

INTERNATIONAL LAW — HUMAN RIGHTS — EUROPEAN COURT OF HUMAN RIGHTS FINDS BULGARIA LIABLE FOR FAILURE TO INVESTIGATE RACIALLY MOTIVATED KILLINGS. — *Nachova v. Bulgaria*, App. Nos. 43577/98 and 43579/98 (Eur. Ct. H.R. July 6, 2005) (Grand Chamber).

Article 14 of the European Convention on Human Rights provides that the “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination.”<sup>1</sup> One critical Convention right that has been violated in a discriminatory manner is the right to life, protected in Article 2.<sup>2</sup> Yet the high standard of proof required by the European Court of Human Rights to prove racial motivation of killings has made the Article 14 antidiscrimination protection aspirational rather than practical. Recently, in *Nachova v. Bulgaria*<sup>3</sup> (*Nachova II*), the Court affirmed the decision in which it found, for the first time, a violation of Article 14 in conjunction with Article 2.<sup>4</sup> Unfortunately, it did so by concluding that Bulgaria violated its procedural duty to investigate alleged racist motives rather than finding that the presence of a racist motive evinced a substantive violation of the Article. Although the Court should be commended for establishing a procedural duty under Article 14, it should have modified the substantive framework so that it can actually identify and punish killings motivated by discrimination.

On July 19, 1996, a Bulgarian military policeman, Major G., shot and killed two Romani men while attempting to arrest them for deserting the Bulgarian army.<sup>5</sup> Although the deserters were unarmed,<sup>6</sup> a senior official ordered the officers to “use whatever means were dic-

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<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/o/EnglishAnglais.pdf> [hereinafter European Convention].

<sup>2</sup> *Id.* art. 2.

<sup>3</sup> App. Nos. 43577/98 and 43579/98 (Eur. Ct. H.R. July 6, 2005) (Grand Chamber), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=17280>.

<sup>4</sup> *Nachova v. Bulgaria (Nachova I)*, App. Nos. 43577/98 and 43579/98, para. 1 (Eur. Ct. H.R. Feb. 26, 2004) (Bonello, J., concurring), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=16186> (remarking that “the Court has, for the first time in history, found a violation of . . . Article 14, together with Article 2”). Because Article 14 prohibits discrimination exclusively with regard to the “rights and freedoms set forth in *this Convention*,” European Convention, *supra* note 1, art. 14 (emphasis added), an applicant may allege an Article 14 violation only in conjunction with some other Convention right. See D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 464–69 (1995) (discussing the relationship between Article 14 and other Convention rights).

<sup>5</sup> See *Nachova II*, <http://cmiskp.echr.coe.int>, paras. 10–35.

<sup>6</sup> *Id.* para. 60.

tated by the circumstances to arrest [the deserters].”<sup>7</sup> The killing took place in a Romani neighborhood,<sup>8</sup> and a witness testified that shortly after the shooting, Major G. directed a racial slur at a resident of the community.<sup>9</sup>

Bulgarian military officials investigated the deaths,<sup>10</sup> and upon the investigator’s conclusion that the shooting officer had “done everything within his power to save [the victims’] lives,” the prosecutor closed the investigation.<sup>11</sup> Following dismissal of subsequent appeals,<sup>12</sup> the victims’ families filed applications with the European Commission of Human Rights against Bulgaria, alleging violations of the European Convention’s right to life (Article 2), the right to an effective remedy (Article 13), and the prohibition against discrimination (Article 14).<sup>13</sup> The Court admitted the applications for review.<sup>14</sup>

On February 26, 2004, a Chamber of the Court unanimously held that Bulgaria violated Articles 2 and 14 of the Convention and that no separate issue arose under Article 13. The Chamber first held that “the use of firearms could not possibly have been ‘absolutely necessary’” and was therefore prohibited by Article 2.<sup>15</sup> The Chamber criti-

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<sup>7</sup> *Id.* para. 19. The arresting officers were permitted to use firearms under the circumstances according to section 45 of the Unpublished Regulations on the Military Policy, which states, in relevant part, that “[m]ilitary police officers may use firearms . . . to arrest a person serving in the army who has committed . . . a publicly prosecutable offence and who does not surrender after being warned.” *Id.* para. 60.

<sup>8</sup> *See id.* paras. 22–25.

