

THE MODIFIED MECHANISM IN EU ACCESSION: A LOOK AT CROATIA'S ACCESSION INTO THE EU AND THE PLIGHT OF CROATIA'S ROMA POPULATION.

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ABSTRACT

Croatia's failure to implement *Orsus v. Croat.*, is but one example of why the new accession monitoring system is the proper step for the EU, and why the new process should be strengthened. *Orsus v. Croat.* is consistent with an emerging trend to enlarge the originally narrow grant of rights found in the European Convention on Human Rights (ECHR) Art. 14.¹ The ECHR Art. 14 is a protection against discrimination on a basis "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."² The EU has suffered severe economic problems in the past several years, and the EU is focusing on economic conditions.³ Croatia's accession negotiations were concluded on June 30, 2011, and Croatia will join the EU in 2013.⁴ Croatia is the first nation that must formally comply with a pre-accession monitoring process.⁵ However, this pre-accession mechanism is the

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¹ See *infra* Part I & Part II.C; see *infra* Part I & Part II.C.

² Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005 (entered into force Sept. 3, 1953), *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf [hereinafter *ECHR*].

³ See *infra* Part III.

⁴ *EU Closes Accession Negotiations with Croatia*, EUROPA (June 30, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/824&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵ *Croatia Accession Near, EU Ministers Say Amid Monitoring Talks*, MONSTERS & CRITICS (June 21, 2011), http://www.monstersandcritics.com/news/europe/news/article_1646716.php/Croatia-accession-near-EU-ministers-say-amid-monitoring-talks; *Barroso: No Putting Off Croatia's*

result of controversy and debate among EU members. This verification mechanism should be a permanent formal component to the EU accession process, and it should be given more power in the process.

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I. INTRODUCTION

Indirect discrimination jurisprudence was recently reinforced as a result of a Croatian court case, *Oršuš v. Croatia*.⁶ In *Oršuš*, the Grand Chamber (GC) held segregating Roma⁷ children violated the European ECHR.⁸ *Oršuš* is consistent with emerging ECHR Art. 14⁹ jurisprudence.¹⁰ The emerging trend is to incorporate the EU's Racial Equality Directive discrimination standards into the ECHR.¹¹ *Oršuš* demonstrates Europe's legal and moral support of human rights,¹² but its

⁶ *Oršuš & Others v. Croat.*, App. No. 15766/03, 52 Eur. H.R. Rep. 300 (2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=864619&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁷ Although "Roma" encompass a variety of cultural traditions and ethnic heritages, it will be used throughout this article to discuss all Roma. Note, however, each Roma group has its own word for its specific ethnicity, yet "Roma" is more accurate than the pejorative term "gypsy," hence the use of the term "Roma."

⁸ *Oršuš*, 52 Eur. H.R. Rep. ¶¶ 184–185.

⁹ *ECHR*, *supra* note 2 ("The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.").

¹⁰ See Rory O'Connell, Commentary, *Substantive Equality in the European Court of Human Rights?*, 107 MICH. L. REV. FIRST IMPRESSIONS, 129, 129 (2009); see *Oršuš*, 52 Eur. H.R. Rep. ¶ 144 (reiterating that Article 14 is not an independent grant of rights); See *D.H. & Others v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. 3 (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=825443&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹¹ See *infra* Part I.C.

¹² See Charter of Fundamental Rights in the European Union, art. 21, Feb. 21, 2001, 2000 O.J. (C 364) 1, 13, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf [hereinafter The Charter] ("1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."); see *ECHR*, *supra* note 1. The EU's charter of Fundamental Rights Article 21 is to be read in compliance with ECHR Article 14. See also Draft Charter of the Fundamental Rights of the European Union, Convent 49, (CHARTE 4473/00), 1, 22–23 (2000), available at http://www.europarl.europa.eu/charter/pdf/04473_en.pdf [hereinafter Draft Charter] ("Insofar as this corresponds to Article 14 of the ECHR, it applies in compliance with it."); see THE CONSTITUTION OF THE REPUBLIC OF CROATIA Dec. 1990, art. 14 ("Citizens of the Republic of Croatia shall enjoy all rights and freedoms, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other properties. All shall be equal before the law."); Prime Minister of the Grand Duchy of

failure to be implemented demonstrates the EU's failure to enforce its human rights requirements and ideals.¹³ Croatia finished EU accession negotiations on June 30, 2011,¹⁴ but countless Roma continue to face discrimination.¹⁵ The EU Council has insisted on a pre-accession monitoring system, to ensure that Croatia is fully compliant before finally being admitted into the EU.¹⁶ Although the pre-accession monitoring mechanism is a positive contribution to the EU accession process, the mechanism and related penalties are too vague.

Part I of this paper will provide an overview of Europe's core values and legal frameworks as demonstrated by their legal conventions. Part II examines the plight of the Roma, and the recent *Oršuš v. Croatia* decision. Part III examines Croatia's accession into the EU, the current EU accession process, and the new pre-accession monitoring system. Part IV concludes that the EU's decision to implement a new pre-accession monitoring system is a positive step in allowing the EU to

Luxembourg, Jean-Claude Juncker, *Council of Europe – European Union: "A Sole Ambition for the European Continent,"* Doc. No. 10897, at 1 (April 11, 2006), available at <http://assembly.coe.int/Documents/WorkingDocs/doc06/EDOC10897.pdf> (stating that the CoE and the EU "were products of the same idea, the same spirit and the same ambition.").

¹³ Telephone Interview with European Roma Rights Centre Legal Advisor (Oct. 7, 2010)(discussing the impact of the *Oršuš* case on the applicants involved); AMNESTY INT'L, *Submission to the Committee of Ministers of the Council of Europe on Oršuš and others v. Croatia* (Application no. 15766/03) (March 2011), available at <http://www.amnesty.org/en/library/asset/EUR64/007/2011/en/7df8f85d-4ee2-4685-b83d-06f01a5818d4/eur640072011en.pdf>; AMNESTY INT'L, *Croatia: Submission to the Committee of Ministers of the Council of Europe on ORŠUS AND others v. Croatia*, (stating, "Amnesty International is concerned that despite some steps undertaken by the Croatian government, the measures developed by the authorities are insufficient to address the causes of discrimination of Romani pupils in the education system of Croatia, as identified in the Grand Chamber's judgment of *Oršuš and Others v. Croatia*.") <http://zunia.org/post/croatia-submission-to-the-committee-of-ministers-of-the-council-of-europe-on-orsus-and-others-v-cr/> (last visited Jan. 2012); AMNESTY INT'L, *Romani children continue to be trapped in separate and unequal education, despite judgments by the European Court of Human Rights*, <http://www.fightdiscrimination.eu/news-and-events/romani-children-continue-be-trapped-separate-and-unequal-education-despite-judgments> (Nov. 2010), See *Czech Government Flouts Court Ruling on Roma Education*, OPEN SOCIETY FOUNDATIONS (Nov. 10, 2010), <http://www.soros.org/initiatives/justice/news/roma-education-czech-20101110> (discussing the failure to implement the *D.H. v. Czech* decision, which is discussed later in this article); Tracy Gurd, *Still Waiting: Czech Republic Drags Its Feet on Roma Education Reform*, OPEN SOCIETY FOUNDATIONS (Feb. 8, 2011), <http://blog.soros.org/2011/02/still-waiting-czech-republic-drags-its-feet-on-roma-education-reform/>

¹⁴ *EU Concludes Accession Negotiations with Croatia*, THE SOFIA ECHO (July 1, 2011), http://sofiaecho.com/2011/07/01/1115795_eu-concludes-accession-negotiations-with-croatia.

¹⁵ See *infra* Part II.

¹⁶ Radio.net, *COREPER Discusses Pre-accession Monitoring for Croatia*, DAILYTPORTAL.HR, <http://daily.tportal.hr/128868/COREPER-discusses-pre-accession-monitoring-for-Croatia.html> (last updated May 5, 2011).

continue growing, promote human rights, and to address EU economic concerns.¹⁷ Nevertheless, the ambiguity of the pre-accession monitoring system leaves much to be desired.

II. EUROPE'S CORE VALUES-THE LEGAL FRAMEWORKS

European nations are regulated by several international bodies such as the Council of Europe,¹⁸ the EU,¹⁹ and also individual national governmental courts, such as the Constitutional Courts of individual nations.²⁰ A variety of human rights charters guide European nations, each with similarly stated goals of equality.²¹ An introduction of the legal frameworks helps demonstrate Europe's values and goals of EU enlargement, thereby emphasizing the importance of EU enlargement. First, this paper examines the Council of Europe, then the EU's ECHR, and finally how the Racial Equality Directive has impacted the ECHR.

A. HUMAN RIGHTS ARE A SIGNIFICANT ASPECT OF THE COUNCIL OF EUROPE'S FOUNDATION AND LEGAL FRAMEWORKS.

Promotion of human rights is a founding tenant of the Council of Europe.²² The Council of Europe was established in 1949,²³ joining the Council of Europe is contingent on adopting the European Charter of Human Rights (ECHR), and now virtually every European country, including all EU members,²⁴ are Council of Europe signatories.²⁵ The

¹⁷ See generally European Comm'n, *Economic Governance*, EUROPA, http://ec.europa.eu/financial-crisis/index_en.htm (last updated Dec. 17, 2010) (providing information about Europe's current financial state).

¹⁸ See COUNCIL OF EUROPE, <http://www.coe.int/> (last visited Dec. 3, 2010).

