

Drexel University Thomas R. Kline School of Law

From the Selected Works of Pamela Quinn

2012

The Integrated Enforcement of Human Rights

Pamela Q Saunders, *Drexel University*



Available at: <https://works.bepress.com/saunderspq/4/>

Drexel University Earle Mack School of Law

Legal Studies Research Paper Series

2013-A-01



“The Integrated Enforcement of Human Rights”

Pammela Quinn Saunders

This article will be published in
45 N.Y.U. J. INT'L L. & POL. 97 (2012)

This article can be downloaded without cost from
the Drexel University College of Law Legal Studies Research Paper Series
at <http://www.ssrn.com/link/Drexel-U-LEG.html>

THE INTEGRATED ENFORCEMENT OF HUMAN RIGHTS

PAMMELA QUINN SAUNDERS*

The strengths and weaknesses of different human rights enforcement regimes are typically assessed from a vantage point that evaluates each regime's type of mechanism in isolation from others. From this perspective, human rights courts are sometimes regarded as the "gold standard" in human rights enforcement because they possess what their far-more-common enforcement brothers—reporting and monitoring mechanisms—lack: The authority to impose sanctions on states that have violated their human rights obligations. When viewed side by side with human rights courts, reporting and monitoring mechanisms are frequently found wanting.

In fact, however, reporting and monitoring mechanisms have strengths as well as weaknesses. Moreover, they support treaties that have substantive obligations that overlap those found in treaties that are enforced by human rights courts. Once the connections between the treaties are taken into account, it follows that the treaties' enforcement mechanisms also may impact one another. Viewing enforcement as an integrated phenomenon reveals a much more nuanced and complicated picture of the strengths and weaknesses of different types of enforcement mechanisms than is typically depicted when they are viewed as acting in isolation from one another.

* Assistant Professor of Law, Drexel University, The Earle Mack School of Law. J.D., Duke University School of Law; A.B. Dartmouth College. I would like to thank the many people whose comments were crucial to the development, drafting, and editing of this Article: Tabatha Abu El-Haj, Katharine Bartlett, Adam Benforado, Stuart Benjamin, David Cohen, Guy-Uriel Charles, Evan Criddle, Deborah DeMott, Anna Dolidze, Jean Galbraith, Alex Geisinger, Alexandra Harrington, Laurence Helfer, Anil Kalhan, Odette Liseau, Catherine McCauliff, Timothy Meyer, Saira Mohamed, Fernanda Nicola, Anna Spain, Shana Tabak, Hunter Tart, Melissa Waters, Jonathan Weiner, and David Zaring. I am particularly indebted to the Duke University School of Law for allowing me to moot the ideas that became this Article, as well as to all those who provided commentary on the earlier drafts I presented at the 2012 Washington University School of Law Workshop on Comparative and International Law and JILSA's 2012 Annual Workshop at the University of Georgia School of Law. Marissa Edwards and Melissa Green provided excellent research assistance, as did John Cannan at the EMSOL Legal Research Center. Thanks to Dean Roger Dennis for providing generous research support, both financial and moral.

Recognizing that different regimes of human rights treaty enforcement can be integrated requires re-conceiving the coercive and persuasive influence of mechanisms that have no direct sanctioning authority. Far from being "toothless," these enforcement mechanisms have the potential to directly impact human rights courts with strong enforcement authority. Moreover, the ability of the courts to identify non-compliant behavior is strengthened through their interactions with other treaties' reporting mechanisms.

INTRODUCTION	99
I. THE ENFORCEMENT OF HUMAN RIGHTS.....	108
A. <i>Human Rights Enforcement Mechanisms</i>	109
B. <i>The Effectiveness of Human Rights Treaties</i>	113
C. <i>Human Rights Regime Complexes</i>	115
D. <i>Integrating Human Rights Enforcement</i>	117
II. INTEGRATED ENFORCEMENT IN PRACTICE.....	125
A. <i>Integrated Enforcement in the European Court of Human Rights</i>	127
1. <i>The Perceived Need for the Framework Convention</i>	127
2. <i>The Structure of the Framework Convention</i> .	133
3. <i>The Rights of Roma in Europe</i>	138
4. <i>The Roma Cases: Gradual Embrace of Group-Based Claims by the European Court of Human Rights</i>	144
5. <i>The Influence of the Framework Convention's Monitoring Mechanism on the European Court of Human Rights</i>	151
6. <i>The Impact of the Framework Convention Reports on the European Court of Human Rights</i>	155
B. <i>Integrated Enforcement in the Inter-American Court of Human Rights</i>	160
1. <i>Women's Rights in Ciudad Juárez Leading up to the Cotton Field Murders</i>	161
2. <i>The Cotton Field Murders and the Response of the Mexican Authorities</i>	165
3. <i>The Influence of Reporting and Monitoring on the Court's Analysis</i>	166
4. <i>The Integration of Reporting and Monitoring in the Cotton Field Decision</i>	168
III. THE FUTURE OF INTEGRATED ENFORCEMENT	170
CONCLUSION	173

INTRODUCTION

After three young women in Mexico were murdered in the fall of 2001, their families brought claims in the Inter-American Court of Human Rights. The Court concluded that the women were victims of a pervasive culture of violence against women.¹ This culture of violence was perpetuated by state authorities who refused to take seriously, and in many cases to investigate at all, the disappearances and subsequent murders of hundreds of young women in Ciudad Juárez over the period of just a few years. In each of the cases, for example, state officials were dismissive of the families' concerns that their daughters were victims of foul play.² Instead, police told one family that "if anything happened to [their daughter], it was because she was looking for it, because a good girl, a good woman, stays at home."³ Another of the victim's mothers was told that "all the girls who get lost, all of them, go off with their boyfriend or want to live alone."⁴ Police took no steps to investigate, even after the badly mutilated and decomposing bodies of the young women were found in a Ciudad Juárez cotton field.

Thousands of miles away, at about the same time, parents of Roma schoolchildren in Europe brought claims challenging state policies and practices that prevented their children from attending school alongside their non-Roma peers. In these cases, the European Court of Human Rights concluded that policies that resulted in segregation of large numbers of Roma children violated the individual claimants' rights to equal educational opportunities. States such as Greece, Croatia, and the Czech Republic were ordered to change their policies and stop discriminating against Roma.

Though an ocean apart, and with very different types of human rights claims, the families prevailing in these cases had some things in common. All were able to succeed in the most renowned and well-known tribunals for vindicating international human rights: regional human rights courts. Their cases

1. *See* González et al. v. Mexico (The Cotton Field Case), Case Nos. 12,496, 12,497, 12,498, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 206 (Nov. 16, 2009).

2. *See id.* ¶¶ 187–202.

3. *Id.* ¶ 198.

4. *Id.* ¶ 200.

were similar in a less obvious way as well. The outcomes of the cases—finding that human rights violations had occurred—appear to have depended upon the existence of reports issued under the auspices of less well-known human rights treaties that lack courts to enforce them.

That the reporting done by separate treaty bodies was crucial to the outcomes of these human rights courts should not be surprising. Human rights treaties frequently overlap one another, such that a single state frequently assumes a similar or identical human rights obligation under multiple treaties. Different treaty bodies may therefore assess the performance of a single state with respect to the same generic obligation.

Of course, most of these treaty bodies are supported not by courts but by mechanisms that monitor and/or report states' compliance with their human rights obligations. While enforcement via reporting and monitoring has often been criticized, such critiques fail to consider the ways in which reporting may work in tandem with other types of enforcement. Conceiving of reporting in a way that situates it within a broader enforcement regime—as I do in this Article—allows for a more fulsome consideration of this type of mechanism's strengths than is possible when it is viewed in isolation from other treaty bodies. As I show, the strengths of reporting mechanisms, though different from the strengths of adjudicative mechanisms, can be leveraged by courts to significant advantage.

When reporting is discussed alongside adjudication, the strengths of reporting are typically overlooked or ignored. Instead, because the different mechanisms are often seen as competing, and not as complementary, the weaknesses of reporting mechanisms are often emphasized, particularly when enforceability is at issue. It is true, of course, that reporting committees are generally not vested with the authority to order reparations or demand that non-compliant states correct their behavior. This lack of authority has long prompted concern that states may be unlikely to obey their human rights commitments because—outside of a very few contexts in which they have voluntarily bound themselves to human rights courts—states are not subject to any direct and binding mandate to conform behavior that is found to be out of compliance.

Indeed, this view has been on display in critiques of one of the most recent human rights initiatives, the human rights body created under the auspices of the Association of Southeast Asian Nations (ASEAN) Charter.⁵ The decision of the ASEAN Member States to create a monitoring committee rather than a human rights court has been the subject of strong criticism contending that this type of enforcement mechanism is inherently “toothless,” thereby demonstrating that ASEAN member states are “more into rhetoric than real action.”⁶ While state officials, such as Singapore Foreign Minister George Yeo, defend the choice of a monitoring mechanism, arguing that it will have “the right to admonish, to criticize, to encourage” and provide a “moral influence,”⁷ even they concede that the reporting mechanism they are creating may lack “teeth.”⁸

The notion that human rights enforcement mechanisms should be strengthened can also be seen in the recent overhaul of the United Nations Human Rights monitoring framework. In 2006, the Commission on Human Rights was dissolved after 60 years’ continuous existence⁹ and replaced by the newly created Human Rights Council.¹⁰ At the same time, a new system of “Universal Periodic Review” (“UPR”) was established to conduct systematic, quadrennial review of every

5. Charter of the Association of Southeast Asian Nations art. 14, Nov. 20, 2007, [hereinafter ASEAN Charter] available at <http://www.aseansec.org/21069.pdf>; *Universal Periodic Review*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Sept. 20, 2012) (describing the new process of “universal periodic review,” created in 2006, which will involve a review of the human rights records of all 192 U.N. member states every four years).

6. Andrea Durbach et al., “A Tongue But No Teeth?": *The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region*, 31 SYDNEY L. REV. 211, 214 (2009) (quoting Sinapan Samydoorai, president of the Think Centre, quoted in Wayne Arnold, *Asean Gets a Charter and Reveals Its Divisions; Fight over Myanmar Points up Problems Among Signatories*, INT’L HERALD TRIBUNE, Nov. 21, 2007, at 1).

