

Alković and others

APPLICANTS

v

Montenegro

RESPONDENT STATE

THIRD-PARTY INTERVENTION**I. Introduction**

1. The European Roma Rights Centre (“the 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 Articles 3 and/or 8, to protect the rights of members of the Roma community against racially-motivated violence or harassment, with a particular emphasis on Roma who are targeted not merely on the basis of their ethnicity, but also on the basis of other characteristics, such as belonging to a minority religious group. 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 and harassment against Roma. The ERRC stressed that the definition of anti-Gypsyism encompasses institutional racism. 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*”. The ERRC then set out the scope of the problem of racist violence against Roma in Europe. The ERRC went on to describe the particular situation of Roma in South East Europe in general and in Montenegro in particular. The ERRC stressed the widespread nature of negative attitudes towards Roma in Montenegro, which were much more common than such attitudes in neighbouring Serbia, for example. The ERRC set out the evidence concerning the situation of Roma Muslims in South East Europe, including their historical presence in the region and negative attitudes towards them. The ERRC then urged the Court to integrate the notion of institutional racism into its analysis of whether there has been a violation of Article 14 taken with other provisions of the Convention where there are allegations of failures to protect Roma from violence or harassment, or to investigate acts of violence or harassment adequately. In addition to or instead of addressing the question of whether protection was adequate in an individual case or whether an investigation failed to unmask racist motives, the ERRC urged the Court to examine whether protection of Roma or an investigation into anti-Roma violence or harassment 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 noted the absence of appropriate procedural and institutional arrangements in Montenegro for responding to violence and harassment against minorities. The ERRC expressed its view that those arrangements, and particularly the unduly burdensome procedures for victims to report and substantiate hate crimes, amounted to institutional racism in Montenegro. The ERRC finished its intervention by urging the Court to expand its approach to intersectional forms of discrimination, an approach which the Court began to develop in *B.S. v Spain* (2012), § 71. When dealing, for example, with the authorities’ approach to harassment of Roma Muslims, the Court should examine whether the authorities took into account the complex situation of exclusion they face, instead of separately examining whether the people concerned were victims of discrimination based on religion and/or race.

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 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 most precisely 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 2010 report entitled “*Police and Roma and Sinti: Good Practices in Building Trust and Understanding*” underlined the increase of the anti-Roma feeling 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 relations with Roma. The report concludes that the police need to improve their relationship with Roma and more effectively secure their rights.
7. In the years since then, anti-Gypsyism has increased in Europe, evidenced in part by an increase in recorded instances of violence against Roma. A 2014 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 officials 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 showed 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.

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.

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. 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. According to 72% of the respondents, their reason for not reporting in-person crimes was not being “*confident the police would be able to do anything*”.¹⁰ The lack of trust in the police was also emphasised in FRA’s 2010 report on “Police Stops and Minorities”¹¹: “*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 available.¹²

11. The impact of institutional racism is already overwhelmingly recognised by those called upon to tackle it. According to a recent survey of professionals, mostly police officers, prosecutors and judges, carried out by the FRA, three quarters believe that victims of hate crime

*are discouraged from reporting because they do not believe that the police would treat them in a sympathetic and non-discriminatory manner. Accordingly, four out of five interviewed professionals believe that it is necessary to enhance victims’ trust in the police; and three fourths of interviewees view as necessary measures that tackle discriminatory attitudes within the police. [...] About two thirds of all interviewees believe that the police and judiciary need to take hate crime more seriously. This finding per se raises concerns. Interviewees indicated that two factors underlie this assessment: first, a lack of profound understanding of the legal concepts and categories that define the phenomenon of hate crime; and, second, a lack of commitment to identify, prosecute and impose sentences for hate crime.*¹³

III. The Particular Position of Muslim Roma in South East Europe

a. Roma in South East Europe and Montenegro in Particular

12. The Court has usually been called upon to deal with cases concerning the violations of rights of Roma in countries that are now Member States of the European Union. In the ERRC’s view – based on our two decades of experience – the absence of cases from those countries in South East Europe which are still outside the EU by no means reflects a more positive situation for Roma there. The ERRC and other human rights organisations have documented the scale of anti-Gypsyism in the region, and it is rife.

