

Lacatus

APPLICANT

v

Switzerland

RESPONDENT STATE

THIRD-PARTY INTERVENTION**I. Introduction**

1. The European Roma Rights Centre (“the ERRC”) submits these written comments in accordance with the leave to intervene granted by the President of the Section.
2. In order to assist the Court in summarising the intervention for inclusion in its judgment, the ERRC has prepared the following summary:

The ERRC urged the Court to identify antigypsyism as the discriminatory motivation underlying the adoption and increasing enforcement of laws criminalising begging in Europe. According to the ERRC, the Court had to use that word to describe the significance, under the Convention, of legislative acts that may appear to be a response to legitimate public order concerns, but, in reality, are based on and/or reflect negative stereotypes of Roma. Legislation criminalising begging forms part of and perpetuates a pattern of exclusion that prevents the targets of antigypsyism from achieving full equality. The ERRC stressed that antigypsyism encompasses racist discourse as well as reliance on or perpetuation of racial stereotypes in legislation. The ERRC discussed the poverty in which many Roma live, providing extensive data about the situation of Roma in Bulgaria and Romania and describing Romani poverty as a consequence of antigypsyism. The ERRC surveyed the evidence – including racist discourse – that antigypsyism has contaminated the adoption and enforcement of anti-begging laws in Europe, including in Geneva. The ERRC surveyed judgments of national courts in Europe and North America and conclusions of Council of Europe bodies, UN bodies, and others finding that criminalising begging violates fundamental rights. The ERRC urged the Court to integrate the notion of antigypsyism into its analysis of whether enforcement of such legislation against Roma amounts to a violation of Article 14 read with other provisions of the Convention. According to the ERRC, it was insufficient for the Court to require an applicant to produce evidence that the authorities were motivated by racism in her individual case or were disproportionately targeting Roma under the law generally. Such an approach would ignore the discriminatory context in which the law was adopted and mischaracterise individual arrests as isolated occurrences, rather than as part of the pattern of discrimination that Roma have experienced and have turned to the Court to expose in full. The ERRC encouraged the Court to apply the notion of “harassment” as a form of discrimination in such cases. Under the ERRC’s proposed harassment-based approach, where there is evidence that the legislation being enforced is related to ethnic and racial origin (including stereotypes about Roma), the burden shifts to the Respondent Government to explain precisely why the legislation was adopted, to show that it successfully promoted a legitimate aim, and to produce evidence that it was not being used to target Roma.

II. Antigypsyism: An Essential Term for Describing Discrimination against Roma

3. When Roma who are reduced to begging are then subjected to criminal prosecution, they feel a link to a broader pattern of historical and ongoing exclusion. The Court has recognised this pattern, finding that: “as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection”. See, e.g., *Horváth and Kiss v Hungary* (2013), § 102. Many Roma sum up the deep-rooted structural prejudices they face in a single word: antigypsyism.¹ The ERRC respectfully submits that the Court must use that word in its case law to describe the significance, under the Convention, of acts and omissions of State bodies that can be presented as benign, but that in reality form part of and perpetuate a pattern of exclusion that prevents the targets of antigypsyism from achieving full equality. The ERRC recalls that Judge Pinto de Albuquerque explicitly used the term when describing the requirements of States under the Convention to react to antigypsyism in his concurring opinion in *Vona v Hungary* (2013). State authorities have a central role in protecting Roma from antigypsyism and not taking legislative action based on and/or perpetuating stereotypes of Roma. See, mutatis mutandis, *Konstantin Markin v Russia* (2012), §§ 141-143.
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 dehumanization and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatization and the most blatant kind of discrimination” (emphasis added).²
5. ECRI’s definition of antigypsyism includes institutional racism. The Commission for Racial Equality in the United Kingdom has defined institutional racism as “those established laws, customs, and practices which systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions” (emphasis added).³ Therefore, institutional racism in a legislative body does not necessarily imply that every or any legislator espouses a racist ideology, or is consciously motivated by racism. Institutional racism can be a by-product of a society where antigypsyism is allowed to flourish. Nor does institutional racism imply that every application of an law contaminated by racism is racist. Institutional racism includes the accumulated consequences over time of a law to ethnic minorities such as Roma.
6. Recently, a coalition of NGOs supporting the rights of Roma has introduced its own definition of antigypsyism in “*Antigypsyism – a reference paper*” (June 2016):

Antigypsyism is a historically constructed, persistent complex of customary racism against social groups identified under the stigma ‘gypsy’ or other related terms, and incorporates:

1. a homogenizing and essentializing perception and description of these groups;
2. the attribution of specific characteristics to them;
3. discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages (emphasis added).

