Human Rights" in Salvino Busutil, ed., *Mainly Human Rights: Studies in Honour of J. J. Cremona*, (Fondation Internationale Malte, 1999) pp. 119-134.

> mal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts. The same principles apply *mutatis mutandis* where no domestic court proceedings have taken place because the prosecuting authorities have not found sufficient evidence to initiate such proceedings. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny even if certain domestic proceedings and investigations have already taken place".[609]

It follows that under certain circumstances, particularly in the context of Article 2 and 3 violations, the Court will not hesitate to take on the role of a first instance tribunal and establish the disputed facts. Such circumstances may include situations where domestic authorities have failed to carry out effective investigations into allegations of ill-treatment or where they have failed to punish those responsible. The *Adalı v. Turkey* judgment cited above illustrates the point that a purported lack of evidence, which might have prevented domestic authorities from bringing criminal proceedings against persons implicated in ill-treatment, will not deter the Court from investigating the allegations of its own motion if such a course of action appears justified under the circumstances. Furthermore, whatever the outcome of the domestic proceedings, the conviction or acquittal of those implicated in ill-treatment does not absolve the respondent State from its responsibility under the Convention to account for any injuries found on a person at the time of his or her release from detention.[610] For example, in the case of *Ribitsch v. Austria*, the Court observed that the police officers allegedly responsible for the ill-treatment had been acquitted because of the high standard of proof required in the domestic legislation. In this connection the Court observed that significant weight had been given by the domestic court to the explanation that the injuries were caused by a fall against a car door. The Court, finding this explanation unconvincing, considered that even if Mr Ribitsch had fallen while he was being moved under escort, this could only have provided a very incomplete, and therefore insufficient, explanation of the injuries he sustained.[611]

The following sub-sections will deal with the evidential issues and the methods employed by the Court in establishing facts.

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609 See, *inter alia*, *Adalı v. Turkey*, no. 38187/97, 31 March 2005, § 213.
610 *Selmouni v. France*, cited above, § 87.
611 *Ribitsch v. Austria*, cited above, § 34.

11.3 Fact-finding Hearings

Before the entry into force of Protocol No. 11, it was the Commission that established the facts of a case and reached a conclusion as to whether those facts revealed a breach of the Convention. While the Court was not bound by the Commission's findings and remained free to make its own assessment of the facts in light of all the material before it, it was only in exceptional circumstances that it exercised such powers in this area.[612] Following the entry into force of Protocol No. 11, however, the Court has assumed this role as the Commission no longer exists.

During its time, the Commission carried out a number of fact-finding hearings in the territory of the respondent Contracting Party in cases where the facts were disputed between the parties. The majority of such hearings were held in Turkey. To carry out these fact-finding hearings, the Commission appointed delegations comprised of Commission and Registry members. The Commission delegates questioned the applicants, eye-witnesses, and expert witnesses, such as doctors. Representatives of the parties were also entitled to cross-examine the applicants and witnesses. Despite a number of difficulties associated with such hearings, including language and cultural differences and the fact that witnesses could not be compelled to attend, these fact-finding hearings enabled the Commission to carry out its task of establishment of facts satisfactorily.

Following the entry into force of Protocol No. 11, the Court has continued to hold fact-finding hearings. However, because of its very heavy case load, it has done so in only a small number of cases. These fact-finding missions are carried out pursuant to Article 38 § 1 (a) of the Convention, which provides:

> "If the Court declares the application admissible,[613] 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".

Furthermore, the Annex to the Rules of Court[614] sets out the procedure to be followed in such hearings and regulates the conduct of those participating in them. According to Rule 1 § 3 of the Annex to the Rules of Court,

> "[a]fter a case has been declared admissible or, exceptionally, before the decision on admissibility, the Chamber may appoint one or more of its

612 *Akdıvar and Others v. Turkey*, cited above, § 78.

613 Following the entry into force of Protocol No. 14, Contracting Parties will have the obligation under this Article to cooperate with the Court not only after admissibility of the application, but at all stages of the proceedings. See Article 14 of Protocol No. 14.

614 The Annex to the Rules of Court entered into force on 7 July 2003.

> 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."

The Court may decide to hold a fact-finding hearing of its own motion, but applicants can also invite the Court to do so. Any such request must be reasoned, and the applicant should explain how a fact-finding hearing would help establish the facts. The applicant should also submit a list of the proposed witnesses together with information about their relevance to the events in question. In the context of Article 3 complaints, such witnesses may include the perpetrators of the ill-treatment, doctors who carried out medical examinations of the applicant, investigating authorities to whose attention the allegations of ill-treatment were brought, and eye-witnesses. As an example of such a request, Appendix No. 13 can be consulted for the applicant's observations in the case of *Kişmir v. Turkey*, in which the applicant invited the Court to hold a fact-finding hearing to question a number of witnesses identified by her in her observations.

If the Court decides to hold a fact-finding hearing, it is imperative for an applicant to be represented by a lawyer who is capable of asking pertinent questions and adequately cross-examining witnesses. It is not uncommon for previously undisclosed documents to be produced during a fact-finding hearing and the representative must be able to study such documents on very short notice and formulate new questions in light of them.

Simultaneous interpretation will be arranged by the Court's Registry, and the costs associated with fact-finding hearings will be borne by the Council of Europe. Following the hearing, the parties will receive the verbatim records of the hearing and will usually be able to submit further observations on the basis of the information obtained in the hearing.

11.4 Admissibility of Evidence

The Court has a very liberal attitude towards the admissibility of evidence; it has adopted a system of free evaluation of evidence[615] whereby no evidence is inadmissible and no witness is incompetent to testify.

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615 *Nachova and Others v. Bulgaria* [GC], cited above, § 147.

The Court made it clear in its judgment in the case of *Ireland v. the United Kingdom* that it is:

> "not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of every kind, including, insofar as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials".[616]

Furthermore:

> "the Court being master of its own procedure and of its own rules … has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it".[617]

This liberal approach of the Court to the admissibility of evidence is unavoidable because in many human rights cases there is an understandable lack of direct evidence. Furthermore, for an international court which in most cases is located far from the location where the incident has occurred, there will be inevitable difficulties in accessing first-hand evidence, and therefore decisions will have to be made largely on the basis of the evidence submitted by the parties. What follows is a review of the Convention institutions' case-law with regard to the types of evidence which have been found to be particularly important in cases concerning complaints of ill-treatment.

