

Aron Lingurar and others

APPLICANTS

v

Romania

RESPONDENT STATE

THIRD-PARTY INTERVENTION

I. Introduction

1. The European Roma Rights Centre (“ERRC”) submits these written comments in accordance with the permission to intervene granted by the President of the Chamber pursuant to Article 36 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).
2. This intervention addresses the positive obligation on States, under Article 14 of the Convention taken in conjunction with Article 3, to protect the rights of members of the Roma community against racially-motivated violence. The intervention focuses on the scale of anti-Roma violence in Europe and in Romania, with special attention to the vulnerable situation of the Roma community as well as to the procedural safeguards afforded by domestic criminal legislation. In order to assist the Court in summarising the intervention for inclusion in the judgment, the ERRC has prepared the following summary:

The ERRC urged the Court explicitly to acknowledge the phenomenon of anti-Gypsyism as underlying the problem of racist violence against Roma. The ERRC stressed that the definition of anti-Gypsyism encompasses institutional racism. The ERRC then set out the scope of the problem of racist violence against Roma in Europe. The ERRC relied on a widely-recognised definition of institutional racism (“*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin*”) and surveyed recent evidence that the national bodies in Romania responsible for protecting Roma against violence suffer from institutional racism. The ERRC urged the Court to integrate the notion of institutional anti-Gypsyism into its analysis of whether there has been a violation of Article 14 taken with the procedural limb of Article 2 or 3 in cases concerning violence against Roma. In addition to or instead of addressing the question of whether an investigation failed to unmask racist motives, the ERRC argued that the Court should ask whether an investigation into anti-Roma violence was ineffective due to institutional racism (i.e. due to a failure to provide an appropriate and professional service to Roma) and, if so, find a violation on that broader basis. The ERRC encouraged the Court to consider both the absence of appropriate mechanisms for monitoring hate crimes, and the implicit or explicit adoption of anti-Roma stereotypes by the authorities, when carrying out this exercise in relation to cases in Romania.

II. Anti-Gypsyism¹ and violence against Roma in Europe

3. There are approximately ten to twelve million Roma across Europe. As the Court has recognised in *D.H and Others v Czech Republic* (Grand Chamber, 2007) and in other judgments, the Roma are a particularly

¹ The ERRC recognises that not all Roma embrace the term “anti-Gypsyism”, which incorporates a word many consider a racist epithet. The ERRC nonetheless relies on the term, particularly in the light of its adoption by various Council of Europe bodies, as capturing the ideology we exist to combat

disadvantaged minority in Europe, requiring special protection. State authorities have a central role in providing sufficient and effective protection for Roma from racism.

4. The European Commission against Racism and Intolerance (ECRI) defines “anti-Gypsyism” as “*a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination*” (emphasis added).² Violence against Roma is an expression of the phenomenon of anti-Gypsyism. See *Vona v Hungary* (2013), Concurring Opinion of Judge Pinto de Albuquerque. The ERRC encourages the Court explicitly to acknowledge the phenomenon of anti-Gypsyism, and, like ECRI and the Committee of Ministers of the Council of Europe,³ to see anti-Roma violence as an expression of it.
5. As the Court will note, the definition of anti-Gypsyism given by ECRI includes “institutional racism”. The term has been defined in the United Kingdom as “*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin*”.⁴ In the ERRC’s view, institutional racism does not necessarily imply that individual members of affected institutions espouse a racist ideology. Institutional racism can be the unconscious by-product of a society where anti-Gypsyism is allowed to flourish, for example.
6. The Organization for Security and Cooperation in Europe (OSCE), in a report entitled “*Police and Roma and Sinti: Good Practices in Building Trust and Understanding*” underlined the increase of the anti-Roma feeling in Europe and particularly in the OSCE area.⁵ According to the report, “*Challenges faced by Roma and Sinti in their relations with the police range from ethnic profiling, disproportionate or excessive use of force by police against Roma to failure by the police to respond effectively to Roma victims of crime and racist violence*”. The report also emphasises the lack of trust in police and the need for police to invest more in building up the relations with Roma. The report concludes that the police need to improve their relationship with Roma and efficiently secure their rights.
7. In recent years, anti-Gypsyism has increased in Europe, evidenced in part by an increase in recorded instances of violence against Roma. A recent report⁶ by Amnesty International indicates that such violence is increasing alarmingly and calls upon authorities to investigate and condemn those who commit hate crimes. The report concentrates on the Czech Republic, France, and Greece, and explains in detail the attitude of State authorities and members of the public towards Roma. The report recommends that governments adopt measures in order to combat hate crimes.
8. The ERRC’s 2012 report⁷ about violence against Roma in the Czech Republic, Hungary, and Slovakia also shows a worrying pattern of anti-Roma attacks across the region. The ERRC recorded more than 120 attacks against Romani people and their property between 2008 and July 2012, including shootings, stabbings, and Molotov cocktails.
9. In recent years, the ERRC has also documented⁸ a number of violent police raids in Roma settlements (notably in Macedonia, Moldova, and Slovakia). These raids appear to be motivated by stereotypical views on Roma criminality and are visibly disproportionate given the circumstances.

