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"EMPTY HUMAN RIGHTS LIP SERVICE": FRANCE'S ROMA EXPULSIONS AND THE FAILURE OF THE EUROPEAN UNION TO EXERCISE ITS RACIAL EQUALITY DIRECTIVE**

Abstract

This article argues that the arrests and expulsion of large numbers of Roma carried out by the French government in 2010 violated the European Union's human rights principles because non-French Roma were targeted collectively for removal. In response to the expulsions, the European Commission initiated infringement proceedings against France for procedural violations of European Union Directive 2004/38 (the Free Movement Directive). However such racially discriminatory state action should be challenged more properly as a substantive violation of Directive 2000/43 (the Racial Equality Directive). Because the European Union does not have its own separate body of human rights law that is binding within Member States, using the Racial Equality Directive to offer protection to vulnerable minorities by challenging discriminatory state practices may be an alternative method of achieving human rights objectives within Member States. Moreover, since the Racial Equality Directive lacks interpretation, a situation of race-based expulsion of EU migrants would be an opportunity to clarify and develop the scope and meaning of the Directive.

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INTRODUCTION

By the fall of 2010, the French government had expelled over 10,000 people from France. Men, women, and children living in camp settlements around the country were rounded up by armed police and told to pack on short notice. Many of their possessions and mobile homes were confiscated and destroyed before police authorities loaded the people onto buses, trains, and specially chartered flights and deported them into eastern European countries. These people were ethnic Roma, mainly from Bulgaria and Romania.[1] A July 28, 2010 announcement by French President Nikolas Sarkozy, which connected migrant Roma communities to crime, had triggered a high-profile crackdown on eastern European Roma in France, which hastened the deportations.[2] It was a government move colored by racial profiling[3] and stereotype-based collective prejudice that threatened the European Union's human rights principles. It stands as an urgent example as to why

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[1] By September 2010, 13,241 eastern European Roma had been deported from France. Human Rights Watch, Open Letter to French Senators on Immigration Bill, Annex: Detailed analysis of problematic measures in the immigration bill and recommendations for amendment (February 7, 2011), http://www.hrw.org/en/news/2011/02/07/open-letter-french-senators-immigration-bill, accessed March 1, 2011. In its 2009 State Party report to the United Nations Committee on the Elimination of all Forms of Racial Discrimination, the French government estimated that Roma population in France totalled 300,000 people. United Nations Committee on the Elimination of all Forms of Racial Discrimination, *Reports Submitted by State Parties under Article 9 of the Convention, seventeenth, eighteenth, and nineteenth Periodic Reports of State Parties due in 2008, France*, CERD/C/FRA/17-19 (December 16, 2009), para. 95 (the "State Party Report"). It is estimated that in 2010, 10,000-15,000 Roma in France were Romanian or Bulgarian citizens. Ligue des Droits de l'Homme, *Comité pour l'Elimination de la Discrimination Raciale Rapport Alternatif de la Ligue des Droits de l'Homme a Propos des Dix-Septième, Dix-Huitième, et Dix-Neuvième Rapports de la France 11 et 12 Aout 2010* (Alternative Report to the Committee for the Elimination of Racial Discrimination from the Human Rights League, regarding the Seventeenth, Eighteenth, and Nineteenth Reports by France), para. 97 (the "Ligue Report").

[2] *See*, Press Release, Elysée Présidence de la République, *Communiqué Faisant Suite à la Réunion Ministérielle de ce Jour sur la Situation des Gens du Voyage et des Roms* (Press Release Following the Ministerial Meeting of the Day on Travelers and Roma) (July 28, 2010), http://www.elysee.fr/president/les-actualites/communiques-de-presse/2010/juillet/communique-faisant-suite-a-la-reunion.9381.html, accessed March 1, 2011 (the "July Press Release").

[3] The Open Society Justice Initiative has provided a useful definition of racial or ethnic profiling as: "the use, by law enforcement officers, of generalizations based on race, ethnicity, religion, or national origin rather than individual behaviour as the basis for making law enforcement and/or investigative decisions about who has been or may be involved in criminal activity." The Open Society Justice Initiative, *Submission to the European Commission Consultation on the Freedom, Security, Justice Priorities for 2010-2014*, p. 2.

the European Union (the "EU") must be more proactive in enforcing its Directive 2000/43 "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin" (the Racial Equality Directive, or "RED").[4]

The French government's actions focused on a particular racial group traditionally stereotyped in Europe as carriers of crime, disease, and other social ills.[5] The Roma are also, ironically, the group most victimized by crime in Europe, and most subjected to discrimination in all aspects of social services across EU Member States.[6] However, the legal and political justification advanced for the deportations was that too many Roma had taken advantage of EU free movement rights to overstay their entry permits to enjoy the social services and economic benefits of life in France. Many of the expelled Roma therefore fell into the category of "irregular migrants,"[7] people who do not have legal status to enter or remain in a foreign state.[8] However, a critical factor that helped push this crackdown from being an issue of a state's immigration control (albeit a heavy-handed one) into a serious human rights violation was a government document revealing that priority would be placed on the Roma, as an ethnic group, for systemic "evacuation" of their camp settlements by the police, to be followed by deportations.[9]

The arrests and deportations in France displayed how irregular migrants world-wide are particularly vulnerable to abuse and exploitation, a problem

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[4] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

[5] *See*, Project on Ethnic Relations, *Roma and the Law: Demythologizing the Gypsy Criminality Stereotype* (1999), p. 9; *see also*, L. C. Deutsch, *The Spanish Gypsy: The History of a European Obsession*, Pennsylvania State University Press, University Park, Pennsylvania: 2004, pp. 9-15 (discussing the origins and persistence of Gypsy myths).

[6] *See*, N. Banulescu-Bogdan & T. Givens, Migration Policy Institute, *The State of Antidiscrimination Policies in Europe: Ten Years after the Passage of the Racial Equality Directive* (2010), p. 6.

[7] I use the internationally recognized term "irregular migration" in this article in lieu of "illegal immigration," a term that denotes criminality (*See*, K. Koser, *Irregular Migration, State Security, and Human Security: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration* (2005), p. 5); *see also*, International Labor Office, *International Labor Migration: A Rights-based Approach* (2010), p. 31 (the "International Labor Office").

[8] European legal scholar Elspeth Guild has pointed out that illegal immigration is a concept which encompasses a variety of issues. These include foreigners illegally entering the state; foreigners overstaying their entry permits, and foreigners working without proper authorization. E. Guild, *Who is an Irregular Migrant?*, in B. Bogusz, R. Cholewinski, A. Cygan, & E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives*, Martinus Nijhoff Publishers, Leiden/Boston: 2004, p. 3.

[9] *Circulaire du Ministre de l'Intérieur de l'Outre-mer et des Collectivitités Territoriales à Monsieur le Préfet de Police* (Circular of the Ministry of the Interior and Overseas and Collective Territories to the Prefect of Police) (August 5, 2010) (the "August Circular").

enhanced by national discourses that demonize the "illegal alien". They also revealed the tension between state sovereignty and universal human rights. This tension exists between the exclusive territorial jurisdiction of the state and the concept of human rights norms that transcend international borders.[10] The result is a fundamental paradox.[11] International human rights legal instruments, such as the International Covenant for Civil and Political Rights (the "ICCPR") and the Convention on the Elimination of all Forms of Racial Discrimination (the "CERD"), which prohibit racial discrimination and profiling by State Parties, are designed to create an internationally recognized body of individual rights.[12] However, because these international human rights come with very limited international enforcement mechanisms, they depend on sovereign states to enforce them through their own national laws and to self-report their failures to do so to international human rights bodies.[13] Standing alone, they do little to protect individuals suffering from state-sponsored racial discrimination.[14]

Because France is an EU Member State, and most of the expelled Roma are EU citizens, a body of regional law was available to intervene in the deportations. Regional human rights instruments, including the European Convention on Human Rights ("ECHR") and the EU Charter of Fundamental Rights ("the Charter") explicitly forbid racial and ethnic discrimination.[15] Furthermore, the European Court of Human Rights ("ECtHR") has made clear that state officials' and police participation in racial discrimination is a human rights violation, even

[10] A. An'Naim, *Global Citizenship and Human Rights: From Muslims in Europe to European Muslims*, in M.L.P Loenen & J.E. Goldschmidt (eds.), *Religious Pluralism and Human Rights in Europe: Where to draw the line?*, Intersentia, Anterwerpen/Oxford: 2007, p. 27.

[11] *Ibidem.*

[12] The ICCPR contains four Articles that specifically prohibit racial discrimination, including for reasons of public security (Article 4) and insists that all people are equal before the law, regardless of race (Article 26). *See*, International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations Dec. 16, 1966) 999 UNTS 171, arts. 4, 20, 24 and 26. Meanwhile, the preamble to CERD declares, "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination." International Convention for the Elimination of All Forms of Racial Discrimination (opened for signature December 21, 1965) 660 UNTS 211, preamble.

[13] *See*, L. Henkin, *Human Rights and State "Sovereignty"*, 25 Georgia Journal of International and Comparative Law 31 (1995), pp. 32-33.

[14] *See*, P. S. Pinheiro, *Sixty Years after the Universal Declaration: Navigating the Contradictions*, 9 International Journal on Human Rights 71 (2008), p. 71 (discussing the inability of most people to actually benefit from universal human rights instruments).

