

Branko HUDORVIČ and Aleks HUDORVIČ

v.

SLOVENIA

&

Ljubo NOVAK and others

v.

SLOVENIA

THIRD-PARTY INTERVENTION

1. Pursuant to the permission granted by the Court, the European Roma Rights Centre (ERRC) submits the following observations on these cases. These observations cover the following topics:
 - a. The ERRC's research on Roma communities and water in Europe.
 - b. The international and European legal framework on the right to water.
 - c. The ERRC's submissions on how to evaluate discrimination in cases concerning Roma communities' access to water.
2. The ERRC has prepared a summary of this submission in the next paragraph to assist the Court with its task of incorporating the ERRC's comments into the Court's ruling.
3. The ERRC's intervention provides an overview of ERRC research, begun in 2014, which has collected evidence on access to safe and affordable drinking water and sanitation in 93 Romani settlements and neighbourhoods in seven countries: Albania, France, Hungary, Macedonia, Moldova, Montenegro, and Slovakia. The communities selected varied by size, level of integration or isolation from non-Roma communities, the legal situation in relation to the water supply, the legal situation in relation to land ownership, and the tenure of the residents to the land. Without claiming to be representative of the situation of Roma in any given country, no less across Europe, the research was designed to demonstrate that a significant number of Roma communities suffer problems in relation to access to water that most people would consider unthinkable in Europe, and which violate the relevant international and European legal framework. The research was also designed to demonstrate that these conditions often amount to race discrimination. Significant numbers of Roma included in the research had no access to running water in their homes. Their water sources were often far from home, with the burden to secure water falling disproportionately on women and girls. These sources were often not tested to ensure their safety and were exposed to a wide range of contaminants, including dry toilets (pit latrines), insects, and wild animals. Roma often could not afford public water-service pipes and water charges, even if they were otherwise available. Many Roma communities only enjoyed access to water thanks to private donations. In two-thirds of the sites surveyed, the ERRC established a prima facie case of race discrimination: there was either clear evidence that Roma experienced less favourable conditions for accessing water due to their ethnicity (direct discrimination), or the less favourable conditions which they disproportionately experienced (compared to non-Roma communities) could not be objectively justified (indirect discrimination). The ERRC's intervention also reviews the international and European framework on the right to water. The ERRC notes the consensus at UN level that there is a human right to water, with links to the right to life and human dignity (and therefore, in the ERRC's view, to Article 2 and Article 8 of the Convention). Under UN law, States are obliged to avoid discrimination in securing the right to water. This includes a positive obligation to design systems for the distribution of water that avoid excluding particular segments of the population (notably those protected by non-discrimination principles). The ERRC's intervention concludes by proposing three principles, drawn principally from the Court's case law but developed in the light of the ERRC's own research and the international legal framework, for assessing whether less favourable conditions for access to water in Roma communities amount to discrimination: (a) the existence of less favourable circumstances for Roma in accessing water, when compared with nearby non-Roma communities, shifts the burden of proof onto the respondent; (b) insecure land tenure alone cannot justify less favourable circumstances for Roma communities in relation to access to water; (c) less favourable treatment of Roma cannot be justified by reference to stereotypes, which the Court must be particularly vigilant in detecting.

a. The ERRC's research on Roma communities and water in Europe.

4. Since 2014 the ERRC has been conducting research¹ in seven countries: Albania, France, Hungary, Macedonia, Moldova, Montenegro, and Slovakia. The ERRC has collected evidence on access to

¹ Although we have employed objective and systematically organised criteria for the selection of our cases, the lack of country-wide representative data on the housing and public utility infrastructure in Romani neighbourhoods and settlements, as well as the incommensurability of available data from individual countries, limited our sampling methods and therefore the research results

safe and affordable drinking water and sanitation in Romani communities. The research has focused on analysing problems with accessibility, affordability, and quality of drinking water resources, as well as with sanitation in Romani neighbourhoods and settlements. The research has also examined potential cases of race discrimination in the distribution and availability of these public utilities. This section first describes the state of knowledge on Roma communities' access to water before the ERRC's research and then summarises the results of the ERRC's research.