13. In recent years, the ERRC has exposed and challenged segregation of Romani pupils in state schools in Albania and Serbia, as well as racial profiling of Macedonian citizens by border guards of their own country, determined to stop them from travelling abroad. Other negative practices targeting Roma communities in these countries include instances of police abuse, forced evictions, and racist attacks. The ERRC is supporting numerous victims of hate crimes – including victims of police brutality – to challenge the failure of the authorities to deal with their cases in accordance with the standards the Court has prescribed in its case law. The Court will find extensive information about this work on the ERRC’s website (www.errc.org).

14. The ERRC regularly documents the failures of all of the countries in the region which are candidates for EU Membership to respect their commitments towards Roma rights and inclusion in submissions to the European

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_uploads/413-EU-MIDIS_ROMA_EN.pdf, page 9.

¹¹ The report is available at <http://fra.europa.eu/en/publication/2010/police-stops-and-minorities-understanding-and-preventing-discriminatory-ethnic>.

¹² See <http://fra.europa.eu/en/project/2015/eu-midis-ii-european-union-minorities-and-discrimination-survey>.

¹³ EU Fundamental Rights Agency, *Ensuring justice for hate crime victims: professional perspectives* (April 2016) available at: <http://fra.europa.eu/en/publication/2016/ensuring-justice-hate-crime-victims-professional-perspectives>.

Commission, for review as part of the Commission's "progress report" process. Those progress reports document the work yet to be done to ensure full compliance in these countries with the rights of Roma.¹⁴

15. According to Montenegrin census data from 2011, 6,251 individuals indicated that they were Roma, and 2,054 persons that they were Egyptian.¹⁵ The Council of Europe estimates that there are 20,000 Roma, including Egyptians, in Montenegro.¹⁶ The socio-economic situation of Roma and Egyptians in Montenegro is difficult. As the Strategy for Improving the Situation of Roma and Egyptians in Montenegro 2012-2016¹⁷ states, *"Unlike other national and ethnic communities, who are involved in the modern developments of the Montenegrin society, Roma and Egyptians are the most vulnerable and marginalized minority ethnic communities in Montenegro. Low economic power, low level of education, very few employees, inadequate housing conditions, social rejection followed by ethnic stereotypes and prejudices, a specific life-styles and other characteristics, are some of the causes of their difficult position in society"*.
16. According to an opinion poll conducted in April 2010¹⁸ by the Centre for Democracy and Human Rights in Montenegro, the majority of respondents (55.9 %) considered that being Roma in Montenegrin society means being somehow disadvantaged, and only 9.9% considered that being Roma had some advantages. Further research¹⁹ on discrimination of members of minority and marginalised groups in Montenegro in 2013 showed that Roma are viewed as suffering the most discrimination in the country, as compared to older people, national minorities, homosexuals, women, and persons with disabilities. Overall, 64.8% of the respondents considered it hard to be Roma in Montenegro. The research showed that 27% of the respondents would not like to have a Romani neighbour. This "social distance" towards Roma is present in other fields of life as well: having a Roma work colleague is undesirable for 31.8% of respondents, having a Romani boss is undesirable for 43.5%, and having a Romani friend is undesirable for 42.8%. The situation is better in neighbouring Serbia: there, having a Roma work colleague is undesirable for 11% of respondents, having a Romani boss is undesirable for 20%, and having a Romani friend is undesirable for 20%; and only 14% of Serbs would not like to have a Romani neighbour.²⁰ Likewise, whereas 21% of Montenegrins would like there to be no Roma in their country, only 6% of Serbs share that view. The same 2013 research in Montenegro also showed that Roma did not enjoy equal treatment when accessing services compared to non-Roma and members of other minority groups. According to the respondents, Roma do not enjoy equal employment opportunities (76.8% of respondents), are not treated equally when accessing health services (45.4%), and have less access to education (52.7%) and justice (39.2%). Lastly, the majority of the respondents considered that the State and its institutions are the main bodies that discriminate against members of minority groups in Montenegro.
17. Both the UN Committee against Torture²¹ and the UN Committee on the Elimination of Racial Discrimination²² noted in 2014 the discriminatory treatment Roma suffer in Montenegro.

b. Muslim Roma in South East Europe

18. Despite widespread recognition of anti-Gypsyism in Europe, and of Islamophobia in Europe,²³ and despite a relatively large population of Muslim Roma in Europe, there is little recognition or exploration of the particular vulnerabilities of Muslim Roma.

