

EUROPEAN COURT OF HUMAN RIGHTS

Hudorovič v. Slovenia and Novak and Others v. Slovenia (Applications Nos. 24816/14 and 25140/14)

Written submissions by the Human Rights Centre of Ghent University

These written comments are submitted by the Human Rights Center of Ghent University (Belgium), pursuant to leave granted by the European Court of Human Rights in its letter of 27 August 2015 and in accordance with rule 44 § 3 of the Rules of the Court.

Executive Summary

The Human Rights Center of Ghent University respectfully submits that *Hudorovič v. Slovenia* and *Novak and Others v. Slovenia* provide the Court with the opportunity to clarify the scope of protection afforded by articles 3, 8 and 14 ECHR in contexts of tolerated informal settlements characterised by unsanitary living conditions. The first part of this intervention briefly situates the legal issues at stake within the historical and social context of informal Roma settlements in Slovenia. The second part discusses the scope of articles 3 and 8 ECHR and the State's procedural and substantive obligations *vis-à-vis* unsanitary living conditions of Roma adults and children who lack access to basic public facilities in tolerated informal settlements. The third part argues that the situation of Roma residents in informal settlements is compounded by both historical discrimination and socio-economic disadvantage, which merits scrutiny under Article 14 ECHR. By taking this approach to Article 14, the Court could further elaborate its regime of positive duties in the field of equality and non-discrimination. Throughout these three sections, the present comments draw attention to comparative materials which are of relevance for the legal reasoning of the Court.

I. Relevant Contextual Considerations

Following a visit to Slovenia in 2010, a UN Special Rapporteur found situations like the ones in the Roma settlements she had visited "astonishing to observe in a country where so much has been achieved for the vast majority of the population."¹ The Council of Europe Commissioner for Human Rights has noted that in a number of Council of Europe member States, including Slovenia, "forms of unequal treatment include preferential treatment of non-Roma in the development of infrastructure and systematic failure to develop infrastructure in Roma communities."² One study also observed that "in general, the Slovenian Roma community is among the most disadvantaged groups with regard to access to public infrastructure."³ The European Commission against Racism and Intolerance (ECRI) indicates in its 2014 Report on Slovenia that around 20 percent of the Roma population experience severe difficulties in accessing water.⁴ Whereas Slovenia has ensured the provision of safe water to nearly 100 percent of its general population, about 21 of 95 settlements in Prekmurje and Dolenjska have no access to water and many of them neither have access to

¹ Statement by the United Nations Expert on Human Rights, Water and Sanitation (Visit to Slovenia, 24-28 May 2010). She travelled to Dolenjska where she visited Roma settlements in Ribnica, Trebnje, Novo Mesto, and Škočjan.

² Commissioner for Human Rights, "Human rights of Roma and Travellers in Europe," Council of Europe, February 2012, p. 138.

³ RAXEN National Focal Point (Slovenia) Thematic Study, *Housing Conditions of Roma and Travellers*, March 2009, p. 58.

⁴ ECRI, Fourth Report on Slovenia (adopted on 17 June 2014), para. 109. The report indicates that 17 percent obtain water from springs or neighbours, 2 percent from cisterns while "some communities are forced to walk considerable distances to collect water in jerry cans from petrol stations, cemeteries or polluted streams." ECRI specifically notes the situation in Roma settlement of Goriča Vas in Ribnica at para. 110. On Ribnica, see also Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Mission to Slovenia, U.N. Doc. A/HRC/18/33/Add.2 (2011), para. 35.

sanitation.⁵ It is estimated that 49 percent of Roma live in “barracks, containers, trailers or other makeshift accommodation.”⁶ Several materials indicate that the living conditions in many Roma settlements in Slovenia are not just “far below any minimum living standard”⁷ but well below the standards enjoyed by the majority population. International materials additionally bring into focus the reciprocal interaction and mutually reinforcing character between historical prejudice against Roma and their disadvantaged position in accessing basic public utilities in Slovenia.⁸

II. Unsanitary Living Conditions in Tolerated Informal Settlements from the viewpoint of Articles 3 and 8 ECHR

The cases of *Hudorovic* and *Novak and Others* provide the Court with a unique possibility to clarify the scope of the rights guaranteed by and the State’s obligations flowing from Articles 3 and 8 ECHR *vis-à-vis* informal settlements that are *de facto* tolerated by the State authorities.

