EVIDENCE IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION

ERC - UGENT

WHY DISSECT?

Evidence is at the heart of adjudication, and adjudication at the heart of the international protection of human rights. Yet evidence in international human rights (IHR) adjudication has never been studied in a systematic and comprehensive way.

Addressing these gaps, DISSECT is a ground-breaking research project which will:

1) identify the set of formal and informal rules and practices ('regime') which govern the treatment of evidence in IHR adjudication, doing this across institutions, time and type of complaints;
2) examine the regime's political underpinnings and uses;
3) generate specific recommendations for the treatment of evidence in adjudication; and
4) develop new insights regarding power, truth and evidence, as well as to the way law treats factual uncertainty.

Under the leadership of Professor Dembour, who is trained both as a lawyer and as an anthropologist, DISSECT will approach the IHR evidentiary regime(s) first as a legal entity and then as a social phenomenon which can be studied anthropologically. This unique combination, and ultimately imbrication, of legal and anthropological tools, will be the key which opens up the IHR evidentiary regime to the possibility of unprecedented understanding and analysis.

A close, systematic and in-depth examination of the IHR evidentiary regime will clarify the regime's features to the benefit of the scholarly community; it will help victims of human rights abuse who seek international redress without knowing exactly what evidence is required of them; and IHR adjudicatory bodies, whose legitimacy is regularly questioned, will be in a better position to avoid accusations of inconsistency and unfairness. Last but not least in our pos-ttruth era, opening up the regime to critical scrutiny will generate much needed insights on the relationship between evidence, truth and power.

How come this has not been done before?

IHR law is a relatively new legal field, born after World War II. With the exception of Van Dijk and Van Hoof's monograph (1978), major studies of even its oldest system – namely, the European Convention on Human Rights (ECHR) - only appeared in the mid-1990s, and in the intervening two decades, not all aspects of IHR law have been studied comprehensively.

In particular, its evidentiary regime - which covers issues as diverse as the burden and standard of proof, and evidence admissibility, collection, submission, assessment and scope - is one area that remains understudied. The few legal studies dealing with it are limited in scope. When they concern a relatively large jurisdictional field, they take judicial precepts at their word, without checking that judicial pronouncements about the treatment of evidence correspond to the way the judge actually treats evidence across cases, thus bypassing judicial inconsistencies (except if blatant) and the 'real life' of evidentiary matters. Some studies go beyond the formal word of judicial pronouncements, but they are limited to one strand of case law within a single institution.

IHR academic lawyers' relative lack of interest in the evidentiary regime is easy to understand: they like to think about the law. With exceptions, their scholarship tends to focus on the substance of human rights norms rather than on procedural matters. This tendency is not specific to IHR law. Evidence is unlikely ever to become a major focus of legal research. The exception is in areas such as Criminal Law where evidence is legally regulated.

In IHR law, the lack of regulation of evidence could hardly be more pronounced. Neither the European Convention on Human Rights (ECHR) nor the American Convention on Human Rights (ACHR) contain any provision dealing with evidence; the Protocol to the African Charter which establishes the relevant African Court only discusses it briefly. It is as if it was believed that all the judge needed to do to get the evidentiary regime right was to apply common sense. However, as anthropologists are acutely aware, common sense is never entirely common. It cannot but arise from within a particular culture, which explains that the common sense of a particular group (or, indeed, IHR court) ends up being different from that of another group (or court). Still, for a lawyer, the idea that a regime would be common sensical makes it uninteresting and unworthy of examination.

Possibly contradicting this, another reason for the neglect in which IHR lawyers hold evidence is worth considering. This is that they would have realised at an unexpressed, diffuse level, that IHR evidence is such a complex field that it is better left untouched (Alston, personal communication). Certainly, reconciling evidentiary dicta emanating from the two main legal traditions in the world (the Civil Law and the Common Law) has proved extremely difficult for the International Criminal Court. Creating an evidentiary hybrid or even more composite whole would have been as difficult in IHR law. If so, the freedom at the core of the IHR evidentiary regime might best be understood as avoidance – not opening a Pandora Box which could not easily be closed again.

Looking into what this box contains should not be delayed any further. But given what has been said above, this task cannot be left solely to lawyers, even if the regime can only be understood in its details and complexity by fully trained lawyers. The unique combination of

legal and anthropological research and analytical tools the PI offers is perfect for the task, whilst the scale of the work requires a team of researchers.

1. SOME BASICS

The role of an IHR court is to assess whether a state has breached its human rights obligations; if it has, reparation must follow and the state must ensure the breach is not repeated. Some UN human rights quasi-judicial bodies undertake a similar role. However, they express opinions (not judgments) on the allegations of human rights abuse they receive from individuals (under certain conditions), and their expert members (not judges) are not entitled to collect evidence of their own motion. DISSECT will be studying the evidentiary regime of the regional courts and at least two UN bodies.

The Human Rights Committee (HRC) is included in the study because its material jurisdiction – the rights guaranteed in the International Covenant on Civil and Political Rights – is very close to that of the regional courts. The Working Group on Arbitrary Detention is also included because its proceedings are expressly described as adversarial in its founding document. The Group evaluates the factual submissions of the parties in punctilious detail, which gives its opinions a different feel to the judgments of the regional courts.

The next point to stress is that the IHR adjudicatory bodies are free to develop their evidentiary regime as they see fit. Lawyers versed in the Civil Law tradition tend to say that the IHR evidentiary regime is characterised by a high degree of flexibility, whereas those versed in the Common Law tradition state that it is non-technical. The 'Rules of Court', which each of the three regional courts have internally devised, give them the freedom to be evidentiarily proactive. They can, for example request that parties submit specific documentation, hold hearings where they summon witnesses and/or experts to appear and testify, or even set up fact-finding missions where some of their own judges proceed themselves with investigating. Having said this, IHR courts are not criminal courts, and they are neither designed nor equipped to carry out large investigations. In addition, when the facts are in dispute (they not always are), the IHR courts become less willing to be directly involved in the collection of evidence over time, as their case load increases. This phenomenon has been documented in regard to fact-finding missions in the European system (Leach et al. 2010), and it has already been observed in the decade-old African Court in respect to public hearings (Loffelman 2016).