[15] Article 14 of the European Convention on Human Rights reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground." The EU Charter of Fundamental Rights states, "Any discrimination

if the victims are breaking the law.[16] In 2005, the Court stressed that states must fight racism and racial violence, which the Court warned is "a particular affront to human dignity."[17] Yet, while Europe may have enough law prohibiting racial discrimination, lack of political will and public support have resulted in the failure to fully implement these legal protections.[18]

In October 2010, the European Commission initially seemed poised to bolster human rights principles by bringing legal sanctions against France for the expulsions. But what started out as a strong rhetorical condemnation of France's policy, with an emphasis on condemning ethnic and racial discrimination, eventually turned into a focus on infringement proceedings under EU Directive 2004/38 "on the rights of citizens and their families to move and reside freely within the territory of the Member states" (the Free Movement Directive).[19] It ultimately concluded with a comparatively low profile withdrawal of the proposed legal proceedings after France promised to amend its laws to allow more individual process before expelling EU citizens.[20] However, by shifting the legal focus onto EU procedural free movement rights, the EU approach left relatively untouched the substantive issue of racial discrimination that was occurring in France. It also avoided the question of how to set a minimum standard for protecting all people in a Member State's jurisdiction from race or ethnicity driven ill-treatment, not just those with EU citizenship status.

Challenging France under the Racial Equality Directive, instead of only the Free Movement Directive, would have set a stronger example for other Member States that discriminatory law enforcement policies, especially under the guise of border protection, will not be tolerated in the EU. RED is an underdeveloped directive that needs to be exercised to turn it into a robust and effective deterrent to discriminatory state policies. [21] The European Commission should consider infringement proceedings for failure to fulfill obligations under RED against Member States with national law enforcement policies or programs that single out

based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

[16] *See*, *Bekos and Koutropoulos v. Greece* (15250/02) Fourth Section, ECHR 13 December 2005.

[17] *Ibidem*, para. 63.

[18] Banulescu-Bogdan & Givens, *supra* note 6, p. 12.

[19] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158.

[20] *See infra*, Section 2.1.2 and accompanying notes.

[21] *See infra*, Section 3.1 and accompanying notes.

an ethnic group for discriminatory treatment, even if written national law adequately reflects RED.[22] Were the Commission to take such a case before the EU's judicial body, the European Court of Justice (the "ECJ"), it would also provide the opportunity to develop more substantive case law interpreting RED. Such a development could better guide national and regional policymakers in respecting everyone's basic rights, regardless of citizenship, and can give the EU more power in the future to respond to violations. Because there are no EU laws specifically categorized as human rights laws that are internally binding on Member States, the need to deal with human rights violations by Member States through other legal tools, such as the EU directives, is particularly urgent. As, Livia Jaroka, a Hungarian member of the European Parliament, put it succinctly to European Commissioner Viviane Reding during a debate on the French Roma crisis, the "empty human rights lip service of the last decade [in the EU]" is "repulsive."[23]

Part 1 of this article is a contextual explanation of the particular legal vulnerability of irregular migrants which highlights the need to supplement sovereign state protection of fundamental human rights. Part 2 provides an overview to the issue of racial discrimination against European Roma and argues that the resistance and ambivalence on the part of national governments in the EU to altering their laws and policies to protect Roma and other minority migrants from abusive treatment makes it critical for the EU to fight racial discrimination. Part 3 suggests some possible legal interpretations of the Racial Equality Directive the EU could take in the future to challenge discriminatory actions by states against vulnerable, non-citizen minorities.

[22] *Cf.*, The Open Society Institute, European Roma Rights Center, and Osserv Azione have argued in briefings to the European Commission for a similar interpretation of the Racial Equality Directive in challenging discriminatory policies by the Italian government, including requiring Roma to be fingerprinted and the information stored in a database. Open Society Institute, European Roma Rights Center & Osserve Azione, *Memorandum to the Commission: Violations of EC Law and the Fundamental Rights of Roma and Sinti by the Italian Government in the Implementation of the Census in "Nomad Camps"* (May 4, 2009), pp. 7-11. *See also*, Open Society Justice Initiative, *Roma in Italy: Briefing to the European Commission* (October 18, 2010), p. 8.

[23] EUX.TV, *Strasbourg Hosts Heated EU Debate on Roma Expulsion*, (September 10, 2010), http://www.youtube.com/watch?v=S4qkmPkqukU&feature=channel, accessed March 1, 2011 (the "Strasbourg Debate").

1. GLOBAL CONTEXT: IRREGULAR MIGRATION AND DIMINISHED RIGHTS' PROTECTIONS

Irregular migrants' enhanced vulnerability comes in large part because they exist in a gray area. Irregular migrant groups like the eastern European Roma in France – who are not within the legal protections of their "home state" and not welcome and recognized as having a full gambit of legal rights in their "host states" – become susceptible to human rights abuses without adequate means to access protection. The worldwide trend in hostility toward irregular migrants is growing increasingly acute. The Global Migration Group (the "GMG"), a combination of 12 United Nations agencies, the World Bank, and the International Organization of Migration, issued a statement addressing this issue on September 30, 2010.[24] Pointing out that it is "deeply concerned about the human rights of international migrants in irregular situations around the globe," the GMG recognized that irregular migrants are particularly vulnerable to exploitation, violence, arbitrary detention, exclusion and abuse by both state and private actors.[25] The GMG criticized the response of states, which have largely handled irregular migration "solely through the lens of sovereignty, border security or law enforcement," and have often been pushed to do so by "hostile domestic constituencies."[26]

Sovereign state mistreatment of vulnerable minority groups like the Roma is a dilemma for the United Nations and regional organizations dependent on sovereign state enforcement of international human rights conventions. Unsurprisingly, these conventions are largely unable to protect irregular migrants.[27] The unwillingness of states to extend protections to migrants is in part because of the conventional belief that migrants are not entitled to the equal set of rights that citizens have.[28] Turkish legal scholar Bulent Cicekli points out that "[t]he common perception and treatment of immigrants as guests who would eventually return home" results in states' lack of interest in including migrants (particularly irregular migrants) in their protective sphere.[29] This situation therefore underscores

[24] Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation (September 30, 2010), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E, accessed December 28, 2011.

[25] *Ibidem.*

[26] *Ibidem.*

[27] *See*, J. A. Bustamante, *Immigrants' Vulnerability as Subjects of Human Rights,* 36(2) International Migration Review 333 (2002), p. 338.

[28] *Ibidem,* p. 343.

[29] B. Cicekli, *The Rights of Turkish Migrants in Europe Under International Law and EU Law* 33(2) International Migration Review 300 (1999), p. 302.

the need for legal regimes that can supplement domestic law in ensuring fundamental human rights protections for all people within a state's territory.[30]

A difficulty encountered by advocates for irregular migrants is the preeminence that border control has in public discourse.[31] The popular demand for secure borders in many western countries makes it easier to portray those who violate immigration controls as dangerous enemies. As a consequence, even those states, like France, with strong civil societies, justify excluding irregular migrants from civil and labor rights by "conflat[ing] immigrants and asylum seekers with criminals and terrorists."[32] This tactic has been used by French and European anti-immigrant factions in targeting the Roma for discriminatory legislation and harsh immigration requirements.[33]

Politicians in rich states respond to constituents who, as European scholar Didier Bigo has put it, welcome the benefits of globalization, such as the mobility of "rich tourists" and "consumers in transit," but who do not want to extend freedom of movement "to the poor people, to the vagabonds, to the people fleeing ecological, economic, or political disasters."[34] This antipathy reflects a double standard by which migrants who might be ignored, or even accepted, during periods of economic growth, get accused of destroying countries' social fabric by draining the state of capital and services that should rightly go to citizens when economic times are hard. [35] Through negative labels such as "illegals," or "aliens," the image of migrants is easily transformed into that of "thieves" and "smugglers,"[36] and can then be more easily used by politicians to justify their removal.

Even in the EU, where there is a more tightly woven body of regional law, irregular migrants have had inadequate access to tangible human rights protections. University of Leicester law professor Erika Szyszczak has identified a predominantly, and "unashamedly," economic emphasis in the original EU migration

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[30] *See ibidem*, p. 300.

[31] *See*, L. Berg, *At the Border and Between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law*, 8 Melbourne Journal of International Law 1 (2007), p. 3 (arguing that "[t]hose who advocate for the rights of undocumented migrant workers are often blocked by the hold that the mantra of border control has on the popular psyche").

[32] *Ibidem*, p. 6.

[33] *See infra*, section 2.1.1 and accompanying notes.

[34] D. Bigo, *Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion*, in B. Bogusz, R. Cholewinski, A. Cygan, & E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* Martinus Nijhoff Publishers, Leiden/Boston: 2004, p. 63.

[35] *See ibidem*. p. 70.

[36] *Ibidem*; *see also*, Berg, *supra* note 31, p. 6.

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frameworks,[37] but one that through European Court of Justice jurisprudence has become more intertwined with citizenship ideas and protections.[38] However, the ECJ has given little attention to human rights based ideas, framing fundamental EU rights, such as freedom of movement, more as conditional economic rights attached to citizenship.[39] There has been a tendency "to allow economic rights to trump other rights in the name of economic integration,"[40] which reflects broader tensions over whether the EU should remain economic in nature, or strive towards political integration.[41]

Where political and popular discourse have portrayed irregular migrants as reaping undeserved benefits that should go to hardworking citizens, it becomes politically easier for states to justify policies that violate human rights, such as the freedom from violence or arbitrary detention, by conflating their authority to do so with the state's legitimate right to withhold citizenship rights, such as voting or tax benefits. Dealing with this challenge does not require abolishing distinctions between citizens and non-citizens, but rather is about setting the minimum standards for decent treatment and respect for fundamental human rights.[42] Irregular migrants cannot easily access sovereign state protection, and therefore, as the treatment of the Roma in France shows, pose an important challenge to the universal application of human rights norms – including the freedom from racial and ethnic discrimination.

