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**Roma Rights: A Comparative Analysis
Between Belgium and Romania**

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FOREWORD

Aged eight, I was unaware of how pivotal our move to Bucharest, Romania in 1996, would be. Following four consecutive trips back to Bucharest, with the American School of Paris, I was dumbfounded by the gruesomeness of what I had witnessed with respect to Roma, increasing my resolve to attempt, if nothing else, to help. Over the years, I have engaged, yet frustrated innumerable amounts of people by instigating debate with respect thereto, and I would like to take this time to thank those who stood by me nevertheless.

Papa. So far, yet ever so close. Words will never suffice in explaining how much I've admired your work ethic and determination, and the shining example they have been throughout my academic career and equally so, this thesis. Throughout this process, your belief in my perseverance and abilities, kept me determined and ambitious. I am eternally grateful for the person you were, and still are. Thank you does not suffice.

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Mama, Savina, Jelle. You all deserve medals for having endured the endless Roma-family debates. Thank you for the supportive phone calls, the cooked meals and the endless belief you have in me. You have all been indispensable throughout this process.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CAT	United Nations Convention Against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CMW	United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRI	European Commission Against Racism and Intolerance
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
ERRC	European Roma Rights Centre
ESC	European Social Charter
FCNM	Framework Convention for the Protection of National Minorities
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
OSCE	Organization for Security and Co-operation in Europe
PIL	Public Interest Law
RC	United Nations Convention Relating to the Status of Refugees
The Commission	The European Commission of Human Rights
UDHR	Universal Declaration of Human Rights

PART 1. INTRODUCTION

1. On April 3rd 2001, 14-year-old Constantin Stoica, a Romanian Roma, was subjected to multiple beatings, kicks and injuries to the head as a result of hostilities that had broken out between Roma individuals and the local police force of his hometown¹. Constantin, merely passing the scene of the events, lost consciousness, as a result of the police inflicted injuries². The flagrantly unwarranted and discriminatory nature of the police violence, as later substantiated by the European Court of Human Rights (*hereinafter* ECtHR)³, is but a glimpse of human rights abuses Roma scattered across Europe are systematically subjected to⁴.

2. Whilst a vast array of human rights and minority norms have been construed on an international plane, in order to ensure the eradication of racially and ethnically motivated discrimination, Roma continue to be the victims of both direct as well as indirect discrimination in conjunction with a plethora of other human rights abuses⁵. Within the scope of this work, adherence to human rights instruments, both general instruments as well as content-specific instruments, regarding Roma, will be evaluated. The concerned evaluation will exist in a comparison of Belgium and Romania, home to Roma communities, in order to identify whether these nations have approached adherence to certain fundamental freedoms and rights of Roma differently. Naturally an assessment of all relevant rights and freedoms cannot be made within the entirety of this work, entailing that four comparable and specific rights of particular relevance to Roma, irrespective of the nations in which they reside, have been decided upon as a basis for analysis. The aforementioned investigation will subsequently pave the path for an analysis of arguments and measures that have proven to be successful and unsuccessful in the amelioration of the Roma plight within these two nations. Moreover, an assessment will be made of the manner in which the two concerned governments have approached the adherence to human rights with respect to their Roma communities.

3. In what follows, a short introduction of the applicable fields of law will be described as well as their relevance within the scope of the current issues Roma in Europe are continuously confronted with. Roma as a minority group will then be discussed, with specific focus on their identity in Europe throughout history and today, before embarking upon the

¹ European Court of Human Rights . „Case of Stoica v. Romania.” Jugdment. Strasbourg: Council of Europe, 4 March 2008. 2.

² *Ibid*.

³ European Court of Human Rights . „Case of Stoica v. Romania.” Jugdment. Strasbourg: Council of Europe, 4 March 2008. 13-14.

⁴ European Roma Information Office. „Discrimination Against Roma in the EU in 2012.” European Commission, January 2013. 1 – 17.

⁵ Council of Europe. „Human Rights of Roma and Travellers in Europe.” Strasbourg: Council of Europe Publishing, 2012. 11 – 28.

analysis of specific human rights and alleged violations thereof, they are subjected to in the concerned states.

I. Human Rights

A. Emergence and Historical Evolution

4. Preceding an assessment of human rights and minority rights violations against Roma, it is essential that the concept of human rights as an aspect of international public law be defined and elaborated upon. Human rights, notwithstanding their initial roots in the 17th century and in the subsequent works of John Locke, were only thoroughly developed and codified in the wake of World War II (*hereinafter* WWII)⁶. They concern certain values, freedoms and immunities seen as indispensable to the existence of individuals⁷. The culmination of WWII and the horrendous consequences thereof, resulted in global awareness regarding the necessity for certain inalienable and fundamental rights to be accorded to individuals⁸. The atrocities committed in the WWII era thus culminated in the adoption of various instruments codifying international human rights. Within this context some of the most notable codifications are the Charter of the United Nations⁹, as well as the Universal Declaration of Human Rights (*hereinafter* UDHR)¹⁰. The latter, an initially non-binding instrument that has, to a certain extent, attained the status of international customary law¹¹. This declaration, which broadly stipulates fundamental rights to which all individuals are entitled, was subsequently elaborated and interpreted upon in two instruments, namely the International Covenant on Civil and Political Rights¹² (*hereinafter* ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights¹³ (*hereinafter* ICESCR)¹⁴. Taken together, these three instruments constitute the International Bill of Rights. Initially,

⁶ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 886 - 887.

⁷ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 886; Aust, Anthony. Handbook of International Law. Cambridge: Cambridge University Press, 2010. 217; Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 288.

⁸ Aust, Anthony. Handbook of International Law. Cambridge: Cambridge University Press, 2010. 215 - 216.

⁹ UN General Assembly. „Charter of the United Nations (1 UNTS XVI).” San Francisco: United Nations, 24 October 1945.

¹⁰ UN General Assembly. „Universal Declaration of Human Rights.” Resolution (217 A (III)). United Nations, 10 December 1948.

¹¹ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 888.

¹² UN General Assembly. „International Covenant on Civil and Political Rights (999 UNTS 171).” United Nations, 16 December 1966.

¹³ UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 January 1976.

¹⁴ Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 290.; Cohen-Jonathan, Gerard. „Human Rights Covenants.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam : Elsevier-Science B.V., 1999. 916.

experts had opted to create one single additional covenant to the UDHR, however it soon became apparent that a distinction was necessitated due to the diverging nature of certain concerned rights, justifying the maintenance of a dualistic approach¹⁵.

5. Depending on their nature, human rights can be categorized in three generations¹⁶. The first generation rights primarily concern those incorporated in the ICCPR¹⁷. These rights have historical roots preceding their codification in the post-WWII era¹⁸. The obligations entrenched in the ICCPR primarily concern negative rights, entailing that they can only be guaranteed insofar they are free from interference by both state as well as private actors¹⁹. Within this context, it suffices to mention, amongst others, the right to life, the prohibition of torture and cruel and inhuman treatment, as well as the right to privacy. Such rights are required to be implemented upon ratification of the instrument, as opposed to being implemented progressively²⁰. Second generation rights are those primarily incorporated in the ICESCR, and evolved at a later stage than the first generation rights²¹. These rights generally encompass positive obligations, entailing that an active role by state is required in securing the adherence to those obligations²². Moreover, the nature of these rights, negate the necessity of immediate implementation. This entails that the concerned provisions and obligations bestowed upon state parties are based on the idea of progressive realization, taking into account factors such as the maximum state capacity to adhere thereto²³. However, a slight nuance is necessitated – whereas second generation rights are attained through the means of progressive realization, it does not negate basic minimum obligations incumbent upon states upon ratification of the instrument. The latter entails that, notwithstanding the principle of progressive realization, in complying with such obligations, member states will need to adhere to core minimum obligations (see *infra* 117).

¹⁵ Cohen-Jonathan, Gerard. „Human Rights Covenants .” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam : Elsevier-Science B.V. , 1999. 916 – 917.

¹⁶ Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 290 – 291.

¹⁷ Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 290 – 291.

¹⁸ *Ibid.*

¹⁹ *Ibid*; Aust, Anthony. Handbook of International Law. Cambridge: Cambridge University Press , 2010. 218.

²⁰ Cohen-Jonathan, Gerard. „Human Rights Covenants .” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam : Elsevier-Science B.V. , 1999. 916.

²¹ Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 290.

²² *Ibid.*; Cohen-Jonathan, Gerard. „Human Rights Covenants .” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam : Elsevier-Science B.V. , 1999. 916, 918 - 919.

²³ Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 296 – 297; Aust, Anthony. Handbook of International Law. Cambridge: Cambridge University Press , 2010. 218.

6. The aforementioned distinction between the first generation and second-generation rights should not be exaggerated however²⁴. The lack of hierarchy between the two instruments depicts the interlinked and interdependent nature of the rights therein enshrined respectively²⁵. It suffices to refer to article 8 ICCPR, prohibiting slavery and its ICESCR counterpart, article 6 with respect to the right to work. Due to the interlinked and interdependent nature of these rights, it follows that the obligations within the ICCPR exceed mere negative obligations, and the provisions within the ICESCR, extend beyond positive obligations²⁶.

7. Lastly, the third generation rights, concern group rights, also known as collective rights²⁷. These rights concern provisions concerning self-determination, the enjoyment of natural resources, provisions concerning the environment as well as rights to development²⁸. Whereas the post-WWI era was very much so, focused on the protection of group rights, more specifically minority rights, as much cannot be said about the post-WWII era²⁹. With the emergence of human rights as a result of the WWII era, the focus was primarily to the individual³⁰. It was assumed that the protection of individual human rights was a prerequisite for the protection of group rights³¹. Regrettably this has not always been the case. Gradually international new norms and instruments were agreed upon in order to rectify this deficiency and lay the foundation for certain guarantees imposed upon certain groups of individuals, in need of enhanced protection³². It suffices to refer to, amongst others, the Convention to Eliminate All Forms of Discrimination Against Women (*hereinafter* CEDAW), the Convention on the Rights of the Child (*hereinafter* CRC), the Convention on the Status of Refugees (*hereinafter* RC), as well as the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (*hereinafter* CMW).

B. Cultural relativism³³

8. The evolution of international law in its entirety has resulted in an increased focus on fundamental rights and freedoms of individuals. Within this context, notable tension has

²⁴Eide, Asbjorn and Allan Rosas. „Economic, Social and Cultural Rights: A Universal Challenge.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause and Allan Rosas. The Hague: Kluwer Law International, 2001. 3 – 4.

²⁵*Ibid.*

²⁶ *Ibid.*

²⁷ Henderson, Conway W. Understanding International Law. West-Sussex : Wiley-Blackwell, 2010. 290.

²⁸ *Ibid.*

²⁹ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 886-887.

³⁰ *Ibid.* 886; Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 2-3.

³¹ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 3.

³² Hannum, Hurst. „The Concept and Definition of Minorities .” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 56 – 60.

³³ Henderson, Conway W. Understanding International Law. West-Sussex : Wiley-Blackwell, 2010. 291.

arisen between national state practices as opposed to the trans-boundary application of human rights norms³⁴. Oftentimes states have relied on concepts such as state sovereignty and the principle of non-intervention to negate the applicability of certain human rights norms³⁵. The lack of adherence thereto has subsequently, in some nations, been ascribed to “*national idiosyncrasies*”³⁶. The essence of such reasoning is what has amounted to the doctrine of *cultural relativism*³⁷. This doctrine stipulates that local traditions, customs, and cultures, which include religious, political and legal practices, hinder the existence of *universal* human rights norms³⁸. The lack of adherence to these human rights norms is thus substantiated on the basis of cultural differentiation and the assumption that human rights norms cannot be transposed in an absolute, universal, analogous manner in such diverse cultures³⁹. The term culture within this doctrine is regarded in broad manner, entailing that its scope is not restricted to indigenous or mere customary practices, but equally extends to the legislative, political and institutional spheres of states⁴⁰. An application of this doctrine consequently entails that the human rights *acquis* existent today cannot be applied universally and analogously within all states⁴¹.

9. Naturally within this spectrum of reasoning, various degrees of cultural relativism exist⁴². For example, some cultural relativists pose that indeed certain human rights enjoy a universal character and can thus be imposed in a universal manner, whereas others take a more extreme stance⁴³. The former requires a nuanced approach however, given that whereas human rights may enjoy a general, global validity, they can nevertheless be interpreted and subsequently *applied* differently in varying cultures⁴⁴.

10. Cultural relativists often argue that universal human rights norms can only exist in a universal manner, insofar international bodies exist with jurisdiction to adjudge on conflicts,

³⁴ Teson, Fernando R. „International Human Rights and Cultural Relativism .” Virginia Journal of International Law 25 (1984 - 1985): 869.

³⁵ *Ibid.*

³⁶ *Ibid.* 870.

³⁷ Steiner, Henry J. en Philip Alston. „Universalism and Cultural Relativism - Comment on the Universalist-relativist Debate.” Steiner, Henry J. en Philip Alston. International Human Rights in Context - Law, Politics, Morals. Oxford: Oxford University Press, 1996. 192 – 194.

³⁸ Tilley, John J. „Cultural Relativism.” Human Rights Quarterly 22 (2000): 505.

³⁹ Teson, Fernando R. . „International Human Rights and Cultural Relativism .” Virginia Journal of International Law 25 (1984 - 1985): 871.

⁴⁰ Steiner, Henry J. en Philip Alston. „Universalism and Cultural Relativism - Comment on the Universalist-relativist Debate.” Steiner, Henry J. en Philip Alston. International Human Rights in Context - Law, Politics, Morals. Oxford: Oxford University Press, 1996. 192.

⁴¹ Pollis, Adamantia . „A New Universalism.” Human Rights - New Perspectives, New Realities. Red. Adamantia Pollis en Peter Schwab. London: Lynne Rienner Publishers, Inc., 2000. 9.

⁴² *Ibid.* 9 – 27; Steiner, Henry J. en Philip Alston. „Universalism and Cultural Relativism - Comment on the Universalist-relativist Debate.” Steiner, Henry J. en Philip Alston. International Human Rights in Context - Law, Politics, Morals. Oxford: Oxford University Press, 1996. 192 - 193.

⁴³ *Ibid.* 193.

⁴⁴ Pollis, Adamantia . „A New Universalism.” Human Rights - New Perspectives, New Realities. Red. Adamantia Pollis en Peter Schwab. London: Lynne Rienner Publishers, Inc., 2000. 9 – 27.

and monitor compliance thereto⁴⁵. Not surprisingly this is indeed a weak aspect of human rights law, but even more so, of international law as a whole⁴⁶. If this line of reasoning were to be followed however, it is clear that this would entail that international public law could equally be negated as a whole⁴⁷. Moreover, the increase of human rights complaint mechanisms globally within the last two decades demonstrates that broad support and consensus does indeed exist with respect to the validity of universal human rights norms⁴⁸.

11. Interestingly, a multitude of human rights instruments do indeed promulgate protective provisions with respect to the protection of cultures, custom and religion⁴⁹. However, it is inconceivable that these provisions were intended to justify a negation of others rights and freedoms incorporated within those respective instruments⁵⁰. Had the intent of such provisions been to constrain the application of other human rights norms insofar they do not fall within the validity of those cultures, this would render international human rights law void of meaning⁵¹. Additionally, various human rights instruments such as the ICCPR, the American Convention on Human Rights (*hereinafter* ACHR) as well as the African Charter on Human and Peoples' Rights (*hereinafter* ACHPR) have not included provisions by which states are justified in their non-compliance of other rights and freedoms based on the prioritization of local cultures, customs or traditions⁵². The sole Convention in which an argument as such could potentially *have* been substantiated, regarded the European Convention for the Protection of Human Rights and Fundamental Freedoms (*hereinafter* ECHR) due to its article 63(3), which prescribes that due attention must be paid to the specificities of colonies concerning the implementation of provisions in the ECHR⁵³. However, the ECtHR denounced such an interpretation in its respective *Tyrer Case* judgment⁵⁴. The ECtHR furthermore noted that the concept of human rights norms is based on the idea that they are *non-negotiable*, entailing that arguments brought forward by cultural relativists were, to a certain extent, ill founded⁵⁵.

⁴⁵ Teson, Fernando R. . „International Human Rights and Cultural Relativism .” Virginia Journal of International Law 25 (1984 - 1985): 875 - 876.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Steiner, Henry J. en Philip Alston. „Universalism and Cultural Relativism - Comment on the Universalist-relativist Debate.” Steiner, Henry J. en Philip Alston. International Human Rights in Context - Law, Politics, Morals. Oxford: Oxford University Press, 1996. 329 - 205; International Court of Justice. „Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).” Merits, Judgment. United Nations, 30 November 2010. 664.

⁴⁹ Teson, Fernando R. „International Human Rights and Cultural Relativism .” Virginia Journal of International Law 25 (1984 - 1985): 873 - 874.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.* 877 - 878.

⁵³ *Ibid.* 877.

⁵⁴ European Court of Human Rights. „Case of Tyrer v. United Kingdom (App.No.5856/72) .” Judgment. Strasbourg: Council of Europe, 25 April 1978. 14.

⁵⁵ *Ibid.* 15 - 16.

12. Notwithstanding the aforementioned, much remains to be said with respect to the extent of the universality human rights norms may enjoy in their application. It cannot be contested that the *corpus* of international human rights law has increased and has been expanded upon tremendously, especially so with respect to rights of a socio-economic nature⁵⁶. It is debatable however, whether rights as such, can be deemed as being universally applicable, irrespective of culture and tradition. Thus a nuanced approach is necessitated with respect to the application of such rights. Within this context, courts such as the ECtHR oftentimes refer to concepts such as the *margin of appreciation*⁵⁷ in order to grant States some leeway in their *application* thereof⁵⁸. Moreover, human rights complaint mechanisms repeatedly confirm that alleged violations of human rights provisions will be assessed in light of all relevant circumstances. This entails that when cultural or socio-economic practices effectively amount to matters of public order - a potential ground to justify limitations of certain rights - this can equally be taken into regard in concluding whether a violation of those rights has occurred⁵⁹. However, the diverging applications and forms of implementation of those rights, which may or may not be deemed acceptable under the concerned human rights instruments, must be distinguished from the right in principle, entailing that universality can nevertheless be ascribed to these rights, irrespective of the diverging *manner* in which they are enforced and applied.

C. Sources

13. Human rights norms can be found in a multitude of sources, and have, to a large extent become entrenched in domestic legislation within a variety of regions⁶⁰. Human rights norms are found in multilateral treaties of both a general nature as well as a specific nature⁶¹. The former refers to, amongst others, the two aforementioned Covenants, and their regional counterparts - the ECHR⁶², the ACHR⁶³, as well as the ACHPR⁶⁴. These instruments are not

⁵⁶ Leckie, Scott. „Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights.” *Human Rights Quarterly* 20 (1998): 88.

⁵⁷ The **margin of appreciation** ascribed to states refers to, in this context, the discretion states are granted in implementing human rights norms within their respective domestic legislation - Sweeney, James A. „Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era.” *International and Comparative Law Quarterly* 54.2 (2005): 462.

⁵⁸ *Ibid.* 462 - 466.

⁵⁹ See for example: European Court of Human Rights. „Case of Tyrer v. United Kingdom (App.No.5856/72).” *Judgment*. Strasbourg: Council of Europe, 25 April 1978. 14.

⁶⁰ Crawford, James. *Brownlie's Principles of Public International Law*. Oxford: Oxford University Press, 2008. 638; teiner, Henry J. en Philip Alston. „Universalism and Cultural Relativism - Comment on the Universalist-relativist Debate.” Steiner, Henry J. en Philip Alston. *International Human Rights in Context - Law, Politics, Morals*. Oxford: Oxford University Press, 1996. 331 - 705.

⁶¹ Henkin, Louis. „Human Rights.” *Encyclopedia of Public International Law*. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 887-888.

⁶² Council of Europe. „European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5).” Strasbourg: Council of Europe, 4 November 1950.

⁶³ Organization of American States. „American Convention on Human Rights, "Pact of San Jose", Costa Rica.” Organization of American States, 22 November 1969.

⁶⁴ Organization of African Unity . „African Charter on Human and Peoples' Rights ("Banjul Charter") (CAB/LEG/67/3 rev. 5, 21 I.L.M. 58).” Organization of African Unity , 27 June 1981.

limited in scope to specific wrongs, nor have they been agreed upon to provide protection to special categories of individuals – on the contrary⁶⁶. These instruments promulgate rights and freedoms that all individuals are entitled to, irrespective of the specificities of those individuals, within the territories of the concerned state parties.

14. In addition to the foregoing, multilateral human rights treaties have been adopted of which the scope is slightly more specific. The content of these treaties refer to, amongst others, categories of wrongs that require specific attention and enhanced legislative protection⁶⁷. Within this context mention can be made of, amongst others, the Convention on the Elimination of Racial Discrimination (*hereinafter* CERD)⁶⁸, and the Convention on the Prevention and Punishment of the Crime of Genocide⁶⁹. Lastly, specific multilateral treaties have also been established with the aim of providing protection in situations or for groups of individuals in precarious or vulnerable positions⁷⁰. Examples of such are the Convention on the Elimination of All Forms of Discrimination Against Women (*hereinafter* CEDAW)⁷¹, Convention on the Rights of the Child (*hereinafter* CRC)⁷², and the Convention Relating to the Status of Refugees (*hereinafter* RC)⁷³.

15. International customary law serves as a third source for human rights norms⁷⁴. Although it is not entirely certain what exact provisions within the ICCPR as well as the ICESCR and other instruments, can be deemed as being of a customary nature, certain core provisions undoubtedly enjoy such status⁷⁵.

D. State Obligations and Individual Remedies

16. Notwithstanding the qualification, nor the source, it is uncontested that the rapidly evolving human rights legislation brings about both positive as well as negative obligations

⁶⁵ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 888.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ UN General Assembly. „International Convention on the Elimination of All Forms of Racial Discrimination (660 UNTS 195).” United Nations, 21 December 1965.

⁶⁹ UN General Assembly. „Prevention and Punishment of the Crime of Genocide (A/RES/260).” United Nations, 9 December 1948

⁷⁰ Henderson, Conway W. Understanding International Law. West- Sussex : Wiley-Blackwell, 2010. 300 – 305.

⁷¹ UN General Assembly. „Convention on the Elimination of All Forms of Discrimination Against Women (1249 UNTS 13).” United Nations, 18 December 1979.

⁷² UN General Assembly. „Convention on the Rights of the Child (1577 U.N.T.S. 3) .” United Nations , 20 November 1989.

⁷³ UN General Assembly. „Convention Relating to the Status of Refugees (189 UNTS 150).” United Nations, 28 July 1951

⁷⁴ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 888.

⁷⁵ *Ibid.*

for states⁷⁶, as portrayed by the necessity of states to *respect, protect and fulfill* their human rights obligations.

*Article 1, Vienna Declaration and Programme of Action 1993*⁷⁷

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations, to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.

These obligations entail that a violation thereof may result in remedies to those affected by violations inflicted by a State⁷⁸. Naturally this can solely be achieved through recourse before domestic and international complaint mechanisms. In order to monitor adherence to these norms, the aforementioned conventions have foreseen in (optional) complaint mechanisms, allowing individual complaints, with respect to the alleged violations⁷⁹. To this extent the First Optional protocol to the ICCPR gave rise to the Human Rights Committee (*hereinafter* HRC)⁸⁰, which monitors state compliance to the ICCPR and considers individual complaints regarding alleged violations by States parties to the First Protocol. The ICESCR, similarly gave rise to the establishment of the Committee on Economic, Social and Cultural Rights⁸¹. The regional counterparts to these instruments have equally given rise to their respective monitoring and complaint mechanisms, namely the ECtHR for the ECHR, as well as the Inter-American Court on Human Rights with respect to the ACHR⁸². Additionally, many of the aforementioned human rights conventions and treaties with a specific, limited scope have equally led to the establishment of their respective monitoring and compliance bodies. Mention in this regard can be made of the Committee on the Elimination of Racial Discrimination, as well as the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child⁸³. Monitoring by these bodies is done primarily via the publication of state reports, and when warranted, via the means of individual complaints⁸⁴. Whilst it is uncontested that the effectiveness of such monitoring mechanisms is

⁷⁶ Nowak, Manfred. Introduction to the International Human Rights Regime. Leiden : Brill Academic Publishers/Martinus Nijhoff Publishers, 2003. 48 – 51.

⁷⁷ UN General Assembly. „Vienna Declaration and Programme of Action (A/CONF.157/23) .” Declaration. United Nations, 12 July 1993

⁷⁸ Henkin, Louis. „Human Rights.” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 891.

⁷⁹ Cohen-Jonathan, Gerard. „Human Rights Covenants .” Encyclopedia of Public International Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam : Elsevier-Science B.V. , 1999. 919.

⁸⁰ Nowak, Manfred. Introduction to the International Human Rights Regime. Leiden : Brill Academic Publishers/Martinus Nijhoff Publishers, 2003. 78 – 83.

⁸¹ *Ibid.*

⁸² *Ibid.* 84 – 94.

⁸³ Marks , Stephen P. „Human Rights, Activities of Universal Organizations.” Encyclopedia of International Public Law. Red. Peter Macalister-Smith. Vol. 2. Amsterdam: Elsevier Science B.V., 1999. 896.

⁸⁴ *Ibid.*

heavily reliant on state consent to their jurisdiction, these bodies have undoubtedly aided in the compliance, interpretation and evolution of international human rights law, as it exists today. The existence of such compliance mechanisms is quintessential in guaranteeing the effectiveness and enforceability of the substantive human rights promulgated by the respective instruments.

E. Universal, Indivisible, Interdependent and Interrelated

17. As promulgated within the Vienna Declaration and Programme of Action, following the World Conference on Human Rights, human rights are universal, indivisible, interdependent and interrelated⁸⁵. This entails that human rights must be regarded as being hierarchically equal and attainment thereof must be achieved taking into regard *all* human rights⁸⁶. It is unconceivable for example to enjoy the right to privacy and a family life without due regard for the right to freedom of expression, freedom of association or freedom of liberty. Within the scope of this work, the interlinked and indivisible nature of human rights is of particular importance given the close relationship between cultural, and socio-economic rights. For example, Roma individuals cannot fully enjoy the right to adequate housing, if they do not equally enjoy the right to access to work. Equally so they cannot adequately enjoy the right to education if direct and indirect discrimination within this field is not eradicated.

II. Minority Rights

A. Sources

18. International and regional instruments, which confer upon states the necessity to protect minority rights, are vast and trace back to the post World War One (*hereinafter* WWI) era⁸⁷. Similarly, yet in a slightly more nuanced manner, the international community in the post-WWII era recognized the necessity and importance of granting particular rights to minorities⁸⁸. As a result of this international awareness, the ICCPR included a specific provision referring specifically to the particularities of minorities, bestowing upon State parties a negative obligation to not deny minorities “*to enjoy their own culture, profess and practice their own religion, or to use their own language*”⁸⁹. Equally so, minority protective

⁸⁵ Paragraph 5 – UN General Assembly. „Vienna Declaration and Programme of Action (A/CONF.157/23).” Declaration. United Nations, 12 July 1993 .

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„Mensenrechten: De basis van beschaving of een luxe van het Westen? Interview met Professor Eva Brems.” Ad Rem - Tijdschrift van de Orde van Vlaamse Balies 4.55 (2009): 4 - 7.

⁸⁷ Hannum, Hurst. „The Concept and Definition of Minorities .” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 53; Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 2.

⁸⁸ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 3.

⁸⁹ Article 27 ICCPR.

provisions have been incorporated in, for example, the CERD⁹⁰, CEDAW⁹¹, and the Convention Against Torture (*hereinafter* CAT)⁹². Whilst other regional treaties have also incorporated provisions as such⁹³, the ECHR interestingly has not done so. In contrast to the aforementioned treaties, the rights and freedoms of minorities are assessed by the ECtHR primarily under its anti-discrimination clause (article 14 ECHR) and insofar necessitated under other rights and freedoms found in the ECHR⁹⁴(see *infra* 112 and 133). The absence of a specific minority protective provision however, by no means negates the notion that enhanced scrutiny is paramount when assessing alleged violations of their rights and freedoms, as exemplified by this Courts' vast jurisprudence on the matter⁹⁵. Reference must also be made to the European Framework Convention on National Minorities (*hereinafter* FCNM), which mandates country assessment reports with respect to its extensive minority protective provisions. Dismayingly however, this convention lacks a judicial complaint system in order to ascertain enforceability of its provisions⁹⁶.

19. Alongside these legislative, binding instruments, a range of political mechanisms have also been established in order to ascertain a protective stance with respect to minorities. It suffices to mention, amongst others as this is by no means exhaustive, the High Commissioner on National Minorities the European Commission against Racism and Intolerance (*hereinafter* ECRI), the Independent Expert on Minority Issues, the UN 1992 Declaration on Minorities as well as the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples⁹⁷.

B. Minority Rights as an Aspect of International Human Rights Law

⁹⁰ Article 4 CERD.

⁹¹ Article 1 CEDAW.

⁹² Article 1: UN General Assembly. „Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85).” United Nations, 10 December 1984.

⁹³ Article 1: Organization of American States. „American Convention on Human Rights, "Pact of San Jose", Costa Rica.” Organization of American States, 22 November 1969; Article 2: Organization of African Unity. „African Charter on Human and Peoples' Rights ("Banjul Charter") (CAB/LEG/67/3 rev. 5, 21 I.L.M. 58).” Organization of African Unity, 27 June 1981; Hannikainen, Lauri. „Legal Nature of Minority Rights As Part of Human Rights, Limitations, Derogations, Reservations and Interpretative Statements .” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 31.

⁹⁴ Eide, Asbjorn. „Introduction: Mechanisms for Supervision and Remedial Action.” Universal Minority Rights. Red. Marc Weller. Oxford: Oxford University Press, 2007. 1 – 23.

⁹⁵ Moucheboeuf, Alcidia. Minority Rights Jurisprudence. Strasbourg : Council of Europe Publishing , 2006. 750; Pogany, Istvan. „Minority Rights and the Roma of Central and Eastern Europe.” Human Rights Law Review 6 (2006): 6.

⁹⁶ Pogany, Istvan. „Minority Rights and the Roma of Central and Eastern Europe.” Human Rights Law Review 6 (2006): 7 – 8.

⁹⁷ Eide, Asbjorn. „Introduction: Mechanisms for Supervision and Remedial Action.” Universal Minority Rights. Red. Marc Weller. Oxford: Oxford University Press, 2007. 16 – 18.

20. General Comment 23⁹⁸ by the Human Rights Committee regarding Article 27 ICCPR, notably the foundation for minority legislation as it is known today (see *supra* 18), stipulates that the rights conferred upon minorities are “*distinct from and additional to*” the provision encompassed in the ICCPR⁹⁹. Whilst it may subsequently be concluded that minority rights should be seen as being distinct from human rights legislation, it has rightfully been stated that this would be detrimental for the content and protection provided by such rights¹⁰⁰. If to be seen as being distinct from human rights and thus be regarded as a separate category of rights, minority rights could easily be disregarded by States, notwithstanding their adoption of general human rights legislation¹⁰¹. Moreover, minority rights as a separate entity would bestow upon those individuals more human rights than it would upon those not belonging to a minority, essentially contradicting the nature of human rights¹⁰². Therefore it is more desirable to perceive minority rights legislation as a sub-category of human rights legislation, as this entails that no extra rights for minorities would be created, which could otherwise be potentially disadvantaging those not belonging to a minority. Regarding minority rights as an aspect enshrined in the framework of general human rights, allows for the same human rights to be applied, yet in a minority sensitive manner, taking into account the specific vulnerability of those groups to be regarded as being a minority¹⁰³.

C. Evolution of minority rights in movements

21. Much like the evolution of general human rights, the establishment and creation of minority rights happened in gradual movements, of which the first took place directly following the culmination of WWI¹⁰⁴. The second movement followed as a result of the upsurge of the universal human rights in the post-WWII era, whilst the third movement is a movement comprised of integrating minority rights within the general human rights framework, which is currently ongoing¹⁰⁵.

22. Due to the disintegration of three multinational empires following WWI and the subsequent creation of new states, nationals belonging to the minorities within these regions

⁹⁸ General Comments denote the authoritative interpretation accorded to the legislative content of the respective human rights provisions enshrined in the ICCPR and the ICESCR (amongst others) by their respective committees: Office of the United Nations High Commissioner for Human Rights. Human Rights Committee - General Comments. <http://www2.ohchr.org/english/bodies/hrc/comments.htm>; Mechlem, Kerstin. „Treaty Bodies and the Interpretation of Human Rights.” Vanderbilt Journal of Transnational Law 42 (2009): 926.

⁹⁹ Hannikainen, Lauri . „Legal Nature of Minority Rights As Part of Human Rights, Limitations, Derogations, Reservations and Interpretative Statements .” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 28-29.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* 31.

¹⁰³ *Ibid.*

¹⁰⁴ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 2-6.

¹⁰⁵ *Ibid.*

were in need of enhanced protection¹⁰⁶. Under the auspices of the League of Nations, this paved the path for treaties and declarations bestowing upon states certain obligations in effectively providing such protection¹⁰⁷. Given the circumstances surrounding the conclusion of these treaties however, the concerned obligations were not generally applicable, and merely bound the concerned parties¹⁰⁸. The treaties and declarations were thus limited in scope and application, as they were concluded with the sole intent to provide protection for those minorities specifically mentioned within the agreements¹⁰⁹.

23. The post-WWII era signified the second movement of minority rights evolution, as the emergence of international human rights substituted the prior notions of restricted minority rights¹¹⁰. The universal human rights approach was intended to eliminate the “*ethnic particularism*”¹¹¹, with the intent of creating equal rights for all¹¹². As aforementioned, it was presumed that respect for individual human rights would equally result in respect for minority and collective rights¹¹³. However, whilst the ideals were commendable, reality illustrated that states did indeed still have concerns regarding minority groups and their respective rights, after having witnessed the atrocities of WWII¹¹⁴. The latter paved the path for the third movement, which is still underway today¹¹⁵.

24. The third movement can be primarily ascribed to the references made to minorities both in the early stages of the contemporary human rights movement¹¹⁶, as well as the culmination of the Cold War which resulted in the adoption of the G.A. Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities¹¹⁷. This third movement subsequently concerns the integration of minority rights within the human rights framework, through the means of standard setting, which go beyond “*cases of gross abuse*”¹¹⁸. As was the case with the earlier movements, the third movement equally

¹⁰⁶ *Ibid.* 2.

¹⁰⁷ *Ibid.*

¹⁰⁸ Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 71.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* 2-3

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 2-3.

¹¹⁴ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 3.

¹¹⁵ *Ibid.* 3 – 4.

¹¹⁶ For example – references were made with respect to minorities in the General Assembly resolution (217A), which contained the UDHR: Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 4.

¹¹⁷ UN General Assembly. „Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities (A/RES/47/135).” United Nations, 18 December 1992.

¹¹⁸ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 11.

encountered certain challenges. The integration process was faced with state reluctance to adhere to the standard setting, rendering the core of minority rights highly relative. Moreover, the lack of supervisory complaint mechanisms equally repudiated the validity of minority rights, as individuals had no means to see their rights enforced. An example of this concerns the refused adoption of a protocol to the ECHR concerning jurisdiction and the ECtHR's capacity to promulgate advisory opinions with respect to the Framework Convention for the Protection of National Minorities (*hereinafter* FCNM). Lastly, a fourth *emerging* movement consists of the increase of minority related jurisprudence, serving as an elaboration and an increase in understanding of minority rights within the human rights framework.

