LEGAL REMEDIES FOR THE GYPSIES: CAN THE EUROPEAN LEGAL FRAMEWORKS HOLD FRANCE LIABLE FOR THE EXPULSION OF THE ROMA?

SYED AHMAD HUDA*

"Let's make things clear. There can be no dismantling of the fundamental values on which our societies are built."

-Viviane Reding

1. Introduction

The Roma² reside at the margins of European society, in life and in art. In popular cultural representations, they are portrayed as temperamental, dark-skinned hyper-sexual beings.³ Sometimes, they even possess magical powers, such as the ability to tell the future.⁴ These representations contrast with the ideal European

^{*} J.D. Candidate, 2012, University of Pennsylvania Law School; B.A. 2008, New York University. I would like to thank the editorial staff of the Journal of International Law for its hard work on this article. I would like to thank my sisters, my brother-in-laws and my Law School friends for their unwavering support, inspiration, and guidance. Above all, I am grateful to my parents for enabling me to follow my dreams. All errors are my own.

¹ Oana Lungescu, Viviane Reding's BBC Interview on Roma Deportation, BBC NEWS EUR., Sept. 14, 2010, http://www.bbc.co.uk/news/world-europe-11306243.

² The Roma are also referred to as the Gypsies.

³ See, e.g., WILLIAM SHAKESPEARE, ANTONY AND CLEOPATRA act 1, sc. 1 (describing Cleopatra's "gipsy's lust," which transformed Antony into a "strumpet's fool"); 1 Victor Hugo, The Hunchback of Notre Dame 82 (Carey, Lea & Blanchard 1884) (1831) ("The crowd opened and made way for a bright and dazzling figure. It was the gipsy-girl.... This extraordinary creature appeared by her fascination and beauty to exercise her sovereign sway over the Court des Miracles itself.").

⁴ See, e.g., CHARLOTTE BRONTË, JANE EYRE 169 (Belford & Clarke 1885) (1847) ("[T]he gipsy['s] strange talk, voice, manner had by this time wrapped me in a kind of dream. One unexpected sentence came from her lips after another, till I got involved in a web of mystification, and wondered what unseen spirit had been sitting for weeks by my heart, watching its workings, and taking record of its every pulse."). European society had a fear of magic and witchcraft. See, e.g., the Witchcraft Act of 1562 (prohibiting "[the] use practise or exercise [of] any

figure, who is, more than anything else, governed by the faculty of reason.⁵ But these representations do not accurately reflect the Roma condition; rather, they contribute to the myth-creating exercise in which European society partakes. Indeed, such representations reflect the "subtle and Eurocentric persistent prejudice" against the Roma.⁶ This deep-rooted prejudice has resulted in the persecution of the Roma throughout European history, most recently during World War II.⁷

These prejudices persist in Europe⁸ today, particularly in France, which has become the most visible platform for their expression and implementation. On July 16, 2010, a gendarme⁹ shot and killed Luigi Duquenet, a 22-year-old Roma, at a police checkpoint located in the small town of Saint Aignan.¹⁰ Officials say that the car in which Duquenet was a passenger knocked over a policeman.¹¹ His cousin was the driver, and he refused to pull over because he did not possess a valid driver's license.¹² Also, Duquenet had committed a robbery that day and did not want an

Witchecrafte Enchantment Charme or Sorcerie, wherby any p[er]son shall happen to bee killed or destroyed").

- ⁵ See Jean-Jacques Rousseau, The Social Contract (Book 1 Chapter 8) 18 (G.D.H. Cole trans., J.M. Dent & Sons Ltd. 1947) (1762) ("[W]hen the voice of duty takes the place of physical impulses and right of appetite . . . man, who so far had considered only himself, find[s] that he is forced to act on different principles, and to consult his reason before listening to his inclinations.").
- ⁶ See EDWARD SAID, ORIENTALISM (1978) (describing the "subtle and Eurocentric persistent prejudice" against the Orient in Western civilization).
- ⁷ Germany sent Gypsies to labor camps in 1938–39, which later became concentration camps. *See* Jean-Paul Clébert, The Gypsies xvi (Charles Duff trans., 1963) ("[Four-hundred thousand] Gypsies were hanged, shot or gassed in the Nazi concentration camps").
- ⁸ See Leo Cendrowicz, Sarkozy Lashes Out as Roma Row Escalates, TIME, Sept. 17, 2010, http://www.time.com/time/world/article/0,8599,2019860,00.html (stating that Italy, Sweden, Belgium, Austria, and Denmark have recently expelled Roma immigrants).
- ⁹ For a definition of "gendarme," see *Gendarme*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/gendarme ("[A] member of a body of soldiers especially in France serving as an armed police force for the maintenance of public order.").
- ¹⁰ See Richard Boegner, Sarkozy Should Leave the Roma Alone and Tackle the Real Issues, Am. Chron. (Oct. 6, 2010), http://www.americanchronicle.com/articles/view/190285 (providing an account of this incident).
 - ¹¹ Id.
 - ¹² *Id*.

2012] LEGAL REMEDIES FOR THE GYPSIES

encounter with the local authorities.¹³ The next day, several French Roma, armed with metal rods and axes, attacked the local police station.¹⁴ The mob hacked down trees and burned many cars.¹⁵ The riot escalated to such proportions that it took two squadrons of gendarmes to take control of the situation.¹⁶

Soon afterward, President Nicolas Sarkozy held a meeting in which he ordered that three hundred illegal squats be dismantled within three months. According to Sarkozy, the camps were of profoundly shocking living standards, and were sites of begging, prostitution, and crime. Interior Minister Brice Hortefeux said... he would use decrees to dismantle about 300 camps, of which 200 belong to Roma. France has sent these Roma back to Romania and Bulgaria where they suffer much discrimination. Digital fingerprint technology would be used to ensure that those who had committed a public order offense had no chance of returning to France. Within a month, nearly one thousand Roma were sent

¹³ Id

¹⁴ See Q&A: France Roma Expulsions, BBC NEWS EUR., Oct. 19, 2010, http://www.bbc.co.uk/news/world-europe-11027288 (recounting these events, and the erupting tensions between the French Roma and police).

¹⁵ Id.

¹⁶ See Boegner, supra note 10 (explaining the extent of the tension, and the need for two squadrons for the French Police to regain control of the situation).

¹⁷ See Matthew Saltmarsh, Sarkozy Toughens on Illegal Roma, N.Y. TIMES, July 29, 2010, http://www.nytimes.com/2010/07/30/world/europe/30france.html?_r=1 (explaining that Sarkozy ordered the dismantling of three hundred illegal camps, two hundred of which belonged to the Roma).

¹⁸ *Q&A: France Roma Expulsions, supra* note 14.

¹⁹ Saltmarsh, *supra* note 17.

²⁰ See, e.g., CTR. ON HOUS. RIGHTS & EVICTIONS, WRITTEN COMMENTS OF THE CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE) AND THE EQUAL OPPORTUNITIES ASSOCIATION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION AT ITS 74TH SESSION ON THE OCCASION OF THE PERIODIC REVIEW OF BULGARIA 4, ¶ 3 (2009), available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/COHRE_EOA_Bulgaria74.pdf (describing that the Roma face discrimination in the housing sphere in Bulgaria in the form of forced evictions, racial segregation, and poor living conditions); see also Jack Greenberg, Report on Roma Education Today: From Slavery to Segregation and Beyond, 110 COLUM. L. REV. 919, 936 (2010) (describing the school segregation system in Eastern European countries where the Roma were placed in the same classroom as students with mental disabilities).

²¹ Saltmarsh, *supra* note 17.

back by plane to Romania or Bulgaria,²² putting France at the center of the debate regarding the treatment of Europe's largest minority.²³

Since the expulsion, President Sarkozy has received much criticism from the French population, even from within his own administration. For instance, Defense Minister Hervé Morin, head of the small New Centre party, described the expulsion as reflecting "the policy of hate [and] of fear "24 Some have viewed this deportation as a calculated, political move by a President worried about his low approval ratings.²⁵ But the French authorities remain resistant to such criticisms, and according to the authorities, the Roma have left or are leaving voluntarily.²⁶ The Roma are taking a resettlement payment of \$385 and a plane ticket instead of facing forcible expulsion one month later.²⁷ France insists that the expulsions do not target an ethnic group; rather each expulsion is handled individually.²⁸ Robert A. Kushen, executive director of the European Roma Rights Centre (hereinafter "ERRC"), has criticized this as a false choice: "the French are trying to insulate themselves from legal challenge, arguing that those who leave are doing so voluntarily and are not being expelled as a group."29

²² See EU: A Key Intervention in Roma Expulsions, HUM. RTS. WATCH (Sept. 14, 2010), http://www.hrw.org/en/news/2010/09/14/eu-key-intervention-roma-expulsions (stating that 979 Bulgarian and Romanian Roma were sent back between July 28 and August 27, 2010).

²³ See id.

²⁴ Hugh Schofield, *Security Moves Test France's Ruling Party*, BBC NEWS EUR., Sept. 2, 2010, http://www.bbc.co.uk/news/world-europe-11155180.

 $^{^{25}}$ See Q & A: France Roma Expulsions, supra note 14 (explaining how the government has adopted "hardline security measures" due to the government's increasing unpopularity).

²⁶ See Steven Erlanger, France Intensifies Effort to Expel Roma, Raising Questions, N.Y. TIMES, Aug. 20, 2010, at A4 (reporting that, according to the French government, the Roma flew back to Romania voluntarily).