The next crucial point is that the freedom at the heart of the IHR evidentiary regime is often assumed to help the judge getting at the truth without encumbrance, to the benefit of the weakest party. IHR adjudication generally involves an individual bringing a case against a state, producing what lawyers call an 'inequality of arms' between the parties. Sandifer (1975) is one amongst many who assume the evidentiary regime tends to compensate this inequality. DISSECT will want to test in which cases this assumption holds. This is why it focuses on the evidentiary regime in place in *IHR* adjudication – as opposed to other types of either domestic or international adjudication which also deal with human rights complaints.

It should also be pointed out that IHR courts resist straightforward classification as either inquisitorial (with the judge in charge of the inquiry), or adversarial (with the judge 'merely'

listening to the parties battling between themselves). The former approach is associated with the Civil Law tradition, the latter with the Common Law. The difficulty in categorising the 'hybrid' IHR courts is not a matter of hair splitting: each tradition has developed evidentiary concepts and rules which make sense within its overall orientation, but may be incongruous or even inappropriate if imported into a different tradition. In a development which is bound to complicate matters further, the African Court on Human and Peoples' Rights (AfrCtHPR) is in the process of acquiring an additional, specifically criminal, jurisdiction - DISSECT will be well placed to observe how this impacts the way the African Court handles evidence even when it acts under its IHR jurisdiction.

Finally, it is worth noting that there are different approaches to the study of IHR law. A classical distinction, which applies to the study of law in general, is between doctrinal and socio-legal approaches. DISSECT will use both approaches to study the IHR evidentiary regime, interlocking them to such an extent that the legal regime will end up being approached as a social phenomenon that can in itself be studied anthropologically (rather than as a legal entity whose *context* is the part which lends itself to be studied in a socio-legal way) (see further WP2).

Another distinction worth establishing when thinking about the evidentiary regime relates to two broad possible epistemological orientations towards IHR law. One, universalist, believes and seeks to participate in the development of a universal IHR law. Nothing illustrates it better than the institutional 'dialogue' between the regional courts, where the institutions seek to learn, and are happy to 'borrow' best principles, concepts and practices, from each other. The other, opposite approach could be called particularist; it is drawn to emphasise the way in which each IHR is located within a particular historical, political and social context - today not just a local but also a global context. As far as DISSECT is concerned, both approaches - the universalist and more legal approach and the particularist and more anthropological one- need to be considered to be in a position to understand what IHR law is about.

2. FOUR AIMS

DISSECT's ambition is to capture – analyse, unveil, strengthen and critically assess - the evidentiary regime in place in international HR adjudication.

AIM 1: ANALYSE - To produce a pioneering and **systematic doctrinal analysis**, from a purely legal perspective, of the extremely complex but hardly understood IHR evidentiary regime

Adopting a particularist perspective, DISSECT will examine how each regional court develops its own regime.

For example, the European Court (ECtHR) has always considered facts in dispute between the parties to be established only if they are proven *beyond reasonable doubt* (*brd*). This standard, borrowed from the criminal law of the Common Law tradition, has been criticised for being unsuitable to IHR law, including from within the ECtHR's own benches (*Nachova v Bulgaria*). Requiring facts to be proven *brd* obviously benefits the state more than the applicant, although this standard has admittedly always been mitigated by the

pronouncement that it can be achieved through concurring and serious inferences (*Ireland v United Kingdom*). No doubt the adoption of the *brd* standard was part of a strategy on the part of the ECtHR, set up in 1959, to coax states into joining its system, which for the first time in the history of the world made it possible for individuals to bring a complaint against a state. By contrast, the InterAmerican Court of Human Rights (IACtHR) accepted to *shift the burden of proof* from the applicant to the state, right from its very first case, *Vélasquez Rodriguez v Honduras*, which it decided in 1979. The main victim's whereabouts were unknown as this was a complaint of forced disappearance. The plaintiffs would not have been in a position to bring full proof of their allegations. Without requiring the state to establish some facts, the Inter-American Court would not have been able to fulfil its protective function at all and might as well have given up being a human rights court.

The younger regional court, the African Court set up in 2006, has adopted an interesting, alternative vocabulary; it stresses that it seeks to achieve an *equitable distribution of the burden of proof* when the parties experience evidentiary problems (see e.g. *Konaté v Burkina Faso*).

DISSECT will also study the regime(s) from a universalist perspective. In this regard, of particular importance will be the 'borrowings' of principles and practices operated by one court from another court, often explicitly. For example, the ECtHR was quick to shift the burden of proof to the state in forced disappearances cases (*Kurt v Turkey*) after the Inter-American Court had shown the way in *Vélasquez Rodriguez*. It subsequently extended this approach to complaints of inhuman treatment in cases where it is established that the applicant entered detention in good health but was injured upon release (*Labita v Italy*). An amicus curiae by the ECtHR's former Deputy-Registrar (written in personal capacity) has invited the African Commission to follow suit in a similar complaint pending before it (O'Boyle 2017).

In summary of Aim 1, DISSECT takes up the enormous but crucial challenge of undertaking a comprehensive doctrinal study of the IHR evidentiary regimes and regime. (The plural is used when referring to the various regimes developed by the institutions studied; the singular when referring to the IHR evidentiary regime in general). This study will use legal methods of analysis. It will be undertaken first in respect to each adjudicatory body studied (Work Package 1) and then comparatively across institutions (WP3). Both positive features (how 'positive law' thinks of itself) and inconsistencies will be noted.

AIM 2: UNVEIL - To examine the **political underpinnings and uses** of the IHR evidentiary regimes

Doctrinal legal analyses are rarely interested in issues of power. By contrast, following Foucault's insight that power is everywhere, DISSECT assumes that the IHR evidentiary regimes constantly either accentuate or lighten the power differentials between the parties, whether this is acknowledged or goes unrecognised. Complementing Aim 1, DISSECT's second aim is to very specifically address the question of what the IHR adjudicatory bodies do about the parties' 'inequality of arms' in respect to evidentiary matters. This will require looking at how power differentials express themselves and are either strengthened or reduced by different factors at play within the IHR evidentiary regimes, including their jurisprudential

norms, handling of external pressures and day-to-day operation. This exercise will entail the adoption of research methods which are more sociological/anthropological than doctrinal.