1. Scope of Articles 3 and 8 ECHR

According to the standards already set by the Court, living conditions in informal settlements that are *de facto* tolerated may attract the protection of Article 8 in both its home and private life limbs. The right to respect for the home applies where persons have “sufficient and continuous links” with any particular premises, regardless of the lawfulness of the occupation under domestic law.⁹ Moreover, the Court has held that living conditions may also attract the protection of the right to respect for private life, in particular where “a sufficient link [exists] between the applicant’s living conditions as well as the lack of provision of adequate housing and the applicant’s private life.”¹⁰

In the Court’s environmental jurisprudence, Article 8 has been held to apply where “the quality of the applicant’s private life and the scope for enjoying the amenities of his home have been adversely affected” by the pollution in question.¹¹ The Court has accepted that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”¹² Adverse health effects are thus not required to engage Article 8 ECHR, but when those effects are nonetheless established, Article 8 is *a fortiori* compromised.¹³ The Court has also found that living in an “area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health.”¹⁴

⁵ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Mission to Slovenia, U.N. Doc. A/HRC/18/33/Add.2 (2011), paras. 15 and 33. See also Amnesty International, *Parallel Lives. Roma denied rights to Housing and Water in Slovenia*, 2011, pp. 40-41 (among the informal settlements referred to in the report are Dobruška vas in Škocjan and Goriča vas in Ribnica).

⁶ *Ibid.*, para. 32.

⁷ See e.g., National Programme of Measures for Roma of the Government of the Republic of Slovenia for the Period 2010–2015, 4.1.1; Advisory Committee on the Council of Europe Framework Convention for the Protection of National Minorities, Third Opinion on Slovenia (adopted on 31 March 2011), para. 47; Council of Europe Committee of Ministers, Resolution CM/ResCMN (2012)12 on the Implementation of the Framework Convention for the Protection of National Minorities by Slovenia, 1.b.; and Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on Slovenia, Seventy-seventh session, 2-27 August 2010, para. 10.

⁸ Council of Europe Commissioner for Human Rights p. 140 and pp. 144-148. This point is further elaborated in section III. 1. below.

⁹ See e.g. *Bjedov v. Croatia*, 29 May 2012, para. 57.

¹⁰ *Costache v. Romania*, 27 March 2012, para. 22.

¹¹ *Powell and Rayner v. the United Kingdom*, 21 February 1990, para. 40. Confirmed by the Grand Chamber in *Hatton v UK*, 8 July 2003, para 96.

¹² *López Ostra v. Spain*, 9 December 1994, para. 51.

¹³ This follows from the standard set in *López Ostra*, *Idem*. See also, *Dzemyuk v. Ukraine*, 4 September 2014, para. 77.

¹⁴ *Dubetska and Others v. Ukraine*, 10 February 2011, para. 111.

Hence, we respectfully submit that living conditions without access to water and sanitation fall under the scope of Article 8 insofar as such conditions prevent individuals from enjoying their homes and affect their well-being, health and quality of life. Support of this interpretation can be found, for example, in the French Council of State. According to the latter, a tacit administrative decision by the local authorities denying the connection of a building irregularly established for residential purposes to the drinking water supply network constituted an interference with the right to respect for private and family life as guaranteed by Article 8 ECHR.¹⁵ The Council of State furthermore concluded that such interference failed to be proportionate, amounting to a violation of the provision.

The Court has accepted that, under certain circumstances, deplorable living conditions may also raise an issue under Article 3 ECHR.¹⁶ Moreover, the Court has acknowledged that not only bodily injury and intense physical suffering may attain the level of severity required by Article 3. “Where treatment humiliates or debases a person, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking this person’s moral and physical resistance, it may also fall within the prohibition of Article 3.”¹⁷ Thus, in assessing the impact, from the perspective of Article 3, of the lack of access to basic public facilities by residents of Roma informal settlements in Slovenia, account should be taken of the numerous diseases reported among them, particularly among children;¹⁸ as well as of the humiliation they experience by having to defecate, urinate and deal with menstruation in the open.¹⁹ We respectfully submit that such circumstances are likely to affect the physical integrity and dignity of the persons concerned, the protection of which is one of the core aims of Article 3 ECHR.

Several international bodies have pointed out that access to water is indispensable for survival and for preserving human dignity.²⁰ In cases concerning prison conditions, the Court has ruled that a lack of access to water and sanitation can amount to inhuman and degrading treatment.²¹ The Court has considered that access to hygienic sanitary facilities is paramount for preserving inmates’ dignity. In its view, “not only is hygiene an integral part of the respect that persons owe to their bodies and to others [...] [sanitary facilities] also constitute a precondition for the preservation of health. *A truly humane environment is not possible without ready access to toilet facilities or the possibility of keeping one’s body clean.*”²² Other international human rights bodies dealing with deprivation of liberty have reached similar conclusions with respect to lack of access to water and sanitation.²³

¹⁵ Madame Sandra A c/ Commune de Gouvernes [2010] Conseil d’Etat 323250 (France).