D. Defining Minorities: An Evolutionary Approach

25. Irrespective of the progression made with respect to minority rights legislation and the implementation thereof, the exact definition of what constitutes a minority remains questionable¹¹⁹. Instruments particularly devoted to minority groups have neglected to define the term, instigating much controversy. Notably the most called upon definition however, is the definition enshrined in the *Greco Bulgarian Communities Advisory Opinion* of the Permanent Court of International Justice¹²⁰. The definition therein enshrined denotes minorities as being the result of “*objective differences of race, religion, language and traditions from the majority population plus a subjective sentiment of solidarity with a view to preserving their traditions*”¹²¹. This definition has clear parallels with the later proposed definition resulting from a study by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities¹²². Jules Deschenes¹²³, within this same sub-commission, proposed a highly similar definition in 1984 but yet again, the international community refused to formally adopt it and postponed further negotiations with respect to the matter¹²⁴. Equally so, following the adoption of the FCNM, an attempt was made to incorporate this convention within the jurisdictional scope of the ECtHR, by allowing the it to promulgate advisory opinions with respect to the FCNM¹²⁵. Unfortunately this was not

¹¹⁹ Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 56.

¹²⁰ Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 57.

¹²¹ Permanent Court of International Justice. „The Greco-Bulgarian "Communities" (Series B, No. 17) .” Advisory Opinion. Permanent Court of International Justice , 31 July 1930.

¹²² Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 58.

¹²³ Jules Deschenes was a member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and amongst others, former Chief Justice of Quebec Superior Court.

¹²⁴ Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 59.

¹²⁵ Pentassuglia, Gaetano. Minority Groups and Judicial Discourse in International Law - A Comparative Perspective. Leiden : Martinus Nijhoff Publishers, 2009. 10.

endorsed, and states who have in fact, ratified the FCNM, have solely compounded the issue pertaining to defining minorities by adding declarations to their ratification in which their own respective, national definitions have been incorporated as to what constitutes a minority¹²⁶.

26. Fortunately, certain commonalities in various conventions regarding minorities have been identified. Subsequently, it is generally agreed upon that the term *minority* consists of both objective elements as well as subjective elements. These objective elements refer to criteria that can be applied in assessing whether a certain group is in fact a minority, such as for example, ethnic homogeneity, cultural homogeneity, as well as historic continuity¹²⁷. Alongside these objective elements, reference is equally made to the concept of *self-identification*, as a subjective element of this definition¹²⁸. This is of particular relevance with respect to Roma, given their clear heterogeneity (see *infra* 38). Insofar individuals thus define themselves as being a minority, this could be instrumental to effectively being recognized as a minority¹²⁹.

27. Notwithstanding the lack of a definitive internationally agreed upon definition, arguments have been raised regarding an elaboration of the scope of minority rights¹³⁰. Justifying these proposals is the notion that minority rights legislation as it stands today, is too restricted in its application¹³¹. The universal, interlinked and interdependent character (see *supra* 17) of human rights entails that limiting certain human rights to specific groups, under a set definition, is unnecessarily restrictive. Moreover, excluding certain minority groups, whom deserve such protection, solely due to the fact that no consensus exists regarding a definitive definition, is highly contradictory with the essence and intent of human rights and minority rights legislation on a whole¹³².

28. More importantly however, is the question regarding the *relevance* of defining what constitutes a minority. As is the case for most human rights, if not all, the substance and scope of these protective provisions can never be ascertained entirely and indefinitely¹³³. Human

¹²⁶ Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 64-65.

¹²⁷ Human Rights Committee. „General Comment No. 23: The Rights of Minorities (Art.27) (CCPR/C/21/Rev.1/Add.5).” General Comment. United Nations, 1994. 5.1.

¹²⁸ Self-identification refers to the individual act of identifying him/herself as being Roma.

¹²⁹ Barth, William K. . „Minority Rights, Multiculturalism and the Roma of Europe.” Nordic Journal of International Law 76 (2007): 404.

¹³⁰ Hannum, Hurst. „The Concept and Definition of Minorities.” Universal Minority Rights - A Commentary on the Jurisprudence of International Courts and Treaty Bodies. Red. Marc Weller. Oxford: Oxford University Press, 2007. 67.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Mechlem, Kerstin. „Treaty Bodies and the Interpretation of Human Rights.” Vanderbilt Journal of Transnational Law 42 (2009): 910 – 913.

rights, and minority rights as a subcategory thereof, have to be assessed in a manner, ensuring full effectiveness of the rights and freedoms it promulgates¹³⁴. If the effectiveness to all cannot be guaranteed, the concerned protective provisions are rendered void of meaning. The question must then be posed as to what extent a set definition can guarantee the effectiveness of minority rights in light of new emerging minorities or, alternatively, older minorities that might not necessarily fit this given definition.

E. Relevance of Minority Legislation Regarding Roma

29. Minority regimes were established with the intent, primarily to ensure the continuation and preservation of characteristics of minority groups and addressing their respective special needs, insofar possible¹³⁵. This must be distinguished from the necessity of states to comply with both civil and political rights, as well as cultural and socio-economic rights, as these are undoubtedly the primary concerns of Roma in Europe today¹³⁶. As Roma today are more concentrated on survival rather than their cultural *preservation*, the human rights regime in general¹³⁷, with specific reference to civil, political, socio-economic and cultural rights prevail within the scope of this work, over minority rights instruments, of which the enforceability is questionable and the standards vague.

30. As has been amply demonstrated, there is a lack of consensus as to what specificities will give rise to the recognition of a minority. Consequently it is highly debatable as to whether Roma across Europe may *or* can enjoy the legal protection provided for by minority rights regimes¹³⁸. As there is no definitive definition, there are no means by which to assess whether in fact they qualify as a minority¹³⁹. The absence of set standards within the minority rights regime, combined with the soft-law nature of many of minority rights instruments, hinder the effective use thereof in ensuring state compliance with its relevant provisions¹⁴⁰. The ECtHR has managed to evade these issues by identifying Roma as a particularly vulnerable within their case law¹⁴¹. Alleged violations of the prohibition of discrimination, which involve Roma individuals/groups, will subsequently be assessed with stricter scrutiny,

¹³⁴ *Ibid.*

¹³⁵ Pogany, Istvan. „Minority Rights and the Roma of Central and Eastern Europe.” *Human Rights Law Review* 6 (2006): 12 – 13.

¹³⁶ *Ibid.* 22 -23.

¹³⁷ *Ibid.*

¹³⁸ Pogany, Istvan. „Minority Rights and the Roma of Central and Eastern Europe.” *Human Rights Law Review* 6 (2006): 4 – 5.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ See for example: European Court of Human Rights. „Case of Beard v. the United Kingdom (App.No. 24882/94).” *Judgment*. Strasbourg: Council of Europe, 18 January 2001. 29; European Court of Human Rights. „Case of Chapman v. The United Kingdom (App.No. 27238/95).” *Judgment*. Council of Europe, 18 January 2001. 27; European Court of Human Rights. „D.H. and Others v. Czech Republic (App.No. 57325/00).” *Judgment*. Strasbourg: Council of Europe, 13 November 2007. 62.

given their vulnerable position¹⁴². Precisely due to the lack of adequate enforceability of the minority regime, vague standards and the possibility of incorporating minority rights minded notions under clauses, which prohibit discrimination, it is far more relevant, at this stage, to assess the plight of Roma in Europe based on the general human rights framework. However, in doing so, it is paramount to bear in mind the minority sensitive approach the ECtHR has accorded Roma.

III. Public Interest Law

31. Public interest law (*hereinafter* PIL) is of growing importance to Roma rights litigation, as portrayed by the increased use thereof in Roma rights cases brought before the ECtHR¹⁴³. Although a vast array of young lawyers reference themselves as PIL-advocates, defining precisely what constitutes PIL is not an easy task, and this for a variety of reasons¹⁴⁴.

32. Firstly, PIL is founded on three different notions, which all result in a different approach on how to perceive PIL, as a tool in litigation¹⁴⁵. The first conception is based on PILs' historical origin, which can be traced back to the United States in the 1960's when the U.S. was facing difficulties both regarding domestic and foreign affairs¹⁴⁶. The notion of PIL within this contextual framework was based on the idea that the law and litigation was to be used to ameliorate the conditions of the underrepresented, as a means of counterbalancing the influential and economically powerful¹⁴⁷. Naturally this gives rise to the question as to what constitutes PIL, given that no such codified body of law exists¹⁴⁸. Accordingly, PIL does not constitute a set of written norms. Rather, it is held that PIL represents the individuals it means to protect¹⁴⁹. The second conception is founded within a theoretical, substantive approach, by which the notion of "*Public Interest*" is analyzed¹⁵⁰. The notion of what constitutes the general public interest was, and still is to some extent, largely defined by the subjective legislative initiatives of parliamentarians and individual politicians¹⁵¹. Often times, amidst political discourse, this results in the neglect or ignorance of certain fundamental rights and

¹⁴² Moucheboeuf, Alcidia. Minority Rights Jurisprudence. Strasbourg : Council of Europe Publishing , 2006. 750.

¹⁴³ European Roma Rights Centre - Strategic Litigation. 2012. 31 January 2013 <<http://www.errc.org/strategic-litigation-european-court-of-human-rights>>.

¹⁴⁴ Rekosh, Edwin. „Who Defines the Public Interest? Public Interest Law Strategies in Central and Eastern Europe.” International Journal on Human Rights 2 (2005): 168.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*; Hershkoff, Helen. „Public Interest Litigation: Selected Issues and Examples.” 2005. siteresources.worldbank.org. 31 January 2013. 3.

¹⁴⁷ Rekosh, Edwin. „Who Defines the Public Interest? Public Interest Law Strategies in Central and Eastern Europe.” International Journal on Human Rights 2 (2005): 168.

¹⁴⁸ *Ibid.* 169.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* 169 – 172.

freedoms¹⁵². PIL in this second approach would entail that the constitutionality of certain legislative initiatives, and the discretion legislative powers exert within this regard could be curtailed and assessed by the means of judicial review¹⁵³. The third conception takes a process-based stance, in which civil society plays a leading role¹⁵⁴. By taking cases to court, the law is no longer the sole result of a higher authority, but becomes a quintessential element of the public sphere and a democratic society¹⁵⁵. PIL is thus regarded as being instrumental to individuals in exerting their democratic rights, and transforming law to a “*product of public sphere discourse*”¹⁵⁶. Notwithstanding the discrepancies between these approaches and different conceptions of PIL, and the diverging means by which it is utilized in the U.S. and Central- and Eastern Europe, central to all conceptions of PIL, is the concept of attaining social change through the means of litigation¹⁵⁷.

33. Generally, PIL within the Central- and Eastern European region, a product of the aftermath of the WWII and the subsequent Communist era¹⁵⁸, can be perceived as effectuating social change through the means of judicial redress aimed at reform and articulation of existing (human rights) norms, with judicial consequences that permeate beyond the scope of the case at hand¹⁵⁹. The relevance thereof with respect to Roma is irrefutable, seeing as to how they equally enjoy a vast array of rights and freedoms, yet seldom see these enforced¹⁶⁰. By empowering Roma individuals in cooperation with civil society, through the means of litigation, precedents can be set, which may subsequently alter public opinion¹⁶¹. Notwithstanding the lack of *stare decisis* in many domestic jurisdictions, it is uncontested that judgments and court rulings are indispensable in ascertaining changes in public opinion¹⁶². To

¹⁵² Goldston, James A. „Race Discrimination Litigation in Europe: problems and prospects.” 5 January 1999. European Roma Rights Centre - Research and Advocacy. 7 April 2013 <http://www.errc.org/article/race-discrimination-litigation-in-europe-problems-and-prospects/1566>; Hershkoff, Helen. „Public Interest Litigation: Selected Issues and Examples.” 2005. siteresources.worldbank.org. 31 January 2013. 9.

¹⁵³ *Ibid.*

¹⁵⁴ Rekosh, Edwin. „Who Defines the Public Interest? Public Interest Law Strategies in Central and Eastern Europe.” International Journal on Human Rights 2 (2005): 176.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Rekosh, Edwin. „Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe.” UCLA Journal of International Law and Foreign Affairs 13 (2008): 57.

¹⁵⁸ Goldston, James en Mirna Adjami. The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe (Prepared for the World Justice Forum). Vienna : American Bar Association, 2008. 3; Rekosh, Edwin. „Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe.” UCLA Journal of International Law and Foreign Affairs 13 (2008): 62.

¹⁵⁹ Goldston, James. „Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges.” Human Rights Quarterly 28.2 (2006): 496.

¹⁶⁰ Goldston, James en Mirna Adjami. The Opportunities and Challenges of Using Public Interest Litigation to Secure Access to Justice for Roma Minorities in Central and Eastern Europe (Prepared for the World Justice Forum). Vienna : American Bar Association, 2008. 2 – 3.

¹⁶¹ Goldston, James. „Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges.” Human Rights Quarterly 28.2 (2006): 494.

¹⁶² *Ibid.* 496 – 497.

illustrate the aforementioned, it suffices to note the concept of *strategic litigation* with respect to Roma. This litigation technique exists in the undertaking of field-research of Roma victims whom have been subjected to human rights violations, and results in the identification and selection of the most emblematic cases¹⁶³. The pursued goal, following thorough analysis, is to bring these cases to courts, both domestic as well as international, in order to secure violations attributable to the State, as well as redress for the applicants¹⁶⁴. Additionally however, such cases, as demonstrated by the case of *D.H. and others v. Czech Republic*, have consequences in the general public sphere, and are a step forward in the amelioration of Roma conditions in Europe¹⁶⁵.

34. PIL as opposed to more traditional forms of adjudication distinguishes itself due to the fact that the defendant oftentimes concerns a certain public institution, whilst the claimants oftentimes represent *de facto*, and insofar possible *de jure* where class actions are permissible, a larger group of individuals¹⁶⁶. Given the techniques used in PIL such as the obtaining of statistics and testing¹⁶⁷, as well as the fact that PIL is not defined by the law it represents, but rather by the individuals it represents, it goes without saying, that a variety of obstacles hinder the successes of PIL. This is especially so within the Central and Eastern European region and regarding Roma. However prior to an analysis thereof (see *infra* Part 4), a short description of what is implied by the term Roma is necessitated.

¹⁶³ Goodwin, Morag. „White Knights on Chargers: Using the US Approach to Promote Roma Rights in Europe.” German Law Journal (2004): 1431 – 1447.

¹⁶⁴ Hershkoff, Helen. „Public Interest Litigation: Selected Issues and Examples.” 2005. siteresources.worldbank.org. 31 January 2013. 10.

¹⁶⁵ European Roma Rights Centre. „Europe’s Highest Court Finds Racial Discrimination in Czech Schools.” 14 November 2007. European Roma Rights Centre. 6 February 2013 <http://www.errc.org/cikk.php?cikk=2866>.

¹⁶⁶ Hershkoff, Helen. „Public Interest Litigation: Selected Issues and Examples.” 2005. siteresources.worldbank.org. 31 January 2013. 3.

¹⁶⁷ Goodwin, Morag. „White Knights on Chargers: Using the US Approach to Promote Roma Rights in Europe.” German Law Journal (2004): 1439.

PART 2. DEFINING ROMA

I. Who Are Roma

35. Prior to embarking upon a comparison between alleged violations concerning Roma rights in both Belgium and Romania, it is quintessential to denote whom these violations refer to specifically. Within this context it is important to note that the retrieval of pertinent information is not a simple task. Due to distrust of authorities, statelessness, and lack of sufficient documentation, much (demographic) information given, may be distorted and incomplete¹⁶⁸. Nevertheless, the entirety of the work will be devoted to emphasizing and illustrating the predicament Roma are confronted with insofar known and documented.

A. Terminological Inconsistencies

36. Defining Roma, due to their heterogeneity, has proven to be a difficult undertaking (see *infra* 38). As aforementioned, it is often unsure, due to a lack of adequate documentation, and incomplete or irrelevant statistics, whether an individual is indeed Roma. When attempting to distinguish Roma from the majority population, five determinants may be taken into account – ethnicity, culture, lifestyle, country of origin, and nationality¹⁶⁹. Much contrary to popular belief, it is entirely possible for a Roma individual to be a Belgian citizen, who lives a sedentary form of life and does not speak (a variation of) *Romani Cib* (see *infra* 38). Naturally, these five factors hinder the qualification of Roma as a distinct minority. However, and more importantly, it has been raised that the notion of *self-identification* is a far more suitable manner in which to address whether an individual is or is not to be defined as being Roma¹⁷⁰.

37. In first instance, the term *Roma*, used interchangeably, may enjoy different connotations in diverging environments and situations. Within this context, a distinction must be made between Roma, Gypsies, and Travellers. Whereas Gypsies may refer to both Travellers and Roma and the maltreatment they are both subjected to, the term Gypsy is originally a derivative of the term “Egyptian” and refers to Egyptian ancestry¹⁷¹. The term

¹⁶⁸ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” *Columbia Law Review* 4.110 (2010): 925; Chido, C.J. „Peril of Movement: Migrating Roma Risk Expulsion as EU Member States Test the Limits of the Free Movement Directive.” *Tulane Journal of International and Comparative Law* 20 (2011 - 2012): 237.

¹⁶⁹ Csepeli, Gyorgy en David Simon. „Construction of Roma Identity in Eastern and Central Europe: perception and self-identification.” *Journal of Ethnic and Migration Studies* 30.1 (2004): 126.

¹⁷⁰ Barth, William K. . „Minority Rights, Multiculturalism and the Roma of Europe.” *Nordic Journal of International Law* 76 (2007): 404.

¹⁷¹ Hancock, Ian. *We Are the Romania People*. Hertfordshire: University of Hertfordshire Press, 2002. Xix; Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” *Arizona Journal of*

Travellers refers solely to individuals and/or communities who practice a (semi-) nomadic, traveller lifestyle or mindset, amongst which Roma may be identified¹⁷². The term Roma consequently, as affirmed during the First World Romani Congress in 1971, within an international scope, signifies the communities and individuals whom are generally held to have ethnic ties in India, whom are bound by a shared history of persecution and encompasses nomadic, semi-nomadic and sedentary communities¹⁷³. Within the scope of this work, the term Roma will encompass the aforementioned, thus signifying those communities and individuals who are historically tied to the Indian subcontinent and have been continuously subject to persecution within European territory. However, it must be noted that certain European states do maintain different approaches with respect to the applied terminology, and insofar necessitated this will be elaborated upon (see *infra* 66).

B. Roma Heterogeneity

38. Much contrary to mainstream misconceptions, Roma constitute a highly heterogeneous group of individuals, bound in essence, and primarily, by a history of persecution and ancestry in India¹⁷⁴. Whilst it can be ascertained that certain commonalities exist, these do not prevail in the slightest. Attempts have been made to unify Roma across Europe in attempts to ameliorate the discrimination they are confronted with, yet the obstacles are vast. It suffices to mention the scattered geographic locations, which they inhabit, the lack of a homogenous cultural identity, the diverging religions practiced by Roma, their unwillingness to self-identify out of fear of persecution, in illustrating these obstacles¹⁷⁵. Moreover, the commonalities Roma do enjoy are in fact far less common than would appear. With respect to the common Romani language, *Romani Cib*, it is of the utmost importance to note the more than 60 diverging dialects, and forms this language is spoken in, often rendering conversations in Romani, between different Roma communities, futile¹⁷⁶. To a great extent *Romani Cib* has undergone influences of and borrowed from other languages, which has led to an increased divergence of the language¹⁷⁷. Moreover, many Roma are nationals of the country in which they reside, subsequently entailing that they speak the national language

International and Comparative Law 27 (2010): 287; Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 36.

¹⁷² Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing , 2012. 31; Council of Europe . The Council of Europe: Protecting the Rights of Roma. Strasbourg: Council of Europe, 2011. 3.

¹⁷³ Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” Arizona Journal of International and Comparative Law 27 (2010): 287.

¹⁷⁴ Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 18; Guy, Will. „Romani Identity and Post-Communist Policy.” Between Past and Future - The Roma of Central and Eastern Europe. Hertfordshire: University of Hertfordshire Press, 2001. 5.

¹⁷⁵ Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” Arizona Journal of International and Comparative Law 27 (2010): 287 – 298.

¹⁷⁶ Hancock, Ian. We Are the Romanians People. Hertfordshire: University of Hertfordshire Press, 2002. 142.

¹⁷⁷ Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 44 – 45.

of that country, more so, or in addition to *Romani Cib*¹⁷⁸. A second feature concerns Gypsy law, an ethics code equally considered a commonality of Roma. This code is of an oral nature and thus prone to varying interpretations, negating the common practice thereof¹⁷⁹. On the other hand, certain cultural particularities can be distilled from Gypsy Law, which deviate from legal and moral notions as entrenched in mainstream society. The latter, as can be portrayed by the notion that theft is only experienced as being intolerable insofar committed against fellow Roma, thus nevertheless serves as an insulating practice, which can be regarded as unifying Roma¹⁸⁰. However, given that only the basic principles of Gypsy law are a shared conception, the unifying factor thereof should not be overestimated¹⁸¹.

39. What does bind Roma communities, constituting approximately 10-12 million individuals in Europe¹⁸², alongside widespread persecution and ancestry in India, relates to the manner in which Roma perceive non-Roma, namely *gaje*¹⁸³. Whilst no common cultural identity exists amongst Roma, and solely *basic* principles of Gypsy law are agreed upon, it is uncontested that a shared mistrust of non-Roma persists amongst Roma¹⁸⁴. *Gaje* are deemed as being over-indulgent and impure, thus justifying a Roma ethnocentric state of mind, and exemplifies the general mistrust Roma maintain with respect to non-Roma¹⁸⁵. This is illustrated best by the aforementioned concept of theft within Gypsy law– when perpetrated against Roma this is seen as a crime¹⁸⁶. However, oftentimes when theft is committed to the detriment of non-Roma, this is not seen as a crime, and is deemed praiseworthy¹⁸⁷.

40. In order to better comprehend the evolution and multifaceted nature of this ethnic minority alongside the perceived and alleged criminally inclined nature and dynamics affecting the situation of Roma today, Roma will be assessed in what follows, through a historical lens.

¹⁷⁸ *Ibid.* 157; Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” Arizona Journal of International and Comparative Law 27 (2010): 291.

¹⁷⁹ *Ibid.* 295.

¹⁸⁰ *Ibid.*

¹⁸¹ Acton, T.A. „A Three-cornered Choic: Structural Consequences of Value-Priorities in Gypsy Law as a Model for More General Understanding of Variations in the Administration of Justice.” American Journal of Comparative Law 51 (2003): 640.

¹⁸² Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing , 2012. 31; Council of Europe . The Council of Europe: Protecting the Rights of Roma. Strasbourg: Council of Europe, 2011. 31; Council of Europe . The Council of Europe: Protecting the Rights of Roma. Strasbourg: Council of Europe, 2011. 3.

¹⁸³ Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” Arizona Journal of International and Comparative Law 27 (2010): 294.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

II. Roma Throughout History

A. Early History

41. Concerning the early history of Roma, note must be made of the fact that primary sources documenting their history are extremely sparse¹⁸⁸. This is in large part due to the fact that Roma, irrespective of their differences, practiced a primarily oral tradition¹⁸⁹. Nevertheless, secondary and regional sources place small Roma communities on European territory as early as the 11th century¹⁹⁰, as a result of migration away from the Indian subcontinent¹⁹¹. Whilst no disparity exists with respect to the fact that Roma migrated to Europe from the Indian subcontinent, confusion does exist concerning what regions in India Roma inhabited prior to their mass migration¹⁹². Moreover, it has been suggested that Roma did not constitute a single category of Indian society, but that they were dispersed over several regions and enjoyed diverging forms of living as well as statuses within the Caste system¹⁹³. Generally, it has been accepted however, that Roma in India were known to have been part of the *Gond* people, a lower caste status in India, engaging in professions such as cleaners, entertainers, and sweepers¹⁹⁴.

42. Historically substantiated evidence supports that Roma arrived *en masse* in Europe, primarily in the regions of Wallachia and Moldova, over the course of the 12th to 14th centuries¹⁹⁵, especially following the fall of the Byzantine Empire¹⁹⁶. However, uncertainty again prevails with respect to the status of the Roma migrants within this timeframe. Uncontested however, is that they were subjected to a multitude of degrees in treatment.

¹⁸⁸ Liegeois, Jean-Pierre. *Roma, Gypsies, Travellers*. Strasbourg: Council of Europe Press, 1994. 17.

¹⁸⁹ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” *Columbia Law Review* 4.110 (2010): 923.

¹⁹⁰ Marushiakova, Elena en Vesselin Popov. „Historical and ethnographic background: Gypsies, Roma, Sinti.” *Between Past and Future: The Roma of Central and Eastern Europe*. Red. Will Guy. Hertfordshire: University of Hertfordshire Press, 2001. 35; Huda, Syed Ahmad. „Legal Remedies for the Gypsies: Can the European Legal Frameworks Hold France Liable for the Expulsion of the Roma? .” *University of Pennsylvania Journal of International Law* 33 (2011-2012): 1082.

¹⁹¹ Marushiakova, Elena en Vesselin Popov. „Historical and ethnographic background: Gypsies, Roma, Sinti.” *Between Past and Future: The Roma of Central and Eastern Europe*. Red. Will Guy. Hertfordshire: University of Hertfordshire Press, 2001. 35; Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” *Indiana Journal of Global Legal Studies* 7 (1999 - 2000): 338.

¹⁹² Barth, William K. . „Minority Rights, Multiculturalism and the Roma of Europe .” *Nordic Journal of International Law* 76 (2007): 395.

¹⁹³ *Ibid.* 395; Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” *Indiana Journal of Global Legal Studies* 7 (1999 - 2000): 338.

¹⁹⁴ Barth, William K. . „Minority Rights, Multiculturalism and the Roma of Europe .” *Nordic Journal of International Law* 76 (2007): 373.

¹⁹⁵ Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” *Arizona Journal of International and Comparative Law* 27 (2010): 298; Korando, Andrew M. . „Roma Go Home: The Plight of European Roma .” *Law and Inequality: A Journal of Theory and Practice* 30 (2012): 128; Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” *Indiana Journal of Global Legal Studies* 7 (1999 - 2000): 338.

¹⁹⁶ Hancock, Ian. *We Are the Romania People*. Hertfordshire: University of Hertfordshire Press, 2002. 15; Korando, Andrew M. . „Roma Go Home: The Plight of European Roma .” *Law and Inequality: A Journal of Theory and Practice* 30 (2012): 128.

Whilst some individuals and Roma communities initially enjoyed unbridled judicial freedom, others were forced to endure a far more constrained lifestyle¹⁹⁷. The initial freedoms enjoyed by Roma throughout the Middle Ages, was in large due to the economic advantages they provided sedentary European communities. Namely, through their preferred professions of trade, crafts, entertainment and seasonal labor, Roma were able to provide these communities with various advantages, that local merchants could not¹⁹⁸. Notably the nomadic lifestyle maintained by Roma communities ensured larger transfers of various goods between sedentary European communities – a practice far more expensive for local merchants to engage in¹⁹⁹. However, this paved the path for the paradoxical notion that Roma were indeed indispensable for trade, yet nevertheless largely mistrusted due to, amongst others, the maintenance of their own language, *Romani Cib*, their customs and the overall perception that Roma engaged in thievery²⁰⁰. The latter, allegedly a construction by local merchants to dissuade communities from trade with Roma, ensuring their own economic profit²⁰¹. As the feudal system evolved into the mercantilist system however, the freedoms Roma initially enjoyed were curtailed²⁰². Labor shortages gave rise to travel restrictions, with the one exception of religious pilgrimages - a ground of justification often given by Roma to ensure their ability to maintain their nomadic lifestyle²⁰³. The imposed restrictions soon gave rise to questions and suspicions regarding the origins of Roma, their culture and religion, paving the path for centuries of maltreatment and enslavement²⁰⁴.

43. The 16th and 17th centuries did not ameliorate the plight of these Roma, as laws were enacted to ban Roma culture, dress and language²⁰⁵. These initial restrictions quickly resulted in increasingly more oppressive policies as exemplified by the first Roma expulsions, dating back from 1493 and 1504 in Italy and France respectively²⁰⁶. Additionally, whilst some authors and studies suggest that (some) Roma communities arrived upon European territory as

¹⁹⁷ Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 339.

¹⁹⁸ *Ibid.* 338 – 339; Hancock, Ian. We Are the Romania People. Hertfordshire: University of Hertfordshire Press, 2002. 17.

¹⁹⁹ Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 339.

²⁰⁰ *Ibid*; Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 123.

²⁰¹ Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 339.

²⁰² *Ibid.* 339 – 340; Hancock, Ian. We Are the Romania People. Hertfordshire: University of Hertfordshire Press, 2002. 18.

²⁰³ Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 339 – 340.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid*; Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 123; Huda, Syed Ahmad. „Legal Remedies for the Gypsies: Can the European Legal Frameworks Hold France Liable for the Expulsion of the Roma? .” University of Pennsylvania Journal of International Law 33 (2011-2012): 1082.

²⁰⁶ Huda, Syed Ahmad. „Legal Remedies for the Gypsies: Can the European Legal Frameworks Hold France Liable for the Expulsion of the Roma? .” University of Pennsylvania Journal of International Law 33 (2011-2012): 1082 – 1083; Korando, Andrew M. . „Roma Go Home: The Plight of European Roma .” Law and Inequality: A Journal of Theory and Practice 30 (2012): 128.

slaves, others suggest that the enslavement was a result of their arrival in 14th century Europe²⁰⁷. Irrespective thereof, the centuries to follow did not provide much solace to the Roma migrants, as they were confronted with continuous unemployment, enslavement and debasement, lasting well into the 19th century²⁰⁸. The perception that Roma were not to be equated with humans, and rather with livestock sold and bought at markets, unfortunately equally persisted throughout the course of the following centuries, solely compounding the Roma predicament²⁰⁹.

B. World War II and Communist Regimes

44. The migratory patterns of Roma can be divided into approximately 3 distinct movements, of which the first concerned the aforementioned travels from India to regions within Europe (see *infra* 48). The second wave of migration was a consequence of the abolition of slavery in Romania around 1855²¹⁰, in line with the formal end of slavery in the United States in 1863²¹¹. However, while the U.S. experienced the Reconstruction process, a process aimed at ensuring civil and political rights for the former slaves, no such process was adopted with respect to the former Roma slaves²¹². The released Roma slaves encountered various obstacles, such as amongst others, severe economic distress and continuous persecution, in their attempt to adjust to mainstream society²¹³. Moreover, upon regaining their freedom, no attempts were made to integrate Roma into society, which merely enhanced the already existent negative perceptions regarding Roma²¹⁴, and further formed the basis for discrimination Roma communities were forced to endure throughout the course of World War II²¹⁵.

45. Over the course of WW II, known as “*O Baro Porrajmos*” or Great Devouring by Roma, an estimated 1.5 million²¹⁶, approximately ¼, of the Roma population were killed both

²⁰⁷ *Ibid*; Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 340.

²⁰⁸ Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 125 – 132.

²⁰⁹ Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 342.

²¹⁰ Marushiakova, Elena en Vesselin Popov. „Historical and ethnographic background: Gypsies, Roma, Sinti.” Between Past and Future: The Roma of Central and Eastern Europe. Red. Will Guy. Hertfordshire: University of Hertfordshire Press, 2001. 35.

²¹¹ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 924 – 925.

²¹² *Ibid*. 925.

²¹³ Huda, Syed Ahmad. „Legal Remedies for the Gypsies: Can the European Legal Frameworks Hold France Liable for the Expulsion of the Roma? .” University of Pennsylvania Journal of International Law 33 (2011-2012): 1082 – 1083.

²¹⁴ These estimates vary tremendously, and it is held that the actual number far exceeds the documented estimates - Hancock, Ian. We Are the Romania People. Hertfordshire: University of Hertfordshire Press, 2002. 26; Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” Arizona Journal of International and Comparative Law 27 (2010): 299.

²¹⁵ *Ibid*. 32, 34.

²¹⁶ *Ibid*. 46 – 47.

by Nazi forces as well as allied Nazi states²¹⁷. Whereas Nazi forces initially sought to investigate and study gypsies in the Hygiene Population Control Center of the National Health Office, Roma were quickly equated with Jewish individuals, and subjected to mass-extirmination as well as medical experimentation²¹⁸. Equally so, following Mussolini's reign in Italy, Roma were gathered in large groups and sent to concentration camps, and collected for forced labor²¹⁹. Recognition for the horrific circumstances Roma were placed in, came at a very late stage, and global awareness concerning the mass violations perpetrated against Roma during WWII has fallen severely short²²⁰. Whilst the maltreatment and widespread discrimination with respect to the Jewish community was vastly documented, acknowledged and deplored, such attitude has not been adopted towards the Roma communities of Europe, whom had endured the same fate. The latter was exemplified by the absence of acknowledgment of the "*Roma Holocaust*"²²¹ both in Nuremberg Trials as well as by the United Nations in its 2009 commemoration ceremony in light of the International Day in the Memory of the Holocaust²²².

46. Following the culmination of WWII, Europe's Roma experienced a phase of stability and certainty under Soviet domination²²³. Although the intent of these former communist states was grounded in forcibly assimilating Roma within their respective majority populations²²⁴, by means of imposing, amongst others, non-Romani names, banning traditional Romani employment²²⁵, Roma enjoyed a decrease in socio-economical deprivation²²⁶. Alongside employment certainty, Roma were provided with health benefits

²¹⁷ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 923 - 925.

²¹⁸ Huda, Syed Ahmad. „Legal Remedies for the Gypsies: Can the European Legal Frameworks Hold France Liable for the Expulsion of the Roma?.” University of Pennsylvania Journal of International Law 33 (2011-2012): 1084; Korando, Andrew M. . „Roma Go Home: The Plight of European Roma .” Law and Inequality: A Journal of Theory and Practice 30 (2012): 129.

²¹⁹ Korando, Andrew M. . „Roma Go Home: The Plight of European Roma .” Law and Inequality: A Journal of Theory and Practice 30 (2012): 131 - 132.

²²⁰ Hancock, Ian. We Are the Romania People. Hertfordshire: University of Hertfordshire Press, 2002. 48 - 51.

²²¹ Uzunova, Iskra. „Roma Integration in Europe: Why Minority Rights Are Failing .” Arizona Journal of International and Comparative Law 27 (2010): 299.

²²² *Ibid.* 299; Hancock, Ian. We Are the Romania People. Hertfordshire: University of Hertfordshire Press, 2002. 48 - 51.

²²³ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 925.

²²⁴ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” Slavic Review 53.2 (1994): 326 - 327; Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 344 - 345.

²²⁵ Brearley, Margaret . „The Persecution of Gypsies in Europe.” American Behavioral Scientist 45.1 (2001): 591.

²²⁶ *Ibid*; Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” Slavic Review 53.2 (1994): 327; Warnke, Adam M. . „Vagabonds, Tinkers, and Travelers.” Indiana Journal of Global Legal Studies 7 (1999 - 2000): 344.

and free access to medical care, subsidized housing and improved educational facilities and services²²⁷. Moreover, Roma were protected from widespread discrimination and violence²²⁸.

47. However, in assessing this Communist era, a nuanced approach is necessitated and paramount. As these communist regimes proclaimed intolerance and sought to destroy and eradicate Roma ways of life²²⁹, these Roma were subjected to *compulsory* employment, which did not require specific expertise, *nor* education²³⁰. As a result, Roma were not sufficiently equipped and prepared to fend for themselves when governments transitioned into the free market system following the end of Communism. Additionally, during and following this phase of transition, the Roma of Europe no longer enjoyed the protective influence of the former Communist governments, resulting in the resurfacing, enhanced marginalization and widespread discriminatory attitudes towards Roma²³¹.

C. Post-Communist Era and Current-day *Anti-Gypsyism*

48. As aforementioned, the fall of Communism was the catalyst for the deterioration of the socio-economical benefits Roma had previously enjoyed, and coincidentally marks a third significant migratory wave of Roma towards Western Europe²³². This can be ascribed to a variety and combination of reasons, ranging from the economic downturn following Communist reign, the “*ideological vacuum*” which followed the decline of the communist frame of mind, as well as the halt on limitations on the freedom of speech²³³. Roma were more frequently than not, confronted with inadequate nutrition, financial insecurity, inappropriate housing and increasing unemployment²³⁴. The aforementioned paved the path for substandard living conditions, increased prevalence of ill health and disease, and a notable

²²⁷ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies.” *Slavic Review* 53.2 (1994): 327.