Two examples that illustrate how the regimes can favour either the applicant or the defendant state (against Sandifer's assumption cited above) can make the object of Aim 2 more concrete. At the level of jurisprudential norms, one can cite the rule, common to IHR law across all systems, that the international judge must refrain from acting as a court of fourth instance, except when strictly necessary. In plain terms, this injunction means that the international judge should normally accept the facts as they have been ascertained by the domestic authorities - possibly after having been examined at three levels of jurisdiction (first instance, appeal, and supreme jurisdiction).

This principle is part of the drive to keep international adjudication subsidiary to domestic adjudication. One can see that if it is applied too strictly, facts will not be re-assessed and new evidence will not be properly considered. The principle could thus make a mockery of the idea that an IHR adjudicatory body offers international supervision: what is the point of a human rights victim being able to bring a complaint before an IHR court if the international judge does not look at the evidence, however strong and incontrovertible, which shows the domestic courts mis-assessed the facts at the basis of the complaint? It is therefore uncontroversial that the principle must suffer exceptions: when the domestic authorities have not investigated or have done so only perfunctorily, it is accepted that the IHR court can and indeed must re-open the facts. However, the exceptions do not come into play in the same way (one might say 'at the same speed') in the three regional systems.

The European Court is the most cautious of the three regional courts. Originally, it was keen to show states that it would treat them with deference so that they needed not fear joining its revolutionary system. Most commentators opine that the ECtHR adopted a wise course. This, however, put the Court on a deferential track which has not abated. On the contrary it has become more pronounced recently, as the Court has suffered increased 'bashing' by states (Oomen 2016).

This has repercussions on the evidentiary regime it is developing. In the recent case of *Ndidi v United Kingdom*, concerning a non-national facing deportation for having committed criminal offences in the past, the ECtHR accepted the British courts' factual assessments. It did not even go through the motions of applying the proportionality test between various elements (seriousness of convictions, age at which the applicant had arrived, reformation of character, etc) which, a few years before, it was always conducting in such cases. When Professor Dembour requested the case file, she saw it contained a number of unequivocal testimonies of community leaders explaining that the applicant had reformed and was now a role model for other local Black youth. Given the European Court's reinforced willingness to treat states with deference, it is unlikely that any of its judges saw this evidence.

Whilst the ECtHR is increasingly averse at playing the role of a court of fourth instance, the Inter-American Court regularly re-opens the facts. Any other approach at its inception would have condemned it to irrelevance. It simply could not afford not to have questioned allegations made by states if it had any ambition to fulfil a protective role. Legally going one step further, it often exempts the victim of the obligation to have exhausted national

remedies before turning to it. The problem then is that it is left with the responsibility of having to assess the factual basis of the complaints, whilst not being equipped to undertake in-depth investigations. One commentator has argued that the result is inconsistent case law (Paul 2015). If there is a bias, it is towards the alleged victim who would be believed by the Court quickly - with potential adverse consequences on the IACtHR's ability to keep states on board its system.

Not believing the applicant soon enough, however, is also problematic. For example, in the European case of *Mercan v Turkey*, the applicant was one of the 2,900 Turkish judges jailed in July 2016 after the failed coup d'état in Turkey. She argued that the Turkish Constitutional Court, which had just purged itself of two of its judges, offered her no prospect of an effective remedy, so that she should be exempted from the obligation to exhaust national remedies. Without explaining why, the European Court qualified her allegations of 'unsubstantiated anxieties'. It therefore went on to dismiss her application as inadmissible. This decision attracted the ire of many commentators (e.g. Turkut 2016; Olcay 2017). In this case, the Court seems to have used the evidentiary field as a pretext for not dealing with a politically sensitive case, thus displaying politics of 'appeasement' (Fenwick 2015) in the face of state pressures and arguably defeating its very purpose. The Court was created in the wake of World War II in order to ensure that a state descent into arbitrariness and dictatorship (as happened in Nazi Germany in the 1930s) would be caught and stopped before it was too late. The idea was that individuals would trigger the human rights system of protection, thereby alerting international institutions to the danger of a democratic and rule of law collapse. But if even a domestic judge cannot convince the ECtHR to look into her case, the chance that a simple citizen could trigger the ECHR system into action appears non-existent (though see also *Altan v Turkey* and *Alpay v Turkey*).

Moving away from the problem of political pressure, DISSECT will want to be attentive to the way the day-to-day operation of the adjudicatory bodies directly impacts on the evidentiary relatively powerful or powerless position of the parties. Of utmost importance in this regard is the way evidence is internally processed within an institution. In the European system, Registry staff are largely responsible for managing the voluminous cases (63,000 new cases in 2017 alone); original and crucial submissions in the case file may never be seen by the judges themselves. This phenomenon, which can only be to the detriment of the applicant, is less likely to happen in the other two regional courts - whose caseload admittedly hardly gets over two dozen new cases a year.

The exceptional meticulousness which the Working Group on Arbitrary Detention (61 opinions in 2017) brings to the examination of the parties' factual submissions has already been noted. One may assume this meticulousness helps the applicant, although this will need to be confirmed through analysis of the case law. Another factor worth examining is whether the parties receive relevant information as the proceedings unfold. One author has advocated - in relation to the International Court of Justice - that parties be given some hints during the proceedings, for example through intermediary rulings, as to the line of judicial reasoning that might be adopted, thereby letting them know which factual issues require substantiating (Teitelbaum 2007). Currently a party may lose the case simply because they had not anticipated that documenting a factual point was needed. At its public hearings, the Inter-

American Court often asks the parties to submit evidence regarding specific points. There is hardly any opportunity for this in the largely written procedure of the ECtHR, which has become the rule in view of the volume of cases the European system must process.