¹⁶ See e.g. *Costache v. Romania*, 27 March 2012, para 21, referring to *Moldovan and Others v. Romania* (No. 2), 12 July 2005.

¹⁷ See e.g. *Ananyev and Others v. Russia*, 10 January 2012, para. 140.

¹⁸ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Mission to Slovenia, U.N. Doc. A/HRC/18/33/Add.2 (2011), paras. 33-36.

¹⁹ Report of the Special Rapporteur on the human right to safe drinking water and sanitation on Stigma and the realization of the human rights to water and sanitation, U.N. Doc. A/HRC/21/42 (2012), para. 53.

²⁰ UN Human Rights Council, Resolution 18/1 on the human right to safe drinking water and sanitation, 12 October 2011, paras. 5 and 7; CESCR, General Comment No. 15 on the right to water, U.N. Doc. E/C.12/2002/11 (2002), paras. 1-4; Council of Europe Parliamentary Assembly, Resolutions 1809 (2011) and Resolution 1693 (2009); IACtHR, *Vélez Loor v. Panama*, Judgment of 23 November 2010, para. 216.

²¹ *Neshkov and others v. Bulgaria*, 27 January 2015, para. 240; *Iordan Petrov v. Bulgaria*, 24 January 2012, para. 125; *Varga and others v. Hungary*, 10 March 2015, paras 90-91; *Stepuleac v. Moldova*, 6 November 2007, para. 65; *Halil Adem Hasan v. Bulgaria*, 10 March 2015, para. 12.

²² *Neshkov and others v. Bulgaria*, 27 January 2015, para. 240.

²³ CAT, Concluding Observations on the UK, U.N. Doc. CAT/C/CR/33/3 (2004), para. 4; CAT, Concluding Observations on Nepal, U.N. Doc. CAT/C/NPL/CO/2 (2007), para. 31; IACtHR, *Vélez Loor v. Panama*, Judgment of 23 November 2010, para. 216.

In this respect, neither the Court’s findings nor those of other human rights bodies are confined to cases concerning persons deprived of their liberty. Deplorable living conditions and lack of access to water and sanitation by asylum seekers and Roma individuals, for instance, have also been found to amount to treatment contrary to Article 3.²⁴ Referring to Roma applicants, the Court concluded that longstanding unsanitary living conditions entailed “considerable mental suffering, thus diminishing [the applicants’] human dignity and arousing in them such feelings as to cause humiliation and debasement.”²⁵ We therefore respectfully submit that longstanding deplorable living conditions characterised by lack of access to water and sanitation are capable of attaining the level of suffering and debasement required to fall within the scope of Article 3 ECHR.

2. State Obligations under Articles 3 and 8 ECHR

According to established case law of the Court, under Article 3 ECHR, State authorities must refrain not just from inflicting inhuman or degrading treatment, but also from exposing individuals to such treatment.²⁶ Moreover, the Grand Chamber has held that State responsibility could arise for ‘treatment’ contrary to Article 3 where an applicant, in circumstances wholly dependent on State support, finds herself faced with official indifference.²⁷ In this context, the Court attaches importance to the fact that a situation incompatible with human dignity has been the result of state inaction, and not of the applicant’s own volition.²⁸

In light of the above, we respectfully submit that in order to assess the State’s compliance with Article 3 in cases concerning living conditions in informal settlements, it is relevant to consider: (1) whether the State authorities have themselves located the group in an informal settlement or have condoned the applicants’ informal settlement; (2) whether the applicants could be considered to be in a situation of dependency from the State for their access to basic public utilities; (3) whether the State authorities have effectively attempted to alleviate the unsanitary living conditions at the informal settlement; (4) whether the applicants have engaged with the government in finding a solution to the problem; (5) the period of time during which the applicants have lived in deplorable circumstances; (6) the impact of the latter on the applicants’ health, well-being and dignity; and (7) whether the State authorities considered the disadvantaged and vulnerable condition of the applicants – such as Roma and children – as requiring special protection.²⁹

With regard to Article 8, the Court has held that this provision “does not guarantee the right to have one’s housing problem solved by the authorities”³⁰ and that “the scope of any positive obligation to house the homeless must be limited.”³¹ The legal question at stake in the cases under review is, however, much narrower.³² Rather than being concerned with the provision of housing, the cases hinge on the question of the State’s procedural and substantive obligations to guarantee acceptable living circumstances in situations in

²⁴ *M.S.S. v Belgium and Greece* [GC], 21 January 2011, para. 263; *Moldovan and Others v. Romania* (No. 2), 12 June 2005, para. 110; *V.M and Others v. Belgium*, 7 July 2015, para. 162. The IACTHR has found that deplorable living conditions of indigenous people and their lack of access to water and sanitation violated their right to life, which includes a dignified life. See *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, paras. 196 and 259; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, para. 168; *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2015, para. 168.