i. Previous research

5. Prior to the ERRC's research, there was very little information available about access to safe drinking water and sanitation for Romani communities in Europe. Those few available sources suggested that many Romani households experienced significant difficulties in relation to water. According to the United Nations Development Programme (UNDP) Regional Roma Survey (2011),² in many European countries a large proportion of Romani households were still not connected to a piped, public-water supply and remained dependent on water whose quality was not tested by the competent public authorities: in Romania it was 72%; in Moldova 66%; in Slovakia 38%; in Croatia 35%; in Hungary 30%; and in Albania 30%.
6. The Atlas of Romani Communities (2013)³ is a comprehensive survey of Romani neighbourhoods and settlements in Slovakia commissioned by the Interior Ministry and conducted by UNDP and the University of Prešov. According to its results, there were more than 150 Roma neighbourhoods and settlements in Slovakia where not one house was connected to a public water supply, and more than 370 without sewerage systems in place. Apart from those totally segregated settlements that were not connected to any public utilities, there were 65 Roma neighbourhoods with no household connected to the municipality's water system, even though the non-Roma households in the area were fully connected.
7. In Hungary, the data from the National Development Agency survey (2010) on "socially excluded settlements" (a term describing mainly-Roma neighbourhoods) pointed out that there were 77 settlements (4.7%) with no public water supply; households there relied purely on self-made wells and open water sources such as rivers and streams. There were a further 181 settlements (11.1%) where households were supplied from public wells. In these settlements households had no tap water or functioning sewerage systems.⁴

ii. The ERRC's research

8. The ERRC has collected evidence on access to safe and affordable drinking water and sanitation in Romani communities in the seven countries mentioned above (§ 2). The research has focused on analysing problems with accessibility, affordability, and quality⁵ of drinking water resources and sanitation in Romani neighbourhoods and settlements. The research has also focused on identifying cases of race discrimination in the distribution and availability of these public utilities.
9. The ERRC mapped the legal and policy frameworks and conducted field research in 93 Romani neighbourhoods and settlements: 18 Romani neighbourhoods/settlements in France; 17 in Hungary; 12 in Macedonia; 12 in Montenegro; eight in Albania; and five in Moldova. The ERRC conducted visits and interviews with local Roma residents, Roma activists, public authorities, water providers,

cannot be considered representative for the entire Roma population in any given country. Nonetheless, the ERRC research is objectively indicative of the current experience of many Roma in accessing safe and affordable drinking water and sanitation. The research was designed to compare the situation of water and sanitation services for Roma with that enjoyed by their non-Roma neighbours, in order to detect discrimination.

² UNDP, *The Housing Situation of Roma Communities: Regional Roma Survey 2011*, 2013, available at:

<http://www.eurasia.undp.org/content/rbec/en/home/library/roma/the-housing-situation-of-roma-communities.html>.

³ Ministry of Labour Social Affairs and Family, UNDP, *Atlas of Romani Communities*, 2013, available at:

http://www.romadecade.org/cms/upload/file/9653_file2_atlas-romadecade.pdf.

⁴ Domonkos V. Herceg B. (2010), *Terra Incognita*, available at: http://www.szociologia.hu/dynamic/szocszemle_2010_3_all.pdf.

⁵ These are the three factors which the UN Committee on Economic, Social, and Cultural Rights has identified as making up the content of the right to water. See below, §25.a.

water experts, civil society, and social care workers. In each country we selected a varied sample for empirical research according to criteria related to geography, population size, severity of segregation, land ownership, and water-network ownership. The selected places included communities that were: (1) integrated into residential areas, on the outskirts of residential areas, and entirely segregated and isolated from other communities; (2) in different regions; (3) of varying sizes; (4) covered by public as well as public-private water providers; (5) formal and informal; and (6) with different forms of tenancy (social and private).