The above should have demonstrated that it is doubtful that the IHR evidentiary regime *necessarily* favours the human rights victim. It can also favour the stronger party, i.e., the defendant state. The main challenge for realising Aim 2 – examining the IHR evidentiary regimes' political underpinnings - is that courts do not generally motivate their decisions regarding evidentiary matters. In order to grasp the power issues which one sense underlays the whole of the evidentiary field, the dissecting method of case law analysis the PI has used in her previous work (Dembour 2015) will be invaluable. Deceptively simple but very effective, it initially consists in closely reading and re-reading decisions for clues as to what 'really' happens below the legal surface. This will be explained further in the description of WP2.

AIM 3: STRENGTHEN - To contribute to the **development of a legally robust evidentiary regime**

The findings achieved through realising Aims 1 and 2 will put DISSECT in a position to comment on the functioning of the IHR evidentiary regime and thus to contribute to its robustness. Of course, judges are the ultimate interpreters of the law it is their task to apply; there is no question of DISSECT ever seeking to impose any recommendation on any adjudicatory body. DISSECT will nonetheless want to help develop 'best evidentiary practices' in IHR adjudication by generating a set of specific recommendations for IHR adjudicatory bodies. This will be done in WP5 in collaboration with the institutions concerned, who have expressed a strong interest in participating in this exercise through the voice of some of their highest-level actors.

Clearly, many evidentiary issues are in urgent need of clarification through systematic analysis of current practice and normative reflection on how they can be best approached. For reasons of space, no more than two examples of such issues will be given here. Some level of technicality in their presentation cannot be avoided – however much evidence in IHR adjudication is said to be non-technical. Their discussion will highlight how DISSECT's recommendations will take many different forms and address different kinds of scenarios.

A first example concerns the proof of a negative fact. In a sense it belongs to the realm of logic. A negative fact is a fact that does not exist - which is impossible to prove. For example, how could the applicant prove to the ERC that no comprehensive study of the IHR adjudicatory evidence regime exists? This absence can be asserted, but it can hardly be established fully just by one person. Two avenues can be followed to try to prove this absence: (1) to cite authorities who say the same thing - basically everyone who has written on evidence in IHR law; (2) to challenge any sceptical person to find a comprehensive study - which, if he or she tries, will get them to the conclusion it is nowhere to be found. What is impossible to do is to prove directly the existence of this negative fact. The upshot in IHR adjudication is that the best hope for an applicant whose case turns around a negative fact is to have the court challenge the sceptical party (most likely, the defendant state) to prove the falsity of the alleged negative fact. This can be made more concrete through an example. In

Solomon v the Netherlands, the ECtHR endorsed as lawful under the ECHR the deportation order against a failed asylum seeker who was living with a Dutch national and had a daughter with her. The Court seemed to reproach the applicant for not having proven that he was *not* already married to someone else in his country of origin. As per the above, no amount of testimonies from relatives and friends that he was not married (had he realised proving this was crucial) could have *established* the absence of marriage. In all likelihood, it is the defendant state who had raised (perhaps even 'thrown in') the idea that he had been married before coming to the Netherlands. If so, the Court could (arguably, should) have required that the defendant state prove its suspicion. This would have been most appropriate since the positive fact of the previous marriage lent itself to be proved relatively easily (e.g. through a marriage certificate).

Interestingly, in cases where police abuse has been ascertained and the question remains as to whether this abuse was racially motivated, the ECtHR expressly exempts the state from having to establish that its police force has *not* exhibited racial prejudice. This is on the grounds that this would amount to 'prove *the absence* of a particular subjective attitude on the part of the [police officer] concerned' (e.g. *M.F. v Hungary*, emphasis added). DISSECT is likely to recommend that no adjudicatory body should expect a party – any party, whether applicant or defendant - to bring an 'impossible proof'. Agreeing to proceed in this way would not resolve the question of how the case whose facts remain uncertain should be decided. This latter question, however, relates to the consequence(s) to be drawn from a lack or incompleteness of evidence. If undoubtedly equally complex and requiring in-depth reflection, it is nonetheless logically separate from the issue of the evidential burden of proof.

Our second example will be on a very different plane. It concerns the distribution of the burden of proof between the parties. The phrase used by the AfrCtHPR of 'equitable distribution' suggests the African Court has done a lot of thinking about it. Interviews conducted with judges and Registry staff at the seat of the Court in Arusha in September 2017 indicate a great sensitivity to the position of the applicant, who is often extremely vulnerable, possibly illiterate, and facing a state which, if not exactly all powerful, is nonetheless a Leviathan by comparison. The potential problem is that the Court seems to be getting close to a *presumption* that the state has done wrong. In *Konaté v Burkina Faso*, for example, a case brought by a journalist whose newspaper was suspended and who was jailed for 12 months for defaming a prosecutor, the African Court relied on the limitations provision of the African Charter to rule that the state might have been able to adopt *less intrusive measures* towards the applicant. Because of this, it reversed the burden of proof onto the state, which had to demonstrate that the punishment was necessary, which it could not do. Such a reasoning is barely imaginable and would be regarded as highly problematic in the European system which tends to treat the question of whether a measure is 'necessary in a democratic society' as a legal issue. In opposition to this, or at least looking at it from a slightly different perspective, one could remark that the actor of the Latin adage *actori incumbit probatio* ('the proof is for the claimant'), commonly accepted to apply in international law including IHR law, refers to any party – not necessarily the applicant (Niyungeko 2005). Thus, if the state claims a measure to be necessary, one might argue that the burden of proving its necessity should fall onto the state. Inversely, it could be objected that it is for the applicant to prove his or her claim that

the measure was not necessary (the more so since here the expression 'not necessary' does not denote a negative fact in the sense of a non-existent fact as in the discussion above).

Despite their universalist orientation, the different IHR adjudicatory bodies may not share an identical view as to the question of how the burden of proof should be distributed between the parties. Mindful of the fact that the various institutions studied cannot but evolve in their own social context and have their own understanding of the IHR mission, in respect of this question, DISSECT is unlikely to be in a position to formulate its recommendations in a categorical manner. It will nonetheless be able to clarify the relevant issues which should be considered.

