european roma rights centre

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IN THE EUROPEAN COURT OF HUMAN RIGHTS

Ioan CIOBAN and others v Romania (application no. 58616/13)

WRITTEN COMMENTS OF
THE EUROPEAN ROMA RIGHTS CENTRE
SUBMITTED PURSUANT TO ARTICLE 36 § 2
OF THE CONVENTION

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 of States to protect the rights of members of the Roma community against racially-motivated violence under Article 14, taken in conjunction with Article 3 of the Convention. The intervention focuses on the scale of anti-Roma violence in Europe and in Romania, with special consideration to the vulnerable situation of the Roma community as well as the procedural safeguards afforded by the domestic criminal legislation. The intervention can be summarised as follows:

   a. The ERRC urges the Court explicitly to acknowledge the phenomenon of anti-Gypsyism, as defined and recognised by other Council of Europe bodies, as underlying the problem of racist violence against Roma. The ERRC stresses that the definition of anti-Gypsyism encompasses institutional racism. The ERRC then sets out the scope of the problem of racist violence against Roma in Europe.

   b. The ERRC sets out 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 surveys recent evidence that the national bodies in Romania responsible for protecting Roma against violence suffer from institutional racism. The ERRC also sets out the evidence that Roma were particularly vulnerable to abuse from border guards in Romania immediately prior to that country's accession to the EU.

   c. The ERRC urges 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 Court should ask whether an investigation into anti-Roma violence was

ineffective due to institutional racism (i.e. due to a failure to provide and appropriate and professional service to Roma) and, if so, find a violation on that basis.

II. Anti-Gypsyism and violence against Roma in Europe

3. There are approximately 10-12 million Roma across Europe. As the Court recognised in *D.H and Others v. Czech Republic* (Grand Chamber, 2007) and 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].[1] Violence against Roma is an expression of the phenomenon of anti-Gyspyism. 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,[2] 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 was defined, notably, 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*".[3] 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.

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.[4] 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.[5] The report concludes that the police need to improve their relationship with the Roma and efficiently serve and protect the needs and rights of the largest minority in Europe.[6]

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 report[7] 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 report[8] about violence against Roma in Slovakia, Hungary, and the Czech Republic also showed a worrying pattern of anti-Roma attacks across the region. The ERRC

[1] 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.
[2] Declaration of the Committee of Ministers on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe, 1 February 2012.
[3] 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.
[4] The report can be found at http://www.osce.org/odihr/67843?download=true. See, especially, page 15.
[5] Ibid, page 20.
[6] Ibid.
[7] Amnesty International, "We ask for Justice", Europe's Failure to Protect Roma from Racist Violence, report of 2014, available at: http://www.amnesty.org/en/library/asset/EUR01/007/2014/en/7c3cc69e-e84d-43de-a6a93732b4702dff/eur010072014en.pdf.
[8] 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.

recorded more than 120 attacks against Romani people and their property between 2008 and July 2012, including shootings, stabbings and Molotov cocktails. Out of these 120 crimes, 14 concerned police brutality.

9. 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 linked to 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 as well as problems of institutional anti-Gypsyism that need to be addressed at a European level.

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

a. Generally

10. The worrying prevalence of anti-Gypsyism in Romanian society, today and stretching back many years, is well documented. Wide-spread 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.

11. Deeply entrenched anti-Roma attitudes can be vividly seen in the annual surveys carried out by the National Council for Combating Discrimination (NCCD): in 2005[14] 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 2013[15] 48% of respondents said that they did not want a Roma work colleague, 41% would not want a Roma neighbour, and 38% would not want any Roma in their municipality.

12. 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 report[16] 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*." Similarly, the UN Committee on the Elimination of Racial Discrimination ("CERD") stated in its 2010 Concluding Observations on Romania that it was

[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] The 2005 survey is available at http://www.cncd.org.ro/publicatii/Sondaje-4/ ; see page 37.
[15] The 2013 survey is available at http://www.cncd.org.ro/files/file/Sondaj%20de%20opinie%20CNCD%202013.pdf; see page 33.
[16] The report is available at http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Romania/ROM-CbC-IV-2014-019-ENG.pdf, page 10

"*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*".[17]

13. 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.

14. The 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 or to enquire as to the reasons why no complaints have been lodged against police officers*".

15. 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)[18], 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 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).*

16. The Committee of Ministers is also awaiting the authorities' assessment of the practical impact of measures adopted to prevent and repress racist incidents. 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.

17. The lack of data on racially motivated crimes is further evidence of the authorities' failure to address anti-Roma hate crime diligently and systematically.

18. According to research by FRA, Romania appears to be the only EU Member State which does not keep any records on hate crimes.[19] 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".*

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[17] The observations are available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk9HknmUTbUvDqDjwUSqemoc4TdqltS%2bjZT%2bLyftwg2oSEAKCwygI6Na1poCrRvPdMhWKEsUW1FhH%2fikjkAtFFFaGQKSA1kptztlWIMN0Oky4aQyMf%2bkGBSDw3rbbBk%2bUg%3d%3d, page 4, para. 16

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

[19] *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.