10. In some European countries, Roma and non-Roma experience problems with the drinking-water supply and sanitation in the same way; in other countries the ERRC found evidence that Romani households remain without water and sewerage due to discrimination. The ERRC research revealed that many Roma suffer disproportionately from the failures of public authorities to secure access to water and sanitation. Roma, especially those living at the outskirts of towns or in completely segregated settlements, are often treated differently by local authorities when it comes to the provision of these public utilities.
11. Out of the 93 sites visited, in 62 (i.e. two thirds), the Romani communities had significantly worse conditions in accessing water resources than their non-Roma neighbours.⁶ The ERRC identified these as prima facie cases of discrimination, either direct (i.e. there was evidence Roma communities had less favourable conditions in relation to water due to their ethnicity), or indirect (i.e. Roma communities had less favourable conditions in relation to water compared which similarly situated non-Roma communities, and those less favourable conditions could not be objectively justified by a legitimate aim).
12. In 75 of the sites investigated (81%), the Romani neighbourhoods or settlements were not connected to the water mains. Moreover, in 63 places (68%), all Romani households in the neighbourhood or settlement were not supplied with tap water and a functioning sewerage system. The data did not reveal a strong correlation between the legal status of the settlements or neighbourhoods and access to water; those Roma living in formal, legal settlements or neighbourhoods were no less likely to be deprived of water, among the sites investigated. However, if the houses were built on land with unclear ownership or the occupants lacked a construction permit or similar paperwork, the local authorities generally refused to connect them to the public water system. The authorities justified this by pointing out that domestic law prevents building water and sewerage system infrastructure in these neighbourhoods. Most of the authorities, when the matter was put to them, rejected accusations of ethnic profiling or other forms of discrimination.
13. Affordability was also a problem: the research findings indicate that more than one quarter of Roma (28%) whose situation was investigated had either been disconnected or were currently under threat of being disconnected from water supply due to payment arrears.
14. In the absence of a public water supply, the Roma whose situation we investigated often had no other choice but to rely on untreated and unprotected water sources like self-made wells, natural springs, and rivers, all of which can be breeding grounds for pathogens. The research pointed out that 20% of the Romani households investigated relied entirely on such unprotected water sources. Although the public authorities were aware that self-made wells provided the only available drinking water for these communities, they failed to check the quality of the water in those wells. Many Roma interviewed also stated that their only water source was also used by wild and feral animals, and was unprotected from contamination by insects. More than half of the Romani neighbourhoods and settlements visited (63.44%) reported that their water sources regularly dried out during summer and froze during winter.
15. Ground water in shallow wells was contaminated by agricultural pesticides and/or pit latrine faeces in 26.88% of sites considered, according to the Roma residents we interviewed. High levels of natural

⁶ The majority of the remaining Romani neighbourhoods also experienced problems with public water supply and sanitation but in these cases these problems were shared with their non-Roma neighbours.

arsenic, boron, fluoride or manganese, and contamination from animal corpses and insects, were also problems.⁷ In 40 of the sites investigated (43.01%), wells in Romani neighbourhoods were situated next to rivers which contaminated the water in the wells.