² See General Policy Recommendation No.13, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n13/e-RPG%2013%20-%20A4.pdf.

³ Declaration of the Committee of Ministers on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe, 1 February 2012.

⁴ The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report): Chapter 6. February 1999. Available at <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry>.

⁵ The report can be found at <http://www.osce.org/odihr/67843?download=true>; see, especially, pages 15 and 20.

⁶ Amnesty International, “*We ask for Justice*”, *Europe’s Failure to Protect Roma from Racist Violence*, 2014, available at: <http://www.amnesty.org/en/library/asset/EUR01/007/2014/en/7c3cc69e-e84d-43de-a6a93732b4702dff/eur010072014en.pdf>.

⁷ *Attacks against Roma in Hungary, the Czech Republic and the Slovak Republic 2008-2012*, available at: <http://www.errc.org/article/attacks-against-roma-in-hungary-the-czech-republic-and-the-slovak-republic/3042>.

⁸ Descriptions of some of these cases can be found at <http://www.errc.org/article/domestic-cases-state-response-to-violence-and-hate-speech/4405>. See, in particular, the descriptions of cases in Topana (Macedonia) and Moldava-nad-Bodvou (Slovakia).

10. The EU Fundamental Rights Agency (“FRA”) carried out its European Union Minorities and Discrimination Survey (EU-MIDIS) in 2008.⁹ They asked 23,500 individuals with an ethnic-minority background about their experiences of discrimination and criminal victimisation in everyday life. According to the survey, 18% of all Roma respondents (like 18% of all sub-Saharan African respondents) reported being victims of at least one “in-person crime” (assault, threat or serious harassment) in the previous year which they thought was racially motivated in some way. Roma and sub-Saharan Africans are the groups most likely to experience in-person crime, and in some places they are four times more likely to be victims of such crime than the majority population.¹⁰ Roma and other minorities are also likely not to report in-person crimes: 69% of minorities did not report assaults or threats they had experienced and 84% did not report serious harassment. According to FRA, the lack of trust Roma have in the police resulting, for example, from excessive police stops of Roma and other minorities and disrespectful treatment, is responsible for this underreporting.¹¹ 72% of the respondents said that the reason for not reporting in-person crimes was not being “confident the police would be able to do anything”.¹² The lack of trust in the police was also emphasised in FRA’s 2010 report on “Police Stops and Minorities”¹³: “Every second minority victim of assault, threat or serious harassment said they did not report these incidents to the police because they were not confident the police would do anything about them.” The ERRC sees these data as evidence of the continued impact of anti-Gypsyism on Roma communities throughout Europe and as evidence of problems of institutional anti-Gypsyism that need to be addressed at European level. By the time the Court considers the present case, the results of the follow-up EU-MIDIS II survey, carried out by FRA in 2015, should be available¹⁴.

III. Anti-Gypsyism, and particularly institutional anti-Gypsyism, in Romania

11. Vâlcele, the village where the present case arose, belongs to an area on the border of Braşov and Covasna counties which comprises, within approximately 60 km, the ten villages with the most significant Roma populations in these two counties,¹⁵ including some where Roma constitute the largest ethnic group.¹⁶ This area has a recent history of serious violence against Roma: repeated police abuse in 2015 in Racoş,¹⁷ tensions in Racoş in 2011,¹⁸ an alleged lynching in 2014 in Apaţa,¹⁹ and ethnic tensions in Apaţa in 2007.²⁰
12. Such anti-Roma violence is best understood in the context of the well-documented and worrying prevalence of anti-Gypsyism in Romanian society, today and stretching back many years. Widespread anti-Roma attitudes, unfettered stigmatising public discourse, and the absence of a robust framework to combat anti-Roma violence contribute to the perpetuation of institutional racism in Romania.
13. Deeply entrenched anti-Roma attitudes can be vividly seen in the annual surveys carried out by the National Council for Combating Discrimination (NCCD): in 2005²¹ 61% of respondents thought that Roma were a source of shame for Romania, while 52% of respondents went further to say that Roma should not be allowed to travel outside the country. These attitudes have not improved much: in 2013²² 48% of respondents said that they did not want a Roma work colleague, 41% would not want a Roma neighbour,

⁹ The report is available at <http://fra.europa.eu/en/project/2011/eu-midis-european-union-minorities-and-discrimination-survey?tab=publications>.