AIM 4: CRITICALLY ASSESS - To **interrogate 'truth'** and instigate a **new strand in Critical Legal Studies**

Like judges in other legal fields, the IHR judge is not inclined to motivate decisions regarding factual matters. Typically, only the conclusion of the reasoning is reported in the judgment, with statements in the form of: 'The Court is (not) convinced that …'; 'It is (not) established that …'. These pronouncements often make or break the case of the respective parties. Given the stakes involved, one would expect that the way in which judgments assert or reject the truth of the facts of a case would have been scrutinised, but surprisingly little scholarship has been devoted to this. DISSECT, by contrast, will want to interrogate the relationship in the judicial exercise between facts, evidence and truth, also bringing power in this equation. This will plant the seeds of a new strand in Critical Legal Studies (CLS).

CLS is an umbrella term that denotes a variety of critical approaches to the study of law. It is often associated with the United States and the towering figure of Harvard Professor Duncan Kennedy. It is the child of Legal Realism, a movement which emerged in the 1920s also in the US. One way to summarise CLS is to say that it highlights that law is not and cannot be politically neutral, even as it continually claims to be acting neutrally. CLS seeks to reveal the many ways in which law fails to dispense justice and equality and how it can constitute a force that oppresses the vulnerable and supports those in power, whilst simultaneously forming a potential arena of contestation which offers avenues to promote social justice. Key themes are the indeterminacy of the law (which can go one way or the other without offending legal logic), its contradictions and its contingencies.

CLS has produced many strands such as, in a non-exhaustive list, studies of law inspired by perspectives linked to feminism, anti-racism, intersectionality, anthropological understandings of culture, political economy analysis and TWAIL (e.g. Third World Approaches to International Law), the latter recently transforming itself into decoloniality. In this vast literature, evidence and epistemology are not words that are regularly encountered. However, there exists an established and ever-growing critical literature on evidence in science and other fields such as public health studies. Building on the work of scholars reflecting on the 'new empire of truth' (Kelly and McGoey 2018) and interested in political epistemology (Latour 2008; Allen 2017), DISSECT will use the concept of the evidentiary regime in order to interrogate the notion of truth in IHR adjudication.

There are many reasons why this is needed, and four will be advanced here. First, even from a positivist perspective, truth is often elusive. This is the more so for judges who need to come up with their judgment without the luxury of being able to postpone their decision until facts have become hopefully clear(er). Indeed, the Law of Evidence has arguably been developed not so much to help judges get at the truth as to equip them with tools for managing factual uncertainty – for example by indicating which party must lose when allegations remain unproven. Second, evidentiary rules and practices cannot but favour some parties to the disadvantage of others. In other words, the evidentiary regime is not neutral; it embodies values. It is therefore important to assess what these values are, and whether they correspond to the values that one believes should be protected. Third, from an epistemological perspective, the idea that facts 'talk for themselves' does not hold. Facts always require interpretation before they start making sense. Fourth, evidence lends itself to political uses by the judge, including by providing excuses for not dealing with sensitive issues. Returning to *Mercan v Turkey*, the disconnect between the ECtHR's judicial presentation of the context of the case – as if everything in Turkey were normal – and the real situation on the ground was beyond what the editor of a major European law journal could countenance. He described the reasoning of the Court as 'magical realism' (Ménendez 2017). This choice of phrasing does not quite name 'alternative facts' but nonetheless connotes this concept through less provocative words, expressing disappointment at what is perceived as an abandonment of objectivity on the part of the judge.

IHR adjudication belongs to a modern, scientifically-orientated tradition proud to claim that it respects the rule of law and enjoys an independent judiciary. One place where one would expect evidence-based practice to be held in high esteem and to never cease to be a cherished goal is the judicial exercise. The four aforementioned issues indicate, however, that reflecting upon the meaning of 'evidence' in IHR adjudication is essential. DISSECT's fourth aim is therefore to assess the IHR evidentiary regime from a critical perspective which combines CLS profound awareness of the lack of neutrality of the law with an epistemological reflection on truth. This will be done in WPs 4 & 6. The insights derived from this analysis will be relevant both in and beyond IHR adjudication.

3. SIX WORK PACKAGES (WPs)

Six WPs will be conducted to achieve DISSECT's four aims. Each WP provides the basis for, and leads to, the next one. Together they form a wholly integrated research programme and result in a systematic and comprehensive study of the IHR evidentiary regime. The diagram below puts this in graphic form.