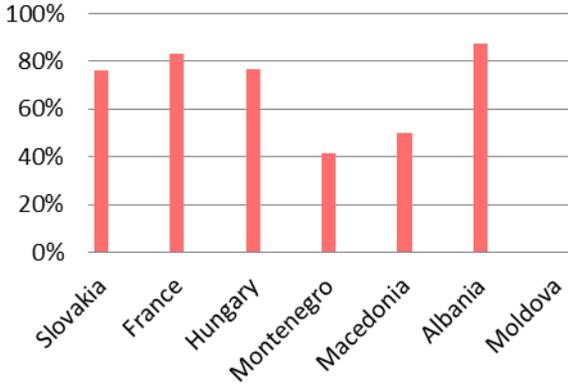
16. In more than half of the places visited (52.69%), the nearest water source was more than 100 metres away, and in some places Roma had to walk several kilometres. Distant water resources result in a high risk to public health from insufficient sanitation. According to the World Health Organization (WHO), when the water source requires a walk of between 100 metres and 1,000 metres from home or five to 30 minutes total collection time, the quantities of water collected are unlikely to exceed 20 litres per person daily and hygiene practice may be compromised, resulting in a high risk to public health from poor hygiene. When the water source is more than one kilometre away from the home or requires more than 30 minutes collection time, the likely volumes of water collected are very low, typically less than five litres per person per day; basic consumption and hygiene practice are compromised to an extent that the risk to public health from poor hygiene is very high.⁸
17. The ERRC's research reveals that the task of collecting water in the communities investigated generally falls on women and girls. Moreover, when water resources are distant, the path can lead through unprotected terrain and contain obstacles such as fences, walls, highways, or private land with protective owners who take aggressive action against trespassers. More than 40% of the Roma surveyed indicated that their path to water contained such obstacles. Those collecting water, mostly women and girls, were also confronted by stray dogs and other animals.
18. The distant public pumps or fire hydrants which are the only source of water for many Roma are often managed by reluctant and hostile authorities who frequently cut them off as soon as they find that Roma are using them. When there is no other possibility left to get water, Roma have to walk to the nearest shop and buy bottled water. As a result, the poorest Roma can end up paying the most for water.
19. Many Romani settlements and neighbourhoods, especially in Albania, Macedonia, and Montenegro, only managed to connect themselves to a water supply thanks to funds provided by international donors. In Slovakia, several Roma settlements were only able to construct adequate wells thanks to special funds distributed by the Roma Plenipotentiary Office in the early 2000s. Without these funds, it seems that these Roma would still be struggling to secure access to water.
20. Fewer than 12% of the sites visited had a functioning sewerage system. Three quarters of Romani households surveyed resorted to defecating either in self-made pit latrines or in the open.
21. A map showing where the ERRC carried out its research is available at <https://www.google.com/maps/d/edit?mid=zPYT6ATnCdMQ.krFMQRruSZco&usp=sharing>. The charts below depict the information discussed above, broken down by country, recording data about the sites researched in each. The notation "X" indicates that the condition was present throughout a given settlement or neighbourhood; "XO" that the condition was present in respect of some, but not all, households in a given settlement or neighbourhood; and "O" that the condition was absent. The ERRC is preparing a full report on the basis of the research which, with the Court's permission, we offer to submit when it is ready.
22. The ERRC's research is of course not meant to represent the situation of Roma communities' access to water across Europe or even in any given country. The research was designed to demonstrate, and does demonstrate, that a significant number of Roma communities suffer problems in relation to access to water that most people in Europe would consider unthinkable, and which violate the international and European legal framework set out in part B of this submission. The

⁷ According to WHO, diseases transmitted through water or human excrement are the second-leading cause of death among children worldwide, after respiratory diseases, available at: <http://www.un.org/waterforlifedecade/background.shtml>.

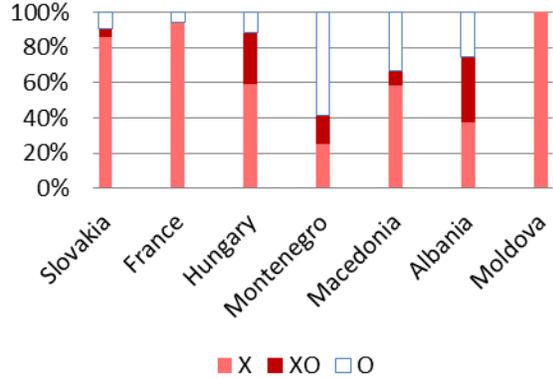
⁸ World Health Organization, *Guidelines for Drinking Water Quality*, 3rd ed, incorporating first and second addenda (Geneva: WHO, 2008), p. 91; Amnesty International Slovenia *Parallel Lives: Roma denied rights to housing and water in Slovenia*, 2011, p. 44, available at: <https://www.amnesty.org/en/documents/EUR68/005/2011/en/>.

research was also designed to reveal discrimination: our evidence showed that many Roma (i.e. those in 62 of the 93 settlements and neighbourhoods visited) were experiencing what amounted to a prima facie case of direct or indirect discrimination.