2. THE 2010 FRENCH EXPULSIONS AND MIGRANT ROMA IN EUROPE

The first ever EU-wide survey of immigrants and minority groups, conducted in 2009 by the EU Fundamental Rights Agency, revealed that the 12 million Roma in Europe outstrip all other European minority groups in their experience

[37] E. Szyszczak *Regularizing Migration in the European Union,* in B. Bogusz, R. Cholewinski, A. Cygan, & E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* Martinus Nijhoff Publishers, Leiden/Boston: 2004, p. 408.

[38] *Ibidem*, pp. 408-409.

[39] *Ibidem*, p. 412.

[40] *Ibidem.*

[41] *See*, S. Nello *Preparing for Enlargement in the European Union: The Tensions between Economic and Political Integration*, 23(3) International Political Science Review 291 (2002), pp. 291-292.

[42] *See*, An'Naim, *supra* note 10, p. 14.

of discrimination.[43] The Roma are also the most economically impoverished ethnic minority in Europe.[44] Although southeastern European states, such as Slovakia, Hungary, and Romania, historically have the highest concentration of ethnic Roma, large numbers of Roma have moved into western states since the late nineteenth century in search of better livelihoods.[45] The Cold War restrictions on movement largely cut off this flow, but the 1990's saw an upswing in East-West Roma migrations, driven by a combination of push and pull factors. Push factors in the 1990's included a fall in living standards in eastern Europe,[46] which would have disproportionately impacted the already severely impoverished Roma, and an increase in nationalist activity in post-Communist states, which largely excluded Roma leading to heightened discrimination towards them.[47]

As more Roma left behind poverty and discrimination in search of economic opportunity in western Europe, public opinion in western states responded defensively. According to a 2008 joint report prepared by the Council of Europe (the "COE") and the Organization for Security and Cooperation in Europe (the "OSCE"), politicians' and media's use of words like "deluge," and "wave" to describe Roma movement "distorted the scale of the issue" in western Europe.[48] The Roma migrations into western Europe also resulted in incidents of high profile and hostile media coverage.[49] Scholar Eva Sobotka has argued that such public

[43] European Agency for Fundamental Rights, *EU-MIDIS: European Union Minorities and Discrimination Survey Main Result Report* (December 9, 2009), p. 8. *See also*, European Agency for Fundamental Rights, *Data in Focus Report 1: The Roma* (April 22, 2009), http://fra.europa.eu/fraWebsite/eu-midis/eumidis_roma_en.htm, accessed March 1, 2011.

[44] *See*, J. D. Wolfensohn & G. Soros, *Roma People in an Expanding Europe*, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/EXTROMA/0,,contentMDK:20341647~menuPK:648308~pagePK:64168445~piPK:64168309~theSitePK:615987,00.html, accessed December 15, 2011.

[45] C. Cahn & E. Guild, *Recent Migration of Roma in Europe* (December 10, 2008), p. 9.

[46] E. Sobotka, *Romani Migration in the 1990's: Perspectives on Dynamic, Interpretation, and Policy*, 13(2) Romani Studies 79 (2003), p.102.

[47] *See*, E. Sobotka, *Human Rights and Roma Policy Formation in the Czech Republic, Slovakia and Poland*, in R. Stauber & R. Vago (eds.), *The Roma – A Minority in Europe: Historical, Political and Social Perspectives*, Central European University Press, Budapest/New York: 2007, pp. 140-141; *See e.g.* L. Kurti, *Right-wing Extremism, Skinheads, and Anti-Gypsy Sentiments in Hungary* (2000), p. 20.

[48] Cahn & Guild, *supra* note 45, pp. 9-10. National leaders have also at times succumbed to media pressure and "inflamed public opinion," to implement "draconian measures to stop Roma from arriving" (*ibidem*, p. 10).

[49] An example of the media's role in perpetuating Roma stereotypes is the 1997 Roma asylum crisis in England. A thousand Czech and Slovak Roma had arrived at the port of Dover claiming political asylum from institutionalized racism at home. For weeks the media reviled their claims as "bogus," and continually recycled old-fashioned stereotypes of

rhetoric about Roma helped turn "Romani asylum seekers" into a "buzz word for the problem of migration *per se*."[50] The perception that western Europe was being flooded by Roma migrants, in turn, caused western states to increasingly view the Roma migrations as a security problem.[51] Western European public antipathy towards Roma migration was therefore exacerbated when in 2004 and in 2007 the EU expanded to include more eastern European states, including Bulgaria, Romania, Hungary, and Slovakia which have large Roma communities.[52] When these countries joined the EU, all of their citizens, including members of their Roma communities, also became EU citizens, and could now freely enter other Member States' territory.[53]

2.1. The French Roma crisis: July – October 2010

Aside from social tensions created by the influx of eastern European Roma in the last decades, France has also long struggled with integrating Roma who are French citizens.[54] The 2007 EU expansion which brought Bulgaria and Romania

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"Gypsies". *See*, C. Clark & E. Campbell, '*Gypsy Invasion': A critical analysis of newspaper reaction to Czech and Slovak Romani Asylum Seekers in Britain in 1997*, 10 Romani Studies 23 (2000), p. 42; *see generally*, J. A. Goldston, *Roma Rights, Roma Wrongs*, Foreign Affairs (March/April 2002) (describing western reactions to Roma migrants in the early 2000s).

[50] Sobotka, *supra* note 46, p.89.

[51] Sobotka, *supra* note 47, p. 140.

[52] European Commission Directorate General for Enlargement, *Understanding EU Enlargement: The European Union's Enlargement Policy* (2007), p. 5. Romania and Bulgaria are estimated to have the largest Roma populations in Europe. A. Tanner, *The Roma of Eastern Europe: Still Searching for Inclusion* (May 2005), http://www.migrationinformation.org/feature/display.cfm?ID=308, accessed March 1, 2011.

[53] Since the 1992 Maastricht Treaty, all citizens of EU Member States are EU citizens.

[54] Approximately one third of French Roma are "travellers", by custom, often living in mobile homes. *See*, State Party Report, *supra* note 1, para. 95. French travellers have often been the victims of facially neutral laws that burden them disproportionately. For example, the "Borloo Law" passed on August 3, 2003 exempts twenty-eight French cities from the prior "Besson Law" which protected travelling Roma by obligating cities to establish a designated "halting area" where people travelling in mobile homes could camp. European Roma Rights Center, *Always Somewhere Else: Anti-Gypsyism in France* (2005), p. 99. The Borloo Law applies, even if travelling Roma are stopping in the municipality for medical related reasons, or to seek professional assistance (*ibidem*). Another example is the requirement that all people over the age of sixteen who do not have a permanent address possess a circulation card, without which they are unable to access services. These cards are notoriously difficult for French Roma to obtain. Commission Nationale Consultative des Droits de l'Homme, *Etude et propositions sur la situation des Roms et des gens du voyage en France* (Studies and Proposals on the Situation of Roma and Travelers in France) (2008), p. 8 (hereinafter CNCDH). The French National Consulting Commission on Human Rights, a government body, has characterized the cards as being motivated exclusively for the purpose of police control, and has told the French government that the cards stigmatize traveler lifestyles, and are discriminatory (*ibidem*, p. 8).

into the EU was followed by official French concerns over more migrant, non-French, Roma into France,[55] which exacerbated existing ethnic tensions.[56] In its 2010 concluding observations on France, the United Nations Committee on the Elimination of Racial Discrimination expressed concern at the "increase in manifestations of violence and racist violence against Roma" in French territory.[57] These tensions climaxed in heavy-handed government action after a riot in Saint Aignan, France in the summer 2010. The events forced the EU to intervene politically, and tested its ability to confront a Member State engaged in large-scale racial discrimination.

2.1.1. The response to collective "Roma Crime"

On July 18, 2010, the small French village of Saint Aignan erupted in riots, as youth, mainly ethnic Roma, smashed store windows, set cars on fire, and attacked police and gendarmerie.[58] In response to the riots at Saint Aignan, an aggressive plan was announced in a July 28 press release from French President Nikolas Sarkozy's office.[59] It emphasized that the President was committed to bringing those responsible for the riots to justice.[60] The decree, however, went far beyond suggesting that only those involved in the Saint-Aignan incident would be punished, but rather promised that all Roma causing trouble would be "severely sanctioned" as a reminder that while the Roma have the same rights as French citizens, "they also have the same duties."[61] However, while it stated that measures would be taken to ensure that only those acting "irresponsibly" would be targeted, the statement claimed that it was clear that too many Roma from eastern Europe were living in France in "inadmissible conditions."[62] To that end, the statement pointed out that 200 "illegal camps," had already been "evacuated" and that they

[55] *See ibidem*, p 17.

[56] *See*, Ligue Report, *supra* note 1, paras. 97-99.

[57] United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by State Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, France*, CERD/C/FRA/CO/17-19 (September 23, 2010), para. 14.

[58] The riots were in response to the shooting death of 22-year old Luigi Duquenet, an ethnic Roma. In circumstances that were unclear, Duquenet was shot by gendarmerie when he failed to stop his vehicle at a police checkpoint. *See*, Q&A: France Roma Expulsions (BBC News October 19, 2010), http://www.bbc.co.uk/news/world-europe-11027288, accessed March 1, 2011; *See also,* L. Davies, *Nicolas Sarkozy Gets Tough on France's Itinterant Groups*, The Guardian July 27, 2010.

[59] Press Release, *supra* note 2.

[60] *Ibidem.*

[61] *Ibidem.*

[62] *Ibidem.*

had been the source of illicit trafficking, exploitation of children, prostitution, and delinquency.[63] The statement contained no further details as to the alleged crimes committed by any individual Roma, or within specific Roma communities. Nor did it reference any studies or reports supporting its assertions that too many Roma were living substandard lifestyles.