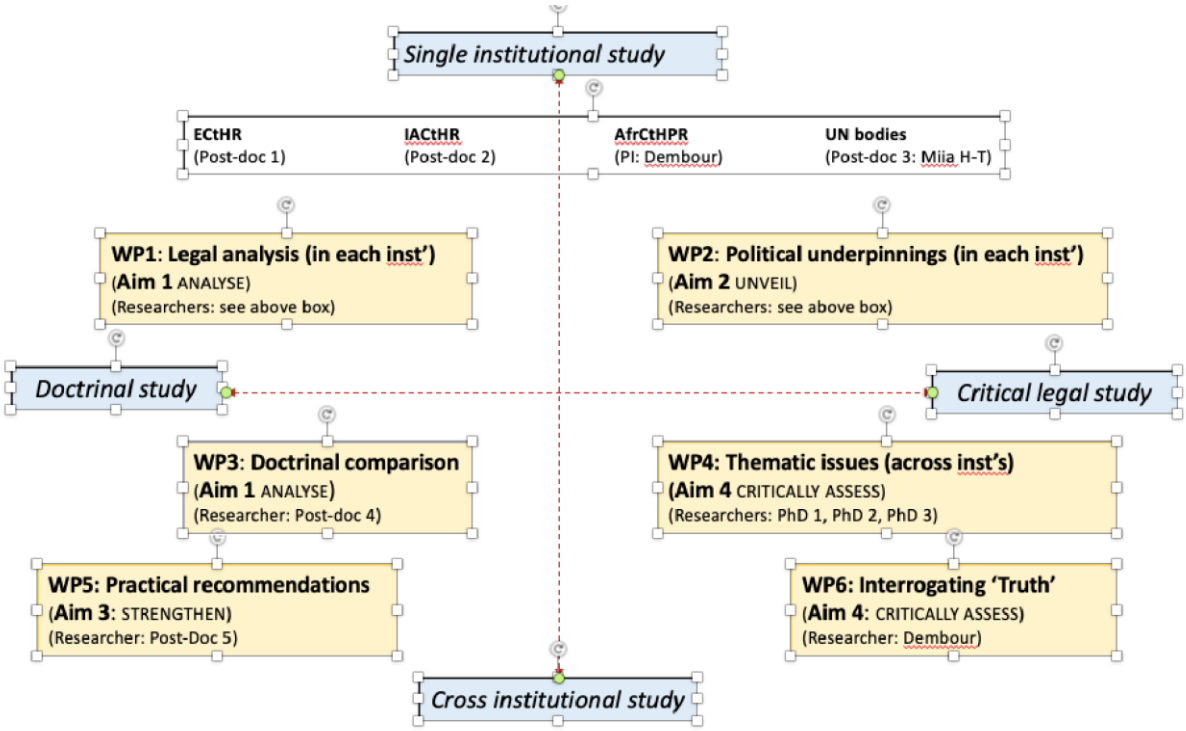

Figure 1: DISSECT's research design

The graph settles labelling the pole on the horizontal axis' right hand-side 'Critical legal study' rather than 'Socio-legal study'. The former expression immediately qualifies the kind of sociolegal study the PI practices as 'critical'. Not using the latter expression also reinforces the point that the PI's anthropological approach goes beyond what is generally understood by 'sociolegal studies'.

WP1: 'The Law': Doctrinal legal analysis of the evidentiary regime of single institutions

WP1 is a doctrinal exercise, achieved through a legal analysis of the case law. It asks: what are the legal norms, principles and concepts of the evidentiary regime in place in each of the institutions within DISSECT's scope? These regimes are hypothesised to differ from each other. WP1's sub-questions are:

i) What needs to be proven?
ii) By whom?
iii) When are facts adjudicated at domestic level reopened?
iv) Which standard of proof is applied?
v) What does the judge do when the facts are deemed uncertain?
vi) Are the regime's explicit and implicit rules applied consistently?

Mapping the evidentiary regime of the ECtHR will be particularly challenging, given the age of the system (60 years) and the voluminous case law (over 15,000 judgments and 70,000 decisions in 2017). A senior researcher, preferably with experience of managing cases in the

ECtHR, will be recruited for this task. The smaller African caselaw will per force lead the comparison (as a case decided in the African system is bound to have an equivalent in the huge European case law, and probably in the Inter-American system too, whilst the reverse is not true). This is the main reason why the PI originally planned to undertake its study. A senior researcher with experience of the American Court will be recruited to study the Inter-American case law. Yet another researcher will examine the HRC and the Working Group on Arbitrary Detention (WGAD).

In order to ensure the feasibility of the research project, a strategy will be adopted which circumscribes the research to be undertaken within realistic limits (about 750 decisions), whilst still guaranteeing that the cases selected for analysis are sufficiently representative to generate valid findings. This strategy will be three-pronged:

- Firstly, in each system, 'landmark' cases which expressly address evidentiary principles and/or norms will be examined. This includes the cases that have been cited above, such as *Vélasquez Rodriguez v Honduras*, *Ireland v United Kingdom* and *Konaté v Burkina Faso*, but also many others, whose list would be too long to compile here.
- Secondly, cases related to up to six types of complaints agreed between DISSECT's research team will be studied across institutions (thereby building a solid comparative basis for WP3). See below for further explanations and rationale.
- Thirdly, in each system, it will be open to each researcher to study 'opportune' cases - either one-offs or jurisprudential series - which appear to him/her to warrant attention. Each researcher will be free to follow their intuition. The 'institutional' members of the Advisory Board will no doubt also be keen to suggest to the research team the analysis of cases which they think merit attention.

The second point requires some elaboration. The selection of the types of complaints which will be systematically studied across the three regional courts -and UN bodies as appropriate- will be done in respect to three criteria. The first is that complaints which have already arisen in the younger African Court will be selected. The second is that complaints concern pressing human rights issues. The third is that the complaints selected will have to see the applicant and the state occupy a variety of political and moral positions, thereby offering a spectrum of evidentiary challenges and judicial responses ensuring that the emerging picture of the evidentiary regime of each institution studied is sufficiently complex to be enlightening.

Taking these three criteria into consideration, a possible list of types of complaints to be studied across DISSECT's institutions could read as follows:

1) inhumane conditions of detention: now a type of complaint which is universally accepted to trigger a shift in the burden of proof when it is established that the applicant entered detention in good health but left it with injuries. In addition, the Working Group on Arbitrary Detention has often dealt with it;
2) the treatment of migrants: a field where the applicant often finds it very difficult to prove his or her claims (e.g. that they were tortured at home) and where the political context is often backing state exclusionary practices.
3) discriminatory practices towards indigenous groups as well as (in Europe) Romas: a legally very different topic from the previous one because establishing discrimination involves

looking not only at the particular circumstances of the applicant but also at the social context, as remarked by Brems (2017);

4) freedom of expression - where state repression (e.g. censorship or killing of journalists) is often considered controversial in much wider political and social circles than is the case with the previous complaints;
5) the foregrounding by the state of an anti-terrorist/security agenda – where the state may be more likely to receive something of a carte blanche even from some IHR institutions, allowing it to exercise repression without having to justify itself very precisely; and
6) abuse of corporate power linked to insufficiently strict state regulation: an issue where the state may not be immediately perceived by the public to be responsible for the wrong. In addition, it brings the complex, urgent, underdeveloped but developing issue of human rights and business into the analysis.

WP2: Examining the political underpinnings and uses of each evidentiary regime

Whilst WP1's doctrinal orientation suggests a 'technical', neutral examination of the evidentiary regime, WP2 is designed to make it possible to unveil the political underpinnings and uses of the IHR evidentiary regime head on. WP2 is conducted by the same researchers as WP1, but this time to ask questions which concern power.