7. *Frequently Asked Questions on the ASEAN Charter*, MARUAH, <http://maruah.org/asean-charter/> (last visited Feb. 19, 2013).

8. Durbach, *supra* note 6, at 214.

9. Philip Alston, *Hobbling the Monitors: Should U.N. Human Rights Monitors Be Accountable?*, 52 HARV. J. INT’L L. 561, 568 (2011).

10. *Id.* at 568–69.

state's record of human rights compliance.¹¹ The United Nations made these changes and revamped its system of monitoring compliance with the many human rights treaties under its auspices in an effort to address some of the shortcomings inherent in a self-reporting system without systematic (or, in some cases, any) examination of most member states by an outside monitor.¹²

To be sure, reporting mechanisms have their share of defenders and advocates. Reporting allows multiple stakeholders to be directly involved in the process, thereby creating a more "democratic" system of monitoring than can be done by human rights courts that are open only to individual applicants. Recent scholarship suggests that they may be more effective than many of their opponents have assumed. Professor Beth Simmons, for example, posits that certain political circumstances are most likely to be correlated with increased state compliance with human rights obligations.¹³ Specifically, she argues that treaties are likely to have the greatest impact where "conditions exist to gain significant domestic traction"—specifically, when political institutions are less stable and are therefore more likely to be influenced by domestic groups that are able to mobilize and petition their governments to respect their human rights obligations.¹⁴

Unlike critical accounts suggesting that human rights treaties are not likely to affect state behavior because most lack direct enforcement mechanisms,¹⁵ Simmons situates human

11. *See id.* at 587–88; OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 5.

12. *Id.*

13. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW AND DOMESTIC POLITICS* (2009).

14. *See id.* at 16–17.

15. *See, e.g.,* Oona Hathaway, *The Cost of Compliance*, 55 STAN. L. REV. 1821, 1838–39 (2003) (explaining that the costs of committing to human rights treaties are often effectively costless when treaty enforcement and monitoring mechanisms are weak) [hereinafter Hathaway, *Cost*]; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2007–08 (2002) [hereinafter Hathaway, *Do Human Rights*]. Hathaway concludes that the ratification of these treaties may not only fail to effect compliance by states with the human rights obligations the treaties are intended to secure. *See* Hathaway, *Cost*, *supra*, at 1940 (pointing to the lack of military or economic mechanisms as a means of holding states to their commitments). Rather, in some cases, states may actually commit more human rights viola-

rights treaties within dynamic political environments that affect the impact of the treaties' reporting mechanisms on state policies and practices. She concludes that the existence of treaties, and of reporting mechanisms that provide details regarding human rights failures, help mobilize advocates who demand changes at the domestic political level.¹⁶

Others, such as Professors Ryan Goodman and Derek Jinks, suggest that reporting may be beneficial even if it is not directly effective.¹⁷ Goodman and Jinks contend that reporting is useful even if it is neither coercive nor persuasive because it contributes to the creation of a human rights culture.¹⁸ On this view, the work of reporting helps to "socialize" or "acculturate" states, ultimately nudging states to behave in conformity with the prevailing cultural norms the reports have helped shape (whether the states agree with the norms' content or not).¹⁹

Reporting may also be effective and useful to the extent it is utilized by domestic courts. Thus, for the many scholars who view domestic courts as an important—or the most important—mechanism of human rights enforcement,²⁰ reporting

tions post-ratification. *Id.* Though important and cited in many major works on this subject, Hathaway's work has also been criticized. In addition, others using the same data sets—including Simmons—have reached somewhat different conclusions regarding the compliance impact of the CAT. *See, e.g.,* SIMMONS, *supra* note 13 (arguing that treaties provide political, legal, and social resources to domestic groups to demand compliance from their governments); James Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008). Nonetheless, as discussed in more detail below, such critiques of self-reporting, and the notion that pure self-reporting is inherently weaker than more neutral reporting mechanisms that incorporate other data to evaluate compliance, are a significant part of the legal literature on human rights enforcement and at least partially underlie the decision by the United Nations to overhaul the monitoring system it employs to review the human rights records of all U.N. member states.

16. SIMMONS, *supra* note 13, at 15–17.

17. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 695–97 (2004).

18. *Id.*

19. *Id.*

20. *See, e.g.,* Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 593 (2007) ("The studies of compliance with human rights treaties support the claim that human rights treaties are most likely to be effective where there is domestic legal enforcement of treaty commitments."); Harold Hongju Koh, *Why Transnational Law Matters*,

may also be significant to the extent that it serves to influence or provide information that is relevant and helpful to domestic courts or other domestic actors.²¹

Even laudatory accounts of human rights reporting mechanisms, however, generally do not consider the ways that such mechanisms may work in tandem with the enforcement mechanisms of wholly distinct human rights treaties.²² Instead, most

24 PENN. ST. INT'L L. REV. 745, 746 (2006) (describing "transnational legal process" as the process by which "states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law"); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 54–56 (2004) (discussing the role of transnational legal process in promoting international law norms through a process that leads to domestic law internalization of those norms).

21. Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 ANN. REV. OF POL. SCI. 265, 283 (2012) ("Implicit in all the new research on human rights has been the assumption that international regimes diffuse information. This diffusion is central to all of the reasons why states might choose to participate in regimes and also to all of the mechanisms through which regimes might influence human rights behavior In order for them to coerce people, deterring violations through fear of punishment, [human rights] regimes must also convey the right information to the right institution or person at the right time."); Yonatan Lupu, *Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements*, 66 INT'L ORG. — (forthcoming 2013), available at <http://dss.ucsd.edu/~ylupu/Best%20Evidence.pdf>, at 28 ("The extent to which domestic courts can enforce international obligations depends on their ability to overcome crucial information problems."). But see Hafner-Burton, *supra*, at 283 (noting that "we know surprisingly little about what information international human rights regimes actually convey and to which audiences, or how it affects individual decision making on human rights"); Lupu, *supra*, at 10–15 (discussing inadmissibility of evidence found in reporting on "personal integrity rights violations").

22. Several scholars do consider similar interactions. Lupu, for example, considers the potential impact of NGO and media reports on domestic adjudication. See Lupu, *supra*, at 14–15. However, he does not consider the reports as direct evidence to be relied upon or the ways in which the existence of findings in such reports might impact a court beyond the findings evidentiary value to be separately and independently evaluated by the domestic court. To the contrary, he contends that such reports typically rely on information that is either inadmissible hearsay or based on information obtained from anonymous sources who would be unlikely to testify if the claim were brought in a judicial forum. See *id.* at 15. Likewise, an adjudicative tribunal's reliance on a reporting committee's reports can be viewed as part of the phenomenon that Anne-Marie Slaughter has described as the increasingly common connection among judicial entities in the growing "global community" of courts. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV.

accounts of human rights treaties examine the impact and effectiveness of different treaties and other legal methods of enforcement independently of one another.²³ This typical approach fails to focus on the fact that every human rights treaty is part of a highly interconnected web of treaties dealing with the same or similar subject matters. Through these overlapping treaty connections, the enforcement of one individual human rights treaty has the potential to impact, and be impacted by, the enforcement of other human rights treaties.

This Article analyzes the enforcement of human rights treaties by considering this interconnectedness directly.²⁴ Recognizing the ubiquitous connections among most—if not all—

INT'L L.J. 191, 192–93 (2003) (describing how the global community of judges “read and cite each other’s opinions,” along with other ways that they are more connected than ever before). That is, interactions between different tribunals that are judicial or quasi-judicial can all be characterized as forms of “integrated enforcement,” although the effect of reporting on adjudicative entities is likely to be qualitatively different than the effect of adjudicative entities on one another. Different adjudicative entities interacting with one another will not be able to draw on the unique strengths of reporting.

23. Although they do not consider the effect of independent legal or soft law commitments, many accounts do consider the interaction of state-parties with other *actors*—including the media and domestic political constituencies—in assessing the likelihood the state will act in compliance with treaty obligations. See, e.g., SIMMONS, *supra* note 13, at 16 (discussing the impact of reporting on groups’ mobilizing to demand political changes at the domestic level); Elvira Domínguez Redondo, *The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session*, 7 CHINESE J. INT’L L. 721, 734 (2008) (noting the “severe lack of reporting” by media at the domestic level, thereby reducing the potential impact of the UPR process in China).

24. Kal Raustiala and David Victor have noted that, in general, “the rising density of international institutions” renders it “increasingly difficult to isolate and ‘decompose’ individual international institutions for study.” Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 278 (2004). Yet, scholars continue to do so, despite the nascent movement to look at “regime complexes” rather than individual treaties. See, e.g., *id.* (highlighting how efforts to build and test theories often are conducted as though decomposition is possible); see also Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change* (Harv. Project on Int’l Climate Agreements, Discussion Paper 2010-33, 2010) (defining and discussing the “regime complex” and arguing that this “regime complex” will persist). While the foregoing articles begin to tackle this important dimension of treaties’ impact in a few contexts, human rights treaties continue to be approached as isolated entities and not as a complex or complexes.

human rights treaties highlights the potential that their enforcement mechanisms will impact one another. Viewing enforcement as an integrated phenomenon reveals a more nuanced and complicated picture of the strengths and weaknesses of different types of enforcement mechanisms than is typically depicted when they are viewed as functioning in isolation from one another.

As this Article describes in detail, understanding that enforcement can be integrated requires re-conceiving reporting mechanisms. Reporting may be far from “toothless,” not just for the reasons recounted above, but also because in at least some cases, the reporting done by one treaty body may strengthen the adjudicative tribunal that supports another. It has the potential to do so, first, by providing such tribunals with far more information than they are likely to be able to obtain through their traditional fact-finding methods, and, second, by providing a binding legal precedent that offers the adjudicative entity both guidance and solidarity, which may be necessary to inspire courts to find violations in cases that are particularly challenging, either legally or politically.