²⁵ *Moldovan and Others v. Romania* (No. 2), 12 June 2005, para. 110.

²⁶ *V.M and Others v. Belgium*, 7 July 2015, para. 162.

²⁷ *M.S.S. v Belgium and Greece* [GC], 21 January 2011, para. 253.

²⁸ *Budina v. Russia*, Decision of 18 June 2009; *O’Rourke v. the United Kingdom*, Decision of 26 June 2001.

²⁹ *V.M and Others v. Belgium*, 7 July 2015, App. No 60125/11, para. 153.

³⁰ See e.g. *Marzari v. Italy*, 4 May 1999.

³¹ See e.g. *O’Rourke v. the United Kingdom*, 26 June 2001.

³² In this vein see, *mutatis mutandis*, *Connors v. United Kingdom*, 27 May 2004, para. 86.

which State authorities have tolerated individuals establishing a “home” in the autonomous meaning of Article 8.

a) Adequate Legal Framework and Proportionality Review

In the framework of its Article 8 jurisprudence, the Court has held that a crucial question as to the State’s compliance with this provision is “*whether the respondent State had in place an adequate legal framework in compliance with its positive obligations under Article 8 of the Convention since the issue before the Court concerns the question of whether the law afforded an acceptable level of protection to the applicant in the circumstances.*”³³ The Court has accordingly scrutinised the adequacy of legal safeguards in a large number of areas of its case law.³⁴ Thus, a first important question to be answered is whether the State has complied with its positive obligation to develop such an adequate legal framework in the cases at hand. Secondly, if such a legal framework were found to exist, it must be shown that the living conditions of the persons concerned are not “linked to any unlawfulness in domestic terms.”³⁵

It is important to observe that the area of urban planning and water and sanitation services is an area *per se* where the State must have an effective legal framework affording adequate protection to individuals, including those living in informal settlements. Indeed, several international bodies have noted that the problem of informal settlements is closely linked to a lack of or inadequate governmental planning for urban growth.³⁶ Moreover, the operation of water and sewerage utility services is also generally managed by the State, either through local authorities, through publicly owned companies, or sometimes by private corporations subject to governmental oversight.³⁷ Therefore, in cases in which access to water and sanitation is impeded by urban planning issues (such as in the case of informal settlements), redressing the situation necessarily depend on steps to be taken by the State.

In order to judge the measures taken by the State to redress unsuitable living conditions in *de facto* tolerated informal settlements, the case of *Yordanova* is illuminating.³⁸ While this case, unlike the present ones, concerned evictions, the Court’s legal reasoning in this case nonetheless gives some guidance as to the factors that may be applied *mutatis mutandis* to the instant cases. On that basis, it is submitted that the principle of proportionality places the State under a procedural obligation to show that the fact that the informal settlement had been tolerated by the authorities (thus allowing the relevant community to develop strong links with the relevant premises) was taken into consideration when determining their response to deal with this situation.

³³ *Söderman v. Sweden* [GC], 12 November 2013, para. 91.

³⁴ Among others, the Court has examined this issue in the field of criminal law (protection against acts infringing physical and psychological integrity e.g. the already-mentioned *Söderman* case and *X and Y v. the Netherlands*, 26 March 1985); family law (e.g. *Marckx v. Belgium* [Plenary], 13 June 1979, and *Mikulić v. Croatia*, 7 February 2002), legal capacity (*Zehentner v. Austria*, 16 July 2009), abortion (e.g. *Tysiāc v. Poland*, 20 March 2007,) and access to information essential for one’s private life (e.g. *Gaskin v. the United Kingdom* [Plenary], 7 July 1989).

³⁵ *Strzelecka v. Poland*, 2 December 2014, para. 53; *Costache v. Romania*, 27 March 2012.

³⁶ CERD, General Comment No. 27 on Discrimination against Roma, U.N. Doc. A/55/18 (2000), paras. 30-31; CERD Concluding Observations on Israel, U.N. Doc. CERD/C/ISR/CO/14-16 (2012), para. 25; CRC, General Comment No. 15 on Article 24, U.N. Doc. CRC/C/GC/15 (2013), para. 48. p. 9; CESCR, General Comment No. 15 on the right to water, U.N. Doc. E/C.12/2002/11 (2002), para. 16 (c).