¹⁹ See EUROPA, http://europa.eu/index_en.htm (last visited Dec. 3, 2010).

²⁰ See *Constitutional Courts (Links)*, COUNCIL OF EUROPE, http://www.venice.coe.int/site/dynamics/N_court_links_ef.asp (last visited Dec. 3, 2010) (providing a list of constitutional courts that control individual European nations).

²¹ *Infra* Part I.A-C; e.g., The Charter, *supra* note 12.

²² *The Council of Europe: An Overview*, COUNCIL OF EUROPE, 2 (June 2010), http://www.coe.int/AboutCoe/media/interface/publications/tour_horizon_en.pdf.

²³ *Council of Europe in Brief: Who We Are*, COUNCIL OF EUROPE, <http://www.coe.int/aboutcoe/index.asp?page=quisommesnous&l=en> (last visited Oct. 25, 2010).

²⁴ *The Council of Europe: An Overview*, *supra* note 22.

²⁵ 47 Countries, *One Europe*, COUNCIL OF EUROPE, <http://www.coe.int/aboutcoe/index.asp?page=47paysleurope&l=en> (last visited Oct. 15, 2010) (listing 47 member states: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France,

European Convention on Human Rights was ratified four years after the Council of Europe was established, and the European Court of Human Rights (Eur. Ct. H.R.) was established in 1959.²⁶ Adopted in the aftermath of World War II, the European Convention of Human Rights emphasizes broad democratic ideals, as opposed to the rights of individuals.²⁷

The Council of Europe has a multi-level interaction with individual nations' courts.²⁸ Member states either choose to directly incorporate the European Convention of Human Rights via their respective constitutions, or use the Eur. Ct. H.R. as an advisory court.²⁹ Although Eur. Ct. H.R. judgments are binding,³⁰ the ECHR itself does not provide methods for implementing its judgments.³¹ The ECHR encourages implementation via its damage provisions, which require

George, Germany Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom); *A Convention to Protect Your Rights and Liberties*, COUNCIL OF EUROPE, <http://human-rights-convention.org/> (last visited Dec. 23, 2010).

²⁶ *60th Anniversary of the European Convention on Human Rights: Council of Europe, Our Rights, Our Freedoms*, I.1, Leaflet, COUNCIL OF EUROPE, http://www.coe.int/AboutCoe/media/interface/publications/60_cedh_en.pdf (last visited Feb. 22, 2011).

²⁷ István Pogány, *Minority Rights and the Roma of Central and Eastern Europe*, 6 (1) HUM. RTS. L.REV. 1, 5–6 (2006); *ECHR*, *supra* note 1, preamble ("Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms; Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend; Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights . . .").

²⁸ Clemens A. Muller, *Fundamental Rights in Multi-Level Systems: Recent Developments in European Human Rights Practice*, 2 INTERDISC. J. HUM. RTS. L. REV. 33, 35 (2007), available at http://www.americanstudents.us/IJHRL2/Articles/Journal_JHRL_2007_Muller_online.pdf.

²⁹ *See id.*

³⁰ *European Court of Human Rights: Questions and Answers*, 3, EUR. CT. H.R., available at http://www.echr.coe.int/NR/rdonlyres/BB10719C-D747-4862-AE44-8A54D9B316D5/0/ENG_Questions_and_Answers.pdf.

³¹ Muller, *supra* note 28.

violating nations to pay monetary damages.³² The ECHR is also a binding treaty on all EU members.³³

B. HUMAN RIGHTS ARE CENTRAL TO THE EUROPEAN UNION'S FOUNDATION, AND PERMEATE THE EUROPEAN UNION'S FOUNDING LEGAL DOCUMENTS AND SUPPLEMENTAL LEGAL DIRECTIVES.

The goals of the EU are to promote peace, human rights, equality, rule of law, and the well being of EU citizens.³⁴ The Council of Europe is considered an early step in the creation of the EU,³⁵ but the European Coal and Steel Community of 1952 is cited as the “first step towards a supranational Europe.”³⁶ In 1957, with the signing of the Treaty of Rome, the European Economic Community was formed.³⁷ The goal was to increase European free trade and services across borders.³⁸ After a series of treaties,³⁹ the penultimate Maastricht Treaty created the modern EU in 1993.⁴⁰

³² *Rules of Court*, EUR. CT. H.R. 1, 66, ¶ 23, available at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourtJuly2006.pdf>; *Id.* at 64 ¶ 9.

³³ Treaty of Lisbon Amending the Treaty on European Union and The Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at http://eur-lex.europa.eu/JOIndex.do?year=2007&serie=C&textfield2=306&Submit=Search&_submit=Search&ihlmlang=en [hereinafter Treaty of Lisbon].

³⁴ *Why Was the EU Founded?*, EUMATTERS.IE, <http://www.eumatters.ie/How-the-EU-Works/Why-was-the-EU-founded.aspx> (last visited Dec. 28, 2010); *Countries*, EUROPA, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Dec. 28, 2010) (listing EU member countries as Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).

³⁵ *1945–1959 A Peaceful Europe – The Beginnings of Cooperation*, EUROPA, http://europa.eu/abc/history/1945-1959/index_en.htm (last visited Dec. 28, 2010).

³⁶ *Treaty Establishing the European Economic Community, EEC Treaty – Original Text (Non-consolidated Version)*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm (last visited Dec. 28, 2010) [hereinafter *ECC Treaty*].

³⁷ *1945–1959 A Peaceful Europe – The Beginnings of Cooperation*, *supra* note 34.

³⁸ *Id.*

³⁹ See *EEC Treaty*, *supra* note 36.

⁴⁰ *Treaty of Maastricht on European Union*, EUROPA, http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/treaties_maastricht_en.htm (last visited Dec. 28, 2010); The four primary institutions of the EU are the European Parliament, the European Court of Justice, European Commission, and the Council. See *EU Institutions and Other Bodies*, EUROPA, http://europa.eu/about-eu/institutions-bodies/index_en.htm (last visited Sept. 29, 2011).

EU members have an affirmative duty to promote equal treatment amongst individuals in their respective nations.⁴¹ The EU established the Charter of Fundamental Rights in 2000,⁴² and recognized the ECHR as a guiding principle.⁴³ The Charter was amended in 2007, and the passage of the Treaty of Lisbon in 2009 made the Charter legally binding.⁴⁴ The amended 2007 Charter of Fundamental Rights establishes that the ECHR sets the floor for human rights in Europe, and therefore the EU Court of Justice can only adopt or expand the human rights found within the ECHR.⁴⁵ EU accession requires a nation to adopt the Charter of Fundamental Human Rights.⁴⁶

In furtherance of equality, the EU established the Racial Equality Directive.⁴⁷ The Racial Equality Directive was adopted in 2000, and prohibits discrimination on the basis of race and ethnicity.⁴⁸ Additionally, it establishes avenues of recourse if a person suffers from “direct discrimination”⁴⁹ or “indirect discrimination.”⁵⁰ When an applicant files a claim of either “direct” or “indirect” discrimination, the applicant is only required to “present facts from which it may be

⁴¹ See MARK BELL, *RACISM AND EQUALITY IN THE EUROPEAN UNION* 1 (2008).

⁴² *The Charter*, *supra* note 12.

⁴³ Draft Charter, *supra* note 12, at 2.

⁴⁴ Treaty of Lisbon, *supra* note 33.

⁴⁵ *The Charter*, *supra* note 12, art. 52 (“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”).

⁴⁶ *EU Accession to the European Convention of Human Rights*, COUNCIL OF EUROPE, http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp (last visited Oct. 19, 2010) (“[A]ll member states of the Union, as parties to the convention, have an obligation to respect the ECHR even when they are applying or implementing EU law.”).

⁴⁷ Council Directive, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000/43, 2000 O.J. (L 180) 22–26 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:EN:PDF> (last visited Dec. 22, 2010) [hereinafter Racial Equality Directive].

⁴⁸ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *THE IMPACT OF THE RACIAL EQUALITY DIRECTIVE 7* (Publications Office of the European Union 2010), available at http://www.fra.europa.eu/fraWebsite/attachments/Racial-equality-directive_conf-ed_en.pdf.

⁴⁹ Racial Equality Directive, *supra* note 47, art. 2(2)(a) (“Direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.”).

⁵⁰ *Id.* art. 2(2)(b) (“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”).

presumed that discrimination has occurred. The burden of proof then shifts to the defendant.”⁵¹ Furthermore, the Racial Equality Directive allows for “positive action.”⁵² Positive action is defined as a “specific measure. . .[designed]..to prevent or compensate for disadvantages linked to racial or ethnic origin.”⁵³ Although the Racial Equality Directive only binds EU signatories,⁵⁴ it is “one of the most significant and powerful pieces of anti-discrimination legislation in the world.”⁵⁵ Recently, it has played a significant role in ECHR Art. 14 jurisprudence.⁵⁶

C. THE EUROPEAN UNION’S HUMAN RIGHTS AND ANTI-DISCRIMINATION JURISPRUDENCE IS INFLUENCING ECHR ART. 14 JURISPRUDENCE.

ECHR Art. 14 embodies the Council of Europe and the EU’s goal and protection of human rights. Furthermore, EU member countries must adopt the ECHR pursuant to the Treaty of Lisbon.⁵⁷ Thus, it is a central aspect of EU accession requirements. The ECHR Art. 14 is an important, yet originally narrow, discrimination provision. ECHR Art. 14 states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁵⁸

⁵¹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 48.

⁵² Racial Equality Directive, *supra* note 47, art. 5 (“Positive Action: With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”).