To be sure, the ability of a reporting mechanism to be “integrated” into an adjudicative enforcement mechanism in this way will depend on a variety of factors. Most obviously, the reputation of the reporting regime will greatly impact its ability to be influential and to provide political cover to adjudicative tribunals looking to rely on its legal conclusions. But in some cases, at least, reporting mechanisms do seem to be doing exactly this. For instance, the claims described in the opening paragraphs—which resulted in recent high-profile findings of human rights violations by the Inter-American and European Courts of Human Rights—likely would not have been successfully prosecuted absent the reporting and extensive factual development undertaken under the auspices of a number of different human rights treaties.

In fact, because of the possibility of integrated enforcement, situating rights within treaties not directly supported by human rights courts may make them more likely to be enforced. As contradictory as it may sound, the failure to incorporate minority group rights directly into the European Convention on Human Rights made it *more likely* that the European Court of Human Rights would take a progressive

approach to claims by Roma relating to group rights.²⁵ Likewise, the substantive right to be free from sex discrimination found in the Inter-American Convention of Human Rights was not likely, by itself, to sustain the claims of femicide alleged by families of the murdered women in Ciudad Juárez. Instead, the reporting work done, establishing a context and framework in which the courts could understand and situate the individual claims, appears to have been a critical aspect of each decision.

As the human rights regime complex becomes ever more byzantine, and as reporting mechanisms like that of the Framework Convention and the treaties subject to the UPR begin to mature, the potentially significant impact of systematic, neutral reporting mechanisms on other enforcement mechanisms is beginning to unfold and could soon explode. This Article proceeds to describe integrated enforcement, in theory and practice, and to consider its potential.

Part I begins by discussing the current debate regarding the strengths and weaknesses of different types of mechanisms to enforce human rights treaties. While scholars disagree about the effectiveness and value of reporting mechanisms, they have in common a tendency to engage with the treaties they are analyzing as if each is an isolated entity. The Part continues by demonstrating that this tendency to evaluate human rights treaties in isolation fails to take account of the potential interactions between the overlapping obligations found embedded in nearly every human rights treaty. After re-situating human rights treaties in the “regime complex” literature, the Part reassesses the potential effectiveness of different types of enforcement mechanisms when they are more appropriately viewed as part of an integrated system of enforcement. In this Part, I show that integration of different types of mechanisms yields enforcement advantages as compared with enforcement via any type of mechanism working in isolation.

Part II then illustrates the integrated enforcement model using recent real-world examples. First, it demonstrates that the Framework Convention’s reporting mechanism has played a significant role in the way that Roma applicants’ claims are

25. See *infra* notes 99–100 and accompanying text (discussing failed efforts to amend the European Convention to recognize minority group rights).

analyzed when they are presented in a separate, adjudicative tribunal: the European Court of Human Rights. Second, it discusses how a number of reports by different reporting committees and by U.N. Special Rapporteurs paved the way for a decision concluding that three women murdered by an unknown assailant or assailants in the fall of 2001 in Ciudad Juárez were victims of the state's pervasive practice of gender discrimination.

Finally, Part III considers the future of integrated enforcement and the value of considering integrated enforcement to be an important facet of an effective regime of human rights enforcement. I suggest first the ways that integrated enforcement can be used to develop empirical projects to test a number of different questions related to human rights enforcement. I then consider ways that integrated enforcement should be consciously taken into account in designing or redesigning human rights treaties and institutions. I also encourage those engaged in institutional design to consider the benefits that reporting may have as part of a comprehensive system of human rights enforcement. In particular, reporting undertaken within the U.N. system has great potential to be undermined if the various reporting mechanisms are ever combined into a single or an omnibus reporting body or—even worse—replaced by or rendered subservient to a global human rights court.

I. THE ENFORCEMENT OF HUMAN RIGHTS

Because enforcement mechanisms that are utilized in other areas of international law do not appear to work in the context of human rights treaties, designing effective enforcement mechanisms has always been challenging.²⁶ This Part provides background regarding those challenges by discussing the different approaches actually taken. It then gives a brief overview of the current academic debate as to how effective²⁷

26. By “enforcement mechanisms,” I mean any type of obligation, procedure, or process established by a treaty that is designed to promote or incentivize compliance, whether such incentives are in the form of avoiding shame or other, more tangible consequences.

27. Various scholars use terms like “effectiveness” and “compliance” to mean slightly different things. *See generally* Lisa L. Martin, *Against Compliance*, in *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: SYNTHESIZING IN-*

each of these different types of mechanisms is apt to be, before explaining that this conception of reporting and monitoring mechanisms fails to consider their potential as part of an integrated system of treaty enforcement. It concludes by reassessing the potential capacities of reporting and monitoring mechanisms when they are utilized not just in their primary capacity, but also to bolster legal claims in adjudicative mechanisms, namely in human rights courts. When these different enforcement mechanisms interact and become “integrated,” they are able to work together in a way that allows each enforcement mechanism to be more effective than either one working in isolation.

A. *Human Rights Enforcement Mechanisms*

Though the few that do so are generally better known, only a very few human rights treaties create and empower a formal mechanism with sanctioning authority. These mechanisms (which I shall refer to as “adjudicative-type mechanisms”) are established pursuant to those human rights treaties that formally establish human rights “courts.” Even these few have not adopted the same framework for considering claims. Instead, they have adopted varying procedures to specify who may bring claims and what type of investigative review must occur prior to adjudication.

SIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP (Dunoff & Pollack eds., 2012) (noting that three strands of political science scholarship use “the language of compliance” in different ways, with one body that uses the language but “ends up measuring cooperation or domestic policy change rather than compliance,” a second that “conflates it with the political concept of cooperation,” and a third that “accepts the judgment of legal scholars about who is in compliance, and goes on to persuasively demonstrate the factors that give rise to patterns of compliance.”). Recently, for example, Yuval Shany has asserted that evaluating effectiveness of international courts should follow a “goal-based” approach that matches the court’s goals with its outcomes. Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225 (2012). I use the term “effective” in the more generic sense of having an impact on a non-compliant state’s behavior (though not necessarily to the point of making the behavior fully compliant). In the context of the European Court of Human Rights, then, compliance with a decision that requires a losing state to pay monetary compensation to a prevailing applicant is “effective” if the state pays—though not as effective as it would be if it also prompted the state to change its behavior going forward.

In the European Court of Human Rights, for example, individuals have the right to file claims (in the form of an “application” against a party state), which are then reviewed by its “investigative” arm (the European Commission of Human Rights) that generally serves to screen allegations and determine if the claims are “admissible,” i.e., worthy of a full judicial proceeding. Those that pass this initial hurdle then proceed through a process designed more or less like domestic litigation: Each party (i.e., the claimant and the state respondent), usually represented by legal counsel, presents evidence and advocates in support of its claims. The cases are then adjudicated by a panel of judges that has the authority to award sanctions in cases where they conclude that a human rights violation has in fact occurred.²⁸

Notwithstanding the existence of a few high-profile human rights courts, the vast majority of human rights treaties rely on some sort of reporting and/or monitoring system as the sole mechanism to compel compliance.²⁹ Nearly every

28. Other human rights courts include the European Court of Justice, the Inter-American Court of Human Rights, the African Court of Human and Peoples’ Rights, and three sub-regional courts in West Africa, described in Solomon T. Ebobrah, *Human Rights Developments in African Sub-Regional Economic Communities During 2009*, 10 AFR. HUM. RTS. L. J. 233, 234 (2010) and Solomon T. Ebobrah, *Human Rights Developments in African Sub-Regional Economic Communities During 2010*, 11 AFR. HUM. RTS. L. J. 216, 217 (2011). Some of these courts have an express mandate to receive and review human rights complaints, while others do not. The International Court of Justice (ICJ) has also become increasingly active in human rights issues over the past decade, such that at least some commentators argue that it is a de facto human rights court. See, e.g., SHIV R. S. BEDI, *THE DEVELOPMENT OF HUMAN RIGHTS LAW BY THE JUDGES OF THE INTERNATIONAL COURT OF JUSTICE* (2007).

29. This article focuses mainly on the interactions between regional human rights courts and certain review and monitoring processes that look broadly at state practices and issue reports discussing the application of policies and practices to a broad number of cases. In fact, there is a greater diversity of human rights enforcement mechanisms than I deal with in this piece. For example, treaty bodies that review individual communications under optional protocols sometimes trigger the same sorts of implementation politics as legally binding judgments issued by international courts, in part because the treaty body has applied what are otherwise general rules to particular facts, creating a prevailing party (in some cases affiliated with an NGO or social movement) that can then bring political pressure to bear on the government to comply with the treaty. An example of this phenomenon is the U.N. Human Rights Committee’s 1994 decision in *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), availa-

human rights treaty under the auspices of the United Nations, for example, originally created self-reporting obligations, without more, as the mechanism for formal compliance review.³⁰ For U.N. treaties with this type of mechanism (which I will call “reporting mechanisms”), a formal review by a neutral monitor might also occur in rare cases where a Special Rapporteur is appointed by the Human Rights Council.³¹

Treaties are increasingly relying on more rigorous mechanisms that are similar to reporting mechanisms (which I will refer to as “monitoring mechanisms”). Monitoring mechanisms utilize self-reporting in conjunction with additional reporting from neutral third parties or other states to compile a comprehensive factual record of state practices relating to their human rights treaty obligations. A formal external monitoring committee then analyzes this entire record.³² This model was recently adopted by the U.N. in connection with its new UPR. The UPR system, which completed its first review of all 193 U.N. member states in October 2011,³³ evaluates each government’s human rights record based on three documents: (1) a self-report submitted by the state’s national government; (2) a separate report compiled by the Office of the U.N. High

ble at <http://iilj.org/courses/documents/Toonenv.Australia.pdf>. Despite the fact that the decision was formally non-binding, it provided authority for Australia to invoke the “international law override” clause in its federal constitution and adopt a sexual privacy statute that had the practical effect of nullifying the Tasmanian sodomy law the Committee had found to be incompatible with the International Covenant on Civil and Political Rights (ICCPR). Thus, in at least some cases, the beneficial effects of interconnectedness may be as powerful for treaty bodies as they are for regional human rights courts. Thank you, Professor Laurence Helfer, for bringing this example to my attention.