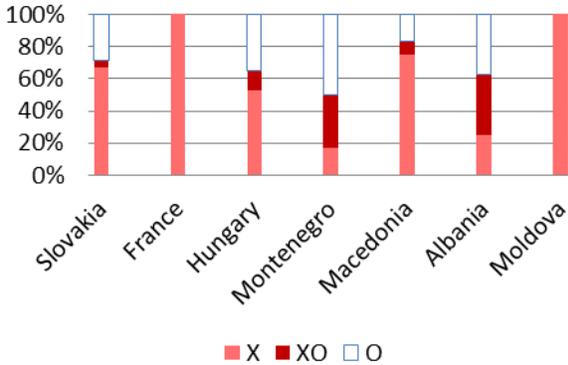
Evidence of discrimination



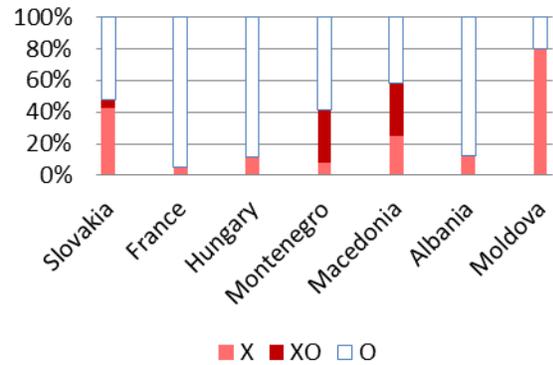
No tap water in household



Cannot afford service pipes and/or charges



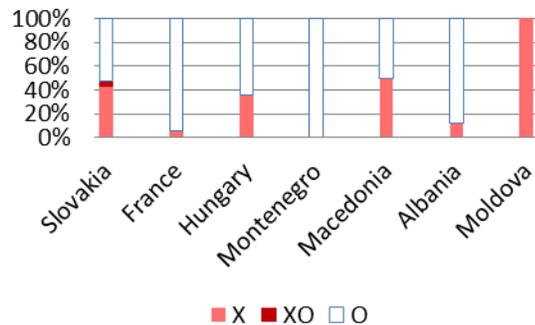
Access only to an open source of water



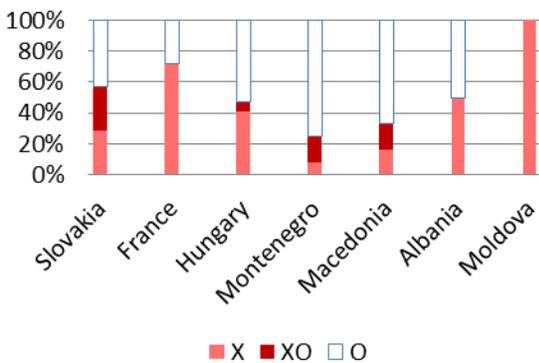
Shallow wells – risk of contamination



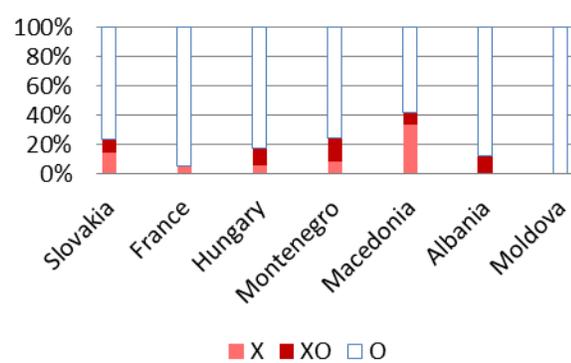
Contamination from animals



Distant water sources (>150 metres)



Households with flush toilets



B. The International and European Legal Framework

23. In the light of Article 53 of the Convention, as well as the Court's established case law to the effect that "*the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law*",⁹ the ERRC sets out below the relevant international and European law framework governing the right to water.

i. United Nations Materials

24. The UN Committee on Economic, Social, and Cultural Rights (CESCR) provided detailed views on the right to water as a human right in 2003, in its General Comment on the subject.¹⁰ The Committee found that "*the right should... be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity*".¹¹ The ERRC respectfully recommends that the Court considers this General Comment carefully. We highlight two points.

⁹ See, e.g., *Neulinger and Shuruk v Switzerland* (Grand Chamber, 2010), § 131.