¹⁴ See, e.g., Communication from the Commission to the European Parliament, the Council, the Social Committee and the Committee of the Regions, Montenegro 2015 Report, available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_montenegro.pdf.

¹⁵ Although Egyptians do not consider themselves Roma, the ERRC's mission extends to promoting the rights of this group, who are also targeted by anti-Gypsyism.

¹⁶ Council of Europe, *Estimates and official numbers of Roma in Europe* (2012) available for download at: <http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680088ea9>.

¹⁷ The Strategy is available at http://www.romadecade.org/cms/upload/file/9310_file2_strategy-for-improving-the-position-of-roma-and-egyptia.pdf.

¹⁸ The report is available at <http://www.cedem.me/programi/istrazivanja/ostala-istrazivanja/send/31-ostala-istrazivanja/840-istraivanje-o-diskriminaciji-u-crnjoj-gori-april-2010>.

¹⁹ Ethnic Distance in Montenegro, Empiric study, Center for Empiric Studies, December 2013, <http://www.cedem.me/publikacije/studije-i-javne-politike/send/69-studije-i-javne-politike/720-etnika-distanca-2013>.

²⁰ UNDP, *Public Perceptions of Discrimination in Serbia* (December 2013), available at http://www.undp.org/content/dam/serbia/Publications%20and%20reports/English/UNDP_SRB_AD%20survey_2013.pdf.

²¹ Committee against Torture, *Concluding Observations on the second periodic report of Montenegro* (2014) § 22, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/054/80/PDF/G1405480.pdf?OpenElement>.

²² Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined second and third periodic reports of Montenegro* (March 2014), available to download at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiqQvsN5V%2bwfWBiLtk9c7qWr8dvvJcLJlb9qvgvYci0gmnMUb1q54gwoX4iA2xMBjexz0ZpwwAXzyWo1WPXLXjG84eFv29w2cozUlvC7%2b76v>.

²³ YouGov, *Roma people and Muslims are the least tolerated minorities in Europe* (2015) available at <https://yougov.co.uk/news/2015/06/05/European-attitudes-minorities>.

19. Many Roma living in South East Europe (Albania, Bosnia and Herzegovina, Bulgaria, Kosovo, Macedonia, Montenegro, and Serbia) are Muslim. Based on language, ethnicity and religion information in census data, their number has been estimated at 290,000.²⁴ As with all census data on Roma, this is likely to underestimate their total number. Although it is not possible to say precisely, the ERRC conservatively estimates that there are at least 500,000 Muslim Roma in the region.

Country	Roma (official data)	Roma (Council of Europe estimate)	Roma Muslims ²⁵
Bulgaria	325,343	750,000	120,000
Serbia	108,193	600,000	30,000
Macedonia	53,879	197,000	50,000
Bosnia and Herzegovina	8,864	58,000	5,000
Albania	1,261	115,000	40,000
Kosovo	45,745	37,500	40,000
Montenegro	8,305	20,000	5,000
Total	551,590	1,777,500	290,000

20. Some Muslim Roma arrived in the region with Ottoman rule in the fifteenth century; others converted from Christianity to Islam during Ottoman rule. Muslim Roma are often referred to as “Turkish Gypsies” by the majority of the population. The use of the terms “Turkish” and “Muslim” in relation to Roma are indeed often interchangeable; this appears to be evidence of a kind of slippage between religious, ethnic, and even linguistic identity, as some, but not all, Muslim Roma in the region speak Turkish.²⁶

21. The nationalist discourse in the region often assumes that non-Turkish Muslims, including Roma, have undergone only a partial or superficial conversion to Islam.²⁷ The myths surrounding their islamisation and the debates on the relationship between Islam and national identity force many Balkan Muslims, including Roma, continuously to justify their presence in Europe.²⁸