<sup>9</sup> *Id.* para. 35. An eyewitness testified that Major G. pointed a gun at a Romani child standing nearby and said, “You damn Gypsies.” *Id.* Instances of racism against Roma have been well documented. *See, e.g.*, Press Release, European Roma Rights Ctr., Bulgarian Court Fines Employer for Denying Access to Employment to Roma (Nov. 16, 2005), <http://www.errc.org/cikk.php?cikk=2415>; Press Release, European Roma Rights Ctr., Desegregation Court Victory (Oct. 26, 2005), <http://www.errc.org/cikk.php?cikk=2411>.

<sup>10</sup> *Nachova II*, <http://cmiskp.echr.coe.int>, paras. 10–35.

<sup>11</sup> *Id.* paras. 50–51.

<sup>12</sup> *Id.* para. 53.

<sup>13</sup> *Id.* paras. 1–2. Prior to 1999, applicants filed petitions with the Commission, which would decide whether to refer the case to the Court and represent the applicants. The procedure has since changed; applicants now file directly with the Court. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 798–800 (2d ed. 2000). Since Bulgaria ratified the European Convention, the Court had jurisdiction over individual complaints against Bulgaria. *See* European Convention, *supra* note 1, arts. 32, 34 (defining the Court’s jurisdiction); European Convention on Human Rights, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, <http://www.echr.coe.int/> (follow “Basic Texts” hyperlink; then follow “Dates of ratification of the European Convention on Human Rights and Additional Protocols” hyperlink) (stating that Bulgaria ratified the European Convention in 1992).

<sup>14</sup> First Section Decision as to the Admissibility of Application Nos. 43577/98 and 43579/98 (*Nachova v. Bulgaria*), at 11 (Eur. Ct. H.R. Feb. 28, 2002), available at <http://cmiskp.echr.coe.int/#!/tkp197/viewhbk.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=23918>. The criteria for admissibility include exhaustion of domestic remedies and filing of the application within six months of the final decision of a domestic tribunal. *See* European Convention, *supra* note 1, art. 35.

<sup>15</sup> *Nachova I*, <http://cmiskp.echr.coe.int>, para. 106.

cized the Bulgarian investigation,<sup>16</sup> finding it “flawed” because it “did not apply a standard comparable to the ‘no more [force] than absolutely necessary’ standard required by Article 2.”<sup>17</sup> Next, considering whether the killings were a result of discrimination against the Roma in violation of Article 14, the Chamber found that the Bulgarian officials did not adequately investigate the evidence of Major G.’s discriminatory motives.<sup>18</sup> Consequently, the Chamber shifted the burden of proof to Bulgaria, requiring the government to show “that the events complained of were not shaped by any prohibited discriminatory attitude on the part of State agents.”<sup>19</sup> Determining that the government failed to carry this burden, the Chamber found a violation of Article 14.<sup>20</sup>

Bulgaria contested the Chamber’s ruling regarding Article 14 and requested that the case be referred to the Grand Chamber.<sup>21</sup> On June 8, 2005, the Grand Chamber unanimously upheld the Chamber’s decisions with respect to Articles 2 and 13.<sup>22</sup> With respect to Article 14, however, the Grand Chamber for the first time identified a procedural duty to investigate, independent of the substantive aspect of Article 14.<sup>23</sup> The Grand Chamber did not articulate a rationale for this break with existing Article 14 jurisprudence,<sup>24</sup> but hinted that the same evidentiary concerns that led to an implied procedural right under Article 2<sup>25</sup> were also relevant to Article 14 claims. It noted that “proving ra-

<sup>16</sup> See *id.* paras. 138–139.

<sup>17</sup> *Id.* para. 128 (quoting European Convention, *supra* note 1, art. 2, § 2).

<sup>18</sup> *Id.* paras. 161–162.

<sup>19</sup> *Id.* para. 171. The applicant must prove a violation of a European Convention right “beyond reasonable doubt.” Ugur Erdal, *Burden and Standard of Proof in Proceedings Under the European Convention*, 2001 EUR. L. REV. (HUM. RTS. SURV.), at HR/68, HR/74. However, this standard is not identical to its namesake in domestic jurisdictions, and it may be satisfied by the “coexistence of sufficiently strong, clear and concordant inferences.” *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 65 (1978). The Court has sometimes shifted the burden of proof to a defendant government, usually in cases involving death or injury to arrestees in police custody. See, e.g., *Salman v. Turkey*, 2000-VII Eur. Ct. H.R. 365, 397.

<sup>20</sup> *Nachova I*, <http://cmiskp.echr.coe.int>, para. 175.

<sup>21</sup> *Nachova II*, <http://cmiskp.echr.coe.int>, para. 83.