⁵³ *Id.*

⁵⁴ *Id.* art. 1.

⁵⁵ James A. Goldston, *The Role of European Anti-Discrimination Law in Combating School Segregation: The path forward after Ostrava*, 3 (April 28, 2006), cms.horus.be/files/99935/MediaArchive/pdfevents/james_goldston.doc (last visited Oct. 19, 2010).

⁵⁶ *See infra* Part I.C.

⁵⁷ *Charter of Fundamental Rights*, CIVITAS, <http://www.civitas.org.uk/eufacts/FSSOC/CIT4.htm> (last updated July 21, 2011).

⁵⁸ ECHR, *supra* note 9.

Although Art. 14 is a significant aspect of the ECHR, Art. 14 is not a substantive grant of rights.⁵⁹ Indeed, a limiting provision within Art. 14 protects “the enjoyment of rights and freedoms *set forth in this Convention*.”⁶⁰ Considering this limitation, it follows that Art. 14 must be read in conjunction⁶¹ with other ECHR provisions.⁶² However, there is some indication that the Eur. Ct. H.R. is willing to view this provision more broadly.⁶³ In fact, the Eur. Ct. H.R. has stressed that although not an independent substantive grant of rights, Art. 14 is an autonomous provision that can be violated even if the article upon which the applicant relies is not violated.⁶⁴ However, the Eur. Ct. H.R. still requires that an ECHR article allegation be joined to any Art. 14 suit.⁶⁵ For example, a petitioner must claim that discrimination occurred on the basis of gender, in conjunction with Art. 14, yet the court may still find a violation of Art. 14 even if the allegation of gender discrimination does not stand. Additionally, the Eur. Ct. H.R. will not examine Art. 14 claims if another substantive ECHR violation is found, unless discrimination is a “fundamental aspect of the case.”⁶⁶ Arguably, the power of Art. 14 is being expanded via Racial Equality Directive standards.⁶⁷

⁵⁹ *Id.* (“The enjoyment of the rights and freedoms *set forth in [the] Convention* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”) (emphasis added); see Christopher McCrudden & Harris Kountourous, *Human Rights and European Equality Law*, in *EQUALITY LAW IN AN ENLARGED EUROPEAN UNION* 73, 75–76 (Helen Meenan, ed., 2007) (providing a discussion of ECHR Article 14 conceptualization of rights).

⁶⁰ *ECHR*, *supra* note 9 (emphasis added).

⁶¹ *D.H. v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. 3 ¶ 210 (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=D.H.%20%7C%20Czech&sessionid=79377815&skin=hudoc-en>.

⁶² *E.g.*, *ECHR*, *supra* note 2, art. 2. (“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”) (ECHR Article 2 Protocol 1 has substantially altered Art. 14 jurisprudence).

⁶³ Rory O’Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 *LEGAL STUD.*, 211, 214–15 (2009).

⁶⁴ *Id.* (citing Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 1 Eur. H.R. Rep. 252, 283 (1968)).

⁶⁵ See O’Connell, *Cinderella*, *supra* note 63, at 216–17.

⁶⁶ MCCRUDDEN & KOUNTOUROS, *supra* note 59, at 79.

⁶⁷ See *D.H. & Others v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. (2007); Telephone Interview with European Roma Rights Centre Legal Advisor (Oct. 7, 2010).

The Racial Equality Directive conceptualization of discrimination and equality has fundamentally altered the Eur. Ct. H.R. “trigger” requirements for heightened judicial scrutiny.⁶⁸ The distinction between “direct” and “indirect” discrimination was absent from Eur. Ct. H. R. jurisprudence until 2007, when the court interpreted the ECHR Art. 14 jurisprudence using the Racial Equality Directive concept of “indirect” discrimination.⁶⁹

In 2007, *DH v. Czech Repub.* established the indirect discrimination jurisprudence of Art.14.⁷⁰ In *DH*, Roma petitioners claimed the Czech Republic’s practice of placing Roma in “special schools,”⁷¹ with an inferior curriculum violated Art. 2 of Protocol No. 1 via Art. 14.⁷² The Grand Chamber (GC) relied on statistics to establish Roma discrimination,⁷³ and required the Czech Republic to demonstrate a justification for the policy.⁷⁴ Justifications for racial discrimination “must be interpreted as strictly as possible.”⁷⁵ The GC also stated that failure to correct inequalities might itself violate ECHR Art. 14.⁷⁶ However, the court has not yet fully developed this concept.⁷⁷

The GC held that the Czech Republic failed to satisfy their burden of proof, and thus its policy violated Art. 14 in conjunction with Art. 2 Protocol 1.⁷⁸ In reaching this conclusion, the GC read the Racial Equality Directive’s “indirect discrimination” element into Art. 14, thereby binding all Council of Europe member states to the EU’s discrimination jurisprudence.⁷⁹ Also, *DH* clarified the burden of proof

⁶⁸ Telephone Interview with European Roma Rights Centre Legal Advisor (Oct. 7, 2010) (discussing *DH v. Czech Republic*, the Racial Equality Directive, and *DH v. Czech Republic*’s approach to Art. 14 jurisprudence); See *DH v. Czech*, App. 57325/00, 47 Eur. Ct. H.R. 3 (2007).

⁶⁹ *D.H. & Others v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. 3, ¶¶ 84–85 (2008); see O’Connell, *Cinderella*, *supra* note 63, at 228.

⁷⁰ O’Connell, *Substantive Equality*, *supra* note 10, at 132.

⁷¹ GAUTHIER DE BECO ET. AL., THE RIGHT TO EDUCATION: HUMAN RIGHTS INDICATORS AND THE RIGHT TO EDUCATION OF ROMA CHILDREN IN SLOVAKIA, 4–5 (2009), available at unesdoc.unesco.org/images/0018/001866/186604e.pdf (last accessed Dec. 28, 2010) (stating “special schools” signify schools “intended for children with physical and mental disabilities or special educational needs, but also for children who have “difficulty in communicating,” “social development problems” or come from “socially disadvantaged backgrounds”).

⁷² *D.H. & Others v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. 3 at ¶¶ 15–18, 210 (2007).

⁷³ *Id.* ¶¶ 18, 180, 190.

⁷⁴ *Id.* ¶ 195.

⁷⁵ O’Connell, *Substantive Equality*, *supra* note 10, at 131.

⁷⁶ *D.H. v. Czech*, 47 Eur. Ct. H.R. ¶ 175.

⁷⁷ O’Connell, *Cinderella*, *supra* note 63, at 228.

⁷⁸ *Oršuš v. Croatia*, App. No. 15766/03, 52 Eur. H.R. Rep. 300, ¶¶ 184–185 (2011).

⁷⁹ Telephone Interview with European Roma Rights Centre Legal Advisor (Oct. 7, 2010).

for ECHR Art. 14 claims.⁸⁰ According to the Court in *DH*, the applicant bears the burden of demonstrating a discriminatory situation, not the burden of establishing the intent to discriminate.⁸¹ Once the applicant demonstrates a discriminatory situation, the burden shifts to the State to justify its action.⁸²

The new ECHR Art. 14 jurisprudence expands beyond an American concept of human rights laws, yet the pre-accession monitoring mechanism is necessary to ensure the promise of this expansion comes to fruition. In *DH*, the Eur. Ct. H.R. cited the U.S. Supreme Court case *Griggs v. Duke Power Co.*⁸³ in support of the claim that intent to discriminate is not relevant.⁸⁴ In *Griggs*, the petitioners brought a discrimination suit under Title VII⁸⁵ and the Supreme Court examined the notion of transferred *de jure* discrimination, meaning a form or act of discrimination that although not law, is practiced, but occurs due to past by law, or *de jure*, forms of discrimination.⁸⁶ Title VII⁸⁷ is part of the Civil Rights Act of 1964,⁸⁸ which was passed under the Commerce Clause,⁸⁹ and not the 14th Amendment.⁹⁰ Thus, the Eur. Ct. H.R.'s *DH* decision substantially extends the notion of human rights and equality beyond American equality jurisprudence.⁹¹ Although *DH* was legally significant, the *DH* decision was not fully implemented.⁹²

⁸⁰ O'Connell, *Cinderella*, *supra* note 63, at 221.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸⁴ *D.H. & Others v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. 3, ¶ 107.

⁸⁵ *Id.*

⁸⁶ *Id.*; PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1025 (Paul Brest, et al. eds., 5th ed. 2006).

⁸⁷ Title VII of the Civil Rights Act, 42 U.S.C §§ 2000e–2000e-17 (2011).

⁸⁸ *Commerce Clause*, CORNELL UNIV. LAW SCHOOL LEGAL INFO. INST., http://topics.law.cornell.edu/wex/Commerce_Clause (last visited Dec. 21, 2010).

⁸⁹ U.S. CONST. art. I, § 8, cl. 3 (the Commerce Clause sets forth that Congress has the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes”); *Commerce Clause*, *supra* note 88.

⁹⁰ U.S. CONST. amend. XIV, § 1 (the Equal Protection Clause sets forth that no state can “deny to any person within its jurisdiction the equal protection of the law.”).

⁹¹ See also *Washington v. Davis*, 426 U.S. 229, 238–241 (1976) (refusing to read the *Griggs* standard into Fourteenth Amendment jurisprudence. Therefore, if de facto discrimination occurs, the petitioner must prove intent); see *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672, 2710 (2009) (requiring intent in Title VII causes of action when de facto discrimination has occurred. J. Ginsburg's dissent implies that *Griggs v. Duke Power* was thereby overturned).