¹⁰ See http://fra.europa.eu/sites/default/files/fra-2012-eu-midis-dif6_0.pdf.

¹¹ See http://fra.europa.eu/sites/default/files/fra_uploads/1132-EU-MIDIS-police.pdf.

¹² See http://fra.europa.eu/sites/default/files/fra_uploads/413-EU-MIDIS_ROMA_EN.pdf, page 9.

¹³ The report is available at <http://fra.europa.eu/en/publication/2010/police-stops-and-minorities-understanding-and-preventing-discriminatory-ethnic>.

¹⁴ See <http://fra.europa.eu/en/project/2015/eu-midis-ii-european-union-minorities-and-discrimination-survey>.

¹⁵ Augustin, Ormeniş, Măieruş, Târlungeni, Racoş (Braşov county); Vâlcele, Belin, Ojdula, Hăghig (Covasna county) http://www.adrcentru.ro/Document_Files/ADStudiiRegionale/00001720/i2hwp_Studiu%20regional%20comunitati%20defavorizate%20-%20romi.pdf.

¹⁶ See https://upload.wikimedia.org/wikipedia/commons/4/4c/Romania_harta_etnica_2011.PNG

¹⁷ See information available at <http://www.apador.org/en/raport-apador-ch-privind-abuzuri-ale-politiei-din-racos-judetul-brasov-asupra-cetatenilor-de-etnie-roma/>.

¹⁸ See information available at <http://www.evz.ro/cazul-racos-cine-are-dreptate-938122.html>.

¹⁹ See information available at <http://newsbv.ro/2014/03/09/tanar-rrom-omorat-in-bataie-la-apata-de-maghiari-printre-ei-si-fiul-primarului-interimar/>.

²⁰ See information available at <http://www.romanicriss.org/Prezentare%20cazul%20tensiuni%20interetnice%20Apatata%202007.pdf>.

²¹ The 2005 survey is available at <http://www.cncd.org.ro/publicatii/Sondaje-4/>; see page 37.

²² The 2013 survey is available at <http://www.cncd.org.ro/files/file/Sondaj%20de%20opinie%20CNCD%202013.pdf>; see page 33.

and 38% would not want any Roma in their municipality. Another official survey carried out in May and June 2015²³ found that 40% of respondents considered Roma to be a “problem” but not a “threat” for Romania, with 21% going as far as considering Roma a “threat”. A full 68% of respondents would not tolerate having Roma colleagues in the workplace or any closer relationship to Roma, such as having Roma as neighbours, friends, or family members.

14. In recent years, international monitoring bodies have expressed particular concern about the rise in anti-Roma rhetoric and racism in Romania. For instance, ECRI noted in its 2014 report²⁴ that *“Stigmatising statements against Roma are common in the political discourse, encounter little criticism and are echoed by the press, the audio-visual media and on the Internet. No effective mechanism is in place to sanction politicians and political parties which promote racism and discrimination.”*
15. Similarly, the UN Committee on the Elimination of Racial Discrimination (“CERD”) stated in its 2010 Concluding Observations on Romania that it was *“concerned at reports of the spread of racial stereotyping and hate speech aimed at persons belonging to minorities, particularly Roma, by certain publications, media outlets, political parties and certain politicians”*.²⁵ CERD also expressed its concern regarding *“the excessive use of force, ill-treatment and abuse of authority by police and law enforcement officers against persons belonging to minority groups, and Roma in particular,”* symptoms, in the ERRC’s view, of institutional anti-Gypsyism.
16. In its 2015 Concluding Observations on Romania,²⁶ the UN Committee against Torture also expressed its serious concern at *“(a) The persistence of reports of racist hate crimes against Roma; (b) The vulnerability of Roma suspects who are ‘administratively conveyed’ to police stations, by law enforcement officials, with increased risks of ill-treatment and torture; (c) The reported excessive use of force by law enforcement officials against Roma; (d) Instances of racist hate speech directed against Roma, and the high incidence of anti-Roma rhetoric and negative stereotypes in public and political discourse, by State and non-State actors”*. The Committee also concluded that the Romanian authorities should *“(a) Provide the Committee with information on the number of cases of violence by law enforcement officials that have been investigated, the number of perpetrators who have been prosecuted for acts of torture and ill-treatment and the penalties applied to those found guilty; [and] (e) Reiterate at the highest political level its commitment to zero tolerance of the use of violence against persons deprived of their liberty, including to elicit confessions”*.
17. This climate of impunity for hate speech, stigmatisation, and discrimination is compounded by the absence of a robust framework to address anti-Roma violence, in particular violence perpetrated by the police. Again, according to ECRI, as of 2014 *“No significant steps have been taken to ensure compliance with the principle of non-discrimination by the police”*.
18. According to the Romanian Government’s latest action plan submitted to the Committee of Ministers regarding the execution of the *Barbu Anghelescu* group of cases, the Romanian authorities’ efforts appear to concentrate on training and awareness-raising activities. At its 1164th meeting (5-7 March 2013),²⁷ the Committee of Ministers noted the following in its examination of the *Barbu Anghelescu* group of cases concerning ill-treatment inflicted by law enforcement officers, including racially-motivated ill-treatment:

