

IN THE EUROPEAN COURT OF HUMAN RIGHTS

LUPU v Romania (application no 36250/09)

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 an 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-Gypsyism. See *Vona v Hungary* (2013), Concurring Opinion of Judge Pinto de Albuquerque. The ERRC encourages the Court explicitly to acknowledge the phenomenon of anti-Gypsyism, and, like ECRI and the Committee of Ministers of the Council of Europe,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 report⁷ 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

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>.

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 report⁸ 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 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 2005¹⁴ 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 2013¹⁵ 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.

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>.

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.

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 report¹⁶ 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 “*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.

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

¹⁷ The observations are available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsk9HkNmUTbUvDqDjwUSqemoc4TdqltS%2bjZT%2bLyftwg2oSEAKCwygl6Na1poCrRvPdMhWKEsUW1FhH%2fikjAtFFFaGQKSA1kptztIWI MN00ky4aQyMf%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=

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”.
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.

b. Roma and border controls

21. The ERRC has for many years combatted discrimination in the enjoyment of freedom of movement by Roma within the European Union²⁰ and across its external border.²¹ Visa liberalisation in the context of a country’s envisaged EU accession is often accompanied by the adoption of restrictive measures with a disproportionate and unjustifiable impact on Roma.²² In practice, a restrictive stance of free movement is compounded by the underlying stigmatisation of Roma, resulting in widespread violation of their rights when trying to cross a border.
22. The ERRC notes that the Court is concerned with the period just before Romania’s accession to the European Union on 1 January 2007.
23. The years immediately preceding Romania’s accession to the EU were marked by a series of restrictions on the rights of Romanian citizens to leave their own country. From 2002 Romanian citizens, although they did not need visas to travel within Europe, had to show they had sickness insurance, a return ticket, and a minimum amount of foreign currency. About one million were turned away by their own country’s border guards under those rules.²³ The rules became even more restrictive under Government Ordinance 28/2005, only to be relaxed again under Government Ordinance 29/2006, in whose preamble the Government revealingly indicated that “*presently illegal migration of Romanian citizens no longer constitutes, like in previous years, one of the main reasons because of which Romania was blamed by the [EU]*

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.

²⁰ See FRA, *The situation of Roma EU citizens moving to and settling in other EU Member States* (November 2009), available at http://fra.europa.eu/sites/default/files/fra_uploads/705-Roma_Movement_Comparative-final_en.pdf.

²¹ *Roma Rights 1:2014*, “Going Nowhere? Western Balkan Roma and EU Visa Liberalisation”, available at <http://www.errc.org/article/roma-rights-1-2014-going-nowhere-western-balkan-roma-and-eu-visa-liberalisation/4325>.

²² See the ERRC’s factsheet on the situation of Macedonian Roma attempting to leave their country, available at <http://www.errc.org/cms/upload/file/macedonia-factsheet-freesom-of-movement-for-roma-in-macedonia-english-26-february-2014.pdf>

²³ See *Roma Inclusion in Romania: Policies, Institutions and Examples* (2012), available at http://www.fundatia.ro/sites/default/files/ro_123_studiu_ro.pdf, especially page 93.

member states". Some of the restrictions of this period were later censured by the European Court of Justice in the *Jipa Case C-33/07*²⁴ under EU law. In the ERRC's view, these restrictions were also highly questionable under the Court's case law on Article 2 of Protocol 4. *Stamose v Bulgaria* (2012), §§ 29-37.

24. Anti-Gypsyism, on the side of the Romanian authorities and within the EU and its Member States, lurks behind these restrictions. In 2004 the French Interior Ministry and the Romanian Government signed an agreement in relation to the return and the reintegration of migrant Roma.²⁵ The response by older EU Member States to Roma migration after accession also shows that Roma were the focus of concerns about migration in the run-up to accession: Italy implemented an unlawful "state of emergency"²⁶ about "nomads", placing large numbers of Roma from Romania in "formal camps" and processing their personal data, such as fingerprints, while France²⁷ and Denmark²⁸ experimented with controversial "voluntary repatriation" programmes.
25. More importantly, this legally-questionable migration regime provided significant opportunities for institutional anti-Gypsyism within Romania's border service to flourish, at a time when anti-Roma sentiment was demonstrably prevalent and linked to migration. As mentioned above (§ 11), according to a national survey conducted by the NCCD in 2005, 61% of respondents thought Roma were a source of shame for Romania and 52% of respondents believed that Roma should not be allowed to travel outside the country. In these circumstances – widespread racism combined with broad, legally-questionable powers given to the authorities to stop citizens from leaving – Roma were particularly vulnerable to unlawful action by border guards targeting them specifically as an ethnic group.

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

26. Roma applicants have had difficulty, when they were victims of a violation of Article 14 taken with the procedural limb of Article 3, of convincing the Court that they were also victims of a violation of Article 14 taken with the substantive limb of Article 3. The ERRC understands the Court's logic. The Court requires an applicant alleging discrimination to demonstrate it "*beyond reasonable doubt*". *Nachova and others v Bulgaria* (Grand Chamber, 2005), § 147. However, vulnerable victims alleging racially-motivated violence are particularly unlikely to discharge this burden of proof (especially where there is no evidence in the record of racist statements), when they are also victims of a failure on the part of the authorities to investigate what happened to them. The Court will appreciate the particular frustration for Roma victims of racist violence: the failure of the State to investigate the crime properly leaves them unable to establish a violation of Article 14 taken with the substantive limb of Article 3 if, for example, the impugned act was one of police brutality. See, e.g., *Nachova*, § 147. The ERRC has argued in the past that the Court should reconsider the way it applies the burden of proof in cases involving allegations by Roma that they have been victims of Article 14 taken with the substantive limb of Article 3. Without again labouring the point, we note here that we endorse the comments of Judges Gyulumyan and Power in *Carabulea v Romania* (2010), §§ 9-16. What follows focuses on the question of how to approach allegations by Roma that they have been victims of violations of Article 14 taken with the procedural limb of Article 3 in the presence of institutional racism.
27. 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.

²⁴ The judgment can be found at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67583&pageIndex=0&doclang=EN&mode=lst&dir=&oc=c=first&part=1&cid=265997>

²⁵ See *Roma Inclusion in Romania: Policies, Institutions and Examples* (2012), available at http://www.fundatia.ro/sites/default/files/ro_123_studiu_ro.pdf, especially page 97.

²⁶ Details about the judgment condemning the state of emergency can be found at <http://www.errc.org/article/end-of-the-road-for-italys-illegal-state-of-emergency/4137>.

²⁷ Details can be found at <http://www.errc.org/article/new-deal-between-france-and-romania-on-roma-returns-must-not-breach-rights-to-free-movement/4053>.

²⁸ Details can be found at <http://www.errc.org/article/further-attempts-by-denmark-to-force-roma-to-voluntarily-return-to-kosovo/1105>.

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

28. Such a finding only considers part of the problem of institutional 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).
29. 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.
30. 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.
31. 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.
32. 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.

33. The treatment of racist motivation under Romanian criminal law as an aggravating circumstance,²⁹ mostly taken into account at the sentencing stage, rather than as an element of the crime (*formă calificată a infracțiunii*), further contributes to obscuring the prevalence of racially motivated crimes.³⁰
34. 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.

²⁹ Article 77(h) of the Criminal Code.

³⁰ 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.