These are:

I. How pro-active a role does the institution take in respect of evidence?
II. Does the evidentiary regime attenuate or accentuate the inequality of arms between the parties?
III. Is the individual in a practical position to bring the evidence required from him/her?
IV. Is anything required from the state?
V. What are the costs associated with submitting evidence?
VI. On which grounds is evidence accepted or rejected?
VII. What is the impact of procedural practices (e.g. Registry involvement; concomitant or separate treatment of admissibility, merits and reparation)?

If these questions do not all seem to directly concern power, this is because DISSECT conceives of power, following Foucault (1977), as being everywhere in social relationships. The questions thus seek to uncover how the regimes 'really' work in practice: understanding their reality will make it possible to unearth the regimes' political underpinnings (both their causes and effects).

With lawyers tending to consider evidence 'common sense', thus not of high interest and not really worth debating, evidentiary matters are often buried amongst other considerations in judgments. Given this, the challenge for WP2 will be to identify where the 'buried' evidentiary matters are. DISSECT will use the dissecting method of case law analysis - which enabled the PI to successfully and innovatively trace how various layers and strands developed in the ECHR migrant case law over 60 years (Dembour 2015).

In the first instance, before systematic analysis takes place, the method consists in reading and re-reading judicial decisions. As typical of social anthropological research, nothing in a judgment is assumed to be 'too small' to be dismissed out of hand as obviously irrelevant. On the contrary, the assumption is that matters of high significance may be hidden behind a word that a conventional lawyer would not spend ('waste') time reading, including for example dissenting opinions, the costs section of the judgment, as well of course as the part devoted to the facts. Every word of every decision selected for study will be read carefully, with the researcher on the look-out for clues as to what is 'really' happening (in a nod to 'Legal Realism'), especially debates that would have arisen between the judges who took the decision, as well as ambiguities and contradictions.

In a sense, this method illustrates leading anthropologist Eriksen's (2017) remark that the anthropologist must first spend time 'as it were crawling on all fours … studying the world by looking at the grains of sand on the beach through a magnifying glass [before getting into a] helicopter, armed with a pair of binoculars, in order to obtain an overview'. The method approaches cases much as an anthropologist approaches fieldwork data. Its originality and strength lie in the fact that it conceives of the case law as itself constituting social reality - rather than being the manifestation of a distinct field called 'law' which socio-legal scholars then study 'in context'.

This dissecting method of case law analysis will be combined with fieldwork in order to enhance the understanding of the significance of the clues found in the case law and thus, in turn, the likelihood of finding more clues as further cases are being studied. A total of at least 120 semi-structured interviews will be conducted with key actors. These fall into three categories: 1) judges and members of the courts' registries, 2) legal representatives of the parties, and 3) inter-governmental organisations (such as a UN special rapporteurship) or NGOs (such as Amnesty International) which either have directly submitted evidence to the adjudicatory body as *amici curiae* (third parties) or whose reports have been referred to in submission by the main parties. Given that only the ECtHR is a permanent court, the researchers will travel to meet these actors wherever they happen to be.

This quest will be enhanced through anthropological fieldwork at the seat of the institutions. This will enable the researchers, by being there, to start noticing the cultural, social and political givens of the institution they are studying, by which are meant features that are, anthropologically speaking, essential but which those who live by them either take for granted, do not reflect upon or are not conscious of.

WP3: Doctrinal comparison: The IHR evidentiary regime across institutions

WP3 will use the findings reached especially in WP1 but to a lesser extent also in WP2 to produce a comparative analysis of the IHR evidentiary regime. The notion of comparison denotes an analytical exercise that identifies similarities and differences by reference to a number of criteria. In law, comparative exercises are sometimes limited to a juxtaposition of different systems, as illustrated by IHR law textbooks. These can be very informative, but they

nonetheless do not seek to understand the social (including political, economic, linguistic) origin and implications of legal similarities and differences. DISSECT will adopt a more ambitious comparative approach.

WP3 is mostly about the three regional courts, although the separate study of the UN bodies in WP1 will provide extra material and reflections which will be included in the comparative study of the three courts as appropriate.

With evidence referring to factual matters, one basis for some of the initial research work will be types of complaints rather than conventional provisions or legal concepts. The senior research team will test the feasibility of, and then agree, a list of up to 6 complaints (such as presented under WP1) which will be examined throughout the three regional courts – and UN bodies as appropriate.

WP3's success will rely on the sharing of information and insights between the research team. When not on fieldwork, the team will meet regularly (using IT communications such as Skype to connect with members of the research team not based in Ghent on a permanent basis). The team will think together about the possible terms of comparison. This will be an exercise undertaken collectively and repeatedly until a comparative design has been created which is both feasible and enlightening.

It is obviously too early to establish the exact parameters of this design, but it can be predicted that it will centre around core concepts such as the burden of proof, the scope of evidence (what can be proven and what is considered outside the scope of what can be proven), the use of presumptions when applying a given standard of proof, and how inferences are operated.

In order to facilitate the comparative analysis, a database of cases searchable through at least six filters -institution (e.g. ECtHR, HRC), evidentiary issue (e.g. burden of proof), substantive area (e.g. prison conditions), substantive provision (e.g. Art 5 ECHR), procedural stage (e.g. admissibility); year of decision- will be created in the first year of the project. All members of the research team will share the task of populating the database throughout the life of the project.

Most doctrinal approaches to IHR law display a universalist orientation. This results in an emphasis on communalities and a possible suggestion that differences should be eliminated because there can only be one 'best' way to proceed or conceive the law. Whilst not rejecting this orientation as such, WP3 will nonetheless not assume that particularities and differences are necessarily to be avoided.

DISSECT will also work in awareness that an apparently identical word, concept, principle or rule may not mean the same thing across systems. Because of this, attention will be given to seek to understand any legal element first within its own legal tradition but also political context and social history before comparing it with its apparent equivalents in other systems. The fieldwork undertaken by each researcher over a much longer period than is generally considered necessary in Socio-Legal studies will be crucial to enable DISSECT to reach a refined understanding of the social make-up of each of the evidentiary regimes under study.