11.4.1 Medical Evidence

Where allegations of ill-treatment are contested, medical findings constitute the most objective and convincing type of evidence.[618] In this regard, the applicant should note that the *most* probative kind of medical evidence is evidence that is obtained *immediately upon*, or *very shortly after*, the applicant's ill-treatment and which is consistent with the applicant's allegations. In practical terms, this usually means that medical evidence should be obtained upon the applicant's release from State custody, since ill-treatment most often occurs in the custodial setting. This is in line with the fact that in order to prevail in an Article 3 case, the applicant must establish a direct causal link between his or her injuries and the fact of having been in the control of the State. Therefore, the longer the applicant waits before seeking medical assistance, the more difficult it is going to be for him or her to prove that the

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616 *Ireland v. the United Kingdom*, cited above, § 209.

617 *Ibid.,* § 210.

618 See D. R. Jones and S. V. Smith, "Medical Evidence in Asylum and Human Rights Appeals," in *International Journal of Refugee Law*, (2004) Vol. 16 No. 3, pp. 381-410 and the references cited therein.

injuries were sustained during, or were connected with, his or her custody. If the applicant succeeds in establishing that his or her injuries occurred while in the custody of the State, then the burden of proof shifts to the respondent State to disprove the allegations, or to prove that the use of force which caused the injuries was warranted and proportionate under the circumstances. Moreover, for purposes of showing exhaustion of domestic remedies, it is equally important that the applicant has shared such evidence with the relevant domestic authorities in the context of a complaint as soon as possible after the occurrence of the ill-treatment. These issues are discussed further below in the context of the Court's case-law.

As mentioned above, by far the strongest medical evidence is a medical report drawn up immediately after the period of detention during which the person was ill-treated. However, in some cases the applicant might not have been medically examined at the time of release. Furthermore, there may be problems associated with medical reports drawn up while the person is still in the custody of the State. For example, the applicant's medical examination might have been carried out in the presence of police officers, in which case the applicant may conceivably have been too frightened to inform the doctor of the extent or cause of his or her injuries. The medical examinations and reports drawn up in the course of those examinations themselves may sometimes be very short and therefore not capable of proving or disproving the applicant's allegations of ill-treatment.[619] For example, in the case of *Elçi and Others v. Turkey* the Court observed that "[t]he collective medical examination of the applicants prior to being brought before the Public Prosecutor can only be described as superficial and cursory… The Court does not therefore attach great weight to it".[620]

In this context, it may be useful to consult the CPT Standards on Police Custody, the relevant parts of which provide as follows:

> "As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer".[621]

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619 See Camille Giffard, *The Torture Reporting Handbook: How to document and respond to allegations of torture within the international system for the protection of human rights*, published by the Human Rights Centre of the University of Essex, United Kingdom, 2000. An online version of the Handbook may be consulted at http://www2.essex.ac.uk/human_rights_centre/publications/index.shtm.

620 *Elçi and Others v. Turkey*, cited above, § 642.

621 CPT Standards may be consulted at http://www.cpt.coe.int/en/documents/eng-standards.doc

When examining allegations of ill-treatment, the Court takes these standards into account. For example, in the case of *Akkoç v. Turkey* the applicant alleged that she had been subjected to ill-treatment in police custody which included being doused with hot and cold water and subjected to electric shocks and blows to the face. Upon release she was brought together with sixteen other detainees before a doctor who stated in a "medical report" that they had not suffered any physical blows. A few days after her release, she was medically examined at a university where x-rays of her head were taken showing that her chin had been broken. The Commission, after holding a fact-finding hearing in Turkey and hearing a number of persons who had witnessed the applicant's state of health following her release from police custody, concluded that she had indeed been subjected to the treatment described in her application form. This conclusion was subsequently upheld by the Court, which found a violation of Article 3. In its judgment the Court stated the following:

> "The Court further endorses the comments expressed by the Commission concerning the importance of independent and thorough examinations of persons on release from detention. The European Committee for the Prevention of Torture (CPT) has also emphasised that proper medical examinations are an essential safeguard against ill-treatment of persons in custody. Such examinations must be carried out by a properly qualified doctor, without any police officer being present and the report of the examination must include not only the detail of any injuries found, but the explanations given by the patient as to how they occurred and the opinion of the doctor as to whether the injuries are consistent with those explanations. The practices of cursory and collective examinations illustrated by the present case undermines [*sic*] the effectiveness and reliability of this safeguard".[622]

The lack of medical evidence in an ill-treatment case will not necessarily mean that the applicant will be unable to prove his or her allegations of ill-treatment. As the Commission stated in *Çakıcı v. Turkey*, in cases of unacknowledged detention and disappearance, independent, objective medical evidence or eyewitness testimony is unlikely to be forthcoming and to require either as a prerequisite of a finding of a violation of Article 3 would undermine the protection afforded by that provision.[623] Similarly, in the case of *Tekin v. Turkey* the Court observed that:

> "[i]t is true that, as the Government have pointed out, the applicant was unable to provide any independent evidence, for example medical reports, to substantiate his allegations of ill-treatment. However, in this respect the Court notes that the State authorities took no steps to ensure that Mr Tekin was seen by a doctor during his time in detention or upon his release,

622 *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10 October 2000, § 118.
623 *Çakıcı v. Turkey*, no. 23657/94, Commission Report of 12 March 1998.

> despite the fact that he had complained of ill-treatment to the public prosecutor … who was under a duty under Turkish law to investigate this complaint".[624]

In both cases the Court found the applicants' allegations of ill-treatment to be substantiated but it based its decision on evidence obtained by the Commission which had held fact-finding missions in Turkey during which members of the Commission questioned the applicants and a number of eyewitnesses.[625] The lack of medical evidence obtained immediately after the period of detention may therefore be compensated by obtaining evidence *in situ*. However, and as pointed out earlier, the Court holds fact-finding hearings in only a small number of cases and for this reason applicants should consider obtaining independent medical reports as soon as possible after their release from custody.

The probative value of independent medical reports is increased if those reports have been brought to the attention of the national authorities. Bringing the evidence to the attention of the national authorities is also critically important for the requirement of exhaustion of domestic remedies. For example, in the case of *Dizman v. Turkey*, the applicant had been taken away from a café by plain-clothes police officers who ill-treated him in a deserted field. He was then released and taken to a hospital by his relatives the same day. The medical examination and x-rays taken in the course of that examination revealed that his jaw had been broken and required surgery. The following day the applicant submitted the x-rays to the attention of the prosecutor and made an official complaint about the ill-treatment. In response, the prosecutor sent the applicant to the Forensic Medicine Directorate where he obtained another medical report, confirming that his jaw had been broken. The police officers were subsequently tried but acquitted for lack of sufficient evidence, in particular, due to the fact that the medical report in question had been obtained two days after the alleged event. The Strasbourg Court accepted the accuracy of the applicant's allegations of ill-treatment and noted that neither the respondent Government nor any other domestic authority had contacted the hospital where the applicant claimed to have been examined and where x-rays were taken immediately after his release in order to verify the accuracy of the applicant's statement.[626]

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624 *Tekin v. Turkey*, no. 22496/93, 9 June 1998, § 41.