Leaders in France publicly justified the collective deportations in humanitarian terms. Frederic LeFebvre, spokesman for President Sarkozy's UMP party, explained that "France should be admired" for carrying out deportations.[64] The reason he gave was that because the Roma are living in France illegally, they cannot find adequate work.[65] The inability to find work, in turn, causes them to live in squalor and turn to crime.[66] Echoing the larger theme that irregular migrants are so often associated with criminality in popular discourse, he continued, "illegality breeds illegality. And it's a country's duty to prevent slums from sprouting downtown. That is how France is becoming charitable and generous."[67] Statements such as these reflect the broader antipathies towards irregular migrants by placing the Roma into the paradigm of dangerous migrants who threaten to take something away from true citizens.

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[63] *Ibidem*. Roma expulsions had been going on systemically in France since at least 2006, in anticipation of the increased Roma migration into France predicted to accompany the Bulgaria and Romania accession to the EU in 2007. CNCDH, *supra* note 54, p. 18. These expulsions were forceful, even violent in nature, and often involved intense levels of psychological pressure to get Roma to leave without protest (*ibidem*, pp. 18-19). What was new in July 2010, however, was the energized and highly publicized vigor with which Sarkozy vowed to go forward with "camp evacuations," and to work with Romanian and Bulgarian authorities in the relocation of individuals to their countries of legal citizenship.

[64] PBS Broadcast, *French Expulsions Lead to Tensions in Europe* (September 27, 2010), *available at* http://www.pbs.org/newshour/bb/social_issues/july-dec10/roma_09-27.html, accessed March 1, 2011 (the "PBS Broadcast").

[65] *Ibidem*.

[66] *Ibidem*.

[67] *Ibidem*. LeFebvre's reference to collective deportation as a charitable gesture was a reflection of the government's "voluntary humanitarian returns program," under which Roma were paid modest sums to leave France without protest. The practice of voluntary "humanitarian returns," whereby Roma who lacked personal resources to support themselves in France were paid to leave, was created by a French circular on December 7, 2006. CNCDH, *supra* note 54, p. 19. It had continually garnered criticism from certain EU politicians and activists who complained that fundamental EU rights cannot be bought or sold and who have questioned the extent to which the returns were voluntary. European Parliament Session Document (B7-0500/2010) (2010), p. 6; *see also*, European Roma Rights Center, *Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of the Roma in France* (August 27, 2010), p. 2 (arguing that Roma had effectively been coerced into leaving because of police harassment and government rhetoric).

The European Commission refrained from intervening in the situation throughout the summer.[68] That changed, however, on September 14, 2010 after a leaked circular from the French Ministry of Interior, dated August 5, 2010, directly stated that Roma were being targeted for expulsion, not on the basis of individual immigration or criminal violations, but on the basis of ethnic identity. The August 5 circular, sent to the national Police Prefect, called for the police to "evacuate" 300 camps or illicit gathering sites, "with priority on those of the Roma."[69] It also called on the gendarmerie to block the growth of any new camps.[70] A second circular released publicly by the Ministry of Interior on September 13 seemed to mitigate the instructions of 5 August by reminding law enforcement that it must carry out the "evacuations" within the strict parameters of law so that legal Roma settlements were not targeted.[71] However, this purported clarification did not prevent the situation from gaining high profile European attention.

The day after the August 5 circular became public, European Commissioner for Justice, Fundamental Rights, and Citizenship Viviane Reding used strong language to denounce the circular and the French policy. At the Commission's meeting in Brussels on September 14, Reding stated that she was personally appalled at the removal of a group from an EU Member State because of their status as an ethnic minority.[72] Reding declared that the French Roma deportations were a situation she "thought Europe would not have to witness again after the Second World War."[73] At the moment Reding conjured up images of World War II deportations, it seemed that the EU Commission would recognize an ongoing human rights violation in France and legally combat the substantive discrimination occurring against the Roma. The statement was welcomed by human rights and Roma advocacy organizations. Human Rights Watch applauded this "powerful message against discrimination" bringing confidence "that the EU's new human

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[68] On September 10, Viviane Reding, the EU's Justice Commissioner, explained to members of the European Parliament in Strasbourg that she had met with Eric Besson, the French Minister of Immigration, and that he had publicly assured her that the Roma were not being singled out for deportation. Despite charges from various parliamentarians that she was failing to defend the European Charter of Fundamental Rights, Reding remained firm. "I see this insurance [sic] given by the French minister," she explained, "as a very positive development." Strasbourg Debate, *supra* note 23.

[69] August Circular, *supra* note 9.

[70] *Ibidem.*

[71] *Circulaire du Ministre de l'Intérieur de l'Outre-mer et des Collectivitités Territoriales à Monsieur le Préfet de Police* (Circular of the Ministry of Interior and Overseas and Collective Territories to the Prefect of Police) (September 13, 2010).

[72] PBS Broadcast, *supra* note 64.

[73] *Ibidem.*

rights architecture may fulfill its promise."[74] Predictably, however, Reding's words were met with indignation from France and other EU Member State governments. The next day at a summit meeting in Brussels, President Sarkozy declared that Reding's use of the historical parallel was "outrageous," and that: "It is an insult. It is a wound. It is a humiliation."[75]

Rhetoric soon shifted from talk of racial discrimination to that of whether the EU Free Movement Directive had been violated. José Manuel Barroso, President of the EU Commission, explained to reporters that while the Commission stood ready to start proceedings against France for any infringement of EU law, Reding's comments were made in the "heat of the moment," and that she did not mean to cite any historical parallels.[76] When Reding next spoke on September 29, it was with a focus on EU procedural rights, meaning concerns over whether Roma had been deported from France in a manner that violated the rules of the Free Movement Directive. She explained that the Commission had found that France had not applied in its law the procedural free movement guarantees required for all EU citizens.[77] She announced that infringement proceedings had been initiated against France under the Free Movement Directive, for expelling EU citizens without adequate process.[78]

2.1.2. The threatened legal action and its shortcomings

The French actions against the Roma implicated at least two possible violations of EU directives: infringement of the Free Movement Directive and of the Racial Equality Directive.

In the fall of 2010, the European Commission did threaten legal action under the Free Movement Directive, which provides certain procedural safeguards

[74] Human Rights Watch, *EU: A Key Intervention in Roma Expulsions*, (September 14, 2010),http://www.hrw.org/en/news/2010/09/14/eu-key-intervention-roma-expulsions, accessed March 1, 2011.

[75] L. Cendrowicz, *Sarkozy Lashes Out as Roma Row Escalates*, Time, September 17, 2010. Meanwhile, Guido Westerwelle, the German foreign minister, denounced Reding's comments saying "[t]o put France into the same category as the crimes of World War II is totally unacceptable, very hurtful." J. Dempsey & S. Castle, *France and Germany Spar Over Policies on Roma*, New York Times, September 17, 2010.

[76] EUX.TV, *Roma Expulsion: Barroso Follows up on Reding's Criticism of France* (September 5, 2010), http://www.youtube.com/watch?v=DHTFT2NcOns&feature=channel, accessed March 1, 2011.

[77] Reuters Broadcast, *Belgium: EU to Begin Proceedings Against France over Roma* (September 9, 2010) http://www.itnsource.com/shotlist/RTV/2010/09/30/RTV2485510/ (the "Reuters Broadcast").

[78] *Ibidem.*

for EU citizens to access any Member State. However it took no action, neither threatened nor direct, under the Racial Equality Directive, which requires that states refrain from enacting, carrying out, or tolerating racially discriminatory laws, policies, or treatment within their jurisdictions.

Despite the Commission's inaction, the Racial Equality Directive does provide a potential avenue for individuals to challenge the legality of the French policy. Article 7 stipulates that Member States must ensure that individuals wronged by the state's failure to apply RED, or those with a legitimate interest in the enforcement of RED, have access to judicial and administrative remedies in the state.[79] However, bringing an initial action as an individual in the same state that is forcibly removing the wronged individual may not be practical for those who do not have the time, money, or means to stay and access the courts. Conversely, in a situation where a state program is causing large-scale and immediate harm, the Commission's ability to initiate proceedings and then bring a recalcitrant state before the ECJ,[80] without relying on an individual's resources, is better poised to quickly confront state violations of RED and to send a broader political message.

2.1.2.1. The Free Movement Directive

The Free Movement Directive was made binding EU law by the European Parliament and European Council on April 29, 2004.[81] The directive reflects the rights introduced by the 1992 Maastricht Treaty, which had formally created European Union citizenship, including the right to circulate freely.[82] The concept was an innovation in that it granted supranational citizenship along with a set of rights for each individual who was a citizen of a Member State.[83] The subsequent Free Movement Directive was therefore a legal instrument to "simplify and strengthen the right of free movement and residence of all EU citizens."[84]

The directive guarantees EU citizens the right to enter any EU country with a valid passport or identity card along with family members even if they are not EU citizens.[85] The entry right is coupled with a right of residence for up to three months in the state.[86] After three months, Article 7 of the directive provides

[79] Directive 2000/43/EC, *supra* note 4, art. 7(1)-(2).

[80] *See*, Treaty of Lisbon, art. 258.

[81] Council Directive 2004/38/EC, *supra* note 19.

[82] Maastricht Treaty, art. 8.

[83] *See*, M. Condinanzi, A. Lang, & B. Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, Martinus Nijhoff Publishers: Leiden, 2008, p. 2.

[84] Council Directive 2004/38/EC, *supra* note 19, preamble, para. 3.

[85] *Ibidem*, art. 5(1).