¹⁰ General comment no.15.

¹¹ *Ibid.*, § 3.

- a. The first is the Committee's outline of the normative content of the right to water. The Committee focuses on three factors: availability; quality; and accessibility (including physical accessibility, economic accessibility, non-discrimination, and accessibility of information about water issues).
- b. The second is the Committee's extensive comments about non-discrimination. According to the Committee:

14. States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.

15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

The Committee also states clearly that “No household should be denied the right to water on the grounds of their housing or land status”.¹²

25. In July 2010, following almost 40 years of high-level negotiations and discussions, UN General Assembly Resolution A/Res/64/292 recognised access to safe drinking water and sanitation as a human right. This recognition solidified the work of Catarina de Albuquerque, a Portuguese legal scholar who in 2008 had been appointed the first UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation; she was succeeded in 2014 by Brazilian water and sanitation expert Léo Haller. The (former) UN Rapporteur established five criteria for access to water: availability; safety; acceptability; accessibility; and affordability.¹³ Water should be available in sufficient quantities for personal and domestic needs.
26. The World Health Organisation (WHO), whose standards the CESCR¹⁴ and the UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation consider the minimum to which everyone is entitled, estimates that 100 litres per person per day meets all needs. Fifteen litres is an absolute minimum; this minimal amount however already raises health concerns.¹⁵ Water should be safe for drinking and free from contamination (from industrial and agricultural pollution, natural groundwater pollution, inadequate sanitation, and improper handling and household storage) and kept away from animals, including insects. Water should be acceptable in terms of colour, odour, and taste for people drinking it. It should not be located a long distance from people's homes, and the path to its source should be safe and convenient for all users. Finally, water should be available at a price that is affordable to all people, including the poorest. Moreover, the cost of water should not be so high as to limit people in acquiring other basic goods and services.

¹² Ibid, § 16(c).

¹³ Special Rapporteur on the human right to safe drinking water and sanitation, Human Rights to Water Criteria Explained: available at: <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx>.

¹⁴ General Comment no.15, § 12(a).

¹⁵ Grandjean, A. *Water Requirements, Impinging Factors, and Recommendation Intakes, Rolling Revision*, WHO, 2004, p.14, available at http://www.who.int/water_sanitation_health/dwq/nutrequirements/en/; see also: Special Rapporteur on the human right to safe drinking water and sanitation, Human Rights to Water Criteria Explained: available at <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx>.

ii. European Union Materials

27. The European Union has adopted two water-related Directives: the Drinking Water Directive (Directive 98/83), in 1998; and the so-called Water Framework Directive (Directive 2000/60). As its name suggests, the former concerns water used for drinking and other everyday uses. The Directive sets minimum standards for the quality of water that is intended for human consumption.
28. In November 2012, a European Citizenship Initiative on the right to water¹⁶ was launched to urge the European Commission to ensure that EU law protects water as a human right. The online petition attracted over 1.8 million signatures, easily passing the threshold under European Union law¹⁷ to require a response. The Initiative highlighted the fact that many people in Europe remain without adequate access to water and sanitation, and that increasing numbers of people are being disconnected as they are not able to pay for water services. The petition put forward three main demands.
- a. EU institutions and Member States should be obliged to ensure that all EU residents enjoy the right to water and sanitation.
 - b. Water supply and management of water resources should not be subject to “internal market rules”, and water services should be excluded from economic liberalisation.
 - c. The EU should increase its efforts to achieve universal access to water and sanitation.
29. The Commission responded to the Initiative with policies ensuring that water is not to be treated as a market commodity in Europe. However, they have so far failed to provide any concrete measures as to how the EU will realise the right to water for all. Due to the lack of tangible measures, the Initiative’s organisers continue their advocacy work with EU bodies.