19. 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 and 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.

20. This institutional failure to address racial violence requires an institutional response. 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 discrimination and enquire as to the reasons why no complaints have been lodged against police officers. The ERRC believes that the absence of such an institution is a serious obstacle to tackling institutional racism in Romania.

21. The ERRC believes that by naming and addressing institutional racism and addressing under Article 14 of the Convention both the failures that perpetuate it and the solutions required thereto, the Court can build upon the concept of "vulnerable groups"[20] it has successfully developed in its case law in a way that empowers members of such groups to assert their rights. This is all the more necessary as there is little indication at present that Romanian courts are well equipped to properly address vulnerability in line with the Court's case law.

22. According to a 2015 study[21] 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*" [emphasis added].

23. 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.*"

24. The overall assessment is also quite sobering: "*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.*"

25. If the Court incorporates institutional racism into its analysis of Article 14 taken with the procedural limb of Article 3 (as set out below in Part V), the ERRC expects that Roma, as well as the national judges considering their cases, will be better able to resolve cases of this kind without it being necessary to take the matter to Strasbourg.

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[20] Lourdes Peroni and Alexandra Timmer, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law,*, International Journal of Constitutional Law, Volume 11, Issue 4, 2013, Pp. 1056-1085 available at http://icon.oxfordjournals.org/content/11/4/1056.full?keytype=ref&ijkey=AWPScB2I6KeQjw6#fn-100

[21] "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

IV. Effective victim participation in the investigation and institutional racism

26. Effective participation in the investigation is rendered theoretical and illusory in the absence of effective communication of relevant information, including all the relevant procedural acts. See *mutatis mutandis Yabansu v Turkey* (2013), §§ 65-71. This is as important in Article 3 cases as in Article 2 cases and is hampered by a formalistic approach to the communication of procedural acts. This is particularly important in cases of victims of torture, because of their particular vulnerability. See, mutatis mutandis, *Mocanu v Romania* (Grand Chamber, 2014), §§ 273-275.

27. The communication of procedural acts under Romanian criminal law (under article 182 of the criminal procedure code) in Romania is flawed in ways comparable to problems the Court has found in relation to civil matters in Romania. See *Raisa M. Shipping S.R.L. v Romania* (2013), §§ 32-35 (where the civil court failed to show due diligence, as required by article 86 § 3 of the civil procedure code, in ensuring that the applicant had actually received the relevant summons, compounded by the appeal court's formalistic analysis of the legality of the method of summons).

28. There is an asymmetry between safeguards applicable during the criminal trial and those applicable to the criminal investigation. At the time of the present case,[22] failure to give proper summons at the trial stage under article 291 at the addresses determined in accordance with article 177 (normally the appointed lawyer's address) amounted to grounds for appeal on points of law under Article 385^9 § 21. (see Annex 1[23]). No similar safeguards exist at the investigation stage or in the procedure under articles $275\text{-}278^1$ to challenge a decision not to prosecute. As a result, if notice does not reach the victim of crime because it was not sent, as requested, to her/his appointed lawyer's address, there is no remedy. Furthermore, there is no specific requirement, equivalent to article 86 § 3 of the civil procedure code, that the prosecutor verify in any way that procedural acts have been effectively communicated. The ERRC submits that the ensuring the effective participation of victims in the investigation under the procedural limb of article 3 requires substantively similar safeguards at both the investigation and the trial stage, in line with the Court's case law on effective victim participation. *Hugh Jordan v the United Kingdom* (2001), § 109; *Kelly and Others v the United Kingdom* (2001), § 98. In particular, we invite the Court to find that the prosecutor is under a positive obligation to diligently verify that procedural acts have effectively been communicated to the victims' chosen address and that failure to do so should be promptly and predictably sanctioned by the courts.

29. The ERRC's experience working in Romania with Romani victims of hate crimes gives us reason to suspect that, the communication of a decision not to prosecute directly to the client, instead of the designated lawyer, is a prosecutorial practice designed to minimise the probability of an appeal being lodged. The Court itself is in a much better position, based on its Romanian case load, to know whether or not there is a significant correlation between prosecutors' decisions being communicated directly to victims, as opposed to their lawyers, and a subsequent failure to challenge that decision within the prescribed delay, resulting before the Court in a finding of non-exhaustion of domestic remedies.

30. Furthermore, direct communication of the prosecutor's decision to the plaintiff warrants stronger scrutiny to avoid an appearance of impropriety. Direct contact with a represented opposing party is considered ethically fraught amongst lawyers. According to article 5.5 of the Code of Conduct for European Lawyers[24] "*A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications)*". This is deemed a generally accepted principle designed to prevent any attempt to take advantage of the client

[22] Up to the entry into force of Law 2/2013 on 14 February 2013, designed to simplify criminal procedure in order to reduce the case load of the High Court of Cassation and Justice according to the reasoning put forth by the Government available at http://www.cdep.ro/proiecte/2012/400/30/6/em436.pdf

[23] Annex 1 contains some examples of domestic case law on the very strict interpretation of these safeguards at the trial stage.