625 For a review of the issue of the role of medical evidence in international human rights tribunals, see Camille Giffard and Nigel Rodley, "The Approach of International Tribunals to Medical Evidence in Cases Involving Allegations of Torture" in Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, Greenwich Medical Media Limited, 2002, pp. 19-43.

626 *Dizman v. Turkey*, cited above, §§ 75-76.

Similarly, in the case of *Balogh v. Hungary*, the applicant alleged that he had been beaten in the course of his interrogation by police. However, the applicant did not obtain a medical examination until two days after his release. He claimed that:

> "he had had no experience with the police or with any other authorities before the incident. He was not therefore aware of the importance of contacting officials at once about his injuries. Although his injuries required immediate medical attention, he felt humiliated and ashamed because of the incident. Being unfamiliar with the towns which he subsequently passed through on his way home, he did not seek medical help until he returned to his home town. However, he was in constant pain throughout this period on account of the severity of his injuries".[627]

The respondent Government submitted, for its part, that "[d]ue to the applicant's belatedness in seeking medical help … the medical expert … could not determine with certainty whether the applicant's injuries had been inflicted before, during or after his interrogation".[628] The Court rejected the Government's submissions and held that:

> "… the applicant, having been interrogated in police custody on 9 August 1995, was said by his four companions to have left the police station with a red and swollen face. All these witnesses deposed, in consistent terms, that he must have been beaten … It is true that the applicant did not seek medical help in the evening of the alleged incident or on the next day, but waited until 11 August 1995 before doing so. However, in view of the fact that the applicant immediately sought medical assistance on his arrival in his home town, the Court is reluctant to attribute any decisive importance to this delay, which, in any event, cannot be considered so significant as to undermine his case under Article 3".[629]

This case illustrates that independent medical reports that are corroborated by witness statements will have an even higher evidential value than medical reports standing on their own.

Moreover, before relying on a medical report obtained some time after the release, the Court will take into account the degree of consistency of the applicant's allegations and will expect the applicant to describe with a certain amount of precision the causal link between the medical report and the ill-treatment. This is illustrated in the case of *Gurepka v. Ukraine* in which the applicant submitted to the Court a medical report, drawn up six days after his release from detention, showing that the conditions of detention had had a negative effect on his health. The Court rejected the allegation as being manifestly ill-founded, holding in relevant part:

627 *Balogh v. Hungary*, cited above, § 37.
628 *Ibid.*, § 40.
629 *Ibid.*, §§ 48-49.

> "[i]n so far as the applicant complains of his detention in a cold cell and his ensuing health problems allegedly caused by it, the Court finds that the applicant has failed to demonstrate that the impugned treatment, formulated by the applicant in very general terms, attained the minimum level of severity proscribed by Article 3 of the Convention, particularly in the absence of any medical or other evidence … The sick leave certificate presented by the applicant as to his illness from 7 December 1998, that is 6 days after his release, does not constitute sufficient proof of a causal link with the alleged ill-treatment".[630]

Where possible, medical evidence obtained from institutions specialising in identifying and treating ill-treatment should also be submitted to the Court in support of allegations of ill-treatment.[631]

However, and as pointed out above, the Court requires that such evidence is first brought to the attention of the national authorities to give them the opportunity to investigate allegations of ill-treatment. Failure to do so may result in the complaint being declared inadmissible for non-exhaustion of domestic remedies. This is illustrated in the case of *Saraç v. Turkey* in which the applicant argued that she had been taken into police custody where she was hung from her arms and hit repeatedly on the head with truncheons until she lost consciousness. While unconscious, her feet were burnt by cigarettes. Following this, she was raped with a truncheon on two occasions. She was then taken by car to an isolated place and abandoned. Thirteen days after the event in question the applicant went to the Human Rights Foundation of Turkey and sought medical assistance. Following medical examinations carried out over a period of three days in two different hospitals and the Nuclear Medical Centre in Istanbul, including gynaecological and neurological tests, x-rays, thorax graphics, scintigraphic imaging, and examinations by an ear, nose and throat consultant as well as a psychiatrist, the doctors concluded in a medical report that the applicant's allegations of ill-treatment, such as post-traumatic stress, depression, marks on her feet caused by cigarette burns, and a pelvic complaint were compatible with the medical findings. The Strasbourg Court, observing that neither this report nor any relevant evidence in support of the allegations of ill-treatment had ever been conveyed to the public prosecutor, concluded that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.[632]

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630 *Gurepka v. Ukraine*, no. 61406/00, 6 September 2005, § 35.

631 For a review of the medical techniques in documenting ill-treatment, see Michael Peel and Vincent Iacopino (eds.), *The Medical Documentation of Torture*, Greenwich Medical Media Limited, 2002. See also Appendix No. 8 for "Diagnostic Tests", published in the Istanbul Protocol, for a review of advanced medical techniques used in the diagnoses of ill-treatment.

632 *Saraç v. Turkey* (dec.), no. 35841/97, 2 September 2004.

11.4.2 Witnesses

According to Rule 1 of the Annex to the Rules of Court:

> "…[t]he 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".

Other than hearing witnesses directly, the Court also accepts statements taken from any eye-witnesses or other persons whose testimonies may help it establish the facts of cases. Naturally, statements taken from such witnesses by domestic authorities will have a higher evidential value. For example, in the case of *Akdeniz v. Turkey*, the Court accepted the applicant's allegation that her son had been detained and ill-treated by soldiers solely on the basis of statements taken by the investigating prosecutor from a number of eye-witnesses to the events. In fact, the prosecutor himself had concluded, on the basis of the same eye-witness evidence, that the applicant's allegations were true but had failed to prosecute those responsible.[633]

The Court also takes into account eye-witness statements taken by an applicant him or herself or by his or her lawyer or an NGO. However, such statements need to be corroborated by other evidence. Furthermore, as both parties to a case will be given the opportunity to comment on any documents submitted in Convention proceedings, the Court may attach greater evidential value to an unauthenticated document if its accuracy and veracity is not contested by the parties. For instance, in the case of *Koku v. Turkey* the applicant submitted to the Court a chronology of events in which attacks against, and killings of, members of a pro-Kurdish political party were detailed. He argued that his brother, who had been a member of that party, was kidnapped and his disappearance was not investigated by the authorities. The body of his brother was found some months after the kidnapping. The Court, noting that the respondent Government had not contested the accuracy of the document submitted by the applicant, and noting further that the alleged kidnapping and disappearance happened at a time when dozens of other politicians of the same political party were being kidnapped, injured, and killed, accepted that the authorities had failed to protect the right to life of the applicant's brother and found a violation of Article 2 of the Convention.[634]

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633 *Akdeniz v. Turkey*, cited above, §§ 81-82.
634 *Koku v. Turkey*, cited above, § 131.