Having regard to the available information on the incidence of ill-treatment by law enforcement services, the awareness-raising and training measures taken do not appear to have been capable of completely eradicating acts contrary to Articles

²³ Carried out by the National Institute for the Study of the Holocaust in Romania, and available at http://www.inshr-ew.ro/ro/files/proiecte/Sondaje/Sondaj_opinie-INSHR-iunie_2015.pdf.

²⁴ The report is available at <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Romania/ROM-CbC-IV-2014-019-ENG.pdf>; see page 10.

²⁵ The Concluding Observations are available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fROU%2fCO%2f16-19&Lang=en; see page 4, § 16.

²⁶ Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fROU%2fCO%2f2&Lang=en.

²⁷ See documents at http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=barbu+anghelescu&StateCode=&SectionCode=.

2 and 3. Additional measures, in the context of a policy of “zero-tolerance” of such acts, appear therefore necessary in respect of all law enforcement services.

...

As regards the effectiveness of criminal investigations, the analysis of recent judgments of the European Court and of the full statistical data provided by the authorities shows that progress still remains to be made. Indeed, no conviction for acts prohibited by Articles 2 and 3 was reported during the reference period (2003 – 2012).

19. The Committee of Ministers is also awaiting the authorities’ assessment of the practical impact of measures adopted to prevent and repress racist incidents.
20. The meagre impact of these efforts can nevertheless be inferred on the basis of the 2014 ECRI report: out of a total force of some 53,000 police officers, only 113 were Roma and only 936 had received appropriate human rights or anti-discrimination training.
21. According to data obtained by the NGO APADOR-CH²⁸ through freedom of information requests addressed to prosecutors’ offices and county police inspectorates, between 2012 and 2014 some 3,304 complaints for abusive conduct²⁹ were filed against police officers. Out of these, only 14 cases resulted in an indictment and four in a conviction, while two cases were still pending.
22. Vâlcele, the village where the present case arose is situated in Covasna county. The data for Covasna county shows 23 complaints against police officers, no indictments, and no convictions.
23. The lack of data on racially-motivated crimes is further evidence of the authorities’ failure to address anti-Roma hate crime diligently and systematically.
24. According to research by FRA, Romania appears to be the only EU Member State which does not keep any records on hate crimes.³⁰ ECRI also notes that “*No information has been provided as concerns the application of racist motivation as an aggravating factor, nor about the application of each criminal law provision against racism, broken down by the number of: opened investigations, cases referred to court, discontinued pre-trial investigations and convictions or acquittals per reference year. The authorities have acknowledged that there is no single institution mandated with the systematic collection of data on the breach of criminal law provisions against racism and that the information is therefore fragmented.*” It went on to recommend that “*The authorities should devise a comprehensive data-collection system on the application of criminal law provisions against racism and racial discrimination*”.
25. The Romanian authorities’ failure to collect data disaggregated by ethnicity is not limited to hate crimes. The UN Special Rapporteur on extreme poverty, Philip Alston, has said that the Romanian authorities are “in denial” as to anti-Roma discrimination and “confused” as to the collection of equality data. “*This confusion is compounded by a frequent, but inconsistent, assertion that the state cannot collect data on how people of Roma ethnicity are faring compared to non-Roma, whether in education, health, employment or housing. [...] But this interpretation is clearly mistaken, as well as being inconsistent with other official actions.*”³¹
26. The ERRC submits that the Romanian authorities’ failure to compile data on racially motivated crimes is a further symptom of institutional racism. Given widespread anti-Gypsyism in Romania, the failure to collect data on racially-motivated crime discloses the authorities’ lack of a serious and professional approach to Romani people’s need for protection; it also shows the lack of any systematic attempt to afford protection to victims or potential victims of racially motivated crime. See, mutatis mutandis, *E.B. v France* (Grand Chamber, 2008), § 74.
27. Ever since 2005 ECRI has strongly recommended that the Romanian authorities set up an independent mechanism for dealing with complaints against the police, to deal, inter alia, with issues of racial

²⁸ See <http://www.apador.org/sunt-abuzurile-politiei-descurajate-de-autoritati/>.