²²⁸ Brearley, Margaret . „The Persecution of Gypsies in Europe.” *American Behavioral Scientist* 45.1 (2001): 591.

²²⁹ *Ibid*; Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” *Columbia Law Review* 4.110 (2010): 925.

²³⁰ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” *Columbia Law Review* 4.110 (2010): 925; Greenberg, Jack . „Roma Victimization: From Now to Antiquity.” *Columbia Human Rights Law Review* 41 (2009 - 2010): 6.

²³¹ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” *Slavic Review* 53.2 (1994): 327 – 328; Brearley, Margaret . „The Persecution of Gypsies in Europe.” *American Behavioral Scientist* 45.1 (2001): 591 – 592.

²³² McGarry, Aidan. *Who Speaks for Roma? Political Representation of a Transnational Minority Community*. New York: Continuum International Publishing Group, 2010. 28 - 30; Marushiakova, Elena en Vesselin Popov. „Historical and ethnographic background: Gypsies, Roma, Sinti.” *Between Past and Future: The Roma of Central and Eastern Europe*. Red. Will Guy. Hertfordshire: University of Hertfordshire Press, 2001. 35.

²³³ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” *Slavic Review* 53.2 (1994): 321.

²³⁴ Brearley, Margaret . „The Persecution of Gypsies in Europe.” *American Behavioral Scientist* 45.1 (2001): 592.

increase in petty crimes, perpetrated by Roma²³⁵. In the words of Jack Greenberg, a notable expert with respect to current socio-economic distress of Roma, as a result of his field research:

*“It is common in Roma townships to see clusters of houses without doors or glass, garbage strewn about, no sewerage, dogs wandering aimlessly or sleeping in the sun, pigpens, and children partly dressed, looking filthy. Disease is inescapable. Life expectancy among Roma is well under the national averages, infant mortality and morbidity well above.”*²³⁶

49. Subsequently, Roma became the scapegoats for the insecurities and troubles mainstream society was confronted with in their transition from communist to free market states²³⁷. Furthermore, Roma were, and still are, subjected to increased physical and mental violence at their address as a result of persistent *Anti-Gypsyism* (see *infra* 53)²³⁸. An example of such violence concerns the 1993 incident that took place in the Transylvanian village of *Hadareni*. The events concerned a Roma settlement of approximately 17 dwellings, which was subsequently destroyed by 750 Romanians and Hungarians²³⁹. The atrocities in the *Hadareni* village amounted to four deaths and 130 individuals were left no choice than to flee the area. Additionally, other forms of violence such as forced sterilization, rape, murder and inhuman treatment have been vastly documented across Europe with respect to Roma²⁴⁰. Unfortunately, as is the case with many such instances of violence, irrespective of how it is manifested, police and law enforcers have proven to be reluctant in addressing such gross violations²⁴¹, and in some cases have even facilitated such discriminatory behavior²⁴².

²³⁵ Huber, Konrad J. . „The Roma: Group Identity, Political Activism, and Policy Response in Post-1989 Europe.” *Helsinki Monitor* 4 (1993): 47; Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” *Slavic Review* 53.2 (1994): 330.

²³⁶ Greenberg, Jack . „Roma Victimization: From Now to Antiquity .” *Columbia Human Rights Law Review* 41 (2009 - 2010): 7.

²³⁷ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” *Slavic Review* 53.2 (1994): 328 – 329; Huber, Konrad J. . „The Roma: Group Identity, Political Activism, and Policy Response in Post-1989 Europe.” *Helsinki Monitor* 4 (1993): 46.

²³⁸ Council of Europe. „Human Rights of Roma and Travellers in Europe.” Strasbourg: Council of Europe Publishing, 2012. 11-12, 39 - 40.

²³⁹ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” *Slavic Review* 53.2 (1994): 332; European Court of Human Rights . „Case of Moldovan and others v. Romania (App nos. 41138/98 & 64320/01).” *Final Judgment*. Strasbourg: Council of Europe , 30 November 2005. 6 – 7, 42.

²⁴⁰ Council of Europe. „Human Rights of Roma and Travellers in Europe.” Strasbourg: Council of Europe Publishing, 2012. 11-12, 39 – 218.

²⁴¹ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” *Slavic Review* 53.2 (1994): 332; European Court of Human Rights. „Case of Stoica v. Romania (App.no.42722/02).” *Jugdment*. Strasbourg: Council of Europe, 4 March 2008. 12 – 14; Brearley, Margaret . „The Persecution of Gypsies in Europe.” *American Behavioral Scientist* 45.1 (2001): 593 – 594.

²⁴² Council of Europe. „Human Rights of Roma and Travellers in Europe.” Strasbourg: Council of Europe Publishing, 2012. 13 – 14, 76 - 84; European Court of Human Rights . „Case of Moldovan and others v.

50. Although no definitive definition exists, *Anti-Gypsyism* refers to the persistent and widespread anti-Roma sentiment, which is portrayed and exemplified through a variety of means²⁴³. This sentiment may be manifested by, amongst others, means of violence, hate speech, direct as well as indirect discrimination, with the aim of justifying the alleged inferiority of Roma²⁴⁴. Reasons for such sentiment are vast, and are historically rooted²⁴⁵ and further substantiated by negative Roma stereotypes often proclaimed by national governments, leading politicians and law enforcers²⁴⁶. The plight of Roma across Europe, as rightfully noted by Thomas Hammerberg²⁴⁷, cannot be ameliorated solely on the basis of the positive action undertaken by civil society and Roma themselves. Such amelioration can only be attained insofar repressive measures are taken to halt *Anti-Gypsyism*²⁴⁸.

51. Conclusively, the post-Communist era marks a sharp decline in Roma enjoyment of socio-economic security, resulting in catastrophic situations of violence and widespread discrimination²⁴⁹. However, this same era has shown some relief with respect to political marginalization of Roma in Europe²⁵⁰. Whilst this marginalization, in other words seclusion and separation from the majority population, remains vivid in current-day Europe, political marginalization of Roma is slowly decreasing²⁵¹. Notwithstanding the lack of unity of Roma groups and societies in Europe and their limited participation in the political process, their ethnic ties have generally been recognized and accepted by national governments²⁵². Equally so, the deplorable conditions to which many Roma are continuously subjected is gaining momentum in international as well as national debates²⁵³. Unfortunately, the vicious cycle

Romania (App nos. 41138/98 & 64320/01)." Final Judgment. Strasbourg: Council of Europe , 30 November 2005. 6 - 7, 23.

²⁴³ Nicolae, Valeriu . „European Roma Grassroots Organization : Counter Anti-Gypsyism." 2006. Anti-Gypsyism (ERGO Network) . 2 May 2013 <http://www.ergonet.org/ergo-network/advocacy/anti-gypsyism/>; Council of Europe. „Human Rights of Roma and Travellers in Europe." Strasbourg: Council of Europe Publishing, 2012. 39 - 40.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid*; Council of Europe. „Human Rights of Roma and Travellers in Europe." Strasbourg: Council of Europe Publishing, 2012. 11.

²⁴⁶ Brearley, Margaret . „The Persecution of Gypsies in Europe." American Behavioral Scientist 45.1 (2001): 594; Council of Europe. „Human Rights of Roma and Travellers in Europe." Strasbourg: Council of Europe Publishing, 2012. 40 - 45.

²⁴⁷ Thomas Hammerberg is a renowned human rights defender, who was Secretary General of Amnesty International and equally held the post of the Commissioner for Human Rights of the Council of Europe.

²⁴⁸ Council of Europe. „Human Rights of Roma and Travellers in Europe." Strasbourg: Council of Europe Publishing, 2012. 40; Council of Europe - Roma and Travellers - Dosta Campaign. Council of Europe Roma and Travellers Division. 3 May 2013 <http://www.coe.int/t/dg3/romatravellers/dosta_en.asp>.

²⁴⁹ Council of Europe. „Human Rights of Roma and Travellers in Europe." Strasbourg: Council of Europe Publishing, 2012. 32; Greenberg, Jack . „Roma Victimization: From Now to Antiquity ." Columbia Human Rights Law Review 41 (2009 - 2010): 6; Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies ." Slavic Review 53.2 (1994): 332 - 334.

²⁵⁰ *Ibid*. 333 - 334.

²⁵¹ *Ibid*. 334.

²⁵² *Ibid*. 332 - 333.

²⁵³ Council of Europe. „Human Rights of Roma and Travellers in Europe." Strasbourg: Council of Europe Publishing, 2012. 32 - 33.

regarding substandard (access to) education, lack of adequate housing as well as deplorable employment ratios, hinder Roma persistently in attaining a standard of living in accordance with the rights and freedoms promulgated by a variety of international, regional and national instruments²⁵⁴. Interestingly, it has been noted that it is precisely the lack of unity, personified in the lack of an external actor such as a state, which feeds the weak enforceability of adherence to human rights of Roma in Europe²⁵⁵.

III. Supra-national Roma Rights Monitoring²⁵⁶

52. As a result of the unsettling and oftentimes horrendous plight Roma have been confronted with, both historically as well as in current-day society, international interest has sparked and a vast array of organizations and projects have been established in order to address the fates of these individuals. These organizations and the instruments they publish have arisen under the auspices of both existing general international organizations, as well as specific non-profit organizations. In what follows, an overview will be given of the main actors with respect to Roma rights adherence.

A. International Actors

UNITED NATIONS

53. A variety of U.N. monitoring bodies have addressed Roma rights violations and conditions within their respective scopes of operation, such as, amongst others, the CERD, CEDAW and the HRC²⁵⁷. These complaint mechanisms, have published and communicated together with UN Special Procedures of the Human Rights Council, UN agencies and the World Bank, general recommendations, resolutions, and studies with respect to Roma rights adherence²⁵⁸.

²⁵⁴ Brearley, Margaret . „The Persecution of Gypsies in Europe.” American Behavioral Scientist 45.1 (2001): 590 – 591; Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 928 – 929; Greenberg, Jack . „Roma Victimization: From Now to Antiquity .” Columbia Human Rights Law Review 41 (2009 - 2010): 7; Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” Slavic Review 53.2 (1994): 330.

²⁵⁵ Barany, Zoltan D. „Living on the Edge: The East European Roma in Postcommunist Politics and Societies .” Slavic Review 53.2 (1994): 328.

²⁵⁶ Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing, 2012. 32 – 36.

²⁵⁷ *Ibid.* 35 – 36.

²⁵⁸ *Ibid.* : see for example *2000 General Recommendation on Discrimination Against Roma and Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination: Addendum Mission To Romania.*

54. Undoubtedly the Council of Europe (*hereinafter* CoE) has been a forerunner in its attempt to ameliorate the conditions within which Roma oftentimes reside, as well as prompt integration and inclusion initiatives in order to introduce Roma into mainstream society. Within this framework mention must be made of the various bodies within the CoE, such as amongst others, the Committee of Ministers, the European Commission against Racism and Intolerance (*hereinafter* ECRI), the European Committee of Social Rights (*hereinafter* ECSR) and the Advisory Committee on the Framework Convention for the Protection of National Minorities, which, through the publication of a variety of instruments and materials, have ascertained an undeniable focus on Roma in Europe²⁵⁹. Additionally the CoE has facilitated the organization of specific bodies focused and aimed at creating awareness regarding Roma rights violations, as well as the amelioration of their troubles. Subsequently, in 1995, the Committee of Experts on Roma and Travellers, also known as MG-S-ROM was established and focused on a review of the human rights situations of Roma in Europe²⁶⁰. The Ad-hoc Committee of Experts on Roma Issues, also known as CAHROM, in 2011, ultimately replaced the MG-S-ROM²⁶¹. In addition, by virtue of an agreement, the CoE agreed to grant the European Roma and Travellers Forum both financial assistance and privileged access to various CoE bodies for matters concerning Roma²⁶². Furthermore, it is undeniable that the CoE's ECtHR has proven to be an invaluable asset in coercing human rights adherence for Roma. The ECtHR has underscored the specific vulnerability of Roma, as well as the necessity for member states to take positive action in protecting these individuals, as portrayed in its ample case law concerning Roma²⁶³. Analogously, complaints have been lodged under the collective complaint mechanism before the European Committee of Social Rights, with respect to Roma rights violations²⁶⁴. Lastly the CoE Commissioner for Human Rights has undertaken the task of issuing and publishing various statements and reports on the conditions Roma are subjected to within Europe²⁶⁵.

²⁵⁹ Liegeois, Jean-Pierre. Roma, Gypsies, Travellers. Strasbourg: Council of Europe Press, 1994. 278 - 284; Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing, 2012. 33.

²⁶⁰ Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing, 2012. 33.

²⁶¹ *Ibid.*

²⁶² European Roma and Travellers Forum. About Us. 2012. 3 February 2013 <<http://www.ertf.org/index.php/about-us>>.

²⁶³ See for example: European Court of Human Rights. „Case of Chapman v. The United Kingdom (App.No. 27238/95).” Judgment. Council of Europe, 18 January 2001. 27; European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 27.

²⁶⁴ Council of Europe. „The European Social Charter and Roma Rights .” 2012. Council of Europe. 4 March 2013 http://www.coe.int/t/dghl/monitoring/socialcharter/Theme%20factsheets/RomaRightsIndex_en.asp.

²⁶⁵ Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing, 2012. 33 – 34.

EUROPEAN UNION (E.U.)

55. Equally so, within the framework of the European Union, focus has shifted to Roma issues predominantly present in Europe²⁶⁶. To this end, the EU has promulgated various resolutions with respect to Roma, as well as organized two Roma summits in 2008 and 2010²⁶⁷. Additionally, the Framework for National Roma Integration Strategies up to 2020 was established under the auspices of the E.U., which was endorsed by the CoE²⁶⁸. Lastly, minority rights in general are protected under the E.U.'s Fundamental Rights Agency as well as the Framework Strategy on Non-discrimination and Equal Opportunities for All²⁶⁹.

ORGANIZATION FOR CO-OPERATION AND SECURITY IN EUROPE (O.S.C.E)

56. Within the OSCE, two actors have consistently aided in monitoring the human rights conditions of Roma in Europe as well as formulated recommendations, namely the Roma and Sinti Contact Point, and the OSCE High Commissioner on National Minorities²⁷⁰. The Contact Point, as an aspect of the OCSEs' Office of Democratic Institutions and Human Rights, have published numerous valuable reports with respect to human rights situations within the OSCE region in which improvement is urgently required²⁷¹. Additionally the Contact Point creates awareness through the publication of factsheets and the creation of audiovisual materials²⁷². The OSCE High Commissioner on National Minorities complements these initiatives brought forward by promulgating recommendations on how to ameliorate the highlighted areas of concern identified by the Contact Point²⁷³.

DECADE OF ROMA INCLUSION (2005 – 2015) & THE EUROPEAN PLATFORM FOR ROMA INCLUSION

57. The policy networks established with the aim of ameliorating the discriminatory practices against Roma as well as the socio-economic conditions they are confronted with are vast²⁷⁴. However, two notable initiatives are the Decade of Roma Inclusion (2005 – 2015) and the European Platform for Roma Inclusion, given that they these networks bring together a variety of actors ranging from NGO's, the CoE, governments and intergovernmental organizations²⁷⁵, in order to achieve change. The first exists mainly to monitor and ameliorate

²⁶⁶ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 9.

²⁶⁷ *Ibid.* 193.

²⁶⁸ Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing, 2012. 34.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 193 – 194.

²⁷⁵ *Ibid*; Council of Europe . The Council of Europe: Protecting the Rights of Roma. Strasbourg: Council of Europe, 2011. 22.

the situation of Roma both in and out of Europe²⁷⁶. The latter, allegedly more successful, was established in order to communicate good practice amongst various actors concerned with the plight of Roma²⁷⁷. An example of the achievements by the European Platform for Roma Inclusion concerns the *10 Common Principles for Roma Inclusion*, which was endorsed by the European Union and the Council of Europe²⁷⁸.

B. Civil Society

58. As a result of the long-neglected human rights violations against Roma, non-profit organizations have equally been established, each with their own specific, varying goals and achievements. What binds these organizations is their unequivocal determination to halt the mishaps Roma are confronted with and their resolve to spur societal awareness with respect thereto. Undoubtedly one of the most notable examples in the field, concerns the European Roma Rights Centre (*hereinafter* ERRC), which is not only focused on awareness building, but takes active steps in attaining judicial change and correct state norm adherence²⁷⁹. Based on its goal, the ERRC aims at facilitating change, by the means of public interest litigation, (see *supra* 31) and has effectively, on numerous occasions assisted in the delivery of positive judgments in favor of Roma individuals before the ECtHR²⁸⁰. Furthermore the ERRC disseminates pertinent assessments of Roma rights and conditions within their Roma Rights Journal²⁸¹.

59. In addition to the ERRC, mention must be made of the European Roma Information Office, an international advocacy organization aimed at stirring international debates with respect to Roma conditions²⁸². Equally so organizations such as, amongst others, the European Roma Grassroots Organization, the Roma Education Fund, the Open Society Foundations Roma Initiatives Office, pursue similar goals²⁸³. Complementing the work by these specific organizations, general non-profit organizations have equally conducted notable studies and reports with respect to Roma. Within this context mention must be made of Human Rights Watch, Amnesty International and Minority Rights Group International²⁸⁴.

²⁷⁶ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 194.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*; European Commission . „Roma in Europe: the Implementation of European Union Instruments and Policies for Roma Inclusion- Progress Report 2008-2010.” Working Document . 2010. 5 – 6, 13.

²⁷⁹ McGarry, Aidan. Who Speaks for Roma? Political Representation of a Transnational Minority Community. New York: Continuum International Publishing Group, 2010. 28 – 145.

²⁸⁰ *Ibid.*; see for example: European Court of Human Rights. „D.H. and Others v. Czech Republic (App.No. 57325/00).” Judgment. Strasbourg: Council of Europe, 13 November 2007. 3.

²⁸¹ McGarry, Aidan. Who Speaks for Roma? Political Representation of a Transnational Minority Community. New York: Continuum International Publishing Group, 2010. 28 – 145.

²⁸² *Ibid.* 152.

²⁸³ European Roma Rights Centre. Civil Society Organizations. 2012. March 12 2013 <http://www.errc.org/cikk.php?cikk=3583>.

²⁸⁴ *Ibid.*

Given the analogous objectives of many of these organizations, the European Roma Policy Coalition, a network of national and international non-governmental organizations fighting Roma discrimination, has been established in order to centralize and align the efforts by these varying organizations²⁸⁵. Not surprisingly, many of the aforementioned bodies are indeed members of this coalition. It is precisely due to the extensive research and dedication to Roma matters by these organizations that allow an assessment of relevant human rights provisions and state adherence thereto in what follows.

IV. Contemporary Roma Marginalization and Discrimination

60. Whilst much of the aforementioned advancements with respect to Roma rights adherence are commendable, much remains to be said regarding their current-day marginalization. Within a variety of policy fields, Roma directly or indirectly are forced to endure the pangs of discriminatory situations, as the aforementioned reports and studies have shown²⁸⁶. Moreover, the different policy fields within which this discrimination takes place inadvertently affect each other, feeding the tenacious cycle Roma experience on a day-to-day basis²⁸⁷. It suffices to refer to the right to employment to demonstrate that a lack thereof, will result in decreased or a lack of income, which will consequently affect the manner in which individuals can afford adequate housing.

61. In addition to areas of concern such as housing, employment and education, Roma have increasingly become victims of police violence and public leaders who use anti-Gypsy rhetoric²⁸⁸. Such violence manifests itself in the form of arbitrary detention, raids, and destruction of property²⁸⁹. Actions taken by public leaders as such as well as law-enforcers are solely compounding the problematic stigmatization and have led, in some case, to the perceived legitimization of anti-Roma violence perpetrated by non-Roma individuals²⁹⁰. Unfortunately it does not stop here – however, documenting the violations against Roma as they are occurring in contemporary Europe far exceeds the scope of this work, necessitating a nuanced and constrained approach. In what follows, four rights have been identified, namely the prohibition of discrimination, the right to education, the right to housing and the right to work, given the commonality thereof both in Belgium and Romania, with the intent of identifying the similarities and difference Roma encounter in both states with respect to their human rights situations. Precisely due to the interlinked nature of these rights, an overview of the general human rights conditions within both respective states can be given.

²⁸⁵ European Roma Policy Coalition . About - European Roma Policy Coalition (ERPC). 2013. 14 March 2013 <http://romapolicy.eu/about/>.

²⁸⁶ Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing , 2012. 11 – 28.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.* 76 – 86.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.* 11.

PART 3. ASSEMENTS OF ADHERENCE TO ROMA RIGHTS

I. Situational Context

A. Introduction

62. As aforementioned, the legal obligations which comprise human rights law can be found in a variety of sources ranging from the, amongst others, ICCPR, the ICESCR, the CRC, as well as various notable regional conventions such as the ECHR and the European Social Charter (*hereinafter* ESC). For the purpose of this work, the assessment of the human rights conditions for Roma in Europe will be primarily be based on the conventions most relevant to the respective rights, entailing that the assessments will be made based on various different conventions, when applicable. Insofar possible however, the ECHR will be heeded as well as its supervisory organ, the ECtHR, as this is undoubtedly one of the primary sources for human rights legislation in Europe. Dismayingly however, the ECHR has fallen short to some extent, in the protection of certain socio-economic rights, necessitating an analysis of those rights as enshrined in other conventions (see *infra* 112 and 133). The human rights analysis is comprised of an analysis of four identifiable human rights, namely the prohibition of discrimination, the right to education, the right to housing as well as the right to work. The utilization of these rights in the following assessment is substantiated upon the comparability thereof in both countries, as well as their uncontested interlinked and interdependent nature. The concerned rights and violations thereof exert influence over the totality of ones' existence, allowing an adequate and general assessment of the human rights conditions within which Roma find themselves in the respective countries. In what follows, a theoretical analysis of each respective right will be elaborated upon, and subsequently will be applied to the conditions Roma are subjected to in Belgium and Romania respectively.

B. Belgium

63. When assessing adherence to human rights concerning Roma in Belgium, one is bound to encounter a variety of obstacles. In first instance, mention must be made of the federal structure in Belgium. Whilst the federal government is responsible for matters concerning migration policy and basic rights enshrined in the Belgian Constitution, the regional governmental powers are entitled to oversee integration, education, employment and housing²⁹¹. As legislation differs depending on the region, the following assessments will be confined to and based upon the findings concerning the Flemish region/community, including Brussels, of Belgium. This is further substantiated by the fact that an estimated 15,000 to 20,000 Roma reside in Flanders, as opposed to an approximated 50,00 to 10,000 in the

²⁹¹ Agentschap voor Binnenlands Bestuur. Afdeling Beleid Binnenland, Steden en Inburgering. „Vlaams Actieplan MOE (Roma) - migranten 2012.” Vlaamse Overheid, December 2012. 8 – 9.

Walloon region²⁹². In Flanders, Roma are generally dispersed, yet the cities with the largest Roma concentrations are Ghent, Antwerp, Brussels and Sint-Niklaas²⁹³. In addition to the diverging competences of the federal and Flemish regional governments, which inadvertently affect Roma in Flanders, mention must be made with respect to the terminological connotation associated with the term Roma. Roma within the Flemish region refers solely to the migrants of Central and Eastern Europe, whom arrived over the course of the last couple of years, consequently depicting them as a fairly recently emerged minority²⁹⁴. Furthermore, the Flemish government makes the distinction between Roma and Travelers – Travelers referring to three distinct subgroups, namely Voyageurs²⁹⁵, Manoush²⁹⁶ and Roms²⁹⁷. For the purpose of the following assessment, when referring to Roma, both Roma in the strict sense, as well as Roms will be included, given their relatively analogous and shared history of discrimination and stigmatization.

64. As is generally the case with Roma in Europe, demographic information is limited in that it does not provide information nor statistics based on ethnicity²⁹⁸. Subsequently much of the field research conducted and conclusions at which such research arrives, is based upon Central and Eastern European migrants, which encompasses Roma²⁹⁹. This entails however, that information presented may be distorted to some extent, given that exact figures and information cannot be ascertained. Moreover, given the accession of Central and Eastern European countries to the E.U., freedom of movement is warranted, implying that migrants, insofar they do not have the intent of extending their stay beyond three months in Belgium, are not in need of appropriate documentation, rendering an assessment of Roma conditions even more difficult³⁰⁰. Needless to say, Belgium is equally confronted with influxes of irregular migrants whom lack adequate documentation altogether and thus fall outside the scope of much of the undergone research by a variety of actors, further distorting findings³⁰¹.

²⁹² „National Roma Integration Strategy .” Samenst. Staatssecretaris voor Maatschappelijke Integratie. Staatssecretaris voor Maatschappelijke Integratie , 6 March 2012. 9 – 10.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.* 7 – 8.

²⁹⁵ The term *Voyageurs* refers to Belgian citizens who live in a nomadic manner, earning their living through various, flexible forms of employment. Their primary language is Dutch.

²⁹⁶ The term *Manoush* refers to the groups who arrived in the concerned region around the 15th century, and who gradually integrated therein. Their primary languages are Dutch and Manoush.

²⁹⁷ The term *Roms* refers to those who, following the fall of the Iron Curtain and the culmination of the Communist era, found their way to these regions in Western Europe. Their main language is (a dialect of) *Romani Cib*, and some speak both French and Dutch.

²⁹⁸ Agentschap voor Binnenlands Bestuur. Afdeling Beleid Binnenland, Steden en Inburgering. „Vlaams Actieplan MOE (Roma) - migranten 2012.” Vlaamse Overheid , December 2012. 11.

²⁹⁹ *Ibid.*

³⁰⁰ Touquet, Heleen en Johan Wets. „Context, drijfveren en Opportuniteiten van Midden- en Oost-Europese immigratie: Een exploratief onderzoek met focus op Roma.” Onderzoeksinstituut voor Arbeid en Samenleving , 2013. 23 – 24.

³⁰¹ *Ibid*; Agentschap voor Binnenlands Bestuur. Afdeling Beleid Binnenland, Steden en Inburgering. „Vlaams Actieplan MOE (Roma) - migranten 2012.” Vlaamse Overheid , December 2012. 11.

65. Irrespective of the lack of adequate information with respect to Roma in Flanders, it is uncontested that the conditions within which the majority of Roma is subjected to in Flanders, are substandard. Analogous to other European states, Roma are confronted with inadequate housing, discriminatory practices with respect to employment, insufficient access standard education, and discriminatory media attention (see *infra* 69). Regrettably, in addition to the aforementioned, a rise with respect to Roma child prostitution has also been documented in Flanders, although exact figures and precise information are again lacking within this sphere³⁰². These conditions are solely aggravated by the lack of adequate documentation, given that legal residency is pivotal for Roma in their enjoyment of certain basic rights. However, this should not be overestimated, as Roma with legal residence permit, nevertheless are faced with analogous conditions, yet at best somewhat less extreme. Irrespective of one's status however, consistent deprivation of basic rights such as work, and adequate housing, not inconceivably, enhance the potential of petty crimes of those whose rights are being neglected.

66. In light of the foregoing, the Flemish and Belgian government in general, have undertaken a variety of initiatives in order to curtail these substandard conditions, and ameliorate aspects of Roma everyday life. While any initiatives to this end are commendable, it must be noted that these are not yet sufficient. Moreover, the diverging responsibilities amongst the different governments in Belgium, render all-encompassing solutions, insofar these are attainable³⁰³, near impossible. Given the interdependence of the socio-economic conditions Roma are facing, such as the interdependency of education and employment, measures will require coherency and cooperation between federal and regional governmental entities. It suffices within this regard, to mention the Roma National Integration Strategy for Belgium – although the concepts therein enshrined are a step in the right direction, no concrete initiatives have resulted therefrom, and no additional funding has been foreseen to attain the goals set therein – a clear indicator of a lack of co-operation³⁰⁴. On the other hand, notable advancements have been made in documenting the conditions within which Roma live in Flanders by organizations funded or instigated by the Flemish government as well as a vast array of NGO's³⁰⁵. Moreover, using a bottom-up approach, these organizations have, in numerous cases, enhanced the empowerment of Roma, raised awareness regarding Roma and have proven to be catalysts for change, however small it may be.

³⁰² Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 9.

³⁰³ Given the divergence of Roma communities within different regions in Flanders, nuanced solutions are required per community as opposed to a 'one size fits all' solution.

³⁰⁴ „National Roma Integration Strategy .” Samenst. Staatssecretaris voor Maatschappelijke Integratie. Staatssecretaris voor Maatschappelijke Integratie, 6 March 2012. 52.

³⁰⁵ See for example: *Opre Roma, VROEM, Foyer, Minderhedenforum, CeMIS, de Raad van Roma, Sinti en Woonwagenbewoners; Centre for Equal Opportunities and Opposition to Racism.*

C. Romania

67. Roma constitute the second largest of Romania's official ethnic minorities and have received targeted attention from the Romanian government in its attempt to ameliorate the plight thereof in contemporary Romania³⁰⁶. Within this context mention must be made of the measures and provisions specifically aimed at combatting discrimination against national minorities, as well as the (conditional) right to use minority languages in education³⁰⁷. In addition, key policy documents have been adopted in order further improve the socio-economic reality within which Roma reside, such as the *Strategy of the Government of Romania for Improving the Condition of the Roma*, the *Joint Inclusion Memorandum*, as well as the policy document named '*Accelerating the Implementation of the Strategy of the Government of Romania for Improving the Condition of Roma*'³⁰⁸. Moreover, international agreements of pertinence to Roma, (and in general), which have been adopted by Romania, prevail over Romanian domestic legislation and are directly applicable as a result of article 11 of the Romanian Constitution³⁰⁹. The latter entails that Romania is thus bound, by conventions such as the ECHR, ICESCR, CRC, and the ICCPR. Additionally, the provisions therein enshrined, can be directly invoked before domestic courts by its citizens, amongst which Roma, whom are undeniably Romanian citizens³¹⁰. The latter has undoubtedly led to successes, as a range of cases have been successfully brought to courts, both national as well as regional, ascertaining the enforceability of violated rights and freedoms³¹¹. These small, yet monumental steps are, in part to be attributed to the unrelenting civil society actors, who contribute to the amelioration of living conditions for Roma, such as Romani CRISS, but equally so the ERRC³¹².

68. Notwithstanding the aforementioned measures however, Roma, whom are estimated to account for approximately 2.5% of the population³¹³, nevertheless are documented as being Romania's most socially and economically disadvantaged minority³¹⁴. As Romanian citizens, Roma have access to the entirety of the protective national framework, which is accessible to non-Roma Romanian citizens, entailing availability of social security, legal remedies and the

³⁰⁶ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 45.

³⁰⁷ *Ibid.* 45.

³⁰⁸ *Ibid.* 62 - 63.

³⁰⁹ Amnesty International. „Mind the Legal Gap - Roma and the Right to Housing in Romania (EUR 39/004/2011).” 2011. 4; article 11.1 Romanian Government. „Romanian Constitution.” 1991.

³¹⁰ *Ibid.*; European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 62.

³¹¹ Romani CRISS. „Shadow Report for the Committee on the Elimination of Racial Discrimination On the Occasion of Report of Romania.” Bucharest: Romani CRISS, 27 July 2010. 10.

³¹² European Roma Rights Centre - Strategic Litigation. 2012. 31 January 2013 <<http://www.errc.org/strategic-litigation-european-court-of-human-rights>>.

³¹³ European Network on Social Inclusion and Roma under the Structural Funds. *Romania - Facts by Country: EURoma*. 2013. 14 May 2013 <http://www.euromanet.eu/facts/ro/>. It must be noted that other sources estimate Roma at 8% of the total population, entailing that estimates do vary considerably.

³¹⁴ *Ibid.*

protection against discrimination³¹⁵. Ample investigations and reports by both domestic civil society as well as international organizations, depict how the enforceability thereof is severely lacking with respect to Roma, as they are continuously subjected to direct and indirect discriminatory practices, as illustrated by the lack or substandard housing they reside in, discrimination with respect to employment, education, and health³¹⁶. Moreover, hate speech and racially motivated violence against Roma is abundant both by individuals as well as governmental officials, notwithstanding the legal obligations enshrined in the *Romanian Anti-Discrimination Law* to refrain from such abhorrent action. Outlining the extent of discriminatory practices, equally instigated and substantiated by governmental officials, exceeds the scope of this work, thus justifying a constrained approach, with respect to the aforementioned, four, interdependent rights and freedoms.

II. Assessing Specific Human Rights

A. Prohibition of Discrimination

1. Theoretical Analysis

SOURCES

69. As to be expected, anti-discrimination provisions are found in a multitude of international, regional and national human rights instruments³¹⁷. Whilst in essence the provisions are grossly similar, a distinction must be made with respect to the ECHR³¹⁸. Whereas other anti-discrimination provisions are denoted as an independent right, the prohibition of discrimination enshrined within the ECHR must be invoked *in conjunction* with other rights enshrined therein³¹⁹. In other words, the anti-discrimination provision encompassed in article 14 ECHR, does not stand alone and thus cannot be invoked as being violated insofar it is not invoked together with another right protected by that same convention³²⁰. In order to address this disparity, the CoE decided upon Protocol 12 ECHR, which gives rise to an analogous similar anti-discrimination provision, that upon ratification, can be invoked independently³²¹.

70. Additional to the foregoing no pertinent differences can be identified in the various anti-discrimination provisions encompassed in the varying international, regional and national

³¹⁵ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 62.

³¹⁶ Council of Europe. „Human Rights of Roma and Travellers in Europe.” Strasbourg: Council of Europe Publishing, 2012. 39 – 180.

³¹⁷ Articles 1,2 and 7 UDHR; articles 2.1, 3, 26 ICCPR; articles 2.1, 3, 7, 10, 26 ICESCR; article 2.1 CRC.

³¹⁸ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 135.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

instruments³²². General consensus affirms that the prohibited discrimination entails that a difference in treatment, in analogous situations, is not justified when reasonable and objective justification for that treatment has not been ascertained³²³. Moreover, it is generally agreed upon that such anti-discrimination provisions encompass a negative obligation³²⁴. This negative obligation entails that a State must refrain from measures that may discriminate in a legal sphere³²⁵. In what follows, the focus will be primarily be on the anti-discrimination provisions within the ECHR, as this provides ample basis for comparison.

DEFINING THE PROHIBITION OF DISCRIMINATION

*Article 14 ECHR*³²⁶

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

71. It is generally held that prohibited discrimination within the context of article 14 ECHR entails that individuals in comparable situations are not treated in a comparable manner, and this without objective and reasonable justification³²⁷. This principle however, does not entail that factual inequalities, which are addressed through the means of different treatment, will amount to discrimination, insofar the different treatment is instilled with the intent of correcting those inequalities³²⁸.

72. It has been established that article 14 ECHR cannot be invoked independently from other rights and freedoms enshrined in the EHCR. However, aside from this obligation, the prohibition of discrimination requires the fulfillment of certain criteria when alleging

³²² *Ibid.*

³²³ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 58; European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 34.

³²⁴ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 46.

³²⁵ *Ibid.*

³²⁶ Council of Europe. „European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5).” Strasbourg: Council of Europe, 4 November 1950.

³²⁷ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 70 – 71.

³²⁸ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 151; European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 31.

violations thereof³²⁹. In first instance, the application criteria must be assessed, which entails that a difference in treatment must be established, between individuals in analogous situations³³⁰. In second instance, an assessment must be made as to whether the difference in treatment is justified, which requires an analysis of the reasonableness and objectiveness of the differential treatment³³¹.