7. The ERRC respectfully encourages the Court to consider the alliance’s full paper on antigypsyism, which can be downloaded from www.antigypsyism.eu.

III. Romani Poverty: The Consequence of Antigypsyism

¹ In previous submissions to the Court, the ERRC has spelled the word “anti-Gypsyism”. In this submission, the ERRC follows the spelling introduced by the Alliance against Antigypsyism, discussed below.

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 The Stephen Lawrence Inquiry, “Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report)”, Chapter 6.30 (February 1999), available at <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry>.

8. As a consequence of centuries of exclusion and discrimination – including slavery in Romania that only ended towards the end of the 19th century⁴ – Roma are not only Europe’s largest ethnic minority, but also its most economically and socially excluded. This section sets out some data on Romani poverty in Europe, with a focus on the European Union Member States (particularly Bulgaria and Romania), whose citizens enjoy free movement rights within the European Union, the European Economic Area, and Switzerland. The ERRC’s purpose in presenting this information is to stress that Romani poverty is not a “natural” or merely unfortunate phenomenon. It is one of the clearest manifestations of antigypsyism in Europe today, with many Roma from the EU’s newest Member States living in worse material conditions than when their countries joined the Union in the 2000s.⁵
9. A survey by the European Union Fundamental Rights Agency (“FRA”) of over 16,000 Romani households in 11 EU Member States found that 90% of Roma surveyed had an income below the national poverty threshold and that more than half lived in segregated areas in housing that fell below minimum housing standards.⁶ It also found that 40% of Romani children lived in households struggling with malnutrition and hunger. According to data collected by the United Nations Development Programme (“UNDP”), Roma are twice as likely as their non-Roma neighbours to be unemployed.⁷ UNDP found that lower levels of educational achievement among Roma could not explain this gap: after controlling for education and experience levels, Roma are still less likely to be employed and face lower wages in employment compared with non-Roma. In fact, the gap between the unemployment rates of Roma and non-Roma was largest for those with the highest levels of education. UNDP found that an increase in Roma educational participation from 2004 to 2011 had not led to a corresponding increase in relative employment prospects.
10. In Eastern Europe, 71% of Roma live in deep poverty.⁸ In Romania, Roma are three times more likely to be born into poverty than other Romanians and have a life-expectancy at least six years lower than non-Roma.⁹ Ninety percent of Roma live in households in severe material deprivation.¹⁰ In these conditions, deprivation begins early. Only 32% of Romani children are enrolled in preschool, compared with 77% of their non-Roma neighbours, and only 10% of Roma complete secondary education, compared with 58% of non-Roma nearby. The employment rates for non-Roma in Romania are 66% for working-age men and 53% for women; yet only 42% of working-age Romani men and 19% of women have jobs, including jobs in the informal sector. Employed Roma earn a fraction of what their non-Roma neighbours earn: the labour income of Romani men is only 20% of that in the general population and for Romani women it is only 12%. The World Bank has concluded that Roma in Romania have the same desire to work as their non-Roma neighbours, but, because of barriers including educational gaps and discrimination, Roma “do not have access to the tools that could help them escape poverty”.¹¹
11. Roma in Bulgaria live in similarly severe poverty. UNICEF research has found that 92% of Romani children in Bulgaria are in poverty, more than twice the percentage of non-Roma children.¹² According to a World Bank study, nearly 9 out of 10 Bulgarian Roma had per capita incomes equal to those of the poorest four-tenths of the population. Eighty-five percent of Roma aged 18-25 in

⁴ See, e.g., Viorel Achim, *Roma in Romanian History* (Central European University Press 1998).

⁵ George Soros, “Europe Needs a Roma Working Class”, *The Guardian* (26 November 2015), available at <https://www.theguardian.com/business/2013/nov/26/europe-roma-working-class-george-soros>.

⁶ FRA, “Poverty and Employment: The Situation of the Roma in 11 EU Member States” (2011), available at http://fra.europa.eu/sites/default/files/fra-2014-roma-survey-employment_en.pdf.

⁷ Niall O’Higgins, United Nations Development Programme Roma Inclusion Working Papers, “Roma and non-Roma in the Labour Market in Central and South Eastern Europe” (2012).

⁸ The World Bank, “Brief: Roma” (24 February 2015), available at <http://www.worldbank.org/en/region/eca/brief/roma>.

⁹ The World Bank, “Breaking the Cycle of Exclusion for Roma in Romania” (7 April 2014), available at <http://www.worldbank.org/en/news/feature/2014/04/07/breaking-the-cycle-of-exclusion-for-roma-in-romania>.

¹⁰ The World Bank Group, “Human Development and Sustainable Development Team, Diagnostics and Policy Advice for Supporting Roma Inclusion in Romania” (2014), available at <http://documents.worldbank.org/curated/en/149471468333037165/pdf/866710WP0P14500nal0Report00English0.pdf>.