iii. Council of Europe Materials

30. The Committee of Ministers of the Council of Europe has adopted Recommendation Rec(2001)14 on the European Charter on Water Resources, according to which:
- 5. Everyone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families.⁷ It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.⁸ Social measures should be put in place to prevent the supply of water to destitute persons from being cut off.*
31. The Committee for the Prevention of Torture has stated that “*proper toilet facilities and the maintenance of good standards of hygiene are essential components of a humane environment*”¹⁸.
32. In a long line of cases, the Court itself has relied on unsatisfactory sanitary conditions, including limited access to running water and washing facilities, as one of the key elements in finding that conditions of detention amounted to degrading contrary to article 3.¹⁹ The Court has also recognised that the uncertainty and anguish experienced by a community in the wake of an industrial accident affecting a river and the underground water supply, compounded by the authorities’ failure to provide information on its past, present, and future health consequences, amounted to a violation of Article 3

¹⁶ Full details (including the text of the petition and details about the European Commission’s response) are available at <http://www.right2water.eu/>.

¹⁷ Article 11(4) of the Treaty on European Union: “*Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties*”.

¹⁸ 2nd General Report on the CPT’s activities covering the period 1 January to 31 December 1991, § 49.

¹⁹ See, e.g., *Iacov Stanciu v Romania* (2012) § 176.

of the Convention.²⁰

iii. Comments on the international and European legal framework

33. There is a consensus at UN level that there is a human right to water. While this is primarily a social and economic right, it has strong links to the right to life (Article 2 of the Convention) as well as to dignity (linked to the notion of “moral and physical integrity”,²¹ which falls under the private-life rubric of Article 8). Water is therefore recognised at UN level as being more than a mere commodity. As the CESCR pointed out (see above, § 24.b), States are obliged to avoid discrimination in securing the right to water. This implies, the CESCR has pointed out, a positive obligation to design systems for the distribution of water that avoid excluding particular segments of the population (notably those protected by non-discrimination principles). There is also long-standing European Union legislation in the field of water quality, and a growing recognition, manifesting itself through the successful Citizens’ Initiative on the matter, that the right to water should be more adequately protected at European Union level.

C. Evaluating Discrimination in Relation to Access to Water

34. It will be unusual for Roma claiming unequal access to water resources to be able to show evidence of discrimination “beyond reasonable doubt”²². The ERRC is aware of cases where public or private providers of water services have subjected Roma to less favourable treatment based on their ethnicity, but evidence that would satisfy the Court of this would be difficult to secure. In many more cases, the less favourable treatment of Roma communities in relation to water is so intertwined with decades-old (if not centuries-old) patterns of residential and economic exclusion as to make it absolutely impossible to identify discrimination directly. Applicants will have to rely on the notion of indirect discrimination, a key principle of anti-discrimination laws as developed at national and EU levels and enshrined in the Court’s case law.²³

35. The ERRC respectfully submits that the following three principles, derived from the Court’s case law and from other sources of anti-discrimination law, should guide the assessment of whether Roma are victims of discrimination in relation to their access to water.

- a. **The existence of less favourable circumstances for Roma in accessing water, when compared with nearby non-Roma communities, shifts the burden of proof onto the respondent.** Roma poverty and social exclusion in Europe are not naturally-occurring phenomena. They are the consequence of the turbulent history of the Romani people – marked by discrimination and segregation – that the Court has repeatedly recognised.²⁴ The existence of Roma communities who do not enjoy equal access to water is, in and of itself, evidence of the discrimination that Roma continue to experience. The historical exclusion of Roma communities is a well-accepted fact implicit in the Court’s own case law.²⁵ Given States’ positive obligations to rectify long-standing patterns of discrimination against Roma,²⁶ showing that only Roma are affected by a particular problem concerning access to water is sufficient to shift the burden of proof onto the respondent. (The shifting of the burden of proof is of course a key concept of anti-discrimination law²⁷ which also forms part of the Court’s case law under Article 14.²⁸) This is the case even if there are some Roma living nearby who do not experience the same problem in relation to access to water: the Court will recall its finding in *Oršuš and others v Croatia* (Grand Chamber, 2010), in which only Roma were

²⁰ *Tatar v Romania* (2009), § 122.

²¹ See *X and Y v the Netherlands* (1985), § 22.

²² See, e.g., *Nachova and others v Bulgaria* (2005), § 147.

²³ *D.H. and others v Czech Republic* (2007), § 184.