30. Of course, *unofficial* monitors, in the form of self-appointed NGO human rights monitors, have been in existence for as long as these treaties. So too might other states (parties and non-parties) have pointed out non-compliance that they might be aware of outside of the formal self-reporting process.

31. See *infra* Part II.B.1 (discussing some examples of this type of reporting in connection with the *Cotton Field* case).

32. See, e.g., *infra* notes 118–125 and accompanying text (discussing Framework Convention structure).

33. Joanna Harrington, *UN Human Rights Council Brings to an End the First Cycle for Universal Periodic Review*, EJIL: TALK! (Feb. 27, 2012), <http://www.ejiltalk.org/un-human-rights-council-brings-to-an-end-the-first-cycle-for-universal-periodic-review/>.

Commission for Human Rights (“High Commissioner”) that is based on information contained in the “reports of treaty bodies and special procedures concerning the country, along with other relevant official U.N. documents”; and (3) a compilation by the High Commissioner of “additional credible and reliable information provided by other relevant stakeholders, including NGOs and national human rights institutions.”³⁴ The UPR system expands the scope of objective monitoring and no longer focuses solely on a handful of human rights “pariahs” but seeks instead to review on a regular basis the human rights record of every U.N. member state.³⁵

While monitoring mechanisms utilize neutral parties to make factual and legal findings, neither they nor reporting mechanisms are typically empowered to impose formal sanctions. Even where a neutral monitor is empowered to make recommendations regarding what measures states should take to remedy their non-compliant behavior, the recommendations are explicitly considered to be non-binding.³⁶ Most

34. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 5.

35. See Alston, *supra* note 10, at 587–88 (stating that the goal of the UPR system “was in part to demonstrate that the [Human Rights Council] would not perpetuate the double standards of the Commission by focusing only on human rights problems in a relatively small range of countries, almost all of which were in the South”). Similar reporting mechanisms have been created to support other treaties as well. As explained in Part III, the Framework Convention on the Protection of National Minorities created a similar system of periodic monitoring of all state parties in 1998, pre-dating the new UPR system by several years.

36. See, e.g., *infra* notes 118–125 and accompanying text (discussing the Framework Convention). Some treaty bodies, including the U.N. Human Rights Committee, ask states to report back on the measures they have undertaken to comply with their non-binding conclusions and recommendations. Civil and Political Rights: The Human Rights Committee, *Human Rights*, Fact Sheet No. 15 (rev. 1) at 27, available at <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> (describing how, if the Committee finds a violation in the case of an individual complaint, “the State party is requested to remedy that violation” and “the case is taken up by the Committee’s Special Rapporteur on Follow-up to Views, who communicates with the parties with a view to achieving a satisfactory resolution to the case in the light of the Committee’s views”); see also, Carolina Dommen, *The U.N. Human Rights Regime: Is it Effective?*, 91 AM. SOC’Y INT’L L. PROC. 460, 463–64 (1997) (noting that “the treaty bodies’ decisions are not binding,” but that “[s]ince 1990 the treaty-based bodies, and in particular the Human Rights Committee have worked to enhance the quasi-judicial nature of the

human rights treaties are not directly enforceable in that they do not provide for the imposition of sanctions or any means of compelling improved behavior in the future, even when the enforcement authority makes a formal determination that a state party has violated one or more of its treaty obligations.

B. *The Effectiveness of Human Rights Treaties*

As discussed above, most human rights treaties continue to utilize some sort of reporting or monitoring system, and treaties' utilizing adjudicative tribunals remain the exception. This remains true despite the fact that human rights advocates have long been concerned that "toothless" reporting regimes offer no direct relief for victims. Such advocates have accordingly lobbied for tribunals vested with sanctioning authority in which individuals can bring claims and obtain direct relief.³⁷ While the lack of a remedy for victims is apparent in the context of reporting and monitoring mechanisms, less clear (and the subject of recent scholarly debate) is whether treaties that contain such mechanisms are also ineffective at changing state behavior.

Skepticism that international law can affect state behavior in the absence of an external enforcement authority has hardly been confined to the human rights context.³⁸ Yet, the issue of human rights obligations in particular has become a matter of intense debate. Some scholars argue that human rights treaties are not only ineffective and unlikely to affect state behavior, but are also, in some cases, actually correlated to worsening human rights records post-ratification.³⁹

While others disagree with the theoretical and empirical work that has led to this conclusion, such work has, at a minimum, led to a greater awareness of, and concern with, the effectiveness of human rights treaties and the mechanisms they

complaints procedures by establishing formal follow-up mechanisms designed to monitor how states parties implement treaty body decisions at the domestic level").

37. See, e.g., *supra* notes 5–8 and accompanying text (discussing uproar over the proposed ASEAN human rights body).

38. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005).

39. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. OF SOC. 1373, 1401–02 (2005); Hathaway, *Do Human Rights*, *supra* note 15, at 2015.

use to achieve their stated aims. Thus, while scholars reach very different conclusions about whether human rights treaties can promote and alter state compliance with human rights norms,⁴⁰ contemporary legal analysis generally accepts that even global support for human rights treaties would not be a panacea.⁴¹ As Professor Beth Simmons notes, “[t]reaties alter politics; they do not cause miracles.”⁴²

It remains unclear, then, what type of mechanism can best—or better—serve to “alter politics” in the way consistent with the intent expressed by the parties to human rights treaties. This issue is reflected, for example, in the debates over how to create an effective enforcement mechanism that will also generate state buy-in,⁴³ as well as in the broader debate over whether the trend towards international adjudication represents a positive or negative development.⁴⁴

But those espousing these different perspectives generally assume, implicitly or explicitly, that the choices are either/or: One can enforce a set of obligations either by establishing an adjudicative mechanism or a reporting mechanism contained in a single treaty (or possibly neither). What is rarely considered is that the obligation might be enforced by *both* adjudication and reporting.⁴⁵ Even those who consider and endorse such a model imagine these mechanisms as interacting under the auspices of a single human rights treaty and do not consider the possibility of one treaty mechanism’s impact on an-

40. *E.g.*, SIMMONS, *supra* note 13; Goodman & Jinks, *supra* note 17.

41. SIMMONS, *supra* note 13, at 16.

42. *Id.*

43. *See, e.g.*, Durbach et al., *supra* note 6, at 212 (discussing defense of the ASEAN human rights body by member states).

44. *See* SIMMONS, *supra* note 13, at 6 (discussing the “common theme [that has emerged in human rights scholarship] . . . that international adjudication [of human rights claims] is a step too far for most governments and a problematic development for the human rights regime generally”) (discussing Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Jack L. Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5 (2003-04)).

45. *See supra* notes 5–8 and accompanying text (discussing debates over ASEAN enforcement); *infra* notes 124–125 (same for Framework Convention).

other treaty or treaties.⁴⁶ Thus, while supporters of adjudication and supporters of reporting (and even the few supporters of a dual model) reach disparate conclusions, they begin from a common premise: a treaty should be analyzed as a distinct entity, disaggregated from, and independent of, other treaties. There has been little-to-no consideration of whether reporting and monitoring mechanisms and adjudicative mechanisms might complement and enhance one another.

Yet, such a hybrid approach is arguably superior to an approach that relies only on adjudication, or only on reporting and monitoring. As discussed in detail below, each type of mechanism has enforcement advantages and disadvantages. A hybrid approach can harness the advantages and obviate many of the disadvantages. Furthermore, a hybrid approach allows human rights actors to work at multiple levels—local, regional, and global—and transfers benefits inherent in each to the others.

C. *Human Rights Regime Complexes*

Even among their supporters, reporting and monitoring mechanisms are generally analyzed only in connection with the treaties they are designed to support directly. Academic analyses of human rights treaties generally focus on single treaty regimes.⁴⁷ Why this remains the case is somewhat puzzling in light of the growing recognition that increasing complexity and “the rising density of international institutions” render it “increasingly difficult to isolate and ‘decompose’ individual international institutions for study.”⁴⁸ Indeed, in

46. See, e.g., Olivier de Frouville, *Building a Universal System for the Protection of Human Rights: The Way Forward*, in NEW CHALLENGES FOR THE U.N. HUMAN RIGHTS MACHINERY 241, 265 (Bassiouni & Schabas eds. 2011) (endorsing a U.N. system of universal human rights enforcement divided between a World Human Rights Court and a World Commission of Human Rights “composed of a certain number of independent experts” that would serve as a “subsidiary body” to the World Court, issuing its “own opinions and decisions” after “undertak[ing] monitoring functions, such as the review of periodic reports, the onsite visits (except if needed for the establishment of facts in a particular case, of course) and continuous dialogue, follow-up of general issues, or development of international law”).

47. Raustiala & Victor, *supra* note 24, at 278.

48. *Id.*

other areas of international law,⁴⁹ there is a growing recognition of what Professors David Victor and Kal Raustiala have called “regime complexes,” which includes any “collective of partially overlapping and even inconsistent regimes that are not hierarchically ordered.”⁵⁰ Regime complexes may be consciously created, with different parts of the regime differently articulating the same substantive obligations, as well as interpretations of them, all of which impact the other parts of the regime complex.⁵¹

Human rights generally are the subject of a regime complex in much the same way as other subject areas of international law. This is hardly surprising since the same factors that create club goods in other international settings are just as present in the context of human rights.⁵² And, indeed, one can view the entire system of human rights as involving a highly generalized articulation of a fixed number of rights, which are then rearticulated and clarified in various ways among clubs that organize around regions and special interest

49. See, e.g., *id.* (plant genetic resources); Laurence Helfer, *Regime Shifting: The TRIPS Agreement and the New Dynamics of International Intellectual Property*, 29 YALE J. INT'L L. 1, 5 (2004) (international IP generally); Keohane & Victor, *supra* note 24 (climate change).

50. Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1025 (2007).