<sup>22</sup> See *id.* paras. 109–123.

<sup>23</sup> See *id.* paras. 157–168. Several judges joined a partial dissent criticizing this bifurcation of Article 14. *Id.* paras. 2–7 (Casadevall et al., JJ., dissenting in part).

<sup>24</sup> See, e.g., *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, 394–95 (ruling on alleged violation of Article 14 without examining procedural and substantive aspects separately); *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1, 29–30 (same).

<sup>25</sup> In *Ilhan v. Turkey*, 2000-VII Eur. Ct. H.R. 267, the Court noted that the circumstances of an alleged Article 2 violation “may be largely confined within the knowledge of State officials,” making it very difficult for an applicant to prove her case. *Id.* at 295. The Court therefore imposed on the government a duty to investigate killings when the government was in the best position to collect and verify evidence. See *id.*; see also *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 49 (1995) (stating that “[t]he obligation to protect the right to life” requires “some form of effective official investigation when individuals have been killed [by] agents of the State”).

cial motivation will often be extremely difficult”<sup>26</sup> under its “beyond reasonable doubt” standard and imposed a duty on the state to investigate assertions of discriminatory motives behind alleged right to life violations.<sup>27</sup> The Grand Chamber found such an obligation implied under both Article 2 alone<sup>28</sup> and “Article 14 . . . taken in conjunction with Article 2.”<sup>29</sup>

Analyzing the substantive issue — whether the killings were motivated by discrimination against Roma — the Grand Chamber overruled the Chamber and held that the burden of proof beyond reasonable doubt did not shift to the government as a result of “alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing.”<sup>30</sup> Turning to the procedural issue — whether the authorities failed to investigate possible racist motives behind the killings — the Grand Chamber held that the government’s failure to conduct a thorough investigation after receiving evidence suggesting that the killings were motivated by discriminatory intentions violated the procedural element of Article 14.<sup>31</sup>

The *Nachova II* decision represents a step forward in the Court’s Article 14 jurisprudence because it eases an applicant’s burden of proving an Article 14 violation of some type — the failure of domestic authorities to investigate relevant facts will allow the Court to find the government liable. It is lamentable, however, that the Grand Chamber did not alter the burden of proof in discrimination cases. Such an innovation would ease an applicant’s burden of proving a *substantive* Article 14 violation, whereas the Grand Chamber’s decision deals only with the Article’s procedural requirement. As a result, *Nachova II*’s impact on the fight against discrimination in Europe will be limited.

Until this case, the Court had never found a violation of Article 14 in conjunction with Article 2.<sup>32</sup> As Judge Bonello pointed out, “an un-

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<sup>26</sup> *Nachova II*, <http://cmiskp.echr.coe.int>, para. 160 (quoting *Nachova I*, <http://cmiskp.echr.coe.int>, para. 159).

<sup>27</sup> *See id.* paras. 160–161.

<sup>28</sup> *See id.* para. 161. The Grand Chamber endorsed the Chamber’s reasoning that the Article 2 duty to investigate subsumes the “duty to take all reasonable steps to unmask any racist motive.” *Id.* (quoting *Nachova I*, <http://cmiskp.echr.coe.int>, para. 158).

<sup>29</sup> *Id.* The Grand Chamber did not specify whether the duty to investigate racist motives arose under Article 2 or Article 14, noting that “[t]his is a question to be decided in each case on its facts and depending on the nature of the allegations made.” *Id.*

<sup>30</sup> *Id.* para. 157.

<sup>31</sup> *See id.* paras. 164–168.

<sup>32</sup> *Nachova I*, <http://cmiskp.echr.coe.int>, para. 1 (Bonello, J., concurring). Notably, a finding of an Article 14 violation in conjunction with Article 2, as opposed to an Article 2 violation by itself, can affect the applicant’s nonpecuniary damages. Such damages “ha[ve] been awarded in respect of anxiety [and] feelings of injustice” if the applicant “show[s] a link of causality with the breach found”; therefore, the award would depend on the Court’s ruling on which Article has been breached. HARRIS ET AL., *supra* note 4, at 687.

informed observer would be justified to conclude that . . . Europe has been exempted from any suspicion of racism<sup>33</sup> given the string of cases in which the Court failed to find violations of Article 14.<sup>34</sup> This conclusion has not been borne out by the experiences of international organizations and human rights NGOs that have documented the perilous situation of ethnic and racial minorities, such as the Roma and Kurds, in many European states.<sup>35</sup> Thus, the Court's failure to find violations of Article 14 was likely due to the high standard of proof, not to an absence of the underlying problem.