¹¹ *Ibid.*, page 9.

¹² Ron Haskins, “Helping the Roma in Bulgaria: Recommendations to the Board of America for Bulgaria Foundation” (2011), available at https://www.brookings.edu/wp-content/uploads/2016/06/0819_roma_haskins.pdf.

Bulgaria had not completed secondary education, compared with 32% of non-Roma.¹³ Roma life expectancy rates are more than 10 years below average life expectancy in Bulgaria.¹⁴ Approximately 50-70% of Roma in urban areas in Bulgaria live in illegally built homes or in shelters. Almost 40% of Roma live in houses without any plumbing and 80% do not have a toilet. On average, Roma have half the dwelling space of non-Roma. Only 33% of Roma with a primary education (i.e. the majority of Roma in Bulgaria) are employed, more than ten percentage points lower than the average for similarly educated non-Roma. ECRI has described Roma as one of “the main targets of racist hate speech” in Bulgaria.¹⁵

12. If Roma are often reduced to begging, it is not surprising: their prospects for joining the economy are limited. Their poverty is a consequence of abiding discrimination and exclusion. The consequences of that poverty – including begging – are turned against them, feeding the racist complex that surrounds Roma in Europe today.

IV. Antigypsyism and Laws Criminalising Begging in Europe

13. In recent years, antigypsyism has increased in Europe, evidenced in part by an increase in the expression of stereotypes of Roma as foreign criminals who beg to take advantage of locals. Laws criminalising begging draw on racist stereotypes about the criminality of the Roma and perpetuate antigypsyism. These stereotypes are particularly invidious because they draw upon deep-rooted and longstanding ideas that encode the idea of Roma in the very word “begging”. For instance, an Italian encyclopaedia in 1973 referred readers of its entry on “begging” to its entry on “Gypsies”, whom it described as the paradigmatic beggars.¹⁶
14. Council of Europe Commissioner for Human Rights Nils Muižnieks has summarised recent political discourse as falsely depicting Roma as migrating into Western Europe in unprecedented numbers, failing to seek jobs, and taking advantage of social safety nets.¹⁷ He notes that the terms “Roma” and “beggars” have become “essentially interchangeable” in the media in many countries.¹⁸ He describes recent bans on begging as efforts “to criminalise the presence of Roma in public spaces”.¹⁹
15. The Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe (“PACE”) has found that “[t]he general public have a tendency to link Roma migrants to begging”.²⁰ The Committee has recognised “problems with the implementation of anti-begging legislation and the way it has allegedly been applied to Roma” in countries including Switzerland, Luxembourg, and Austria.²¹
16. PACE itself has recognised a connection between “the widespread tendency to make a generalised link between Roma and criminality” and “the criminalisation of begging in certain Council of Europe member States.”²²

¹³ World Bank, “Roma Inclusion: An Economic Opportunity for Bulgaria, Czech Republic, Romania and Serbia,” Policy Note (September 2010), available at http://siteresources.worldbank.org/INTROMA/Resources/Policy_Note.pdf.

¹⁴ Roma Education Fund, “Bulgarian Country Assessment 2015”, available at http://www.romaeducationfund.hu/sites/default/files/publications/bg_country_assessment_2015_web.pdf.

¹⁵ ECRI Report on Bulgaria, CRI(2014)36, page 15.

¹⁶ Alessandro Simoni, “Roma and Legal Culture: Roots and Old and New Faces of a Complex Equality Issue”, 13 *European Anti-Discrimination Law Review* 11, 15 (2011).

¹⁷ Nils Muižnieks, “Human Rights Comment: Time to Debunk Myths and Prejudices about Roma Migrants in Europe”, Council of Europe Commissioner for Human Rights Blog (16 July 2015), available at <http://www.coe.int/de/web/commissioner/-/time-to-debunk-myths-and-prejudices-about-roma-migrants-in-europe>.

¹⁸ Council of Europe Commissioner on Human Rights, “Human Rights of Roma and Travellers in Europe” (2012), available at https://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf, page 51.

¹⁹ Nils Muižnieks, “Human Rights Comment: Time to Debunk Myths and Prejudices about Roma Migrants in Europe”, Council of Europe Commissioner for Human Rights Blog (16 July 2015), <http://www.coe.int/de/web/commissioner/-/time-to-debunk-myths-and-prejudices-about-roma-migrants-in-europe>.

²⁰ Committee on Migration, Refugees and Displaced Persons, “The Situation of Roma in Europe: Movement and Migration”, Report to the Council of Europe Parliamentary Assembly, (2012), page 7.