⁹² O'Connell, *Substantive Equality*, *supra* note 10, at 133; Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 941 (2010).

The Czech Republic is not the only nation in which Roma have faced discrimination; Roma discrimination is a reality throughout the world.⁹³

III. EUROPEAN ROMA SEGREGATION⁹⁴

A brief historical introduction to Roma provides a better understanding of Roma persecution throughout Europe. Roma are Europe's largest minority, and have faced a history of discrimination.⁹⁵ Thus, improving Roma rights should be considered essential to building a stronger EU.

A. ROMA HAVE BEEN PRESENT THROUGHOUT EUROPE FOR GENERATIONS, AND HAVE FACED SIGNIFICANT DISCRIMINATION THROUGHOUT THEIR HISTORY.

The Roma originated in India, although Roma persecution is well documented upon arrival in Europe, their path to Europe is one of speculation.⁹⁶ For Roma, their origin is often considered a political question rather than a culturally significant issue.⁹⁷ After arriving in Europe the Roma faced significant persecution,⁹⁸ culminating in the Holocaust.⁹⁹ The Third Reich considered Roma of "Aryan" decent, yet

⁹³ See *infra* Part II. A.

⁹⁴ For the purposes of this paper, I chose to highlight discrimination in education. However, Roma discrimination permeates Europe. See *Paraskeva Todorova v. Bulgaria*, App. No. 37193/07, Eur. Ct. H.R. (2009) (finding that Art. 14 in conjunction with Art. 6 had been violated where applicant was refused a suspended sentence because she was a Roma, and it was believed Roma do not take suspended sentences seriously); See Jeffrey White, *Report: Czech, Others Sterilize Gypsies*, CHRISTIAN SCI. MONITOR (Sept. 6, 2006), <http://www.csmonitor.com/2006/0906/p07s02-woeu.html> (discussing the forced sterilization of several Roma women and the related report to the United Nations).

⁹⁵ *Roma: The Plight of Europe's Largest Minority: The Roma: An Overview*, WORLD VISION, http://meero.worldvision.org/sf_roma.php (follow "The Roma: An Overview" hyperlink; then follow hyperlinks to both "People and Origins" and "Persecution and Enslavement") (last updated Oct. 27, 2010).

⁹⁶ *Education of Roma Children*, COUNCIL OF EUR., http://www.coe.int/t/dg4/education/roma/histoCulture_en.asp (download PDF entitled "1.0 From India to Europe") (last visited March 2, 2011)[hereinafter *From India to Europe*]; *Education of Roma Children*, COUNCIL OF EUR., http://www.coe.int/t/dg4/education/roma/histoCulture_en.asp (download PDF entitled "2.0 Arrival in Europe") [hereinafter *Arrival in Europe*].

⁹⁷ *From India to Europe*, *supra* note 96, at 3.

⁹⁸ *Arrival in Europe*, *supra* note 96.

⁹⁹ *Education of Roma Children*, COUNCIL OF EUR., http://www.coe.int/t/dg4/education/roma/histoCulture_en.asp (download PDF entitled "Holocaust") (last visited Dec. 21, 2010)[hereinafter *Holocaust*].

scientific tests were conducted on countless Roma to prove they belonged to another race.¹⁰⁰ Estimates of the number of Roma who lost their lives during the Holocaust are difficult to establish, but conservative estimates are around 250,000, not including those who were killed in mass murder actions, such as concentration camp gas chambers.¹⁰¹ After the Holocaust, most Roma survivors were ignored.¹⁰² Those who came forward were not believed, often due to the liar and deceiver stereotype surrounding the Roma ethnicity.¹⁰³

Combating the continued Roma social segregation is a matter of international concern.¹⁰⁴ In 2005, an international commitment was forged, titled “the Decade of Roma Inclusion.”¹⁰⁵ It was designed to improve the social status of Roma.¹⁰⁶ Education was selected as a “priority area” for the participating nations; the other priority areas are health and housing.¹⁰⁷ Each participating nation must develop and adopt an action plan to address the identified Roma rights “priority areas” of concern.¹⁰⁸ Croatia was one of the original endorsing nations of the Decade,¹⁰⁹ and will lead the Decade’s Committee from 2012-2013.¹¹⁰ Although the Decade has attempted to improve the social condition of Roma throughout Europe, educational segregation remains an issue.¹¹¹ For example, in the Czech Republic, after the *DH v. Czech Republic* decision, only the names of the Roma schools were changed, but not the quality of education Roma children received.¹¹²

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.* at 7.

¹⁰² *Id.* at 8.

¹⁰³ *Id.*

¹⁰⁴ *Decade of Roma Inclusion 2005–2015: Terms of Reference*, DECADE OF ROMA INCLUSION 2005–2015, 3 (Feb. 2, 2005), <http://www.romadecade.org/files/downloads/Decade%20Documents/Roma%20Decade%20TOR.pdf> [hereinafter *The Decade*].

¹⁰⁵ *Id.*

¹⁰⁶ *About*, DECADE OF ROMA INCLUSION 2005–2015, <http://www.romadecade.org/about> (last visited Oct. 25, 2010).

¹⁰⁷ *The Decade*, *supra* note 104, at 3.

¹⁰⁸ *Id.* at 3–5.

¹⁰⁹ *Governments Endorse “Decade of Roma Inclusion”*, OPEN SOCIETY FOUNDATIONS (July 8, 2003), http://www.soros.org/initiatives/roma/news/decade_20030708.

¹¹⁰ *The Decade*, *supra* note 104, at 8.

¹¹¹ *See infra* Part II.B.

¹¹² *D.H. and Others v. Czech Republic*, OPEN SOCIETY FOUNDATIONS, <http://www.soros.org/initiatives/justice/litigation/czechrepublic> (last visited Aug. 24, 2011); *supra* note 13.

B. ROMA SCHOOL SEGREGATION REMAINS AN ISSUE THROUGHOUT EUROPE, AND REINFORCES ROMA'S LOWER SOCIAL STANDING.

Roma educational segregation is prevalent throughout Europe.¹¹³ Healthy Roma children are placed in “special schools.”¹¹⁴ A “special school” is one designed for children who are mentally handicapped, or have poor communication skills, as determined by the school.¹¹⁵ In all Central European Nations, more Roma children are enrolled than non-Roma children in schools for students with mental disabilities.¹¹⁶ In Romania, non-Roma children are placed in Roma-only schools or classes as a form of punishment.¹¹⁷

There have been some positive gains in the desegregation of Roma schools.¹¹⁸ In Silven, Bulgaria, Roma children were once placed in schools equivalent to sweatshops.¹¹⁹ Roma children are being integrated into the Bulgarian school system, yet “over 70 percent of Roma children remain in segregated schools without access to quality education.”¹²⁰ Furthermore, Spain’s significant improvements identify that other EU countries can institute similar improvements.”¹²¹

¹¹³ See ISABEL FONSECA, BURY ME STANDING: THE GYPSIES AND THEIR JOURNEY 163 (1995); Greenberg, *supra* note 92, at 919.

¹¹⁴ Greenberg, *supra* note 92, at 919.

¹¹⁵ Jennifer Devroye, *The Case of D.H. and Others v. the Czech Republic*, 7 NW. U. J. INT’L HUM. RTS. 81, 85–86 (2009), available at <http://www.law.northwestern.edu/journals/JIHR/v7/n1/3>.

¹¹⁶ Devroye, *supra* note 115, at 85–86.

¹¹⁷ Greenberg, *supra* note 92, at 936.

¹¹⁸ However, Bulgaria has had some success and provides the EU with a model for Roma integration. See Yana Lukanova, *Fighting Discrimination in Education of Romani Children. The Bulgarian Model*, STUDENT INST. FOR INT’L. & GLOBAL AFFAIRS (Feb. 24, 2009), <http://www.siiga.org/articles-and-interviews/fighting-discrimination-in-education-of-romani-children-the-bulgarian-model.en.html> (explaining that the Vidin Model consists of Romani-led desegregation action, All-inclusive desegregation, and “Carrot and Stick” monitoring).

¹¹⁹ FONSECA, *supra* note 113, at 163.

¹²⁰ Witness, *Equal Access: Integrated Education for Roma in Bulgaria*, YOUTUBE (Sept. 5, 2008), <http://www.youtube.com/watch?v=WgN-XxewkVI>.

¹²¹ Indeed, Spain is often cited as a strong example of Roma inclusion and integration into society, including access to education. See Andres Cala, *Spain's Tolerance of Gypsies: A Model for Europe?*, TIME, Sept. 16, 2010, <http://www.time.com/time/world/article/0,8599,2019316,00.html>.

**C. ORŠUŠ V. CROAT. IS THE MOST RECENT IN A LINE OF ROMA
EDUCATIONAL SEGREGATION CASES.**

Multiple cases¹²² brought before the EU Grand Chamber address the issue of Roma educational segregation. The most recent case is *Oršuš v. Croat.* In *Oršuš*, fourteen Roma petitioners brought suit against Croatia alleging discrimination as a result of school segregation policies.¹²³ Roma children were segregated into “special schools” because of their difficulty with the Croatian language,¹²⁴ and offered a limited curriculum.¹²⁵

The defendant schools argued that they did not practice purposeful discrimination, but instead the segregation occurred after psychological tests were implemented to all school children.¹²⁶ According to the schools, only the Roma children’s test results demonstrated (1) a lack of knowledge of the Croatian language, (2) a “difficulty channeling emotions”, and (3) a lack of “basic hygienic skills of washing, dressing, tying or buttoning.”¹²⁷ Thus, the law did not prescribe the segregation.