As a result, although envisaged primarily as a doctrinal exercise, WP3 will have a stronger anthropological flavour than 'straight' comparative legal studies. (WP3 could thus have been located slightly more to the right on the horizontal axis in the research-design diagram included above. This has not been done in order to keep the reading of the diagram simple).

Together with WP1, WP3 will fulfil DISSECT's first aim of documenting the IHR evidentiary regime from a legal perspective.

WP4: Analysis of thematic issues related to the interpretation of evidence in IHR adjudication

Good, solid evidence is assumed to indicate unequivocally the truth of factual allegations. However, evidence is rarely unequivocal. WP4 is the first work package specifically devoted to DISSECT's fourth aim of interrogating 'truth'. It will be conducted by three PhDs students. Each student will select one issue/problem related to the interpretation of evidence in IHR adjudication.

Ideally, one doctoral project will be concerned with technology, another with science and the third with unconscious bias. Thus the following issues could be studied: the promises but also unprecedented challenges and possibly intractable problems linked to the ever-increasing role of digital evidence in IHR adjudication; the making of inferences which are scientifically incorrect; the judge's reliance on emotional 'common sense' (whereby the court assumes how an ordinary person would emotionally react to a particular event). These topics, however, are not fixed, as DISSECT will want to harness the expertise and interest of the best possible candidates.

One important feature of these 3 PhDs is that they will be undertaken from a wide interdisciplinary perspective. They will thus deepen DISSECT's inter-disciplinary horizon and help conduct WP6 (on which, see below).

WP5: Practical implications: Turning specific recommendations into a policy guide

Right from day one, DISSECT will start thinking about what works well and not so well in the IHR evidentiary regimes of the various institutions studied, so as to eventually be in a position to propose specific recommendations.

When not on fieldwork, the research team will meet fortnightly to reflect upon cases and develop insights regarding what could be termed 'best' and 'worst' practice. The conclusions which the research team reaches between itself will be shared with the advisory board.

A conference expected to be held at the seat of the ECtHR will bring together primary actors in the institutions studied to discuss the underlying techniques of factual adjudication and to make comparisons between the systems, with a view to identifying and understanding the reasons for differences and the extent to which systems should learn from each other or have learned from each other. This conference will be open especially to practitioners involved in

IHR adjudication - judges, experts and legal representatives. Its main aim will be to test the preliminary conclusions which DISSECT will have reached by then and to invite further reflections.

WP5 will generate specific recommendations for more coherent and/or fairer judicial practice, especially in IHR adjudication but with likely application beyond this field. Some recommendations are expected to be rather direct (e.g. 'Adjudicatory bodies should avoid requesting a negative proof from a party'); others will be more open-ended (e.g. 'Adjudicatory bodies should consider whether the distribution of the burden of proof they practice is conducive to justice'). They will be brought together into a policy guide which will be widely circulated amongst relevant practitioners, as well as posted on DISSECT's website. More practical and doctrinal – as well probably as universalist - in orientation, this task will be especially suited for a post-doc with legal practical experience -ideally in one of the court's DISSECT is studying.

WP6: Theoretical implications: Interrogating 'Truth'

WP6 will analyse the IHR evidentiary regime from a perspective which allies epistemological questioning with political critique. Its reflections will be nourished by all the findings reached in WPs 1-5. In this sense, WP6 can be said to tie in the various directions that the research project will have taken. It will result in a monograph provisionally entitled *Evidence, Truth and Power: Lessons from international human rights adjudication for our post-truth era*.

Research projects conducted by the PI in the past have generated important insights which could not have been imagined at their outset. Her four-school human rights model unpredictably emerged from her study of the relationship between classical critiques of human rights and the ECHR case law. Her study of the European Court's disappointing case law on migrants' rights ends with the idea that 'the right to act humanely' should top any human rights list.

It is too early to say where WP6 will take DISSECT but what is already clear is that it may take her full circle back to her early academic days in the heyday of postmodernism, when she was enthused by the attention, even recovery, offered 'muted' voices (Ardener 1975) but also wondering how universalism and particularism could be reconciled. Her doctorate asked: How could the colonial officers of the Belgian Congo legitimate their participation in the colonial enterprise – and also, how could we *know* what had happened there? One of her early papers was on female genital mutilation. It observed how the French judiciary was oscillating between using a general criminal provision to condemn mothers who had had their daughters cut, and acquittal on the basis that these women had been acting out of love for their daughters.

DISSECT is taking shape just as postmodernism is being blamed for having laid down the intellectual ground for the era of 'post-truth' politics we have entered. It therefore holds the promise of returning the PI to the tension between universalism and particularism, though no longer so much in the field of ethics as in that of epistemology, as DISSECT grapples with

the tension between objectivity and subjectivity when 'truth' is sought through the submission and examination of evidence.

As Kelly and McGoey (2018) have wonderfully expressed, the authority of facts is both 'far-reaching' and utterly 'fragile', and evidence is a conduit that leads both to 'ecstatic knowledge' and 'charismatic violence'. They also argue that if post-structuralist theory has contributed to 'the dissolution of the modern fact', what is now required is not to cave into the apparent 'authoritarian implications of a wholesale destruction of scientific norms and institutions', but to demand 'more truth'. The PI agrees this is the way forward. She also believes DISSECT will play a crucial role in both identifying the issues and proposing solutions as we take on this complex challenge.

4. IMPACT

DISSECT is an ambitious research project which sits at the frontier of knowledge. It will deliver an impact at six different levels. It will 1) clarify the 'messy' IHR evidentiary regime with benefit for the scholarly community and practitioners; 2) influence judicial practice through offering recommendations; 3) contribute to the development of IHR comparative studies; 4) further refine and articulate the PI's anthropologically-informed 'dissecting' method of case law analysis; 5) encourage a wider recognition and adoption of socio-legal research skills in law faculties; and 6) offer reflections and insights on how to handle factual uncertainty and approach truth in our 'alt-truth' political era.