11.4.3 Other Evidence

In cases concerning allegations of ill-treatment, the Court has examined a wide variety of evidence submitted to it by the parties or obtained by the Court itself. Such evidence has included, *inter alia*, custody records showing that a particular person had or had not been detained at a particular detention facility, photographs of the applicant's body,[635] video footage of the prison cell in which the applicant was allegedly detained,[636] plans of the detention facility where the applicant was detained and raped and which she described in her application form,[637] a piece of cloth used to blindfold the applicant in police custody while he was being ill-treated,[638] autopsy reports showing that the person had been subjected to ill-treatment prior to his killing,[639] and photographs showing that a body had been mutilated.[640] It must be stressed that such objects, individually, do not constitute conclusive evidence and in most cases they will be regarded as circumstantial evidence. However, sufficient circumstantial evidence may persuade the Court, in the absence of any direct evidence – which can be very difficult to obtain in human rights cases – to find an applicant's allegations established.

11.4.4 Reports Compiled by International Organisations

Reports compiled by governmental and non-governmental organisations are regularly relied on as evidence by the Court. For example, in examining allegations relating to prison conditions, the Court frequently relies on the reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) based on that organisation's visits to prisons in the territory of the respondent Contracting Party.[641]

Furthermore, reports prepared by such organisations enable the Court to take into account the general human rights situation in a Contracting Party when examining allegations of ill-treatment against that Party. For example, in its judgment in the case of *Elçi and Others v. Turkey* the Court relied on the CPT's reports on Turkey when examining the testimony of the Government's witnesses during the fact-finding hearing. The Court observed that:

> "In its second public statement, issued on 6 December 1996, the CPT

635 *Mathew v. the Netherlands*, cited above, §§ 158-165.
636 *Ostrovar v. Moldova*, cited above, § 72.
637 *Aydın v. Turkey*, cited above, § 39.
638 *Tekin v. Turkey*, no. 22496/93, Commission Report of 17 April 1997, § 190.
639 *Süheyla Aydın v. Turkey*, cited above, § 188.
640 *Akkum and Others v., Turkey*, cited above, §§ 51-52.
641 See, *inter alia*, *Van der Ven v. the Netherlands*, cited above, §§ 32-33. For further details on the mandate and working methods of the CPT, see Appendix No. 11.

> noted that some progress had been made over the intervening four years. However, its findings after its visit in 1994 demonstrated that torture and other forms of ill-treatment were still important characteristics of police custody. In the course of visits in 1996, CPT delegations once again found clear evidence of the practice of torture and other forms of severe ill-treatment by the police. It referred to its most recent visit in September 1996 to police establishments. It noted the cases of seven persons who had been very recently detained at the headquarters of the anti-terrorism branch of the Istanbul Security Directorate and which ranked among the most flagrant examples of torture encountered by CPT delegations in Turkey. It concluded that resort to torture and other forms of severe ill-treatment remained a common occurrence in police establishments in Turkey".[642]

In reference to this information, the Court stated that the Government witnesses before the Commission Delegates had "constantly denied the applicants' allegations, but in such a strident manner as to cast doubt on their testimony in the light of the accepted background knowledge for the period".[643] Similarly, in its judgment in the case of *Khashiyev and Akayeva v. Russia* the Court, in concluding that the applicants' version of the events was accurate, consulted reports prepared by human rights groups and documents prepared by international organisations which supported their version of events.[644]

Furthermore, in expulsion and extradition cases the Court may consult the Guidelines, Position Papers, and Country Reports published by the United Nations High Commissioner for Refugees (UNHCR).[645] The Court also has regard to information and reports compiled by non-governmental organisations. For example, in the case of *Kalantari v. Germany* the Court examined evidence submitted to it by the World Organisation Against Torture (OMCT) showing that the applicant would be at risk of persecution if expelled to Iran.[646] In *Said v. the Netherlands*, the Court concluded that the expulsion of the applicant to Eritrea would expose him to a real risk of being subjected to treatment contrary to Article 3 relying in part on material compiled by Amnesty International showing the existence of such a risk.[647]

Applicants are therefore advised to append any such reports or information to their application or to their observations. Applicants should avoid submitting such information separately, and in order to avoid the risk of rejection by the Court, all supporting evidence should be submitted within the applicable time limits for submission of written pleadings (see Rule 38 § 1).

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642 *Elçi and Others v. Turkey*, cited above, § 599.
643 *Ibid.*, § 643.
644 *Khashiyev and Akayeva v. Russia*, cited above, § 144.
645 See, *inter alia*, *N. v. Finland*, cited above, §§ 119-121.
646 *Kalantari v. Germany*, no. 51342/99, 11 October 2001, §§ 35-36.
647 *Said v. the Netherlands*, cited above, §§ 31-35.

11.5 Burden of Proof

As pointed out above, Convention proceedings do not always lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation).[648] In this connection, reference may be made to the Court's judgment in *Ireland v. the United Kingdom*:

> "[i]n order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*".[649]

Nevertheless, according to the Court's established case-law, an applicant bears the initial burden of producing evidence in support of his or her complaints at the time the application is introduced. Once the applicant satisfies this burden and the Court decides that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3,[650] the burden may shift to the Government to disprove the applicant's allegations. The Court's case-law provides for such a shift in two circumstances. They are examined below.

11.5.1 Obligation to Account for Injuries Caused During Custody

The difficulties associated with proving ill-treatment have perhaps best been described by Judge Bonello in his dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey*, in which he stated the following:

> "[e]xpecting those who claim to be victims of torture to prove their allegations 'beyond reasonable doubt' places on them a burden that is as impossible to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim's complaint is almost invariably confronted with the negation 'corroborated' by many".[651]

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648 See Section 2.6.2.above.