22. Historically, with the advent of the post-Ottoman states, national minorities were not recognised in the region. Many Roma were considered to belong to the wider Muslim religious minority, facing the same pressure to convert or leave. The subsequent strengthening of national state identities, particularly in Bulgaria, has led to more favourable treatment for Slavic Muslims than for Roma and Turkish Muslims.²⁹

23. At the same time, in societies which were not ethnically homogenous, such as Macedonia or Kosovo, Roma Muslims often found themselves caught between the assimilationist pressure of the Albanian community, the most numerous Muslim group, and those of the Serbian or Macedonian state authorities.³⁰ A similar dynamic occurred in Bulgaria where some Muslim Roma assimilated within the Turkish minority, who still enjoyed higher social prestige despite facing the same discrimination on religious grounds and additional resentment over Ottoman rule.³¹

24. The particular vulnerabilities of Muslim Roma in the region have not been fully explored. The most extensive study of which the ERRC is aware was done by the Islamic Human Rights Commission in 2010: *Europe’s Shame: The Plight of the Roma Muslims in Bulgaria*.³² The report provides details about how Muslim Roma in Bulgaria face a set of distinct challenges, intensifying the social exclusion that all Roma in the country

²⁴ Nathalie Clayer and Xavier Bougarel, *Les Musulmans de l’Europe du Sud-Est* (Karthala et IISMM, 2013), 19.

²⁵ Ibid.

²⁶ See David Crowe, *Muslim Roma in the Balkans*, Nationalities Papers, Vol. 28, Issue 1 (2000); Elena Marushiakova & Veselin Popov, University of Graz, “Roma Muslims in the Balkans”, *Factsheets on Roma*, available at <http://romafacts.uni-graz.at/index.php/culture/introduction/roma-muslims-in-the-balkans>.

²⁷ *Les Musulmans de l’Europe du Sud-Est*, 54.

²⁸ Ibid., 276.

²⁹ Ibid., 39 and 114.

³⁰ Ibid., 178-179.

³¹ *Roma Muslims in the Balkans*.

³² The full report can be downloaded from <http://www.ihrc.org.uk/publications/reports/7905-forthcoming-q-europes-shame-anti-muslim-hatred-and-the-roma-of-bulgaria-q> (last accessed on 15 May 2016).

face. The Muslims who remain in Bulgaria have survived multiple historical pressures to assimilate, including, for example, a campaign in the 1970s forcing them to abandon their Turkish-sounding surnames in favour of Christian-Slavic names, and a wave of conversions after the end of Communism.

IV. The assessment of Article 14 in cases involving institutional anti-Gypsyism, and particularly cases of intersectional discrimination

a. The Framework for Assessing Breaches of Article 14

25. While the present case has been communicated under Article 8 taken with Article 14, the ERRC expects that by the very nature of the case, the Court's analysis will closely follow that applicable to cases falling under Article 3 taken with Article 14 of the Convention. See *mutatis mutandis R.B. v Hungary*, (2016), §§ 78-79.
26. Romani 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 Romani victims of racist violence: the failure of the authorities 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, or similar principles under Article 8.
27. Without naming it as such, the Court has frequently dealt with institutional racism affecting Roma in police and prosecutors' offices. See, e.g., *Nachova and others v 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.
28. Such a finding only considers part of the problem of institutional racism. 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).
29. 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 purpose of investigating of a minor offence (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).

30. 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. There is strong evidence that this is the case: the FRA report on professional perspectives on hate crime finds that three quarters of those surveyed, mainly police officers, prosecutors and judges, believe that investigative authorities discriminate against victims of hate crimes.³³
31. The ERRC encourages the Court to view the question of Article 14 taken with the procedural limb of Article 3 (or similar principles under Article 8) from the perspective of institutional racism. 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. 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. 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 the future.
32. In order to uncover institutional racism the Court may consider both a quantitative approach, looking at data ranging from anti-Roma attitudes to statistics on the handling of hate crimes, and a qualitative approach, by closely scrutinising the investigative authorities' output for any anti-Roma stereotypes.
33. 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.
34. 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.

b. The Role of Stereotypes in Assessing Institutional Racism

35. A racially-motivated failure to investigate properly may also become apparent based on the adoption of explicit or implicit racial stereotypes by the authorities.
36. 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).
37. 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. Similarly in *V.C. v Slovakia* (2011), §§ 115 and 146, the Court noted "*widespread negative attitudes towards the*

³³ See Fundamental Rights Agency, Ensuring justice for victims of hate crime (2016) (cited above).