The applicants argued that the segregation impacted more than their educational opportunities.¹²⁸ The applicants alleged that the school segregation led to stigmatization of Roma children as “intellectually inferior and children who need to be separated from normal children in order not to be a bad influence on them.”¹²⁹ The Croatian Constitutional Court found this belief to be merely “a subjective value judgment,” and subsequently rejected this argument.¹³⁰

The applicants appealed the Croatian Constitutional Court decision to the Eur. Ct. H.R.¹³¹ In 2008, the Eur. Ct. H.R. held that these

¹²² See, e.g., *D.H. & Others v. Czech*, App. No. 57325/00, 47 Eur. H.R. Rep. (2007); see *Sampanis & Others v. Greece*, App. No. 32526/05, Eur. Ct. H.R. (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=Sampanis%20%7C%2032526/05&sessionId=79425167&skin=hudoc-en>.

¹²³ *Oršuš & Others v. Croat.*, App. No. 15766/03, 52 Eur. H.R. Rep. 300, ¶¶ 20–51 (2011).

¹²⁴ *Id.* ¶¶ 145–147.

¹²⁵ *Id.* ¶ 123 (“The Government admitted that it was possible that the curriculum in Roma- only classes was reduced by up to 30% in relation to the regular, full curriculum.”); *id.* ¶ 164 (“It is not clear what exactly that [the ‘adapted curriculum’] included.”).

¹²⁶ *Id.* ¶ 60.

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 60.

¹²⁹ *Id.*

¹³⁰ *Id.* ¶ 60.

¹³¹ *Id.* ¶ 193.

segregation practices did not violate Art. 14.¹³² The Eur. Ct. H.R. held that the applicant's rights were violated per ECHR Art.6 section 1¹³³ because of the lengthy proceedings.¹³⁴ However, it found that the educational segregation was not done with a purpose to discriminate based on race or ethnicity, and therefore did not violate Art. 14.¹³⁵

The case was then appealed to the Eur. Ct. H.R. Grand Chamber (GC), which held Croatia's segregation practices violated Art. 14.¹³⁶ The GC took notice of the peculiar issue of the Roma,¹³⁷ and the subsequent difficulty of states' educational systems,¹³⁸ yet held Croatia's policy violated Art. 2 of Protocol 1¹³⁹ in conjunction with Art. 14¹⁴⁰ of the ECHR.¹⁴¹ The GC acknowledged the difficulty of balancing linguistic requirements, cultural preservation, and maintenance of an educational system.¹⁴² While member states have discretion on these issues,¹⁴³ safeguards are required to account for the special needs of minorities,¹⁴⁴ and Croatia lacked adequate safeguards to protect the Roma.¹⁴⁵ The cyclical nature of discrimination in education was of particular concern.¹⁴⁶ The court took note of a European Commission against Racism and Intolerance policy recommendation, which discussed that limited education prevents societal advancement, and thus entrenches Roma's unequal social status.¹⁴⁷

Oršuš was a nine to eight decision, and the dissent argued the decision was not practical. The dissent contended that forced integration

¹³² *Id.* ¶ 4.

¹³³ *ECHR*, *supra* note 2, art. 6 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

¹³⁴ *Oršuš*, 52 Eur. H.R. Rep. 300, ¶ 99.

¹³⁵ *Id.* ¶ 193.

¹³⁶ *Id.*

¹³⁷ *Id.* ¶¶ 147, 193 (explaining that Roma are considered an especially vulnerable class because of their significant persecution throughout history).

¹³⁸ *Id.* ¶ 180.

¹³⁹ *ECHR*, *supra* note 2, at protocol 1, art. 2.

¹⁴⁰ *ECHR*, *supra* note 2.

¹⁴¹ *Oršuš*, 52 Eur. H.R. Rep. 300, ¶ 185.

¹⁴² *Id.* ¶ 180.

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 181.

¹⁴⁵ *Id.* ¶ 182.

¹⁴⁶ *Id.* ¶ 83 (referencing ECRI general policy recommendation no. 3).

¹⁴⁷ *Id.* ¶ 84.

could lead to a loss of minority culture.¹⁴⁸ Furthermore, the majority failed to provide instructions for implementation.¹⁴⁹ Therefore, according to the dissent, the majority failed to provide an adequate remedy.

Unfortunately, although the applicants were legally successful, as of the latest report in March 2011, Croatia has yet to successfully and adequately desegregate the nation's school system.¹⁵⁰ Although Croatia set forth an action plan to address the issue, including an improved curriculum, Amnesty International has raised concerns regarding the lack of precise details and implementation plans.¹⁵¹

IV. THE SIGNIFICANCE OF *ORŠUŠ* FOR CROATIA AND THE EU: HOW DOES *ORŠUŠ* IMPACT THE EU ACCESSION PROCESS?

The EU accession process can take several years, and Croatia is on the road to EU accession.¹⁵² One aspect of accession is compliance with human rights standards, including the ECHR.¹⁵³ Despite this requirement, Croatia's accession negotiations were completed on June 30, 2011 and will join the EU in 2013, after EU nations each ratify Croatia's accession treaty.¹⁵⁴ To ensure that Croatia complies with the EU accession requirements, the Croatia Accession Treaty includes a formal pre-accession monitoring requirement.¹⁵⁵ This formal requirement is new

¹⁴⁸ *Id.* ¶¶ 17, 19 (Jungwiert, dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ AMNESTY INTL., *supra* note 13.

¹⁵¹ *Id.*; *Supervision of the execution of the judgments in the case of Oršuš and others against Croatia*, COM (2010) 46 (Nov. 23, 2010), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1707977&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

¹⁵² *EU-Croatia Relations*, EURACTIV (Nov. 15, 2005), <http://www.euractiv.com/en/enlargement/eu-croatia-relations-links dossier-188293>; See also *Croatia Becomes a Candidate for EU Membership - Frequently Asked Questions on the Accession Process*, EUROPEAN COMM'N, http://ec.europa.eu/enlargement/pdf/croatia/croatia04_14-06_en.pdf (last visited Feb. 22, 2011).

¹⁵³ Treaty of Lisbon, *supra* note 32; European Union, *Questions and Answers*, TREATY OF LISBON, http://europa.eu/lisbon_treaty/faq/index_en.htm#2 (last visited Aug. 26, 2011).

¹⁵⁴ Andrew Willis, *EU May Impose Monitoring System on Candidate Croatia*, EUOBSERVER.COM (May 24, 2011), <http://euobserver.com/9/32381>; Radio.net, *supra* note 16; THE SOFIA ECHO, *supra* note 14.

¹⁵⁵ European Comm'n, *supra* note 3; Interview by Ante Raić with Andrej Plenković, State Sec'y, Ministry of Foreign Affairs and European Integration (June 27, 2011), available at <http://www.balkananalysis.com/croatia/2011/07/27/croatia-on-the-verge-of-eu-membership-interview-with-andrej-plenkovic/>; Toby Vogel, *EU Leaders Welcome Croatia*, EUROPEANVOICE.COM (June 24, 2011), <http://www.europeanvoice.com/article/2011/june/eu-leaders-welcome-croatia/71462.aspx>; Radio.net, *supra* note 16.

to the EU accession process, and it should be continued and strengthened for future EU accessions.

A. ALTHOUGH CROATIA'S ACCESSION NEGOTIATIONS ARE COMPLETE, THE EU ACCESSION PROCESS TAKES SEVERAL YEARS TO CLOSE.

EU accession requires candidate countries to meet the Copenhagen Criteria,¹⁵⁶ which include political evaluation,¹⁵⁷ economic evaluation,¹⁵⁸ and the adoption of the *acquis communautaire*.¹⁵⁹ The EU *acquis communautaire* is an evolving collection of EU law and initiatives.¹⁶⁰ For example, the Racial Equality Directive is one aspect of the *acquis communautaire*,¹⁶¹ and following the Treaty of Lisbon, the ECHR is also a part of the *acquis communautaire*.¹⁶² New to this process is a formal pre-accession monitoring requirement written into Croatia's Accession Treaty.¹⁶³ Although, according to some EU members this has been an informal requirement in the past.¹⁶⁴ This pre-accession monitoring system strengthens the accession process and hopefully leads to improved human rights, judiciary concerns, and stronger economic conditions upon entrance into the EU. This pre-accession monitoring stage is designed to ensure that the *acquis communautaire* is being met.¹⁶⁵

¹⁵⁶ Glossary: Accession Criteria (Copenhagen criteria), EUROPA, http://europa.eu/legislation_summaries/glossary/accesion_criteria_copenhagen_en.htm (last visited Oct. 26, 2010).

¹⁵⁷ *Id.* (defining "political" as "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.").

¹⁵⁸ *Id.* (defining "economic" as "existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union.").

¹⁵⁹ European Comm'n, *The Mandate and the Framework*, EUROPA, http://ec.europa.eu/enlargement/the-policy/process-of-enlargement/mandate-and-framework_en.htm (last updated Oct. 30, 2010).

¹⁶⁰ *Id.*

¹⁶¹ James A. Goldston, *Roma Rights Workshop in Italy: New Developments in Anti-Discrimination Law*, EUROPEAN ROMA RIGHTS CENTRE (July 7, 2004), <http://www.errc.org/cikk.php?cikk=688>.

¹⁶² Treaty of Lisbon, *supra* note 33; European Union, *supra* note 153.