²⁷ See id. (describing various families who have faced this "false choice"). See also EU May Take Legal Action Against France Over Roma, BBC NEWS EUR., Sept. 14, 2010, http://www.bbc.co.uk/news/world-europe-11301307 (explaining that France paid 330 euro per adult and 100 euro per child to Roma in order to repatriate them to other countries).

²⁸ See id.

²⁹ Erlanger, *supra* note 26.

2012] LEGAL REMEDIES FOR THE GYPSIES

1079

Although this maneuver might help France insulate itself from legal challenge, the international community has been quick to voice its concerns. The United Nations ("U.N."), for instance, expressed grave reservations regarding the Roma expulsion. At its annual session in 2010, The Committee on the Elimination of Racial Discrimination expressed worry that France was not individually reviewing each expulsion case.³⁰ Pope Benedict XVI also joined the debate and urged France to treat the Roma with more compassion.³¹ But French authorities seemed unmoved and undeterred.³²

The European Union ("EU") Commissioner for Justice, Fundamental Rights and Citizenship,³³ Viviane Reding, has also sharply criticized the expulsion. She has labeled the deportations a "disgrace."³⁴ Commissioner Reding has even said that the

³⁰ See Interview by Yvette Morris with Pierre Richard Prosper, Vice Chair, Comm. on the Elimination of Racial Discrimination, in Geneva, Switz. (Aug. 30, 2010) ("Now whether France is actually taking the time to interview and go and process each person one by one, you know, that may be the case, but all we're doing is raising awareness, raising concerns, and hope that the state does the right thing.").

³¹ See Le pape appelle les Français à la tolérance vis-à-vis des Roms [The Pope Asks the French for Tolerance Regarding the Roma], LE NOUVEL OBSERVATEUR (Aug. 23, 2010, 6:33 AM) (Fr.), http://tempsreel.nouvelobs.com/actualite/societe/20100822.OBS8839/le-pape-appelle-les-francais-a-la-tolerance-vis-a-vis-desroms.html ("Les textes liturgiques de ce jour nous redisent que tous les hommes sont appelés au salut. C'est aussi une invitation à savoir accueillir les légitimes diversités humaines, à la suite de Jésus venu rassembler les hommes de toute nation et de toute langue." ["The liturgical texts tell us repeatedly that all men are called to salvation. It is also an invitation to learn how to accommodate legitimate differences among humans, just like Jesus came to pull together men of every nation and every language."]).

³² See, e.g., Bernard Kouchner, Op-Ed, A Duty to Act in Truth, N.Y. TIMES, Oct. 7, 2010, http://www.nytimes.com/2010/10/08/opinion/08iht-edkouchner.html ("A lot of them also illegally occupy public or private land. Like any other government, it is the duty of the French authorities to enforce the law. It is as simple as that.").

³³ The Commissioner for Justice is one of twenty-seven Commissioners who comprise the EU Commission, the executive body of the EU. *See, e.g., The Members of the Barroso Commission* (2010-14), EUR. COMMISSION, http://ec.europa.eu/commission_2010-2014/index_en.htm (last updated Feb. 2, 2012) (listing the twenty-seven Commissioners for the 2010-2014 term); *see also The European Commission at Work: Basic Facts*, EUR. COMMISSION, http://ec.europa.eu/atwork/basicfacts/index_en.htm#comm (last updated July 29, 2011) (explaining how the Commission works).

³⁴ Press Release, Viviane Reding, Vice-President for Justice, Fundamental Rights & Citizenship, Eur. Comm'n, Statement on the Latest Developments of the

Commission would initiate legal proceedings against France, which could result in heavy fines.³⁵ The role of the Commission, she asserted, was to act as a "guardian of its treaties." More controversially, Commissioner Reding said that this was a situation she thought "Europe would not have to witness again after the Second World War."37 On September 29, 2010, the Commission warned France that it had two weeks to implement the 2004 EU Directive on Freedom of Movement, which guarantees EU citizens the right to freedom of movement within the EU.³⁸ Otherwise, the Commission threatened that it would initiate proceedings against France in the European Court of Justice ("ECJ") in Luxembourg.³⁹ Any targeted discrimination of an ethnic group violates EU law, which includes the Charter of Fundamental Rights of the European Union ("Charter").40 Two weeks after she issued the warning, Commissioner Reding announced that she was satisfied with France's timely implementation of her orders.⁴¹

Roma Situation (Sept. 14, 2010), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/428.

³⁵ See EU May Take Legal Action Against France Over Roma, supra note 27 ("EU disciplinary action against France could lead to substantial fines.").

³⁶ *Id*.

³⁷ *Id. See also Sarkozy Denounces EU Commissioner's Roma Remarks*, BBC NEWS EUR., Sept. 16, 2010, http://www.bbc.co.uk/news/world-europe-11332189 (referring to Reding's comments as "disgusting" and "shameful").

³⁸ See Reding, supra note 34 (explaining that France is in breach of the Free Movement Directive); see also Directive 2004/38/EC, of the European Parliament and of the Council 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 O.J. (L 158) 77.

³⁹ See EU May Take Legal Action Against France Over Roma, supra note 27 (explaining that the case would go before a tribunal in Luxembourg if the Commission decided to institute legal proceedings).

⁴⁰ See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 21 [hereinafter Charter] (outlining the fundamental rights accorded to citizens of the European Union).

⁴¹ See Press Release, Viviane Reding, Vice-President, EU Comm'r for Justice, Fundamental Rights & Citizenship, Eur. Comm'n, Statement on the Recent Developments Concerning the Respect for EU Law as Regards the Situation of Roma in France (Oct. 19 2010), available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/502&format=HTML&aged=1&lan guage=EN&guiLanguage=en">http://europa.eu/rapid/press

2012 LEGAL REMEDIES FOR THE GYPSIES

1081

The treatment of the Roma is one of the most urgent human rights crises in Europe. It is particularly worrisome because the Roma, unlike other persecuted minorities, have remained in the shadows of history. The Roma are only associated with the myths that have been conjured in the past; they are not known for the repeated acts of persecution and discrimination that they have endured. Essentially, this Comment seeks to analyze the unique condition of the Roma and the legal remedies that are available to them as a people. Section 2 of this Comment traces the history of the Roma in Europe and in France, which will help place the current situation in France in a historical and political context. Section 3 will examine the legality of the expulsion, using the jurisprudence followed by the ECJ and the European Court of Human Rights ("ECtHR"). If the legality of the expulsion is challenged, the case will likely proceed to the ECJ.⁴² However, a comparison of the jurisprudence followed by both courts will highlight the legal challenges that the Roma, as prospective litigants, would face. Under the jurisprudence of the ECJ, France has to show that its anti-discriminatory conduct, which involved targeting the Roma more than other groups in the illegal camps, was necessary and appropriate to satisfy a legal interest.⁴³ This is a demanding standard to meet. The ECtHR standard, by contrast, is more lax since it allows France to pursue a rational aim in targeting the Roma.⁴⁴ While the two courts interpret anti-discrimination differently, they both categorically prohibit collective expulsion; France would need to show that it did not engage in this type of expulsion at all.⁴⁵ This claim of collective expulsion is the strongest legal argument available to the Roma.

Section 4 of this Comment critically evaluates the legal claims available to France, and whether France can insulate itself from legal challenge. For instance, France can rely on the Directive on the Freedom of Movement, which holds that an EU member state

under the EU's Free Movement Directive into French legislation by early 2011. France has thus done what the Commission had asked for.").

⁴² See EU May Take Legal Action Against France Over Roma, supra note 27 (explaining that legal proceedings could end up in a European Court of Justice tribunal in Luxembourg).

⁴³ See infra Section 3.2.

⁴⁴ See infra Section 3.2.

⁴⁵ See infra Section 3.2.

can deport an individual to her or his country of origin after that individual has remained in the host member state for more than three months and has not been able to secure employment.⁴⁶ An EU member state can also deport an individual if that individual is a public security risk. Even though France has these options, it must show that it followed the procedural safeguards and engaged in the proper decisionmaking process. I argue that France will not be able to demonstrate compliance with these safeguards, and thus, even France's strongest legal arguments will not prevail in any court.

The Roma endured much discrimination and persecution in the course of the twentieth century, and little has been done to ensure them a life of respect and dignity. Indeed, Jack Greenberg notes that "after centuries of subjugation, including slavery, second-class citizenship, ethnic cleansing, oppression under communism, and stigmatization in the modern world, the Roma must launch a movement to claim their freedom. The Roma must take steps to cast off their shackles."⁴⁷ To some extent, this Comment explores and evaluates a few of the tools needed to break those shackles.

2. PAST AS NARRATIVE OF PERSECUTION AND DISCRIMINATION

2.1. The History of the Roma in Europe

The Roma are a nomadic group of people, believed to have arrived in Europe from the northwest of India at the beginning of the eleventh century.⁴⁸ After their arrival, the Roma were subject to discrimination, if not outright persecution. In the sixteenth and seventeenth centuries, several laws were enacted in Europe that banned Roma customs, language, and dress.⁴⁹ This was done in order to compel assimilation,⁵⁰ but soon after, more oppressive orders were promulgated. The first official repression of the Roma

⁴⁶ See infra Section 4.

⁴⁷ Greenberg, *supra* note 20, at 1001.

⁴⁸ See Q&A: France Roma Expulsions, supra note 14 (describing the origin of the Roma).

⁴⁹ See Maryam Hilli, The Forgotten Holocaust: Gypsy, OPPRESSION.ORG (Aug. 19, 2010, 7:02 PM) (originally published Jan. 21, 2005), http://oppression.org/site/index.php/world/europe/60-the-forgotten-holocaust-gypsy (reviewing the oppressed history of Gypsies throughout Europe).