[86] *Ibidem*, art. 6(1).

a checklist of conditions which, if the individual fulfills, grants the right to remain in the state.[87] Being an employed person, including self-employment, is included in the checklist.[88]

The Free Movement Directive, although bestowing a set of residential rights alongside procedural safeguards to ensure those rights are not unjustly denied, is therefore not adequate by itself to fight state-sponsored racial discrimination on a substantive level. The preamble to the directive states that "Member States should implement [the] [d]irective without discrimination," including on race or ethnicity based grounds.[89] However, this non-discrimination only applies to EU citizens exercising their free movement rights, and there is no substantive provision in the directive itself addressing racial discrimination. Furthermore, the rights in this directive are not absolute. They can be rescinded "on grounds of public policy, public security, or public health."[90] The directive prescribes narrow procedural circumstances by which an individual can be removed for these reasons.[91] However, these removal provisions could potentially be misused by a state as pretext for deporting individuals based on underlying racial prejudices.

2.1.2.2. The Racial Equality Directive

The Racial Equality Directive was adopted in 2000 by the European Parliament and Council, and gave Member States until July 19, 2003 to integrate its provisions into their national laws.[92] It was passed on the heels of the 1999 Treaty of Amsterdam which expanded individuals' rights in the EU.[93] The Amsterdam Treaty granted explicit authority for the first time to the EU to actively prevent discrimination in Member States. The EU used this authority to create RED as a common framework for national laws in Member States to prevent racial and ethnic discrimination.[94] RED is the most important legislation in the EU for fighting racial discrimination.[95]

RED recognizes that "the right to equality before the law and protection against discrimination for all persons" is a universal right. The fact that

[87] *Ibidem*, art. 7(1).
[88] *Ibidem*, art. 7(1)(a).
[89] *Ibidem*, preamble, para. 31.
[90] *Ibidem*, art. 27(1).
[91] *Ibidem*, art. 27(2-3).
[92] Council Directive 2000/43/EC, *supra* note 4, art. 16.
[93] European Commission, *Treaty of Amsterdam: What has changed in Europe?* (2000), pp. 9-10.
[94] Banulescu-Bogdan & Givens, *supra* note 6, pp. 3-4.
[95] European Agency for Fundamental Rights, *Annual Report* (2010), p. 13 (the "FRA Annual Report").

the preamble to RED states "it is important to protect all *natural* persons"[96] (emphasis added) is significant because it means that the protections guaranteed by RED are not exclusive to EU citizens. While many of the Roma expelled from France in 2010 may have been EU citizens, not all European Roma are citizens of EU Member States.[97] Furthermore, providing that racial discrimination is prohibited regardless of nationality brings RED closer towards international human rights norms,[98] which should, in turn, help underscore freedom from racial discrimination as a fundamental human right in the EU. RED also declares that protection from discrimination should include "social protection," and "social advantages.[99] It forbids both direct and indirect forms of discrimination.[100] It has no "public security" derogation exception like the Free Movement Directive does.[101] It also requires that each state set up monitoring bodies to provide assistance to discrimination victims, conduct surveys, and make recommendations to their governments.[102]

RED has had very little case interpretation by the European Court of Justice, and its terms and scope of application have been criticized as vague and lacking in definition.[103] However, that is precisely a reason why it should be used in a high-profile case of state-sponsored discrimination so that it develops more legal clout. Furthermore, it is clear in RED that an "instruction to discriminate"[104] for reasons of race fall within the concept of discrimination and that the directive applies to public bodies as well as private.[105] RED can therefore be used to show that Member States must remain faithful to honoring and fulfilling anti-discrimination legislation in practice, not just in written law.

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[96] Council Directive 2000/43/EC, *supra* note 4, preamble, para.16.

[97] *See e.g.*, Human Rights Watch, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo* (2010) (detailing discrimination towards of Kosovar Roma, who are not EU-citizens, in Germany).

[98] An'Naim, *supra* note 10, p. 14.

[99] Council Directive 2000/43/EC, *supra* note 4, art. 3(1)(e)-(f).

[100] *Ibidem,* art. 2(1).

[101] RED does not cover different treatment based soley on nationality or on the legal status of non-EU citizens. For example, denying an American citizen access to certain benefits reserved for EU citizens, because the American is a third country national, is not prohibited by RED. However, denying that American certain benefits because the American is African-American, would be forbidden by RED. *See ibidem,* art. 3(2).

[102] *Ibidem,* art. 13.

[103] For example, a 2010 study by the EU Fundamental Rights Agency revealed that discrimination against Roma in employment sectors was generally not recognized as a form of racism, and that there was little awareness that Roma are covered by RED. European Union Agency for Fundamental Rights, *The Impact of the Racial Equality Directive: Views of Trade Unions and Employers in the European Union* (2010), p. 12.

[104] Council Directive 2000/43/EC, *supra* note 4, art. 2(4).

[105] *Ibidem*, art. 3(1).

2.1.2.3. Substantive vs. procedural rights

The EU Commission never publicly threatened to bring proceedings against France under the Racial Equality Directive.[106] Meanwhile the legal steps initiated under the Free Movement Directive were suspended once France agreed to revise its laws to create more process before removing Roma.[107] However, as Robert Kushen, the director of the European Roma Rights Center, explained to Voice of America, France had only addressed one set of concerns, which was that "French law, as written,[108] did not properly reflect the protections that need to be provided to EU citizens before they can be expelled."[109] The substantive question of racial discrimination had been, in effect, dropped.

The cautious approach of the European Commission, and its willingness to step back from the issue is in a part a reflection of the difficulty in drawing consensus on dealing with Roma issues in the EU. In a November 2011 speech, the European Commissioner for Employment, Social Affairs, and Inclusion, László Andor, emphasized that Roma inclusion was dependent on a positive political atmosphere in Member States combined with a recognition that "[s]ocieties where Roma do well will be more cohesive."[110] But building such a consensus is quite difficult because Member States' national laws and policies regarding migrants

[106] When a reporter asked Reding whether the Commission had considered violations against France under the Racial Equality Directive, the Commissioner answered with a flat no, and declined to give further explanation beyond ambiguously stating that "we have only looked at what has gone on in French territory over the last few weeks." Reuters Broadcast, *supra* note 77.

[107] Emphasizing the importance of EU procedural rights, which "serve to protect EU citizens against arbitrary, discriminatory, or disproportionate decisions," Reding announced in a video statement that France had met its legal obligations through its promise to re-structure its laws. EUX.TV, *Viviane Reding Issues Video Statement on Roma*, (October 20, 2010), http://www.youtube.com/watch?v=qKowYcUoTt8, accessed March 1, 2011.

[108] An example of French law that the EU has identified in the past as problematic for the Free Movement Directive is Article L121-2 of Law no. 2006-911 which requires EU citizens in France to register *within* three months of entry or face a fine. This wording is in tension with the Free Movement Directive's provision in Article 8 which allows Member States to require registration for periods of residence *longer than* three months. *See* Directorate General, Internal Policies of the Union, *Comparative Study on the Application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their Families to Move and Reside Freely within the Territory of Member States* (March 2009), p. 64.

[109] Voice of America, *3 Questions: Roma Rights and Roma Wrongs*, (October 21, 2010), http://www.voanews.com/english/news/europe/3-Questions-Roma-Rights-and-Wrongs-105435603.html, accessed March 1, 2011. Kushen went on to say that the issue that the Commission had downplayed "the basic question of whether France [was] discriminating against a group on the basis of ethnicity in its practice of expulsions" (*Ibidem*).

[110] L. Andor, *Getting Member States to draw up their Roma integration strategies – Opening of Roma Platform* Brussels Speech/11/771 (17 November 2011).

can shift quickly and dramatically.[111] Moreover, a 2009 study published by the European Policy Institutes Network, shows that the European Commission has been struggling to maintain its relevance against national perceptions that it is a weak institution.[112]

Nevertheless, for the Commission to treat France's agreement to revise its laws to grant migrants with EU citizenship more process before expelling them as the end of the matter is short-sighted. On the one hand, ensuring procedural rights against deportation is an important tool for fighting racial discrimination because they can safeguard against collective expulsion of entire groups. Analyzing whether an individual has become an irregular migrant in the country subject to removal should be conducted on a case-by-case basis. There should also be adequate opportunities to challenge removal. However, by themselves, procedural rights do not directly attack the underlying substantive racial discrimination that may be occurring in a given context.

Simply adding more process, or strengthening existing procedural rights, without addressing the underlying discrimination, can become circular because the state can always set higher standards for a group's desired goal that in the end remain unattainable for the disadvantaged group no matter how many chances its individual members get to explain that they deserve it. If, for example, institutionalized racism in France results in Roma being denied opportunities to find employment within three months of arrival in France (the necessary condition for EU workers to remain in France legally), then the opportunity to contest their deportations becomes futile. This logic was detailed in the 2008 joint OSCE and COE report on Roma migration which pointed out that the inability of Roma to access goods and services, has "concrete implications for the exercise of EU freedom of movement rights."[113] Public antipathy towards the Roma can result in their diminished ability to access key goods and services in healthcare, education, employment, and housing.[114] While it is regular in the EU for Member States to place restrictions on the ability of new Member States' citizens to find work, the additional factor of latent racism against the Roma can make it impossible for Roma to ever achieve the required living and personal security standards to remain legally in a host country.

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[111] *See*, T. Givens, *Immigrant Integration in Europe: Empirical Research*, 10 Annual Review of Political Science 67 (2007), p. 75.

[112] P.M. Kaczynski, Rapporteur, *The European Commission 2004-09: A Politically Weakened Institution? Views from the National Capitals,* Working Paper No. 23 (May 2009), pp. 1-3.