51. Raustiala & Victor, *supra* note 24, at 277; see also *id.* at 297–98 (discussing how additional agreements may be negotiated to create “strategic inconsistency” with respect to how particular agreements should be interpreted); Helfer, *supra* note 49, at 6 (arguing that the creation of redundancies in overlapping regimes provides a backstop to allow continued cooperation between states when particular agreements fail).

52. As Keohane & Victor, *supra* note 24, at 3, explain:

States construct international regimes on the basis of their interests. Under conditions of complex interdependence, state interests will reflect the interests of the major constituencies that exert influence over state leaders. The weighting of these interests in determining international outcomes depends on the power resources, relevant to the issue-area, that are available to the states involved. . . .

All of these fundamental features of the situation—interests, power, information, and beliefs—change over time, at different rates in different countries, and on different issues. Since interests and power vary among states[,] governments often form “clubs,” and seek to create club goods, limiting benefits to states that do not share their interests or seek to act as free riders. As a result, international regimes vary in membership. . . .

areas. Thus, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR) contain universal (or near-universal) membership, and the vast majority of the rights contained in these treaties are then rearticulated in other treaties, such as general membership treaties focused on specific interests that are lobbied for and created through processes directed by the interest groups, as well as regional membership treaties that can articulate the same rights in ways that may be tailored to reflect regional interests and values.⁵³

D. *Integrating Human Rights Enforcement*

The phenomenon of overlapping obligations assumed by a single state pursuant to multiple human rights treaties has potential significance for how effectively these treaties promote state compliance.⁵⁴ Multiple enforcement mechanisms

53. Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 301 (1999) (describing “[t]he complex nodes of overlap among the world’s human rights agreements”). Thus, the rights found in *universal, general* treaties such as the ICCPR and the ICSECR overlap with other treaties, many of which use similar language. See, e.g., *id.* Such overlapping treaties include *universal, specific* treaties, like the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention Against Torture (CAT), which create detailed regimes covering a single subject area covered only generically in the universal, general treaties, as well as in *regional, general* treaties, such as the European Convention on Human Rights and the Inter-American Convention on Human Rights, which both more or less duplicate the general rights found in universal, general treaties (as well as create unique obligations reflect that specific regional priorities, local “expertise” in understanding contextual historical or cultural facts in play, or the ability to more easily agree upon the contours of, and enforce, obligations among regional neighbors). See Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 106 (2008) (discussing the benefits of supplementing a global, U.N.-based human rights structure with a regional human rights regime). *Regional, specific* treaties, such as the Framework Convention on the Protection of National Minorities and the European Charter for Regional or Minority Languages, also exist and overlap with the above as well.

54. Let me be clear that, although there are some parallels, the interactions among different enforcement entities created by treaties are not precisely what Raustiala and Victor appear to have in mind when they discuss regime complexes. See Raustiala & Victor, *supra* note 24, at 277–78. In their discussion, they describe the ways in which the obligations themselves impact other regimes. See *id.* By contrast, I am more interested in the ways in which the same type of outcome is arguably being achieved, not through the

create multiple opportunities for enforcement.⁵⁵ If a prohibition against torture can be found in a general universal treaty,⁵⁶ in a specific universal treaty,⁵⁷ and in a general regional treaty,⁵⁸ there are three separate opportunities for the treaties' enforcement mechanisms to influence the behavior of a state that is a party to all three. If only one of the three is very effective at changing the party state's behavior, the less-effective regimes benefit as well. There is a net increase in compliance with the norms created by the less-effective treaties even though these treaties are not directly responsible for the state's behavioral shift.⁵⁹

Multiple types of enforcement mechanisms may be more effective than a single mechanism for other, less obvious reasons as well. As I describe in detail below, different types of enforcement mechanisms have complementary strengths that may offset each other's weaknesses and increase the likelihood of state compliance with an overlapping treaty obligation.

For example, reporting and monitoring mechanisms generally lack direct authority to sanction states for non-compliance or to order party states to make specific changes to bring themselves in compliance with their treaty obligations.⁶⁰ Indeed, this reality often forms the basis of criticism regarding

articulation of more specific substantive obligations, but through the integration of different types of enforcement mechanisms. For example, it was not the separate articulation of a similar substantive right that prompts the European Court of Human Rights to change its approach in the Roma cases discussed below. Rather, it is the fact-finding and accompanying legal analysis found in the detailed Reports generated by the Framework Convention's Advisory Committee. See *infra* notes 203–205 and accompanying text.

55. See Helfer, *supra* note 53, at 346–53 (discussing institutional and other benefits of allowing litigants to file complaints with multiple treaty bodies and thereby cross-pollinate legal norms across treaties with similar substantive provisions).

56. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) (Mar. 23, 1976).

57. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

58. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 5 E.T.S. 2.

59. Cf. Helfer, *supra* note 49, at 5 (arguing that the creation of redundancies in overlapping regimes provides a backstop to allow continued cooperation between states when particular agreements fail).

60. See *infra* notes 120–125 and accompanying text.

the effectiveness of such an enforcement mechanism.⁶¹ What such critiques often overlook, however, are the corresponding strengths that flow from this very lack of authority. For one thing, monitoring mechanisms that are authorized to issue what amount to advisory opinions⁶² have attenuated institutional concerns about issuing opinions and recommendations that states ignore. Precisely because they are not vested with formal authority to order or compel states to comply with their recommendations, monitoring committees are not undermined if their recommendations are not pursued. In effect, whether or not states choose to adopt their recommendations is irrelevant to whether the monitoring committee will be viewed as legally authoritative by other state parties going forward.

In contrast, adjudicative tribunals with formal sanctioning authority *do* have such institutional concerns. A tribunal that issues an order with which states refuse to comply will quickly find itself viewed as less authoritative, thereby rendering it less likely to be effective going forward. The European Court of Human Rights, for example, is viewed as particularly “strong” (effective) in large part because states do *not* refuse to comply with its orders.⁶³

For treaties that rely on monitoring, the fact that non-compliant states cannot be sanctioned by the monitoring committee does not make the legal findings contained in such committees’ opinions any less valid, at least as a formal matter.⁶⁴ Even when their follow-on recommendations are not considered binding, monitoring committees are frequently

61. See, e.g., *supra* notes 5–8 and accompanying text; *infra* notes 124–125.

62. I mean “advisory” in the sense that state compliance is optional, either because it is formally not required that states comply or because the mechanism has no authority to sanction non-compliance.

63. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125 (2007) (“It is no exaggeration to state that the Convention and its growing and diverse body of case law have transformed Europe’s legal and political landscape, qualifying the [European Court of Human Rights] as the world’s most effective international human rights tribunal.”).

64. Of course, the fact that the consequences of the legal findings are not enforceable arguably does make such findings “softer” law if indeed there is a range of how “hard” hard law can be. But it is certainly the case that such findings are hard law with hard legal significance.

vested by the state parties with the formal authority to render conclusive legal findings.⁶⁵ Such an enforcement body need be less concerned about a state's reaction to a finding that it is in violation of a human rights obligation in a close or politically sensitive case, precisely because the state's reaction to its finding and subsequent recommendations is far less threatening to its institutional legitimacy. Even a public, express refusal by a state to implement recommendations does not threaten or call into question the committee's authority if the recommendation was not binding in the first place.⁶⁶ In this way, compared to an entity with formal sanctioning power, a monitoring mechanism will be less likely to hesitate to find a legal violation in these types of close cases.⁶⁷

Monitoring mechanisms have another advantage over adjudicative tribunals that hear individual claims. Because monitoring mechanisms collect information from a wide range of sources—the states themselves, rights advocates, and others⁶⁸—they are able to situate their legal judgments against a much richer and more comprehensive factual backdrop. As Professor Yonatan Lupu recently discussed in the context of domestic judicial enforcement of international human rights, “[w]hile courts have strong enforcement powers, they have relatively weak monitoring powers.”⁶⁹ Thus, “[c]ourts’ effectiveness as enforcers of human rights law is systematically affected by the availability of legal evidence.”⁷⁰ In general, individual claimants before adjudicative tribunals will focus on their own, individual factual circumstances.⁷¹ They will frequently lack

65. See *supra* notes 9–12 (discussing the UPR); *infra* notes 124–125 and accompanying text (discussing the Framework Convention).

66. In fact, to avoid triggering potentially negative reactions from other state parties, a state is not likely to expressly refuse to take any action, since that would be tantamount to disclaiming treaty obligations it willingly undertook. More likely, states will put off taking action—potentially indefinitely.

67. See *infra* Part II.A.3 (discussing the illustration of this point in the context of the Roma cases).

68. In theory, a monitoring mechanism could allow individuals to present complaints and take evidence from them. In practice, monitoring mechanisms tend to restrict rights advocates to NGOs and groups that screen and compile individual evidence for them.

69. Lupu, *supra* note 21, at 7.

70. *Id.* at 3.

71. See discussion *infra* Parts II.A.3, II.B.3 (illustrating this in the Roma and *Cotton Field* cases).

the resources and capacity to investigate and bring forth relevant facts outside of their control, especially ones that are old or stale. To the extent such claimants attempt to demonstrate the broader impact of a challenged policy, the information they present may not be admissible; even when it is, it may be viewed critically or skeptically, because it will be presented against an adversarial backdrop that incentivizes advocacy and the selective presentation of facts and evidence that most strongly supports the claimant's position. In part to try to compensate for this structural downside, adjudicative tribunals have become increasingly receptive to permitting evidence from *amici*.⁷² Still, even if the presence of *amici* becomes more widespread, the adversarial format may make it easier to dismiss an *amicus* because of a perception that it is acting more as an advocate and less as an issue-area expert. This may be less true in the monitoring context, when third-party interest groups that serve an *amicus*-like role are likely to be engaged in a back-and-forth conversation with a monitoring committee in a less formal, investigative setting.⁷³

In addition, adjudicative proceedings that evaluate each claimant on a case-by-case basis will only inspire *amicus* participation by third parties such as NGOs when an NGO knows of the case and considers it a likely vehicle for filing a supporting brief or memorial. In contrast, reporting committees can seek to solicit testimony from NGOs that are likely to have relevant information, as well as conduct their own in-country investigations to uncover a wide range of relevant facts that can then be considered as part of their legal analyses and conclusions.⁷⁴ NGOs may also be more likely to choose to participate, and expend institutional resources, in investigations that will result

72. Because it is generally more familiar to an American readership, I will use the term "*amici*" throughout in reference to third-parties filing supporting briefs. In fact, third-party supporters akin to *amici* are actually called "interveners" in the European Court of Human Rights.