⁵⁰ *Id*

2012 LEGAL REMEDIES FOR THE GYPSIES

in France took place in 1539, when there was an order expelling the Gypsies from Paris. In 1569, England followed France's suit and expelled Gypsies under the threat of death.⁵¹

Louis XIV of France promulgated a law in which "those who are called Bohemians or Egyptians⁵² . . . shall leave the Kingdom within one month, under penalty of the galleys or other corporal punishment."53 Moreover, in 1682 Louis XIV again ordered that Gypsies were to be sent to the galleys "without other form of trial" and would serve there "in perpetuity." 54 The women and children, however, were treated differently.⁵⁵ The women's heads were shaven and the children were taken to "poor-houses" where they were raised like other French children.⁵⁶ In 1740, however, the Gypsies were encouraged to find work, such as in agriculture; according to Louis XIV, banishment proved to be impossible.⁵⁷ But not all of Europe treated the Roma similarly. For instance, beginning in the seventeenth century, many Roma were forced to become slaves in Hungary and Romania; these slaves were only freed in 1855 under the influence of the Western abolitionist principles.⁵⁸

In the middle of the eighteenth century, several measures were taken to compel Roma to conform to the social norms of European society. Many Roma children were separated from their families and were subsequently made to live with non-Romani families.⁵⁹

⁵¹ Id

 $^{^{52}}$ The term "Gypsy" is a variation of the word "Egyptian," reflecting the common belief during the Middle Ages that Gypsies hailed from Egypt. $\emph{Id}.$

⁵³ CLÉBERT, supra note 7, at 60.

⁵⁴ Id. at 62.

 $^{^{55}}$ $\emph{Id.}$ at 61 (noting that Gypsy women and children received different punishments).

 $^{^{56}}$ Id. (explaining that Gypsy women were shaved while children were removed from their families).

 $^{^{57}}$ Id. at 62 (discussing the policy of Louis XIV to encourage Gypsy participation in agriculture).

⁵⁸ See Hilli, supra note 49 (noting that the Roma's "final liberation" in Hungary and Romania came in 1855); see also Greenberg, supra note 20, at 924 (assessing the impact of the abolitionist movement on the emancipation of Roma slaves).

⁵⁹ See EMP'T & SOC. AFFAIRS, EUR. COMM'N, THE SITUATION OF ROMA IN AN ENLARGED EUROPEAN UNION 7 (2004), available at http://academos.ro/sites/default/files/biblio-docs/293/roma04_en.pdf (highlighting efforts undertaken to compel Roma conformity with European social norms).

At that time, other Roma were sent to institutions where they were supposedly corrected and purged of their "deviant traits." ⁶⁰ Further, the idea of "Gypsy crime" developed along with the development of police practices, which further made the Roma the target of needless prosecution, and hence, persecution. ⁶¹

When the Nationalist Socialists assumed power in Germany in the early twentieth century, the persecution of the Roma reached its zenith. For example, the Roma were initially a part of social experiments. Adolf Hitler wanted to preserve two Gyspy tribes, as he thought they were the direct descendants of the primitive Indo-Germanic race; these tribes were meant to be sent to a region where scholars would be able to study them. Nomadic Gypsies were sent to "residence camps" located near large cities. A Nazi institution was established for the study of Gypsies, called the Race Hygiene Population Control Center of the National Health Office. Notwithstanding the expressed intention to preserve the purity of the German blood, the Gypsies, along with the Jews, were sent to concentration camps where they were subject to heinous treatment. Several pieces of legislation were passed during this period, which further reduced the Roma to second-class citizens.

⁶⁰ *Id.* (noting that Roma were also placed in institutions to rid them of such traits, and to "end the common existence of the ethnic group itself").

⁶¹ *Id.* (stating "the development of modern police practices brought with it the development of ideas of 'Gypsy crime,' and with it, comprehensive police registers of Roma").

⁶² Donald Kenrick & Grattan Puxon, Gypsies Under the Swastika 15 (2009).

 $^{^{63}}$ See Clébert, supra note 7, at 205 (explaining that Gypies were subject to appalling "biological research").

⁶⁴ *Id.*, at 206; *see also* Letter from Gaultier Portschy of Steiermark to Dr. Lammers, Reichs-Minister (Jan. 9. 1938), *reprinted in* CLÉBERT, *supra* note 7, at 206 ("[B]ecause [the Gypsies] are inveterate criminals who constitute parasites in the bosom of our people . . . it is fitting in the first place to watch them closely, to prevent them from reproducing themselves and to subject them of forced labor in the labor camps.").

 $^{^{65}}$ See Kenrick & Puxon, supra note 62, at 15 (explaining that the center was established in 1936 by Dr. Robert Ritter as the main Nazi institution concerned with research into Gypsies.).

⁶⁶ See Greenberg, supra note 20, at 925 (noting that Nazis created a program to exterminate the Roma, similar to their "final solution" to eliminate the Jews.").

⁶⁷ See KENRICK & PUXON, supra note 62, at 21 (explaining the impact of the Nuremberg Laws and the Decree to Prevent Crime on the Roma community); see also id. at 21 (describing the passage of the Decree on the Fight to prevent Crime in

2012 LEGAL REMEDIES FOR THE GYPSIES

It is a well-known fact that more than six million Jews were killed at Nazi concentration camps during World War II. But few recall, remember, or even know, the number of Roma killed.⁶⁸ Interestingly, few races can claim that they were both held in slavery and were victims of the Holocaust. In fact, according to Thomas Acton, a Professor of Romani Studies, "when Romani people from Eastern Europe meet Romani people from North-Western Europe today, it is the descendents of the survivors of slavery meeting the descendents of the survivors of genocide."⁶⁹

Whereas the situation for the Jews improved after the Holocaust, the same cannot be said of the Roma. Indeed, post-War Eastern European governments never provided any type of aid to those Roma who did survive the Holocaust.⁷⁰ Communist countries were especially hostile toward the Roma. For instance, Czechoslovakia adopted a coerced sterilization policy towards Roma women; the practice officially ended in 1990, after the collapse of the communist state.⁷¹ Depriving Roma of further dignity, concrete walls were built around the Roma villages in Slovakia.⁷² Bulgaria also adopted a segregationist policy, sending

1937, which applied to those who showed "antisocial behavior," including Gypsies); see also id. at 161 (narrating the passage of the 1935 Law for Protection of German Blood and Honour). See Herbert Heuss, German Policies of Gypsy Persecution (1870–1945), in The Gypsies During the Second World War: Vol. I: From "Race Science" to Camps 15, 29 (Donald Kenrick trans., 1997) (discussing the discrimination endured by the Roma during World War II as part of "special operations" implemented by German forces).

- ⁶⁸ See Greenberg, supra note 20, at 925 (presenting an estimate of the number of Roma killed at 1.5 million people, excluding the number of Roma killed by Nazi-allied regimes, during the Roma Holocaust).
- ⁶⁹ EMP'T & SOC. AFFAIRS, EUR. COMM'N, *supra* note 59, at 7; *see also* Lavinia Gligor, The Concept of Vulnerable People, A Case Study on the Roma Culture 4 (unpublished case study) (on file with author), *available at* http://www.inclusionexclusion.nl/papers/Gligor,%20Lavinia.pdf.
- ⁷⁰ See On the Road: Centuries of Roma History, BBC NEWS, Jul. 8, 2009, http://news.bbc.co.uk/2/hi/europe/8136812.stm (denoting that the lack of aid was characteristic on both sides of the Iron Curtain).
- ⁷¹ See Marina Denysenko, Sterilised Roma Accuse Czechs, BBC NEWS, Mar. 12, 2007, http://news.bbc.co.uk/2/hi/europe/6409699.stm (reporting claims that the Czech government coerced Roma women into undergoing sterilization procedures).
- ⁷² See Nick Thorpe, Slovakia's Separation Barrier to Keep Out Roma, BBC NEWS, Mar. 9, 2010, http://news.bbc.co.uk/2/hi/europe/8548417.stm (discussing a new concrete wall, built by the Slovakian government, dividing the Roma from the non-Roma).

_

Roma children to schools established for children with mental disabilities.⁷³ There were also efforts to eliminate the supposed anti-social traits of the Roma.⁷⁴ Poland and Czechoslovakia attempted to end nomadism amongst the Roma by transforming them into a more homogenous proletariat.⁷⁵ To some extent, these state efforts were successful because a new generation of Roma elite was born, and many held high positions in state institutions.⁷⁶

The Roma did not fare any better in Western Europe. For example, in Norway and Sweden, there were measures adopted to force sterilization of both men and women, as well as to place Romani children in state care.⁷⁷ Recently, however, Sweden and Switzerland have provided compensation to many Roma.⁷⁸

The anti-Romani sentiment particularly increased throughout Europe after 1989. In Eastern European countries, the Roma were blamed for a breakdown of public order.⁷⁹ Many Roma migrated to Western Europe but were resented by the countries that harbored them.⁸⁰ In 1999, the Roma community suffered one of the greatest threats to its existence since World War II.⁸¹ When North Atlantic Treaty Organization ("NATO") forces withdrew from the Federal Republic of Yugoslavia, ethnic Albanians initiated a smear campaign advocating ethnic cleansing of the Roma, and those whom they perceived as "Gypsies." Notwithstanding the U.N.'s presence in Kosovo, there have been attacks on Romani property,

⁷³ See Eur. Comm'n Against Racism and Intolerance, Council of Eur., Third Report on Bulgaria 22 (June 27, 2003), available at http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/BGR-CbC-III-2004-2-ENG.pdf (noting that Roma children in Bulgaria were sent to schools designed for mentally disabled children).