²⁹ Article 296 of the Criminal Code covering insults, threats and violence in the exercise of public authority.

³⁰ *Making Hate Crime Visible in the European Union: Acknowledging Victims’ Rights*, available at http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

³¹ End of Mission Statement, 11 November 2015, available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16737&LangID=E#sthash.n0qswsf.dpuf>.

discrimination. The call on Romania to “*establish an independent monitoring and oversight mechanism*” for ill-treatment and torture by the police was recently echoed by the UN Committee against Torture “*in order to avoid the investigation of complaints by peers*”³². The ERRC believes that the absence of such a mechanism is a serious obstacle to tackling institutional racism in Romania.

28. There is also little indication at present that the Romanian courts are well equipped to address anti-Roma violence in line with the Court’s case law. According to a 2015 study³³ published by the Romanian Superior Council of Magistracy, “*The judiciary does not seem to grasp the landscape of vulnerable groups in Romania. There is a wide diversity of opinions among Court stakeholders about who are vulnerable groups. However, the majority of Court respondents (62%) consider that people infected with HIV, Roma (60% of respondents), children (59% of respondents) and single mothers (55%) are not belonging to vulnerable categories*”. When it comes to Roma in particular, the study finds that “*The judiciary does not acknowledge discrimination faced by vulnerable groups particularly the Roma. Only a very small percentage of Court respondents consider that Roma are facing discrimination in various spheres of life. Most of the challenges faced by Roma are considered to stem from lack of identity documentation, land disputes and lack of registration. The apparent lack of awareness concerning discriminatory aspects of the legal system among court representatives, together with a lack of systematized data of the functioning of the legal system, constitute serious impediments to the equal functioning of the Romanian legal system particularly as regards vulnerable groups*”. The overall assessment is that “*Access to justice is not an individual level issue when addressing vulnerable groups. The rather overwhelming assertion among Courts and Central / local authorities and some Bar representatives that the problem of equal access to justice is more or less an individual problem, is disturbing. It points to a lack of awareness on central aspects of human rights: That it is the responsibility of the state and its authorities to provide human rights to its citizens, and that individual and group differences in equal access must be acknowledged and compensated proportionally with their respective disadvantage by public measures in line with the anti-discrimination legal framework and the case law of the European Court of Human Rights*”.

IV. The assessment of Article 14 in cases involving institutional anti-Gypsyism

a. The Framework for Assessing Breaches of Article 14

29. Roma applicants have had difficulty, when they were victims of a violation of Article 14 taken with the procedural limb of Article 3, of convincing the Court that they were also victims of a violation of Article 14 taken with the substantive limb of Article 3. The ERRC understands the Court’s logic. The Court requires an applicant alleging discrimination to demonstrate it “*beyond reasonable doubt*”. *Nachova and others v Bulgaria* (Grand Chamber, 2005), § 147. However, vulnerable victims alleging racially-motivated violence are particularly unlikely to discharge this burden of proof (especially where there is no evidence in the record of racist statements), when they are also victims of a failure on the part of the authorities to investigate what happened to them. The Court will appreciate the particular frustration for Roma victims of racist violence: the failure of the State to investigate the crime properly leaves them unable to establish a violation of Article 14 taken with the substantive limb of Article 3 if, for example, the impugned act was one of police brutality. See, e.g., *Nachova*, § 147. The ERRC has argued in the past that the Court should reconsider the way it applies the burden of proof in cases involving allegations by Roma that they have been victims of Article 14 taken with the substantive limb of Article 3. Without again labouring the point, we note here that we endorse the comments of Judges Gyulumyan and Power in *Carabulea v Romania* (2010), §§ 9-16. What follows focuses on the question of how to approach allegations by Roma that they have been victims of violations of Article 14 taken with the procedural limb of Article 3 in the presence of institutional racism.
30. Without naming it as such, the Court has frequently dealt with institutional racism affecting Roma (i.e. institutional anti-Gypsyism) in police and prosecutors’ offices. See, e.g., *Nachova and others v*

³² 2015 Concluding Observations, cited above.

³³ *Improving access to justice. An integrated approach with a focus on Roma and other vulnerable groups* (study within a project of the Romanian Superior Council of Magistracy and developed in collaboration with the Norwegian Courts Administration and the Council of Europe), available at http://www.csm1909.ro/csm/linkuri/26_01_2015_72130_ro.pdf.

Bulgaria (Grand Chamber, 2005) and *Šečić and others v Croatia* (2009). In these cases, the Court found violations of Article 14, taken with the procedural limb of Article 2 or Article 3, resulting from the failure to unmask the racist motives that appeared to lay behind violence against Roma.