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).

38. 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.
39. Stereotyping may influence a judge’s views on witness credibility³⁴ or the assessment of the factual situation. A 2010 report published by the Council of Europe Commissioner for Human Rights notes “an absence of respect for Roma as witnesses”.³⁵ ECRI concurs, stating: “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, nationality 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).³⁶ These findings about the police are applicable *mutatis mutandis* at every stage of the investigation.
40. 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).
41. Stereotyping may also corrupt the appraisal of the factual circumstances under investigation. There is ample work on gender stereotyping³⁷ in particular in relation to the investigation of rape allegations.³⁸
42. While it is not the role of the Court to substitute its appraisal of the factual situation for 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*, *Baczowski and others v Poland* (2007), § 97.
43. The Court has been encouraged in academic writing to name and contest harmful stereotyping.³⁹ 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.

c. Institutional Racism in Montenegro: Absence of Appropriate Procedural and Institutional Arrangements

44. Bias motivation was introduced as an aggravating circumstance in Montenegrin criminal law only in 2013.⁴⁰ There is no indication that this has made any difference in practice. According to the OSCE, data on hate crimes, including complaints, prosecutions and sentencing, are recorded by the police and prosecutors but

³⁴ 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.

³⁵ 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.

³⁶ ECRI, General policy recommendation no.11 on combating racism and racial discrimination in policing.

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.

³⁸ See, for example, Corina Heri, blog (9 June 2015) available at <http://strasbourgobservers.com/2015/06/09/the-courts-approach-in-y-v-slovenia-annotated/#more-2885>.

³⁹ *Judging stereotypes*.

⁴⁰ Article 42a of the Criminal Code introduced by Law 40/2013-59.

have not been made available between 2009-2014. The only available information is that there have been no sentences handed down in 2014, according to the annual report of the Supreme Court.⁴¹

45. More worryingly, the UN Committee on the Elimination of Racial Discrimination noted that as late as 2013 “*very serious cases of incitement to racial hatred are treated as misdemeanours and that they seldom result in convictions*”.⁴² The practice had been criticised by ECRJ as far back as 2008. There are indications that the mischaracterisation of hate crimes as misdemeanours has endured after the amendment of the criminal code and the accompanying training push by Montenegrin authorities. See *mutatis mutandis* the findings of the Council of Europe Commissioner for Human Rights, who noted in 2014 his concern that “*recent violent attacks against LGBTI persons were investigated only as misdemeanour offences, whereas there was apparently evidence of more serious criminal offences, including hate crimes*”.⁴³
46. The misdemeanour classification is emblematic of a lack of commitment within the system, which is recognised as a major impediment to tackling hate crimes.⁴⁴ It may result in lower priority or handling by insufficiently trained officers, thus precluding the vigorous investigation required by the Court’s case law. See *mutatis mutandis Milić and Nikezić v Montenegro* (2015), § 99.
47. FRA emphasises the need for specialised police units that proactively reach out to victims of hate crime and ensure that victims who report incidents are treated in a sympathetic and non-discriminatory manner; FRA also highlights the crucial importance of lowering the reporting threshold.⁴⁵ Likewise, the ERRC submits that apparently neutral yet unduly burdensome procedures for victims to report and substantiate hate crimes and for police to investigate them as such are a form of institutional discrimination against the same vulnerable categories who are likely to be victims of hate crime in the first place. See, *mutatis mutandis, Borbála Kiss v Hungary* (2012), § 26.
48. The prevalence of negative attitudes towards Roma and the lack of commitment are at the heart of the Montenegrin authorities’ failure to address hate crime. The ERRC considers that the authorities’ failure to implement appropriate legal and policy measures discloses institutional racism.