 $^{^{74}~}See~{\rm EMP'T}$ & Soc. Affairs, Eur. Comm'n, supra note 59, at 8 (discussing steps taken after World War II to eliminate Roma nomadism).

⁷⁵ *Id.* (describing assimilation efforts by Soviet Block countries and their limited effect on the eradication of racism).

⁷⁶ *Id.* (identifying the resulting high numbers of Roma in state institutions).

 $^{^{77}}$ $\emph{Id.,}~8\text{--}9$ (identifying the forced sterilization practices in Norway and Sweden).

 $^{^{78}}$ Id. (discussing the Swiss government's recent efforts to compensate the Roma victims of these practices).

⁷⁹ *Id.* (describing the intensity of anti-Roma sentiment including systematic persecution of Roma, racist movements, and violence).

⁸⁰ *Id.* (noting that much anti-Roma sentiment follows alarmist media reports).

 $^{^{\}rm 81}$ $\it Id.$ (leading to the displacement of eighty percent of Kosovo's Romani population)

2012 LEGAL REMEDIES FOR THE GYPSIES

as well as grenade attacks.⁸² Roughly 120,000 Roma are displaced within Kosovo.⁸³

More than a decade into the twenty-first century, the Roma still occupy the margins of European society. After the fall of the Iron Curtain and the accession of Central and Eastern European countries to the European Union, many Roma traveled to other EU Member States in search of a better life, but have been disappointed time and time again by the obstacles they have encountered along this search.84 Today, most Roma live in dire conditions, often with no electricity or running water.85 They have few, if any, employment opportunities. Forty-seven percent of Roma do not know that laws exist that ban discrimination in access to housing, and few think that they would see any tangible benefit even if they did report discrimination.86 There are often forced evictions of Roma residents even if they are regular rent-payers.⁸⁷ These are just some of the problems that plague the Roma. Even more troubling, the recent economic crisis has greatly affected the Roma population because they are more likely to be affected by such downturns.⁸⁸ What is worse, there is little reason to believe that the grim socio-political and economic situation of the Roma will improve in the near future.

⁸² Id.

⁸³ Id.

⁸⁴ See Eur. Union Agency for Fundamental Rights [FRA], The Situation of Roma EU Citizens Moving To and Settling In Other EU Member States 5–9 (2009) [hereinafter FRA, Situation of Roma EU Citizens], available at http://fra.europa.eu/fraWebsite/attachments/Roma_Movement_Comparative-final_en.pdf (assessing whether the right of free movement within the European Union has been respected as regards the movement of Roma throughout Europe).

 $^{^{85}}$ See On the Road: Centuries of Roma History, supra note 70 (describing the poverty-stricken lives of the majority of Roma).

⁸⁶ See FRA, Housing Conditions of Roma and Travellers in the European Union 7 (2009), available at http://fra.europa.eu/fraWebsite/attachments/ROMA-Housing-Comparative-Report_en.pdf (examining the housing situation for Roma in Europe and advancing proposals to improve the situation).

⁸⁷ *Id.* at 6; see also FRA, THE STATE OF ROMA AND TRAVELLER HOUSING IN THE EUROPEAN UNION: STEPS TOWARDS EQUALITY 6 (2010), available at http://fra.europa.eu/fraWebsite/attachments/ROMA-HOUSING-SUMMARY_EN_Web.pdf (noting that the Roma are often forced to live in low value sites, such as near waste dumps, which create health hazards).

⁸⁸ See FRA, SITUATION OF ROMA EU CITIZENS, supra note 84, at 8 (noting the impact of the economic crisis on the Roma).

U. Pa. J. Int'l L.

[Vol. 33:4

2.2. France's Treatment of the Roma

Like most of Europe, France has generally adopted harsh measures that have targeted the Roma. Even though ninety-five percent of the Roma in France are French citizens, they are treated like foreigners.89

In 2000, however, France enacted the Besson Law, which requires that every municipality of at least five thousand residents create a stopping area for travellers.⁹⁰ The law defines travellers as those with mobile homes. The Roma are not mentioned in the law, but, because many Roma are mobile, the law clearly applies to

89 For example, in the debates over 2003 anti-Roma legislation in the French Senate, Senator Bret argued:

Nous ne pouvons que réaffirmer notre opposition la plus ferme à cet article, qui tend à faire des gens du voyage une catégorie à part, une nouvelle classe de personnes dangereuses, . . . au seul motif que leur mode de vie diffère de celui de la plupart des Français.

Mais . . . les gens du voyage n'en sont pas moins français eux aussi, à 95 % qui plus est! Pourquoi chercher à tout prix à les marginaliser davantage en offrant aux maires des moyens supplémentaires pour les chasser de leur territoire communal?

[We can only reaffirm our firmest opposition to this article [19], which strives to make the Travellers [Roma] a separate category, a new class of dangerous persons, . . . the only reason for which is that their way of life differs from that of the majority of French citizens.

But . . . the Travellers are themselves no less French, 95% of them are at that! Why search at all costs to marginalize them more by offering local governments additional means to evict them from their communal terri-

Statement of Robert Bret, Séance du 13 février 2003 (compte rendu intégral des débats) [Meeting of February 13, 2003 (complete report of debates)], Art. 19 (2003), available at http://www.senat.fr/seances/s200302/s20030213/s20030213003.html#

90 See Loi 2000-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage [Law 2000-614 of July 5, 2000 concerning the Reception and the Settlement of Travellers], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2000, p. 10189 [hereinafter French Law 2000-614] ("Dans chaque département, . . . un schéma départemental prévoit les secteurs géographiques d'implantation des aires permanentes d'accueil et les communes où celles-ci doivent être réalisées. Les communes de plus de 5 000 habitants figurent obligatoirement au schéma départemental." department, . . . a departmental scheme provides for geographic areas for the establishment of permanent camp sites and the communes where they are to be established. Communes with populations greater than 5000 inhabitants must be included in the departmental scheme."]).

2012] LEGAL REMEDIES FOR THE GYPSIES

them. It was enacted in large part to improve access to economic activities in which the travellers can participate, as well as to improve access to education for their children. Although the Besson Law is admirable and ambitious, a majority of French municipalities have not implemented it. This failure to implement the law on a local level effectively illustrates France's general indifference, if not antipathy, towards the Roma. Examples of such antipathy are countless. For instance, many mayors of small towns have denied educational access to Roma children. And while the Besson Law afforded the Roma some dignity in spirit, France soon reversed course when it adopted Sarkozy Law II in 2003, which criminalizes Roma who have not set up their mobile homes at a legal halting area. Together, the Besson Law and the Sarkozy Law II have resulted in a Catch-22

⁹¹ Id. ("[A]u vu d'une évaluation préalable des besoins et de l'offre existante, notamment de la fréquence et de la durée des séjours des gens du voyage, des possibilités de scolarisation des enfants, d'accès aux soins et d'exercice des activités économiques" ["[F]ollowing a preliminary evaluation of needs and existing services, including amongst others the frequency and duration of the stays by Travellers, the possibility of the education for children, access to healthcare and the exercise of economic activities"]).

⁹² But see id. art. 9 ("En cas de stationnement effectué en violation de l'arrêté prévu au I, y compris sur le domaine public, le maire peut . . . saisir le président du tribunal de grande instance aux fins de faire ordonner l'évacuation forcée des résidences mobiles." ["When parking is in violation of the order envisaged in [paragraph] I, including on public property, the mayor may . . . refer the matter to the president of the superior court for the purpose of ordering the forcible evacuation of mobile residences."]).

 $^{^{93}}$ See Eur. Roma Rights. Ctr., Always Somewhere Else: Anti-Gypsyism in France 142 (2005) [hereinafter "ERRC"], available at http://www.errc.org/cms/upload/media/01/A5/m000001A5.pdf (examining the precarious housing and civil rights situation faced by European Roma, with a particular focus on their poor treatment in France).

⁹⁴ *Id.* at 20.

⁹⁵ See Loi 2003-239 du 18 mars 2003 pour la sécurité intérieure (1) [Law 2003-239 of March 18, 2003 for Interior Security (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 19, 2003, p. 4761 ("Dans les communes non inscrites au schéma départemental, le maire peut . . . ordonner l'évacuation forcée des résidences mobiles installées sur un terrain privé n'appartenant pas à la commune, lorsque le stationnement est de nature à porter atteinte à la salubrité, la sécurité ou la tranquillité publiques." ["In communes not included in the departmental scheme, the mayor may . . . order the forcible evacuation of mobile residences located on private property not belonging to the commune, where parking is likely to affect the public health, safety or tranquility."]).

situation: because there are too few legal halting areas, many Roma could face criminal prosecution. Or, more ironically put, "it is as if you have a game of musical chairs with one chair for five persons and the four who remain standing risk six months in prison."⁹⁶

In the legislative discussions regarding the Sarkozy Law II, a Senator referred to the Roma as a "plague of tomorrow They are anti-social people who have no respect for private property, no references, and for whom the words we use have no meaning."97 Moreover, Paul Girot de Langlade, the Prefect of Vaucluse,98 at a public meeting two months after the Senate debates of Sarkozy Law II, said, "I have no particular tenderness for those people. They live at our expense; from pillage too, everyone knows it. When they invade a piece of land, believe me, I am always ready to use all means to expel them."99 Not all Senators expressed aversion towards the Roma, however. Indeed, another Senator, Robert Bret, noted that the Sarkozy Law II essentially equated travellers with other dangerous peoples.¹⁰⁰ He also argued that it did not make sense to penalize travellers when the goal of the Besson Law has hardly been realized; the absence of punitive sanctions for mayors who did not uphold the Besson Law ensured its non-compliance.¹⁰¹

The failure of the Besson Law and the enactment of the Sarkozy Law II have made the issue of housing a particularly pressing problem for the Roma of France. Today, they are made to live in sub-par conditions, with housing typically close to factories, waste dumps and polluted rivers.¹⁰² Often, they have little access to clean

⁹⁶ ERRC, supra note 93, at 13 (citing Gens du voyage: la répression et l'absurde (Canal Plus television broadcast May 10, 2004)).