649 *Ireland v. the United Kingdom*, cited above, § 160.

650 See Section 2.6 above.

651 *Sevtap Veznedaroğlu v. Turkey,* cited above. As regards the issue of standard of proof beyond reasonable doubt, see Section 11.6 below.

Indeed, in most cases of ill-treatment, the only evidence the victim will be able to produce is his or her own testimony. However, the Court is aware of this difficulty and has created its own unique set of rules to mitigate it. Thus, according to the Court's established case-law, if the victim of ill-treatment is able to show that he or she suffered injuries while in the custody of the State, the Court will shift the burden onto the Government to explain those injuries.

Ribitsch v. Austria was the first case in which the burden was expressly shifted onto the respondent Government to explain injuries caused during police custody.[652] In this case, it was not disputed that the applicant had suffered injuries in custody. However, the respondent Government submitted that because of the required high standard of proof in the proceedings before the national courts, it had not been possible to establish that the policemen had been responsible for the applicant's injuries. The Government also argued that in order for a violation of the Convention to be found, it was necessary for the ill-treatment to be proved beyond reasonable doubt. The Commission rejected the Government's argument and found that where a person sustains injuries in police custody, it is for the Government to produce evidence establishing facts which cast doubt on the allegations of the victim, particularly if the victim's account is supported by medical certificates. In this case, the explanations put forward by the Government were not sufficient to cast a reasonable doubt on the applicant's allegations concerning ill-treatment.[653] The Commission's approach was adopted by the Court, which found in its subsequent judgment that Article 3 had been violated.[654]

This approach was followed by the Court in its judgment in the case of *Selmouni v. France*; the Court stated that

> "… where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention".[655]

In its judgment in the case of *Salman v. Turkey*, the Court added that "[t]he obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies".[656]

Three aspects of the Court's finding in *Selmouni* require further exploration. They are: 1) the question of *when* the obligation to account for a detainee's

652 For a review of the issue of burden of proof in Convention proceedings, see U. Erdal, "Burden and Standard of Proof in Proceedings under the European Convention" (2001) *26 EL Rev. Human Rights Survey*, 81 et seq., (hereinafter referred to as "Erdal").

653 *Ribitsch v. Austria*, cited above, § 31.

654 Ibid., § 40.

655 *Selmouni v. France*, cited above, § 87.

656 *Salman v. Turkey*, cited above, § 99.

fate starts, 2) the *duration* of the period during which the obligation is in force, and 3) the meaning of the term "plausible explanation".

As regards the first question, it must be stressed that the term "police custody" in *Selmouni*, or "custody" in *Salman*, does not necessarily imply that the person has been placed in a detention facility.[657] In its judgment in the case of *Yasin Ateş v. Turkey*, which concerned the killing of the applicant's son during a military operation following his arrest, the Court held that a lack of evidence in support of the applicant's allegation that his son had been killed by agents of the State did not:

> "mean that the respondent Government are absolved from their responsibility to account for Kadri Ateş's death, which occurred while he was under arrest. In this connection the Court reiterates that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them".[658]

Referring to its earlier case-law, the Court went on to hold:

> "… States are under an obligation to account for the injuries or deaths which occurred, not only in custody, but also in areas within the exclusive control of the authorities of the State because, in both situations, the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, 24 March 2005)".[659]

It follows, therefore, that a Contracting Party's obligation will begin as soon as its agents detain a person, regardless of whether that person is subsequently placed in a detention facility.

As regards the second aspect – the duration of the obligation to account for a detainee's fate – the Contracting Parties' obligation to protect a detained person continues until that person is released. It appears from the Court's case-law that it is incumbent on the Contracting Party to show that the person is released. This issue is well illustrated by the judgment in the case of *Süheyla Aydın v. Turkey*, in which the applicant's husband was arrested and detained at a police station. He was then brought before a judge at the court house who ordered his release on 4 April 1994. However, he never emerged from that court house and on 9 April 1994 his body was found in a field some 40 kilometres away. The Government argued that the applicant's husband had been released on 4 April 1994 and responsibility for his subsequent death could not be attributed to agents of the State. The Commission held a fact-finding

657 See, *mutatis mutandis*, *H.L. v. the United Kingdom*, no. 45508/99, 5 October 2004, § 91.
658 *Yasin Ateş v. Turkey,* no. 30949/96, 31 May 2005, § 93.
659 *Ibid.*, § 94.

hearing in Turkey to hear a number of witnesses, but the respondent Government failed to identify and summon police officers who had accompanied the applicant's husband to the court house on 4 April 1994. Furthermore, the Government failed to produce any documents to prove that the applicant's husband had indeed been released. The Court concluded in its judgment of 24 May 2005 that:

> "[i]n the light of the above-mentioned failure of the Government to identify and summon the police officers who accompanied Necati Aydın to the Diyarbakır Court on 4 April 1994, coupled with the absence of a release document, the Court concludes that the Government have failed to discharge their burden of proving that Necati Aydın was indeed released from the Diyarbakır Court building on 4 April 1994. The Court finds it established that Necati Aydın remained in the custody of the State. It follows that the Government's obligation is engaged to explain how Necati Aydın was killed while still in the hands of State agents. Given that no such explanation has been put forward by the Government, the Court concludes that the Government have failed to account for the killing of Necati Aydın".[660]

In this judgment the Court also referred to Article 11 of the Declaration on the Protection of all Persons from Enforced Disappearance (United Nations General Assembly resolution 47/133 of 18 December 1992). This Article provides that

> "[a]ll persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured".[661]

Finally, as regards the third aspect, i.e. the nature of the "plausible explanation" for the injuries caused during custody, the Commission has held that in cases where injuries occurred in the course of police custody, it is "not sufficient for the Government to point at other possible causes of injuries, but it is incumbent on the Government to produce evidence showing facts which cast doubt on the account given by the victim and supported by medical evidence".[662] Similarly, in the above mentioned case of *Ribitsch v. Austria* the respondent Government's explanations "were not sufficient to cast a reasonable doubt on the applicant's allegations concerning ill-treatment he had allegedly undergone while in police custody".[663]

In establishing whether a respondent Government has accounted for injuries caused in custody, the Court refers to investigations – in particular forensic

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660 *Süheyla Aydın v. Turkey*, cited above, § 154.
661 *Ibid.*, § 153.
662 See *Klaas v. Germany*, cited above, § 103.
663 *Ribitsch v. Austria*, cited above, § 31.