73. With respect to the application criteria, note must be made of the fact that this encompasses two components, namely the first being a difference in treatment between individuals³³². The second component is subsequently comprised of the assessment of the comparable situations in which these individuals find themselves³³³. With respect to the first component, the burden is upon the individual alleging the differential treatment³³⁴. Naturally the difference in treatment must be proven or be derivable from the facts presented³³⁵. However, it must be noted that when the alleged differential treatment is substantiated upon one of the grounds enshrined in article 14 ECHR, such as amongst others, race, sex, or nationality, the justification grounds for such treatment will be assessed more stringently³³⁶. The ECtHR has held that claims based upon these grounds will lead to a *prima facie* case triggering enhanced scrutiny in the justification grounds offered by the concerned states³³⁷. Whereas statistics were initially neither deemed relevant nor conclusive in establishing differential treatment, the ECtHR has recently altered its stance with respect thereto³³⁸. As affirmed in the cases of *D.H. and others v. Czech Republic* and *Horvath and Kiss v. Hungary*, reliable statistics can serve as a manner of indicating discriminatory treatment³³⁹.

³²⁹ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 153.

³³⁰ *Ibid.*

³³¹ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 34.

³³² Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 153.

³³³ *Ibid.*

³³⁴ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 104.

³³⁵ The ECtHR utilizes two standards of proof, insofar a reversal of the burden of proof is not applicable – *beyond reasonable doubt* and *coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted assumptions of fact*: *Ibid.* 105.

³³⁶ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 154.

³³⁷ *Ibid.*

³³⁸ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 100.

³³⁹ European Court of Human Rights. „D.H. and Others v. Czech Republic (App.No. 57325/00).” Judgment. Strasbourg: Council of Europe, 13 November 2007. 63 – 64; European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 28.

74. Concerning alleged differential treatment the Court has reaffirmed that the assessment of such treatment is indeed, a factual matter, to be assessed on a case-to-case basis³⁴⁰. Furthermore, within the ambit of the different rights and freedoms in the Convention, States enjoy a diverging margin of appreciation in applying differential treatment³⁴¹. Additionally, when assessing whether differential treatment has occurred, this treatment cannot be owed to discrepancies between different legal systems, irrespective of whether this concerns different legislation in different countries, or diverging legislation within a federal framework of states³⁴². Equally so, the differences created merely by the implementation of new legislation as opposed to older legislation cannot be invoked as grounds to prove differences in treatment within the context of article 14 ECHR, given that it is the prerogative of states to adopt new legislation³⁴³.

75. The second component of the application criteria for the assessment of a violation of article 14 ECHR entails that an assessment will be made with respect to the comparability of the presented situations. Within this context the Court has proclaimed that the comparison of such allegedly comparable situations must take into account only relevant similarities and difference³⁴⁴.

76. If indeed the Court establishes a difference in treatment, regarding individuals in analogous situations, an assessment must consequently be made with respect to the justifiability of the differential treatment³⁴⁵. In essence this entails that the Court will assess whether the differential treatment is based on the existence of legal justification and whether the treatment is proportional³⁴⁶. The first condition will take into regard the goal and essence of the measure insofar this is possible and will result into an investigation of the legal aim of that measure³⁴⁷. The latter test for proportionality will be assessed based on the availability of less intrusive means, the consensus criterion³⁴⁸ with respect to other state practices, and the availability of means by which individuals can contest the domestic instruments, which result in the differential treatment. It must be noted however, that it is not uncommon for the Court

³⁴⁰ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 153.

³⁴¹ *Ibid.* 148.

³⁴² *Ibid.* 155 – 158.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* 163 - 165

³⁴⁵ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 34.

³⁴⁶ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 60.

³⁴⁷ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 168 – 169.

³⁴⁸ Consensus criteria refers to the existence of a “common ground” between legislation in member states in order to ascertain whether a certain measure is to be deemed proportional: —. „Sunday Times v. United Kingdom.” Final Judgment. Strasbourg: Council of Europe, 26 April 1979. 29 – 30.

to assess the aforementioned conditions simultaneously, rendering it more difficult to derive the standards the Court maintains with respect to its anti-discrimination provision.

77. Current case law by the ECtHR indicates that although one must have a personal legal interest in an anti-discrimination claim brought forward to the ECtHR, this rule is not of an absolute nature. Whilst the general rule states that domestic legislation or individual decisions cannot be contested *in abstracto*, it is possible in specific circumstances an individual can be deemed a victim, and thus have a legal personal interest, due to the mere existence of a factual discriminatory legal situation. These situations remain limited however.

INDIRECT DISCRIMINATION

78. In its most recent educational segregation case with respect to Roma, the ECtHR has reaffirmed its stance on indirect discrimination. The ECtHR held that indirect discrimination may arise when

“A general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable on the basis of an ethnic criterion”³⁴⁹.

Insofar a measure or policy as such is thus not appropriate, proportional and necessitated by a legitimate aim, state responsibility may arise and a violation may be concluded upon³⁵⁰. The ECtHR elaborates on this definition by stating that a violation of indirect discrimination within this context may equally arise from a *de facto* situation, entailing that intent is not a prerequisite for the aforementioned Court to conclude indirect discrimination³⁵¹. Interestingly and as aforementioned, this judgment equally reaffirms the principles it promulgated in its innovative *D.H. and others v. Czech Republic* judgment, by stating that a *prima facie* case of indirect discrimination may arise based on reliable statistical evidence substantiating the claim of disproportional prejudicial effects³⁵². The result of a *prima facie* finding of indirect discrimination results in a shift of the burden of proof within the ECtHR’s case law, entailing that it is left to the defendant State to negate the alleged indirect discrimination³⁵³. As is the case for direct discrimination, in assessing alleged violations of indirect discrimination, an

³⁴⁹ European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 28.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² European Court of Human Rights. „D.H. and Others v. Czech Republic (App.No. 57325/00).” Judgment. Strasbourg: Council of Europe, 13 November 2007. 63 – 64.

³⁵³ European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 28.

assessment will be made with respect to all the relevant factors and taking into regard the specificities of the case.

OBLIGATIONS ARISING FROM ARTICLE 14 ECHR

79. In reference to the phrasing of article 14 ECHR, it is apparent that this was not established in a manner which gives rise to clear negative or positive obligations incumbent upon the State. This thus gives rise to the question as to what precise obligations the state parties must adhere to in order to be in compliance with article 14 ECHR. In first instance the concerned provision entails a negative obligation for the state parties, entailing that they must refrain from undertaking measures, both individually as well as in a general manner, that may result in discrimination based on the non-exhaustive categories included therein³⁵⁴. Within this scope and in accordance with jurisprudence of the ECtHR, the term *government* must be interpreted broadly, entailing that various branches, such as local governmental branches, must equally be taken into account when addressing anti-discrimination claims³⁵⁵. Moreover, article 14 ECHR is not only applicable when states undertake measures to guarantee the other rights and freedoms in the Convention, it equally finds application when those same states undertake measures to *restrict* those rights and freedoms³⁵⁶.

80. More debatable however, is the question whether state parties are bound by positive obligations under this same provision. Namely, is a State obliged to undertake steps to limit and halt (ongoing) discrimination in a horizontal, private sphere? Whilst it appears that consensus exist with respect that this is not the case, a nuance is in order. Insofar article 14 ECHR is invoked in conjunction with other obligations and rights in the Convention that give rise to positive obligations, States must indeed undertake steps in achieving those obligations in a non-discriminatory manner³⁵⁷. Article 14 ECHR does not however, at this point in time, encompass specific positive obligations for States to halt discrimination in a private sphere³⁵⁸. Not only could and would this give rise to potential violations of the right to privacy as enshrined in article 8 ECHR, it would equally give rise to complications with respect to the *margin of appreciation* state parties enjoy in implementing the ECHR³⁵⁹. With the arrival of the 12th Protocol ECHR, this same reluctance regarding positive obligations and the anti-discrimination was reaffirmed, as the anti-discrimination provision concerns a prohibition of states to discriminate against individuals³⁶⁰.

³⁵⁴ Edel, Frederic. The prohibition of discrimination under the European Convention on Human Rights. Strasbourg: Council of Europe Publishing, 2010. 46.

³⁵⁵ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 145.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.* 148 – 149.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

81. It has nevertheless been voiced that indeed the ECtHR in future case law is free to elaborate upon the obligations arising from articles 14 and article 1 of the 12th Protocol ECHR respectively, thus not excluding the possibility of positive obligations arising therefrom³⁶¹. Moreover, national legislation, which does incorporate more stringent, positive protective measures within this realm, cannot be negated based on the lack of explicit referral thereto in the two concerned articles³⁶². Lastly, it is not inconceivable that in specific circumstances member states may have specific positive obligations arising from the aforementioned articles. The recent case of *Horvath and Kiss v. Hungary*, before the ECtHR, affirmed the foregoing by stating that positive measures are highly necessitated, specifically concerning groups whom have historically been subjected to discriminatory practices³⁶³.

82. The matter of positive obligations under article 14 and article 1 of the 12th Protocol ECHR respectively, is an entirely different matter than the matter concerning *positive action*. This term, also known as *positive discrimination*, or *corrective inequality*, refers to differential treatment towards citizens, by States in order to correct factual inequalities amongst those citizens³⁶⁴. Such measures are often taken in cases concerning *suspect groups* or *individuals*, whom due to certain individual or collective characteristics and the inequality this may give rise to, might require such differential treatment³⁶⁵. As substantiated in the *Belgian Linguistics Case*, the ECtHR established early on, that such corrective measures do not necessarily give rise to a violation of the prohibition of discrimination³⁶⁶. Moreover, in the case of *Chapman v. the United Kingdom*, the ECtHR held that this could entail the positive obligation of undertaking measures to address such inequalities³⁶⁷. In assessing whether such measures give rise to a violation of article 14 ECHR, the same standard, namely that of objective and reasonable justification, is applied (*supra* 35).

ARTICLE 14 ECHR: COMPLEMENTARY OR AUTONOMOUS?

83. The formulation of the anti-discrimination provision within the ECHR, as aforementioned, is complementary to the other rights and freedoms therein enshrined, in that it cannot be invoked independently. In order to claim an alleged violation of article 14 ECHR, the violation must equally fall within the ambit of another right or freedom protected by the

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 27.

³⁶⁴ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 150 – 152.

³⁶⁵ *Ibid.*

³⁶⁶ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 31.

³⁶⁷ European Court of Human Rights. „Case of Chapman v. The United Kingdom (App.No. 27238/95).” Judgment. Council of Europe, 18 January 2001. 26 – 27.

same convention. It goes without saying that human rights provisions not enshrined in this Convention can equally not be applied in a discriminatory manner, given that this would merely give rise to claims and violations enforceable before other human rights complaint mechanisms (see *supra* 16).

84. The complementary nature of article 14 ECHR however, is far less stringent than it may first appear. Namely the ECtHR requires solely that the invoked article 14 ECHR, fall within the ambit of another right or freedom enshrined in the Convention³⁶⁸. Whilst a link must thus be present, this does not entail that the factual circumstances will effectively give rise to a violation of *or* fall within the scope of those rights and freedoms³⁶⁹. A broad link between a right or freedom enshrined in the Convention, and article 14 ECHR, assessed on a case-to-case basis will suffice in bringing a claim on behalf of the latter³⁷⁰. The *Belgian Linguistics Case*, interestingly noted that the subsidiary character of article 14 ECHR does not imply that a violation of another right or freedom must be found for there to be a violation of article 14 ECHR³⁷¹. In other words, it is conceivable that, irrespective of its subsidiary character, article 14 ECHR can independently be deemed violated, without requiring violations of other rights and freedoms. On the other hand, the Court has stated that once a violation of a right or freedom has been decided upon, it is no longer necessary to address alleged violations of article 14 ECHR unless this is crucial given the circumstances of the case³⁷².

2. Anti-discrimination in Belgium

CONTEXTUALIZATION

85. Whereas Belgium has signed the 12th Protocol to the ECHR, it has regrettably not ratified it, entailing that complaints concerning the prohibition of discrimination, allegedly attributable to Belgium, must be within the ambit of other rights and freedoms enshrined in this same Convention³⁷³. Hence, discriminatory practices towards Roma in Flanders will be assessed in greater detail when addressing the right to education, the right to housing and the right to employment respectively (see *infra* 90, 112, and 133). The aforementioned principles

³⁶⁸ Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 138.

³⁶⁹ *Ibid.* 142.

³⁷⁰ *Ibid.*

³⁷¹ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 31.

³⁷² Goedertier, Geert. „Artikel 14. Verbod van discriminatie.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 138.

³⁷² *Ibid.* 144.

³⁷³ Council of Europe. Council of Europe: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. 10 February 2010. 15 April 2013 <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=1&DF=10/02/2010&CL=EN>>.

and prohibitions derived from article 14 ECHR are enshrined in two pertinent Belgian legislative instruments, namely the *Anti-discrimination Law*³⁷⁴, as well as the *Anti-Racism Law*³⁷⁵. Moreover, the Centre for Equal Opportunities and Opposition to Racism and the Institute for the Equality of Women and Men was established to monitor adherence thereto. However, notwithstanding the progress made in eliminating *de jure* discrimination, (in-) direct and *de facto* discrimination are still points of concern for Roma residing in Flanders³⁷⁶. Such *de facto* discrimination is oftentimes further aggravated by hate speech within political discourse. It suffices to mention the example of a politician affiliated with *Vlaams Belang*, whom during a parliamentary debate reduced Roma to being, amongst others, thieves, insubordinate, and overly aggressive³⁷⁷. Such discourse can and will legitimize as well as incite racially and ethnically motivated violence and further condone *de facto* discrimination³⁷⁸. Whilst the aforementioned article does not necessarily fall within the scope of article 14 ECHR and the rights discussed herein, it does depict the anti-Roma sentiment embraced by many, which subsequently results in (in-) direct discriminatory practices with respect to other rights and freedoms protected by the ECHR and other human rights instruments³⁷⁹. Moreover, it is highly conceivable that political discourse, which stigmatizes to such an extent that, in accordance with case law of the ECHR, it *may* give rise to violations of other rights than those discussed herein, such as the right to privacy enshrined in article 8 ECHR in conjunction with article 14 ECHR³⁸⁰.

INSTANCES OF DISCRIMINATION

86. Assessing discriminatory practices in Flanders, whether direct or indirect, is hindered by a variety of reasons. In first instance, Roma communities, generally, tend to remain distrustful of public services, and given their often, precarious status, fear that lodging complaints will have disastrous consequences for them, rather than ameliorate the discriminatory conditions which they are subjected to³⁸¹. However, while the positive

³⁷⁴ Belgian Federal Government. „Law against certain acts of discrimination.” *Federal Law*. 10 May 2007.

³⁷⁵ Belgian Federal Government. „Law of July 30, 1981 on the punishment of certain acts inspired by racism or xenophobia.” *Federal Law*. 30 July 1981.

³⁷⁶ *De jure discrimination* refers to discrimination which is the result of and embedded in legislation, as opposed to *de facto* discrimination, which is derived from certain practices rather than legislative initiatives: Duminica, Ramona en Andreea Tabacu. „Brief Reflections on the Exercise of the Right to Education of the Romany Minority.” *AGORA International Journal of Juridical Sciences* (2010): 3.

³⁷⁷ Oomen, Jochem. „Dewinter stigmatiseert Roma.” 23 November 2011. *DeWereldMorgen.be*. 2 May 2013 <<http://www.dewereldmorgen.be/artikels/2011/11/23/dewinter-stigmatiseert-roma>>.

³⁷⁸ Council of Europe. „Human Rights of Roma and Travellers in Europe.” Strasbourg: Council of Europe Publishing, 2012. 44.

³⁷⁹ *Ibid.*

³⁸⁰ See for example: European Court of Human Rights. „Case of Aksu v. Turkey.” Strasbourg: Council of Europe, 15 March 2012. 22.

³⁸¹ Hemelsoet, Elias. *Target the Problem, Not the People* Joyce De Coninck. 27 May 2013. 8; Vlaams Minderhedencentrum. *Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen*. Brussel: Vlaams Minderhedencentrum, 2010. 16; Wauters, Joris, Noel Clycq en Christiane Timmerman. *Aspiraties en*

obligations arising from article 14 ECHR are neither absolute nor definitive, it is uncontested, as affirmed by the case of *Horvath and Kiss v. Hungary*, that a State must undertake positive action in social and economical spheres in order to correct direct and *de facto* discrimination, insofar it concerns vulnerable groups, such as amongst others, Roma³⁸². With respect to migration matters and the subsequent consequences dependent on the status Roma receive upon arrival in Belgium, the State falls flagrantly short. An illustration thereof concerns the tolerance policy Belgium has adopted with respect to the residence of irregular migrants within its borders³⁸³. Irregular migrants are thus susceptible to penal infractions and expulsion if caught on Belgian territory - however; the Belgian government nevertheless condones their residence³⁸⁴. Additionally, notwithstanding their irregular stay, they are held to abide by certain obligations such as compulsory education for their children, and enjoy, amongst other basic rights, the right to housing (for a detailed discussion thereof, see *infra* 121). However, when confronted with discrimination with respect to housing or education for example, a complaint cannot be lodged without risking expulsion³⁸⁵. Such discriminatory treatment can manifest itself through the means of refusal of enrollment based on ethnicity regarding education, and the non-adherence to housing standards with respect to the right to housing (see *infra* 90 and 112). In essence this entails that the tolerance policy, seemingly neutral, with respect to irregular migrants as exemplified by, for example the right to education and the right to housing that they are accorded, is discriminatory, as they cannot see the latter enforced, in cases of discrimination. In other words, whilst they have the right to housing and the right and obligation to education, they cannot see these rights enforced, at the risk of being expelled back to their countries of origin, which they had fled, resulting in discriminatory treatment of these individuals.

87. Naturally, the foregoing contradictory policies are applicable however, to all irregular migrants, which is the precisely the second difficulty in ascertaining discrimination with respect to Roma in Flanders. The Flemish government refrains from investigating, assessing and establishing policies directly targeted at Roma, and thus centers its findings around inter-European and international migration³⁸⁶. Hence, comprehensive research specifically aimed at

sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 86.

³⁸² European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 27.

³⁸³ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 2.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*: governmental officials are obliged to notify the concerned competent authorities with respect to irregular migrants, whom consequently undertake steps in order to return the concerned individuals to their respective countries of origin.

³⁸⁶ Committee on Economic, Social and Cultural Rights. „Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant [on Economic, Social and Cultural Rights] : concluding observations of the Committee on Economic, Social and Cultural Rights Belgium (E/C.12/BEL/CO/3).” United Nations, 4 January 2008. 4; Committee on the Elimination of Racial Discrimination. „Consideration of Reports Submitted by State Parties Under Article 9 of the Convention: Concluding Observations of the

assessing adherence to human rights of Roma, and more specifically to the prohibition of discrimination, has not been conducted by Belgian governmental branches, as affirmed and deplored by a variety of human rights mechanisms³⁸⁷. However, civil society within Flanders, has managed to document, specifically concerning Roma, cases which may give rise to both direct and indirect discrimination, which will be assessed in the discussion of the subsequent rights to follow.

3. Anti-discrimination in Romania

CONTEXTUALIZATION

88. As aforementioned, the Romanian Constitution in its article 11 stipulates that international treaties ratified by Romania will prevail over domestic legislation, and are directly applicable within Romanian jurisdiction³⁸⁸. As a result thereof, article 14 ECHR as well as the 12th Protocol ECHR, given the signing and ratification of both by Romania, is directly enforceable in Romania, irrespective of its domestic legislation³⁸⁹. Additionally, the Romanian Anti-discrimination Law, amended in 2006, gave rise to the establishment of the National Council for Combatting Discrimination, a politically independent institution in order to monitor adherence to the concerned legislation and receive complaints³⁹⁰. Dismayingly however, discrimination, both direct and indirect, is mainstream within contemporary Romania regarding treatment of Roma³⁹¹. Discrimination towards Roma manifests itself in a multitude of forms as exemplified by the political discourse and a statement by Romania's President Basescu, whom referred to a journalist as a "*stinking gypsy*"³⁹². Discriminatory treatment has equally been documented, on numerous occasions with respect to law enforcement. It suffices to recall the facts concerning the cases of *Cobzaru v. Romania*³⁹³, *Stoica v. Romania*³⁹⁴, and *Moldovan and others v. Romania*³⁹⁵. Moreover, recent years have demonstrated an upsurge in Anti-Gypsyism, as portrayed by violent attacks on Roma settlements in Romania, analogous to events, which took place in the Hadareni village, which gave rise to the *case of Moldovan v. Others* before the ECtHR, and portrayed by

Committee on the Elimination of Racial Discrimination." Concluding Observation. United Nations, 11 April 2008. 6.

³⁸⁷ *Ibid.*

³⁸⁸ Article 11: Romanian Government. „Romanian Constitution.” 1991.

³⁸⁹ Amnesty International. „Mind the Legal Gap - Roma and the Right to Housing in Romania (EUR 39/004/2011).” 2011. 4.

³⁹⁰ Romani CRISS. „Shadow Report for the Committee on the Elimination of Racial Discrimination On the Occasion of Report of Romania .” Bucharest: Romani CRISS, 27 July 2010. 40.

³⁹¹ *Ibid.*

³⁹² Council of Europe. „Human Rights of Roma and Travellers in Europe .” Strasbourg: Council of Europe Publishing, 2012. 43 – 44.

³⁹³ European Court of Human Rights. „Case of Cobzaru v. Romania (App.No. 48254/99) .” Judgment. Strasbourg: Council of Europe, 26 July 2007.

³⁹⁴ European Court of Human Rights. „Case of Stoica v. Romania (App.no.42722/02).” Judgment. Strasbourg: Council of Europe, 4 March 2008. 24.

³⁹⁵ European Court of Human Rights . „Case of Moldovan and others v. Romania (App nos. 41138/98 & 64320/01).” Final Judgment. Strasbourg: Council of Europe , 30 November 2005. 42.

discriminatory practices towards Roma in employment, education and housing as will be discussed in the following³⁹⁶.

INSTANCES OF DISCRIMINATION

89. Regrettably, Romania is notorious for its discriminatory practices towards Roma. This is exemplified by, amongst others, the eviction and relocation of 2000 Roma individuals in the region of Baia Mare, to empty buildings belonging to an inoperable chemical factory³⁹⁷. This chemical factory was documented as being the largest polluter in Romania when it was closed down in 2005. As a result of their relocation to these buildings, more than 20 children were hospitalized due to intoxication, as a result of the remaining toxic waste from the concerned factory³⁹⁸. Similar abhorrent action was taken in the region of Miercurea Ciuc, which resulted in the forced eviction and relocation of approximately 100 Roma individuals near a sewage treatment plant³⁹⁹. Despite the vast amount of human rights norms prohibiting discrimination by which Romania is bound, in conjunction with its own respective anti-discrimination legislation, it continuously falls short of the standards promulgated with respect to anti-discrimination provisions. As the instances of discrimination concerning Roma far exceed the scope of this work, discriminatory practices will further be discerned in the assessment of the rights discussed below.

B. Right to Education

1. Theoretical Analysis

SOURCES

90. The right to education has been codified in numerous international conventions as well as regional instruments⁴⁰⁰. It suffices to mention the prevalence of this provision within various human rights conventions such as exemplified by the UDHR⁴⁰¹, the CRC⁴⁰², the ICESCR⁴⁰³, and the ECHR⁴⁰⁴, to demonstrate that the right to education is of large importance. Adherence to this provision can and has been proven to be a key determinant in

³⁹⁶ Toma, Stefania. „Segregation and Ethnic Conflicts in Romania.” The Gypsy 'Menace' - Populism and the New Anti-Gypsy Politics. London: Hurst and Co. Publishers Ltd., 2012. 191 – 213.

³⁹⁷ European Roma Information Office. „Discrimination Against Roma in the EU in 2012.” European Commission, January 2013. 13.

³⁹⁸ *Ibid.*

³⁹⁹ Romani CRISS. „Shadow Report for the Committee on the Elimination of Racial Discrimination On the Occasion of Report of Romania.” Bucharest: Romani CRISS, 27 July 2010. 27.

⁴⁰⁰ Lathouwers, Jan en Ludo Veny . „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2 . Antwerpen: Intersentia, 2004. 401 – 406.

⁴⁰¹ Article 26 UDHR.

⁴⁰² Article 28 CRC.

⁴⁰³ Article 13 ICESCR.

⁴⁰⁴ Article 2, First Protocol ECHR.

attaining fulfillment and enjoyment of other fundamental rights⁴⁰⁵. Notwithstanding its importance however, it must be noted that the application and interpretation of this right does vary across the diverging human rights instruments⁴⁰⁶. Whilst the provisions regarding education in the ICCPR, the ICESCR, the CRC, as well as the UDHR formulate the right to education in a *positive* manner, article 2 of the First Protocol of the ECHR, formulates the provision in a negative manner⁴⁰⁷. Moreover, whilst some provisions make note of the necessity to guarantee *free access to education*, irrespective of whether this be legally binding or not, the same article 2 does not do so⁴⁰⁸. The application of the right to education may differ further with respect to national legislation, as domestic policy can in fact invoke more stringent standards regarding the application of article 2 of the First Protocol ECHR, thereby providing enhanced protection with respect to the right to education⁴⁰⁹. Seeing as to how the right to education is often called upon by Roma and invoked before the ECtHR⁴¹⁰, it is subsequently beneficial to focus on article 2 of the First Protocol ECHR in the following assessment thereof.

DEFINING EDUCATION

91. The key term within this provision is undoubtedly the term “education”. As is often the case, defining education has not proven to be a simple task, as it is uncertain whether education includes solely the primary, basic education or whether it equally includes higher education as well as other forms of education. In the *Belgian Linguistics Case* the European Commission of Human Rights (*hereinafter* the Commission) noted that it included all forms of education and thus was equally applicable with respect to higher education⁴¹¹. However, soon thereafter, the Commission curtailed its own previous notions by limiting the scope of the term to basic, primary education⁴¹². Given the impact this has on the access to higher education as well as other forms of education, it is not inconceivable that the Commission received much criticism for its line of reasoning. Again it must be noted however, that

⁴⁰⁵ Nowak, Manfred. „The Right to Education.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 245.

⁴⁰⁶ Lathouwers, Jan en Ludo Veny. „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek ECRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 406 – 408.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Nowak, Manfred. „The Right to Education.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 260 – 261.

⁴¹⁰ See for example: European Court of Human Rights. „D.H. and Others v. Czech Republic (App.No. 57325/00).” Judgment. Strasbourg: Council of Europe, 13 November 2007. 90; European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Judgment. Strasbourg: Council of Europe, 29 January 2013. 32; European Court of Human Rights. „Sampanis and Others v. Greece (App.No. 59608/09).” Merits - Judgment. Strasbourg: Council of Europe, 11 December 2012; European Court of Human Rights. „Case of Orsus and Others v. Croatia (App.No. 15766/03).” Merits - Judgment. Strasbourg: Council of Europe, 16 March 2010. 71.

⁴¹¹ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 103.

⁴¹² *Ibid.*

domestic legislation can invoke enhanced protective standards, additional to those provided in article 2 of the First Protocol ECHR, including elaborating the scope of the right to education, to higher and alternative forms of education.

STATE OBLIGATIONS

92. The obligations arising from the concerned provision equally give rise to much debate, as the *positive* state obligations are not without certainty⁴¹³. It is uncontested that the negative obligation requires a State to refrain from hindering access to educational facilities, however defining the scope of the positive obligations resulting from the concerned article 2 of the First Protocol ECHR has not proven to be an easy task⁴¹⁴. Notwithstanding the fact that the negative formulation of article 2 First Protocol ECHR could give the impression that the right contains primarily a negative obligation, the aforementioned *Belgian Linguistics Case* explicitly noted that this is not the case. Within this case, it was noted that in first instance the State is held to ensure, in principle, the access to educational services⁴¹⁵. The Commission, earlier on, held in *Cohen v. UK* that this positive obligation does not oblige (local) governments to provide specific and personalized services in order to ensure the effective application of this right⁴¹⁶. However, the positive obligations arising from the right to education were subsequently elaborated upon in the case of *Horvath and Kiss v. Hungary*, where it was affirmed that facilitative measures must be taken in order to ensure access to educational services, especially with respect to vulnerable groups, amongst which Roma⁴¹⁷.

93. Within the realm of the right to education, state governments do maintain the ability to regulate education⁴¹⁸. Thus, they preserve the right to implement conditional acceptance and enrollment based upon, amongst others, certain diplomas and certificates, as well as the payment of tuition fees⁴¹⁹. Insofar such regulation does not result in the denial of access to basic education, States will not be held liable for alleged violations of their positive obligations under the concerned article 2.

⁴¹³ Wahlstrom, Ninni. „The Struggle for the Right to Education in the European Convention on Human Rights.” Journal of Human Rights 8 (2009): 158.

⁴¹⁴ *Ibid.*

⁴¹⁵ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 29.

⁴¹⁶ Lathouwers, Jan en Ludo Veny. „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 418.

⁴¹⁷ European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 27 – 28.

⁴¹⁸ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe, 23 July 1968. 29.

⁴¹⁹ Lathouwers, Jan en Ludo Veny. „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2. Antwerpen: Intersentia, 2004. 418 – 422.

94. Insofar an individual finds him or herself within the jurisdiction of a state, which has ratified the First Protocol, their right to education cannot be negated. However, within this context a nuance is necessitated. In the event that a State is confronted with irregular aliens within their territory, those aliens, whom are to be expelled, cannot invoke the right to education as a means to negate their expulsion orders⁴²⁰. The right enshrined in article 2 of the First Protocol ECHR can however, be invoked by both those directly affected by alleged violations as well as by the parents and guardians of those directly affected⁴²¹. When parents and children are in conflict with respect to the application thereof however, the ECtHR will assess the circumstances in the case prior to any decision. Within the framework of the second provision of article 2 of the First Protocol ECHR, it has been clarified that the rights of the parents are not by any means absolute, thus entailing that they do not prevail over the right to education of the child⁴²². The question has arisen as to whether an organization or a group of united parents equally are able to invoke article 2, however the Commission answered this in a negative manner⁴²³. Authors do contest this however, based on a literal interpretation of the terms within article 2. The provision namely refers to ‘persons’ rather than ‘individuals’, substantiating the claim that there was intent to allow for unified claims⁴²⁴.

2. Belgium and the Right to Education

CONTEXTUALIZATION

95. Within the region of Flanders notable issues persistently affect the ability of Roma children to enjoy their respective rights to education. A variety of causes to this extent can be identified, such as amongst others, deplorable living conditions within which they reside, lack or absence of financial means, lack of knowledge pertaining to the available services as well as discrepancies between their respective cultures and those of that of the concerned educational facilities⁴²⁵. Causes as such have paved the path for high truancy rates, (prohibited) segregation, concentration schools and a generally burdensome academic career⁴²⁶. Before continuing however, it must be reiterated that the gathering of information thereof may be distorted to some extent due to terminological discrepancies when defining Roma. As previously noted (see *supra* 63), demographic information cannot be gathered

⁴²⁰ Lathouwers, Jan en Ludo Veny . „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2 . Antwerpen: Intersentia, 2004. 411.

⁴²¹ *Ibid.*

⁴²² *Ibid.* 412.

⁴²³ *Ibid.* 414.

⁴²⁴ Article 24: „De Belgische Grondwet/The Belgian Constitution .” Federal Law. 14 February 1994 (*hereinafter* the Belgian Constitution).

⁴²⁵ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 67 – 79; Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 13 - 27.

⁴²⁶ Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 13 – 27.

based on ethnicity, thus much of the information presented is derived from diverging investigations into Central and Eastern European migrants, of which Roma currently residing in Flanders, Belgium, constitute an aspect.

96. Whilst some basic principles with respect to education, have been incorporated within the Belgian Constitution, it is the Flemish government, which bears the responsibilities concerning the regulation thereof⁴²⁷. Within the educational system of Flanders, it must be noted that education is compulsory until the age of 18, with the distinction that between the ages of 15 and 18, children can opt for part-time education in conjunction with employment⁴²⁸. Moreover, irrespective of the absence of an obligation as such in the ECHR, as advised by international norms enshrined in the ICESCR⁴²⁹ and the CRC⁴³⁰, primary education should be state-provided and free of charge, which has effectively been embedded within the Belgian Constitution⁴³¹. Article 2 of the First Protocol ECHR prescribes that primary and secondary education may be enjoyed by all individuals within the jurisdiction of a state party with the one exception that irregular migrants cannot deviate from an expulsion order based on their academic subscriptions⁴³². Belgian legislation exceeds this obligation by prescribing that irregular migrants equally have the right to education, irrespective of their legal or illegal residence within Belgian jurisdiction⁴³³. Whilst at first glance the legislative norms appear exceed and are in complete accordance with the prescribed obligations under article 2 First Protocol ECHR, this is not entirely true.

TRUANCY

97. A persistent point of concern regarding Roma concerning education regards the high truancy rates⁴³⁴. The absenteeism can take a variety of forms ranging from absolute

⁴²⁷ Touquet, Heleen en Johan Wets. „Context, drijfveren en Opportuniteiten van Midden- en Oost-Europese immigratie: Een exploratief onderzoek met focus op Roma.” Onderzoeksinstituut voor Arbeid en Samenleving, 2013. 23 – 28.

⁴²⁸ Vlaams Informatiepunt Jeugd/De Ambrassade. „Leerplicht: Naar school gaan, moet dat of mag dat? .” 2012. Onderwijs Vlaanderen. 21 January 2013 <http://www.ond.vlaanderen.be/leerplicht/>.

⁴²⁹ Article 13 ICESCR.

⁴³⁰ Article 28 CRC.

⁴³¹ Article 24 § 3 Belgian Constitution “(…). *De toegang tot het onderwijs is kosteloos tot het einde van de leerplicht*”.

⁴³² Lathouwers, Jan en Ludo Veny . „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2 . Antwerpen: Intersentia, 2004. 411.

⁴³³ Based on a Flemish circular, within the educational circuit, government officials are **not** bound by the obligation to notify the competent governmental authorities of the irregular status of their respective students, in order to ensure their right to education – Hemelsoet, Elias. „Gelijke Kansen Als Hefboom voor het Universeel Recht op Onderwijs. Een Pedagogische Lezing.” Tijdschrift voor Onderwijsrecht en Onderwijsbeleid 11.6 (2011): 481.

⁴³⁴ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 69; Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 14 – 15.

absenteeism, to irregular attendance, as well as regularly arriving late for school⁴³⁵. Truancy at school *grosso modo* can be ascribed to two distinct causes, namely precarious living conditions exemplified through the lack of adequate financial means, as well as cultural divergence regarding the perspective on education⁴³⁶.

98. Recent field research amongst various Roma families in Flanders concluded that that one of the main factors resulting in irregular or absolute lack of school attendance is the result of the precarious and lacking availability of financial means⁴³⁷. Due to lacking financial means, affected families cannot afford adequate clothing or food, entailing that means to foresee in transport to and from school for their children, is entirely out of the question⁴³⁸. Moreover the fines risked, by allowing children to take public transportation without payment thereof, further impedes parents to effectively send their children to school⁴³⁹. Whilst no specific positive obligation arises under article 2 of the First Protocol ECHR to foresee in reimbursement of funding for transport to facilitate attendance at school, it must be noted that states are nevertheless under the obligation to guarantee *access* to educational facilities and services (see *supra* 92). Within the realm of this positive obligation to ensure access to education, the following is of interest concerning the right to education of Roma within Flanders. Flemish legislation does in fact provide funding and/or reimbursement of transport to schools insofar these schools are within a 4-kilometer distance of the place of residence⁴⁴⁰. Interestingly enough this would entail that Roma families need not equate irregular school attendance or absenteeism with lacking financial means. As aforementioned however, this is one of the primary causes for truancy in Flanders. It can thus be concluded that the lack of knowledge pertaining to Flemish regulation with respect to transport funding, consequently entails that Roma families, not to mention others in similar financial precarious situations, prevents them from fulfilling their obligation, given that education is compulsory and susceptible to penal infractions, and enjoying their rights to education⁴⁴¹.