[113] Cahn & Guild, *supra* note 45, p. 63.

[114] *Ibidem.*

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Furthermore, in discrimination cases, procedural violations lack the stigma of substantive violations and are often met with procedural, rather than substantive remedies that can effect more meaningful, long-term change.[115] By placing the legal focus only on procedural rights in the 2010 confrontation with France, the Commission failed to set a precedent that discriminatory state policies are actionable, even if they do not implicate free movement rights. Meanwhile, although the Commission's commitment to developing Roma integration strategies should rightly be seen as a welcome step, it will require a great deal of political will on the part of the Member States to see the Commission's suggestions turn into reality. Therefore, sending a powerful message to France, and by implication the rest of Europe, that Roma ethnic targeting and discrimination will not be tolerated because it is a substantive human rights violation, not merely a procedural infringement, would have been critical to the EU in establishing a forceful stance against racial discrimination.

2.2. Implications for all migrants in the European Union

The shared ambivalence among EU states towards respecting Roma rights, of which the 2010 French expulsion program is an example, poses a serious challenge to the universality of human rights. The expulsions were an example of a trend of European states collectively judging Roma and singling them out for police scrutiny, leading to the denial of basic rights. For example, in 2008 the Italian government began mandatory finger-printing of all Roma men, women, and children living in Italian camp settlements.[116] Meanwhile, the German government announced plans in 2010 to increase returns of Roma war refugees from Kosovo which, according to Human Rights Watch, puts at least 12,000 Kosovar Roma in Germany at risk of persecution once back inside Kosovo.[117] Other countries have also been engaged in collective Roma expulsions on a smaller scale, including Sweden, Italy, Germany, Denmark, and Belgium.[118] Common trends in these actions

[115] *European Court of Human Rights Finds Bulgaria Liable for Failure to Investigate Racially Motivated Killings*, 119(6) Harvard Law Review 1907 (2006), p. 1913.

[116] The justification for the *en masse* fingerprinting was to empty the camps of irregular migrants that allegedly posed a health risk. Then – Interior Minister Roberto Maroni claimed that the finger-printing, and subsequent deportation, would allow Italian Roma to "live in decent conditions," rather than with "rats." *Italian Gypsies Find Echoes of Nazism in Fingerprinting Move*, The London Times, July 2, 2008; *see also* Open Society Institute et al., *Security a la Italiana: Fingerprinting, Extreme Violence, and Harassment of Roma in Italy* (2008), p. 19.

[117] Human Rights Watch, *supra* note 97, p. 7.

[118] Deutsche Welle Inside Europe, *European Governments Cracking Down on Roma* (August 5, 2010), http://www.dw-world.de/popups/popup_single_mediaplayer/0,,5868452_type_audio_struct_3067_contentId_57031 03,00.html, accessed March 10, 2011.

and policies in various European states since the 2004 and 2007 EU enlargements include vilification of Roma in the national press and public discourse, an insistence by the government that Roma are dangerous and spread crime, and a lack of interest in, or explanation for, the circumstances Roma will face once deported.

Whatever truth arguments about Roma connections to poverty and crime may hold, in terms of the international legal prohibitions on racial discrimination they are irrelevant. An important idea behind protection from racial discrimination and profiling is that an individual will not be judged or singled out for negative treatment by the state because of his or her affiliation with a racial group. Arguing that Roma cause social problems which justify racial profiling or collective treatment threatens the entire sanctity of both regional and international human rights structures. Furthermore, leaving such discrimination unchallenged also makes it easier and more likely that states inside and outside Europe will continue to enact even more harsh and ethnically discriminatory laws and policies toward unwanted people in the future, and to justify their policies in terms of an ongoing fight against irregular migration.

Economic migration, both regular and irregular, into developed countries is a by-product of globalization that will increasingly be a challenge to states in upholding their commitments to human rights.[119] Challenging such discrimination requires recognizing that no one anti-Roma or anti-immigrant policy in Europe is unique, and that the widespread nature of such policies requires the EU to act.[120] Otherwise, the uncomfortable question remains, if EU states cannot uphold basic rights for Roma and other unwanted migrants, how can the current international system of human rights obligations dependent on sovereign state enforcement protect anyone?

3. TOWARDS A STRONGER REGIONAL LAW RESPONSE TO RACIAL DISCRIMINATION

The threat of legal proceedings under the Racial Equality Directive could send a stronger message to other governments in Europe which are discriminating against Roma and other migrants. EU law has superior enforcement mechanisms

[119] International Labor Office, *supra* note 7, pp. 13-14.

[120] The Open Society's Institute's Justice Initiative has recommended that the EU Commission provide guidance and uniformity throughout Member States on prohibiting racial and ethnic profiling through a framework decision, provide more safeguards against racial and ethnic profiling, and devote more resources into research and projects to reduce discrimination. Open Society Justice Initiative, *Submission to the European Commission consultation on the Freedom Securities and Justice Priorities 2010-2014* (2010), pp. 1-2.

to international human rights law when it comes to being able to respond to state breaches of regional law.[121] This advantage might actually lead to tangible alternative enforcement if a Member State is not upholding human rights protections within its jurisdiction. Even so, human rights mechanisms in both the European Union and Council of Europe have significant limitations in their current form. Developing jurisprudence around specific, targeted laws, like the Racial Equality Directive, may be the best legal solution to the problem of racial discrimination against non-citizens in European states.

3.1. Limitations on current European human rights mechanisms

There had been considerable debate prior to the 2009 Treaty of Lisbon as to the degree to which the EU is under a positive obligation to enforce human rights norms, and the extent to which the existing protections of the European Convention on Human Rights were adequate for Europe.[122] One line of argument is that since all members of the EU have ratified the European Convention on Human Rights, there is no need for a separate EU Bill of Human Rights to bind the Member States.[123] However, this argument does not account for the fact that the ECHR exists as a treaty body without the level of enforcement that the EU can provide.[124] The European Court of Human Rights interprets the ECHR in resolving cases brought by individuals against State Parties. The ECtHR can order a state that violates the ECHR to pay monetary compensation to individual victims of violations, and execution of the Court's decisions has generally been effective due to diligent monitoring mechanisms.[125] However, it does not have direct practical power to force the state to change its laws or alter its policies.[126] In contrast, the EU

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[121] *See e.g.*, Cicekli, *supra* note 29, p. 303.

[122] *See*, D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe,* 13 Duke Journal of Comparative and International Law 95 (2003), p. 95 (explaining that while no one questions the need for regional human rights bodies in Europe, there is disagreement as to how to divide jurisdiction between states, the EU, and other regional bodies); *cf.*, T. Ahmen & I. Butler, *The European Union and Human Rights: An International Law Perspective*, 17(4) European Journal of International Law 771 (2006), pp. 771-772.

[123] V. Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, House of Commons, Research Papers No. 2000/32, pp. 13-14.

[124] *See*, S. Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution*, 6(2) Human Rights Law Review 323 (2006), p. 353 (explaining that the EU's legislative and executive power allow it to expand beyond judicial remedies to take on a policymaking role when developing a human rights solution).

[125] Rt. Hon. J. Arden, *Peaceful or Problematic: The Relationship between National Supreme Courts and Supranational Courts in Europe*, 30(1) European Yearbook of International Law 3 (2011), p. 7.

[126] *See*, Shelton, *supra* note 122, pp. 147-148.

Commission is empowered under Article 258 of the Treaty of Lisbon to bring an action against Member States whose national laws and policies are not in compliance with EU law in the ECJ.[127] The ECJ, in turn, has been empowered since 2009 to directly lay fines and penalties on States that it finds to be in non-compliance with EU laws.[128] The relationship between the ECJ and the Commission therefore has a special advantage for enforcing directives because these cases against a state do not have to be brought by individuals who may not have the time, money, or opportunity to enforce their rights.

However, these EU institutions are restricted in their ability to deal directly with human rights violations through judicial channels because of the limited nature of EU human rights law. The 2000 European Charter of Fundamental Rights lists the social justice norms to which all Member States are supposed to be committed, but it does not bind any of them, unless they are applying EU law.[129] On December 1, 2009, the Treaty of Lisbon came into effect.[130] The Lisbon Treaty required that the EU, as an institution, will accede to the ECHR.[131] Among other structural changes, the Lisbon Treaty elevated the European Charter of Fundamental Rights to treaty status, making it binding law on the EU as an institution.[132] The change means that all legislation, directives, and decisions made by EU institutions must comply with the human rights standards set forth in the Charter.[133]

The Charter explicitly states that it does not apply to Member States unless they are specifically implementing EU laws.[134] Therefore, although the Charter provides a human rights guideline within the EU, it does not empower the Commission to bring an action against Member States for human rights infringements that do not involve the direct application of EU law. The Commission noted in an October 2010 strategy paper that because it has no power to intervene when Member States violate the principles in the Charter outside the application of EU law, it must rely on Member States' "own systems to protect fundamental rights" and "to take the necessary measures in accordance with their

[127] Treaty of Lisbon, art. 258.

[128] *Ibidem*, art. 260(2-3).

[129] Charter of Fundamental Rights, art. 51; *see also*, Communication from the Commission, European Commission, *Strategy for the Effective Implementation of the Charter for Fundamental Rights by the European Union*, (October 19, 2010), p. 3 (the "Communication from the Commission").

[130] Europa, *Treaty of Lisbon: Taking Europe into the 21st Century*, http://europa.eu/lisbon_treaty/index_en.htm, accessed March 1, 2011.

[131] Treaty of Lisbon, art. 6(2).

[132] *Ibidem*, art. 6(1).

[133] Communication from the Commission, *supra* note 129, p. 3.

[134] Charter of Fundamental Rights, art. 51.