The emergence of a procedural right under Article 14 will likely result in more findings of faulty state investigations. Ever since the Court in *McCann v. United Kingdom*<sup>36</sup> and *Assenov v. Bulgaria*<sup>37</sup> established duties to investigate under Article 2 and Article 3 respectively,<sup>38</sup> it has repeatedly found procedural violations of those Articles without concurrent substantive ones.<sup>39</sup> The *Nachova II* decision and the subsequent case of *Bekos v. Greece*<sup>40</sup> suggest that Article 14 case law will develop in a similar way.

<sup>33</sup> *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, 399 (Bonello, J., dissenting in part).

<sup>34</sup> See, e.g., *id.* at 395 (majority opinion); *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1, 30; *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1751, 1782-83.

<sup>35</sup> See, e.g., EUROPEAN COMM'N AGAINST RACISM & INTOLERANCE, ECRI GENERAL POLICY RECOMMENDATION NO. 3: COMBATING RACISM AND INTOLERANCE AGAINST ROMA/GYPSIES (1998), [http://www.coe.int/T/e/human\\_rights/ecri/1-ECRI/3-General\\_themes/1-Policy\\_Recommendations/Recommendation\\_N%Bo3/Reco3en.pdf](http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%Bo3/Reco3en.pdf); Human Rights Watch, Rights Denied: The Roma of Hungary, <http://hrw.org/reports/1996/Hungary.htm> (last visited Mar. 12, 2006); INT'L HELSINKI FED'N FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE OSCE REGION: EUROPE, CENTRAL ASIA AND NORTH AMERICA 9-10 (2003), [http://www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc\\_id=5829](http://www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc_id=5829).

<sup>36</sup> 324 Eur. Ct. H.R. (ser. A) (1995).

<sup>37</sup> 1998-VIII Eur. Ct. H.R. 3264.

<sup>38</sup> See *Assenov*, 1998-VIII Eur. Ct. H.R. at 3290; *McCann*, 324 Eur. Ct. H.R. (ser. A) at 49.

<sup>39</sup> For Article 2 cases, see, for example, *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, in which the Court found that the applicant did not prove that Turkish forces killed missing Greek Cypriots, but nevertheless held Turkey liable under the Article 2 duty to investigate. See *id.* at 39, 41; see also *Ergi*, 1998-IV Eur. Ct. H.R. at 1776, 1779 (finding a breach of the procedural Article 2 obligation even though the applicant did not prove that the victim had been shot by government security personnel). For Article 3 cases, see, for example, *Vezenardoglu v. Turkey*, App. No. 32357/96 (Eur. Ct. H.R. Apr. 11, 2000), available at [http://cmiskp.echr.coe.int/\[\[tkp197/viewhbkkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=13437](http://cmiskp.echr.coe.int/[[tkp197/viewhbkkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=13437), in which the Court found that the applicant did not prove beyond reasonable doubt that she was tortured by the police, but nevertheless held that the government was obliged to investigate her claims further. See *id.* paras. 30-35. But cf. *Denizci v. Cyprus*, 2001-V Eur. Ct. H.R. 225, 313 (finding a violation of the substantive Article 3 obligation but noting that "a separate finding . . . in respect of the alleged lack of an effective investigation" would be unnecessary).

<sup>40</sup> App. No. 15250/02 (Eur. Ct. H.R. Dec. 13, 2005), available at [http://cmiskp.echr.coe.int/\[\[tkp197/viewhbkkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=46072](http://cmiskp.echr.coe.int/[[tkp197/viewhbkkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=46072). In *Bekos*, the Court held that the Romani applicants had not proved that the ill-treatment they suffered in police custody was racially motivated, see *id.* paras. 66-68, but nevertheless found a violation of Article 14's procedural duty due to the Greek authorities' failure to investigate the alleged racial overtones of the incident, *id.* para 75.