d. Article 14 and Cases of Intersectional Discrimination

49. The Court has only rarely been invited to deal with the notion of intersectional discrimination under Article 14. See *B.S. v Spain* (2012), § 71 (“*les décisions rendues en l’espèce par les juridictions internes n’ont pas pris en considération la vulnérabilité spécifique de la requérante, inhérente à sa qualité de femme africaine exerçant la prostitution*”). The term “intersectional discrimination” describes human rights violations which occur on the basis of multiple grounds (for example gender and ethnicity), and where these grounds do not merely add to each other, but interact to create a complex dynamic of exclusion. The Court has of course dealt with other cases where such a complex dynamic of exclusion appears to have been at play. See, e.g., *Opuz v Turkey* (2009), § 194.
50. The notion of intersectional discrimination has existed in academic literature for decades. Related concepts exist in the legislation of some Member States of the Council of Europe. Notably, section 14 of the Equality Act 2010 in the United Kingdom prohibits “combined discrimination” based on “dual characteristics”. Under that legislation, a person can show she has been a victim of discrimination if “*because of a combination of two relevant protected characteristics*”, such as race or ethnicity, on the one hand, and religion, on the other. Notably, in such cases, the victim “*need not show that [the less favourable treatment amounts to] direct discrimination because of each of the characteristics in the combination (taken separately)*”.
51. The essence of this analysis – like the Court’s analysis in *B.S. v Spain* (2012), § 71 – is on the individual experience of victims of intersectional discrimination, not a separate demonstration that those victims have experienced discrimination on each ground. The ERRC urges the Court, when faced with cases of

⁴¹ For more information, visit <http://hatecrime.osce.org/montenegro>.

⁴² UN CERD, *Concluding Observations on Montenegro* (13 March 2014), §8, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsiqQvsN5V%2BwfWBilqk9c7qWr8dvvJcLJlb9gvyYciOgmnUmUb1g54gwoX4iA2xMBjxez0ZpwqAXzyWo1WPXLXjFk3IFdAOdeDKVp9Vfh%2FCwu>.

⁴³ Commissioner for Human Rights of the Council of Europe, *Report following his visit to Montenegro from 17 to 20 March 2014*, § 80, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2562940&SecMode=1&DocId=2156564&Usage=2>

⁴⁴ Fundamental Rights Agency, *Ensuring justice for victims of hate crime* (2016)

⁴⁵ *ibid.*

discrimination based on more than one ground protected by Article 14 or Protocol 12, to consider the experience of the victim as a whole, and the particular vulnerabilities involved. Looking at discrimination based on only one individual ground, or on different grounds but separately, particularly in a classic comparator analysis, might result in findings of discrimination in some cases; but ultimately it will send the message to Respondent States that they do not need to guarantee protection tailored to the needs of specific individuals facing complex forms of exclusion. Such an analysis is also unlikely to lead to the introduction of the practices and policies necessary to ensure that similar violations do not take place in the future.

52. Romani and other victims of intersectional discrimination face a unique set of pressures. They may face discrimination within one or both minority groups to which they belong, as minorities within a minority. In particular, their status as a member of multiple minority groups may prevent them from seeking protection or being able to articulate their protection needs. Furthermore, as described above, Romani Muslims have historically faced significant and often conflicting pressures to assimilate within a larger religious or ethnic group. Failure to recognise and protect their multifaceted identity carries the risk of erasing it.
53. When dealing with the authorities, Roma who suffer discrimination solely on the basis of ethnicity may (although not always will) be able to rely on other characteristics – such as the fact of being male, Christian, heterosexual, able-bodied – to secure a response that conforms to the requirements of the Court’s case law. Roma who also belong to a religious minority, for example, face greater obstacles when appealing to the authorities. Failures by police, for example, to provide them with a professional and appropriate service in such cases will not be captured by comparing their situation, alternately, with similarly situated non-Roma and similarly-situated Christians.
54. The ERRC urges the Court to elaborate on the “particular vulnerabilities” analysis begun in *B.S. v Spain*. Instead of looking at multiple protected characteristics in isolation, the Court should examine whether the authorities took into account the complex situation of exclusion of victims of intersectional discrimination. Failing to do so when responding to violence motivated by multiple characteristics will amount to an institutional failure to combat forms of violence particularly destructive of fundamental rights.

European Roma Rights Centre
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