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national laws."[135] As the French Roma crisis demonstrates, however, such reliance on sovereign state enforcement to ensure fundamental rights for all people in a jurisdiction is an inadequate response to serious human rights violations.

3.2. Developing the RED as a tool for human rights enforcement

Another approach to reliance on regional human rights conventions or broad, general declarations promoting human rights in Europe is to use specific European directives as a method of realizing human rights. The Racial Equality Directive is not a human rights law, *per se*. However, if used as a robust enforcement mechanism against racial discrimination, it will help achieve human rights implementation in practice. Past European case law can suggest ways for conceptualizing the ways in which RED can be interpreted in the future to create an enforcement regime against racial discrimination. In particular, the European Court of Justice's first case using RED and analogous discrimination cases in the European Court of Human Rights provide potential models for how to flesh out the Racial Equality Directive.

3.2.1. The ECJ's first RED interpretation

In the first substantive ECJ case under the Racial Equality Directive,[136] *Belgian Centre for Equality and Against Racism v. Feryn* (2008), the ECJ issued a preliminary ruling on a case referred to it from the Brussels Labor Court of Appeals.[137] The defendant was a company that had publicly announced a policy by which it would not hire "immigrants" in Belgium.[138] The ECJ decided that Member State courts would be correct to interpret such an employer policy as a violation of RED.[139] Kristin Henrard has concluded however that the ECJ failed to adopt a clear ruling with sound reasoning that could be used in the national courts.[140] The ECJ's failure lies in part because its ruling was too narrow and highlights the need for the ECJ to adopt systemic level rulings that give body and definition to RED.[141]

However, *Feryn* did establish that a public statement announcing a discriminatory hiring policy creates a presumption of direct discrimination, even if there

[135] Communication from the Commission, *supra* note 129, p. 10.

[136] K. Henrard, *The First Substantive ECJ Judgement on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle*, Jean Monnet Working Paper 09/09, p. 3.

[137] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* [2008] ECR I-05187, para. 18.

[138] *Ibidem*, para. 16.

[139] *Ibidem*, para. 41.

[140] Henrard, *supra* note 136, pp. 24-25.

[141] *Ibidem*, p 35.

are no identifiable victims.[142] A discriminatory announcement therefore puts the burden on the defendant to disprove direct discrimination.[143] The ECJ should apply this same logic when dealing with public statements by politicians and government officials. In the case of France, for example, because legal proceedings could be brought against the state itself, the ECJ also would have had the opportunity to make the broader, systemic clarification of the law.

The ECJ found in *Feryn* that illegal direct discrimination can exist even if there is no single identifiable victim.[144] This precedent is important to the situation in France and others like it because it means that individual Roma would not have to come forward and prove that they were personally harmed by the discriminatory treatment to show that a government policy amounted to illegal discrimination. Furthermore, it is significant that the ECJ found a presumption of discrimination under RED because the company's statement referred to "immigrants." RED does not prohibit discrimination based on nationality,[145] and so the ECJ's ruling can be used to argue that discrimination towards "immigrants" may be a proxy for forbidden race or ethnicity based discrimination. This reading of *Feryn* would allow the ECJ to broaden the scope of RED to use it to challenge Member States' treatment of migrants.

3.2.2. European Court of Human Rights case law

As a threshold matter, neither the fact that the EU has not yet acceded to the ECHR nor that the Charter of Fundamental Rights and Freedoms is not directly binding on Member States, negates the relevance of ECtHR jurisprudence for guidance in formulating interpretations of EU law.[146] The ECJ Court of First Instance itself, while acknowledging that it is not bound by ECtHR case precedent, has stated that the "special significance of the Convention on Human Rights as a source of inspiration concerning general principles has long been recognized by Community [EU] Courts."[147] Also, the Charter's preamble states that the EU will

[142] *Feryn*, *supra* note 137, para. 41.

[143] *See ibidem*, para. 34.

[144] *Ibidem*, paras. 24-25.

[145] Directive 2000/43/EC, *supra* note 4, art. 3(2)

[146] It should be acknowledged that the ECtHR jurisprudence on racial discrimination is neither fully developed nor free of controversy. However, it is much further along than that of the ECJ. *See*, E. Sebok, *The Hunt for Race Discrimination in the European Court* (May 2002) http://www.soros.org/resources/articles_publications/articles/discrimination-european-court-20020301/discrimination-european-court-20020301.pdf, accessed March 1, 2011.

[147] Case T-253/04, *Kongra-Gel v. Council*, [2008] ECR II-46, para. 69.

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recognize rights derived from ECtHR case law.[148] Although the ECtHR's case law is not binding on the EU, it is highly influential because the ECHR's provisions are recognized as general principles by the Commission.[149] Given the expectation that the EU will accede to the ECHR, the relevance of ECtHR jurisprudence to the ECJ is likely to increase. Because ECtHR case law is grounded in human rights, which apply to everyone, and not just EU citizenship rights, it can potentially be expansive for the ECJ in formulating its human rights jurisprudence. It is therefore a source of substantive case law useful to interpreting the Racial Equality Directive. Of special importance are those ECtHR judgments which combine a substantive human rights violation of the Convention with Convention Article 14, prohibiting racial discrimination.[150] In particular, ECtHR jurisprudence is helpful in two key areas: its flagship decision on collective deportations (*Conka v. Belgium*); and its Article 14 decisions, which place responsibility on states that either directly or indirectly condone racial or ethnic discrimination, particularly those that deal with anti-Roma discrimination.[151]

3.2.2.1. *Conka v. Belgium* – collective deportations

In *Conka v. Belgium*, the ECtHR dealt directly with immigrant deportations. Decided on 5 February 2002, it has valuable lessons for formulating a human rights argument against countries engaged in ethnically targeted deportations. In *Conka*, four Slovakian asylum-seekers brought a claim against Belgium alleging that the circumstances surrounding their arrest and deportation to Slovakia constituted an infringement of Convention Article 5,[152] which protects the right to liberty.[153] In September 1999, police in Belgium had sent a notice to a number of Slovakian families requiring them to report to a police station to complete their asylum applications.[154] However, upon arrival they were served with deportation

[148] European Charter of Fundamental Rights, preamble.

[149] Miller, *supra* note 123, p. 13.

[150] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14.

[151] Additional Protocol 12 was added to the ECHR in 2000, and creates a stand alone prohibition on race discrimination. The ECtHR's first interpretation of Protocol 12 on the merits was handed down in December 2009. The Court found that while Protocol 12 may be wider in scope than Convention Article 14, the meaning of its general prohibition on discrimination is intended to be identical in meaning to that of Article 14. *Sejdic & Finci v. Bosnia and Herzegovina*, (27996/06 & 34836/06) Grand Chamber, ECHR 22 December 2009, para. 55; *See also*, Human Rights Watch, *European Court: Landmark Ruling on Racial and Religious Discrimination* (December 22, 2009), http://www.hrw.org/en/news/2009/12/22/european-court-landmark-ruling-racial-and-religious-exclusion, accessed March 1, 2011.

[152] *Conka v. Belgium* (51564/99) Third Section, ECHR 5 February 2002, para. 2.

[153] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5.

[154] *Ibidem*, para. 18.

orders and taken to a detention center.[155] Several days later they were placed on a military plane and forcefully returned to Slovakia.[156] Significantly in the eyes of the ECtHR, the Belgian Minister of Interior issued a public statement on December 23, 1999 announcing that because of the large number of Slovakian asylum seekers in the city of Ghent, "arrangements ha[d] been made for their collective repatriation…."[157]

In deciding *Conka,* the Court identified three factors about the Belgian deportation it considered inappropriate, and which would be useful in future proceedings to rule that collective deportations violate basic principles of justice and fairness: (1) the migrants involved were not informed of available remedies to stall or prevent the deportation, except for paperwork forms written in miniscule print and not in their language;[158] (2) only one interpreter was available for a large number of families; [159] and (3) even though they had a legal right to a lawyer, the arrested Slovakian migrants were practically unable to contact a lawyer because of the circumstances in which they were confined.[160] No legal assistance was offered at the police station or at the detention center.[161] In effect, the Court established that individuals, whether illegally present or not, have a right to effective communication with the state if they are going to be held in custody or expelled.[162]

Conka is of particular relevance because it also found a violation of Article 4 of Convention Protocol No. 4, which prohibits collective expulsion of aliens.[163] The *Conka* Court defined collective expulsion as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group."[164] The Court put the burden of proof on Belgium to prove that the expulsion was not collective, and listed four more factors that persuaded it that the action was collective and therefore illegal. First, the Minister of Interior, a high level government official, had made public announcements admitting that the government was undertaking collective repatriation.[165] The second factor was

[155] *Ibidem*, paras. 19-20.
[156] *Ibidem*, para. 22.
[157] *Ibidem*, para. 23.
[158] *Ibidem*, para. 44.
[159] *Ibidem*.
[160] *Ibidem*.
[161] *Ibidem*.
[162] Cahn & Guild, *supra* note 45, p. 43.
[163] *Conka, supra* note 152, para. 56.
[164] *Ibidem*, para. 59.
[165] *Ibidem*, para. 62.

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that all the affected Slovakian asylum-seekers had been required to attend the police station at the same time.[166] Third, all the written deportations orders served on them were written in identical boilerplate language.[167] Finally, they were expelled before their asylum applications had even been completed.[168]

The *Conka* factors defining collective and discriminatory deportations are a useful baseline for categorizing state actions against vulnerable minority immigrants. Nearly all of the elements the ECtHR identified in *Conka* are present in the French deportations, but they are magnified because they occurred on a massive scale. The police raids on Roma camps that have been documented by NGOs and journalists in France left little room for informing each arrested Roma of his or her rights to contact an attorney or to seek interpreters.[169] The European Roma Rights Center has reported that many of the arrested Roma in France were coerced into signing a form, which they could not read, and which French authorities did not disclose to NGOs.[170] Furthermore, their deportations were coupled with very high level rhetoric, coming even from the French President himself, justifying the arrests and deportations as a needed policy response to increased Roma crime.