and medical examinations – carried out at the national level. For example, in the case of *Salman v. Turkey*, in which the detained person died in police custody, the Court observed that no plausible explanation had been provided by the respondent Government:

> "for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government's contention that the injuries might have been caused during the arrest, or that the broken sternum was caused by cardiac massage".[664]

In reaching that conclusion, the Court noted a number of medical reports prepared by international forensic experts on the basis of the post-mortem reports prepared following the death of the detained person. Thus, it concluded that the opinion expressed in the post-mortem report which found that the bruising of the chest pre-dated the arrest and that the detained person died of a heart attack brought on by the stress of his detention alone and after a prolonged period of breathlessness, "was rebutted by the evidence of Professors Pounder and Cordner".[665]

In the case of *Kişmir v. Turkey*, the respondent Government submitted, as a possible explanation for the death of the applicant's son in police custody, that the death could have been due to a childhood illness. However, the Court observed that the Government had failed to put forward any evidence in support of that submission. There was no indication in the documents submitted by the Government that the deceased person had any previous health problems.[666] The Court further observed that the Government had not specifically dealt in its observations with the cause of the oedema in the lungs, which was the cause of death according to post mortem examinations. The Court agreed with the shortcomings in the post mortem examination identified by an international forensic expert who had been commissioned by the applicant and who had drawn up his report on the basis of the post mortem reports prepared following the death.[667]

In *Akkum and Others v. Turkey*, the Court, examining whether the Government had explained the killings of the applicant's two relatives, assessed the oral evidence taken by the Commission's delegates and also took particular note of the investigation carried out at the domestic level.

664 *Salman v. Turkey*, cited above, § 102.
665 *Ibid.*
666 *Kişmir v. Turkey*, cited above, §§ 91-98. See also Appendix No. 13 for the applicant's observations.
667 *Ibid.*, § 85.

Having established that no meaningful investigation had been conducted at the domestic level capable, firstly, of establishing the true facts surrounding the killings and the mutilation of one of the bodies, and secondly, of leading to the identification and punishment of those responsible, the Court concluded that the Government had failed to account for the killings and for the mutilation in violation of Articles 2 and 3 of the Convention.[668]

It also appears from the Court's case-law that when a respondent Government fails to conduct a medical examination before placing a person in detention, it will to some extent have forfeited the argument that the injuries present at the time of release pre-dated the period of detention. Thus, in its judgment in the case of *Abdülsamet Yaman v. Turkey* the Court observed that the applicant had not been medically examined at the beginning of his detention and had not had access to a doctor of his choice while in police custody. Following his transfer from police custody, he had undergone two medical examinations which resulted in a medical report and the inclusion of a medical note in the prison patients' examination book. Both the report and the note referred to scabs, bruises, and lesions on various parts of the applicant's body.[669] Those injuries, in the absence of a plausible explanation from the respondent Government, were sufficient for the Court to conclude that they were the result of ill-treatment for which the Government bore responsibility in violation of Article 3 of the Convention.[670]

In conclusion, based on the case-law examined above, the Court expects a respondent Government to provide a satisfactory and convincing explanation for injuries and deaths caused in custody. It is not sufficient for a respondent Government to point to other potential causes without providing adequate evidence in support of its submissions. Any medical evidence submitted by a respondent Government will be scrutinised by the Court before it can be accepted as proof of the cause of injury or death in custody. It is also open to applicants to submit to the Court medical reports to rebut those put forward by the respondent Government. Furthermore, the Court itself can ask a forensic expert to comment on any medical evidence submitted by the parties. The Commission did just this in the *Salman v. Turkey* case mentioned above when it requested an expert opinion on the medical issues in the case "from Professor Cordner, Professor of Forensic Medicine at Monash University, Victoria (Australia) and Director of the Victorian Institute of Forensic Medicine".[671]

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668 *Akkum and Others v. Turkey*, cited above, §§ 212-232.
669 *Abdülsamet Yaman v. Turkey*, cited above, § 45.
670 *Ibid.*, §§ 46-48.
671 See *Salman v. Turkey*, cited above, § 6.

11.5.2 Obligation to Assist the Court in Establishing Facts

As pointed out above, pursuant to Article 38 § 1 of the Convention, respondent Governments have an obligation to cooperate with the Court in the establishment of facts. Furthermore, according to Rule 44A of the Rules of Court, the parties to a case before the Court[672] have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice.

The Court has encountered difficulties in establishing the facts in a number of cases in which respondent Governments have failed to cooperate either by withholding documents or other evidence requested by the Court, or by failing to submit all the relevant documents in their possession. In this connection, the Court has stated that:

> "it is of the utmost importance for the effective operation of the system of individual petition, instituted under Article 34 of the Convention, that States should furnish all necessary facilities to make possible a proper and effective examination of applications".[673]

The Court acknowledged in its judgment in the case of *Timurtaş v. Turkey* that where an individual applicant accuses State agents of violating his or her rights under the Convention, it is in certain instances solely the respondent Government that has access to information capable of corroborating or refuting these allegations. The failure of a respondent Government to submit such information in its possession – or to submit it timely – without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention.[674] The case of *Timurtaş* concerned the disappearance of the applicant's son after the latter had allegedly been taken into unacknowledged custody by soldiers. The respondent Government denied that the applicant's son had been detained. The applicant submitted to the Commission a photocopy of a document which he argued was a post-operation military report. The report detailed the arrest and detention of his son by the soldiers who took part in the operation. When requested by the Commission to submit the original of the document, the respondent Government argued that a document with the same reference number did indeed exist but that they could not submit it to the Commission as it con-

672 Indeed, the duty to cooperate with the Court is extended in Rule 44A to Contracting Parties which are not even parties to the case at hand.

673 *Tanrıkulu v. Turkey* [GC], no. 23763/94, 8 July 1999, § 70.