¹⁶³ Radio.net, *supra* note 16, Toby Vogel, *EU Leaders welcome Croatia*, EUROPEANVOICE.COM (June 24, 2011), <http://www.europeanvoice.com/article/2011/june/eu-leaders-welcome-croatia/71462.aspx>;

Press release, *EU closes accession negotiations with Croatia*, EUROPEAN COMMISSION, Ref. No. IP/11/824, (June 30, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/824&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁶⁴ Willis, *supra* note 154.

¹⁶⁵ *Id.*; Raić, *supra* note 155; Vogel, *supra* note 155; Radio.net, *supra* note 16.

Each stage of EU accession is within the framework of the *acquis communautaire*.¹⁶⁶ First, the EU Council must reach a unanimous decision to open negotiations with the applicant country,¹⁶⁷ which requires a finding that the “political criterion”¹⁶⁸ has been met.¹⁶⁹ Next, a screening process is required to determine if, and how, the candidate country is prepared to enter the EU.¹⁷⁰ After that, the Commission determines and formally recommends if negotiations should be opened on a certain chapter of EU law, or if the candidate nation must meet a “benchmark” before negotiations can commence.¹⁷¹

A country wishing to join the EU must pass several stages of negotiations.¹⁷² The negotiations entail discussion of a timeline to implement and enforce the *acquis communautaire*.¹⁷³ The *acquis communautaire* themselves are non-negotiable.¹⁷⁴ However, the method of implementation is negotiable, thus “negotiations” are issues of harmonization more than traditional negotiations.¹⁷⁵ Candidate countries are required to provide an Action Plan for implementation, and to submit progress reports throughout the process.¹⁷⁶ This process supports the underlying goal of EU enlargement.

The purpose of EU enlargement is to strengthen Europe overall, and to reinforce its underlying values.¹⁷⁷ For example, the EU’s economic concerns are also addressed as part of the *acquis communautaire*¹⁷⁸ in the

¹⁶⁶ European Comm’n, *supra* note 159.

¹⁶⁷ *Id.*

¹⁶⁸ *Glossary: Accession Criteria*, *supra* note 156.

¹⁶⁹ *Id.*

¹⁷⁰ European Comm’n, *Screening and Monitoring*, EUROPA, http://ec.europa.eu/enlargement/the-policy/process-of-enlargement/screening-and-monitoring_en.htm (last updated Oct. 30, 2010).

¹⁷¹ *Id.*

¹⁷² See European Comm’n, *The Process of Enlargement*, EUROPA, http://ec.europa.eu/enlargement/the-policy/process-of-enlargement/index_en.htm (last updated Oct. 30, 2010).

¹⁷³ See generally European Comm’n, *The Accession Process of a New Member State*, EUROPA, http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/114536_en.htm (last updated Feb. 28, 2007) (providing an overview of the accession process and negotiations).

¹⁷⁴ European Comm’n, *supra* note 159.

¹⁷⁵ Ministry of Foreign Affairs and European Integration, *What are Accession Negotiations?*, NEGOTIATIONS FOR THE ACCESSION OF THE REPUBLIC OF CROATIA TO THE EU, <http://www.eu-pregovori.hr/default.asp?ru=432&sid=&akcija=&jezik=2> (last visited Nov. 29, 2010).

¹⁷⁶ European Comm’n, *supra* note 170.

¹⁷⁷ European Comm’n, *Question and Answers about the Fifth Enlargement (Archived)*, EUROPA, http://ec.europa.eu/enlargement/archives/questions_and_answers/1-10_en.htm (last visited Nov. 29, 2010).

¹⁷⁸ See *Stability and Growth Pact*, EURACTIV (July 07, 2006), <http://www.euractiv.com/euro/stability-growth-pact/article-133199?display=normal>.

1996 Stability and Growth Pact.¹⁷⁹ The Stability and Growth Pact establishes guidelines¹⁸⁰ for a EU member states economy.¹⁸¹ The EU's structure and stability are relevant beyond Europe. One goal of the EU structure is to provide political stability,¹⁸² increase Europe's trade position globally, and to increase its political and economic power.¹⁸³ Ignoring any candidate country's human rights or economic development issues is counterintuitive to the EU accession process.

Croatia was granted EU member candidacy status in 2004,¹⁸⁴ and the EU council began formal negotiation talks with Croatia in 2005.¹⁸⁵ In 2009, however, negotiations were halted due to Croatia's boarder dispute with Slovenia.¹⁸⁶ Croatia finished negotiations on June 30, 2011,¹⁸⁷ and will join the EU in 2013.¹⁸⁸

Although some positive steps have been taken, Roma rights remain a concern in Croatia. Although Croatia claims to have made improvements in regards to Roma education,¹⁸⁹ *Oršuš* was decided in March of 2010.¹⁹⁰ No significant beneficial changes have trickled down to Roma in Croatia.¹⁹¹ Nevertheless, Croatia has legal frameworks to

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* ("Member states must still keep their public deficits under a 3% GDP/deficit ratio and their debts under a 60% GDP/debt ratio.").

¹⁸¹ *Id.*

¹⁸² CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACT BOOK (2010).

¹⁸³ *Id.*

¹⁸⁴ Ministry of Foreign Affairs and European Integration, *Croatia's 2009 Progress Report*, NEGOTIATIONS FOR THE ACCESSION OF THE REPUBLIC OF CROATIA TO THE EU, 4 (Oct. 14, 2009), http://www.eu-pregovori.hr/files/Izvjesce/Progress_report_2009.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 5; see generally *Croatia, Slovenia Dash Hopes for Quick End to Dispute*, EURACTIV (June 19, 2009), <http://www.euractiv.com/enlargement/croatia-slovenia-dash-hopes-quick-dispute/article-183352> (providing information about the dispute between Croatia and Slovenia).

¹⁸⁷ Press Release, Jerzy Buzek, The President of the European Parliament, Croat. on the way to EU accession (Feb. 15, 2011), available at http://www.europarl.europa.eu/president/view/en/press/press_release/2011/2011-February/press_release-2011-February-18.html.

¹⁸⁸ *Croatia Cleared for EU Membership in 2013*, BBC NEWS (June 10, 2011), <http://www.bbc.co.uk/news/world-europe-13725558>; *Confusion Reigns on Croatia's Last Stretch to EU*, EURACTIV (May 24, 2011), <http://www.euractiv.com/en/enlargement/confusion-reigns-croatias-stretch-eu-news-505089>.

¹⁸⁹ Ministry of Foreign Affairs and European Integration, *supra* note 184, at 14, 16.

¹⁹⁰ *Oršuš & Others v. Croat.*, App. No. 15766/03, 52 Eur. H.R. Rep. 300 (2011), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=864619&portal=hbkm&source=externalbydocnumber&table=?F69A27FD8FB86142BF01C1166DEA398649>.

¹⁹¹ Note from the Presidency of the European Council to the European Council (June 16, 2004), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/80998.pdf; *supra* note 13.

address Roma rights.¹⁹² First, Croatia recognizes the Roma as a national minority.¹⁹³ Second, Croatia allows one seat for a Roma parliamentary representative, and three Roma are municipal level representatives.¹⁹⁴ In total, there are approximately 300 Roma political representatives in Croatia.¹⁹⁵ Third, Croatia has implemented the National Programme for Roma with the goal to harmonize international human rights standards and improve Roma living conditions.¹⁹⁶ As previously noted, Croatia is a member of the Decade.¹⁹⁷

**B. CROATIA'S ACCESSION INTO THE EU IS PARTICULARLY
SIGNIFICANT GIVEN CROATIA'S GEOGRAPHIC LOCATION IN THE
WESTERN BALKAN REGION.**

Croatia's accession into the EU would increase the EU's financial prospects, and provide an example to the other Western Balkan states.¹⁹⁸ The EU is facing a significant financial crisis.¹⁹⁹ The GDP shrunk 4% in 2009, the most significant decrease in the history of the Union.²⁰⁰ This was due in large part to the EU's connection to America's Subprime crisis of 2007.²⁰¹

¹⁹² Protection of Roma in Croatia, 1,1 www.europarl.europa.eu/document/activities/.../20101124ATT00191EN.pdf (last visited Dec. 21, 2010); European Parliament Subcomm. on Human Rights, *Protection of the Roma in Croatia*, EUROPEAN PARLIAMENT, 1 (Oct. 2010), <http://www.europarl.europa.eu/document/activities/cont/201011/20101124ATT00191/20101124ATT00191EN.pdf>.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *The Decade*, *supra* note 104, at 3.

¹⁹⁸ See Buzek, *supra* note 187 ("I believe that a timely Croatian accession to the EU will be an example for other countries in the region. Croatian membership in EU will boost the European perspective of its neighbouring countries in South Eastern Europe. It will be a signal that reforms pay off. Croatia is a role model in the region.").

¹⁹⁹ Enayet Rasul Bhuiyan, *Fallout from the EU Financial Crisis*, THE FINANCIAL EXPRESS (Dec. 2, 2010), http://www.thefinancialexpress-bd.com/more.php?news_id=118885&date=2010-12-02.

²⁰⁰ European Commission, *Economic Crisis in Europe: Causes, Consequences and Responses*, EUR. ECON., no. 7, 2009 at iii.

²⁰¹ *Id.* at 9; See Louise Story, et al., *Wall St. Helped to Mask Debts Shaking Europe*, N.Y. TIMES, Feb. 14, 2010, at A1 (discussing how Goldman Sachs secretly provided Greece with billions of dollars as a "currency trade" instead of a loan allowing Greece to meet the SGP requirements for EU accession).