31. Such a finding only considers part of the problem of institutional anti-Gypsyism. For example, in *Nachova*, the Court found, firstly, that there had been a failure adequately to investigate the deaths of two Romani men (a violation of the procedural limb of Article 2, taken on its own) (§§ 114-119). The Court then separately found a violation of Article 14 taken with the procedural limb of Article 2, because of the failure to investigate the racist motives behind the killings (§§ 162-168). This second finding was, in effect, a truism: it would be difficult to imagine an investigation into the death or ill-treatment of a Romani person that was ineffective in general (violation of the procedural limb of Article 2 taken on its own) yet effective in unmasking any racist motive. See also *Šečić and others v Croatia* (2009) (finding, first, a violation of the procedural limb of Article 3 and then, separately, a violation of Article 14 taken with the procedural limb of Article 3).

32. These difficulties are also illustrated in the recent case of *Ciorcan and others v Romania* (2015), §§ 114 and 126, where the authorities used grossly excessive force, without any indication of planning or urgency, in order to serve summonses on persons not known as dangerous or armed for the investigation of a minor crime (indeed, the summonses could have been served by post). The finding of an Article 14 violation also does not capture the truly discriminatory failings of the authorities:

163. *Whilst the planning of the operation and the State agents' conduct calls for serious criticism, the Court considers, however, that these elements are of themselves an insufficient basis for concluding that the treatment inflicted on Ms Ciorcan and the applicants was racially motivated. It has thus not been established beyond reasonable doubt that racist attitudes played a role in Ms Ciorcan's and the applicants' treatment by the State agents.*

164. *On the other hand, all the above-mentioned elements, seen against the background of the many published accounts of the existence in Romania of general prejudice and hostility against Roma and of continuing incidents of police abuse against members of this community (see paragraphs 76-81 above), called for verification. Indeed, the authorities were under the obligation to investigate a possible causal link between the alleged racist attitudes and the abuse suffered by Ms. Ciorcan and the applicants at the hands of the police (see B.S. v. Spain, no. 47159/08, § 60, 24 July 2012).*

33. The unanswered question is whether the failure to carry out an effective investigation (in general and into the racist motive in particular) was itself due to institutional racism. This question, the ERRC submits, should form part of the Court's analysis where there is evidence that a particularly vulnerable minority group is not receiving an appropriate level of service from the authorities responsible under the Convention for protecting them from violence.

34. The ERRC encourages the Court to view the question of Article 14 taken with the procedural limb of Article 3 from the perspective of institutional racism, and particularly institutional anti-Gypsyism. The question is not only whether there has been a failure properly to investigate racist motives, but also whether the overall failure to conduct the investigation properly was due to institutional racism. The Court was not called upon to answer this question in *Nachova*, *Šečić*, or *Ciorcan*, where the analysis was limited to the narrower question of whether the authorities had failed to unmask a racist motive when there were indications of a hate crime. The ERRC urges the Court to consider the larger question though where there is evidence of institutional racism, as in Romania. This approach to Article 14 taken with the procedural limb of Article 3 will more comprehensively deal with the problems of anti-Roma hate crime. In these circumstances, where there is evidence of institutional racism, Roma are also, under the Convention, entitled to a finding that the failures in the investigation generally are due to discrimination. This will provide recognition that institutional racism deprives Roma of access to the evidence with which they could prove, for example in a case of police brutality, a violation of Article 14 taken with the substantive limb of Article 3. Such a finding is more likely to ensure that the Court's judgments lead to the systemic changes at national level that make it unnecessary to take similar cases to Strasbourg in future.

35. The Court has already conducted similar exercises in uncovering institutional racism or sexism in police forces, in relation to the substantive limb of Articles 2 and 3. For example, in *Opuz v Turkey* (2009), the Court concluded "*that domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively*" (§ 196), also noting that "*the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence*" (§ 197). In other

words, the Court found institutional sexism in the Turkish institutions responsible for protecting women from gender-based violence.

36. Similarly, In *Stoica v Romania* (2008), the Court began its analysis of Article 14 taken together with the procedural limb of Article 3 “by looking into the alleged racial motives behind the conduct of the investigations” § 119. The Court did not find it necessary to conclude this analysis, as it found that there were racist motives behind the violence which were not properly investigated. Indeed, it went on to find a violation of Article 14 taken together with both the substantive and the procedural limbs of Article 3.
37. There are at least two indicators of institutional anti-Gypsyism to which the Court should be attentive: a lack of appropriate institutional arrangements for protecting Roma, such as a lack of training or appropriate records and data; and evidence of the adoption of negative stereotypes about the behaviour or credibility of Romani complainants.

b. Institutional Racism in Romania: Absence of Appropriate Institutional Arrangements