674 *Timurtaş v. Turkey*, cited above, § 66.

tained military secrets. In the Government's opinion, the photocopy of the original document had been manipulated by the applicant to insert the name of his son. The Court stated in its judgment that the Government was in a pre-eminent position to assist the Commission by providing access to the document which it claimed was the genuine one; it was insufficient for the Government to rely on the allegedly secret nature of the document. In light of the respondent Government's failure to submit the original document, the Court drew an inference as to the well-foundedness of the applicant's allegations and accepted that the photocopied document was indeed a photocopy of the authentic post-operation report. Consequently, the Court found it established that the applicant's son had indeed been detained by the soldiers and had died in their custody.[675]

The approach adopted by the Court in the case of *Timurtaş* has become established practice, and the Court continues to draw inferences from the failures of respondent Governments to submit documents and other evidence as to the well-foundedness of applicants' allegations. Furthermore, on 13 December 2004 a new Rule was added to the Rules of Court in light of the approach adopted by the Court in *Timurtaş*.[676] According to this Rule:

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

It was not until the adoption of the judgment in the case of *Akkum and Others v. Turkey* on 31 May 2005 that a respondent Government's failure to cooperate with the Court by withholding relevant documents led the Court to shift the burden to that Government to disprove an applicant's allegations. This case, in so far as relevant, concerned the killing of two of the applicants' relatives in an area where a military operation had taken place, as well as the mutilation of the ears of one of those relatives. When the documents submitted by the parties proved insufficient to establish the facts of the case, the Commission held a fact-finding mission in Turkey and heard, *inter alia*, a number of military personnel who had taken part in the operation. Their testimonies made it clear that there existed another military report which was potentially capable of shedding light on the events in question but which the Government had not made available to the Commission. The Commission requested that the Government submit the report, but the Government failed to respond. The applicants, for their part, argued that in the circumstances of the case, the Government was required to provide a plausible explanation of

675 *Ibid.*, § 86.
676 Rule 44C of the Rules of Court.

how their relatives had been killed. In support of their arguments, they referred to the judgment of the Inter-American Court of Human Rights in the case of *Godinez Cruz v. Honduras*, in which that court held the following:

> "in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation" (judgment of 20 January 1989, Inter-Am. Ct. H. R. Ser. C No. 5, § 141).

Moreover, the Human Rights Committee has also adopted a similar approach. The applicants referred to *Barbato v. Uruguay* (Human Rights Committee Communication No. 84, 1981, § 9.6), in which it had been considered that:

> "with regard to the burden of proof, the Committee has already established in other cases that the said burden cannot rest alone on the complainant, especially considering that the author and the State Party do not always have equal access to the evidence and that frequently the State Party has access to the relevant information".

The Court accepted the applicants' arguments and held that it was inappropriate to conclude that they had failed to submit sufficient evidence in support of their allegations, given that such evidence was in the hands of the respondent Government. The Court considered it legitimate to draw a parallel between the situation of detainees, for whose well-being the State is responsible,[677] and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State. According to the Court, that parallel was based on:

> "the salient fact that in both situations the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities. It 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".[678]

Observing that the Government had failed to make any argument from which it could be deduced that the documents withheld by them contained no information bearing on the applicants' claims, the Court went on to examine the investigation carried out at the national level in order to establish whether the respondent Government had discharged its burden. Having established that the domestic investigation was defective in many ways, the Court found that

677 See Section 11.5.1 above.

678 *Akkum and Others v. Turkey*, cited above, § 211.

the Government had failed to account for the killings and also for the mutilation of one of the bodies, in violation of Articles 2 and 3 of the Convention.

Similarly, in the case of *Çelikbilek v. Turkey*, the Court, referring to the *Akkum and Others* judgment, shifted the burden to the Government to prove that the documents it withheld could not serve to corroborate the applicant's allegations. In this case the applicant alleged that his brother had been taken into police custody and killed there. Despite the Commission's, and subsequently the Court's, numerous requests that the Government submit copies of the custody records to enable them to verify whether the applicant's brother had indeed been taken into custody, the Government failed to submit those records. The Court held:

> "in cases such as the present – where it is the non-disclosure by the Government of crucial documents in their possession which puts obstacles in the way of the Court's establishment of facts –, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegation made by the applicant".[679]

Noting that the Government had not presented any such arguments, the Court found that the applicant's brother had indeed been arrested and detained by agents of the State as alleged by the applicant. Noting further that no explanation had been put forward by the Government to explain the killing, the Court concluded that the Government had failed to account for the killing in violation of Article 2 of the Convention.[680]

The judgments in the cases of *Akkum and Others v. Turkey* and *Çelikbilek v. Turkey*, mentioned above, brought the Court's case-law in the area of burden of proof in line with the case-law of the Inter-American Court of Human Rights as well as that of the Human Rights Committee. In this connection, it must be pointed out that according to the Rules of Procedure of the Inter-American Commission on Human Rights:

> "[t]he 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".[681]

It remains to be seen whether the Rules of Court in Strasbourg will be modified in the light of the Court's new approach to the burden of proof.

679 *Çelikbilek v. Turkey*, no. 27693/95, 31 May 2005, § 70.
680 *Ibid.*, §§ 71-72.
681 Article 39 of the Rules of Procedure of the Inter-American Commission on Human Rights.

11.5.3 Concluding Remarks

There is an understandable difficulty in obtaining evidence in ill-treatment cases. Because of the nature of ill-treatment, perpetrators are usually the only persons to witness it and they are therefore in a position to cover up their criminal actions. Such a cover-up will make it very difficult to establish the accuracy of allegations even if the authorities do have the will to investigate them. In certain circumstances, perhaps less frequent, perpetrators will not be deterred from ill-treating people publicly and will not even make attempts to cover up their actions because of the tolerance displayed by the authorities towards such actions. In such cases the authorities will not secure the evidence implicating State agents in the ill-treatment. Whatever the reasons, the fact remains that in most instances the victim will have difficulties supporting his or her case with "hard" evidence. It is in light of this fact that the Court's unique rules of evidence pertaining to the burden of proof must be examined. Burden-shifting compensates for the superior situation of a respondent Contracting Party *vis-à-vis* an individual and maximises the opportunity for the Court to establish the truth.

Needless to say, a respondent Government will not bear the burden of disproving each allegation of ill-treatment made against it. As pointed out elsewhere, the Court will have weeded out the frivolous allegations in its examination of the admissibility of an application. The rules discussed above relating to the burden of proof are employed by the Court only after it has decided that the allegations are not manifestly ill-founded. Furthermore, the Court will also require the applicant to be consistent in his or her allegations throughout the proceedings. For example, in the *Akkum and Others v. Turkey* and *Çelikbilek v. Turkey*, discussed above, the applicants were consistent in their allegations throughout the proceedings before the Convention institutions and did everything within their power to substantiate those allegations. These two cases can be contrasted with the case of *Toğcu v. Turkey*, which concerned the disappearance of the applicant's son after the latter had allegedly been detained by police officers. In his application form and later observations the applicant presented seriously contradictory versions of events leading up to his son's alleged detention by the police. The Government, for its part, failed to submit to the Court a number of important documents including custody records. The Court stated that it was faced with a situation in which it was unable to establish what had taken place and that this inability had emanated from, on the one hand, the contradictory information submitted by the applicant, and, on the other hand, the incomplete investigation file submitted by the Government. While noting the difficulties for an applicant to obtain the necessary evidence from the hands of the respondent Government, the Court concluded that to shift the burden of proof onto a

respondent Government under circumstances similar to those in the case of *Akkum and Others* required by implication that the applicant have already made out a *prima facie* case. In light of the contradictory versions of events put forward by the applicant, the Court concluded that he failed to make out his case to the extent necessary for the burden to shift to the Government to explain that the documents withheld by them contained no relevant information concerning his son's disappearance.[682]