At first glance, *Conka* might be read as simply another call for more procedural rights. However, the ECtHR's logic in *Conka* can buttress an analysis of racial discrimination. The French situation has the added element that the deportations were occurring, not because of an overflow of asylum-applications, as was the purported reason in the Belgian case, but specifically because the Roma were accused as an ethnic group of collectively contributing to crime. Therefore the link between racial discrimination and the deportations is far stronger and more obvious than it was in *Conka*. Were the ECJ to take another case under RED, it could look to *Conka* not merely for an outline of factors that define prohibited collective deportation, but also as a building block upon which to argue that collective deportations that are racially motivated are a substantive violation of RED. It can further support this logic by drawing from other ECtHR cases that deal with state responsibility to prevent and to investigate racial discrimination claims, under ECHR Article 14.

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[166] *Ibidem.*

[167] *Ibidem.*

[168] *Ibidem.*

[169] *See*, European Roma Rights Center, *Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of the Roma in France: Factual Update* (September 27, 2010), p. 2 (detailing the alleged nature of the expulsion process, based on interviews with Roma in France).

[170] *Ibidem.*

b. Article 14 cases – discrimination and state responsibility[171]

Bekos v. Greece stands for the principle that a state's failure to investigate a credible complaint that police torture was racially motivated is a violation of Article 14 as well as Article 3, the prohibition against torture.[172] In *Bekos* two young Roma men had been caught burglarizing a kiosk. [173] At the police station, the men were severely beaten, and one was sexually assaulted.[174] The men claimed the police were shouting racial slurs at them throughout the abuse.[175] The ECtHR stopped short of finding a substantive violation of Article 14, finding that it had not been proved beyond a reasonable doubt that the police beat and shouted at the men because they were Roma.[176]

However, the ECtHR considered relevant the wide range of international organization and non-governmental organization reports documenting Roma abuse by law enforcement in Greece and throughout Europe.[177] In particular, it quoted extensively from findings by the European Commission against Racism and Intolerance[178] that Roma were regularly subjected to disproportionate police force in Greece.[179] In this context, the ECtHR found that where racially tinged verbal abuse happens in conjunction with an Article 3 violation, there is a duty to investigate the motivations behind the abuse.[180] This failure by the state to investigate a credible complaint[181] of a causal link between racism and the police beatings amounted to an Article 14 procedural violation.[182] *Bekos* thus reaffirms that the state is responsible for taking all reasonable steps in investigating racially motivated violence carried out by its law enforcement,[183] and that this responsibility may

[171] These cases do not comprise an exhaustive list of ECtHR Article 14 jurisprudence involving Roma-targeted discrimination, but rather serve as examples highlighting key concepts.

[172] *Bekos*, *supra* note 17, para. 75.

[173] *Ibidem*, paras. 8-9.

[174] *Ibidem*, paras. 11-13.

[175] *Ibidem*, para. 14.

[176] *Ibidem*, para. 67.

[177] *Ibidem*, paras. 33-37.

[178] This commission is an independent human rights monitoring body in the Council of Europe. It specializes in fighting racism and xenophobia. Council of Europe, Welcome to the Website of the European Commission against Racism and Intolerance (ECRI), http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp accessed March 1, 2011.

[179] *Bekos*, *supra* note 17, para. 33.

[180] *Ibidem*, para. 75.

[181] The plaintiff's had provided sworn affidavits and a letter of support from the Greek Helsinki Monitor and the Greek Minority Rights Group (*ibidem*, para. 72).

[182] *Ibidem*, para. 75.

[183] *Ibidem*, para. 69.

be heightened when the alleged victims are members of a minority, like the Roma, known to suffer disproportionately from discriminatory abuse.

The ECtHR expanded its Article 14 interpretation in *Moldovan and others v. Romania*. Although decided earlier, that 2005 case goes a step beyond *Bekos* by affirming that the state has a duty to investigate racially motivated crimes by non-state actors engaged in community violence. In *Moldovan* an angry mob burned thirteen Roma homes,[184] murdered three men after one had stabbed to death a non-Roma man during a bar fight, and severely beat multiple Roma men.[185] Police officials stood by watching, and reports indicated that the police chief personally joined the carnage.[186] Police also watched, and participated in, mob harassment of Roma in the days following the pogrom and allegedly arranged a cover up for civilian villagers. The Court found that the victims' Roma ethnicity was decisive in them being targeted for violence. [187] In addition, the authorities had made anti-Roma remarks throughout the whole case history in the national courts, which was a factor in the survivors' inability to get redress and compensation.[188] An Article 14 violation attached to the underlying Convention Articles 8 and 6 violations, guaranteeing protection of home and family, and the right to a fair hearing respectively.[189]

Moldovan bolsters the message in *Bekos* by insisting that the state, in addition to having direct responsibility for the behavior of its police, must ensure that its law enforcement actively protects people in its jurisdiction from racially motivated violence. *Moldovan* is relevant because it reinforces the seriousness of police complicity in racial discrimination and stresses the duty of the state to prevent it. Moreover, the logic in *Moldovan* indicates that governments actually risk inciting community racial hatred and potential violence by directly empowering its police to discriminate. By extension, high-level government rhetoric that demonizes a group, such as that characterizing the Roma as threats to community security in France, may be an extreme form of incitement found unacceptable in *Moldovan*.

In *D.H. v. the Czech Republic* (2007), eighteen Czech nationals of Roma origin[190] complained that the Czech Republic was disproportionately assigning Roma children to schools for students with special needs and learning disabilities,

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[184] *Moldovan and others v. Romania*, (41138/98) former Second Section ECHR 12 July 2005, para. 19.

[185] *Ibidem*, paras. 45-47.

[186] *Ibidem*, para. 18.

[187] *Ibidem*, para. 139.

[188] *Ibidem*.

[189] European Convention on Human Rights, arts. 6 and 8.

[190] *D.H. and Others v. the Czech Republic* (57325/00) Grand Chamber, 13 November 2007 ECHR, para. 1.

even though many of the children were of average or above average ability.[191] In doing so, the state was depriving them of a right to an equal education.[192] Like in *Bekos*, the judgment in *D.H.* directly recognized that the enhanced vulnerability of the Roma requires that they receive extra protection from discrimination. The Court referred to a set of recommendations by the ECRI that used the EU's Racial Equality Directive to define discrimination, and to eventually help it find that the Czech Republic had engaged in indirect discrimination by treating Roma children less favorably than non-Roma children in similar situations.[193]

Of particular interest, the Court denied that a state could simply rely on Roma's voluntary waiver of protection, throwing aside the Czech Republic's argument that the students' parents had signed forms agreeing to place them in the special needs schools.[194] The Court indicated that waivers of fundamental rights are to be interpreted very narrowly and that the burden is on the state to show that the waiver was "equivocal" and that it was "given in full knowledge of the facts."[195] It articulated a standard that "whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material."[196] This reasoning means that states cannot use other means of pushing out unwanted migrants, such as offering financial incentives for people to leave.

The ECtHR cases mentioned here are not authoritative ends in themselves, but they are efforts to develop the contours around what counts as substantive racial discrimination that a state is failing to mitigate or is contributing to. Since the ECJ lacks significant case law clarification of the Racial Equality Directive beyond *Feryn*, the ECtHR jurisprudence may be the most practical reference to expand the meaning of the RED so that it can be a more potent tool to combat egregious state behavior like what has occurred in France and other powerful EU states in their treatment of vulnerable minorities.

Taken together these cases suggest the following factors to determine state complicity in racial discrimination that can be imported into standards for the Racial Equality Directive: (1) collective targeting of any racial group for deportation purposes is absolutely forbidden; (2) when state action results in abusive treatment of vulnerable populations, the state must investigate the extent to which racial discrimination played a role in the abuse; (3) the state has both a duty to

[191] *Ibidem*, para. 18.
[192] *Ibidem*, para. 207.
[193] *Ibidem*, para. 60.
[194] *Ibidem*, para. 203.
[195] *Ibidem*, para. 202.
[196] *Ibidem*, para. 206.

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protect its people from racial discrimination and to refrain from inciting such discrimination; and that (4) fundamental rights, including the right to be free of racial discrimination by the state, cannot be waived. They therefore offer a useful paradigm with which to sculpt the contours of the Racial Equality Directive.

CONCLUSION

The 2010 French Roma expulsions are an example of severe racial discrimination that is recurrent throughout the European Union. Placed in the context of worldwide hostility toward irregular migrants, discrimination against European Roma is an urgent issue the EU must address. However, given the great disconnect between human rights norms on the international level, and implementation of those human rights in practice, acknowledging the seriousness of the problem alone is not enough either. In terms of European regional law, the Racial Equality Directive is an underdeveloped tool that could, if exercised, become a robust enforcement mechanism against states engaged in race-based discrimination. As a starting point, existing jurisprudence in the European Court of Justice and the European Court of Human Rights suggest ways in which the Racial Equality Directive can be interpreted in the future.

The European Union is constantly evolving in its development of regional law and social justice policies. To strengthen those available tools to combat racial discrimination and other human rights violations, the EU must be willing to push Member States harder to protect the fundamental rights of all people within their jurisdiction, including those migrants considered unwelcome by the state. Those that fail to do so should be sanctioned. Only in this way can the EU live up to its promise as a world leader in practical human rights protection and implementation.