The Court should be commended for breaking with its previous Article 14 case law and ensuring that the right to be free from discrimination is “practical and effective,” not “theoretical or illusory.”<sup>41</sup> But the Court unwisely refused to heed calls to reform the Article 14 standard of proof, either by switching to a “balance of probabilities” standard as advocated by Interights<sup>42</sup> or by shifting the burden of proof to the government once an applicant had established a prima facie case of discriminatory motive.<sup>43</sup>

The Court’s approach is problematic for three reasons. First, the *Nachova II* decision may undermine an applicant’s attempt to prove substantive violations of Article 14. Before the identification of separate substantive and procedural Article 14 components, an inadequate investigation was an element on which an applicant could rely to prove a violation of the Article as a whole.<sup>44</sup> *Nachova II* has isolated this procedural violation, leaving the applicant with even less in her arsenal to prove substantive discrimination.<sup>45</sup> In addition, when the Court finds a procedural violation of Article 14, it may be less inclined to find a substantive one. Before *Nachova II*, both commentators and judges had criticized the Court for “not seriously tackling the problem of discriminatory practices”<sup>46</sup> and for “pay[ing] lip-service to the guarantees it then makes impossible to uphold.”<sup>47</sup> The possibility of finding a procedural violation of Article 14 might placate judges who have historically looked upon the Court’s Article 14 jurisprudence with disfavor. For example, Judge Bonello, a vocal critic of the Court’s “beyond reasonable doubt” standard and a frequent dissenter from the Court’s opinions,<sup>48</sup> voted with the majority in *Bekos v. Greece* even

<sup>41</sup> *Ilhan v. Turkey*, 2000-VII Eur. Ct. H.R. 267, 295.

<sup>42</sup> See *Nachova II*, <http://cmiskp.echr.coe.int>, paras. 140–142 (internal quotation marks omitted) (responding to Written Comments by Interights at 4–5, *Nachova II*, App. Nos. 43577/98 and 43579/98, available at <http://www.interights.org/doc/Nachova%20Written%20comments%202%20November.doc>). Interights, located in London, is an international center for the legal protection of human rights.

<sup>43</sup> See *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, 402 (Bonello, J., dissenting in part); Council Directive 2000/43, art. 21, 2000 O.J. (L 180) 22, 23 (EC), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_180/l\\_18020000719en00220026.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf).

<sup>44</sup> See, e.g., *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1, 30 (noting that “the investigation omitted certain fundamental and indispensable steps which could have shed light on the events,” but finding no violation of Article 14 nonetheless).

<sup>45</sup> In fact, this is one of the *Nachova II* dissenters’ criticisms of the bifurcation of Article 14. See *Nachova II*, <http://cmiskp.echr.coe.int>, paras. 5–7 (Casadevall et al., JJ., dissenting in part).

<sup>46</sup> Pietro Sardaro, *Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court*, 8 EUR. HUM. RTS. L. REV. 601, 617 (2003).

<sup>47</sup> *Anguelova*, 2002-IV Eur. Ct. H.R. at 402 (Bonello, J., dissenting in part).

<sup>48</sup> See, e.g., *id.* at 399–403; *Vezenardoglu v. Turkey*, App. No. 32357/96, paras. 1–19 (Eur. Ct. H.R. Apr. 11, 2000) (Bonello, J., dissenting in part), available at <http://cmiskp.echr.coe.int/>

though the Court continued to apply the “beyond reasonable doubt” standard.<sup>49</sup> The only salient difference between *Bekos* and pre-*Nachova II* cases is the finding of a procedural Article 14 violation in *Bekos*, which suggests that the declaration of *some* violation led Judge Bonello to back off his criticism of the standard of proof.

Second, a procedural violation does not carry the same stigma as a substantive violation. As the dissent stated in *Labita v. Italy*,<sup>50</sup> a procedural violation is “obviously less serious than a violation for ill-treatment.”<sup>51</sup> Along these lines, the procedural violation of inadequate investigation, while condemnable, is not as grave as a judgment that state officials engaged in racist killings or torture.

Third, procedural violations are often met with procedural, not substantive, remedies. The Committee of Ministers, which oversees the enforcement of the Court’s judgments,<sup>52</sup> decides whether an offending state has effectively complied with a judgment partly by considering whether the state promulgated “general measures [to] prevent[] new violations.”<sup>53</sup> Thus, when a governmental policy is likely to lead to similar violations in the future, the state is obligated to change it.<sup>54</sup> But when the Court finds a procedural violation, the faulty policy is the investigation procedure. The state, then, would at most be responsible for changing the procedure, not for addressing any discriminatory practices that might exist.