⁹⁷ *Id.* at 32.

⁹⁸ *Id.* ("In France, a Prefect is named in each Department by the Government through a decree of the President, based on propositions from the Prime Minister and Minister of the Interior. The Prefect is the representative of the Prime Minister and all of the Ministers in the Department and thus acts as a link between the State, the Government and the Department.").

⁹⁹ Id.

¹⁰⁰ See Statement of Robert Bret, supra note 89.

¹⁰¹ Id.

¹⁰² See ERRC, supra note 93, at 132 (describing the substandard conditions and segregation in halting areas for Travellers and Gypsies in France).

2012 LEGAL REMEDIES FOR THE GYPSIES

drinking water.¹⁰³ Many of these halting areas are not fit for human habitation.¹⁰⁴ And when the Gypsies are evicted, they are not well-treated. For instance, there are police raids early in the morning, and the police often subject them to physical and verbal abuse.¹⁰⁵ Because of their illegal occupation of land, the travellers are told to leave the town immediately.¹⁰⁶

The housing problem has made it difficult for travellers even to access basic services. For example, many Roma parents are afraid of enrolling their children in school in case they are subsequently evicted.¹⁰⁷ The deplorable conditions of various settlements, such as the lack of water, have made it difficult for parents even to send their children to school on a daily basis.¹⁰⁸ Many school officials simply refuse to admit them even though the children have a legal right to an education.¹⁰⁹ In short, the French laws have made it difficult for Roma to find a settlement where they are free from harassment, and this in turn has an effect on other areas of their lives, such as their access to free education.

3. THE LEGALITY OF THE EXPULSION UNDER THE ECHR AND THE CHARTER

3.1. The Relationship Between the ECHR and the Charter.

Hypothetically, two different courts, applying two different controlling documents, could review the legality of the Roma expulsion. First, the European Convention on Human Rights (hereinafter "Convention"), drafted in 1950, is an international treaty that protects human rights and fundamental freedoms in Europe. The Council of Europe drafted the Convention, and it came into effect in 1953. The Convention also created the European Court of Human Rights ("ECtHR"), which acts as a court of last resort to which litigants can bring claims that assert

¹⁰³ *Id*.

¹⁰⁴ *Id.* at 134.

¹⁰⁵ *Id.* at 181–82.

¹⁰⁶ *Id*.

¹⁰⁷ *Id.* at 238.

¹⁰⁸ *Id.* at 235.

¹⁰⁹ *Id.* at 236.

 $^{^{110}}$ See EVELYN ELLIS, EU ANTI-DISCRIMINATION LAW 319 (2005) (describing the history and effects of the European Convention on Human Rights).

violations of a Convention right. The Convention binds contracting members of the Council of Europe, including France.

The European Court of Justice could also review the legality of the expulsion. The ECJ is the judicial branch of the EU. It reviews the legality of acts of EU Member States; it ensures that these States, including France, comply with EU law; and it interprets EU law at the request of States. The Charter, drafted in 2000, encompasses political, social, and economic rights for EU citizens and qualifies as EU law. The Charter was not initially binding, but in 2009, the Treaty of Lisbon gave it absolute legal weight. Thus, one of the roles of the ECJ is to enforce the Charter.¹¹¹

The relationship between the ECJ and the ECtHR, as well as the relationship between the Charter and the Convention, is to some extent unclear. First, both courts seem to have jurisdiction over similar cases.¹¹² Second, there is a great degree of overlap between the Charter and the Convention since both contain antidiscriminatory provisions. 113 Notwithstanding these differences, the two bodies differ in many ways, such as the extent to which they permit indirect discrimination. 114 That is, although both the Charter and the Convention contain similar provisions, courts have interpreted them differently. Also, EU law, such as the Charter, has more legal weight than the Convention.¹¹⁵ For instance, if there is a conflict between a directly effective EU provision and a national law, the EU provision is controlling.¹¹⁶ In fact, national courts must interpret their legislation in light of EU law. 117 This is not the case with the Convention.¹¹⁸ The Convention grants

¹¹¹ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115/1), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001: 0012:EN:PDF. See also NICHOLAS BAMFORTH ET AL., DISCRIMINATION LAW: THEORY AND CONTEXT 50 (2008) (describing the conflict of law in discrimination cases for member states of both the EU and the Convention).

¹¹² Bamforth et al., *supra* note 111, at 50.

 $^{^{113}}$ \it{Id} . For a discussion of cases that involve an overlap between the two courts, see Helen Toner, Partnership Rights, Free Movement, and EU Law (2004).

¹¹⁴ Bamforth et al., *supra* note 111, at 50.

¹¹⁵ *Id*.

¹¹⁶ *Id*.

¹¹⁷ *Id*.

¹¹⁸ *Id*.

2012 LEGAL REMEDIES FOR THE GYPSIES

citizens of signatory states the right to a remedy where a Convention right has been violated, but only to the extent the constitutional system of the signatory state allows.¹¹⁹ Contracting States are afforded a "margin of appreciation in conforming with their obligations under the [Convention]."¹²⁰

3.2. A Comparison of the Anti-Discriminatory Provisions in the Charter and the Convention

principal way the Convention protects against discrimination is through Article 14, which provides that: "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."121 The Article itself does not directly confer substantive rights, but rather, it does so only in conjunction with another Article in the Convention. 122 It is not necessary that the plaintiff show that another Convention right has been violated; he need only show that the matter falls within the ambit of a Convention right.¹²³ Even though Article 14 contains no explicit mention of disability or sexual orientation, the phrase "or other status" suggests that the Convention may be read as applying to other discriminated groups that the Council of Europe had not considered when drafting the Convention.¹²⁴ frustratingly, the Convention does not define discrimination. The French version contains a broader definition than the English version: "sans distinction aucune." 125 In spite of these shortcomings, Article 14 has the potential to discrimination given its broad language.

¹¹⁹ *Id*.

 $^{^{120}}$ $\it Id.$ at 51 (citing Smith & Grady v. United Kingdom, 29 Eur. Ct. H.R. 493, \P 135 (1999)).

 $^{^{121}}$ Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221.

¹²² ELLIS, *supra* note 110, at 320.

¹²³ *Id*.

¹²⁴ *Id*.

¹²⁵ See id. at 321 (within the context of the Article, "sans distinction aucune" means "with no discrimination whatsoever").

In construing Article 14, the main inquiry is whether there is a difference of treatment between two persons in similar situations. The ECtHR held that the equality treatment principle is breached if the "distinction has no objective or reasonable justification." The justification should "be assessed in relation to the aims and effects of the measure at issue." Also, national courts are given a "margin of appreciation," which refers to the "the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights." The ECtHR in *Handyside v. United Kingdom* described the rationale behind the margin of appreciation:

This level of inquiry is similar to rational basis review in U.S. constitutional jurisprudence, which is the lowest level of inquiry. ¹³¹ The combination of margin of appreciation and the reasonable aim inquiry makes it easy for signatory states to condone anti-discriminatory conduct. ¹³² However, at times, the margin of appreciation can be narrowed depending on the type of discrimination alleged. ¹³³ Indeed, the proportionality rule, or the level of inquiry used, depends on the type of discrimination

¹²⁶ IA

¹²⁷ *Id.* (citing Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits) [hereinafter *Belgian Linguistics Case*], 34 Eur. Ct. H.R. (ser. A) at 34 (1968).

¹²⁸ BAMFORTH ET AL., *supra* note 111, at 73.

¹²⁹ Steven Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights 5 (2005); see generally Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (1996).

 $^{^{130}\,}$ Handyside v. United Kingdom, Eur. Ct. H.R. (Ser. A) \P 48 (1976).

¹³¹ See United States v. Carolene Products, 304 U.S. 144, 152 n. 4 (1938) (articulating rational basis review).

¹³² BAMFORTH ET AL., *supra* note 111, at 73.

¹³³ The ECtHR is not willing to give national legislatures a wide margin of appreciation in sexual orientation discrimination claims. *Id.* at 76.

2012] LEGAL REMEDIES FOR THE GYPSIES

claim.¹³⁴ For instance, in the *Belgian Linguistics Case*, the Court held that the right to a fair hearing, found in Article 6 of the Convention, does not compel states to establish an appeals system, nor does the right to education, found in Article 2, compel states to establish a particular kind of educational establishment.¹³⁵ This shows that signatory states do have a wide margin of appreciation in their interpretation of the Convention.

The ECtHR's interpretation of Article 14 has developed over time. For instance, although Article 14 historically only precluded direct discrimination, it now bans indirect discrimination. Also, a facially neutral blanket rule, if it disproportionately affects a particular group, such as one with a particular religious belief, could run afoul of Article 14.137

The Charter's provision pertaining to discrimination is worded differently from the parallel provision in the Convention. There are two main differences between the two. First, Article 14 of the Convention requires another Convention right to be violated in order for a litigant to have a viable claim that she has been discriminated against, whereas Article 21 of the Charter, in contrast, is free-standing. Second, Article 21 includes a list of more groups that are deemed to be worthy of protection, which is not included in Article 14 of the Convention. An example of this is the sexual orientation suspect group.