²¹ *Ibid.*

²² Resolution 1740 (2010).

17. The ERRC encourages the Court, like these other Council of Europe institutions, to recognise the link that exists between Roma and begging in the imagination of many Europeans and see this as a manifestation of antigypsyism. Amnesty International has likewise recognised laws on begging as “particularly targeting Roma”.²³ What follows is a non-exhaustive survey of the situation of the link between criminalisation of begging and Roma, again with a focus on the free movement of some of the EU’s newest Romani citizens.
18. **Bulgaria’s and Romania’s accession to the EU.** When considering the links between the criminalisation of begging and antigypsyism, the ERRC urges the Court to give special consideration to the period since 1 January 2007, when Bulgaria and Romania joined the European Union. Since then, Bulgarian and Romanian citizens have been able to move freely to and within EU Member States, as well as Iceland, Lichtenstein, Norway, and Switzerland.²⁴ According to Council of Europe estimates, between 750,000 and 800,000 Roma live in Bulgaria and between 1.2 and 2.5 million Roma live in Romania.²⁵ An estimated 3 million Romanians work in other EU Member States.²⁶ Some 2.5 million Bulgarians work outside of Bulgaria.²⁷ Roma from these countries exercise their right to free movement for the same reasons as non-Roma: as Commissioner Muižnieks has said, Roma “look for employment, better living conditions and a better education for their children”.²⁸ A 2013 study on Roma in Romania found that they were not more likely to emigrate than non-Roma, but media in many EU states have depicted Roma as “invading”.²⁹ In the ERRC’s experience of monitoring hate speech against Roma across Europe, many Europeans in wealthier EU Member States have only a vague idea about the situation that Roma face, yet harbour vicious prejudices. The confusion in the minds of many people about Roma (often compounded by the coincidental similarity between the words “Roma”, “Romanian”, and “Romania” in many languages) means that xenophobia and concerns about migration pressures intermingle with racial prejudice. The Romedia Foundation has described this attitude as a “conceptual entanglement...with the stereotype of the ‘Gypsy’ as the embodiment of backwardness and Balkanist conceptions about Romania”.³⁰ In States where begging was already criminalised, prosecutions of Roma have surged since 2007. A number of municipalities have adopted new anti-begging laws since then, apparently linked to fears about arrivals from these countries. States have also increasingly discussed adopting national bans on begging following the recent EU enlargements.
19. **France.** In 2011, the city of Marseille banned begging with a law that Commissioner Muižnieks described as an instance of “anti-Gypsyism and hostility to migrant Roma” interacting with “a broader context in which the poor and vulnerable are treated as criminals”.³¹ In 2012, France’s Interior Minister, Claude Guéant, described bans he issued on begging in popular Parisian tourist

²³ Cambridge Policy Consultants, “Executive Summary: External Evaluation of Amnesty International’s Work on Tackling Discrimination Against Roma” (2014), available at <file:///C:/Users/adam.weiss/Downloads/ACT1028962014ENGLISH.pdf>, page 4.

²⁴ Agreement on the Participation of the Republic of Bulgaria and Romania in the European Economic Area, 2007 O.J. L 221/15; Agreement between the European Community and the Swiss Confederation on Air Transport - Final Act - Joint Declarations - Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological co-operation, mutual recognition in relation to conformity assessment, and trade in agricultural products, 2002 O.J. L 114/73.

²⁵ European Commission, “An EU Framework for National Roma Integration Strategies”, COM (2011) 173 final, 5.4.2011, page 15.

²⁶ Conect Association, “Romanian Migrants in the EU: The Struggle for Decent Work and Dignity” (2016), available at http://migrationonline.cz/romania_country_report.pdf.

²⁷ Sofia News Agency, “More Bulgarians Working Abroad than in Bulgaria” (6 November 2015), available at <http://www.novinite.com/articles/171684/More+Bulgarians+Working+Abroad+Than+in+Bulgaria>.

²⁸ Nils Muižnieks, “Human Rights Comment: Time to Debunk Myths and Prejudices about Roma Migrants in Europe”, Council of Europe Commissioner for Human Rights Blog, 16 July 2015, available at <http://www.coe.int/de/web/commissioner/-/time-to-debunk-myths-and-prejudices-about-roma-migrants-in-europe>.

²⁹ Sorin Căce, Roxana Toader, & Ana Vizireanu, “The Roma in Romania: From Scapegoat to Development Engine” (2013), available at http://www.academia.edu/6037269/IN_ROMANIA_ROMA_From_Scapegoat_to_Development_Engine.

³⁰ Romedia Foundation, “Roma and the Double Standards of European Migration” (12 May, 2014), available at <https://romediafoundation.wordpress.com/2014/05/12/the-roma-and-migration-in-the-eu/>.