³⁷ *Butan and Dragomir v. Romania*, 14 February 2008, para. 34. See also, UN-HABITAT and American Association for the Advancement of Science, *Manual on the right to water and sanitation*, Centre on Housing Rights and Evictions (2007), pp. 9 and 46.

³⁸ *Yordanova and Others v. Bulgaria*, 24 April 2012, para. 121.

b) Protective and Preventive Measures

At the substantive level, we respectfully submit that if it is shown that the State knew or ought to have known that there were health risks resulting from the living circumstances in a *de facto* tolerated informal settlement, it must be verified whether the State took necessary and sufficient preventive operational measures to protect the individuals concerned against those risks. This follows from the *Öneryildiz case*, which was also concerned with health and safety in an informal settlement.³⁹

Such a protective obligation does not only apply to Article 2, but also to Article 3 ECHR. Accordingly, States are obligated to take “reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known.”⁴⁰ “These measures should provide effective protection, in particular, of children and other vulnerable persons.”⁴¹ The Court has furthermore requested States to secure, through different measures, the health and well-being of detainees and other persons under its custody.⁴² Although in cases concerning unsanitary informal settlements the persons concerned may be neither detained by the State nor under its custody, it is relevant to inquire whether in practice they could be considered as dependent on the State with regard to their access to basic public infrastructure.

We respectfully contend that principles concerning the protection of individuals against health risks must *mutatis mutandis* also apply under Article 8. This is so since the provisions of the Convention “should (...) be construed in harmony with one another”⁴³ and since “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”⁴⁴ It would go against such purpose to wait until health risks result in fatalities or acute suffering before being able to invoke Article 2 or 3, instead of recognising that such obligations – with a preventive aim – are already imposed by Article 8.

Finally, regard must be had to the context of the cases under examination. In *Moldovan*, the Court not only considered the inadequate living circumstances as serious enough to amount to a violation of Article 3, in addition to Article 8. It also found that discrimination should be taken into account as an aggravating circumstance when examining such situations from the viewpoint of both articles.⁴⁵ The Court has furthermore held that discriminatory treatment as such may constitute degrading treatment for the purposes of Article 3 where the level of severity is sufficient to constitute an affront to human dignity.⁴⁶

We therefore respectfully submit that it is necessary to verify whether the absence of an adequate solution for Roma informal tolerated settlements may be explained by a discriminatory attitude of the authorities or, more broadly, whether discriminatory societal attitudes have contributed to the applicants being confined to such

³⁹ *Öneryildiz v Turkey* [GC], 30 November 2004: “The Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals (...), especially as they themselves had set up the site and authorised its operation, which gave rise to the risk in question.” (para. 101)

⁴⁰ *Rumor v. Italy*, 27 May 2014, para. 58; *Z. v. the United Kingdom*, 10 May 2001, para. 73.

⁴¹ *Rumor v. Italy*, 27 May 2014, para. 58.

⁴² *Popov v. Russia*, 13 July 2006, para. 208; *Ananyev and Others v. Russia*, 10 January 2012, para. 141.

⁴³ See e.g. *Schalk and Kopf v. Austria*, 24 June 2010, para. 101.

⁴⁴ See e.g. *Airey v. Ireland*, 9 October 1979, para. 24.

⁴⁵ *Costache v. Romania*, 27 March 2012, para. 21 (summarizing *Moldovan and Others v. Romania (No. 2)*, 12 July 2005)

⁴⁶ *Karahmed v. Bulgaria*, 24 February 2015, para. 73, citing *Begheluri v. Georgia*, 7 October 2014, para. 100

informal settlements; and if so, whether the State has complied with its positive obligation to correct a history of discrimination.⁴⁷ To this we turn in the remainder of this intervention.

III. Article 14: Unequal Access to Basic Public Services by Roma People in Slovenia

We respectfully submit that the present cases offer the Court the opportunity to further develop its Article 14 case law in two important ways. Firstly, they may allow the Court to tackle the frequent correlation between historical discrimination and social disadvantage.⁴⁸ Secondly, these cases may additionally allow the Court to further develop States' positive duties arising from article 14 ECHR taken together with substantive ECHR rights.⁴⁹