73. Searches of Grand Chamber decisions on the European Court of Human Rights' database, HUDOC, revealed 116 judgments in which the court had permitted third-party comments on, observation of, or participation in hearings over an almost twenty-year period (between January 1994 and February 2013), HUDOC, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/> (last visited Feb. 13, 2013). Thank you, John Cannan, for creating and updating searches of the HUDOC database.

74. See, e.g., *supra* notes 9–12 and accompanying text (UPR).

in a comprehensive report, as opposed to in an adversarial proceeding that may or may not result in an opinion that will prove useful to future claimants.

The ongoing nature of some monitoring committees' responsibilities enables a reporting committee to develop a comprehensive historical record. For instance, the United Nation's Universal Periodic Review process occurs every four years for every U.N. member state, while the similar review undertaken by the committee tasked with monitoring compliance with the Framework Convention on the Protection of National Minorities takes place every five years.⁷⁵ This allows the monitoring committee to build upon facts it developed in the prior iteration and to assess changes in states' records over time. A similar historical record may be difficult to develop in the context of an individual claim in which relevant historical facts may no longer be available or may be hard to reconstruct.

When the same human rights obligation is found in more than one treaty, the strengths enjoyed by a monitoring mechanism that lacks the ability to impose sanctions can be transmitted to, and then integrated into and utilized by, an adjudicative tribunal that does have sanctioning authority. This allows the adjudicative tribunal to consider a more comprehensive factual record when rendering a decision.⁷⁶ In addition, an adjudicative tribunal may be much more likely to feel confident that it is relying on an accurate and unbiased account when the facts have been vetted through the monitoring committee's fact-finding process. Such facts—especially when forming the basis of a legal determination made by a formally co-equal enforcement authority—are far more likely to be persuasive

75. See *id.*; *infra* notes 118–120 and accompanying text (discussing the ongoing nature of some monitoring committees).

76. Professors Laurence Helfer and Anne-Marie Slaughter have described the importance of a supranational tribunal's "ability to elicit credible factual information on which to base [its] decisions." Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 303 (1997). This function is important, they explain, because "[a] guaranteed capacity to generate facts that have been independently evaluated, either through a third-party fact-finding process or through the public contestation inherent in the adversary system, helps counter the perception of self-serving or 'political' judgments." *Id.* A "double-layered" outcome that incorporates third-party fact-finding into the adversarial process arguably acts even more strongly to guard against any such perception.

than are identical facts asserted by the claimant, by the responding state, or by NGOs or other *amici* in an adversarial posture.⁷⁷

Furthermore, the institutional concerns that might prompt an adjudicative tribunal to hesitate in cases where it is uncertain that a state party will comply with its order should be considerably lessened when that tribunal is able to rely on factual and legal findings already rendered by a reporting committee. The facts and consequent legal findings contained in the committee's opinion are made by a (formally) co-equal entity that has also been expressly vested—by the same state party now before the adjudicative tribunal—with authority to render authoritative legal conclusions.⁷⁸ States will find it harder to accuse a tribunal of having “gone too far,” or having reached an incorrect legal conclusion, when the tribunal is following the lead of another body that the state has also vested with the formal authority to render legal conclusions on the same subject—at least in cases where the Rapporteur or reporting committee is a well-respected individual or entity. This is especially so given that the second, adjudicative decision will be based on a more comprehensive factual record: the reporting committee's factual record, as supplemented and expanded by the parties to the adversarial proceeding.

Precisely because a committee report is issued by a body that the state has expressly vested with authority to develop a comprehensive factual record on the human rights subject area that is now the subject of a subsequent adversarial proceeding, the content of the report issued by a reporting committee will generally be even more persuasive than a legal opinion on the same issue by a well-respected domestic judicial authority in a case involving a claim against that state party.⁷⁹ Moreover, the state will not only have consented to the

77. See, e.g., Part II.A.3 (discussing rejection of NGO data in 2001 Roma cases and later reliance on the same data contained in Framework Convention Advisory Committee's Report).

78. See *infra* note 207 and accompanying text.

79. This may vary from context to context, of course, and depend on a variety of factors unique to each case. Moreover, the existence of other adjudicative decisions finding similar violations would likely also bolster a claim. See, e.g., Slaughter, *supra* note 22 at 192; see also *id.* at 194 (describing how judges are becoming more deferential to other judges based on respect for their judicial office and function, even as they “are willing to judge the per-

creation of the report on the subject area in question, but will have also had the opportunity to participate directly in the committee's proceedings and will frequently have more than one opportunity to challenge its preliminary factual findings before a final report is issued.⁸⁰ Because of this level of participation and control, committee reports will inspire more confidence than will well-respected legal opinions by domestic courts that discuss the contours of treaty rights or obligations in cases where the state is either not involved in the case or has not directly consented to the court's authority to interpret its treaty obligations. In such cases, unlike ones in which they previously participated in the standard investigation of a monitoring committee, the state will have far less—if any—buy-in to the earlier process that resulted in a legal conclusion that is the basis of the subsequent adjudicative tribunal's legal ruling. In addition, because states may already have reacted to the initial finding by the reporting committee, the adjudicative tribunal may have a less theoretical, and more realistic, sense of whether a state is likely to refuse to comply with an adverse ruling.

In turn, the threat of sanction by an adjudicative mechanism that serves to enforce an overlapping right will strengthen the reporting committee by giving its recommendations more weight and influence. Knowing that they may be used to bolster claims subsequently brought before adjudicative tribunals, states will likely perceive several potential advantages to taking at least some steps in response to suggestions made by reporting committees. To begin with, adopting recommendations forestalls the possibility of being subject to sanctions for the same violation. But, even if wholesale adoption is not feasible, a state may well take what steps it is able. Such steps will allow them, first, to change the factual basis that underlies the reporting committee's legal findings, and, second, to argue that it is acting in good faith to remedy its human rights practices, which may reduce the likelihood of a sharp opinion or aggressive sanction in a court action.

formance and quality of fellow judges in judicial systems that do not measure up to minimum standards of international justice").

80. See, e.g., *infra* Part II.A.2 (discussing the Framework Convention process by which states have an opportunity to challenge the Advisory Committee's reports before they are adopted as final by the Committee).

II. INTEGRATED ENFORCEMENT IN PRACTICE

As I have described it, integrated enforcement requires interaction between overlapping treaties that, between them, contain a reporting or monitoring mechanism, as well as an adjudicatory tribunal. There are currently only a few such adjudicatory tribunals, including the European Court of Human Rights—which is by far the most active and has the longest history, having now been in existence for over fifty years—and the Inter-American Court of Human Rights, which has become an increasingly active court in recent years. The few extant adjudicative tribunals overlap with numerous other human rights treaties, nearly all of which are actually or potentially subject to reporting and/or monitoring. As discussed in detail below, both of these human rights courts have in fact recently utilized reporting from overlapping treaties to bolster their decision-making. The cases in which they have done so reflect that the reporting and monitoring done by other treaties' enforcement mechanisms may have allowed the human rights courts to be more effective enforcement entities.

In Europe, overlapping regional treaties, such as the Framework Convention on the Protection of National Minorities ("Framework Convention"),⁸¹ are of relatively recent vintage. Previously, the recognition of new rights occurred not by adopting new treaties but by directly amending the European Convention. The reports of the Framework Convention, which anticipated the United Nations' decision to use a monitoring mechanism similar to the UPR by more than a decade, have been integrated into recent decisions of the European Court of Human Rights.⁸² Furthermore, contrary to at least some of

81. See Framework Convention for the Protection of National Minorities, opened for signature Feb. 1, 1995, 34 I.L.M. 351 [hereinafter Framework Convention]. The Framework Convention is the successor to several regional documents dealing with the same subject matter that preceded it. See, e.g., Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992); European Charter for Regional or Minority Languages, E.T.S. No. 148 (Nov. 5, 1992); Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, Den., June 5–29, 1990, ¶ 6, reprinted in 29 I.L.M. 1305 (1990), available at http://www.osce.org/documents/odihr/1990/06/13992_en.pdf [hereinafter "Copenhagen Document of 1990"].

82. See *infra* Part II.A.

the expectations expressed at the time it was being drafted, the Framework Convention has allowed the Court's case law to evolve in dramatic fashion. The express reliance on Reports issued pursuant to the Framework Convention, as well as the reasoning the European Court of Human Rights utilizes in relying on the Reports, strongly indicates that the Reports encouraged the Court to draw legal conclusions that it would have been reluctant to draw in the absence of the Reports. Without these Reports, the Court would have had a far shakier factual foundation on which to rest its own decision-making and would likely have had greater institutional concerns about finding that states had violated the human rights of the Roma applicants.

Likewise, in the *Cotton Field* case,⁸³ decided in 2009, the Inter-American Court of Human Rights relied heavily on the reporting done by a number of enforcement entities in order to understand the background of the unsolved murders of three women. Without reporting conducted under the auspices of a number of different treaties, these claims brought in the Inter-American Court also would have lacked necessary context, and the Court likely would not have been able to conclude that the killings were femicides, nor been able to hold the state of Mexico responsible.

This Part uses these cases to illustrate that integrated enforcement can and does work in practice, as theorized above. This Part does so by first providing background about the Framework Convention, including the debate over how to recognize and enforce minority group rights in Europe in the 1990s and the details of the decision to create a separate treaty that utilizes a reporting mechanism, rather than to fold the rights created into the European Convention on Human Rights (and channel claims directly into the European Court of Human Rights). The Part then discusses the way in which the Framework Convention has in fact interacted with the European Court of Human Rights to create a system of "integrated enforcement" of Roma's educational rights protected by both treaties. The last sections of this Part then illustrate a similar phenomenon in the Inter-American Court of Human Rights.