³¹ Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe Following his Visit to France from 22 to 26 September 2014 (2015), § 171.

locations as part of a “merciless fight” against “Romanian delinquency”.³² The city of Hénil-Beaumont also instituted an order banning begging, which it rescinded after an NGO, the Ligue des Droits de l’Homme, challenged it for targeting Roma.³³

20. **Germany.** The cities of Berlin, Bremen, and Munich have passed laws making it illegal for adults to beg with children. The ban was perceived in the media as responding to an increase in Roma child beggars.³⁴
21. **Luxembourg.** Luxembourg bans begging only if it is organised and carried out in a group, an accusation often levelled against Romani beggars. The Roma NGO Chachipe found that Romani beggars were arrested, handcuffed, and taken to the police station, where they were sometimes kept for hours in custody and had their money taken from them.³⁵
22. **Norway.** In 2013, Norway, which had decriminalised begging in 2005, adopted amendments to the Police Act enabling municipalities to regulate soliciting money in public places. These amendments were tied to a perceived increase in Romani beggars: Norway’s Ministry of Justice found that of 194 beggars identified in Oslo in 2012 only seven were Norwegian nationals while the rest were mainly Romanian citizens, the majority of whom had a criminal record in Norway.³⁶ In 2015, the Norwegian government proposed criminalising begging nationwide, either through a ban on organised begging, defined as two or more people cooperating, or a general ban on begging with a maximum penalty of six months of imprisonment. Although the proposal’s language was neutral, Norway’s Equality Ombud recognised it as targeting Roma and emphasised that the proposed law could lead to the harassment of migrating Roma and further reduce opportunities for Roma to improve their living conditions, characterised by poverty and discrimination.³⁷ Commissioner Muižnieks welcomed the decision to withdraw the proposal, noting that “A blanket ban on non-aggressive begging has a discriminatory impact on Roma immigrants and interferes with freedom of expression. Such bans should be repealed”.³⁸ In his report following his 2015 visit to Norway,³⁹ he concluded that criminalising begging may also violate principles of equality, non-discrimination, and freedom of expression.
23. **United Kingdom.** Half of those arrested in London in 2013 for begging-related offenses were Romanian.⁴⁰ In England and Wales, prosecutions for begging rose over 70% nationwide in 2014 – in some municipalities rising nearly 400%.⁴¹ London police also used dispersal tactics that it described as “predominately designed to counter the increasing nuisance of Romanian beggars that frequent the area”.⁴²
24. Space constraints make it impossible to provide a complete account of the antigypsyism on display as States have debated, enacted, and enforced laws criminalising begging since 2007. The critical

³²Angelique Chrisafis, “Paris Bans Beggars from Most Popular Shopping and Tourist Hotspots”, *The Guardian* (13 December 2011) available at <https://www.theguardian.com/world/2011/dec/13/paris-bans-beggars-tourist-hotspots>.

³³ Suzanne Daley, *Seeking New Heights in France*, National Front Party Thinks Locally, *N.Y. Times*, Sept. 30, 2014, <http://www.nytimes.com/2014/10/01/world/seeking-new-heights-in-france-national-front-thinks-locally.html>

³⁴ DW, “Banning Children from Begging in Berlin” (27 July 2015), available at <http://www.dw.com/en/banning-children-from-begging-in-berlin/a-18610505>.

³⁵ Cachipe a.s.b.l., letter to the European Commission (24 February 2011), available at <https://romarights.files.wordpress.com/2011/07/letter-eu-commission-240211.pdf>.

³⁶ “Norway parliament debates begging ban”, *The Local NO* (16 June 2014), available at <http://www.thelocal.no/20140616/norway-parliament-debates-begging-ban>.

³⁷ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Norway, from 19 to 23 January 2015 (2015), §§ 59-67.

³⁸ Council of Europe, “Norway: people with disabilities and Roma need more attention” (18 May 2015), available at <http://www.coe.int/en/web/commissioner/-/norway-people-with-disabilities-and-roma-need-more-attention?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fhome>.

³⁹ See above, note 37.

⁴⁰ Sam Knight, “Home Invasion: The Roma of Park Lane”, *GQ* (2 January 2014), available at <http://www.gq-magazine.co.uk/article/romanian-immigrants-park-lane-investigation>.

⁴¹ Rob Waugh & Helen Pidd, “Begging Prosecutions Increase Dramatically Across England and Wales”, *The Guardian* (30 November 2014), available at <http://www.dw.com/en/banning-children-from-begging-in-berlin/a-18610505>.