The Court’s reluctance to modify the application of the substantive component of Article 14 probably stems from a fear of backlash, with the offending state resisting the perceived radical judgments of the Court.<sup>55</sup> Although the intergovernmental nature of the Court weakens its ability to enforce orders, the *Nachova II* Court may have been overly cautious. After all, the Court’s procedures already provide states with ample opportunity to resolve disputes internally; for exam-

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<sup>49</sup> App. No. 15250/02, at 1 (Eur. Ct. H.R. Dec. 13, 2005), available at <http://cmiskp.echr.coe.int/ViewDoc.aspx?p=1132746FF1FE2A468ACBCD1763D4D8149&key=46072>. Judge Bonello did not take part in the *Nachova II* decision.

<sup>50</sup> 2001-IV Eur. Ct. H.R. 99.

<sup>51</sup> *Id.* at 152–53 (Pastor Ridruejo et al., JJ., dissenting in part).

<sup>52</sup> See European Convention, *supra* note 1, art. 46.

<sup>53</sup> See Council of Europe, Committee of Ministers, Rules Adopted by the Committee of Ministers for the Application of Article 46, Paragraph 2, of the European Convention on Human Rights, Rule 3(b) (Jan. 10, 2001), [http://www.coe.int/T/E/Human\\_rights/execution/02\\_Documents/CMrules46.asp](http://www.coe.int/T/E/Human_rights/execution/02_Documents/CMrules46.asp).

<sup>54</sup> See John Cary Sims, *Compliance Without Remands: The Experience Under the European Convention on Human Rights*, 36 ARIZ. ST. L.J. 639, 656 (2004).

<sup>55</sup> The Court has arguably elicited such a response from Russia. See Philip Leach, *Russia Put to the Test on Human Rights*, TIMES (London), July 12, 2005, at Law 5.

ple, they require applicants to exhaust domestic remedies.<sup>56</sup> Moreover, the European Convention specifically instructs the Court to encourage friendly settlements, which, if achieved, require dismissal of the case.<sup>57</sup>

Furthermore, in many contexts, a far-reaching Court decision can prod a state to alter its policies dramatically,<sup>58</sup> and Bulgaria's aspirations of European Union membership suggest that it would fall into this category.<sup>59</sup> Thus, by creating a procedural Article 14 violation without changing the burden of proof, the *Nachova II* Court overestimated the risk of backlash and limited its own ability to influence states that might willingly change their policies in the face of more sweeping judgments.

Moreover, the Court need not alter the standard of proof in a radical way that would produce a backlash. In reforming the substantive aspect of Article 14, the Court can use as a model its own creative methods for dealing with the substantive Article 2 guarantee. In right to life cases, the Court shifts the burden of proof to the defendant government if the facts pertaining to the alleged violation "lie wholly, or in large part, within the exclusive knowledge of the authorities."<sup>60</sup> In a similar context, the Court held that the government's failure to submit pertinent information in its exclusive control can lead to a presumption in favor of the applicant.<sup>61</sup> Still, the Court has retained the "beyond reasonable doubt" standard for Article 2 violations, ensuring that the Court's caseload remains manageable.

The *Nachova II* decision does not prevent the Court from similarly reforming Article 14 case law. Unfortunately, the Court in *Nachova II*, and subsequently in *Bekos v. Greece*, gave no indication that such a development is forthcoming. One can only hope that the Court will heed Judge Bonello's call to "succumb with pride to its own tradition of trail blazing" in matters of ethnic discrimination.<sup>62</sup>

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<sup>56</sup> See European Convention, *supra* note 1, art. 35.

<sup>57</sup> See *id.* arts. 38–39.

<sup>58</sup> The United Kingdom, for example, "eliminated all restrictions on gays in its military forces" in response to the Court's decision. T.R. Reid, *Britain Ends Its Curbs on Gays in Military*, WASH. POST, Jan. 13, 2000, at A13.

<sup>59</sup> See Commission of the European Communities, *2004 Regular Report on Bulgaria's Progress Towards Accession*, at 19, 23, 25, COM (2004) 657 final (Oct. 6, 2004), available at [http://europa.eu.int/comm/enlargement/report\\_2004/pdf/rr\\_bg\\_2004\\_en.pdf](http://europa.eu.int/comm/enlargement/report_2004/pdf/rr_bg_2004_en.pdf) (noting cases of Bulgaria's compliance and noncompliance with the European Convention).

<sup>60</sup> *Anguelova v. Bulgaria*, 2002-IV Eur. Ct. H.R. 355, 382.

<sup>61</sup> See *Timurtas v. Turkey*, 2000-VI Eur. Ct. H.R. 303, 331–32.

<sup>62</sup> *Anguelova*, 2002-IV Eur. Ct. H.R. at 402 (Bonello, J., dissenting in part).