38. The Court has indicated specific elements of what an effective investigation into police brutality against ethnic minorities such as Roma should entail. In particular, there should be a focus on the individual record of the police officers involved and whether or not there have been previous complaints against them for discriminatory treatment (see *Nachova and Cobzaru v Romania* (2007)). Such steps, of course, require more than the diligence of the investigators in any particular case; they call for institutional arrangements, in particular for collecting, storing, and analysing complaints about the racist conduct of police officers. The absence of such institutional arrangements, in an environment where anti-Gypsyism is prevalent in general and anti-Roma police brutality appears common, amounts to a failure to provide an adequate service to Roma (i.e. institutional anti-Gypsyism). As discussed above, Romania is an outlier among EU Member States in its failure to collect data on racially motivated crime in general and discriminatory police misconduct in particular.
39. The treatment of racist motivation under Romanian criminal law as an aggravating circumstance,³⁴ mostly taken into account at the sentencing stage, rather than as an element of the crime (*formă calificată a infracțiunii*), further contributes to obscuring the prevalence of racially motivated crimes.³⁵
40. The Romanian Government has made a limited promise to collect data on convictions disaggregated by the hateful motive that constitutes the aggravating circumstance in its comments on the report of the Council of Europe Commissioner for Human Rights.³⁶ There is no indication that such data has become available. However, given the overall small number of convictions for police brutality (four convictions out of 3,304 complaints), data on convictions alone is unlikely to foster more effective investigations into possible racist motivations. Data on allegations of racist motivation at the complaint stage would be far more useful in this respect, as indicated by the Court in *Nachova*.
41. The current crime-enhancement approach under domestic law in Romania leads to a lack of records of complaints or allegations of hate crimes. There is, as a result, a risk that patterns of racist violence will not be brought to the attention of the prosecutor when (s)he examines individual cases. See, *mutatis mutandis*, *Milanović v Serbia* (2010), § 89, in which the Court found that the authorities had failed in their obligation to identify a pattern of violence. In Romania, a mere finding that the investigation failed to unmask racist motives does not cover the extent of the violations of which Roma are victims. It may also be appropriate to find that the failures in the investigation overall were due to institutional failings to serve Roma – a wider finding of a violation of Article 14 taken with the procedural limb of Article 3.
42. The prevalence of negative attitudes towards Roma and the accompanying climate of impunity is conducive of racially-motivated violence. Surveys point to the extent of such violence. Yet despite repeated

³⁴ Article 77(h) of the Criminal Code.

³⁵ See *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights*, available at http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf.

³⁶ See <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2563666&SecMode=1&DocId=2164674&Usage=2>, page 3.

international recommendations and some promises, official data is absent. The lack of official data, particularly on complaints alleging racist violence, is at the heart of the Romanian authorities' failure to address such violence systematically through appropriate policy tools. The ERRC considers that the authorities' failure to take appropriate structural measures, such as collecting data or establishing an independent complaint mechanism (that would also centralise such data) discloses institutional racism. The Court may also wish to also consider these issues in light of Article 46 of the Convention.

c. Institutional Racism in Romania: Discriminatory Attitudes Among Investigative Authorities

43. A racially-motivated failure to investigate properly may also become apparent based on the adoption of explicit or implicit racial stereotypes by the authorities.
44. The Court has already dealt with such cases: in *Cobzaru v Romania* (2007), it relied on the fact that “the prosecutors made tendentious remarks in relation to the applicant’s Roma origin throughout the investigation” § 98. (It also noted that the applicant had not alleged any racist motivation of the violence before the domestic courts.) In *Moldovan and others (no 2) v Romania* (2005), the Court was precluded from looking into any racial motivation of the original violence as it was “not competent *ratione temporis* to examine under the Convention the actual burning of the applicants’ houses and the killing of some of their relatives” (§ 139). However, it observed “that the applicants’ Roma ethnicity appears to have been decisive for the length and the result of the domestic proceedings, after the entry into force of the Convention in respect of Romania” (§ 139).
45. The Court has for a long time acknowledged anti-Roma stereotypes more or less explicitly, noting for instance in *Stoica v Romania* (2008), § 122 that a police officer’s remarks labelling aggressive behaviour as “purely Gypsy” were “clearly stereotypical”, and finding a violation of Article 14 taken together with Article 3.
46. Similarly in *V.C. v Slovakia* (2011), §§ 115 and 146, Court noted “widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits”; likewise, “the reference in the record to the applicant’s ethnic origin without further details being given indicates, in the view of the Court, a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed” (emphasis added).
47. The ERRC submits that a focus on racial stereotyping is necessary to determine whether a failure to investigate police brutality stemmed from institutional racism and, so, whether there has been a violation of Article 14 on that broader basis.
48. Stereotyping³⁷ may influence a judge’s views on witness credibility³⁸ or the assessment of the factual situation (e.g. the justification of a planned police operation, the danger in which policemen found themselves at a given moment, etc.).
49. A 2010 report published by the Council of Europe Commissioner for Human Rights notes “an absence of respect for Roma as witnesses”³⁹. ECRI concurs, stating: “However, it is also necessary to ensure that the police behave in a professional and impartial manner when dealing with offences that are not racially-motivated and still involve members of minority groups as victims, perpetrators, witnesses, etc. ECRI’s country monitoring reports indicate that prejudice on the basis of race, colour, language, religion,