⁴² Ryan Erfani-Ghettani, “Clearing Roma Off the Streets”, *Institute of Race Relations Comment* (2 August 2012), available at http://www.irr.org.uk/news/clearing-roma-off-the-streets/#_ftn3.

point is that these laws are rooted in and reflect stereotypes about the targets of antigypsyism and fears of their arrival following EU enlargement. See, mutatis mutandis, *Konstantin Markin v Russia* (2012), §§ 141-143.

25. **Antigypsyism and Geneva's criminalisation of begging.** According to Switzerland's Federal Commission Against Racism ("the FCR"), Roma are one of the most stigmatised groups in Switzerland.⁴³ An analysis of Swiss media articles in 2013 found that the Swiss media disproportionately featured stories depicting Roma as unable to integrate into Swiss society and engaging in criminal activity.⁴⁴ For instance, in 2012, a Swiss magazine featured a photo of a Romani child waving a toy gun with the headline, "The Roma are Coming: they come, they steal, and they go"; the article concluded that Roma came to Switzerland for "crime tourism".⁴⁵ The FCR reported that many Roma in Switzerland do not admit to being Roma out of fear of discrimination.⁴⁶ In 2007, prior to a vote on extending free movement to the people of Romania and Bulgaria, the FCR found that political ads targeted Roma, raising fears of an influx of Roma and an increase in begging.⁴⁷ In June 2007, Geneva legislators introduced a bill that criminalised begging. The bill described a rising number of foreign beggars as endangering public safety. No data quantified this perceived increase in foreign beggars.⁴⁸ However, a police report prepared in October 2007 at the request of the government stated that 92% of beggars who had been arrested came from Romania or Slovakia.⁴⁹ In the parliamentary debates, Geneva legislators framed the anti-begging bill as targeting these "false" foreign beggars, whom they characterised as acting in "perfectly well-organised and structured networks".⁵⁰ Some legislators made the link to Roma plain, such as one, who said:

I think that we should not confuse things: there is begging tourism, which is practised by travellers – all those gypsies who settle in camps just outside our borders, who hold out their hands by day and, by night, brandish the screwdrivers and crowbars they use to rob our homes – and then, there are the real beggars....⁵¹

Some pointed out that their fellow legislators used the words "beggar" and "Roma" interchangeably in the debates over the bill.⁵² Once the law was passed, a report from PACE's Committee on Migration, Displaced Persons, and Refugees referred to reports that Geneva police used the new law to target Romani beggars systematically for street searches.⁵³

V. Comparative Materials on the Criminalisation of Begging

26. Legislation criminalising begging exists in a minority of European countries. Only Greece, Hungary, Italy, and Romania have explicit bans on begging in their national legislation.⁵⁴ Many EU Member States allow local governments to ban begging, but often only with administrative, not criminal sanctions, and most municipalities restrict the bans to "aggressive" begging and limit

⁴³ Report of the Federal Commission Against Racism to the UN Committee on the Elimination of Racial Discrimination (CERD) 18 (2014), http://www.ekr.admin.ch/pdf/140121_REPORT_FCR_to_CERD_2014.pdf.

⁴⁴ *Ibid.* at 18.

⁴⁵ Will Cohen, "The Roma Are Coming: Ed Kashi on the Misuse of Photography", Open Society Foundations (13 April 2012), available at <https://www.opensocietyfoundations.org/voices/roma-are-coming-ed-kashi-misuse-photography>.

⁴⁶ Report of the Federal Commission Against Racism (FCR) to the UN Committee on the Elimination of Racial Discrimination (CERD) 18 (2014), http://www.ekr.admin.ch/pdf/140121_REPORT_FCR_to_CERD_2014.pdf.

⁴⁷ Ellen Wallace, "Geneva rounds up Romanian beggars, Bern hits out at racists", Lake Geneva Region Swiss News (15 January 2009), available at <https://genevalunch.com/2009/01/15/geneva-rounds-up-romanian-beggars-bern-hits-out-at-racists/>.

⁴⁸ Giada de Coulon, Caroline Reynaud, & Annamaria Colombo Wiget, "Begging in Geneva in Times of Crisis: Multi-layered Representations of Beggars, Begging, and Cohabitation in the Public Space", 9 *European Journal of Homelessness* 191, 197 (2015), available at <http://www.feantsaresearch.org/IMG/pdf/article-8.pdf>.

⁴⁹ *Ibid.*, page 197.

⁵⁰ *Ibid.*, page 199.

⁵¹ *Ibid.*, page 200.

⁵² *Ibid.*, page 203.

⁵³ Committee on Migration, Refugees and Displaced Persons, "The Situation of Roma in Europe: Movement and Migration", Report to the Council of Europe Parliamentary Assembly, (2012), page 7; "Roms: des saisies à coups de 90 ct.", *Le Matin* (6 November 2008); and TSRInfo, "GE: la police devra rembourser les mendiants", published on the webpage of TSR on 21 May 2008.