99. From a human rights perspective and under article 2 of the First Protocol ECHR, matters pertaining transport as an indicator for truancy, can be assessed in two manners.

⁴³⁵ Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 14 – 15.

⁴³⁶ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 67 – 79.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.* 70.

⁴³⁹ *Ibid.*

⁴⁴⁰ Agentschap voor Onderwijsdiensten. „Gids voor ouders met kinderen in het basisonderwijs.” March 2013. Vlaanderen.Be - officiële site van de Vlaamse overheid. 9 April 2013 <http://www.vlaanderen.be/nl/publicaties/detail/gids-voor-ouders-met-kinderen-in-het-basisonderwijs-2>.

⁴⁴¹ Vlaams Minderhedencentrum. „Hoe krijg je Romakinderen naar school? Het motivatieplan 'Scholarisatie Roma'." Annual Report. 2008. 36; Hemelsoet, Elias. „Gelijke Kansen Als Hefboom voor het Universeel Recht op Onderwijs. Een Pedagogische Lezing.” Tijdschrift voor Onderwijsrecht en Onderwijsbeleid 11.6 (2011): 481.

Firstly, given the derived lack of knowledge concerning this Flemish regulation, it could be assessed whether the lack of facilitative measures taken to inform vulnerable groups such as Roma, of this rule, results in non-compliance with the right to education, in accordance with case law by the ECtHR⁴⁴². This is of specific importance given the *vulnerability status* of Roma accorded to them by the ECtHR⁴⁴³. Secondly, whilst case law such as the case of *Cohen v. the United Kingdom*, stipulates that states are not under the obligation to foresee in transport funding, it must be noted that the facts of this case were entirely different when compared to situations in which Roma families in Flanders find themselves⁴⁴⁴. The applicants in the aforementioned case based their claim of an alleged violation of the right to education under the ECHR, on the notion that States are under a positive obligation to provide funding for transport to educational facilities⁴⁴⁵. However the facts underlying this case are notably different, in that the parents claimed that a further located school (rather than the school closest by) “*better reflected the parents’ philosophy*” and thus the State was obliged to fund the transport thereto⁴⁴⁶. Not surprisingly this claim was rejected, however, it remains questionable whether a claim as such would be rejected if and when substantiated upon the fact that the lack of funding for transport is one of the main factors hindering school attendance, and thus the right to education, in the nearest educational facility. Studies concerning Roma in Flanders with respect to education, have concluded that oftentimes, if not most of the time, Roma families choose schools for their children based on pragmatic reasons, entailing that it is indeed the closest school within the vicinity of their residence that will receive preference⁴⁴⁷. In other words, given the specific vulnerability of Roma, and their vast non-enjoyment of the right to education, it seems plausible and in accordance with article 2 of the First Protocol ECHR that a violation might arise given that children as such are not guaranteed access to schools within their vicinity due to financial reasons. The ECtHR in its *Belgian Linguistics Case* stated that “*it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol*”⁴⁴⁸, entailing that indeed States must see to it that this right is ensured and effectively guaranteed. Given the factual discrepancies with the aforementioned *Cohen v. United Kingdom* case, acknowledged Roma vulnerability and the fact that Roma absenteeism can largely be ascribed to lacking financial means for transport funding, not to mention extra

⁴⁴² European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 27 – 28.

⁴⁴³ *Ibid.*

⁴⁴⁴ Lathouwers, Jan en Ludo Veny . „Artikel 2 Eerste Protocol: Recht op onderwijs.” Handboek EVRM Deel 2. Artikelsgewijze Commentaar. Red. Johan Vande Lanotte en Yves Haeck. Vol. 2 . Antwerpen: Intersentia, 2004. 418.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 75.

⁴⁴⁸ European Court of Human Rights. „Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (App.No. 1474/62; 1677/72; 1691/62; 1769/63; 1994/63; 2126/64).” Judgment. Strasbourg: Council of Europe , 23 July 1968. 29.

costs associated with subscription to schools, it would be contradictory to the essence and meaning of article 2 of the First Protocol ECHR not to acknowledge the necessity of funding with respect to transport. Moreover, given the fact that the Flemish government does indeed stipulate that it will foresee in funding, the lack of usage thereof potentially signifies negligence of the Belgian state, more specifically the Flemish government in effectively implementing those guarantees. The latter is substantiated further by Recommendation no.R(2000)4 of the Committee of Ministers to the member States on the education of Roma/Gypsy children in Europe⁴⁴⁹:

“Particular attention should also be paid to the need to ensure better communication with parents, where necessary using mediators from the Roma/Gypsy community which could then lead to specific career possibilities. Special information and advice should be given to parents about the necessity of education and about the support mechanisms that municipalities can offer families...Appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school.”

100. Lack of financial means equally inadvertently affects the prevalence amongst Roma children in Flanders. Within the field research conducted, it was concluded for example, that Roma parents do not necessarily distrust school institutions, however financial benefits oftentimes do prevail over regular school attendance⁴⁵⁰. This entails that, oftentimes, when money can be saved or gained, irrespective of the source of income or benefit, this may receive preference over consistent attendance⁴⁵¹. Moreover, it is uncontested that many Central and Eastern European migrants, and thus Roma included therein, face an educational deficit, which requires additional schooling⁴⁵². Additional schooling such as tutoring for example, can equally often not be provided for due to a lack of sufficient financial means⁴⁵³. Whilst the lack of adequate financial resources exemplifies the interdependency of certain human rights and does not necessarily give rise to the obligation of a State to address this cause in order to be in compliance with article 2 of the First Protocol ECHR, based on the foregoing in conjunction with the aforementioned Recommendation, it can be derived that

⁴⁴⁹ Committee of Ministers. „Recommendation No R (2000) 4 of the Committee of Ministers to Member States on the Education of Roma/Gypsy Children in Europe.” Adopted Recommendation. Strasbourg: Council of Europe, 3 February 2000.

⁴⁵⁰ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 70 – 71.

⁴⁵¹ *Ibid.*

⁴⁵² Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 23 – 27.

⁴⁵³ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 73.

enhanced facilitative measures need be taken in order fully and effectively guarantee access to education as protected and enshrined within the ECHR.

101. On a final note, the status of Roma when within Belgian jurisdiction will be pivotal concerning adherence to the right to education. Notwithstanding their irregular residence, irregular migrants are obliged to abide by the compulsory education established in Belgium⁴⁵⁴. However, due to their irregular stay, these migrants, amongst which Roma, cannot make claims with respect to individual scholarships nor governmental financial aid of any sort⁴⁵⁵. Whilst the latter is comprehensible at first glance, the logic behind this reasoning is quickly lost, as irregular migrants are prohibited from functioning on the formal labor market (see *infra* 148). This entails that these migrants, again amongst which Roma, are obliged to adhere to compulsory education implemented in Belgium, with its accompanying costs, at the risk of being fined in case of non-compliance, yet nevertheless are not entitled legally to attain the means to finance the aforementioned obligation concerning education⁴⁵⁶. This undoubtedly places Roma, and other vulnerable irregular migrants in a very contradictory, and discriminatory predicament.

PROHIBITED SEGREGATION AND PLACEMENT IN REMEDIAL SCHOOLS

102. Whilst the recent case of *Horvath and Kiss v. Hungary* before the ECtHR reiterated that segregation in schools based on ethnicity is prohibited and discriminatory and consequently violates articles 14 of the ECHR as well as article 2 of the First Protocol of the ECHR⁴⁵⁷, this trend appears to nevertheless be existent within Flanders regarding Roma⁴⁵⁸. Bearing in mind that pertinent information is not based on ethnicity but on nationality, entailing in this case Central and Eastern European migrants, the municipality of Ghent published figures that paint a disturbing picture⁴⁵⁹. Whereas 7% of Belgian children are enrolled in remedial schools for children with special needs, 19% of the Slovak and 22% of the children with Czech Republic nationality are equally enrolled therein, for the purpose of primary education⁴⁶⁰. Secondary schools in Ghent exemplify this same trend with 33% of Slovak children, and 8% of Bulgarian children being enrolled in such remedial schools⁴⁶¹. In addition thereto, the city of Ghent has recently been confronted with “*concentration schools*”, which entails that the majority of students are comprised of foreigners, amongst which Roma (see *infra* 162). In accordance with the aforementioned case of *Horvath and Kiss v. Hungary*,

⁴⁵⁴ Hemelsoet, Elias. „Gelijke Kansen Als Hefboom voor het Universeel Recht op Onderwijs. Een Pedagogische Lezing.” Tijdschrift voor Onderwijsrecht en Onderwijsbeleid 11.6 (2011): 481.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.* (Whilst basic education is presumably free in Belgium, costs nevertheless accompany enrollment in educational facilities.)

⁴⁵⁷ European Court of Human Rights. „*Horvath and Kiss v. Hungary* (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 34.

⁴⁵⁸ Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 17.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

pertinent and reliable statistical evidence can give rise to *prima facie* evidence of indirect discrimination and thus shift the burden of proof to the State held attributable for the alleged (in-) direct discrimination⁴⁶². Moreover, as substantiated by the ECtHR, respecting the right to education exceeds beyond the mere negative obligation and bestows certain positive obligations upon States to ensure and effectively guarantee those rights⁴⁶³. Although the extent and scope of these positive obligations may at first glance appear to be vague, the ECtHR reiterates the specific vulnerability of Roma, and the necessity for positive measures when addressing structural deficiencies within the educational system⁴⁶⁴. Furthermore, when an actual history of discrimination is present, the positive obligations, and adherence thereto will be assessed in a more stringent manner⁴⁶⁵. Needless to say Roma have known a history of discrimination, thus segregation within the current Flemish educational system must be assessed with great scrutiny. Conclusively, while the statistics at hand may be the result of a variety of causes, the mere overrepresentation of Central and Eastern European children, and consequently Roma within remedial schools, must be stringently assessed with respect to the requirements of proportionality and a legitimate aim in order for this to *not* result in non-compliance with article 2 of the First Protocol ECHR in conjunction with article 14 ECHR.

OTHER CAUSES FOR PROBLEMATIC EDUCATION IN FLANDERS

103. Conducted field research with respect to Roma and more generally Central and Eastern European migrants concerning education, has resulted in the identification of a variety of causes, which hinder effective enjoyment of the right to education⁴⁶⁶. In addition to financial distress, a significant factor, explanatory for why Roma children do not attend school on a regular basis, concerns the divergence of cultural perception of education⁴⁶⁷. Due to multiple factors certain Roma families within Flanders do not feel incentivized to send their children to school⁴⁶⁸. In some cases this can be attributed to the lack of adequate documentation combined with the uncertainty of residence they subsequently face within the region as a result of their precarious status⁴⁶⁹. In other cases it merely concerns the notion that

⁴⁶² European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 28.

⁴⁶³ European Court of Human Rights. „Horvath and Kiss v. Hungary (App.No. 11146/11).” Merits - Judgment. Strasbourg: Council of Europe, 29 January 2013. 27.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Geurts, Koen, Norah Van den Daele en Natasja Naegels. „Roma kinderen op de schoolbanken.” Welwijs 21.1 (2010): 11.

⁴⁶⁷ *Ibid.*; Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 27 – 31.

⁴⁶⁸ Geurts, Koen, Norah Van den Daele en Natasja Naegels. „Roma kinderen op de schoolbanken.” Welwijs 21.1 (2010): 11.

⁴⁶⁹ Geurts, Koen, Norah Van den Daele en Natasja Naegels. „Roma kinderen op de schoolbanken.” Welwijs 21.1 (2010): 11; Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 74.

school is not as productive, given that being taught certain practices at home, may help ameliorate the familial situations they are confronted with⁴⁷⁰. Insofar structural discriminatory practices, such as placement in remedial schools and refused enrollment, prevail towards Roma within the societal realm, it is not inconceivable that Roma do not experience education as being beneficial for them and thus resort to other means of educating their children.

104. Recurring obstacles which compounds the problematic school career of Roma children in Flanders concerns, amongst others, the transfer from lower school to secondary school, which, in Belgium, takes place around the age of 12⁴⁷¹. Within certain Roma communities though, this transfer is associated with the transfer from childhood to adulthood, or less extremely phrased, a certain degree of independence and maturity⁴⁷². This in stark contrast with the extended childhood and adolescent years accorded to non-Roma children. Consequently, certain Roma communities in Flanders experience the switch from primary to secondary education as being premature⁴⁷³. In addition to this early development into adulthood attributed to some Roma communities, a tendency exists within certain Roma communities in Flanders, for younger adolescents to engage in teen-marriages and teen-pregnancies⁴⁷⁴. Irrespective of the causality however, it is uncontested that a large discrepancy exists between attendance of Roma children in lower school, as opposed to secondary school. In light of the foregoing and in addition to the lack of adequate information for parents, students and educational facilities, difficult communication between all concerned parties, and the general distrust that may still exist, it is questionable whether Roma are in fact adequately being guaranteed the right to education as promulgated by article 2 of the First Protocol. Notwithstanding the notable and sometimes successful steps that have been undertaken by different municipalities, it appears that coherency and centralization of those measures are lacking, and need be enhanced in order to be in accordance with jurisprudence of the ECtHR concerning Roma⁴⁷⁵.

3. Romania and the Right to Education

CONTEXTUALIZATION

105. When addressing education of Roma minors in Romania, the historical context thereof is of extreme relevance. Throughout the course of the Communist era, Roma children, due to

⁴⁷⁰ Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 28; Geurts, Koen, Norah Van den Daele en Natasja Naegels. „Roma kinderen op de schoolbanken.” Welwijs 21.1 (2010): 11.

⁴⁷¹ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 74.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 28.

⁴⁷⁵ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 2.

forced assimilation, enjoyed education analogously to that of non-Roma children⁴⁷⁶. Increased focus was given to school attendance both of Roma and non-Roma children in mainstream educational facilities⁴⁷⁷, resulting both in increased monitoring of causality with respect to absenteeism, a higher quality of education and less manifest forms of discrimination within classrooms⁴⁷⁸. However, this does not negate the fact that higher education, as was the case for non-Roma children, was nevertheless less accessible for a variety of reasons⁴⁷⁹. The lack or burdensome access to higher education proved to be a crucial determinant in the deteriorating Romanian adherence to the right of education for Roma in the transition period following Communism. Whereas Roma children had been more or less integrated during Communism, the transition resulted into omnipresent segregation tendencies, largely due to non-Roma parents whom used the notion of freedom of speech to ascertain such segregation⁴⁸⁰. Segregation as such lasted well into the beginning of the 21st century and is still very much present today⁴⁸¹. The shift into the 21st century did bring about political discourse with respect to education of Roma in Romania however, which culminated in a series of legislative measures in order to combat segregation. This commenced with the first Romanian Anti-discrimination Law, as a result of pre-accession conditions for Romania to the E.U, which incorporated the *Copenhagen Criteria*, which describes respect for minorities as being an integral part thereof⁴⁸². This first step was laudable and as a result of certain amendments, it now exceeds the minimum requirements laid down by European law⁴⁸³. Additionally, the work undertaken by Romania's National Council for Combating Discrimination⁴⁸⁴, as a result of its first successful (de-) segregation case, has been a step forward in ending the ongoing discriminatory practices in schools around the country. Notably one of the most significant legislative works however, concerns the *Ministry Order No.1540*, which not only bans segregation, but also equally encompasses a methodology in order to ascertain desegregation⁴⁸⁵. Just recently, Romani's new *National Education Law* was agreed and voted upon, which promulgates, amongst others, that abusive diagnosis of children

⁴⁷⁶ Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices .” *International Journal of Children's Rights* 19 (2011): 503.

⁴⁷⁷ Rostas, Iulius, Mihai Surdu en Marius Taba. „Interview with Costel Bercus from Romania.” *Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe*. Red. Iulius Rostas. Budapest: The Roma Education Fund & Central European University Press, 2012. 267; Moisa , Florin. „Roma School Desegregation Policies in Romania.” *Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe*. Red. Iulius Rostas. Budepest: The Roma Education Fund & Central European University Press, 2012. 294.

⁴⁷⁸ *Ibid.* 268.

⁴⁷⁹ *Ibid.* 267.

⁴⁸⁰ *Ibid.* 270.

⁴⁸¹ Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices .” *International Journal of Children's Rights* 19 (2011): 512.

⁴⁸² Moisa , Florin. „Roma School Desegregation Policies in Romania.” *Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe*. Red. Iulius Rostas. Budepest: The Roma Education Fund & Central European University Press, 2012. 283.

⁴⁸³ *Ibid.* 284.

⁴⁸⁴ The *Copenhagen Criteria* are a set of standards and rules upon which accession to the E.U. by candidate member states is conditioned.

⁴⁸⁵ Ministry of Education, Research, and Youth. „Order No. 1540.” 2007.

based on a number of grounds such as ethnicity, will be punishable by law⁴⁸⁶. Unfortunately, notwithstanding amongst others, the aforementioned commendable legislative measures,⁴⁸⁷ the situation of education for Roma in Romania remains substandard and deplorable⁴⁸⁸.

SEGREGATION AND DISCRIMINATION

106. Segregation is undoubtedly the most profound and predominant obstacle to the effective guarantee of the right to education for Roma in Romania. As substantiated by ample reports and field research, segregation in Romania takes on a multitude of forms, which, in order to be addressed, will need nuanced and specific solutions. Generally segregation in Romania can take one of three forms⁴⁸⁹. Segregation in its most basic and well-known form concerns the effective establishment of schools intended solely for Roma children, as opposed to schools attended by solely non-Roma children⁴⁹⁰. Segregated Roma schools as such are generally lacking in basic infrastructure, as portrayed by the absence of certain facilities such as a library, gyms, inadequate learning materials⁴⁹¹. Moreover, teaching staff in such Roma schools are generally unqualified, and prevalent high staff turnover rates, solely compound the issue of inadequate access and provision of standard education. The latter is substantiated by the proportionally large dropout rates resulting from these inadequate educational services, as opposed to dropout rates in non-Roma schools⁴⁹². An example derived from a recent study, which relied on statistics concerning the timeframe 1997 - 1999⁴⁹³.

⁴⁸⁶ Article 50(3) New Education Law: Moisa, Florin. „Roma School Desegregation Policies in Romania.” Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe. Red. Iulius Rostas. Budapest: The Roma Education Fund & Central European University Press, 2012. 285.

⁴⁸⁷ See for example: *Cooperation Memorandum for Ensuring the Access of Roma Children and Youth to Quality Education Through School Desegregation and the Promotion of Education for Identity; Governmental Strategy for Improvement of the Condition of the Roma; Stop Prejudices Against Ethnic Roma*.

⁴⁸⁸ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 965 – 966.

⁴⁸⁹ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 935 – 936.

⁴⁹⁰ *Ibid.*

⁴⁹¹ Andreescu, Gabriel. Analytical Report PHARE RAXEN CC Minority Education: National Focal Point Romania. European Monitoring Centre on Racism and Xenophobia. Vienna, 2004. 14; Surdu, Laura, Eniko Vincze en Marius Wamsiedel. Roma School Participation, Non-attendance and Discrimination in Romania. ROMANI CRISS. Bucharest: Publishing Vandemonde, 2011. 92.

⁴⁹² Surdu, Laura, Eniko Vincze en Marius Wamsiedel. Roma School Participation, Non-attendance and Discrimination in Romania. ROMANI CRISS. Bucharest: Publishing Vandemonde, 2011. 92 – 97.

⁴⁹³ *Ibid.* 93.

	Primary School Dropout	Lower Secondary School Dropout
Schools with less than 50% Roma	30,3	41,7
Schools with over 50% Roma	46,1	69,1
Total Rural Schools with Roma	32,4	44,2
Total Rural Schools	17,2	40

107. Segregation equally manifests itself based on misdiagnosis of children and their subsequent placement in special remedial schools⁴⁹⁴. Currently in Romania, Roma are disproportionately represented in such schools⁴⁹⁵. Given that such schools are intended for individuals and children with learning disabilities, and more often than not, Roma children do not have such learning disabilities, placement within these schools excessively constrains their ability to grow academically and creates an academic deficit hard to reverse⁴⁹⁶. Within this context, a slight nuance is necessitated however. Oftentimes Roma parents do not oppose placement of their children in remedial schools owing to the benefits of such schools, which prevail over the benefits of non-remedial schools⁴⁹⁷. Benefits range from free meals, to additional financial contributions, extended teaching programs – all of which render remedial schools potentially more attractive to Roma parents and families subjected to and trapped in otherwise poverty struck situations⁴⁹⁸.

108. A third and last form of segregation as it is known in Romania today, concerns segregation within the establishment of educational facilities, or within specific classrooms⁴⁹⁹. Whilst it is admittedly harder to substantiate, reports have concluded that it is not uncommon for Roma students to be taught in different classrooms than non-Roma students, while the

⁴⁹⁴ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 936.

⁴⁹⁵ *Ibid*; Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices .” International Journal of Children's Rights 19 (2011): 512.

⁴⁹⁶ Rostas, Iulius, Mihai Surdu en Marius Taba. „Interview with Costel Bercus from Romania.” Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe. Red. Iulius Rostas. Budapest: The Roma Education Fund & Central European University Press, 2012. 274.

⁴⁹⁷ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 936; Horvath, Istvan. Formal and Informal Education for Roma: Different Models and Experience - Two Decades of Educational Policies for the Roma: Lessons and Dilemmas from Romania. Institute for Ethnic Studies. Ljubljana , sd. 64.

⁴⁹⁸ Rostas, Iulius, Mihai Surdu en Marius Taba. „Interview with Costel Bercus from Romania.” Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe. Red. Iulius Rostas. Budapest: The Roma Education Fund & Central European University Press, 2012. 275.

⁴⁹⁹ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 936.

school maintains the pretense of being a desegregated school⁵⁰⁰. Oftentimes such segregation is attributed to lacking academic skills and the need to separate those who lack certain skills from those who do not⁵⁰¹. Furthermore, under the pretext of giving classes focused on acquiring and mastering the Romani language, an aspect of a governmental initiative to preserve Roma culture and identity, Roma students were and are frequently identified and kept separately from other non-Roma students⁵⁰². Naturally, this solely enhances the disparity between the two groups and intensifies the stigmatization of Roma. The latter is exemplified by, amongst others the violent reactions amounting to death threats by non-Roma individuals and parents that have occurred as a result of desegregation measures within certain schools⁵⁰³.

109. The foregoing paints a bleak picture, denoting *de facto* segregation within the Romanian educational system. This as opposed to the absence of *de jure* segregation owing to the anti-discriminatory legislation and minority protective measures adopted by the Romanian government⁵⁰⁴. Whereas the Romanian government has taken large steps in ascertaining the “*inclusive education*”⁵⁰⁵ they promulgate and aspire to attain by the adoption of such instruments, much remains to be said concerning the enforceability thereof. Recalling case law concerning segregation of Roma children in educational facilities, positive action taken to ameliorate the conditions of Roma, especially within the realm of education, will be assessed with great scrutiny. Whilst the *de facto* segregation may not be directly attributable to the Romania as a State, the foregoing leads to the conclusion, that a lack of adequate measures to ensure enforceability anti-discrimination instruments and the eradication of segregation can amount to violations of article 14 ECHR as well as article 2 of the First Protocol of the ECHR.

⁵⁰⁰ Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices.” International Journal of Children's Rights 19 (2011): 512.

⁵⁰¹ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 936.

⁵⁰² Rostas, Iulius, Mihai Surdu en Marius Taba. „Interview with Costel Bercus from Romania.” Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe. Red. Iulius Rostas. Budapest: The Roma Education Fund & Central European University Press, 2012. 276.

⁵⁰³ Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” Columbia Law Review 4.110 (2010): 968.

⁵⁰⁴ Andreescu, Gabriel. Analytical Report PHARE RAXEN CC Minority Education: National Focal Point Romania. European Monitoring Centre on Racism and Xenophobia. Vienna, 2004. 14; Moisa , Florin. „Roma School Desegregation Policies in Romania.” Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe. Red. Iulius Rostas. Budepest: The Roma Education Fund & Central European University Press, 2012. 292.

⁵⁰⁵ **Inclusive Education** as defined by the Romanian government as being “*a permanent process of improving the school, aimed at exploiting the existing resources, especially human ones, to support participation in the education of all persons from the community.*” Moisa , Florin. „Roma School Desegregation Policies in Romania.”: Ten Years After - A History of Roma School Desegregation in Central and Eastern Europe. Red. Iulius Rostas. Budepest: The Roma Education Fund & Central European University Press, 2012. 288.

110. Alarming, segregation in its various forms is not the sole impediment to effective enjoyment of the right to education in Romania. As a result of a variety of factors, academic enrollment is despairingly low and drop out rates far exceed national averages of non-Roma students, at every educational level⁵⁰⁷. To exemplify the latter – whereas non-Roma students overall enjoy 11.2 years of education, Roma children only enjoy approximated 6.8 years of education⁵⁰⁸. Moreover, although statistics depict that generally Roma enrollment in schools apparently has increased in past years, this doesn't necessarily reflect an actual increase of enrollment. In part this can be ascribed to the mere fact that Roma individuals already enrolled in educational facilities are gradually self-identifying themselves as being Roma. Additional to these low enrollment rates, high drop out rates prevail amongst Roma students. A study conducted by UNDP concluded that 30% of Roma in Romania whom are registered students, drop out before the conclusion of the fourth grade, two out of three do not complete primary school and two out of five do not even attend primary school⁵⁰⁹. Naturally a variety of causes underlie the low enrollment rates and high drop out rates, ranging from lacking financial means, as well as cultural discrepancies⁵¹⁰.

111. In light of the obligations imposed upon Romania under article 2 of the First Protocol of the ECHR, it is uncontested that positive action is required in ensuring Roma children their right to education. Situations in which desegregation attempts lead to violence must be avoided at all costs, and undoubtedly require swift and coherent reprisals, as further stigmatization and segregation stands in stark contradiction with both the article 2 of the First Protocol of the ECHR, as well as article 14 ECHR. Notwithstanding the aforementioned however, as ascertained by European case law, a margin of appreciation does exist in implementing norms enshrined in the ECHR into domestic law. Whilst the enforceability of those norms within Romania, regarding education and anti-discriminatory legislation is lacking, it cannot go unnoticed that Romania has in fact taken targeted positive action in order to correct the inequalities Roma students face. That said, with respect to taking facilitative measures that will further ensure and guarantee the right to education through access to education, it remains questionable whether Romania is in compliance with the concerned provisions.

⁵⁰⁶ Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices .” International Journal of Children's Rights 19 (2011): 504.

⁵⁰⁷ Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices .” International Journal of Children's Rights 19 (2011): 512.

⁵⁰⁸ Surdu, Laura, Eniko Vincze en Marius Wamsiedel. Roma School Participation, Non-attendance and Discrimination in Romania. ROMANI CRISS. Bucharest: Publishing Vandemonde, 2011. 29.

⁵⁰⁹ Roth, Maria en Florin Moisa . „The right to education of Roma children in Romania: European policies and Romanian practices .” International Journal of Children's Rights 19 (2011): 504.

⁵¹⁰ *Ibid.* 507 – 510.

C. The Right to Housing

1. Theoretical Analysis

SOURCES

112. Whilst arguably less explicitly encompassed within the ECHR, the right to housing equally finds its roots in a multitude of international and regional treaties⁵¹¹. The origin of the right to housing dates back to 1948, when it was incorporated in the UDHR⁵¹² and subsequently expanded upon in both the ICCPR⁵¹³ as well as the ICESCR⁵¹⁴. Other relevant conventions and treaties encompassing this (an aspect of this) right are the CERD⁵¹⁵, CEDAW⁵¹⁶, and the CRC⁵¹⁷. Equally so, regional instruments have included the right to housing such as, amongst others, the European Social Charter⁵¹⁸, as well as the ECHR⁵¹⁹. In addition to these *binding* legislative instruments, a vast amount of *non-binding* instruments have been adopted, equally proclaiming the right to housing and the implications thereof, such as the *Global Strategy for Shelter for the Year 2000*⁵²⁰, the *Vancouver Declaration on Human Settlements and the Vancouver Action Plan of 1976*⁵²¹, and the *Beijing Declaration and Platform for Action*⁵²². The combination of these instruments illustrate the global consensus with respect to the aforementioned right, and from it, it can be derived that this right is one of an international customary nature⁵²³. Notwithstanding the multitude of codifications regarding this right, article 11 of the ICESCR⁵²⁴ is conceivably the most comprehensive and fundamental foundation of this provision⁵²⁵. Precisely for this reason, the

⁵¹¹ Leckie, Scott. „The Human Right to Adequate Housing.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 151 – 153; UN Habitat. The Right to Adequate Housing (Fact Sheet No. 21/Rev.1). Office of the United Nations High Commissioner for Human Rights. Geneva: United Nations, 2009. 10 - 15.

⁵¹² Article 25(1) UDHR.

⁵¹³ Article 17 ICCPR.

⁵¹⁴ Article 11 ICESCR.

⁵¹⁵ Article 5 (e)(iii) CERD.

⁵¹⁶ Article 14(2) CEDAW.

⁵¹⁷ Article 27 CRC.

⁵¹⁸ Article 31 ESC (1996).

⁵¹⁹ Article 8 ECHR.

⁵²⁰ UN General Assembly . „Global Strategy for Shelter for the Year 2000 (A/RES/43/181).” General Assembly Resolution. United Nations, 20 December 1988.

⁵²¹ UN Conference on Human Settlements. „Vancouver Declaration on Human Settlements and the Vancouver Action Plan of 1976.” Vancouver: United Nations, 1976. 44.

⁵²² United Nations Specialized Conferences. „Beijing Declaration and Platform for Action (A/CONF.177/20).” United Nations, October 1995.

⁵²³ Leckie, Scott. „The Human Right to Adequate Housing.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 151 – 153; UN Habitat. The Right to Adequate Housing (Fact Sheet No. 21/Rev.1). Office of the United Nations High Commissioner for Human Rights. Geneva: United Nations, 2009. 10 -15; Article 38 - United Nations. „Statute of the International Court of Justice.” San Francisco: United Nations, 24 October 1945.

⁵²⁴ Article 11: UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 Jan 1976.

⁵²⁵ Paragraph 3: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing.” General Comment. United Nations, 1991. 7.

primary focus in what follows will be on the concerned article, its subsequent relevant General Comments, and the state obligations arising from this right.

SCOPE OF ARTICLE 11 ICESCR

*Article 11.1 ICESCR*⁵²⁶

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

113. Whilst it is uncontested that the ICESCR contains economic, social and cultural rights, and primarily imposes an *obligation of means* upon state parties⁵²⁷, the relevance thereof cannot be undermined. As aforementioned, the interlinked and interdependent nature of human rights, and equally so, the absence of a hierarchy within international human rights law (see *supra* 17), entail that aspects of these economic, social and cultural rights require immediate fulfillment of obligations therein enshrined, rather than an application of the *progressive development* principle⁵²⁸. Far too often States have attempted to justify non-adherence to the obligations arising from article 11 ICESCR by basing themselves upon this principle, claiming that they are, to the extent possible, taking steps to ensure full enjoyment of the concerned right⁵²⁹. Within this context, the Committee on Economic, Social and Cultural Rights, the main authoritative body with respect to interpretation and implementation of the ICESCR⁵³⁰, published two pertinent, interpretative documents, namely General Comment 4⁵³¹ and General Comment 7⁵³². These General Comments, stipulate the sole authoritative interpretations of article 11 ICESCR, and denote precisely what the obligations for states are in complying with the obligations found therein⁵³³.

⁵²⁶ Article 11: UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 Jan 1976.

⁵²⁷ Article 2: Article 11: UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 Jan 1976.

⁵²⁸ Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing.” General Comment. United Nations, 1991. 7.

⁵²⁹ Kabir, Abul Hasnat Monjurul. „Development and Human Rights.” Asia-Pacific Journal on Human Rights and the Law 3 (2002): 98.

⁵³⁰ Senders, Mignon. „Women and the Right to Adequate Housing .” Netherlands Quarterly of Human Rights 16 (1998): 178-179.

⁵³¹ Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵³² Committee on Economic, Social and Cultural Rights. General Comment 7: Forced Evictions (E/1998/22).” General Comment. Geneva: United Nations, 1997. 6.

⁵³³ Senders, Mignon. „Women and the Right to Adequate Housing .” Netherlands Quarterly of Human Rights 16 (1998): 179-180.

DEFINING HOUSING

114. General Comment 4 elaborates on the right to *adequate* housing in general terms, approaching the topic in a broad sense, whereas, General Comment 7 stipulates the obligations and practicalities of *forced eviction*, as an aspect of the right to housing. As stipulated repeatedly in doctrine⁵³⁴, General Comment 4 reaffirms the right to housing as being quintessential to the enjoyment of both civil and political rights, and economic, social and cultural rights⁵³⁵. By means of example, housing plays a pivotal role in the enjoyment of both physical as well as mental wellbeing, as well as the right to education, freedom of expression, freedom association, the right to security of persons and the right to privacy⁵³⁶.

115. General Comment 4 equally reiterates that this provision is applicable to *everyone* within the jurisdiction of state parties⁵³⁷, irrespective of affiliation or status of any sort, which is of extreme importance regarding Roma minorities. Furthermore, it stipulates that the referral to housing exceeds the mere notion of shelter, and should thus not be interpreted in a narrow, nor restrictive sense⁵³⁸. Housing within article 11 ICESCR subsequently extends to *adequate* housing, the latter encompassing security, peace and dignity⁵³⁹. In other words, state parties must commit to ensuring that individuals residing within their respective jurisdiction have access to safe, accessible housing with guarantees of “*privacy, adequate living space, lighting, electricity, ventilation and basic infrastructure*”. Additionally, houses should be found within reasonable distance of work and other basic resources, irrespective of whether they are found in rural or urban areas⁵⁴⁰.

116. In defining what constitutes *adequate* housing, the concerned Committee took to enumerating certain factors, which must be incorporated in an assessment thereof, as denoted in paragraph 8 of the concerned General Comment 4. These factors make a referral to, amongst others, as this is *not* an exhaustive list, accessibility, affordability, habitability, and

⁵³⁴ See for example: UN Habitat. The Right to Adequate Housing (Fact Sheet No. 21/Rev.1). Office of the United Nations High Commissioner for Human Rights. Geneva: United Nations, 2009. 9; Kabir, Abul Hasnat Monjurul. „Development and Human Rights.” Asia-Pacific Journal on Human Rights and the Law 3 (2002): 104.

⁵³⁵ Paragraph 1 & 7: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵³⁶ Kabir, Abul Hasnat Monjurul. „Development and Human Rights.” Asia-Pacific Journal on Human Rights and the Law 3 (2002): 104

⁵³⁷ Paragraph 6: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵³⁸ UN Habitat. The Right to Adequate Housing (Fact Sheet No. 21/Rev.1). Office of the United Nations High Commissioner for Human Rights. Geneva: United Nations, 2009. 3 – 4; Paragraph 1 & 7: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵³⁹ Paragraph 7: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵⁴⁰ *Ibid.*

legal security of tenure⁵⁴¹. An underlying point of concern both in this paragraph as well as other paragraphs within this instrument, regards the necessity to heed the particularities of especially vulnerable and disadvantaged social groups⁵⁴². The concerned provisions bestow upon state parties, the obligation to give “*due priority*” in ascertaining and guaranteeing the right to housing to these individuals⁵⁴³.