1. Entrenched Discrimination and Social Exclusion: Their Mutually Reinforcing Character

As mentioned in section I, international materials indicate that the situation of Roma residents in many informal settlements is compounded by both entrenched discrimination and socio-economic disadvantage.⁵⁰ In fact, it has been noted that the irregular character of Roma settlements in Slovenia is "historically attributed to their inability to buy land legally, but also to *prejudices in communities that forced Roma to settle on the outskirts of towns* – problems that persist today."⁵¹ Meanwhile, the lack of access to basic public utilities perpetuates stigmatisation and discrimination against Roma. Reports show how inability to maintain personal hygiene reinforces negative stereotypes about Roma, which in turn further reinforces their social exclusion, including exclusion from education and employment.⁵² The impact of this lack of access is particularly devastating on children. Faced with stigmas such as called "smelly" and "dirty" by classmates,⁵³ children do not want to attend school.⁵⁴

The overlap between entrenched discrimination and social disadvantage is similarly reflected in the Court's recognition of Roma as a vulnerable minority and an underprivileged social group.⁵⁵ In applying the concept of "vulnerability" to refer to Roma and other groups,⁵⁶ the Court demands special protection⁵⁷ and narrows the States' margin of appreciation.⁵⁸ This concept is furthermore applied by the European Committee of Social Rights (ECSR) and the Inter-American Court of Human Rights (IACtHR) with similar consequences.⁵⁹ At the same

⁴⁷ See *Mutatis mutandis, Horváth and Kiss v. Hungary*, 29 January 2013, para. 127.

⁴⁸ *Ibid*, para. 115.

⁴⁹ The Court has already engaged in substantive equality analysis but it is still criticised for avoiding the complexities of article 14, preferring instead to base its decisions on other articles of the Convention. See O'Conneide, Colm, "The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?" in *1 UCL Human Rights Law Review* (2008), pp. 83-84 and 91-94.

⁵⁰ Parliamentary Assembly of the Council of Europe, Recommendation No. 1557 (2002) on the Legal Situation of Roma in Europe, paras. 3-5.

⁵¹ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Mission to Slovenia, 4 July 2011, para. 38. See also Amnesty International, p. 26.

⁵² *Ibid*, paras. 34 and 36. The Special Rapporteur notes how "lack of hygiene perpetuates discriminatory stereotypes about Roma among Slovenians. Roma are perceived as dirty and unhygienic and, even in public places, they are not a welcome presence."

⁵³ Amnesty International, *Parallel Lives*, *op. cit.*, p. 4.

⁵⁴ Special Rapporteur on the human right to safe drinking water and sanitation, Mission to Slovenia (2011), para. 35.

⁵⁵ *Connors v. United Kingdom*, 27 May 2004, para. 84; *Chapman v. United Kingdom* [GC], 18 January 2001, para. 96; *Yordanova and Others v. Bulgaria*, 24 April 2012, para. 129.

⁵⁶ *Alajos Kiss v. Hungary*, 20 May 2010, para. 42; *Kiyutin v. Russia*, 10 March 2011, para. 64; *Horváth and Kiss v. Hungary*, 29 January 2013, para. 110.

⁵⁷ See e.g. *D.H. and Others v. the Czech Republic* [GC], 13 November 2007, para. 182.

⁵⁸ Importantly, the discretion left to the state is 'substantially narrower' when the contested policies or conduct restrict the rights of members of vulnerable, historically discriminated groups, such as the Roma. *Alajos Kiss v. Hungary*, 20 May 2010, para. 42.

⁵⁹ See e.g. ECSR, *European Roma Rights Centre (ERRC) v. France*, decision of 19 October 2009; para. 84; IACtHR, *Ximenes Lopes v. Brazil*, judgment of 4 July 2006, paras. 103-105 and *Sawhoyamaya Indigenous Community v. Paraguay*, judgment of 29 March 2006, para. 189.

time, the Strasbourg Court has acknowledged how historical prejudice/past discrimination against certain groups have resulted in their social exclusion.⁶⁰ Suspect discrimination grounds such as race or ethnic origin reflect precisely these concerns.⁶¹ The rationale behind the suspected grounds of discrimination applied by the Court suggests that article 14 ECHR may thus require States to address the underlying structures that perpetuate the marginalisation of certain groups. This has been recognised by other international human rights bodies such as the UN Committee on Economic, Social and Cultural Rights. The Committee, acknowledging that socio-economic inequality is often a result of entrenched discrimination,⁶² is of the view that “ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas”.⁶³

2. Unequal Enjoyment of the Rights Protected by Articles 3 and 8 ECHR

As explained by the Court, Article 14 comes into play whenever “the subject-matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed”, or the measures complained of are “linked to the exercise of a right guaranteed.”⁶⁴ We respectfully submit that being prevented from access to the water and sanitation which are available to the vast majority of the population on account of living in a tolerated informal Roma settlement may amount to *de facto* discrimination. Such circumstances may be indicative of an unequal enjoyment of the rights to private and family life, respect for the home and the prohibition of degrading and inhuman treatment, which raise issues under Article 14 ECHR.⁶⁵