83. *Cotton Field*, *supra* note 1.

A. *Integrated Enforcement in the European Court of Human Rights*

1. *The Perceived Need for the Framework Convention*

Modern human rights law is generally traced to the end of World War II, when a number of treaties recognizing individual rights were created and entered into force.⁸⁴ While the individual as the proper subject of rights was the backbone of many domestic constitutional systems—including, most obviously, U.S. constitutional law—the preference for recognizing individual rights, as opposed to group rights, was slow to develop before World War II.⁸⁵ But this slowly developing prefer-

84. While the fact that the individual and the state are the quintessential actors at the center of international human rights law is now archetypal, this modern formulation is in fact a recent phenomenon that has been controversial, in some corners at least, since its inception. Going back to the pre-beginnings of modern international law, before the Peace of Westphalia, which brought the ascendancy of the nation-state in international law, a number of small, autonomous polities were independent actors in the international sphere. See Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 977–78 (2011) (discussing the “false and inhibiting myth” that individuals and non-state actors have never had rights or duties based directly on international law). Political maps from the seventeenth century and earlier illustrate the proliferation of small territories among a sea of enormous empires. See, e.g., *Map of Europe in Year 1600*, EURATLAS, <http://www.euratlas.net/history/europe/1600/index.html> (last visited Oct. 19, 2012).

85. Even as the Peace of Westphalia gave birth to the sovereign state in the seventeenth century, protections of sub-national and minority group interests emerged as an important subject of treaties and international legal norms. NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 7 (2d ed. 2003) (“International human rights law actually began, rather timidly, as an attempt to protect discriminated groups, particularly religious minorities, through initial emphasis on tolerance more than on rights.”). Indeed, one of the treaties comprising the Peace of Westphalia was the first of several treaties negotiated by European sovereigns during this period that were aimed at protecting minority religious groups, as well as the individual members of such groups. See, e.g., Treaty of Westphalia, Oct. 24, 1648 (granting rights to German Protestants); Treaty of Oliva, Empire of Brandenburg-Swed., art. II § 2, April 23, 1660 (granting rights to Roman Catholics); Treaty of Ryswick, Fr.-Gr. Brit., art. VI, Sept. 20, 1697 (granting rights to Catholics in Holland); Treaty of Paris, Fr.-Gr. Brit.-Port.-Spain, art. IV, Dec. 10, 1763 (protecting Roman Catholics in Canadian territories); Treaty of Berlin, Austria-Hungary-Fr.-Ger.-It.-Russ.-Turk.-U.K., art. IV, July 13, 1878 (protecting Turks, Greeks, and Romanians under Bulgarian rule); Convention for the Definitive Demarcation of the Frontiers between Greece and Turkey, Greece-Tur., July 2, 1881 (protecting Muslims in Greek-con-

ence for individual rights acted as a catalyst for the full-blown antipathy to group rights after the War.⁸⁶ Documents drafted at that time, such as the Universal Declaration of Human

trolled territories). As these same protections of the rights of minority religious adherents were integrated into many domestic legal systems, rights inhering in individuals increasingly became the backbone of many domestic systems. See LERNER, *supra*, at 7 (listing treaties that have accorded protections to minority groups, rather than to individuals).

The origins of the international shift from group to individual protection can be traced back to at least the end of World War I. Several treaties were negotiated that attempted to solve the “problem” of ethno-cultural minorities in a different way. Rather than protecting groups living within heterogeneous populations, as the Minority Treaty System did, several treaties actually swapped minority populations between states, in an attempt to create uniform, homogenous ethno-cultural populations aligned with existing state boundaries. See Jennifer Jackson-Preece, *Human Rights and Cultural Pluralism*, in INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE RIGHTS OF GROUPS 54 (Gene M. Lyons & James Mayall eds., 2003) [hereinafter INTERNATIONAL HUMAN RIGHTS]. The Minorities Treaties system, in place between the World Wars, was intended to preserve the characteristics, cultures, and traditions of these minority racial, linguistic, and religious groups. See LERNER, *supra*, at 12. The Minority Treaties did so, in the first place, by vesting certain rights in the groups themselves—namely, ensuring certain groups the means to preserve “their racial peculiarities, their traditions and their national characteristics.” *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J., (ser. A/B), No. 64, at 17 (April 6). But many provisions simultaneously granted protections to individuals belonging to those groups. LERNER, *supra*, at 12. During this same time-frame, the Permanent Court of International Justice, for example, made clear that individuals only—and not groups—could bring claims under the Greco-Bulgarian Convention on Emigration. See *id.* at 9 (discussing this case).

86. Of course, in both domestic and international legal systems, the modern trend favoring individual autonomy varies over time and between cultures. European notions of family solidarity, for example, are slowly changing and becoming less traditionally unit-oriented and more likely to be perceived from an individualist perspective, wherein the family is conceived as an entity operating in the service of its individual members as they pursue their own separate lives and goals. Mary Ann Glendon, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 385, 402; see also *id.* at 407 (comparing legal systems of U.S. and Western Europe and concluding that both “assign a high priority to the free development of the autonomous individual,” but that European systems “accord somewhat greater attention than the United States legal system does . . . to the social contexts, including the family, within which that development takes place”); *id.* at 402 (noting the “internal tension in [European Convention on Human Rights] Article 8’s limited protection of the right to ‘respect for private and familial life’” because the first is focused on the individual while the latter “concerns both the individual and society (society’s

Rights, contain broad references to equality and nondiscrimination, but do not include specific provisions recognizing cultural, language, or education rights of minority groups or their members. In this way, they were a direct departure from the previous Minority Treaties system, which had expressly recognized the rights of certain groups.⁸⁷ The omission was intentional. Such rights were included in the initial draft of the Universal Declaration, but ultimately removed, with some states fearing that recognizing rights in minority groups would engender instability.⁸⁸ Thus, beginning at the end of World War II, and with the establishment of the United Nations, “[t]he emphasis in the protection of human rights shifted from *group* protection to the protection of *individual* rights and freedoms, almost exclusively.”⁸⁹

This concern was especially marked in Europe, where the devastating consequences of World War II were particularly immediate. Like many of the major human rights documents adopted post-World War II, the European Convention on Human Rights vested rights in individual persons, even when the right itself related to an individual’s membership in a group.⁹⁰ The extreme distaste for recognizing minority group rights—with the attendant fear that such recognition would

interest in the family is explicitly recognized in many constitutions and international instruments”).

87. Jackson-Preece, *supra* note 85, at 56.

88. *Id.* at 57.

89. LERNER, *supra* note 85, at 14.

90. For example, Article 16 of the Universal Declaration of Human Rights refers to “[t]he family” as “the fundamental *group unit* of society” (emphasis added). Yet, it is drafted to emphasize the individuals comprising it and their individual right to marry (or not), to “start a family,” and to remove themselves from the marriage if they choose. Roger Ballard, *Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?*, in *LEGAL PRACTICE AND CULTURAL DIVERSITY* 305–06 (Ralph Grillo et al. eds., 2009). The European Convention on Human Rights has even less to say about groups. Of the very few instances in which the word “group” is used, nearly all refer to “groups of *individuals*,” see, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 34, Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added), and for the most part group-oriented claims have been rejected. See, e.g., Savez Crkava “Riječ _ivota”, App. No. 7798/08, Eur. Ct. H.R. (2010) (First Section), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102173> (dismissing claim brought by Church because right to marry is an individual right and can only be brought by an individual).

foster ethnic conflicts—abated after the absence of such recognition failed to prevent the numerous ethnic conflicts that erupted throughout the 1980s and 1990s.⁹¹

In the wake of these conflicts, a handful of soft law initiatives were quickly promulgated.⁹² While previous attempts to integrate minority group rights into documents like the ICCPR⁹³ and European Convention had been derailed by the fear that such rights would become the basis of ethnic conflicts, now many believed that explicit protections might have helped to prevent them.⁹⁴

91. Jackson-Preece, *supra* note 85, at 60. Jackson-Preece notes that “according to one study, seventy-nine of the eighty-two conflicts worldwide between 1989 and 1992 were linked to ethno-cultural minority/majority differences within states.” *Id.* at 66 (citing UNESCO & THE COMMONWEALTH SECRETARIAT, TOWARDS A CONSTRUCTIVE PLURALISM 13 (1999), available at <http://unesdoc.unesco.org/images/0012/001211/121144eo.pdf>); see also Antti Korkeakivi, *In Defense of Speaking Out: The European Human Rights Regime and the Protection of Minority Languages*, 3 INTERCULTURAL HUM. RTS. L. REV. 137, 138 (2008) (describing a shift in the response of Europe’s political leaders after the ethnic conflicts of the 1980s and 1990s).

92. These include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, *supra* note 81, as well as official documents promulgated by the Organization for Security and Cooperation in Europe (OSCE), such as the Copenhagen Document of 1990, *supra* note 81; Charter of Paris for a New Europe (1990); the Geneva Report on National Minorities (1991); the Moscow Document (1991); the Helsinki Document (1992); and the Budapest Document (1994). In addition, the OSCE created, in December 1992, the office of High Commissioner for National Minorities “to assist in member states’ implementation of international minority standards and to help resolve ethnic conflicts.” Jackson-Preece, *supra* note 85, at 62.

93. Article 27 of the ICCPR recognizes that members of minority groups should not be denied the right to enjoy their culture, religion, or language, but the right is not expressed as a collective right. Rather, “[t]he right [articulated by Article 27] is expressed as adhering instead to individuals who belong to minority groups, and is thus of the same nature as the other rights guaranteed in the Covenant, which are accorded to individuals rather than to other entities.” SEBASTIAN POULTER, ETHNICITY, LAW AND HUMAN RIGHTS 79 (1998).