[24] Code of Conduct for European Lawyers available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

of another lawyer.[25] Of course, the prosecutor and the victim of crime are generally not considered opposing parties. However when the allegations concern ill-treatment by law enforcement of vulnerable groups, stringent rules similar to those applicable to opposing parties, are needed to avoid the appearance of collusion between the prosecutor and the law-enforcement officers under investigation.

31. The Court itself has recognised that the vulnerability of victims of state violence should be taken into account in assessing their engagement with the investigation into their ill-treatment (see *mutatis mutandis Mocanu* precit. §§ 273-275). Along the same lines, the Committee of Ministers of the Council of Europe states that "*There should be a sufficient element of public scrutiny of the investigation or its results to secure accountability, to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts*."[26] In relation to violence against Roma in Romania, the Commissioner for Human Rights "*stresses the need to elaborate policies and practice to prevent and combat any institutional culture within law enforcement authorities which promotes impunity. Measures in this context should include a policy of zero-tolerance*"[27] [emphasis added].

32. Private lawyers play a key role in ensuring the victims' effective participation in an investigation, particularly in the absence of publicly provided victims' services[28] or free legal assistance[29]. Their role is all the more critical when there are linguistic, educational and social barriers in access to justice and there is evidence[30] that lawyers are more attuned than the authorities to the vulnerability of Roma clients. For instance, CERD[31] noted "*with concern that persons belonging to national minorities, particularly the Roma, are not always granted the opportunity to communicate in their own language at all stages of legal proceedings, owing to a lack of interpreters, which undermines their right to the proper administration of justice*". Roma (and minorities in general) also understandably distrust the criminal justice and are reluctant to report crime based on collective experiences of institutional racism (see above § 9). Under the circumstances, it is essential that the authorities respect the lawyer's role in ensuring the effective participation in the investigation for victims of police brutality.

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

33. 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

[25] ibid. page 33
[26] Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (Adopted on 30 March 2011 at the 1110th meeting of the Ministers' Deputies).
[27] Commissioner for Human Rights of the Council of Europe Report following his visit to Romania from 31 March to 4 April 2014
[28] FRA, Victims of crime in the EU: the extent and nature of support for victims, January 2015, page 21, available at http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf
[29] CoE Guidelines on eradicating impunity for serious human rights violations, precit.
[30]. Romanian Superior Council of Magistracy "Improving access to justice" precit.
31 See Concluding Observations on Romania, 13 September 2010, § 19, available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk9HknmUTbUvDqDjwUSqemoc4TdqltS%2bjZT%2bLyftwq2oSEAKCwygI6Na1poCrRvPdMhWKEsUW1FhH%2fikjkAtFFGK4p3o0OCiErXDHSL6j4w5QduiiP5eDUda6MMpufD3Fw%3d%3d

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.

34. 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 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.

35. Such a finding only considers part of the problem of institutional anti-Gypsyism. For example, in *Nachova and others*, 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).

36. There is another aspect to an analysis in this kind of case of whether Article 14, taken with the procedural limb of Article 2 or 3, has been violated: whether the failure to carry out an effective investigation in general was the result of institutional racism. This question, the ERRC submits, should also form part of the Court's analysis in this kind of case, 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.

37. 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 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* or in *Šečić*, where it limited the analysis 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.

38. 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.

39. While the ERRC will of course not comment on the individual facts of this case, the ERRC has set out above the recent evidence of institutional racism in Romania. 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*). 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. anti-Gypsyism). As discussed above, Romania is an outlier among European countries in its failure to collect data on racially motivated crime in general and discriminatory police misconduct in particular.

40. The treatment of racist motivation under Romanian criminal law as an aggravating circumstance,[32] mostly taken into account at the sentencing stage, rather than as an element of the crime (*formă calificată a infracţiunii*), further contributes to obscuring the prevalence of racially motivated crimes.[33]

41. This crime-enhancement approach 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 held that such an obligation existed and found that the authorities had failed in their obligation to identify a pattern of hateful violence. In these circumstances, 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 Court has already taken into account the climate of rampant anti-Gypsyism in its analysis of positive obligations under article 14 taken together with article 3 of the Convention. (see most recently *Ciorcan v. Romania*, § 164). Domestic courts have time and again failed to do so and the ERRC believes that this is relevant beyond a case-by-case basis as it discloses institutional racism. The domestic courts' vocal indifference[34] to discrimination faced by Roma should therefore inform the Court's article 14 analysis.

[32] Article 77(h) of the Criminal Code.
[33] 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.
[34] see above §§ 22-24