⁵⁴ European Federation of National Associations Working with the Homeless (FEANTSA), "Criminalising Homeless People – Banning Begging in the EU" (2015), page 4.

the bans to specific areas.⁵⁵ Some domestic courts in Europe and elsewhere have found such laws incompatible with their constitutions.

27. **Austria.** In 2012, the Austrian Constitutional Court found that a ban on all forms of begging violated the principle of equality before the law and accordingly was unconstitutional.⁵⁶ The court concluded that freedom of speech extends to all forms of communication, including body language, and that non-aggressive begging communicated a message of poverty and dependence on others for support. The court reasoned that begging was no different from commercial advertisements, which also are intended to motivate the recipient of the message to spend money. Further, the court held that prohibiting all forms of begging was disproportionate and unnecessary to guarantee public order.
28. **Canada.** The Canadian Supreme Court has held that begging is a form of speech protected under the Canadian Charter of Rights and Freedoms because it is “a tool used by those in poverty to engage with the rest of society about their plight”.⁵⁷ The court also noted that anti-panhandling laws may implicate interests in life, liberty, and security because “the ability to provide for oneself” is a crucial part of realising one’s interest in life and liberty.⁵⁸
29. **Italy.** The Italian Constitutional Court has held that it is unconstitutional to criminalise non-intrusive begging.⁵⁹ The court rejected arguments based on maintaining the peace and public order, which, it concluded, are not endangered by what amounts to nothing more than a request for help. The Court further emphasised the adverse consequences of criminalising begging, both for the poor and for society as a whole, describing the trend towards criminalisation as a temptation to “hide” misery and view people in poverty as dangerous and guilty. The court noted the perverse consequence of exacerbating the overcrowding of prisons through such legislation. The case in the Constitutional Court arose from a series of criminal cases that all concerned Roma.⁶⁰
30. **The United States.** US courts have recognised begging as involving multiple speech interests, including propagating views and ideas and advocating causes. As the Second Circuit Court of Appeals (a federal court) concluded in one such judgment,

*Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs.*⁶¹

31. There is a consensus among legal experts, policymakers, and researchers that begging bans violate human rights and worsen the situation of the poor. Magdalena Sepúlveda Carmona, the U.N. Special Rapporteur on Extreme Poverty and Human Rights, argues that

Bans on begging and vagrancy represent serious violations of the principles of equality and non-discrimination. Such measures give law enforcement officials wide discretion in their

⁵⁵ Ibid.

⁵⁶ G 155/10 (VfSlg 19.662/2012, 30 June 2012).

⁵⁷ Federated Anti-Poverty Groups of BC v Vancouver (City), 2002 BCSC 105, § 151 (holding that Vancouver’s panhandling restrictions did not violate the Charter because they targeted aggressive and “captive audience” begging).

⁵⁸ Ibid. at § 201.

⁵⁹ Decision 519/1995 (15 December 1995).

⁶⁰ Alessandro Simoni, Roma and Legal Culture: Roots and Old and New Faces of a Complex Equality Issue, 13 European Anti-discrimination Law Review 11, 15 (2011).

⁶¹ Loper v New York City Police Dep’t, 999 F.2d 699, 704 (2d Cir. N.Y. 1993); see, also, Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015), cert den’d; City of Springfield v. Norton, 2016 U.S. LEXIS 1352 (29 February 2016); Thayer v. City of Worcester, 2015 U.S. Dist. LEXIS 151699 (D. Mass. 2015); McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 183-84 (D. Mass. 2015); and Browne v. City of Grand Junction 136 F. Supp. 3d 1276 (D. Co. 2015).

*application and increase the vulnerability of persons living in poverty to harassment and violence. They serve only to contribute to the perpetuation of discriminatory societal attitudes towards the poorest and most vulnerable.*⁶²

She further noted that begging bans have a perverse impact by imposing fines that persons living in poverty are unable to pay, leading to further fines or prison sentences. She describes this cycle of unpaid fines and imprisonment as a “considerable waste of state financial and administrative resources” that “perpetuat[es] the social exclusion and economic hardship of persons living in poverty.”⁶³ Criminalising begging costs the State and its taxpayers for policing, detention, prosecution and incarceration, and offers no social return on this investment.⁶⁴