STATE OBLIGATIONS UNDER ARTICLE 11 ICESCR

117. Whilst the Committee acknowledges the disparity between the legal obligations arising from article 11 ICESCR and the reality regarding adherence thereto⁵⁴⁴, it re-emphasizes that certain aspects of this provision, precisely due to the interlinked and interdependent nature of this right with other human rights, require immediate compliance rather than a progressive attainment⁵⁴⁵. Within this context the Committee rightfully proclaims that the right to housing encompasses two aspects. Namely, in first instance, the refrainment of governments from certain measures, such as for example, forced eviction (*Infra* 89), which can be categorized under the general human rights obligations to respect and protect respective rights⁵⁴⁶. In second instance, it requires from state parties the facilitation of “*self-help*” for individuals whom are faced with housing difficulties as an aspect of a States’ positive obligation to fulfill the right to housing⁵⁴⁷. Furthermore, if governments are faced with housing difficulties that exceed their respective capacities to ameliorate, it is incumbent upon those states to seek assistance from the international community⁵⁴⁸. Additional to these aforementioned obligations which require *immediate* compliance, the Committee established that states must “*effectively monitor*” the housing situation within their jurisdiction,

⁵⁴¹ *Ibid.* Paragraph 8.

⁵⁴² Chapman, Audrey R. en Benjamin Carbonetti. „Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Social and Cultural Rights.” Human Rights Quarterly 33.3 (2011): 685, 692, 694; Committee on Economic, Social and Cultural Rights. „General Comment 3: The nature of States parties obligations (E/1991/23).” General Comment. Geneva: United Nations, 14 December 1990.

⁵⁴³ Paragraph 11: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵⁴⁴ Leckie, Scott. „The Human Right to Adequate Housing.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 149; Paragraph 4: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁵⁴⁵ United Nations Housing Rights Programme. Housing Rights Legislation: Review of International and National Legal Instruments. Report No.1. (UN-HABITAT) United Nations Human Settlements Programme. Nairobi: United Nations, 2002. 20 – 22; Leckie, Scott. „The Human Right to Adequate Housing.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 153 – 157; UN Habitat. The Right to Adequate Housing (Fact Sheet No. 21/Rev.1). Office of the United Nations High Commissioner for Human Rights. Geneva: United Nations, 2009. 30 – 31.

⁵⁴⁶ UN Habitat. The Right to Adequate Housing (Fact Sheet No. 21/Rev.1). Office of the United Nations High Commissioner for Human Rights. Geneva: United Nations, 2009. 30 – 31.

⁵⁴⁷ *Ibid.* 33 – 34.

⁵⁴⁸ Article 11 (1): UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 Jan 1976; Paragraph 19: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

bestowing upon them an investigatory obligation, with a specific emphasis on gathering detailed information regarding housing situations of particularly vulnerable groups and individuals⁵⁴⁹.

GENERAL COMMENT 7 ICESCR – FORCED EVICTIONS

118. An aspect of particular importance within the sphere of the right to housing concerns the practice of forced evictions. Whilst General Comment 4 restricts its content to denoting that forced evictions are *prima facie* incompatible with the provisions enshrined in the ICESCR and particularly in article 11 ICESCR⁵⁵⁰, the Committee elaborated upon this issue in their subsequent General Comment 7⁵⁵¹. This incompatibility is further substantiated by article 17 ICCPR⁵⁵², in which it is stated that no individual shall be subjected to undue interference in, amongst others, his or her home. Within the scope of this provision, forced eviction is delineated as being, “ *the permanent or temporary removal against their will of individuals, families, and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection*”⁵⁵³. This is of particular relevance to Roma as they are frequently subjected to situations in which they are forced to leave their homes and/or land without prospects of new housing possibilities⁵⁵⁴.

119. As is the case with general violations of the right to housing, forced evictions may give rise to numerous violations of rights enshrined in the ICCPR, such as the right to life, the right to security of persons, the right to privacy as well as the right to enjoyment of individual possessions⁵⁵⁵. Whilst limitations on the right to housing can effectively be implemented as a

⁵⁴⁹ Paragraph 13: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23) .” General Comment. Geneva: United Nations, 1991. 7; United Nations Housing Rights Programme. Housing Rights Legislation: Review of International and National Legal Instruments. Report No.1. (UN-HABITAT) United Nations Human Settlements Programme. Nairobi: United Nations, 2002. 22.

⁵⁵⁰ Paragraph 18: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23) .” General Comment. Geneva: United Nations, 1991. 7.

⁵⁵¹ Committee on Economic, Social and Cultural Rights. „General Comment 7: Forced Evictions (E/1998/22) .” General Comment. Geneva: United Nations, 1997. 6.

⁵⁵² Article 17: UN General Assembly. „International Covenant on Civil and Political Rights (999 UNTS 171) .” United Nations, 16 December 1966

⁵⁵³ Paragraph 3: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23) .” General Comment. Geneva: United Nations, 1991. 7.

⁵⁵⁴ See for example: European Court of Human Rights. „Case of Yordanova and Others v. Bulgaria (App.No. 25446/06) .” Final Judgment. Strasbourg: Council of Europe, 24 April 2012. 33; European Court of Human Rights . „Case of Moldovan and others v. Romania (App nos. 41138/98 & 64320/01) .” Final Judgment. Strasbourg: Council of Europe , 30 November 2005. 42; European Committee of Social Rights. „Centre on Housing Rights and Evictions (COHRE) v. Italy (Complaint No. 58/2009) .” Merits - Judgment. Strasbourg: Council of Europe, 25 June 2010. 43.

⁵⁵⁵ UN Commission on Human Rights. „Prohibition of Forced Evictions (E/CN.4/RES/2004/28) .” Commission on Human Rights Resolution: 2004/28. United Nations, 14 April 2004. 2; Chaudbry, Shivani.

result of legislative and external factors and thus be justifiable, these limitations must adhere to the conditions set forth in General Comment 7 and must be in full compliance with the conditions promulgated in article 4 ICESCR⁵⁵⁶. Namely, these limitations may only be implemented insofar they are the result of the implementation of legislative norms, and solely insofar they are compatible with the nature of that right and necessitated by the general welfare of public society⁵⁵⁷. When limitations on the right to housing, and more specifically, forced evictions are necessitated, state parties are bound to provide adequate protection and assistance to those whom are affected by such measures⁵⁵⁸. This entails that state parties in such instances must adhere to the principles of proportionality and reasonableness. To this end, Paragraph 15 of the concerned General Comment 7 sets forth a non-exhaustive list of procedural guarantees that must be made accessible those who are forcibly evicted⁵⁵⁹. Some of these guarantees include, amongst others, effective dialogue with those affected, reasonable notice of the eviction orders, and information with respect to alternative housing options⁵⁶⁰. Additionally, within their respective capacities, states are held to *ensure* that adequate alternative housing is proposed, and/or, the access to “*productive land*”⁵⁶¹.

120. Lastly, the concerned General Comment casts enhanced emphasis on the rights of minorities and their specific vulnerability in cases of forced eviction⁵⁶². Given that vulnerable groups, amongst which minorities, suffer disproportionately from instances of forced eviction, the Committee recalls the obligations incumbent upon states as a result of articles 2.2 and 3 of the ICESCR⁵⁶³. These provisions affirm that States are bound to ensure that no discriminatory behavior was exercised in instances of forced eviction. Unfortunately, it suffices to mention the instances of forced eviction in France, Italy, Bulgaria and Romania to portray that the effective implementation thereof is lacking in Europe⁵⁶⁴.

„Chapter 15: Development-induced Displacement and Forced Eviction.” Studies in Transnational Legal Policy 41 (2010): 602 – 603, 605.

⁵⁵⁶ Paragraph 5, 14 – 15: Committee on Economic, Social and Cultural Rights. „General Comment 7: Forced Evictions (E/1998/22).” General Comment. Geneva: United Nations, 1997. 6.

⁵⁵⁷ *Ibid.* Paragraph 5.

⁵⁵⁸ *Ibid.* Paragraph 14 – 15.

⁵⁵⁹ *Ibid.* Paragraph 15.

⁵⁶⁰ *Ibid.*; Chaudbry, Shivani. „Chapter 15: Development-induced Displacement and Forced Eviction.” Studies in Transnational Legal Policy 41 (2010): 603 – 604.

⁵⁶¹ Paragraph 16: Committee on Economic, Social and Cultural Rights. „General Comment 7: Forced Evictions (E/1998/22).” General Comment. Geneva: United Nations, 1997. 6.

⁵⁶² *Ibid.* Paragraph 10

⁵⁶³ *Ibid.*

⁵⁶⁴ Korando, Andrew M. „Roma Go Home: The Plight of European Roma .” Law and Inequality: A Journal of Theory and Practice 30 (2012): 125; European Court of Human Rights. „Case of Yordanova and Others v. Bulgaria (App.No. 25446/06) .” Final Judgment. Strasbourg: Council of Europe, 24 April 2012. 33; European Court of Human Rights . „Case of Moldovan and others v. Romania (App nos. 41138/98 & 64320/01).” Final Judgment. Strasbourg: Council of Europe , 30 November 2005. 42; European Committee of Social Rights. „Centre on Housing Rights and Evictions (COHRE) v. Italy (Complaint No. 58/2009).” Merits - Judgment. Strasbourg: Council of Europe, 25 June 2010. 43.

2. Application in Belgium

CONTEXTUALIZATION

121. In accordance with article 11.1 ICESCR, and its subsequent explanatory General Comment 4, the right to adequate housing is enshrined in article 23 of the Belgian Constitution. However, the implementation and regulation thereof is attributed to the different regions within Belgium⁵⁶⁵. Regarding the region of Flanders, implications of the right to housing are incorporated in the *Flemish Housing Code*⁵⁶⁶. Within this *Flemish Housing Code*, acknowledgment is made of the fact that encampment sites are an integral part of residential policies, which may be of particular pertinence to those Roma who do practice a (semi-) nomadic way of life⁵⁶⁷. Moreover, it incorporates the principles required in assessing whether housing is effectively adequate, and stipulates that actions by devious landlords may give rise to penal responsibility⁵⁶⁸. Whilst legislatively the region of Flanders adheres to the obligations encompassed in the right to housing, numerous factors have and are hindering effective implementation thereof with respect to Roma⁵⁶⁹. Whether Roma, or more generally, migrants, have access to adequate housing in Flanders will depend on whether they have managed to obtain a residence permit therein⁵⁷⁰. When in possession of a valid residence permit, this provides such individuals, amongst which Roma, access to a variety of possibilities including access to social housing and housing benefits⁵⁷¹. However, those not in possession of such a permit, solely have access to the private housing market⁵⁷². Although the right to adequate housing is guaranteed to all within Belgian jurisdiction, depending on the status migrants have, they will be confronted with a variety of deplorable conditions, which cannot be seen as being in compliance with international norms concerning housing.

122. As aforementioned, a valid residence permit will guarantee access to social housing and housing benefits. However, a structural deficiency with respect to the availability of social housing hinders effective guarantees of this right. The lack of adequate and sufficient housing poses an even bigger problem for Roma families given that oftentimes these families

⁵⁶⁵ Article 7bis *in juncto* article 23 Belgian Constitution.

⁵⁶⁶ „Flemish Action Plan on Central and Eastern European (Roma) Migration.” Flemish Government, 2012. (*hereinafter* Flemish Housing Code)

⁵⁶⁷ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” *Thematic Study*. Centre for Equal Opportunities and Opposition to Racism, March 2009. 15.

⁵⁶⁸ *Ibid.* 3.

⁵⁶⁹ Wauters, Joris, Noel Clycq en Christiane Timmerman. *Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf*. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 85 – 88.

⁵⁷⁰ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” *Thematic Study*. Centre for Equal Opportunities and Opposition to Racism, March 2009. 3, 21, 29.

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

are relatively large, and cannot be held within the available houses⁵⁷³. Within this context it must be noted that Roma families (as other eligible candidates for social housing) are placed upon a waiting list for an extensive period of time, only to ultimately get denied social housing based upon the size of their families⁵⁷⁴. Given that such dilemmas primarily affect Roma families it remains questionable whether this doesn't constitute indirect discriminatory treatment, notwithstanding the lack of intent to discriminate. Moreover, in Flanders, in order to gain access to social housing, certain conditions must be met, in addition to the requirements for a valid residence permit – namely a *permanent* residence permit must be obtained, and access is equally conditioned upon a language requirement⁵⁷⁵. Additionally, in some cases individuals may be required to undergo an integration procedure⁵⁷⁶. As it stands, only a handful of Roma or Central and Eastern European individuals have been allotted social housing, implying that those who cannot or have not obtained social housing are required to find housing within the private housing market⁵⁷⁷.

123. For those whom do not comply with the requirements to obtain a valid residence permit or, alternatively, do have such a permit yet have not obtained access to the social housing opportunities, housing must be acquired via the private housing market⁵⁷⁸. Unfortunately, this market puts the concerned individuals at a greater risk of maltreatment, ranging from *de facto* discriminatory practices, dishonest landlords and deplorable structural housing conditions⁵⁷⁹. Within this regard it must be noted, that the federal anti-discrimination law prohibits discrimination in housing with respect to goods publicly placed on the market⁵⁸⁰. This is further underscored by the federal law, which prohibits the collection of ethnic data concerning non-scientific matters⁵⁸¹. The latter entails that landlords cannot refuse publicly made available goods, whether for rent or sale, to individuals based on their ethnicity⁵⁸².

124. Concerning those Travellers who fall under the scope of Roma within this work, it must be reiterated, that encampment sites are an integral aspect of residential policies, which

⁵⁷³ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 6.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” Thematic Study. Centre for Equal Opportunities and Opposition to Racism, March 2009. 21.

⁵⁷⁶ Hemelsoet, Elias. „De Inburgering van Roma - Twee maten, twee gewichten? ” Alert 2 (2013): 3.

⁵⁷⁷ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 6.

⁵⁷⁸ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” Thematic Study. Centre for Equal Opportunities and Opposition to Racism, March 2009. 3.

⁵⁷⁹ „National Roma Integration Strategy .” Samenst. Staatssecretaris voor Maatschappelijke Integratie. Staatssecretaris voor Maatschappelijke Integratie, 6 March 2012. 11.

⁵⁸⁰ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” Thematic Study. Centre for Equal Opportunities and Opposition to Racism, March 2009. 16.

⁵⁸¹ *Ibid.* 17.

⁵⁸² *Ibid.*

is further substantiated by the Flemish legal recognition thereof in the *Flemish Housing Code*. However, policies concerning encampment sites are based upon voluntary cooperation of municipalities, entailing that no legal obligation exists to establish such sites⁵⁸³. In order to incentivize establishment of such sites, the Flemish government foresees in stimulatory initiatives such as subsidies, information and guidelines⁵⁸⁴. Further substantiating these regulations, is the Flemish Decree promulgated in 1998 with respect to the protection of minorities, which specifically identifies Travellers as a target group in need of enhanced protection⁵⁸⁵. Notwithstanding the legislative and political efforts aimed at ensuring adequate and sufficient camping sites however, the availability thereof falls short of the targets announced⁵⁸⁶.

PRECARIOUS HOUSING CONDITIONS

125. The assessment of the housing conditions of Roma, whom do not have access to social housing in Flanders, remains a burdensome task for a variety of reasons. First, scientific research within this scope would entail self-identification by Roma given the lack of available ethnic data to depart from⁵⁸⁷. Due to stigmatization, discrimination and the general distrust of non-Roma, many may not be inclined to cooperate with such initiatives⁵⁸⁸. Moreover, field research that has been concluded in this regard, revealed that although the conditions many Roma in Flanders live in is highly sub-standard, it nevertheless exceeds the conditions they were subjected to in their respective countries of origin⁵⁸⁹. Therefore, Roma in Flanders feel less inclined to contest their current housing situation. In conjunction with the foregoing, the uncertainty and potential illegality of their stay hinder Roma in lodging complaints concerning their respective situations, given that this may pave the path to expulsion – a consequence to avoid at all costs⁵⁹⁰. As a result, Roma reside in the lowest standard rental properties, which lack adequate facilities such as, amongst others, electricity, running water, adequate heating and other basic amenities, such as bathrooms⁵⁹¹. Additionally, many of these properties subject Roma families to a variety of safety and health hazards, as exemplified by damp rooms, parasites, and outdated equipment, which no longer complies with safety

⁵⁸³ *Ibid.* 15.

⁵⁸⁴ *Ibid.* 15 – 16.

⁵⁸⁵ Flemish Government. „Decree on the Flemish policy towards ethnic-cultural minorities.” Decree. 1998. 16.

⁵⁸⁶ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” Thematic Study. Centre for Equal Opportunities and Opposition to Racism, March 2009. 16.

⁵⁸⁷ „National Roma Integration Strategy .” Samenst. Staatssecretaris voor Maatschappelijke Integratie. Staatssecretaris voor Maatschappelijke Integratie , 6 March 2012. 9.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 85 – 88.

⁵⁹⁰ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 2.

⁵⁹¹ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 2, 7 - 8; and see for example - Vancoppenolle, Eric. „Roma kamperen al vijf weken op middenberm Kleine Ring.” Brussel Nieuws.be 22 Mei 2013.

norms⁵⁹². To make matters worse, the soaring rental prices oblige families to rent properties not adequately equipped to deal with the size of the families, resulting in severe overcrowding within Roma homes⁵⁹³. In obtaining access to such rental properties, Roma families are often confronted with *de facto* discriminatory behavior by landlords, whom either refuse to rent the concerned property based on ethnicity or dishonest landlords who abuse the already precarious situations of these individuals, in flagrant contradiction with the stipulations of the anti-discriminatory provisions in the *Flemish Housing Code*⁵⁹⁴. Whilst the latter is indeed susceptible to criminal investigations⁵⁹⁵, Roma often do not take judicial steps as this may result in eviction notwithstanding the lack of a legally enforceable obligation to aid in finding new housing for those evicted.

SQUATTING AND EVICTION

126. Another concern with respect to the right to housing is the practice of squatting⁵⁹⁶. Due to the fact that this is not explicitly forbidden by Flemish nor Belgian federal legislation, Roma, oftentimes, are inclined to resort to such measures to ensure a roof above their heads⁵⁹⁷. Whilst it is uncontested that criminal activities may and have resulted from this practice, it is equally uncontested that squatting implies various detrimental effects on Roma who engage therein. In addition to the constant uncertainty regarding their housing situation, and the potential for immediate eviction, places for squatting equally often do not meet the minimum standards required under the right to adequate housing⁵⁹⁸. Moreover, the aforementioned evictions, if not undergone with respect for the conditions delineated in General Comment 7 to article 11.1 ICESCR, may give rise to violations thereof, resulting in state responsibility. Conclusively, Flanders has legislatively implemented the obligations arising under article 11.1 ICESCR, however the enforceability and adherence thereto is largely substandard. In addition to the lack of data on housing of Roma in Flanders, it appears that the fear for eviction and potential expulsion prevails over the necessity for adequate

⁵⁹² Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 7 – 8.

⁵⁹³ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” Thematic Study. Centre for Equal Opportunities and Opposition to Racism, March 2009. 29.

⁵⁹⁴ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 7 – 8.

⁵⁹⁵ Centre for Equal Opportunities and Opposition to Racism. „Housing Conditions of Roma and Travellers : Belgium RAXEN National Focal Point.” Thematic Study. Centre for Equal Opportunities and Opposition to Racism, March 2009. 8.

⁵⁹⁶ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 8; Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 86.

⁵⁹⁷ Fransen, Anke. „Kraken van Woningen Strafbaar Maken.” 22 April 2013. De Redactie.be. 4 May 2013 <http://m.deredactie.be/cm/vrtnieuws.mobile/mpolitiek/1.1610740>.

⁵⁹⁸ See for example: Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 7-8. (Particularly the example of the child falling through the ground floor, into the cellar, which was infested with mosquitos, feces and water).

housing⁵⁹⁹. However, the right to adequate housing is not a result of judicial complaints, but must be attained pre-emptively, insofar possible, taking into account the socio-economic capacity of member states⁶⁰⁰. The mere fact that many residential establishments, precisely those inhabited by Roma, lack a variety of basic amenities, and the lack of measures taken to address these situations, stands in stark contrast with the positive obligations arising under article 11.1 ICESCR. Again the enhanced vulnerability of this target group must be taken into regard when assessing adherence to the right to housing. The latter is paramount given that recent years have resulted in the conclusion that an increased amount of Roma are being forced to survive on the streets and public places such as train stations – again in violation of article 11.1 ICESCR⁶⁰¹.

3. Application in Romania

CONTEXTUALIZATION

127. Following the fall of Communism, Romania was confronted with a privatization wave in 1990, which had catastrophic implications for its Roma community⁶⁰². The privatization resulted in a mass loss of employment opportunities for Roma, and equally so, State withdrawal from housing provision resulted in a severe loss of access to housing for Roma⁶⁰³. Historical developments solely compounded the aforementioned issues, as many Roma during the Communist regime, did not receive proper and formalized documents, denoting their ownership of the property that they inhabited⁶⁰⁴. As a result, following the culmination of Communism, many of these properties still lack adequate registration and ownership documents, and the occupation of these properties by Roma, is oftentimes based on informal agreements and consent⁶⁰⁵. Not inconceivably, this places Roma in highly precarious situations, as a variety of issues arise with respect to their uncertainty of tenure⁶⁰⁶. Due to the inadequate registration, and lack of formalized property documentation, many Roma

⁵⁹⁹Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 16; Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 86.

⁶⁰⁰ Paragraph 1: Paragraph 18: Committee on Economic, Social and Cultural Rights. „General Comment 4: The Right to Adequate Housing (E/1992/23).” General Comment. Geneva: United Nations, 1991. 7.

⁶⁰¹ Vlaams Minderhedencentrum. „Hoe krijg je Romakinderen naar school? Het motivatieplan 'Scholarisatie Roma'.” Annual Report. 2008. 17; Hemelsoet, Elias. „De sociale inclusie van Roma: vragen bij een Europees project.” Oikos (2011): 46.

⁶⁰² Achim, Viorel. The Roma in Romanian History. Bucharets: Central European University Press, 2004. 209.

⁶⁰³ Amnesty International. „Briefing to the Romanian Government on the right to adequate housing with regard to the marginalized Romani communities (EUR 39/001/2013).” 2013. 2.

⁶⁰⁴ Fleck, Gabor en Cosima Rughinis. Come Closer - Inclusion and Exclusion of Roma in Present-Day Romanian Society. Bucharest: National Agency for Roma, 2008. 115.

„Flemish Action Plan on Central and Eastern European (Roma) Migration.” Flemish Government, 2012. 115.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

encounter difficulties receiving adequate identification papers, which subsequently results in difficulties obtaining social security, birth certificates and equally so contracts with electrical networks, water companies and gas companies for their homes⁶⁰⁷. Furthermore, due to the absence of registration, and the lack of formalized possession of properties, Roma face the risk of being forcibly evicted from their homes⁶⁰⁸.

128. The right to housing as denoted in article 11 ICESCR, is an integral aspect of Romanian legislation, due to article 11.1 of the Romanian Constitution, which denotes that international treaties prevail over domestic legislation⁶⁰⁹. The Romanian Housing law, whilst it does incorporate certain aspects of the principles enshrined in article 11 ICESCR, such as for example, factors concerning habitability of housing, fails to provide security for tenure for all⁶¹⁰. The latter entails, that solely the individuals with formalized documentation are protected against forced evictions, thus not adequately transposing the entirety of article 11 ICESCR in its domestic legislation⁶¹¹. Moreover, whereas the Ministry of Regional Development and Tourism in addition to the National Agency for Housing are responsibly for Romanian housing policies⁶¹², due to decentralization, enforceability and implementation thereof is attributed to local authorities. Deplorably however, no monitoring nor evaluation mechanisms exist with respect to local adherence to the right to housing⁶¹³. Notwithstanding the *Governmental Housing Strategy* which bears in mind the specific vulnerability of vulnerable minority groups, in addition to the *Strategy of the Government of Romania for Improving the Condition of Roma 2001-2010*, and the *Joint Inclusion Memorandum 2005-2010*, a lack of political will nevertheless plagues the implementation of the right to housing with respect to Roma, as substantiated by amongst others, the ongoing deplorable living conditions in conjunction with documented discriminatory practices by local authorities⁶¹⁴.

PRECARIOUS HOUSING CONDITIONS

129. Housing availability in Romania can be divided in three categories, namely the private housing market, social housing and the availability of encampment sites⁶¹⁵. However, given the aforementioned privatization wave, the availability of social housing is extremely

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.* 15 – 16.

⁶⁰⁹ Amnesty International. „Mind the Legal Gap - Roma and the Right to Housing in Romania (EUR 39/004/2011).” 2011. 4; article 11.1 Romanian Government. „Romanian Constitution.” 1991.

⁶¹⁰ Amnesty International. „Mind the Legal Gap - Roma and the Right to Housing in Romania (EUR 39/004/2011).” 2011. 4; Amnesty International. „Unsafe Foundations - Secure the Right to Housing in Romania (EUR 39/002/2012).” 2012. 10 – 11.

⁶¹¹ *Ibid.*

⁶¹² European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 152.

⁶¹³ *Ibid.*; Amnesty International. „Unsafe Foundations - Secure the Right to Housing in Romania (EUR 39/002/2012).” 2012. 14 – 15.

⁶¹⁴ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 152 – 153.

⁶¹⁵ *Ibid.* 143.

limited⁶¹⁶. Moreover, such housing has given way to (informal) “*urban ghettos*”, which segregate Roma communities from the mainstream population, by placing such social housing properties and families lacking legal tenure on the outskirts of towns⁶¹⁷. The deplorable conditions, as demonstrated by the lack of basic facilities such as sewage, garbage disposal systems, gas and electricity in conjunction with severe overcrowding, within these ghettos further aggravate the housing experience of the concerned individuals, and stand in stark contrast with the principles enshrined in the right to housing of article 11 ICESCR⁶¹⁸. Equally so, within these social housing areas, Roma tenure of their properties is dependent upon local authorities, further compounding the uncertainty in which they live⁶¹⁹.

130. Lastly, due to an inability to pay rent or provide adequate documentation for their tenure, Roma face the prospects of forced eviction, mostly without sufficient prior notice or aid in finding alternative solutions to their predicament⁶²⁰. This has resulted in the establishment of a variety of informal settlements and camps on the outskirts of cities, sometimes instigated by local authorities, where the housing conditions are even bleaker⁶²¹. Notwithstanding the transposing of minimum standards for adequate housing in the Romanian Housing Law, local authorities have been documented on numerous occasions to cut off housing blocks in their entirety from water and electrical services, failing to assess alternative means to address non-payment of such facilities⁶²². In addition to lack of basic amenities, Roma here are subjected to expensive and irregular transport to the city centers, hindering their search for employment and the ability to consequently guarantee regular school attendance by their children⁶²³. Needless to say, the described conditions fall short by all means in their compliance with article 11 ICESCR.

SECURITY OF TENURE AND FORCED EVICTIONS

131. Irrespective of the legality of tenure, Romania as a state party to the ICESCR is bound to ensure certain guarantees when exercising limitations upon the right to housing by means of eviction. Eviction, as denoted in General Comments 4, and 7, can only take place insofar this pursues a legitimate aim, and is necessitated on grounds of public order (see *supra* 118). Additional thereto, are procedural guarantees that must be guaranteed in order to provide adequate protection to the evictees, when eviction is legitimate (see *supra* 118). Whilst it is

⁶¹⁶ *Ibid.* 144, 151.

⁶¹⁷ *Ibid.* 144.

⁶¹⁸ Amnesty International. „Briefing to the Romanian Government on the right to adequate housing with regard to the marginalized Romani communities (EUR 39/001/2013).” 2013. 4.

⁶¹⁹ Amnesty International. „Unsafe Foundations - Secure the Right to Housing in Romania (EUR 39/002/2012).” 2012. 12.

⁶²⁰ *Ibid.*

⁶²¹ Amnesty International. „Mind the Legal Gap - Roma and the Right to Housing in Romania (EUR 39/004/2011).” 2011. 12 -13.

⁶²² Amnesty International. „Unsafe Foundations - Secure the Right to Housing in Romania (EUR 39/002/2012).” 2012. 12.

⁶²³ *Ibid.* 14.

uncontested that consistent non-payment of rental dues, lack of adequate formalized documentation may give rise to legitimate limitations of the right to adequate housing, Romania falls severely short of enforcing the procedural guarantees aimed at protecting those, amongst which primarily Roma, whom are subject to eviction⁶²⁴. Romanian domestic legislation does not provide for guarantees, nor safeguards against eviction and solely protects those against eviction whom have attained formalized tenure, directly contradicting the promulgated necessity for a minimum degree of security of tenure⁶²⁵. Moreover, contradictory to article 11 ICESCR and its subsequent General Comments, Romanian law does not foresee in the procedural safeguard to effectively consult the individuals whom are facing eviction, entailing that oftentimes these individuals are inadequately informed thereof⁶²⁶. In instances where eviction takes place in conjunction *with* housing relocation, Romanian housing legislation does not prohibit such relocations to unsafe, unhealthy and unsanitary areas⁶²⁷. This has resulted in a variety of relocations of Roma individuals and communities, to areas in Romania hazardous for their health and safety, in direct contradiction with the obligation to provide aid in finding an adequate alternative⁶²⁸.

132. The discrepancies between directly enforceable human rights law as enshrined in the ICESCR, and domestic Romanian legislation, have resulted in negligent behavior on behalf of local authorities in respecting the right to housing⁶²⁹. Within this framework, it has been noted that local authorities, do not consider themselves bound by the procedural guarantees concerning, effective dialogue with the evictees, the quest for alternative housing, and generally the principles of proportionality and reasonableness, insofar it concerns informal tenure⁶³⁰. The latter entails, that local authorities, generally do not abide by procedural stipulations concerning eviction insofar it concerns informal settlements and evictions of those lacking formalized documentation of their tenure, thus resulting in direct discrimination⁶³¹. These procedural guarantees are applicable, irrespective of the legality of the eviction, and render eviction illegal insofar they are not respected, thus violating article 11 ICESCR and its corresponding anti-discrimination provision in article 2.2 thereof. The lack of monitoring and evaluation mechanisms with respect to local adherence thereto, solely compounds the illegality thereof, and furthermore encompasses a violation of the State's investigatory obligation under the right to housing as enshrined in the ICESCR.

⁶²⁴ Amnesty International. „Briefing to the Romanian Government on the right to adequate housing with regard to the marginalized Romani communities (EUR 39/001/2013).” 2013. 6.

⁶²⁵ Amnesty International. „Unsafe Foundations - Secure the Right to Housing in Romania (EUR 39/002/2012).” 2012. 10 – 11.

⁶²⁶ *Ibid.* 12.

⁶²⁷ *Ibid.* 14.

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.* 14; European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 152.

⁶³⁰ Amnesty International. „Unsafe Foundations - Secure the Right to Housing in Romania (EUR 39/002/2012).” 2012. 12, 14 – 15.

⁶³¹ *Ibid.*

D. The Right to Work

1. Theoretical Analysis

SOURCES

133. As demonstrated by the aforementioned rights, both civil and political rights as well as economic, social and cultural rights are encompassed in a variety of human rights instruments, both at an international level, as well as regional and national levels. This is no different for the right to work, as it is codified in the UDHR⁶³², ICCPR⁶³³, ICESCR⁶³⁴, CERD⁶³⁵, CEDAW⁶³⁶, CRC⁶³⁷ and regional instruments such as the ESC⁶³⁸. Moreover, the International Labor Organization, a specialized agency of the United Nations, has undertaken much effort in codifying and elaborating upon the obligations arising from the right to work⁶³⁹. Whilst the significance of ILO conventions and treaties cannot be underestimated, as illustrated, for example, by continuous reference thereto by the Committee on Economic, Social, and Cultural Rights in their General Comments referring to the right to work⁶⁴⁰, it must be underscored that the ILO does not address the right to work from a human rights perspective⁶⁴¹. Subsequently, the provisions it denotes and protects are often limited, both regarding to whom it applies as well as the scope within which they are applicable⁶⁴². This, in stark contrast to the right to work within the human rights framework, which dictates the principles of universality, entailing that the concerned right is applicable to everyone, and moreover is not limited in its scope as it pertains to all forms of work⁶⁴³.

134. Again, within the scope of human rights instruments available, regarding the right to work, the ICESCR has delivered the most comprehensive basis on which to assess potential violations⁶⁴⁴. In conjunction with the articles 6, 7 and 8, the Committee's General Comments,

⁶³² Article 23 UDHR

⁶³³ Article 8 (3)(a) ICCPR

⁶³⁴ Articles 6, 7, and 8 ICESCR

⁶³⁵ Article 5 (c)(i) CERD

⁶³⁶ Article 11 (1)(a) CEDAW

⁶³⁷ Article 32 CRC

⁶³⁸ Part II, article 1 ESC

⁶³⁹ Drzewicki, Krzysztof. „The Right to Work and Rights in Work.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 223; Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 14; MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 445 – 446.

⁶⁴⁰ Paragraphs 4, 9, 11, 12 (b)(i): Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁴¹ MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 446.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 12 – 14; Paragraph 2: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General

provide a holistic approach to the right to work - its thoroughness far exceeding that of other similar instruments⁶⁴⁵. For this reason, the following will primarily be assessed in light of the relevant provisions encompassed within the ICESCR.

IDENTIFYING THE RIGHT TO WORK AS A HUMAN RIGHT?

135. Currently much debate exists as to the extent and nature of the right to work. The concerned right is an excellent example of the intersection between the advancement of human rights law and its inextricable relationship with current events in society⁶⁴⁶. The implementation of the right to work is highly susceptible to changes within society, which is precisely what potentially negates the universality of this right and consequently its characterization as a human right⁶⁴⁷. It suffices to mention the current economic crises to illustrate how certain economic, social and cultural rights have been placed back on the forefront of human rights debates⁶⁴⁸. Much more so than civil and political rights, which have been widely documented and elaborated upon, economic, social and cultural rights oftentimes undergo influences depending on current events⁶⁴⁹. These civil and political rights on the other hand, are less prone to external influences such as current world events, and have been interpreted upon more extensively⁶⁵⁰.

136. Within this context authors often note the artificial hierarchical position cultural and socio-economic rights, however this difference is merely with respect to the means in which they are accomplished, not the ultimate goal, which they pursue. In other words, whilst it is argued that no hierarchical position prevails with respect to human rights, second-generation rights, can, due to such external influences, temporarily receive increased focus, and equally so, less focus⁶⁵¹. The right to work is an example of this fluctuating focus on socio-economic rights. The right to work will be heeded more stringently in times and situations of heightened unemployment, as opposed to times of economic growth in which politicians are prone to divert their attention to other issues, rights and freedoms⁶⁵². Moreover, the apparent lack of political will to discuss the right to work, notwithstanding the vast doctrine surrounding the

Comment. Geneva: United Nations, 24 November 2005; MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 462.

⁶⁴⁵ Paragraph 2: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005; MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 462; Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” Netherlands Quarterly of Human Rights 26.1 (2008): 44.

⁶⁴⁶ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 2.

⁶⁴⁷ *Ibid.* 2 – 3.

⁶⁴⁸ *Ibid.* 2.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*

right, further substantiates the notion that the right to work lacks in universality, potentially negating its characterization as a human right⁶⁵³. This lack of political will can be attributed to a variety of factors, amongst which, diverging political approaches, as well as the division of the right to work into various subsections⁶⁵⁴. This segmentation of the right to work has led to the idea that various aspects of the right to work exist in a hierarchical order, thus again, potentially negating its validity as a human right⁶⁵⁵.

137. Despite the debate with respect to the right to work and its implications, the vast amount of doctrine and international treaties encompassing this right, stipulate certain, general principles that nevertheless substantiate the argument that the right to work is of a universal nature and equally so an integral aspect of the human rights framework. In general, as can be derived from the articles 6, and 7 of the ICESCR, three core obligations arise from the right to work, namely a general negative obligation, and two positive obligations, which will be discussed below (see *infra* 141). The scope of article 8 ICESCR will not be discussed below, as this pertains solely to the collective aspect of the right to work, such as the right to strike, which is not relevant with respect to Roma in the current context.