³⁷ Alexandra Timmer, *Judging stereotypes: what the European Court of Human Rights can borrow from American and Canadian equal protection law*, American Journal of Comparative Law Winter, 2015 63 Am. J. Comp. L. 239. This article is available through paid databases to which the Court may have access; if the Court wishes to read it, and does not have access to it through such a database, the ERRC undertakes to request permission from the publisher to provide the article to the Court.

³⁸ See, mutatis mutandis, Simone Cusack, *Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases*, June 2014, available at https://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/judicial_stereotyping2014.pdf.

³⁹ Human rights of Roma and Travellers in Europe, page 15, available at https://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

nationality or national or ethnic origin also affects the way in which the police deal with members of minority groups in the context of these offences. For instance, members of minority groups are more easily believed to be the perpetrators of specific offences. Conversely, the police may be less likely to trust members of minority groups who are witnesses or victims of ordinary crime” (emphasis added).⁴⁰ These findings about the police are applicable *mutatis mutandis* at every stage of the investigation.

50. The Court itself has already relied on racially-biased witness appraisal by the domestic courts in order to find a violation of Article 14 taken together with the procedural limb of Article 3: “*Moreover, it finds problematic the fact that only the villagers, mainly Roma, were considered to be biased in their statements during the criminal investigations, while the police officers’ statements were integrated into the military prosecutor’s reasoning and conclusion*” (Stoica, §121).
51. Stereotyping may also corrupt the appraisal of the factual circumstances under investigation. There is ample work on gender stereotyping⁴¹ in particular in relation to the investigation of rape allegations.⁴² See, e.g., *M.C. v Bulgaria* (2003).
52. Racial stereotyping of Roma is likely to play the same role, particularly in a context of widespread anti-Roma sentiment. The police may be motivated by stereotypical views of “Roma criminality” in their choice of investigative priorities and by notions of “Roma violence” in choosing the means to intervene in a Roma neighbourhood, just as those stereotypes may affect a judge reviewing a complaint stemming out of the intervention.
53. The Court referred obliquely to this type of racial stereotyping in *Ciorcan*, §66, noting Prosecutor A.A.’s statement that “*I consider that it was the strange reaction that Roma people have on seeing police cars or policemen that led to the clash that day*” and describing this statement as one of the factors that should have determined the domestic courts to vigorously look for a racial motivation of the violence.
54. While it is not the role of the Court to substitute its appraisal of the factual situation to that of the domestic courts, it must nevertheless stay alert to racial stereotyping at the domestic level, which would indicate institutional racism warranting a finding of an Article 14 violation. See, *mutatis mutandis*, *Baczkowski and others v Poland* (2007), § 97.
55. The Court has been encouraged in academic writing to name and contest harmful stereotyping.⁴³ In relation to judicial stereotyping stemming from the domestic level, this would entail capturing the content of the stereotype, characterising it as a stereotype, and spelling out its harmful effect on the protection of Convention rights. This would enhance judicial dialogue and facilitate the application of the Court’s case law at the domestic level, thus preventing recurring violations.
56. In conclusion, the ERRC invites the Court to espouse the concept of institutional racism explicitly when looking at allegations of a violation of Article 14 taken together with the procedural limb of Article 3, and, in so doing, to look at the broader question of whether the lack of an effective investigation was due to institutional racism. Furthermore, in a context of pervasive anti-Roma attitudes, the Court may find it useful, on the one hand, to look for inadequate institutional arrangements for the vigorous investigation of racially-motivated violence, and, on the other, to identify and expose any racial stereotyping in the conduct of the investigation itself.

The European Roma Rights Centre
14 December 2015

⁴⁰ General policy recommendation no.11 on combating racism and racial discrimination in policing.

⁴¹ See above, note 37.

⁴² See, for example, Corina Heri, blog (9 June 2015) available at <http://strasbourgothers.com/2015/06/09/the-courts-approach-in-y-v-slovenia-annotated/#more-2885>.

⁴³ See above, note 37.