¹³⁴ See id. at 76–80 (mentioning the importance of the proportionality requirement in Article 14 cases).

¹³⁵ See Belgian Linguistics Case, 28 Eur. Ct. H.R. (ser. A) at 28 (1968) (addressing Article 6); id. at 42-43 (addressing Article 2).

¹³⁶ BAMFORTH ET AL., *supra* note 111, at 77; *see also* D.H. v. Czech Republic, 43 Eur. Ct. H.R. 144 (2007) (banning indirect discrimination in a case in which Roma children were disproportionately educated in "special" schools).

¹³⁷ BAMFORTH ET AL., *supra* note 111, at 78; *see also* Thlimmenos v. Greece, 2000-IV Eur. Ct. H.R. 263, 278-80(finding that a facially neutral law criminalizing people for not wearing military uniforms violated Article 14 when a Jehovah's Witness was sentenced to prison for refusing to wear a uniform and then later denied employment on that basis).

¹³⁸ See Charter, supra note 40, art. 21 ("Any discrimination 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.").

The ECJ determines whether there has been a case of discriminatory conduct by applying the proportionality test. The ECJ requires that a "measure be suitable or appropriate, as well as necessary, to achieve the desired end, as well as . . . proportionate to that end" 140

This is strikingly different from the standard used by the ECtHR in interpreting Article 14 of the Convention. The ECJ's review is a heightened level of scrutiny, similar to the strict scrutiny followed in U.S. constitutional jurisprudence.¹⁴¹ Furthermore, the level of scrutiny employed also depends on context. For economic matters, the court's level of inquiry is more relaxed, but if a litigant claims that her or his fundamental rights have been violated, the ECJ is willing to examine the alleged violation closely; the Charter also bans indirect, as well as direct, discrimination.¹⁴²

Article 21 of the Charter will likely prove to be more helpful to the Roma than Article 14 of the Convention. First, the Charter adopts a more heightened level of inquiry, which means that France would have to demonstrate that the expulsion was necessary and appropriate in order to ensure that no one was occupying its national territory illegally. Second, Article 21 of the Charter is freestanding and does not need to hook onto another Charter right in order to be validly applied. Although France claims otherwise, its expulsion qualifies as direct discrimination. A memorandum that circulated within the French equivalent of the Department of Homeland Security basically called for the targeting of Roma.¹⁴³ This leaked memorandum is a crucial piece of

¹³⁹ BAMFORTH ET AL., *supra* note 111, at 113.

¹⁴⁰ Id

¹⁴¹ See, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and "courts must subject them to the most rigid scrutiny").

¹⁴² See Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) 1, 24–25 (1981) (holding that a U.K. law prohibiting sodomy was illegal because the benefits of the law did not outweigh the disadvantages, such as the invasion of right to privacy, as required by the principle of proportionality). See also BAMFORTH ET AL., supra note 111, at 109 (stating that the Charter bans indirect discrimination).

¹⁴³ Memorandum from Brice Hortefeux, Minister of the Interior, to Michel Gaudin, Prefect of Police, Frédéric Péchenard, Gen. Dir. of the Nat'l Police, General Jacques Mignaux, Gen. Dir. of the Nat'l Gendarmerie, the Prefects, & Francis Delon, Sec'y Gen. for Def. & Nat'l Sec. (Aug. 5, 2010) (on file with author) (ordering that the camps must be dismantled with a priority placed on those of the Ro-

2012 LEGAL REMEDIES FOR THE GYPSIES

evidence since it proves that the Roma were not the target of indirect discrimination, but rather, they were the target of direct discrimination. Even if this memorandum were not available, two hundred out of the three hundred dismantled camps were occupied by the Roma.¹⁴⁴ It might be possible to prove that Sarkozy's expulsion order had a disproportionate impact on the Roma and therefore, this would be an act of prohibited indirect discrimination. Still, the memorandum highlights the fact that the Roma were the target of direct discrimination, and therefore, they should be able to allege successfully France's violation of Article 21 of the Charter.

3.3. Comparison of the Collective Expulsion Provisions in the Convention and the Charter

Article 19 of the Charter states that: "(1) Collective expulsions are prohibited; [and] (2) No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." If a person is expelled without the case having been reviewed individually, that expulsion is an instance of collective expulsion. This Article is concerned more with the procedural dimensions of expulsion. The European Commission of Human Rights ("the Commission") 147

ma, and that the establishment of new camps should be impeded; however, the State must take care not to conduct a policy of simple human displacement). See also Kim Willsher, France's Deportation of Roma Shown to be Illegal in Leaked Memo, Say Critics, GUARDIAN, Sept. 13, 2010, http://www.guardian.co.uk/world/2010/sep/13/france-deportation-roma-illegal-memo.

- 144 Saltmarsh, supra note 17 ("Interior Minister Brice Hortefeux said . . . he would use decrees to dismantle about 300 illegal camps, of which 200 belong to Roma.").
- ¹⁴⁵ Charter, *supra* note 40, art. 19. *See also JUSTICE Commentary on Art.* 19 *Protection in the Event of Removal, Expulsion, or Extradition, EU CHARTER FUNDAMENTAL RTS., http://www.eucharter.org/home.php?page_id=94 (last visited Apr.* 16, 2012) (noting that each decision on deportation is meant to be based on a specific examination, and that "no single measure can be taken to expel all persons having the nationality of a particular State").
- $^{146}\,$ Yutaka Arai et al., Theory and Practice of the European Convention on Human Rights 677 (Pieter Van Dijk et al. eds., 3d ed. 1998).
- ¹⁴⁷ The role of the Commission is to review admissibility of applications and ensure that domestic remedies have been exhausted, as well as to review the applications themselves. *See* Jonathan L. Black-Branch, *Observing and Enforcing Human Rights Under the Council of Europe: The Creation of a Permanent European*

_

has held that such an individual treatment must, most notably, entail an objective weighing of the interests of the individual and the authority seeking the expulsion.¹⁴⁸

The collective expulsion provision was enacted because of two ECtHR cases: *Soering v. UK*¹⁴⁹ and *Ahmed v. Austria*. ¹⁵⁰ In the *Soering* case, the plaintiff was to be sent to Virginia where there was a strong possibility that he would be executed; execution is a violation of Article 3 of the Convention. The ECtHR held that a state must consider the consequences of returning an individual to another country where he might endure punishment that breaches the Convention. ¹⁵¹ In the *Ahmed* case, a Somali refugee, upon being convicted of attempted robbery, was to be deported to Somalia, but the Court found that since he would face degrading treatment there, he could not be legally deported. ¹⁵²

In the *Soering* case, the ECtHR considered whether, if the plaintiff was sent to Virginia, there was a chance that his Article 3 right would be violated. The Article states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Court held that the possibility of execution qualified as "inhuman or degrading treatment or punishment;" inhuman" treatment includes premeditated treatment, which was "applied for hours at a stretch and 'caused, if not bodily injury, at least intense physical and mental suffering"154 Moreover, the term "degrading" refers to treatment that is likely to "arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."155

Court of Human Rights, 3 BUFF. J. INT'L L. 1, 17-21 (1996) (describing the Commission's work).

__

¹⁴⁸ ARAI ET AL., *supra* note 146. *See* A. v. Netherlands, App. No. 14209/88, 59 Eur. Comm'n H.R. Dec. & Rep. 274, 277 (1988) (finding no case of collective expulsion where applicants were able to present their cases before the Minister of Justice and the courts).

¹⁴⁹ Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

¹⁵⁰ Ahmed v. Austria, 1996-VI Eur. Ct. H.R. (No. 26) 2194.

¹⁵¹ *Soering*, 161 Eur. Ct. H.R. at 44–45.

¹⁵² Ahmed, 1996-VI Eur. Ct. H.R. at 2208.

 $^{^{153}\,}$ European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁵⁴ Soering, 161 Eur. Ct. H.R. at 39.

¹⁵⁵ *Id*.

2012] LEGAL REMEDIES FOR THE GYPSIES

Here, it is certain that the Roma will be subject to humiliating treatment upon their return to Bulgaria or Romania. 156 example, "70% of Roma children have either never attended school or dropped out of the overcrowded 'Gypsy schools' in the early grades."157 Also, the Roma must often deal with the vexing problem of segregated housing.¹⁵⁸ But it is unclear whether such acts of discrimination rise to the level of an Article 3 violation. Even though it is difficult to show that there is an Article 19(2) violation, Article 19(1) unequivocally states that collective expulsions are prohibited. At this point in time, it is unclear whether the French authorities are individually reviewing each case of expulsion, and engaging in the objective weighing of the individual's interests and the state's interests. France expelled roughly a thousand people within a span of one month.¹⁵⁹ It is hard to imagine that each of these expulsions was based on an objective balancing of interests. Further, the leaked memorandum highly suggests that no balancing of interests ever took place. 160

Protocol 4, Article 4 of the Convention also unequivocally prohibits collective expulsion of aliens.¹⁶¹ The legislative history of

¹⁵⁶ See, e.g., CTR. ON HOUS. RIGHTS & EVICTIONS, supra note 20, at 4–5, ¶ 7 (noting that the Roma face discrimination in the housing sphere in Bulgaria in the form of forced evictions, racial segregation, and poor living conditions: "The informal nature of the housing occupied by some Roma is put forth by Bulgarian authorities as justification for their failure to assist Romani residents and, at times, to harass them and/or to subject them to invasive practices incompatible with the international human rights standards to which Bulgaria has voluntarily agreed to be legally bound, including ICERD."); see also Greenberg, supra note 20, at 936 (describing the school segregation system in Eastern European countries under which the Roma were placed in the same classroom as students with mental disabilities).