SCOPE OF THE RIGHT TO WORK

Article 6 ICESCR⁶⁵⁶

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 ICESCR⁶⁵⁷

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration, which provides all workers, as a minimum, with:

⁶⁵³ *Ibid.* 5.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ Risse, Mathias. „A Right to Work? A Right to Leisure? Labor Rights as Human Rights.” Law & Ethics of Human Rights 3.3 (2009): 8, 11 – 12; Drzewicki, Krzysztof. „The Right to Work and Rights in Work.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 227, 243; Mundlak, Guy. „The Right to Work: Linking human rights and employment policy.” International Labour Review 146.3/4 (2007): 192 – 193.

⁶⁵⁶ Article 6: UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 January 1976.

⁶⁵⁷ Article 7: UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 January 1976.

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

138. The right to work is both an individual right (article 6 ICESCR and article 7 ICESCR), as well as a collective right (article 8 ICESCR)⁶⁵⁸. The scope of the concerned right is general in its nature, in that it is applicable to all forms of work, both independent and wage dependent work, and can be invoked by *all* individuals within a states' jurisdiction, irrespective of their (employment) status⁶⁵⁹. Within their respective capacities, states must establish measures that will incentivize work in the *formal* sector of the economy, rather than the *informal* sector, with the intent of reducing persistent unemployment⁶⁶⁰. This is substantiated by the fact that those whom are employed in the informal sector do not enjoy the protective mechanisms the formal sector of the economy is bound to provide⁶⁶¹. Work must be read as *decent* work, entailing that state governments must take steps to ensure that other fundamental rights of employees are not hindered by the undertaken employment⁶⁶². In other words, certain *qualitative* standards such as sufficient income and safety standards must be taken into account and regulated in order for a state to be in compliance with the right to work⁶⁶³.

139. In its General Comment 18 ICESCR, the Committee on Economic, Social and Cultural rights underscores the interlinked, interdependent, and indivisible nature of human

⁶⁵⁸ Paragraph 2: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁵⁹ Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” Netherlands Quarterly of Human Rights 26.1 (2008): 45 - 47; Paragraph 2 & 23: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁶⁰ Paragraph 9 – 10: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005

⁶⁶¹ *Ibid.*

⁶⁶² Paragraph 7: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁶³ Mundlak, Guy. „The Right to Work: Linking human rights and employment policy .” International Labour Review 146.3/4 (2007): 192 – 194; Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 19.

rights, with specific reference to the right to work⁶⁶⁴. It cannot be contested that one's ability to work will directly and inadvertently affect one's right to, amongst others, education, right to health, as well as the right to an adequate standard of living⁶⁶⁵. The interdependence of economic and social rights is equally irrefutable as exemplified by the right to food, right to water, right to housing and the right to health – all inextricably entwined with the right to work⁶⁶⁶. The interdependence in this regard is paramount in addressing questions regarding the right to work, as it will require, in some cases, input and cooperation by various policy fields by governments in ascertaining adherence to the right to work⁶⁶⁷. The interdependent aspect of the right to work entails that the adherence to the right to work will augment the capacity of fulfilling and ensuring other rights associated thereto.

140. However, the right to work remains a right susceptible to the principle of progressive realization, thus is dependent on a variety of external factors which may dictate the maximum capacities of states in complying with this right⁶⁶⁸. Moreover, the right to work is not an absolute and unconditional right to *obtain* employment⁶⁶⁹. It focuses rather on the measures taken by governments in facilitating the right to work for individuals within their respective jurisdictions⁶⁷⁰.

STATE OBLIGATIONS UNDER THE RIGHT TO WORK

141. Whereas the right to work within the conceptual human rights framework appears self-evident, the aforementioned discrepancies in the application thereof and general focus thereon, prove the contrary⁶⁷¹. The right to work is based on a series of related determinants that form a cluster of obligations bestowed upon states⁶⁷². As stated, the right to work

⁶⁶⁴ Paragraph 8: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁶⁵ MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 452; Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” Netherlands Quarterly of Human Rights 26.1 (2008): 43.

⁶⁶⁶ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 3.

⁶⁶⁷ MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 467 – 468.

⁶⁶⁸ Article 2: UN General Assembly. „International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).” General Assembly Resolution. United Nations, 3 January 1976.

⁶⁶⁹ Paragraph 6: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁷⁰ *Ibid.*

⁶⁷¹ Drzewicki, Krzysztof. „The Right to Work and Rights in Work.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 226 – 227.

⁶⁷² *Ibid*; Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 8 – 9.

generally encompasses three forms of obligations incumbent upon states, namely one negative obligation, and two positive obligations⁶⁷³.

142. Article 6.1 ICESCR delineates the first obligation, which pertains to the freedom of individuals to choose the work of their pleasing. This does not entail that a State must foresee that every individual may exercise the job that they so please, yet it does obligate a State to refrain from interference in one's quest for their preferred employment opportunities⁶⁷⁴. From this, it can be derived that states are not entitled to enforce work upon individuals within their jurisdiction⁶⁷⁵. In order for a state to be in compliance with this first negative provision, they must thus refrain themselves from imposing labor upon individuals and equally so guarantee that each individual is free to pursue the employment which best suits that individual's skills⁶⁷⁶. Based on the foregoing a nuance is necessitated however – the freedom of choice with respect to ones' occupation can be subjected to certain restrictions and obligatory conditions insofar these restrictions and conditions adhere to the principles of proportionality and necessity⁶⁷⁷.

143. The two positive obligations arising from the right to work are found both in article 6 as well as article 7 ICESCR and can be divided in a quantitative and a qualitative obligation. With respect to both positive obligations, it must be noted that, these are of a progressive nature, entailing that the compliance thereto will naturally depend on a variety of factors such as the general economic state of the state, social policy as well as external influences⁶⁷⁸. This does not however, negate the obligations, as the concerned obligations are to be assessed in light of the maximum available resources of a state⁶⁷⁹. Not implementing these obligations to the maximum of their capacities may result in violations of the right to work in the respective states⁶⁸⁰.

⁶⁷³ Paragraphs 23 – 26: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005; Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 12 – 13.

⁶⁷⁴ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 10; Paragraph 6: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.*

⁶⁷⁷ Drzewicki, Krzysztof. „The Right to Work and Rights in Work.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 233.

⁶⁷⁸ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 10.

⁶⁷⁹ Paragraph 32: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁸⁰ *Ibid.*

144. The first quantitative obligation refers to the *access to work*⁶⁸¹. Within this scope, a State is obliged to undertake measures to guarantee full and *equal access* to employment and subsequently attempt the attainment of full employment “*for every individual seeking employment*”⁶⁸². This obligation can be read both in article 6.1 ICESCR as well as article 6.2 ICESCR, and entails specific components.

145. In respecting this first obligation, states must establish and maintain employment services, with the intent on facilitating the search for employment⁶⁸³. Such a supervisory system must be fortified by the employment guidance they provide, which may take the form of vocational and technical training⁶⁸⁴. Additionally, insofar necessitated by the circumstances, such aid must be granted free of charge or via financial contributions⁶⁸⁵. Aside from establishing measures that will aid individuals in their search for *decent work*, States must assure, in that accessibility to work is in accordance with the principles dictated in General Comment 18 ICESCR⁶⁸⁶. This principles proclaim that accessibility must be provided in a manner that is non-discriminatory, provides physical access in relation to individuals with disabilities as well as ensures that individuals can “*seek, obtain and impart*” information with respect to prospective work opportunities⁶⁸⁷. This first positive obligation equally imparts upon governments, the obligation to foresee and assist those groups whom find themselves in less favorable positions, in complying with the accessibility of work and subsequently the right to work⁶⁸⁸. Specifically they must undertake measures aimed at fighting discrimination and the disadvantaged positions these individuals find themselves in⁶⁸⁹. In protecting the right to work, states must thus foresee in measures that provide equal access to employment

⁶⁸¹ Paragraph 12, 23: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁸² Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 10; Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” Netherlands Quarterly of Human Rights 26.1 (2008): 47.

⁶⁸³ Drzewicki, Krzysztof. „The Right to Work and Rights in Work.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 234; Paragraph 2: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁸⁴ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 18.

⁶⁸⁵ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 18 – 19.

⁶⁸⁶ Paragraphs 19 – 32: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁸⁷ Paragraph 12: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁸⁸ Paragraphs 12 (b)(i), 23, 26: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005; Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 17.

⁶⁸⁹ Paragraph 12 (b)(i): Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

opportunities, through the means of positive measures, such as training, when necessitated⁶⁹⁰. Additionally they must be able to provide information with respect why certain groups undergo unemployment more prevalently than others⁶⁹¹. As will be portrayed and as has been affirmed, Roma are deemed as being a disadvantaged group, subsequently entitling them to such positive measures, insofar it is within a states' capacity to do so⁶⁹².

146. The second positive obligation bestows upon governments the qualitative obligation with respect to the right to work, as enshrined in article 7 ICESCR⁶⁹³. This aspect of the right to work is with reference to the conditions in which work must be exercised and guaranteed⁶⁹⁴. Given the exploitative nature of work in general, it is conceivable that output and production could be maximized at the expense of the wellbeing of those employed⁶⁹⁵. Without a provision on the conditions at work, the right to work as enshrined in the ICESCR as well as multiple international and regional treaties would be rendered void, as it would not guarantee the adequate standard of life pursued by such human rights instruments⁶⁹⁶. The concerned obligation will result in state responsibility insofar it does not proclaim and regulate safety requirements nor penalize violations of such safety standards within their jurisdiction⁶⁹⁷. Moreover, the qualitative element equally entails the right to fair compensation for the provided work, in order to assure sustenance and caretaking of ones' self and families⁶⁹⁸ again exemplifying the interdependency of socio-economic rights.

147. Conclusively the obligations arising under the right to work can be classified within the general framework of human rights obligations, namely the obligations to *respect, protect and fulfill*, the first being of a negative nature, and the latter two of a positive nature⁶⁹⁹. Within the context of the right to work, it must be noted that specific attention is paid to

⁶⁹⁰ Paragraph 2: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005; Drzewicki, Krzysztof. „The Right to Work and Rights in Work.” Economic, Social and Cultural Rights. Red. Asbjorn Eide, Catarina Krause en Allan Rosas. The Hague: Kluwer Law International, 2001. 234.

⁶⁹¹ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 17.

⁶⁹² Chapman, Audrey R. en Benjamin Carbonetti. „Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Social and Cultural Rights.” Human Rights Quarterly 33.3 (2011): 694 – 695, 712 – 713.

⁶⁹³ MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 462 – 463.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 19.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ Paragraph 35 – 36: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁶⁹⁸ Sarkin, Jeremy en Mark Koenig. „Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy.” Human Rights Quarterly 33.1 (2011): 19; MacNaughton, Gillian en Diane F. Frey. „Decent Work for All: A Holistic Human Rights Approach.” American University International Law Review 26.2 (2011): 469 – 471.

⁶⁹⁹ Paragraph 22: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

disadvantaged groups of individuals, resulting in the necessity of enhanced scrutiny when assessing alleged violations thereof, as well as increased positive obligations on behalf of the State in guaranteeing this right to such individuals⁷⁰⁰.

2. Application in Belgium

CONTEXTUALIZATION

148. Access to work in Flanders, for Roma as well as other Central and Eastern European migrants, is heavily reliant on the status they receive upon arrival in Belgium and subsequently the region within which they choose to reside. Within this context it must be noted that matters concerning migration, form an integral aspect of federal Belgian legislation, and is codified within the *Vreemdelingenwet* of 1980, which has been repeatedly modified in order to adhere to international and European obligations⁷⁰¹. As a result of Belgian legislation, migrants whom reside on Belgian territory irregularly cannot be granted access to the formal labor market⁷⁰². This entails that, generally, migrants amongst, which Roma, will have to obtain a residence permit, (if not accorded automatically due to E.U. regulations), in order to seek employment in Belgium⁷⁰³. It is questionable whether the aforementioned rule however, is in accordance with article 6 ICESCR, as this is intended to protect all those whom reside within the jurisdiction of a state party⁷⁰⁴. Additionally the accession of Central and Eastern European countries to the E.U. in 2004 and 2007 is of particular relevance in this context, given the implications this has with respect to the status of the concerned individuals in Belgium and subsequently their access to employment within the various regions in Belgium, as a result of their migration⁷⁰⁵. Due to this accession, citizens of the concerned Central and Eastern European countries enjoy the freedom of movement, which encompasses the right to seek employment in other E.U. countries⁷⁰⁶.

149. Whereas the aforementioned stipulated rule is applied with respect to most E.U. countries, Belgium has maintained transitional measures with respect to citizens arriving from

⁷⁰⁰ See for example: paragraphs 12 (b)(i), 18, 23, 26: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁷⁰¹ Touquet, Heleen en Johan Wets. „Context, drijfveren en Opportuniteiten van Midden- en Oost-Europese immigratie: Een exploratief onderzoek met focus op Roma.” Onderzoeksinstituut voor Arbeid en Samenleving, 2013. 23.

⁷⁰² *Ibid.* 25 – 28.

⁷⁰³ Belgian Federal Government. „Wet Betreffende de tewerkstelling van buitenlandse werknemers (1999-04-30/45).” Federal Law. 30 April 1999.

⁷⁰⁴ Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” Netherlands Quarterly of Human Rights 26.1 (2008): 47.

⁷⁰⁵ Kruispunt Migratie-Integratie: Expertisecentrum voor Vlaanderen-Brussel. Vreemdelingenrecht.be. 11 April 2013. 23 April 2013 <<http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=278>>.

⁷⁰⁶ *Ibid.*

Romania and Bulgaria⁷⁰⁷. The latter imposes restrictions upon their access to the Belgian labor market. Individuals as such, can either exercise independent work (i.e. self-employment) or must perform jobs in bottleneck professions⁷⁰⁸. Such restrictions have equally been maintained with respect to migrants arriving from non-EU countries, and candidate applicants for EU accession⁷⁰⁹. These restrictions are not imposed upon other E.U. countries⁷¹⁰. As many Roma migrating to Belgium originate from the aforementioned countries upon which these restrictions are applicable, their access to the labor market is consequently restricted as they are bound to adhere to the conditions set forth in the transition measures⁷¹¹. These measures dictate that for the bottleneck professions, such citizens must generally obtain a *B Permit*, prior to arrival in Belgium, which entails that the concerned individual has found a specific job, with a specific employer⁷¹². With respect to independent labor (a.k.a. *self-employment*), certain qualifications are often required, rendering the opportunities for low-schooled Roma to exercise such profession near to impossible⁷¹³. Moreover, the latter has resulted paved the path for fraudulent behavior in order to qualify for a profession as such, which consequently, when caught, can only result in a graver deterioration of the life standard of the individual(s) involved⁷¹⁴. Without elaborating upon the specificities, it can be concluded that such stipulations are incredibly burdensome for Roma, as they generally are less qualified for a variety of jobs, which can be ascribed to, amongst others, lower educational achievements, language barriers, and illiteracy⁷¹⁵. The lack of access to the formal labor market consequently results, to a certain extent, in employment within the informal sector and can give rise to increased petty crimes as a source of income⁷¹⁶.

ACCESS TO EMPLOYMENT

150. As previously mentioned, Roma, originally arriving from states upon which the transition measures have been imparted, can enjoy employment in Belgium and specifically Flanders, through the means of being independently self-employed or via contractual agreements with employers prior to their arrival in Belgium. Independent employment however, poses a variety of difficulties upon Roma individuals, as this will require certain

⁷⁰⁷ Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 13.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ Kruispunt Migratie-Integratie: Expertisecentrum voor Vlaanderen-Brussel. Vreemdelingenrecht.be. 11 April 2013. 23 April 2013 <<http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=278>>.

⁷¹⁰ *Ibid.*

⁷¹¹ Touquet, Heleen en Johan Wets. „Context, drijfveren en Opportuniteiten van Midden- en Oost-Europese immigratie: Een exploratief onderzoek met focus op Roma.” Onderzoeksinstituut voor Arbeid en Samenleving, 2013. 31 – 37.

⁷¹² Kruispunt Migratie-Integratie: Expertisecentrum voor Vlaanderen-Brussel. Vreemdelingenrecht.be. 11 April 2013. 23 April 2013 <<http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=278>>.

⁷¹³ Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 13.

⁷¹⁴ Hemelsoet, Elias. Target the Problem, Not the People Joyce De Coninck. 27 May 2013. 9.

⁷¹⁵ Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 14.

⁷¹⁶ *Ibid.* 13.

qualifications for certain professions, that a majority of Roma do not possess⁷¹⁷. Naturally this will impede their ability to obtain a residence permit in Belgium. Those who do acquire a residence permit however, based upon independent employment are more often than not, confronted with limited financial income, resulting in deplorable living standards, and the inability to fend for themselves⁷¹⁸. Moreover, the social taxes accompanying self-employment hardly render their socio-economic conditions more appealing⁷¹⁹. Not inconceivably, this paves the path, again, towards employment within the informal labor market, and potentially petty crime.

151. As a second option, Roma originating from the aforementioned nations that undergo the transition measures imposed by Belgium, can gain access to the labor market via the means of contractual agreements with Belgian employers prior to their arrival⁷²⁰. In order to obtain residence permits in Belgium via this channel however, a dual condition is imposed – namely citizens seeking employment must obtain a *B Permit*, which allows for employment within bottleneck professions, and secondly the employer is required to equally get a second permit on his behalf⁷²¹. Moreover, the conditions stipulated in acquiring a *B Permit*, entail that the concerned individual can only seek employment with one single employer and for one specific profession, and that for the time span of 12 months⁷²². In addition to the fact that the availability and types of bottleneck professions are limited, the administrative procedure that must be completed renders access to employment in Belgium extremely difficult. The encountered difficulties are solely enhanced with respect to Roma, as they generally have had limited schooling and oftentimes lack professional or academic experience⁷²³. Moreover, the stigmatization of Roma in conjunction with the administrative hurdles, eliminate incentives for Belgium employers in hiring individuals from the aforementioned countries⁷²⁴. Again, given the universal applicability of the right to work as enshrined in article 6 ICESCR, it is doubtful whether Belgian immigration law, an aspect of its state sovereignty, and its inextricable relationship with employment matters, is in compliance thereof⁷²⁵.

⁷¹⁷ Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 13.

⁷¹⁸ *Ibid.* 14.

⁷¹⁹ *Ibid.* 13.

⁷²⁰ Exceptions do exist, however the complexity thereof exceeds the scope of this work.

⁷²¹ Kruispunt Migratie-Integratie: Expertisecentrum voor Vlaanderen-Brussel. Vreemdelingenrecht.be. 11 April 2013. 23 April 2013 <<http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=278>>.

⁷²² *Ibid.*

⁷²³ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 82; Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 13 – 14.

⁷²⁴ Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 14.

⁷²⁵ Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” Netherlands Quarterly of Human Rights 26.1 (2008): 47.

152. For Roma arriving from states upon which these transition measures have been imposed, whom have successfully completed the administrative and procedural requirements for residence status and access to employment, the access to employment and the conditions to which they are subjected, do not necessarily comply with the obligations enshrined in articles 6 and 7 ICESCR⁷²⁶. The latter being particularly pertinent with respect to Roma, given the vulnerability status the Committee on Economic, Social and Cultural rights has ascribed to this minority, and the necessity for enhanced positive measures to ameliorate the socio-economic conditions they face⁷²⁷. Again difficulties pertaining to limited schooling, communication, and lack of experience hinder their capacity to seek employment in a variety of professions⁷²⁸. Moreover, irrespective of anti-discrimination legislation applicable in Belgium, *de facto* and direct discrimination does still prevail with respect to Roma seeking employment⁷²⁹. In protecting the right to work, as part of the positive obligation incumbent upon member states, Belgium would need to take targeted measures aimed at eradicating this form of discrimination, specifically with respect to Roma in order to be in compliance with the obligations arising from articles 6 and 7 ICESCR. Moreover, in facilitating the right to work to those whom are entitled thereto as a result of their residence status, the State is obliged to undertake measures to foresee in vocational training when necessitated, the dissemination of relevant information to those seeking employment and the gathering of information in order to ascertain the causality of unemployment within distinct vulnerable groups, as part of their core and immediate obligations⁷³⁰. However, field research indicates that initiatives as such, insofar they are applied, oftentimes fall short of these principles⁷³¹. The lack of a targeted approach with respect to vulnerable categories such as Roma, is exemplified by the lack of adequate training trajectories that are experienced as being insufficient as a basis for further employment. Moreover, the vacuum with respect to relevant data on employment matters concerning Roma, equally entails that Belgium is not complying with their obligations arising under articles 6 and 7 ICESCR, as further substantiated by

⁷²⁶ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 82.

⁷²⁷ Chapman, Audrey R. en Benjamin Carbonetti. „Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Social and Cultural Rights.” Human Rights Quarterly 33.3 (2011): 694 – 695, 712 – 713.

⁷²⁸ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 82; Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 14.

⁷²⁹ *Ibid.*

⁷³⁰ Paragraph 12 & 31: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁷³¹ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 82; Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 14.

paragraph 14 of the Concluding Observation for Belgium by the Committee on Economic, Social and Cultural Rights⁷³².

3. Application in Romania

CONTEXTUALIZATION

153. The catalyst for vast Roma unemployment in contemporary Romania, as has been repeatedly mentioned, was marked by the fall of Communism and the transition of Romania's Communist regime to a free market structure⁷³³. Whilst Roma had been employed as unskilled or semi-skilled actors in the formal labor market during Communism, their overall lack of (academic) qualifications proved to be a crucial determinant in the subsequent unemployment of Roma in Romania⁷³⁴. However, the aforementioned is far too simplified to conclude the causality of Roma unemployment. As a result of lacking targeted initiatives aimed at curbing this unemployment, persistent lack of schooling, and lack of job qualifications and experience, the lack of Roma access to the formal labor market has persisted up until today⁷³⁵. Generally, unemployment rates for Roma are staggering as shown by a study undertaken in 1992 - 79%, do not have a profession, whilst the percentile for female Roma unemployment is even higher (88.8%)⁷³⁶. Moreover, it has been ascertained that unemployment of Roma in Romania has amounted to 51.2 %, again with higher unemployment rates for Romani women⁷³⁷. However, a recent study has shown that the unemployment, which was prevalent in 1992, has improved substantially (although this should not be overestimated⁷³⁸), especially within Romania⁷³⁹. Unfortunately the disparity between male as opposed to female Roma employment does remain⁷⁴⁰. The causal determinants for the unemployment amongst Roma in Romania, is to be ascribed to a variety of factors and cannot solely be reduced to lacking skills on behalf of Roma⁷⁴¹. Conceivably the lack of educational and vocational training does place constraints on the ability of Roma to enter the formal labor market, however spatial segregation (see *supra* 129) as a result of

⁷³² Paragraph 31: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁷³³ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 123.

⁷³⁴ *Ibid.*

⁷³⁵ Bodewig, Christian en Lucia Kurekova. „Enhancing the Employment Chances of Roma - Knowledge Brief.” The World Bank. 2009. 2- 3.

⁷³⁶ Achim, Viorel. The Roma in Romanian History. Bucharets: Central European University Press, 2004. 203.

⁷³⁷ *Ibid.*

⁷³⁸ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 123.

⁷³⁹ Bodewig, Christian, et al. „Europe and Central Asia - Roma Inclusion: An Economic Opportunity for Bulgaria, Czech Republic, Romania and Serbia Policy Note.” Human Development Sector Unit, The World Bank. 2010. 7- 8.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Bodewig, Christian en Lucia Kurekova. „Enhancing the Employment Chances of Roma - Knowledge Brief.” The World Bank. 2009. 2- 3.

public policy in conjunction with the receiving of social benefits, the informal labor market and widespread discrimination enhance the problematic nature of the discrepancies between Roma and non-Roma employment⁷⁴².

154. Notwithstanding Romanian initiatives aimed at ameliorating the conditions of Roma, the effect thereof on the access of Roma to the formal labor market not been sufficient⁷⁴³. The supervisory actor with respect to the assessment of (un-) employment is the Ministry of Labor and Social Policy, which is aided by the National Employment Agency bearing the responsibility of implementing labor policies⁷⁴⁴. The latter is the most prominent actor in ameliorating situations of unemployment and seeking manners in which to address the issue⁷⁴⁵. Whilst initiatives such as the *National Employment Strategy*, the *JIM Action Plan*, the *Decade Action Plan*, the *Employment Caravan for the Roma*, and the *National Plan for Social Inclusion* have resulted in meager successes, they lack coherency and interdependence⁷⁴⁶. The principles enshrined in the Strategy of the Government of Romania for Improving the Condition of the Roma are minimally reflected in the aforementioned initiatives, illustrating the lack of a targeted approach within the employment sphere in protecting Roma⁷⁴⁷. On the other hand, the National Agency for Employment has undertaken, in conjunction with various NGO's, a variety of complex initiatives in order to stimulate employment participation⁷⁴⁸. Within this context it suffices to note the *Regional Profession Training Centers for Adults*, which disseminate training, information, counseling and establish orientation services⁷⁴⁹. Moreover, funding has been granted to initiatives, which aim at incentivizing re-employment⁷⁵⁰. Notwithstanding the laudable initiatives however, the unemployment rate of Roma, especially Roma women, remains disturbingly high when compared to the unemployment rates of non-Roma, rendering it questionable as to whether the State is undertaking measures to curb unemployment to the maximum of their capacity⁷⁵¹.

⁷⁴² European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 123; Fleck, Gabor en Cosima Rughinis. Come Closer - Inclusion and Exclusion of Roma in Present-Day Romanian Society. Bucharest: National Agency for Roma, 2008. 128.

⁷⁴³ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 125.

⁷⁴⁴ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 123.

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

⁷⁴⁸ *Ibid.*

⁷⁴⁹ Rusu, Marioara, et al. „Incluziunea romilor din Romania: politici, institutii, experiente/ Roma Inclusion in Romania: Policies, Institutions and Examples.” 2012. 217.

⁷⁵⁰ *Ibid.*

⁷⁵¹ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 125.; Bodewig, Christian, et al. „Europe and Central Asia - Roma Inclusion: An Economic Opportunity for Bulgaria, Czech Republic, Romania and Serbia Policy Note.” Human Development Sector Unit, The World Bank. 2010. 7- 8.

CAUSES UNDERLYING ROMA UNEMPLOYMENT

155. As aforementioned, a variety of factors contribute to the persistent unemployment of Roma, some of which can be attributed to Roma themselves, and some of which can be attributed to employers⁷⁵². Discouraging professional and future perspectives, low remuneration for exercised employment, and high turnover rates for low- skilled jobs, render Roma discouraged with respect to working in the formal labor market, resulting in a lack of labor participation⁷⁵³. This notion is further fortified by the fact that, a majority of Roma have been confronted with substandard schooling, a high rate of illiteracy prevails amongst them, and they generally are lacking in professional skills⁷⁵⁴. Additionally, the traditional skills inherent to Roma culture in Romania are no longer regarded as being profitable, and consequently do not grant relief to the employment strain Roma undergo⁷⁵⁵. Lastly, Roma whom fall outside of the formal active labor market obtain income through a combination of social benefits in conjunction with income from the informal labor market, and may in some instances, again, give rise to petty crime⁷⁵⁶. Obstacles hindering Roma employment on the side of the employer is oftentimes linked with the lacking need for low-skilled workers⁷⁵⁷. Additionally, spatial segregation results in higher commuting costs for Roma as opposed to non-Roma, whom are not necessarily spatially segregated. Lastly, it is uncontested that *de facto* discrimination by potential employers towards Roma, notwithstanding anti-discrimination legislation in Romania, is still very dominant in the formal labor market⁷⁵⁸. Whilst the legislative framework is in place to combat such discrimination, aided by the work of the *Consultative Committee on Equal Opportunities for Men and Women and for Vulnerable Groups on the Labor Market*, complaints thereof are limited⁷⁵⁹. In assessing Romania's responsibilities under articles 6 and 7 ICESCR, it is uncontested it has undertaken initiatives to comply with its positive obligation to guarantee access to the labor market, by establishing services that can indeed disseminate pertinent information. With respect to this same obligation, Romania, via the means of its National Employment Agency has managed to address unemployment of those in less favorable positions by establishing services aimed at providing training and information with respect to potential professions. However, as previously mentioned, it remains doubtful as to whether Romania is undertaking steps to the

⁷⁵² Bodewig, Christian en Lucia Kurekova. „Enhancing the Employment Chances of Roma - Knowledge Brief.” The World Bank. 2009. 2- 3.

⁷⁵³ *Ibid.*

⁷⁵⁴ *Ibid.*

⁷⁵⁵ Fleck, Gabor en Cosima Rughinis. Come Closer - Inclusion and Exclusion of Roma in Present-Day Romanian Society. Bucharest: National Agency for Roma, 2008. 130.

⁷⁵⁶ *Ibid.* 127.

⁷⁵⁷ Bodewig, Christian en Lucia Kurekova. „Enhancing the Employment Chances of Roma - Knowledge Brief.” The World Bank. 2009. 2.

⁷⁵⁸ Bodewig, Christian en Lucia Kurekova. „Enhancing the Employment Chances of Roma - Knowledge Brief.” The World Bank. 2009. 2- 3; European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 125.

⁷⁵⁹ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 123; European Roma Rights Centre. „The Glass Box - Exclusion of Roma from Employment.” 2007. 43.

maximum of its resources in guaranteeing Roma access to the formal labor market, given that there is a blatant lack of coherency and coordination between various interlinked policies, and the lack of a an enforceable targeted approach with respect to Roma specifically⁷⁶⁰.

DISCRIMINATION REGARDING EMPLOYMENT

156. A far more worrying aspect of employment with respect to Roma in Romania concerns the direct *de facto* discrimination they frequently encounter, both with respect to access to the formal labor market as well as the conditions within which they perform formal employment⁷⁶¹. Especially when searching for employment, discrimination is notorious with respect to Roma, as exemplified by uncontested total-exclusion policies by certain companies with respect to Roma⁷⁶². Oftentimes, such discrimination is depicted by both employers and labor offices that explicitly refuse employment to Roma on account of their ethnicity, whereas sometimes it is experienced as such by Roma themselves⁷⁶³. Rather than contesting such discriminatory practices by employers, labor offices compound the issue by acting in accordance with discriminatory behavior by employers, and this for a variety of reasons⁷⁶⁴. Labor offices, which form an integral aspect of the search for employment of Roma, ascribe such mentality to a variety of reasons ranging from their lack of influence as to whom a potential employer will see fit for the job, as well as the notion that it would not be beneficial to contest Roma exclusion as this will give rise to Roma being positioned in jobs where they will continue to face discrimination⁷⁶⁵. Irrespective of the reasoning behind the discriminatory actions however, such attitudes stand in stark contradiction with the principles enshrined in article 6 ICESCR, which prescribes equal access to employment⁷⁶⁶. Given the vulnerability of Roma, factual inequalities need be addressed through the means of positive measures in order to correct these differences⁷⁶⁷. By not enforcing, through the means of facilitative and positive measures, Romania falls short of its obligations under article 6 ICESCR.

157. Additionally, discrimination is equally documented with respect to the conditions of work Roma are subjected to, of which remuneration is a vital component⁷⁶⁸. Whilst discrimination in the workplace is notably lower when compared to discrimination in access to employment, it is uncontested that receiving less favorable employment than non-Roma colleagues solely on account of ethnicity is not in accordance with the stipulations of articles

⁷⁶⁰ *Ibid.*

⁷⁶¹ European Roma Rights Centre. „The Glass Box - Exclusion of Roma from Employment.” 2007. 37, 43.

⁷⁶² *Ibid.* 39.

⁷⁶³ *Ibid.* 9.

⁷⁶⁴ *Ibid.* 40 – 42.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ Paragraph 12: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

⁷⁶⁷ Chapman, Audrey R. en Benjamin Carbonetti. „Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Social and Cultural Rights.” Human Rights Quarterly 33.3 (2011): 694 – 695, 712 – 713.

⁷⁶⁸ European Roma Rights Centre. „The Glass Box - Exclusion of Roma from Employment.” 2007. 43.

6 and 7 ICESCR. However, as previously mentioned, complaints with respect to the conditions and remuneration are seldom and scarce, as this could jeopardize the employment status of Roma in such situations⁷⁶⁹. Irrespective of the instance where discrimination takes place however, it is an aspect of state responsibility under the right to work, to foresee in the enforceability of anti-discrimination legislation⁷⁷⁰. The lack of enforceability thereof, further burdens the plight of Roma in Romania and needs to be assessed as a primary step in ameliorating conditions for Roma, not only in the employment sphere, but equally so with respect to their standard of life.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Paragraph 12: Committee on Economic, Social and Cultural Rights. „General Comment 18 : The Right to Work (E/C.12/GC/18).” General Comment. Geneva: United Nations, 24 November 2005.

PART 4. COMPARATIVE ANALYSIS

I. General Observations

158. As has been ascertained, conditions concerning Roma rights in Flanders and Romania vary greatly to a certain extent, yet at the same time illustrate deplorable similarities. Whereas Roma in Romania generally are considered as being Romanian citizens and are thus entitled to a variety of state implemented initiatives, such as access to amongst others, social security and financial aid, the situation is slightly different in Belgium, and Flanders specifically (see *supra* 63 and 67). For Roma in Flanders, amongst others, their cultural and socio-economic situation is entirely dependent on the status they have attained while in Belgian jurisdiction⁷⁷¹. Whilst irregular migrants, amongst which Roma, presumably enjoy certain basic rights, notwithstanding their irregular status, these rights have been rendered void. When government officials of any sort (with the one exception concerning educational facilities – see *supra* 96) become aware of the irregular status of migrants they are confronted with, they are bound by the obligation to notify officials whom are competent for such matters (see *supra* 86). As a result of this notification, irregular migrants face potential criminal proceedings and subsequent expulsion back to their country of origin⁷⁷². Consequently this entails, that the basic rights conferred upon them cannot be enforced in case of (alleged) violations (given the risk of expulsion), thus rendering the substantive provisions of those rights void of meaning. Moreover, it has equally been established that these individuals, amongst which Roma, generally give preference to (irregular) residence in Belgium, irrespective of whether their basic rights are being violated, due to the fact that the conditions in their respective countries of origin are equally or far more deplorable than the conditions to which they are confronted in Belgium⁷⁷³. The latter entails, that these individuals do not attempt to judicially see their basic rights enforced. Due to the fact that Roma in Romania generally do have legal residence and subsequently citizenship, the barriers to judicial recourse are less limited, allowing for a greater potential to judicially enforce their rights⁷⁷⁴.

⁷⁷¹ Touquet, Heleen en Johan Wets. „Context, drijfveren en Opportuniteiten van Midden- en Oost-Europese immigratie: Een exploratief onderzoek met focus op Roma.” Onderzoeksinstituut voor Arbeid en Samenleving, 2013. 23 – 28.

⁷⁷² Kruispunt Migratie-Integratie: Expertisecentrum voor Vlaanderen-Brussel. [Vreemdelingenrecht.be](http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=278). 11 April 2013. 23 April 2013 <http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=278>.

⁷⁷³ Wauters, Joris, Noel Clycq en Christiane Timmerman. Aspiraties en sociale mobiliteit bij Roma - De visies van beleidsmakers, middenveldorganisaties, schoolactoren en Roma zelf. Steunpunt Inburgering en Integratie. Antwerpen: Steunpunt Inburgering en Integratie, 2012. 86.

⁷⁷⁴ European Parliament. „Measures to Promote the Situation of Roma EU Citizens in the European Union.” Directorate-General for Internal Policies, 2011. 62; Romani CRISS. „Shadow Report for the Committee on the Elimination of Racial Discrimination On the Occasion of Report of Romania .” Bucharest: Romani CRISS, 27 July 2010. 10.

The latter is substantiated by the expanding case law concerning Romanian Roma both in domestic as well as regional and international case law⁷⁷⁵.