The Western Balkans' entrance into the EU is a primary EU policy concern,²⁰² and the Union Council hopes that Croatia's accession will send a positive signal to the Western Balkans.²⁰³ Other states from this centrally important Eastern European region hope to follow Croatia's lead.²⁰⁴ Recently, the area has been plagued with violent conflicts,²⁰⁵ but it is believed that Croatia's accession would be a stabilizing force in the region.²⁰⁶ The accession of these countries will hopefully increase political stability in the region,²⁰⁷ provide the region with economic gains²⁰⁸ and improve security.²⁰⁹ The guiding principle is that a united Europe is a stronger Europe.²¹⁰ To that end, the accession of the Western Balkans will provide the EU with financial gain.²¹¹ In

²⁰² European Comm'n, *Regional Cooperation in the Western Balkans: a Priority Policy for the European Union*, EUROPA, 1, 2 (2005), http://ec.europa.eu/enlargement/pdf/nf5703249enc_web_en.pdf; Antoine Blua, *EU Commits to Opening Door to Western Balkans, But Warns Progress Still Needed*, RADIO FREE EUROPE – RADIO LIBERTY (June 2, 2010, 4:23 PM), http://www.rferl.org/content/Troubled_BalkansEU_Conference_Opens_In_Sarajevo/2059640.html.

²⁰³ *Communication from the Commission to the European Parliament and the Council: Western Balkans: Enhancing the European Perspective*, at 2 n.1, COM (2008) 127 final (May 3, 2008), available at http://ec.europa.eu/enlargement/pdf/balkans_communication/western_balkans_communication_050308_en.pdf [hereinafter *Communication: Western Balkans*] (“Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, and Montenegro and Serbia, as well as Kosovo under UNSC Resolution 1244/99.”).

²⁰⁴ *Id.* at 2, 4; TIM JUDAH, *THE EU MUST KEEP ITS PROMISE TO THE WESTERN BALKANS* 1, 4 (Centre for European Reform 2006), available at http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/essay_balkans_judah_july06-2080.pdf; WORLD BANK, *WESTERN BALKAN INTEGRATION AND THE EU: AN AGENDA FOR TRADE AND GROWTH* xi (Sanjay Kathuria ed., 2008); *Id.* at 71. Jacques Rupnik, *The Challenges of EU Enlargement in the Balkans*, European Union Institute for Security Studies, 1,3 (June 2009), http://www.iss.europa.eu/uploads/media/EU_enlargement_in_the_Balkans.pdf.

²⁰⁵ *EU-Western Balkans Relations*, EURACTIV (Dec. 14, 2007), <http://www.euractiv.com/en/enlargement/eu-western-balkans-relations-links dossier-188295>.

²⁰⁶ Rupnik, *supra* note 204, at 3.

²⁰⁷ See Commission of the European Communities, *Communications From the Commission the European Parliament and the Council, Western Balkans: Enhancing the European perspective*, COM (2008) 127 Final (May 3, 2008), http://ec.europa.eu/enlargement/pdf/balkans_communication/western_balkans_communication_050308_en.pdf; *Communication West Balkans*, *supra* note 203 at 2, 4–8.

²⁰⁸ *Communication West Balkans*, *supra* note 203, at 4–8.

²⁰⁹ Rupnik, *supra* note 204, at 8.

²¹⁰ Štefan Füle, European Commissioner for Enlargement and Neighborhood Policy, *Press Points on Enlargement Package* (Nov. 9, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/639&format=HTML&aged=0&language=EN&guiLanguage=en>.

²¹¹ See European Comm'n, *Basic Arguments*, EUROPA, http://ec.europa.eu/enlargement/archives/press_corner/basic_arguments_en.htm (last updated

support of this goal, in 2008, the EU Commission began increasing negotiations with the Western Balkans to help them more quickly prepare to accede into the EU.²¹² The economic conditions of these countries are a concern given the economic downturn of the past several years.²¹³ Nevertheless, EU expansion benefits the EU economy overall, and individual EU member states.

EU expansion greatly benefits trade among new EU member states.²¹⁴ This aspect of trade increased from 15 to 77 billion from 1999 to 2007.²¹⁵ This allowed for the growth of a balanced economy for individual EU members.²¹⁶ Economic growth helped, and will continue to help, stabilize an otherwise frail EU.²¹⁷ For example, following the EU expansion of 2004/07, when initial talks began with Eastern European countries, bilateral trade agreements formed that were credited to assisting the EU avoid a “trade shock” in May 2004.²¹⁸ Croatia has bilateral trade agreements in place with the EU, but bilateral trade is estimated to increase by an additional one-third upon Croatia’s accession.²¹⁹

Croatia is an anchor in the Western Balkans region,²²⁰ and the new monitoring system should set the standard for future accessions. Hopefully, it will help avoid past EU accession issues. Romania and

Apr. 29, 2002) (“Research estimated that accession of countries of Central and Eastern Europe would – even in a conservative scenario – bring an economic gain for the EU-15 of € 10 billion, and for the new members of € 23 billion.”).

²¹² *Communication Western Balkans*, *supra* note 203.

²¹³ See Olli Rehn, European Commissioner for Enlargement, Western Balkans: Overcoming the economic crisis – from regional cooperation to EU membership conference 1, 6 (Dec. 9, 2009), available at http://ec.europa.eu/enlargement/pdf/western-balkans-conference/2009-12-08_or_speech_wb-conference_final.pdf.

²¹⁴ See Franz Neueder, *Costs and Benefits of EU Enlargement*, 38 *INTERECONOMICS* 190, 190–191 (2003); Andrew Kilmister, *Enlarging the European Union to the East: Issues and Problems*, 5 *TEACHING BUS. & ECON.* 3, 4 (2001); EUROPEAN COMMISSION, *FIVE YEARS OF AN ENLARGED EU: ECONOMIC ACHIEVEMENTS AND CHALLENGES* 2–7 (2009), available at http://ec.europa.eu/economy_finance/publications/publication14078_en.pdf.

²¹⁵ *Id.*

²¹⁶ Delegation of the European Union to Croatia, *Croatia and the EU: Prejudices & Realities*, EUROPA, <http://www.delhrv.ec.europa.eu/?lang=en&content=61> (last visited Dec. 2, 2010).

²¹⁷ European Commission, *Five Years of an enlarged EU: Economic achievements and challenges*, *supra* note 214 (the report also discusses the economic difficulties created by EU expansion).

²¹⁸ See also *id.* at 19; see also Arjan Lejour Et. Al., *The Economic Effects of Croatia’s Accession to the EU*, PROSINAC 1,1 (Dec. 2007), <http://ideas.repec.org/p/cpb/docmnt/154.html#download>.

²¹⁹ Lejour Et. Al., *supra* note 218.

²²⁰ See Visnja Samardzija, *Croatia: Political Evolutions and Relations with the EU*, 15 *MEDITERRANEAN POLITICS*, 210, 213–214 (2010); European Commission, *Regional Cooperation in the Western Balkans*, *supra* note 202.

Hungary were subject to post-accession monitoring, but “reform efforts are perceived as grinding to a halt” after accession.²²¹ The new pre-accession monitoring system should alleviate these issues. Nevertheless, the proposed system is vague, and seems to lack significant power.

Štefan Füle, the current EU Enlargement and Neighborhood Policy Commissioner, believes benchmarks are sufficient to monitor the EU accession process.²²² Mr. Füle has stated he is determined that the post-monitoring accession mechanism used for Romania’s and Bulgaria’s accession not be imposed on Croatia.²²³ Instead, he wants the lessons of past accessions utilized.²²⁴ Romania and Bulgaria were allowed to accede before fully complying with the EU accession standards.²²⁵ Both Romania and Bulgaria had a post-accession system imposed, though this system has led to incredibly slow, virtually nonexistent, progress with EU compliance.²²⁶ This system is not being imposed on Croatia.²²⁷ Instead, a pre-accession mechanism is being formally imposed in the Accession Treaty for the first time.²²⁸

The new pre-accession mechanism will require the European Commission to submit progress reports every three months to ensure that Croatia is complying with EU accession requirements, with the threat of “warning” letters being sent if areas of noncompliance are found.²²⁹ This mechanism should be seen as a welcome change for it will serve to

²²¹ Willis, *supra* note 164.

²²² Füle: *I’ll Make Sure Croatia Joins EU Without Monitoring*, EURACTIV (Mar. 30, 2010), <http://www.euractiv.com/enlargement/fuele-ill-make-sure-croatia-joins-eu-without-monitoring-news-395250>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Florian Trauner, *Post-Accession Compliance with EU Law in Bulgaria and Romania: a Comparative Perspective*, EUROPEAN INTEGRATION ONLINE PAPERS (2009), http://eiop.or.at/eiop/index.php/eiop/article/viewPDFInterstitial/2009_021a/135; Füle: *I’ll Make Sure Croatia Joins EU Without Monitoring*, *supra* note 222.

²²⁶ See Trauner, *supra* note 225; Füle: *I’ll Make Sure Croatia Joins EU Without Monitoring*, *supra* note 222.

²²⁷ Radio.net, *supra* note 16.

²²⁸ Ante Raić interview with Andrej Plenković, state secretary in the Ministry of Foreign Affairs and European Integration, “Croatia on the Verge of EU Membership: Interview with Andrej Plenković (July 27, 2011)” <http://www.balkananalysis.com/croatia/2011/07/27/croatia-on-the-verge-of-eu-membership-interview-with-andrej-plenkovic/>; THE SOFIA ECHO, *supra* note 14; European Comm’n, *supra* note 164.