In *COHRE v. Italy*, a case examined by the European Committee of Social Rights (ECSR), the complainant alleged racial discrimination concerning the enjoyment of the rights to housing and to family life by the Roma and Sinti in view of, *inter alia*, their substandard living conditions and forced evictions, as well as of difficulties for these groups in having access to housing.⁶⁶ The ECSR found discrimination in the enjoyment of said rights.⁶⁷ Instead of examining those allegations under the substantive rights at stake only, the ECSR rightly clarified that “the alleged inequality of treatment in the enjoyment of the above-mentioned rights is a fundamental aspect of the present complaint. It therefore must analyse all the issues pertaining to this complaint from the standpoint of Article E [non-discrimination] read in conjunction with each of the substantive provisions relied upon by the complainant.”⁶⁸ This reasoning underscores that *de facto* inequality and social marginalisation merit separate scrutiny under the non-discrimination provision.

3. The Substantive and Positive Dimensions of Article 14 ECHR

Article 14 ECHR does not only impose on States a negative obligation not to discriminate. It also entails positive obligations towards effective equality.⁶⁹ As early as in the *Belgian Linguistic case*, the Court acknowledged that

⁶⁰ *Alajos Kiss v. Hungary*, 20 May 2010, para. 42.

⁶¹ *Idem*.

⁶² UN Committee ESCR, *General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights*, 2 July 2009, E/C.12/GC/20, para. 1.

⁶³ *Ibid*, para. 8.

⁶⁴ *Petrovic v. Austria*, 27 March 1998, para. 28.

⁶⁵ Living conditions characterised by a lack of access to water and sanitation come within the ambit of Articles 8 and 3 ECHR (as explained in section II) for purposes of an Article 14 analysis.

⁶⁶ ECSR, *COHRE v. Italy*, Complaint No. 58/2009, decision of 25 June 2010, para. 46.

⁶⁷ *Ibid*, para. 100.

⁶⁸ *Ibid*, para. 47.

⁶⁹ This transpires from the wording of article 14 ECHR, which provides that the convention rights and freedoms “shall be secured without discrimination.” [Emphasis added]. The importance of positive action is also reflected in the Preamble to Protocol No. 12 to the ECHR, recital 3.

not every case of differential treatment is incompatible with article 14.⁷⁰ In *Thlimmenos v. Greece*, the Court went further and held that discrimination may arise where States, without a reasonable and objective justification, “fail to treat differently persons whose situations are significantly different.”⁷¹ Subsequent judgments have reiterated the principle that in certain circumstances States are obliged to “correct inequality through different treatment”.⁷² Importantly, the Court has accepted that a “*de facto* situation” could give rise to discrimination.⁷³

In a similar vein, the ECSR has stated that discrimination “may arise by failing to take due and positive account of all relevant differences or *by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.*”⁷⁴ In interpreting Article E (non-discrimination) of the Revised European Social Charter (RESC), the Committee has consistently recalled that this provision draws its inspiration from Article 14 ECHR.⁷⁵ The existence of positive State duties to alleviate and correct structural disparities and *de facto* inequalities also finds broader international support.⁷⁶ Moreover, in the context of the right to education of members of groups who suffered past discrimination, the Court has held that “*structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems [...].*”⁷⁷

On this basis, we respectfully submit that in order to ascertain the existence of structural inequalities or *de facto* discrimination in the framework of informal Roma settlements in Slovenia, it is important to inquire, *inter alia*: (1) whether the relevant situation could be explained by entrenched or historical discrimination; (2) whether the personal and social situation of the individuals concerned could be distinguished from that of the majority population; (3) and, if so, whether an unequal enjoyment of rights is linked to a State failure to take due account of those disparities by adopting positive steps to correct the entrenched inequalities at stake.

Positive duties in this field encompass different types of arrangements, as recognised by regional and international human rights systems.⁷⁸ These duties include procedural steps such as giving special consideration to the particular needs of the individuals belonging to historically discriminated groups in

⁷⁰ Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v. Belgium [Plenary], 23 July 1968, para 10 [Decision of the court]: “Moreover, certain legal inequalities tend only to correct factual inequalities.”

⁷¹ *Thlimmenos v. Greece* [GC], 6 April 2000, para. 44.

⁷² *Zeman v Austria*, 29 June 2006, para. 32; *Stec and others v. The United Kingdom* [GC], 12 April 2006, para 51; *D.H. and Others v Czech Republic* [GC], 13 November 2007, para. 175; *Yordanova and Others v. Bulgaria*, 24 April 2012, para. 129.