¹⁵⁷ Rossen Vassilev, *The Roma of Bulgaria: A Pariah Minority*, 3 GLOBAL REV. ETHNOPOLITICS 40, 47 (2004), *available at* http://www.ethnopolitics.org/ethnopolitics/archive/volume_III/issue_2/vassilev.pdf.

¹⁵⁸ See id. at 46 ("Like Roma in many other parts of the former East bloc, the Bulgarian Roma face segregation and discrimination in employment, housing, education, health care, criminal justice, and the military.").

¹⁵⁹ See EU: A Key Intervention in Roma Expulsions, supra note 22 (979 Bulgarian and Romanian Roma were deported between July 28 and August 27, 2010).

 $^{^{160}}$ $\it See$ Memorandum from Brice Hortefeux, $\it supra$ note 143; Willsher, $\it supra$ note 143.

¹⁶¹ France ratified this Protocol in 1974. See Status of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, TREATY OFFICE, COUNCIL OF EUR. (Jan. 24, 2011), available at http://conventions.coe.int/

the Protocol suggests it was drafted in response to the "relatively clear-cut mass expulsions of ethnic Germans and Eastern Europeans after World War II." Like the Charter, an alleged expulsion under the Convention "must be conducted without individual review." 163

One of the chief cases interpreting this Article of the Convention is Čonka v. Belgium, which was the first case in thirtyfive years to favor an applicant claiming a signatory state engaged in collective expulsion.¹⁶⁴ In that case, the Roma plaintiffs were expelled from Belgium to Slovakia based on their country of origin. The plaintiffs were called to the police station, along with other individuals of the same origin. At the station, the plaintiffs were told, along with the other Roma families, that they were to be deported.¹⁶⁵ The ECtHR noted that there were several factors that suggest there was a collective expulsion of aliens. First, before the plaintiffs' expulsion, the political authorities had announced that such an operation would be undertaken. 166 Second, all aliens had to arrive at the police station at the same time. 167 Third, the terms of their arrest were identical.¹⁶⁸ Finally, many of the aliens were unable to get in touch with a lawyer.¹⁶⁹ Thus, the ECtHR found that there was a violation of Protocol 4, Article 4 of the Convention.

It is unlikely that France afforded the Roma the same procedural guarantees the ECtHR mentions in Čonka. For instance,

Treaty/Commun/ChercheSig.asp?NT=046&CM=8&DF=24/01/2011&CL=ENG (last visited Mar. 24, 2012).

¹⁶² Jacob D. Howley, Note, *Unlocking the Fortress: Protocol No. 11 and the Birth of Collective Expulsion Jurisprudence in the Council of Europe System*, 21 GEO. IMMIGR. L.J. 111, 115 (2006) (footnote omitted).

¹⁶³ Id

¹⁶⁴ See id. at 121 (analyzing collective expulsion case law and describing the growing receptiveness of courts toward collective expulsion claims).

¹⁶⁵ A note concerning immigration policy was approved by the Belgium Cabinet: "'A plan for collective repatriation is currently under review, both to send a signal to the Slovakian authorities and to deport this large number of illegal immigrants whose presence can no longer be tolerated.'" Čonka v. Belgium, App. No. 51564/99 Eur. Ct. H.R. at 10 [¶ 31] (2002) (citing "Note providing General Guidance on Overall Policy in Immigration Matters" (Oct. 1, 1999)).

¹⁶⁶ *Id.* at 20.

¹⁶⁷ *Id*.

¹⁶⁸ *Id*.

¹⁶⁹ *Id*.

2012 LEGAL REMEDIES FOR THE GYPSIES

it is probably the case that the Roma families were not able to contact a lawyer. That the Roma were essentially rounded up and returned to either Bulgaria or Romania implies that there was no individual consideration of each case; this is similar to the congregation of the Roma families at the police station in the *Conka* case. In short, the provision in the Convention prohibiting collective expulsion works very similar to the parallel provision in the Charter. It seems both provisions would support finding France liable for the collective expulsion of the Roma without due consideration of each individual's case, whereas France maintains that it is targeting breeding grounds for crime.

4. France's Possible Defenses

To be sure, France has some strong legal arguments in favor of the deportation of at least some Roma. The main source that President Sarkozy can rely on is the EU Directive¹⁷⁰ on Freedom of Movement which states that EU citizens can stay after a period of three months only if (1) they are either self-employed or can legally work in the host Member state; (2) they have sufficient resources for themselves and their families such that they are not a burden on the host Member state; or (3) they are enrolled in a public or private institution for studies and have health insurance.¹⁷¹ The

All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host Member

¹⁷⁰ EU Directives are legislative acts of the EU, which require that EU Member states implement the Directive. Nevertheless, states are not directed as to how they should implement the Directive. *See Application of EU Law: Directives – Definitions*, EUR. COMMISSION, http://ec.europa.eu/eu_law/directives/directives_en.htm (last updated Aug. 17, 2011) ("EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so.").

¹⁷¹ The EU Directive states:

Directive also states that EU citizens may be expelled because of public policy, public security or public health concerns.¹⁷² Before a host Member state expels an individual based on public policy or security concerns, however, it must take into account a variety of factors, such as his age, extent of cultural integration into the host Member state, family and economic situation, and cultural connections with the country of origin.¹⁷³ Moreover, a host Member state cannot expel an individual if that person has lived in the state for the previous ten years or if that person is a minor.¹⁷⁴

To justify the legality of the deportation of several Roma, President Sarkozy claims that the Roma campsites are a breeding ground of begging, prostitution and other crimes.¹⁷⁵ There is a grain of truth in this statement. For instance, in 2003, police arrested sixty-seven Roma outside Paris for sexual enslavement of children; these children were kidnapped from Romania, raped to make them obey, and sent to the streets of Paris to prostitute themselves.¹⁷⁶ Furthermore, Interior Minister Brice Hortefeux said that the "'delinquency of Romanian origin'" in Paris had increased "'by 138% in 2009 and 259% in eighteen months.'"¹⁷⁷ Further, he noted that "'in Paris, the reality is that almost one thief in five is a Romanian'" and that "'one theft in four by minors is committed by

State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

Council Directive 2004/38/EC, supra note 38, art. 7, at 93–94.

- ¹⁷² *Id.* art. 28–29 at 115–16.
- ¹⁷³ *Id.* art. 28(1) at 115.
- 174 Id. art. 28(3) at 115.
- ¹⁷⁵ See Q&A: France Roma Expulsions, supra note 14 ("A statement from the president's office said the camps were 'sources of illegal trafficking, of profoundly shocking living standards, of exploitation of children for begging, of prostitution and crime.'").
- ¹⁷⁶ See 2005 Country Reports on Human Rights Practices: France, U.S. DEP'T STATE, http://www.state.gov/j/drl/rls/hrrpt/2005/61648.htm (last visited Apr. 16, 2012) (describing various human rights issues in France, including discrimination, societal abuses, and human trafficking).
- ¹⁷⁷ Michael Cosgrove, Op-Ed., *Is France Lying About Roma Crime Rates?*, DIGITAL J. (Sept. 3, 2010), http://www.digitaljournal.com/article/297015.

2012] LEGAL REMEDIES FOR THE GYPSIES

a Romanian minor.'"¹⁷⁸ However, evidence suggests that such statistics are suspect.¹⁷⁹ Though some Roma may very well commit crimes, it is unclear whether they commit crimes at a greater rate than other minority groups with little access to education and employment.

Even if it were true that twenty percent of all thieves are Roma, the Directive requires that host Member states follow the proportionality principle when considering expelling an individual from the state.¹⁸⁰ This means that France would need to show that the expulsion of such individuals would not be "manifestly disproportionate to the gravity of the infringement."181 This is quite a demanding requirement because France would have to show that in each case of expulsion, the individual posed such a security risk to the public that deportation was the necessary and proportionate response. But deportation of an individual for committing a petty crime is not a proportionate response. Further, even if the crime rate is higher within the Roma community, deportation is still unwarranted. Authorities cannot rely on such collective statistics when considering the deportation of a single individual; this falls outside the scope of factors authorities should take into account when considering the expulsion of an individual.182

It would be difficult for France to show that each Roma deported was a security risk. A better claim would be that each of the Roma stayed beyond the three-month period, but was not able

179 See id. (noting that the alleged statistics are far-fetched and that there is no way to verify them); see also C.J. Chido, Peril of Movement: Migrating Roma Risk Expulsion as EU Member States Test Limits of the Free Movement Directive, 20 Tul. J. INT'L & COMP. L. 233, 252 (2011) (noting that the "more likely explanation [for the expulsion] is that they are . . . Roma who exercised their right to free movement").

¹⁷⁸ *Id*.

¹⁸⁰ See Council Directive 2004/38/EC, supra note 38, art. 27(2), at 114 ("Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.").

¹⁸¹ Case C-459/99, MRAX v. Belgium, 2002 E.C.R. I-6630, I-6664 [¶¶ 77, 78], available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX: 61999CJ0459:EN:PDF (applying the proportionality principle to the case); see also BAMFORTH ET AL., supra note 111, at 113 (describing the proportionality test).