²⁴ See, e.g., *Horváth and Kiss v Hungary* (2013), § 102.

²⁵ See, e.g., *Horváth and Kiss v Hungary* (2013), § 115; *Winterstein v France* (2013), § 148(ç).

²⁶ See, mutatis mutandis, *Horváth and Kiss v Hungary* (2013), § 116.

²⁷ See EU Directive 2000/43, Article 8.

²⁸ See, e.g., *Oršuš and others v Croatia* (2010), §§ 152-155; *E.B. v France* (2008), § 74.

affected by a policy targeting those pupils who at the beginning of their education could not speak Croatian, though some Roma children could speak Croatian and so were unaffected. Likewise, it maybe that only Roma living in informal settlements are affected by lack of access to water, while other Roma (and most non-Roma) live in formal neighbourhoods connected to the water mains. That does not eliminate the existence of a prima facie case of discrimination.

- b. **Insecure land tenure alone cannot justify the less favourable circumstances Roma communities experience in relation to access to water.** As mentioned above (§ 12), the ERRC found that the authorities frequently explain the less favourable situation of Roma communities in terms of the lack of tenure to the land or the buildings in which they live. The Court has already found that States have obligations towards people in respect of their homes under Article 2²⁹ and Article 8,³⁰ even when those people have no domestic-law right to live there (contrary to an argument often pleaded in vain by governments before the Court). At the same time, the Court has long held that States have a wide margin of appreciation in regulating private property in the pursuit of greater social justice,³¹ in particular when regulating the use of private property in order to provide utilities to a community.³² In circumstances where States are aware of the existence of a residential community whose members belong to the Roma minority, and are aware of the effect on their moral and physical integrity of their less favourable access to water, mere reference to a lack of tenure or competing private property interests is insufficient to justify those less favourable conditions. This question must again be considered in the light of States' positive obligations: lack of tenure is often the result of segregationist housing policies and other forms of discrimination, and making provision of water dependent on tenure cannot be justified under the international and European legal framework set out above.
- c. **Less favourable treatment of Roma cannot be justified by reference to stereotypes, which the Court must be particularly vigilant in detecting.** The Court has already found in its case law that discrimination cannot be justified by reference to stereotypes about the protected groups concerned (particularly women),³³ and has been urged in academic writing³⁴ to expand this anti-stereotyping approach. The propagation of anti-Roma stereotypes are a key feature of anti-Gypsyism.³⁵ Any justification for less favourable treatment which is contaminated³⁶ by such stereotypes cannot protect the Respondent State putting it forward from a finding of discrimination. The ERRC regularly monitors hate speech and hate crimes against Roma. One of the most persistent and insidious stereotypes deployed by those seeking to exclude Roma is that all Roma wish to live apart from non-Roma communities and according to a lifestyle so different from the majority that they do not need (or deserve) access to the same level of public services (water, electricity,³⁷ education...). Council of Europe bodies have resisted and debunked this stereotype of Roma wishing to live separate, different lives from the rest of European society. The ERRC respectfully advises the Court to be alert to such stereotypes and to reject justifications for unequal treatment based on them.

The European Roma Rights Centre
23 September 2015

²⁹ *Öneriyıldız v Turkey* (2004), §§ 105-106.

³⁰ *Winterstein v France* (2013), § 148(5).

³¹ *James and others v the United Kingdom*, (1986), § 47.

³² *Cernea v Romania*, dec., (2011), §§ 34 & 43.

³³ See, e.g., *Konstantin Markin v Russia* (2012), §§ 141-143.

³⁴ Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, in HUMAN RIGHTS LAW REVIEW (2011) 11 (4): 707-738.

³⁵ See European Commission Against Racism and Intolerance, General Policy Recommendation no.13, recommendation 6(g) (recommending that States take measures to “combat prejudice and stereotypes concerning Roma and Travellers in respect of access to housing”).

³⁶ See, mutatis mutandis, *E.B. v France* (2008), § 80.

³⁷ See the judgment of the Court of Justice of the European Union in Case C-83/14 (16 July 2015), concerning alleged discrimination against Roma by an electricity provider.