⁷³ *Zarb Adami v. Malta*, 20 June 2006, para. 76.

⁷⁴ ECSR, *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006, para. 40; *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, decision of 25 June 2010, para. 35.

⁷⁵ ECSR, *Association internationale Autisme-Europe (AIAE) v. France*, Complaint No. 13/2000, decision on the merits of 4 November 2003, para. 52.

⁷⁶ Committee CERD, General Comment 32, *The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* (2012) para. 22; The IACtHR, for instance, has repeatedly held that States are obliged to “take positive steps to reverse or to change discriminatory situations that exist in their societies to the detriment of a specific group of people.” It has also found that failure to adopt special measures of prevention and protection amount, in certain circumstances, to *de facto* discrimination. See e.g. IACtHR, *Xákmok Kásek v. Paraguay*, Judgment of 24 August 2010, paras. 273-274; *Nadege Dorzema et al. v. Dominican Republic*, judgment of 24 October 2012, paras. 237-238.

⁷⁷ *Horvath and Kiss*, 29 January 2013, para. 104.

⁷⁸ See e.g., Committee CERD, General Comment No. 32, *op. cit.*; IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, paras. 103- 104; Inter-American CommHR, *The Situation of People of African Descent in the Americas*, OEA/Ser.L/V/II. Doc. 62, Report 5 December 2011, paras. 203-254.

regulatory frameworks and in reaching relevant decisions. Similarly, measures are applied in domestic jurisdictions which impose duties to ‘mainstream equality’, ‘have due regard’ to the need to promote equality, or ensure the ‘meaningful engagement’ of underprivileged groups in decision-making processes.⁷⁹ At a substantive level, positive duties to correct inequality may comprise, *inter alia*, putting in place an effective normative framework to promote equality and eliminate discrimination; adopting policies promoting social integration; and providing excluded groups and individuals assistance to enable them to effectively enjoy the same rights as the majority population.⁸⁰ In the context of inequalities affecting Roma in informal settlements, the required assistance may include ensuring access to basic public services and providing alternative accommodation.⁸¹

We therefore respectfully invite the Court to further develop Article 14’s aim of tackling the structural inequalities which perpetuate the marginalisation of historically discriminated groups.⁸² This entails addressing the State’s positive duties towards effective equality. Such positive duties are present in the ECSR jurisprudence and in the case-law of other regional courts of human rights.⁸³ The Court already has a rich set of standards on positive human rights obligations in general. Yet, we respectfully submit that a more elaborated regime of positive duties in the field of equality and non-discrimination is needed.

IV. Conclusion

This third-party intervention has respectfully suggested a line of reasoning that would allow the Court to demarcate the scope of the rights and the State obligations arising from Articles 3, 8 and 14 ECHR in cases concerning unsanitary living conditions in tolerated informal settlements. It has been argued that longstanding lack of access to water and sanitation as a result of living in a tolerated informal settlement may affect the rights to private and family life, respect for the home and the prohibition of degrading treatment. Additionally, where such living conditions unequally burden members of a particularly vulnerable and historically discriminated group -such as the Roma- who are confronted with State inaction, it is necessary to examine whether this constitutes *de facto* discrimination requiring positive measures towards effective equality. We have thus respectfully invited the Court to take on the opportunity offered by *Hudorovič v. Slovenia* and *Novak and Others v. Slovenia* to bring together and further elaborate standards laid down in its own jurisprudence while also moving in the line of regional and international legal developments on the matter.

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⁷⁹ See the experience of Northern Ireland and United Kingdom as explained in Fredman, Sandra, *Discrimination Law*, Clarendon law Series, 2nd. Ed., 2001, 299-302. The criterion of meaningful engagement has been developed by the South African Constitutional Court in cases concerning equality claims and housing rights against the background of entrenched disadvantage inherited from Apartheid. See Liebenberg, Sandra, “Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law” in 32 *Nordic Journal of Human Rights*, 2014.

⁸⁰ See references in note 78 and Sandra Fredman, *op. cit.*, at 302.

⁸¹ In this vein, see PACE, Ending Discrimination against Roma Children, Report Doc. 13158, 04 April 2013, paras. 51-52, 64-66 and 82; UN Committee ESCR, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, 2 July 2009, para. 8.

⁸² *Ibid.* Arnardottir, Oddny Mjoll, “The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights,” *Human Rights Law Review*, 2014, 14 at 664.

⁸³ See *supra* notes 74, 76 and 78.