 $^{^{182}}$ See Council Directive 2004/38/EC, supra note 38, art. 27(2), at 114 ("Measures . . . shall be based exclusively on the personal conduct of the individual concerned.") (emphasis added).

to secure employment. However, in France, Bulgarian and Romanian citizens must obtain a work permit, which is determined by the condition of the economic market. 183 This effectively means that France has reduced the type of employment that the Roma can hold "to a list of 150 jobs which are in need of workers." 184 Therefore, it seems France is making it difficult for the Roma to even satisfy a condition that would enable them to remain for more than three months. Still, even if France expels these individuals who have stayed beyond the three-month period, these expelled Roma can legally return to France.¹⁸⁵ Moreover, the ERRC claims that it was not determined for every Roma expelled whether he or she had been in France for fewer than three months. Therefore, even though France has a right to expel some Roma, it is not clear whether France legally expelled those Roma who were residing in France in violation of the Directive.

Undoubtedly, France has some potentially viable claims against the expelled Roma. For instance, France could assert that each of the Roma expelled posed a security risk and that deportation was the proportionate response to that risk. However, such an argument would hardly be persuasive given that so many Roma were expelled in a short span of time. Further, the high crime rate within the Roma community, even if true, does not necessarily justify the deportation of any one particular Roma individual. Alternatively, France would have to demonstrate that the Roma expelled were living in France beyond the three-month deadline without any security of employment. While this is a legally viable claim, the ERRC has reported several cases in which the Roma were expelled without any meaningful consideration of their cases. Even if France had legal options available, the manner in which the deportations were conducted suggests that it had improperly engaged in collective expulsion of the Roma.

¹⁸³ See Virginie Semedo, The Deportation of Roma People by France: Or How to Displace a Problem Instead of Solving It, MIGRANTS' RTS. NETWORK (Sept. 20, 2010), http://www.migrantsrights.org.uk/migration-pulse/2010/deportation-roma-people-france-or-how-displace-problem-instead-solving-it (describing the restricted freedom of movement of Roma people in France).

¹⁸⁴ *Id*.

 $^{^{185}}$ $\it See~id.$ (recognizing the absence of a system that would prevent expelled Roma from legally returning to France).

2012] LEGAL REMEDIES FOR THE GYPSIES

5. CONCLUSION

The Roma have been the subject of persecution throughout history, especially during World War II, where they were killed in large numbers. 186 The condition of the Roma has not considerably improved because they have since been subject to segregated housing and schools¹⁸⁷ and forced sterilizations.¹⁸⁸ The legal remedies available to them have been few and far between. But with the jurisprudential development of the European courts, the ECJ and ECtHR, there are more legal remedies that the Roma can take advantage of now, thereby moving them closer towards the achievement of a life of dignity. The 2010 expulsion of the Roma from France has been one of the most high-profile examples of mistreatment against the Roma. There is some evidence that suggests that a collective expulsion took place, without due consideration of each individual case. 189 Indeed, given the swift execution of the deportation of nearly one thousand Roma, 190 it is very much likely that there was a collective expulsion. Moreover, France acted in an anti-discriminatory manner because it specifically targeted the Roma when dismantling all the illegal camps.

Both the Charter and the Convention prohibit direct discrimination. The Charter adopts a heightened level of inquiry, which means that France must show that its actions were necessary and appropriate to deal with the Roma's illegal occupation of its

_

¹⁸⁶ See Greenberg, supra note 20, at 925 ("[O]ne estimate is that the Nazis killed at least 1.5 million in the Roma Holocaust . . . a number that does not include Roma exterminated by Nazi allied states.").

¹⁸⁷ See Vassilev, supra note 157, at 47 (describing the low education and illiteracy problems among Roma people that result from the "deliberate segregation and exclusion of Roma children from ethnic Bulgarian schools and classes").

¹⁸⁸ See Denysenko, supra note 71 (highlighting the allegations that Roma in the Czech Republic were sterilized against their wills).

¹⁸⁹ See Robert Kushen, Exec. Dir., Eur. Roma Rights Ctr., Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of Roma in France: Factual Update, to the Eur. Comm'n and Eur. Parliament (Sept. 27, 2010), available at http://www.errc.org/cms/upload/file/france-ec-legalbrief-27-sept-2010.pdf (summarizing evidence that France "singled out Roma as an ethnic group for law enforcement action").

¹⁹⁰ See EU: A Key Intervention in Roma Expulsions, supra note 22 (noting the expulsion of 979 Roma from France in 2010).

territory.¹⁹¹ The Convention, by contrast, lacks teeth because France need only show that its actions had an objective, rational purpose; its use as a legal shield will not be as effective as the Charter.¹⁹² Furthermore, the Convention allows the signatory states a significant margin of appreciation in their interpretation and implementation of the Convention.¹⁹³ Therefore, under the Charter, France will find it difficult to demonstrate the necessity and appropriateness of its discriminatory actions; under the Convention, however, France need only show a rational aim, which is significantly easier to do.

In addition to violating the anti-discriminatory provisions, France has also violated the prohibition on collective expulsion, which is unequivocally prohibited by both the Convention and the It is doubtful that France engaged in the proper decisionmaking when considering the deportation of each Roma, which requires balancing the interests of the individual with its The only way France can prevail is by own interests. demonstrating that it engaged in no collective expulsion, and indeed, France can even rely on the Directive on the Freedom of Movement to support its claim. For example, those individuals who have been present in France for a period of more than three months and have not secured employment are not legally entitled to remain in the state.¹⁹⁴ Moreover, France can even deport an individual if that individual poses a security risk. However, France would have to show that it applied the proportionality principle; this is an extraordinary hurdle for France to overcome given that nearly one thousand Roma were expelled within a month.

The collective expulsion claim is an important one because the history of Europe is fraught with examples of collective expulsion, most prominently with the expulsion of the Jews from Nazi

¹⁹¹ See BAMFORTH ET AL., supra note 111, at 113 (providing an overview of the proportionality test).

 $^{^{192}}$ See BAMFORTH ET AL., supra note 111, at 77–78 (observing the court's holding that states can violate the rights granted under Article 14 when they act "without an objective and reasonable justification").

¹⁹³ Bamforth et al., *supra* note 111, at 76–77.

¹⁹⁴ Council Directive 2004/38/EC, *supra* note 38, arts. 6-7, at 92-93.

2012 LEGAL REMEDIES FOR THE GYPSIES

Germany.¹⁹⁵ This treatment of the Roma is a painful reminder that the specter of collective expulsion haunts us still in the twenty-first century, and that a state indulges in its xenophobic tendencies when it expels groups of aliens en masse. A robust legal framework did not exist when previous collective expulsions had taken place, but legal frameworks exist today to protect those who are politically vulnerable. That the Roma are the "most impoverished, marginalized and discriminated group in Europe" makes reliance on the collective expulsion provisions in both the Charter and the Convention all the more urgent.¹⁹⁶

The discriminatory nature of the collective expulsion of the Roma highlights the racist motivations behind France's actions. France might claim otherwise, but its actions serve to ensure that the Roma remain as the "other," the elusive figure in the shadows of society. The Roma, unlike other peoples, lack the political capital to assert their fundamental human rights, and as a result, cannot escape the shadows into which they have been thrust. Because of the "difficulties surrounding the identification and definition of discrimination," there is always a danger that the Roma will not be able to successfully assert their political voice. 197

But after years of discrimination and expulsion from their own settlements, the Roma now stand a good chance of prevailing should EU Justice Commissioner Reding initiate a legal action against France. However, even Commissioner Reding has rescinded the threat of legal action. The legal remedies are

_

¹⁹⁵ See Jean-Marie Henckaerts, Mass Expulsion in Modern International Law and Practice 1–2 (1995) (listing notorious cases in the history of mass expulsion including "the expulsion of the Jews from England in 1290, the expulsion of the Jews from Spain in 1492, the expulsion of Moslems from Spain in 1610, the expulsion of Huguenots from France in 1685, the expulsion of Protestants from Salzburg in 1731, the expulsion of Jews from Bohemia in 1744 . . . the expulsion Armenians from the Ottoman Empire (Turkish Armenia) in 1915–1916, and the expulsion of the Jews from Nazi Germany in the period up to 1939").

¹⁹⁶ Morag Goodwin, Multidimensional Exclusion: Viewing Romani Marginalization Through the Nexus of Race and Poverty, in European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law 137, 137 (Dagmar Schiek & Victoria Chege eds., 2009).

¹⁹⁷ See Ellis, supra note 110, at 3.

¹⁹⁸ See Press Release, supra note 41. However, according to Robert Kushen, the inquiry into the Roma expulsion is ongoing. Statement by Robert Kushen, Exec. Dir., Eur. Roma Rights Ctr., France and Roma: It Ain't Over 'Til It's Over, (Oct.

1108 U. Pa. J. Int'l L.

[Vol. 33:4

available to the Roma, but the international community must take an aggressive, uncompromising stance against France. History shows that many states were able to mistreat the Roma without any fear of consequence, whether legal or political. The recent expulsion of the Roma from France is a chance to, if not remedy the injustices of the past, pave way for a future free of state-sponsored persecution. Indeed, now more than ever, the marginalized Roma have a decent opportunity, to borrow Jack Greenberg's phrase, at "cast[ing] off their shackles." ¹⁹⁹

20, 2010), *available at* http://medias.lemonde.fr/mmpub/edt/doc/20101021/1429044_c43e_errc_statement_sarkozy_21_october.pdf.

¹⁹⁹ Greenberg, supra note 20, at 1001.