159. Although the status of individuals in Flanders and Romania is crucial in paving the path to judicial recourse in cases of violations, this is not the sole determinant explanatory for why Roma are continuously subjected to a wide array of human rights violations in both Belgium as well as Romania. A commonality between Roma in Flanders and Roma in Romania, which can be attributed to a variety of reasons, concerns their lack of awareness of the legally enforceable rights they are entitled to (see for example *supra* 99 and 155). This complexity and the lengthiness of judicial procedures equally results in a lack of knowledge concerning the litigation trajectories they can undergo in order to ascertain those legally enforceable rights. Moreover, their general distrust of governmental branches further impedes their ability to seek judicial redress for the wrongs they have been confronted with (see *supra* 39). Within this context civil society is of primordial importance, as they can disseminate information with respect to litigation procedures, and aid Roma in their quest for justice. However, focus thereto is far more centralized in Central and Eastern European countries such as Romania, as opposed to Flanders, where a vacuum persists between the work undertaken by civil society and judicial recourse⁷⁷⁶. Organizations active in litigation undertakings with respect to Roma, such as the ERRC, tend to limit their laudable activities to the respective countries of origin of Roma, which inadvertently disproportionately disadvantages Roma residing in Flanders⁷⁷⁷. Whilst it is uncontested that migration policies, such as in Belgium, are an aspect of state sovereignty, this cannot be invoked as justifying non-compliance with respect to universal rights granted to individuals, irrespective of their status.

II. Analysis of the Right to Education

160. Truancy, segregation, and placement in remedial schools are persistent concerns with respect to Roma in both Belgium as well as Romania. The underlying causes thereof, render all-encompassing solutions and measures to remedy these concerns difficult, given that it requires substantial efforts from all actors concerned (see *supra* 104). Nevertheless, both Belgium and Romania fall short in adhering in the right to education enshrined in article 2 of the First Protocol ECHR. Whilst the positive obligations encompassed in the provision itself are vague, the ECtHR, in its case law, has provided a sufficient basis in order to deduct the scope of these positive obligations. As affirmed by the very recent judgment of the ECtHR in its *Lavida and others v. Greece* case, it cannot go unnoticed that the consistent Roma segregation techniques in the field of education undergone by a variety of European states enhance these positive obligations incumbent upon states, obliging them to correct these

⁷⁷⁵ *Ibid.*

⁷⁷⁶ Hemelsoet, Elias. *Target the Problem, Not the People* Joyce De Coninck. 27 May 2013. 8.

⁷⁷⁷ *European Roma Rights Centre - Strategic Litigation*. 2012. 31 January 2013.

discriminatory practices⁷⁷⁸. Moreover, not taking positive measures aimed at eliminating and correcting the discriminatory and unequal treatment of Roma individuals regarding education, can equally give rise to violations of both the right to education (article 2 First Protocol ECtHR) as well as the prohibition of discrimination (article 14 ECHR)⁷⁷⁹.

161. Applying the foregoing to the situation of Roma in Flanders, Belgium and Romania, it would appear that both states have taken facilitative steps in guaranteeing the right to education for Roma – whether these steps are adequate and/or sufficient, remains doubtful. In addressing truancy in both states, it is irrefutable that a vast array of measures need be taken in order to eradicate this concern. This is in part due to the variety of causes underlying truancy, such as the financial distress, which impedes regular school attendance, cultural differences, spatial segregation and communication difficulties. Truancy is, to a certain extent, attributable to the non-fulfillment of other basic rights, rendering regular school attendance more difficult. Conclusively, if and when addressing absenteeism, a comprehensive interdependent approach is necessitated, entailing that the latter can only be ameliorated in a progressive manner. However, this does not negate the obligation for both Belgium and Romania to undertake facilitative measures in order to enhance the fulfillment of the right to education towards their respective Roma populations. Moreover, discriminatory treatment with respect to enrollment in educational facilities requires an immediate response, if respective anti-discrimination provisions are to be effectuated towards Roma in both Belgium and Romania. Insofar the aforementioned discriminatory treatment is condoned progress for Roma will be slow if not non-existent. Both within Flanders and Romania commendable efforts have been made in order to incite regular school attendance, ranging from social workers both within the educational circuit as well as those whom make regular house visits, NGO's aimed at disseminating information regarding the necessity of schooling as well as undertaking measures to address the totality of their concerns in order to further incentivize education (see *supra* 104 and 111). However, in Flanders, a targeted approach is lacking with respect to Roma, as they opt for a more general inclusive educational policy, which addresses truancy with respect to a broader range of individuals, beyond the Roma communities themselves. The sole initiative aimed at addressing truancy with respect to Roma concerns the *Roma Certificates*⁷⁸⁰, which entails that by means of Roma self-identification, a school will be granted increased funding in order to facilitate measures to encourage Roma school-participation⁷⁸¹. This as opposed to Romania, where targeted

⁷⁷⁸ Amnesty International . „European Court again chides Greece over discrimination against Roma schoolchildren.” Newsarticle. 2013, 30 May 2013.

⁷⁷⁹ European Court of Human Rights. „Case of Chapman v. The United Kingdom (App.No. 27238/95).” Judgment. Council of Europe, 18 January 2001. 27.

⁷⁸⁰ Hemelsoet, Elias. Roma in het Gentse onderwijs. Een verhaal apart? Gent: Academia Press, 2013. 31 – 33.

⁷⁸¹ The effectiveness thereof however, is highly doubtful, as many Roma in Flanders due to their precarious status and the stigma accompanied with being defined as Roma, will feel disinclined to self-identify themselves as Roma. Moreover, for those whom do not self-identify, whatever the underlying

approaches towards Roma prevail. Given the discrepancies between Roma communities in both countries however, a different approach may be deemed necessary, as Roma in Belgium are generally, by definition migrants, as opposed to Roma in Romania whom constitute a national minority. Irrespective of the focus placed by these approaches and measures however, the State initiated measures to resolve the concerns with respect to Roma are limited. The initiatives taken are primarily attributable to civil society actors, often resulting in lacking coherency and cooperation in addressing truancy for Roma in both Belgium and Romania.

162. In accordance with ample case law by the ECtHR, eradicating discrimination equally implies that segregation practices need be curtailed and halted. Segregation, which can take on one of three forms, is undeniably a significant issue in Romania, and has been equally documented in Belgium concerning Roma. However, whereas in Romania all three forms of segregation (see *supra* 106) have been distinguished, Flanders has only been confronted with two forms of segregation, namely the (mis-) diagnosis of Roma children and their subsequent placement in remedial schools, as well as the aforementioned *concentration schools*⁷⁸². Undeniably, states in complying with their obligations arising under article 14 ECtHR, and article 2 of the First Protocol ECHR, and specifically so with respect to their respective Roma communities are bound to take active measures to halt such practices. Interestingly though, a distinction must be made with respect to the forms of segregation that are found in both Romania as well as Flanders. Commencing with the misdiagnosis of Roma children and their subsequent placement in remedial schools, much is to be said with respect to the detrimental effects this may have on the academic capacities and the growth thereof on the concerned individuals. Placing children whom are characterized by an academic deficit together with children whom require enhanced attention due to amongst others, mental disabilities, naturally will inhibit and constrain the growth potential these misdiagnosed children may have. Figures indicate that the prevalence of (abusive) misdiagnosis of Roma children to this extent is far more alarming than children in Flanders. However, again it must be reiterated that in part this can be ascribed to the fact that Roma, notwithstanding (irregular) school attendance may be part of a family residing irregularly in Belgium, entailing that exact figures do not exist. Interestingly though, both in Flanders and Romania, insofar research has been conducted in this field, Roma families generally did and do not contest placement of their children in remedial schools – on the contrary⁷⁸³. Placement in remedial schools, in both Romania as well as Flanders, entails that the students receive enhanced care, as exemplified by the extended school days, are provided lunches and receive more funding (whether

cause may be, the additional funding will not be made available, entailing that they remain in a disproportionately disadvantageous position as opposed to those whom do self-identify themselves as being Roma.

⁷⁸² Hemelsoet, Elias. *Roma in het Gentse onderwijs. Een verhaal apart?* Gent: Academia Press, 2013. 16 – 17.

⁷⁸³ *Ibid.* 18; Greenberg, Jack. „Report on Roma Education Today: From Slavery to Segregation and Beyond.” *Columbia Law Review* 4.110 (2010): 936.

individual or via the school) to foresee in the needs of those children. The latter exemplifies, yet again, the interdependency of certain socio-economic rights with the right to education, and depicts the necessity to address the entirety of the problem rather than just attempting to ameliorate school attendance. If the socio-economic determinants were eliminated within this framework, it is uncontested that placement of Roma children, in special remedial schools, is detrimental for the concerned in the foreseeable future. The ECtHR has been consistent in this regard, and governments condoning such actions, such as Romania, and possibly to a lesser extent Belgium⁷⁸⁴ will be held accountable for non-compliance with article 2 of the First Protocol in conjunction with article 14 ECHR.

163. The second form of segregation found in both Romania as well as Flanders, concerns the segregation of Roma in different schools as opposed to the schools attended by non-Roma students. Again, case law by the ECtHR has consistently stipulated that this renders a state in non-compliance with the aforementioned obligations. However, in the concerned cases the segregation generally entailed a disadvantaged position for Roma due to structural deficiencies within their “own” respective schools, high staff turnover rates and lacking basic necessities – the quality of education was perceived as being lower than that of non-Roma schools (see *supra* 106). This as opposed to the example of Ghent, in Flanders, where schools as such have spontaneously arisen⁷⁸⁵. The aforementioned *concentration schools* entail that the majority of the students is of a foreign or immigrant background, as opposed to the social mix schools are aiming to attain⁷⁸⁶. In contrast to the aforementioned case law and as documented by field research however, this does not necessarily concern schools deemed as being of a lower standard or quality⁷⁸⁷. Moreover, the threshold for foreign parents to send their children to school on a regular basis decreases given that they more frequently encounter children and families in comparable situations⁷⁸⁸. It remains questionable as to whether such segregation, when the quality of education hasn’t been compromised would equally amount to a violation of the right to education under the ECHR. Naturally however, segregation practices, whether intentional or not, are to be avoided insofar possible, given that measures as such can quickly pave the path for increased stigmatization and discrimination. Increased efforts are necessitated both in Belgium as well as Romania in order to integrate, which should not be equated with assimilation, Roma into mainstream society – logically this requires efforts from all parties concerned. Investigating the dispersed and scattered measures that have proven to be fruitful such as the voluntary *concentration schools* in Ghent, as well as the initiatives undertaken by NGO’s in Romania will further facilitate this integration.

⁷⁸⁴ Given limited documentation thereof.

⁷⁸⁵ Hemelsoet, Elias. *Roma in het Gentse onderwijs. Een verhaal apart?* Gent: Academia Press, 2013. 16.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Ibid.*

III. Analysis of the Right to Housing

164. Whether it be in Romania or Flanders, the foregoing has demonstrated that Roma are continuously subjected to substandard housing conditions, uncertainty of tenure with the accompanying fear of eviction, and discriminatory practices on the private housing market, by amongst others, unscrupulous landlords. When recalling the obligations arising from article 11.1 ICESCR and its subsequent General Comment 4 and 7, it is clear that this encompasses both a negative obligation and a positive obligation. First, concerning the negative obligation, states cannot unduly interfere in the right to housing with respect to individuals under its jurisdiction. This is particularly so with respect to forced eviction. If and when eviction is nevertheless necessitated, state parties to the ICESCR are bound to adhere to numerous procedural guarantees in order to minimize the detrimental effect this will have on the evictees.

165. Precisely with respect to these guarantees, both Belgium and Romania have fallen short in their respective adherence thereto. Regarding Flanders, Roma have the right to housing irrespective of their status, entailing that they can access the free housing market but insofar they are irregular migrants, cannot be accommodated with social housing. However, as aforementioned in cases of violations of the right to housing, irregular migrants, amongst which Roma, can hardly see these violations remedied, due to the risk of criminal proceedings and the subsequent risk of expulsion back to their country of origin (see *supra* 158 – 159). However, it is precisely these individuals whom are, more frequently than not, confronted with violations of the right to housing. Especially in instances of squatting, in which the housing conditions are often substandard, eviction has been a common consequence. Whilst government officials and law enforcers in Flanders tend to abide by the procedural guarantees *prior* to the eviction, the guarantees pertaining to the consequences of the eviction are often forgotten⁷⁸⁹. In other words, while the concerned Roma families are given adequate notice of their eviction order in compliance with article 11.1 ICESCR, the obligation to aid in the search and provide alternative adequate housing is easily ignored. Romania on the other hand, in cases of eviction, fails to comply with the stipulated procedural safeguards in another manner. Namely, more often than not, evictees are not properly warned in advance with respect to the eviction order, and when alternative housing is foreseen, it can hardly be qualified as being adequate in accordance with article 11.1 ICESCR. With little to no time to prepare for the eviction, Roma are frequently relocated to areas that pose safety hazards, health hazards, and are not at all equipped to house them⁷⁹⁰. Whereas finding alternative housing may be hindered due to a variety of factors such as a structural deficiency of housing, this does not negate the obligations both Belgium as well as Romania have under the right to housing enshrined in article 11.1 ICESCR. Field research substantiates however, that in both

⁷⁸⁹ Hemelsoet, Elias. *Target the Problem, Not the People* Joyce De Coninck. 27 May 2013. 8.

⁷⁹⁰ It suffices to recall the relocations concerning *Baia Mare* and *Cluj Napoca* (see *supra* 89)

cases, concerning Roma, they have regrettably fallen short in abiding by the procedural guarantees promulgated in cases of eviction.

166. Concerning unscrupulous landlords and substandard housing conditions in the private housing market in both Romania as well as Belgium, the aforementioned examples are self-explanatory. Naturally a safe, habitable environment cannot be equated with informal settlements lacking water, electricity in gas, nor with establishments equally lacking these facilities and posing safety hazards as exemplified by the foregoing example where an entire floor gave way. Extremely alarming however, is the notion that Roma in Flanders cannot contest such violations, insofar they have not been accorded legal residency in Belgium. Thus again, whilst they have been accorded the right to housing, they have no means of enforcing this right as this would only lead to forced eviction, criminal proceedings, and subsequently expulsion to their country of origin. Conclusively this entails that the entirety of the right to housing for Roma in such situations is rendered void of meaning. Whilst merely implementing legislative provisions, which prohibit and make landlords who engage in such abhorrent behavior, is a prerequisite in guaranteeing the effective enjoyment of article 11.1 ICESCR, it does not suffice. Acknowledging that both in Belgium and Romania it is near impossible to actively find unscrupulous landlords without being instigated by complaints, enforcing the right to housing through judicial recourse is primordial in effectively guaranteeing this right. By maintaining these contradictory provisions with respect to migration and the basic rights conferred upon irregular migrants, Belgium is discriminately disadvantaging both Roma, and irregular migrants in general, and furthermore rendering article 11.1 ICESCR futile for the concerned individuals.

IV. Analysis of the Right to Work

167. Although the right to work as enshrined in articles 6, 7, and 8 ICESCR can be deemed universally applicable to every individual within a states' jurisdiction⁷⁹¹, Belgium has opted to confine the right to work to those individuals whom reside in Belgium legally. As an aspect of state sovereignty, it is uncontested that Belgium does indeed have the right to regulate the influx of migrants and the manner in which it chooses to address these influxes. However, by bestowing certain basic rights upon irregular migrants, thus substantiating the tolerance policy it promulgates with respect to irregular migrants, Belgium solely enhances the predicament irregular migrants, amongst which Roma, face, by prohibiting them from accessing the formal labor market. Given the determinants that instigated their migration, such as amongst others, discrimination, ethnically motivated violence and possibly a far less adequate standard of living, it is not inconceivable, that these individuals are willing to seek employment in the

⁷⁹¹ Lu, Haina. „The Personal Application of the Right to Work in the Age of Migration.” *Netherlands Quarterly of Human Rights* 26.1 (2008): 44.

informal labor market and possibly venture into petty crime as a source of income⁷⁹². The latter is precisely one of the obligations, irrespective of its progressive nature, that is incumbent upon member states to the ICESCR under articles 6, 7, and 8. The ultimate goal is to ensure the diminishing and eradication of the informal labor market, as this places individuals in a far more precarious condition and subjects those individuals to greater risks of exploitation, further increasing the deplorable conditions in which they find themselves. By allowing this tolerance policy yet denying the right to work, Belgium continuously feeds the demand for this informal labor market, in stark contradiction with the right to work under the ICESCR.

168. The aforementioned is naturally not as prevalent in Romania as it is in Belgium, given that Roma constitute a national minority and thus are not subjected to migratory legislation. However, a significant barrier in guaranteeing access to employment in Romania, remains the discriminatory policies companies maintain with respect to accepting Roma as employees⁷⁹³. Again, while legislative efforts are commendable in an attempt to eradicate such discrimination, enhanced positive measures are necessitated⁷⁹⁴. Much of the discrimination with respect to Roma regarding employment is attributable to the stigma and entrenched Anti-Gypsyism prevailing in contemporary Romania. Insofar public officials, both formally and informally, do not contest these stigmas, societal perception of Roma as such, is bound to persist. Notwithstanding the efforts made in the field of employment, as exemplified by the 8 regional offices⁷⁹⁵, which disseminate information, and provide vocational training, the vast unemployment of Roma is nevertheless substandard, and requires immediate attention, and enhanced positive action on behalf of the Romanian government. Employment is instrumental and influential with respect to all other aspects concerning the quality of life Roma experience, and is pivotal in addressing a wide array of socio-economic conditions, which up until today remain sub-standard for Roma in Romania.

⁷⁹² Vlaams Minderhedencentrum. Werknota: Roma in Vlaanderen, knelpunten en aanbevelingen. Brussel: Vlaams Minderhedencentrum, 2010. 13.

⁷⁹³ Fleck, Gabor en Cosima Rughinis. Come Closer - Inclusion and Exclusion of Roma in Present-Day Romanian Society. Bucharest: National Agency for Roma, 2008. 40.

⁷⁹⁴ Chapman, Audrey R. en Benjamin Carbonetti. „Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Social and Cultural Rights.” Human Rights Quarterly 33.3 (2011): 694 – 695, 712 – 713.

⁷⁹⁵ Rusu, Marioara, et al. „Incluziunea romilor din Romania: politici, institutii, experiente/ Roma Inclusion in Romania: Policies, Institutions and Examples.” 2012. 217.

PART 5. CONCLUSION

169. It is irrefutable that Roma constitute one of Europe's largest and most disadvantaged minorities. Notwithstanding the adoption and promulgation of a vast amount of instruments across Europe and by the international community aimed at combatting discriminatory practices and stigmatization, Roma nonetheless continue to be victims thereof. Discriminatory political discourse, racially motivated violence instigated by, both non- Roma individuals, and law enforcers, extreme poverty, and discrimination with respect to education, employment, and housing, are all conditions that Roma have been confronted with. Not surprisingly this has forged a path for Roma, which has led them to be on the outskirts of society across Europe and not seldom this equally has paved the path to crime as alternative means for survival. This dysfunctional dialogue remains adamant between the European Roma community and Europe's majority populations, irrespective of the initiatives undergone.

170. In addressing the rights of Roma in contemporary Europe, and more specifically Belgium and Romania, three fields of law are of interest, namely human rights legislation in general, minority legislation, and PIL. Although all three fields are of particular pertinence towards Roma, the general human rights framework provides the necessitated basis upon which to assess Roma rights in its current state, given that the rights therein enshrined, are precisely those rights which are frequently violated with respect to Roma. Minority legislation and PIL, within the contextual framework herein provided, can be seen as manners in order to enhance adherence to human rights of Roma. Namely, minority legislation, as shown by vast case law by the ECtHR, has resulted in enhanced scrutiny when addressing human rights of minorities, entailing that the standards required in order to be in compliance with those concerned rights, need be assessed more stringently. In addition, PIL has evolved as a handy tool in ascertaining and enforcing human rights of minorities, such as exemplified by the technique of strategic litigation. Through the usage, by civil society, of such techniques, violations of human rights against Roma have been contested and successfully remedied underscoring the need thereof for Roma.

171. Categorizing Roma as a minority group is not an easy task, given the very distinct heterogeneity, which defines them, as shown by their various cultural characteristics, their divergent religious belief, the inconsistent usage of their common language *Romani Cib*, as well as their nationalities. The sole elements that can be deemed as unifying determinants for Roma as a minority group, concerns their ancestry in parts of India preceding the 11th century, as well as their common historical subjection to oppression

and discrimination – the latter a commonality which has persisted in contemporary Europe, as illustrated by the analysis of discriminatory practices and human rights violations concerning Roma in both Belgium and Romania.

172. Certain particularities about both countries respectively, have rendered the adherence to the right to education in conjunction with other socio-economic human rights, largely substandard. Concerning Belgium this is primarily attributable to the federal immigration legislation, which has rendered certain basic rights Roma are entitled to irrespective of their status, void of meaning. This as opposed to Romania, where the difficulties are largely the result of historical events, and more specifically the transition from a Communist regime to a free market structure, which marked a severe deterioration for the socio-economic realities of Romanian Roma. Compounding these issues in both Belgium as well as Romania, is the lack of persistent political will to ameliorate the plight of their Roma, illustrative of how *Anti-Gypsyism* is entrenched both in society as well as the political and governmental arena. Human rights provisions protecting the right to education, employment and housing, nor litigation techniques can provide the solace much needed concerning Roma, insofar societal stigmatization is not curtailed, of which the latter requires above all, a strong and clear message by political leaders within their respective jurisdictions, condemning discriminatory treatment of Roma. Without this, mainstream society may continue to regard their discriminatory treatment of Roma as being legitimized and consequently persevere therein, further aggravating the already existent dysfunctional interaction.

173. Conclusively, irrespective of whether the foregoing human rights violations could or couldn't be proven before judicial complaint mechanisms, the conditions Roma are confronted with in Europe stand in stark contradiction with the core and essence of the conceptual human rights framework established in the aftermath of the WWII atrocities. It is inconceivable, that notwithstanding the shared horrific European history, which to a certain extent depicts Europe, analogous tendencies are yet again arising with respect to Roma. By not acknowledging the vicious cycle of their socio-economic realities, and remaining negligent in protecting the universally promulgated rights they are entitled to, mainstream society has failed and continues to fail Roma across Europe tremendously. In contributing to such discriminatory practices, mainstream society treads against the quintessential safeguards implemented to ensure the wellbeing of every individual, irrespective of status, or origin, negating precisely those universal rights equally conferred upon Roma, which are freely enjoyed by others.

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ANNEX

TARGET THE PROBLEM, NOT THE PEOPLE

Interview with Elias Hemelsoet – 27th of May, 2013

CONTEXTUALIZATION

Elias Hemelsoet, affiliated to the University of Ghent and an assistant in its Department of Social Welfare Studies, is currently conducting and finishing research with respect to his doctoral thesis “*A critical appraisal of policies and practices focusing upon the right to education: the case of the Roma in Ghent*”. As a result of research concerning the scope of his work, as well as his involvement in *VZW De Tinten* and *Opre Roma*, Elias has gained invaluable insights with respect to Roma residing in Ghent specifically, and Flanders generally, and the socio-economic conditions they are subjected to.

INTERVIEW QUESTIONS

Regarding Discrimination

1. What are, in your opinion the main areas of concern for Roma residing in Flanders?

“Everything related to poverty are main concerns of Roma - ranging from housing, education to employment. In addition to that discrimination is highly prevalent. Education in this regard is of particular relevance given that this forms the basis for achieving any pertinent change for Roma. Addressing these is going to be quintessential in addressing the plight of Roma in Flanders.”

2. Given your field research, what are your thoughts on open and direct discrimination regarding Roma in Flanders? Insofar discriminatory treatment is prevalent towards Roma, in what spheres of everyday life does it affect Roma?

“The main area of concern with respect to discrimination is migration legislation in Belgium. There is a flagrant lack of coherency and cooperation with respect to migration matters and other basic rights that Roma enjoy. This is illustrated by the governmental authorities, which illegally distribute information regarding Roma to other governmental agencies, subsequently not respecting such basic rights.”

“Particularly with respect to housing, discrimination is apparent. Many housing establishments are uninhabitable. Although the legal framework, namely the *Flemish housing code*, has been adopted, the enforceability thereof is lacking. Consequently this has drastic consequences on Roma in Ghent for example. Ghent has a serious structural housing problem – social housing is insufficient, and many buildings on the private housing market are substandard and no longer comply with the legal framework and standards set therein. Naturally, given their precarious conditions, Roma reside the worst possible conditions. However, it is hard to prove direct discriminatory practices towards Roma, given that these structural issues form a problem for vulnerable individuals in general”.

“A particular point of concern is the fact that Roma oftentimes cannot or will not protest to these substandard housing conditions. This is frequently linked with their precarious legal status. Belgium namely has tolerance policy with respect to irregular migrants – irregular migrants are allowed to be here, and expulsion is not very frequent. Expulsions happen rarely, and mostly take place with respect to people who arrived here recently and/or have criminal records. As a result Belgium maintains contradictory policies – whereas irregular migrants have certain basic rights such as education, urgent medical care and housing, these cannot be enforced because of fear for federally established criminal provision and the *risk* of expulsion.”

“For example, the mayor of Ghent oftentimes, in political discourse concerning Roma, refers to 10 to 15 problematic Slovak Roma families in Ghent. By equating these families with problematic circumstances in Ghent, the mayor is discriminating, and at the very least stigmatizing Roma. Flanders addresses migration influxes with an inclusive policy, aimed at addressing migration in general as opposed to solely Roma. However, by consistently referring specifically to Roma within these policies, the stigmatization towards Roma is solely increased, which in turn, legitimizes more discriminatory behavior.”

3. What are your thoughts on discrimination with respect to law enforcers, such as the police?

“Discrimination by police is very apparent with respect to squatting. Law in Belgium does not prohibit squatting, and consequently, squatters can be registered in their respective squats. In order to be registered, a police officer must come and check whether you live there effectively, irrespective of whether you own or rent the property. However, more often than not, police officers refuse to register Roma, and use faulty arguments in order to do so. Such arguments can include, that too many people are already registered within a certain property – however, this isn’t the task of the police. As a result, people in similar situations are being treated differently. Although, Roma will not file complaints, informally a lot of pressure is exerted in order to stop such actions, as shown by the complaints given in ‘*De Tinten*⁷⁹⁶’. It is unclear whether such measures by police officers are the result of orders by higher officials though.”

4. Are certain Roma communities in Flanders less likely to be subjected to discriminatory behavior?

“In Flanders, generally when talking about Roma there are little to no differences – they all generally encounter the same obstacles. Naturally distinctions arise dependent on their countries of origin. Depending on their nationality, certain Roma will receive a legal status in Belgium more efficiently than others.”

⁷⁹⁶ ‘*De Tinten*’ is a non-governmental organization, aimed at providing help, nourishment, legal and social guidance to individuals without appropriate legal documentation in Ghent.

Regarding Education

5. What have you concluded, are the main causes for truancy?

“The main causes are undeniably financial distress and social and cultural practices. Social and cultural practices are very different between Roma and non-Roma. Many of these people don’t have any school experience, and lack confidence towards social institutions amongst which education facilities. Additionally, many parents never went to school in their countries of origin, and as a result have no familiarity with the concept of schooling, its structure and organization, not to mention the Belgian school system. An example concerns compulsory education, which in Belgium is until approximately 18 years of age, whereas in the countries of origin compulsory education only lasts until 16 years of age.”

6. What are your thoughts, with respect the right to education which is in fact compulsory even for those residing in Belgium irregularly, and the notion that they cannot obtain work when here irregularly? School enrolment brings about costs, can Roma families or more generally Central and Eastern European migrants receive funding of some sort?

“Firstly, legal residence is a precondition for individual funding – Roma cannot receive funding to cover the school expenses if they are here as irregular migrants. Interestingly, in Belgium, the right to education is not solely a right – it is equally an obligation, as dictated by federal law. Regionally, this federal matter is to be implemented, however, by refusing the individual funding, as a regional measure, the essence of the right to education is lost. The essence of the right and obligation is, amongst others, to ensure access to education for everyone in Belgian jurisdiction – by denying that funding, aimed at achieving this goal, to Roma who are here irregularly they are discriminating.”

7. With respect to guaranteeing access to school for young Roma, you speak of concentration schools in Ghent, which aren’t necessarily detrimental in Belgium –

how would you relate such schools to the educational segregation practices in Central and Eastern European countries?

“These concentration schools here in Belgium are focused more on the ameliorating schooling of Roma (and other migrants). This segregation could potentially be seen as advantageous in Belgium given that you have motivated teachers, the schools are very accessible, and there is less to no fear of discrimination. These schools are not problematic by definition - a lot comes down to economic capacity. Belgium has the economic capacity to sustain such concentration schools, whereas Romania for example has this to a lesser extent. It is not ideal however for the apparent reasons. Teachers strive for social mix, however, they generally don't believe positive measures should be taken to achieve such a mix.”

“Concerning discrimination with respect to enrolment, supervisory institutions exist. However, these institutions do not generally receive complaints, entailing that they have to actively conduct field research thereto. More often than not, complaints will be given informally – civil society helps in this regard. By threatening schools, which employ discriminatory practices, with media coverage for example, the discrimination Roma encounter is often negated.”

8. With respect to Ghent, you equally mention in your book that high percentages of Roma students, end up in special, remedial classes – how is this reconcilable with the standards the ECtHR has maintained in analogous situations? Are there, or can the Flemish Government take initiatives to prevent this?

“Again this exemplifies the social and cultural gap between Roma and non-Roma. Belgium isn't prepared to deal with such migratory fluxes. It will take time in order to properly address this issue. In order to avoid such placement though, it could be a good idea to extend the length of preparatory classes⁷⁹⁷.”

⁷⁹⁷ In this context he refers to classes established to decrease the educational deficit migrant, and consequently Roma children, may have. These classes can currently be taken for a maximum of two years. However, two years of such classes has proven insufficient in combatting the educational deficit some of these Roma have. In his book Elias refers to the inability of such children of mastering simple techniques, such as holding a writing utensil. Naturally such deficits require enhanced and prolonged care in order to

9. In your book, you delineate certain initiatives that have been taken to incentivize Roma children to attend school – interestingly you note that specific all encompassing solutions are required, which require coherency and cooperation between a variety of actors and various policy fields – how do you reconcile that notion with the idea that Roma shouldn't be targeted specifically, given that this further enhances stigmatization?

“A simple answer suffices – target the problem, not the people.”

Housing

10. Flemish law prescribes that social housing is only accessible insofar the individuals or families have valid residential permits, and access is conditioned upon various other determinants, such as language requirements and a potential integration training? How do Roma families respond to these conditions? Do they make use of social housing or prefer the private housing market?

“Roma hardly know about these conditions and this is consequently not seen as an option for them. The only stories they hear, is that there's a lack of social housing, so they do not regard this as an option. Those who do are confronted with waiting lists that last for years, and more often than not, when a Roma family is at the top of the list to be allotted social housing, the concerned agencies refuse to do so because the size Roma families exceeds the living space of social housing.”

11. In attaining social housing, upon arrival, how long would a procedure as such last, and where do Roma reside in the meantime? Can discriminatory treatment be concluded throughout these procedures?

ensure that this educational deficit is adequately addressed, and brought in accordance with the standards in the Belgian educational system.

“Upon arrival, within three months they need to obtain a *Bijlage 19*. This document should be handed out upon arrival in Belgium by the concerned institutions, however there have been numerous documented cases documented were Roma and other migrants have been denied the document by desk clerks, telling them that they have to come back at a later date to receive the documents. Oftentimes, the given date exceeds the three-month leeway migrants are given to obtain such documentation, entailing that they subsequently reside in Belgium irregularly. In order to combat this, civil society is again instrumental – by gathering volunteers and experts, situations as such are contested by threatening to involve the media and threatening with judicial procedures. In Ghent this was the case for example – however, before it got that far, the concerned offices started abiding by the rules. In Antwerp however, in order to receive such a document, these migrant individuals have to pay taxes upon their documentation, which is again illustrative of the lack of coherency with respect to policies in Belgium. Oftentimes, regionally competent authorities and institutions interfere with federal matters, in contradiction to what Belgian federal law dictates.”

12. For those whom have not attained a valid residential permit and are here irregularly – are they confined to the private housing market? Given that irregular residence is subject to penal regulations, how does this affect Roma citizens in such situations?

“In order to receive funding of any sort, legal residence is required. As a result irregular migrants have the right to housing, yet cannot claim any financial interference of any sort. Additionally, social housing is not an option for those residing here irregularly. Due to limited individual financial means and their vulnerable position, Roma are often subjected to abhorrent problems. They tend to be the victims of unscrupulous landlords, and the conditions lacking electric, gas, water, leaks, hygiene, rats, and so forth.”

“To give an example: a Roma family, with ten children in Ghent, were confronted with such despicable conditions. They were squatting in a building, where the ground floor gave way. As a result, the youngest child, in its crib, fell through the ground floor into the cellar, which was infested with a plague of mosquitos and submerged in water and feces. Luckily the child was unharmed, not counting the innumerable mosquito bites.”

“Within this same family, the father, in another establishment, had captured two garbage bags full of rats, which had been scurrying around on the floor, on which two of the children slept. Although Ghent provides for extermination services, given that such situations are regarded as being a hazard to public health, the family could not contact this service out of fear for reprisal as a result of their irregular status.”

13. Regarding squatting – how does Flemish legislation approach this? Is it prevalent? Is it condoned, or prohibited? If not explicitly prohibited, how do law enforcers approach eviction?

“Squatting is very prevalent in Ghent, and discriminatory practices often occur with respect to squatting. The city is attempting to be stricter with respect to this. As a result though, evictions are being employed more frequently.”

“Regarding evictions, it is safe to say that everything up until the moment of eviction is in accordance with the standards laid down in legislation. However, following the eviction little to nothing is done to ensure the wellbeing of the evictees. There is no aid in searching for alternative housing, and the evictees are left to live on the streets. As a result deplorable situations have arisen, as illustrated by the rape of minor evictee. Following the expulsion of this family, which hadn’t been given alternative options with respect to housing, they were left to reside in a park, where the girl was consequently raped. Again, complaints aren’t filed however, out of fear for other reprisals, which may result in expulsion.”

14. With respect to both encampment sites and squatting – do evictions take place, from your experience, in accordance with articles 11 ICESCR?

“This is a minor problem - the only relevant issue is the lack of available space for encampment sites. Moreover, this is not necessarily with respect to Roma.”

Right to Work

15. What are your thoughts on the right to work with respect to Roma in Flanders?

“As a result of the conditions imposed in order to attain legal residence, many Roma often times work in false businesses or fictive organizations and companies, in order to attain legal residence based on self-employment. This allows them to reside in Belgium for approximately a year, and consequently, following regulation controls, their fraud is discovered. This then leads to criminal and fiscal sanctions, which further aggravate the socio-economic distress many Roma are already in. The establishment and participation in such companies is often a result of corrupt networks already existent in Belgium. Even within these corrupt networks though, within the first year upon arrival in Belgium, many Roma are confronted with severe exploitation, inadequate remuneration, and indebtedness. Naturally this solely increases their predicament.”

“Again the tolerance policy Belgium maintains with respect to irregular migrants entails that they enjoy basic rights yet cannot see them enforced. Due to their inability to participate in the formal Belgian labor market, Roma are unequipped to adequately fend for themselves and acquire adequate housing or comply with the obligation regarding education. As a result, they are left little to no choice and subsequently delve into the informal labor market, not to mention small crimes.”

16. Aside from what was mentioned, are there any areas of concern that are equally alarming with respect to Roma in Flanders?

“An issue, which is experiencing a surge, concerns child prostitution, which is becoming increasingly prevalent as a source of income for Roma families. In Antwerp specifically, there is a growing tendency to exploit 6 to 7 year old boys for prostitution. Oftentimes this is the only source of income for these families, although this is naturally not a justification of such action. It does however, show the increasing necessity to address the socio-economic distress of Roma, in order to prevent even more horrendous violations of their basic rights.”