11.6 Standard of Proof

The Commission held in the *Greek Case* that the standard of proof it adopted when evaluating the material it had obtained was "proof beyond reasonable doubt".[683] This standard was also adopted by the Court in its judgment in the inter-State case of *Ireland v. the United Kingdom*, in which it stated the following:

> "…to 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. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account".[684]

"Reasonable doubt" was explained by the Commission in the *Greek Case* in the following terms:

> "A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be drawn from the facts presented".[685]

The high standard adopted by the Court has been the focus of intense criticism from a substantial number of the Court's own judges over the years. For example, eight of the seventeen judges of the Grand Chamber in the case of *Labita v. Italy* stated, *inter alia*, the following in their dissenting opinion:

> "The majority of the Court considered that the applicant has not proved 'beyond all reasonable doubt' that he was subjected to ill-treatment in Pianosa as he alleged. While we agree with the majority that the material produced by the applicant constitutes only prima facie evidence, we are nonetheless mindful of the difficulties which a prisoner who has suffered ill-treatment on the part of those responsible for guarding him may experi-

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682 *Toğcu v. Turkey*, cited above, §§ 96-97.
683 *The Greek Case*, Yearbook of the Convention, 1969, p. 196, § 30.
684 *Ireland v. the United Kingdom*, cited above, § 161.
685 § 30.

> ence, and the risks he may run, if he denounces such treatment… We are accordingly of the view that the 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'… Lastly, it should be borne in mind that the standard of proof 'beyond all reasonable doubt' is, in certain legal systems, used in criminal cases. However, this Court is not called upon to judge an individual's guilt or innocence or to punish those responsible for a violation; its task is to protect victims and provide redress for damage caused by the acts of the State responsible. The test, method and standard of proof in respect of responsibility under the Convention are different from those applicable in the various national systems as regards responsibility of individuals for criminal offences…".[686]

Similarly, Judge Bonello stated in his dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey* that

> "[p]roof 'beyond reasonable doubt' reflects a maximum standard relevant and desirable to establish *criminal* culpability. No person shall be judicially deprived of liberty, or otherwise penally censured, unless his guilt is manifest 'beyond reasonable doubt'. I subscribe to that stringent standard without hesitation. But in other fields of judicial enquiry, the standard of proof should be proportionate to the aim which the search for truth pursues: the highest degree of certainty, in criminal matters; a workable degree of probability in others… Confronted by conflicting versions, the Court is under an obligation to establish (1) on whom the law places the burden of proof, (2) whether any legal presumptions militate in favour of one of the opposing accounts, and (3) 'on a balance of probabilities', which of the conflicting versions appears to be more plausible and credible. Proof 'beyond reasonable doubt' can, in my view, only claim a spurious standing in 'civil' litigation, like the adversarial proceedings before this Court. In fact, to the best of my knowledge, the Court is the only tribunal in Europe that requires proof 'beyond reasonable doubt' in non-criminal matters".[687]

A review of the Court's case-law on the subject provides little guidance as to the nature of the "reasonable doubt" standard. However, the same review of the case-law reveals that in most cases the doubts which have prevented the Court from finding allegations to be substantiated were attributable to a lack of evidence which could only have been obtained with the cooperation of the respondent Contracting Party.[688] It is submitted that the application of this

686 *Labita v. Italy* [GC], cited above.
687 *Sevtap Veznedaroğlu v. Turkey*, cited above.
688 See Erdal, pp. 73-79.

criminal law standard adopted from common law legal systems, in isolation from a number of other principles in those legal systems which are intertwined with this standard, may not always result in the establishment of the true facts of a case. In this connection, three principles associated with the standard of proof in common law legal systems are relevant for the purposes of illustration. Firstly, in the legal systems where the standard of proof "beyond reasonable doubt" is employed, the burden of proving the guilt of the accused rests solely on the prosecution, and the accused person does not have to prove his or her innocence. This is not so in Convention proceedings: the applicant does not have the legal burden in its technical sense, and therefore the burden of proof continually shifts.[689]

The second prominent principle of the common law legal systems connected with the standard of proof "beyond reasonable doubt" is the defendant's right to silence. By virtue of this right, an accused person enjoys the freedom from compulsion to incriminate him or herself while at the same time enjoying the right not to have adverse inferences drawn from his or her silence. On the other hand, a respondent Government in Convention proceedings does not enjoy such freedoms. As pointed out above, Contracting Parties have obligations under Article 38 § 1 (a) of the Convention to furnish all necessary facilities to assist the Court in establishing the facts of cases. The failure of a respondent Government to cooperate with the Court may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations and, in certain circumstances, to the shifting of the burden to the Government.

Finally, the standard of proof "beyond reasonable doubt" is applied in conjunction with a rule of evidence whereby only the most relevant evidence is admissible. In Convention proceedings, on the other hand, no evidence is inadmissible, and therefore it is easy for the respondent party to create doubts in the minds of the Court's judges by adducing evidence which would be inadmissible in a court of law in common law legal systems.

The Court acknowledged the criticisms in its judgment of 6 July 2005 in the case of *Nachova and Others v. Bulgaria* and stated the following:

> "In assessing evidence, the Court has adopted the standard of proof 'beyond reasonable doubt'. However, 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

689 Both in the area of exhaustion of domestic remedies and in the area of establishment of facts as explained above in Sections 2.4.2 and 11.5, respectively.

> Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. 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. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, 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".[690]

This new approach has already been followed in the judgment of 29 September 2005 in the case of *Mathew v. the Netherlands*, in which the Court added that the term "beyond reasonable doubt" has an autonomous meaning in the context of Convention proceedings.[691] However, the term remains undefined, and the Court has yet to state with precision the nature of the standard in Convention proceedings.

690 *Nachova and Others v. Bulgaria*, cited above, § 147.
691 *Mathew v. the Netherlands*, cited above, § 156.