²²⁹ Radio.net, *supra* note 16; *Croatia Accession Near, EU Ministers Say Amid Monitoring Talks*, MONSTERS AND CRITICS (June 21, 2011), http://www.monstersandcritics.com/news/europe/news/article_1646716.php/Croatia-accession-near-EU-ministers-say-amid-monitoring-talks; THE SOFIA ECHO, *supra* note 14; European Comm’n, *supra* note 164.

strengthen the EU overall. This will create a more secure EU, and improve EU economic conditions and human rights standards.

The new final monitoring system stage will assure and strengthen the EU process, providing a more solid foundation in EU enlargement.²³⁰ After negotiations, EU members will spend approximately two years ratifying the accession treaty before the candidate can become a member.²³¹ Thus, the new system will not add an undue burden to the accession process. In regards to pre-accession monitoring, a British official has stated, “[i]t is better to have a monitoring mechanism between the close of negotiations than after the ribbon is cut.”²³² The new monitoring system provides that opportunity to ensure a country is complying before leverage to encourage change is lost. This is vital given the lessons of past EU accessions.

The pre-accession system is a necessity. Although some may view accession to the EU as an opportunity to apply pressure to reform institutional policies, EU accession does not guarantee institutional reforms.²³³ During the Czech Republic’s accession, the international community hoped that the EU could pressure the Czech Republic to fully comply with the EU’s human rights requirements.²³⁴ However, the Czech Republic has failed to follow the *DH v. Czech Repub.* decision and fully desegregate its school system.²³⁵ Furthermore, the Czech Republic is in the process of negotiating an ECHR opt-out, and some are arguing for the Czech Republic’s ECHR opt-out to be put to a single vote, tied to the Croatia Accession Treaty ratification vote.²³⁶

Croatia has several changes that must occur before full EU accession compliance is met. In addition to discrimination faced by

²³⁰ *EU Eyes New Monitoring System Amid Work on Croatia Accession Talks*, EUROPE TOP NEWS (May 23, 2011), <http://europetopnews.com/31251/eu-eyes-new-monitoring-system-amid-work-on-croatia-accession-talks.html>.

²³¹ Willis, *supra* note 164.

²³² Lejour et. al., *supra* note 218.

²³³ See Lejour et al., *supra* note 218, at 26 (discussing the role resistance to reform can play when implementing institutional changes); See *Czech Government Flouts Court Ruling on Roma Education*, *supra* note 13.

²³⁴ Matthew D. Marden, Note, *Return to Europe? The Czech Republic and the EU’s Influence on Its Treatment of Roma*, 37 VAND. J. TRANSNAT’L L. 1181, 1184 (2004).

²³⁵ Lydia Gall & Robert Kushen, *What Happened to the Promise of D.H.?*, EUROPEAN ROMA RIGHTS CENTRE (July 26, 2010), <http://www.errc.org/cikk.php?page=5&cikk=3613>.

²³⁶ *Czech Republic May Block Croatia’s EU Accession*, B92 (June 22, 2011), http://b92.net/eng/news/region-article.php?yyyy=2011&mm=06&dd=22&nav_id=75063; *Czech PM Wants to Link Croatian EU Entry With Opt-Out*, PRAGUE DAILY MONITOR (June 23, 2011), <http://praguemonitor.com/2011/06/23/czech-pm-wants-link-croatian-eu-entry-opt-out>.

Roma, concerns exist surrounding the level of corruption in Croatia's judiciary, as well as Croatia's helpfulness with the UN War Crimes Tribunal.²³⁷ The pre-accession monitoring system will help to ensure that the necessary steps are being followed to remedy those concerns. Croatia is taking some steps to remedy the concerns.²³⁸ Therefore, the pre-accession mechanism should be seen as a satisfactory middle ground. The pre-accession mechanism rewards Croatia's progress, and recognizes that additional work is required.²³⁹

Nevertheless, the pre-accession mechanism is not without its faults. The pre-accession mechanism will ensure that every three months, progress reports are provided.²⁴⁰ However, the ramifications of failing to meet a goal are unclear. The European Commissioner has the option of sending "early warning" letters in response to a failure to meet a goal.²⁴¹ However, what the option to send "early warning" letters or what an "early warning letter" precisely means are both uncertain. Some nations have called for the mechanism to be supported by enforcement options, such as postponing Croatia's accession if Croatia fails to comply with the required reforms.²⁴² However, European Commission President Jose Manuel Barroso, "has ruled out postponing Croatia's accession if there are concerns about possible shortcomings."²⁴³ This lack of finality,

²³⁷ Andrea Despot, Dušan Reljić, *Croatia's Rush to Join the EU: Hasty Admission Would Damage the Country, Other Candidate Countries and the EU*, GERMAN INSTITUTE FOR INTERNATIONAL AND SECURITY AFFAIRS, 1 (June 2011), http://www.swp-berlin.org/fileadmin/contents/products/comments/2011C14_despot_rlc_ks.pdf.

²³⁸ See European Comm'n, *Interim Report from the Commission to the Council and the European Parliament on Reforms in Croatia in the Field of Judiciary and Fundamental Rights (Negotiation Chapter 23)*, EUROPA, 2-4 (March 2, 2011), http://ec.europa.eu/enlargement/pdf/hp/interim_report_hr_ch23_en.pdf; See also Toby Vogel, *EU Leaders Welcome Croatia*, EUROPEANVOICE.COM (June 24, 2011), <http://www.europeanvoice.com/article/2011/june/eu-leaders-welcome-croatia/71462.aspx>.

²³⁹ *Croatia Become the European Union 28th member; Final Ratification June 2013*, MERCOPRESS (June 24, 2011), <http://en.mercopress.com/2011/06/24/croatia-become-the-european-union-28th-member-final-ratification-june-2013>.

²⁴⁰ Radio.net, *supra* note 16.

²⁴¹ Barroso: No Putting Off Croatia's 2013 EU Accession, *supra* note 229.

²⁴² *Croatia Accession Near, EU Ministers Say Amid Monitoring Talks*, *supra* note 230; See Joanna Sopinska, Article, Zagreb formally concludes accession talks, EUROPOLITICS (June 30, 2011), <http://preprod.europolitics.abccom.cyberscope.fr/zagreb-formally-concludes-accession-talks-artb308663-41.html> (stating, "Following intensive discussions, the member states ultimately refrained from introducing any provisions allowing for the use of sanctions against Zagreb within the framework of the monitoring mechanism. They warned, however, that the Council could take 'any appropriate decisions' in case Croatia fails to meet its commitments, an EU source told *Europolitics*. Depending on interpretation, 'this could allow for the use of some sort of restrictions,' he added.").

²⁴³ *Id.*

definition, and seemingly weak enforcement options of the pre-accession monitoring system imply that formalizing this aspect of accession is a welcome, but probably insufficient change. EU accession should require a stronger mechanism to avoid weakening the EU, and subsequently the legal and economic protections the EU was designed to foster.

V. CONCLUSION

Case law can serve as an example of an institution's policy and values.²⁴⁴ Given the EU's numerous human rights provisions, it should serve as an example to the world. The EU is being called upon to pressure North Korea to improve their human rights standards,²⁴⁵ yet the EU is struggling with this issue. Similar to the United States' struggles and efforts to desegregate schools²⁴⁶ during the Cold War,²⁴⁷ the EU is struggling to desegregate schools for Roma children.²⁴⁸

Absent legal documents with meaning and force, "harmonization" of the EU risks casting aside the founding principles of the Council of Europe and the EU.²⁴⁹ Pre-accession monitoring should be formally included in all accession treaties, but for the mechanism to be of any great significance, it must be given more power. The power to stop accession, not merely slow it down, if failures are routinely found. Absent a mechanism that carries meaning, as opposed to the creation of more reports, the pre-accession monitoring system is unlikely to produce significant positive results. Croatia's pre-accession monitoring system should be seen as a welcome step in the accession process, but the pre-accession monitoring system's lack of definition and seeming lack of power should cause hesitation in those who believe this is a solution to EU accession compliance concerns. Admittedly, the pre-accession

²⁴⁴ Erin Miller, *The Global Impact of Brown v. Board of Education*, SCOTUSBLOG (Feb. 18, 2010, 12:42 PM), <http://www.scotusblog.com/2010/02/the-global-impact-of-brown-v-board-of-education/> (discussing the role *Brown v. Board* played in American policy and America's global image. In the article, Mr. Miller quotes several international newspapers, including India's Hindustan Times, which heralded the *Brown* decision and stated that it provided legitimacy to America's anti-communist stance).

²⁴⁵ EU: *Try to Improve Human Rights in North Korea*, HUMAN RIGHTS WATCH (June 14, 2010), <http://www.hrw.org/en/news/2010/06/14/eu-try-improve-human-rights-north-korea>.

²⁴⁶ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

²⁴⁷ See Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. OF AM. HIST. 32, 34 (2004) (discussing the role of the Cold War in *Brown v. Board of Education of Topeka*, and the surrounding history of the Cold War).

²⁴⁸ *Czech Government Flouts Court Ruling on Roma Education*, *supra* note 13.

²⁴⁹ See *supra* Part I.

monitoring system is a positive step in modifying the mechanism of EU accession. However, given the importance of a sound EU accession process for human rights and for the global economy, the pre-accession monitoring system is an insufficient step in modifying the mechanism of EU accession.