32. Commissioner Muižnieks emphasises the discriminatory nature of criminal bans on begging. In addition to worsening the situation of the poor, he concludes that “[r]epressive laws that specifically target homeless people amount to discrimination on the basis of economic and social status.”⁶⁵ He writes that these laws arise out of “deep-rooted prejudices about homeless people and ignorance of the daily deprivation and discrimination they suffer.”⁶⁶
33. The United States Interagency Council on Homelessness has concluded that measures criminalising homelessness, including criminalising begging, are a waste of state resources that further enmesh people into poverty. It found that criminal penalties “exacerbate the problem by adding additional obstacles to overcoming homelessness” and waste “critical public resources for law enforcement activities” that do little more than “create a costly revolving door” between the street and the criminal justice system.⁶⁷
34. Swiss police have acknowledged that the ban on begging has been difficult and expensive to attempt to enforce.⁶⁸
35. While the Court can rely on these comparative materials which condemn the criminalisation of begging in the abstract, the Court will nonetheless be required, when analysing cases of Roma targeted under such legislation under Article 14, to go further, and take into account the context of antigypsyism.

VI. Harassment and the Shift of the Burden of Proof

36. Laws criminalising begging in Europe must be seen in the context of antigypsyism; they draw on racial stereotypes and perpetuate the poverty and social exclusion that Roma.
37. The ERRC urges the Court to consider such laws not only in the context of direct or indirect discrimination, but also through the notion of harassment, which is a common feature of European anti-discrimination law. For example, European Union law defines harassment as a form of discrimination (alongside direct and indirect discrimination) in the following terms:

⁶² U.N. Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, § 32, U.N. Doc. A/66/265 (Aug. 4, 2011), <http://www.ohchr.org/Documents/Issues/EPoverty/A.66.265.pdf>.

⁶³ *Ibid.*, § 43.

⁶⁴ Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepúlveda Carmona & Special Rapporteur on Adequate Housing Raquel Rolnik, *Foreword* in “Mean Streets: A Report on the Criminalisation of Homelessness in Europe” 11, 12 (Samara Jones, Ed., 2013).

⁶⁵ Commissioner Muižnieks, *Preface* in “Mean Streets: A Report on the Criminalisation of Homelessness in Europe” 9, 10 (Samara Jones, Ed., 2013).

⁶⁶ *Ibid.*, page 9.

⁶⁷ United States Interagency Council on Homelessness, “Searching Out Solutions: Constructive Alternatives to the Criminalisation of Homelessness” 7 (2012), available at https://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf.

⁶⁸ Pamela Taylor, “The Roma – Begging for an Answer”, *Le News* (16 January 2014), <http://lenews.ch/2014/01/16/the-roma-begging-for-an-answer/>.

Harassment shall be deemed to be discrimination... when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States (emphasis added).⁶⁹

38. The ERRC emphasises the low threshold in the definition: the unwanted conduct merely needs to be “related to” racial or ethnic origin, as anti-begging laws in Europe generally appear to be (see above, Part IV); and such conduct will amount to harassment regardless of its purpose if its “effect” is to create the kind of environment that laws criminalising begging inevitably create for Roma reduced to begging.
39. The Court cannot ignore the link between recent anti-begging laws in Europe and antigypsyism, or their obvious effect in violating the dignity of and creating an intimidating, hostile, degrading, humiliating and/or offensive environment for Roma. See, *mutatis mutandis*, *Bączkowsi and others v Poland* (2007), § 100. The ERRC urges the Court to apply the notion of harassment and not to place the burden on Romani applicants claiming a violation of Article 14 to demonstrate that they are victims of direct or indirect discrimination (e.g. by having to produce evidence of racial slurs by those arresting them or of the disproportionate use of these laws against Roma). Such an approach would ignore the discriminatory context in which such laws are adopted and mischaracterise individual arrests as isolated occurrences, rather than as part of the pattern of racial harassment that Roma have experienced and have turned to the Court to expose in full. Instead, the burden of proof must shift onto the Respondent Government to show that legislation criminalising begging is not discriminatory. Shifting the burden of proof is a common concept in discrimination law (see, e.g., Article 8 of EU Directive 2000/43), including in the Court’s case law under Article 14. See, e.g., *E.B. v France* (Grand Chamber 2008), § 74. In the ERRC’s view, and in the light of the ways in which antigypsyism contaminates laws criminalising poverty in Europe, the burden is on the Respondent Government in such cases to explain precisely why the legislation was adopted, to show that it successfully promoted a legitimate aim, and to produce evidence that it was not being used to target Roma. This includes a burden to provide statistical evidence that the law is not used disproportionately against one racial or ethnic group or, in the absence of data disaggregated by ethnicity, against groups defined by nationality, language, or another proxy for race or ethnicity. In the absence of a satisfactory explanation that the law was adopted for neutral reasons, that it is responsive and proportionate to a social problem, and that it does not target Roma in practice, the Court should conclude that a violation of Article 14, read with whatever other provisions of the Convention are relevant, has taken place.

The European Roma Rights Centre
19 August 2016

⁶⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 2(3), emphasis added.