94. While the focus of this Article is on minority group rights as such, there are numerous other post-World War II international legal initiatives that focus on issues of particular pertinence to minority groups, such as a number of conventions that protect cultural property. See, e.g., UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330, 1330; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 232–34; Convention for the Protection

Against this shift in thinking about ethnic group rights, the United Nations General Assembly officially proclaimed the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992.⁹⁵ At the same time, European political leaders were trying to cope with the impact of a number of serious inter-ethnic conflicts, including conflicts in the Balkans and the former Soviet Union.⁹⁶ The by-now fairly broad acceptance of the need for minority group rights prompted the drafting of several soft law documents by the Organization for Security and Cooperation

of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, 240. These treaties codified—and greatly expanded—existing customary international law that offered some—albeit weak—protection of cultural claims to historical artifacts. See Pamela Quinn Saunders, *A Sea Change off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323, 1360 (2011) (noting that customary international law arguably did not require restitution for cultural property removed by conquering states but that many principles prohibiting expropriation of cultural property did exist, and were followed, even before the major cultural property rights Conventions were drafted and implemented). There are multiple other possible avenues for cultural groups to achieve legal protection in the absence of rights specifically tailored to those groups and their cultures. For example, the World Intellectual Property Organization (WIPO) has long discussed “policy and legal options for the improved protection of expressions of traditional cultures” and created the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is in the process of “identifying and clarifying the relevant issues and in developing policy and practical responses to them.” Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* 4 (2003), <http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>; see also, United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, Principle 22 (Aug. 12, 1992) (recognizing that “[i]ndigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices” and calling upon states to “recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development”).

95. While some parts of the Declaration reiterated rights already recognized in the ICCPR, the Declaration went further, recognizing the associational right of minorities, including across international frontiers, as well as their right to participate in national and regional decision-making. States were required to ensure that their national laws protected the right of minorities to instruction in their native language and to promote knowledge regarding minority cultures and language among the majority population.

96. *Id.*; Korkeakivi, *supra* note 90, at 138.

in Europe (OSCE). The Copenhagen Document, which established a list of standards relating to the treatment of minorities that states should aspire to follow, was the most comprehensive. The OSCE also created an office—the High Commissioner for National Minorities—that provides assistance to member states in their implementation of minority rights standards and which is also intended to help resolve ethnic conflicts.⁹⁷

The Council of Europe also took up the challenge of turning the OSCE's list of standards into a set of legally binding commitments.⁹⁸ Ultimately, this resulted in the Framework Convention on the Protection of National Minorities, adopted by the Council of Europe in 1994.⁹⁹

Yet a separate Framework Convention was not the original proposal. Several times over the years, previous attempts had been made to amend the European Convention to add a protocol recognizing minority group rights.¹⁰⁰ While early propos-

97. *High Commissioner on National Minorities: Overview*, ORG. FOR SECURITY & CO-OPERATION IN EUR., <http://www.osce.org/hcnm/43199> (last visited Feb. 18, 2013) ("The High Commissioner's function is to identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations between the participating States of the OSCE. The mandate describes the HCNM as 'an instrument of conflict prevention at the earliest possible stage.'").

98. The pre-Framework Convention documents all seek to expand protections to minority groups that may not be recognized by other human rights treaties. At the same time, they continue to reaffirm principles of state sovereignty that remain a special concern for states in the context of group rights' initiatives that, at their extreme, could extend to declarations of self-determination rights and succession efforts. See, e.g., Hurst Hannum, *Indigenous Rights*, in INTERNATIONAL HUMAN RIGHTS, *supra* note 85, at 79; Jackson-Preece, *supra* note 85, at 58.

99. Charles F. Furtado, Jr., *Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe Under the Council of Europe*, 34 COLUM. HUM. RTS. L. REV. 333, 358 (2003).

100. One such early proposal sought to amend the European Convention on Human Rights to dictate that "[p]ersons belonging to a national minority shall not be denied the right, in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their schools and receive teaching in the language of their choice or to profess and practice their own religion." COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, *reprinted in* HUMAN RIGHTS TODAY: EUROPEAN LEGAL TEXTS 185, 185 (Council of Europe Publishing ed., 1999). For a discussion of proposals during this early period, see

als were more or less summarily rejected, in the 1990s the Parliamentary Assembly again took up the issue of amending the European Convention to protect minority rights.¹⁰¹ This new push for recognition in the European Convention was rejected again in October 1993, despite the fact that there was by now broad agreement that such protections needed to be recognized formally.¹⁰² This rejection meant that there would instead need to be a new treaty committed to the specific protection of minority rights in Europe—but one that would not be directly subject to enforcement by the powerful European Court of Human Rights. The treaty that resulted was the Framework Convention on the Protection of National Minorities.

2. *The Structure of the Framework Convention*

The Framework Convention entered into force in 1998. As of January 2013, it had been signed or acceded to by 43 members of the Council of Europe, and ratified by 39 of

ATHANASIA SPILIOPOULOU AKERMARK, JUSTIFICATION OF MINORITY PROTECTION IN INTERNATIONAL LAW 200–03 (1997).

101. Eur. Parl. Ass., *Recommendation 1201 on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights*, Doc. No. 6742 (1993), reprinted in Eur. Parl. Ass., *Report on Rights of National Minorities*, 2001 Sess., Doc. No. 8920 (2001). Interestingly, Recommendation 1201 included a definition for the term “national minority,” which has generally been a contentious issue and which has caused problems with implementation of the Framework Convention, as many states have entered reservations limiting what groups may be so considered. Recommendation 1201 defined a “national minority” as a group of persons who:

- a. reside on the territory of that state and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that state;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.

Id. Art. 1.

102. Geoff Gilbert, *Minority Rights Under the Council of Europe*, in MINORITY RIGHTS IN THE ‘NEW’ EUROPE 62 (Peter Cumper & Steven Wheatley eds., 1999).

them.¹⁰³ The preamble to the Framework Convention reflects the shift in thinking that led to its ratification, noting that “upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent.”¹⁰⁴ It then goes on to outline in sixteen articles the specific rights of minorities that are the subject of the Convention.¹⁰⁵ These include, among others: the rights of assembly, association, and religion; the right of persons to manifest religion or belief; the right to use a minority language without interference; the right to set up and manage their own private educational and training establishments; and the right to learn a minority language.¹⁰⁶ Several of these directly overlap rights enjoyed by all persons in Europe pursuant to the European Convention on Human Rights, while others are specific to national minorities covered by the Framework Convention.¹⁰⁷

The Convention also imposes obligations on states in their treatment of national minorities. For example, member states agree not to undertake “policies or practices aimed at assimilation of persons belonging to national minorities

103. COUNCIL OF EUROPE, FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: SIGNATURES AND RATIFICATIONS AND STATUS OF MONITORING WORK – 1ST, 2ND, 3RD AND 4TH CYCLES (Jan. 28, 2013) http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_Table_Monitoring_en.pdf.

104. Framework Convention, *supra* note 81, pmbl., para. 12.

105. *Id.* art. 4.

106. *Id.* arts. 4–14.

107. For example, the Framework Convention and the European Convention on Human Rights both recognize the right to education. *Compare* Convention for the Protection of Human Rights and Fundamental Freedoms, protocol no. 1, art. 2, Sept. 21, 1970, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights], *available at* <http://www.hri.org/docs/ECHR50.html> (“No person shall be denied the right to education.”), with Framework Convention, *supra* note 81, art. 12(3) (“The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.”). The Framework Convention at least arguably goes further than the European Convention on Human Rights, however, requiring, *inter alia*, that the party states shall, “where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language, and religion of their national minorities and of the majority,” *id.* art. 12(1), and, “within the framework of their education systems, . . . recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments,” *id.* art. 13(1).

against their will.”¹⁰⁸ They also agree not to adopt “measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities [that] are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention”¹⁰⁹ and to refrain from “interfer[ing] with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers,” particularly with respect to “those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.”¹¹⁰ Member states also commit, among other things, “to promot[ing] equal opportunities for access to education at all levels for persons belonging to national minorities.”¹¹¹

Thus, the Framework Convention reaffirms and provides overlapping protection of many “classic” rights that are already broadly recognized in such documents as the European Convention. However, the overlap is not complete. The Framework Convention provides broader rights to minority groups, making clear, for example, that minorities have a right to protect their own cultural traditions and values against assimilation. To be sure, the Framework Convention has been criticized for not going far enough in this respect. It uses qualifying language in many instances, requiring only that member states “shall endeavour” to provide adequate opportunities for minority language instruction, but only “as far as possible” and “if there is sufficient demand.”¹¹²

Yet, procedure, not substance, proved to be perhaps the most controversial aspect of the Framework Convention. Supporters of minority group rights in Europe complained that the enforcement mechanism adopted was weak.¹¹³ As one

108. Framework Convention, *supra* note 81, art. 5(2).

109. *Id.* art. 16.

110. *Id.* art. 17(2).

111. *Id.* art. 12(3).

112. Furtado, *supra* note 99, at 365.

113. *See, e.g., id.* at 410 (describing the appearance of weak enforcement powers as leaving minorities without sufficient protection); Korkeakivi, *supra* note 91, at 142–43 (noting that the Framework Convention’s “monitoring mechanism is relatively ‘soft’ in comparison with the complaint procedure of the European Convention on Human Rights, which provides judicially binding decisions delivered by the European Court of Human Rights”); Steven Wheatley & Peter Cumper, *Minority Rights in the ‘New’ Europe: An Introduction*, in *MINORITY RIGHTS IN THE ‘NEW’ EUROPE*, *supra* note 102, at 15, 21 (“lack of

critic has put it, “[t]he Council of Europe now relies on the weakest system of international supervision to monitor principles and programmatic provisions laid down in the Framework Convention: the State reporting mechanism.”¹¹⁴ The choice of mechanism was far from accidental. “By its very nature, this Convention was not intended to establish a thoroughgoing compliance mechanism. After all, a proposal for a protocol to protect national minorities—one that would be incorporated within the European Convention and hence [be] policed by the European Court—was rejected in December 1993.”¹¹⁵ Indeed, the decision to pursue a separate treaty, rather than to amend the European Convention, was compelled largely by concerns about recognizing minority rights in a context that would not permit claims to be brought in the European Court of Human Rights.¹¹⁶

Notwithstanding the criticisms, the mechanism created by the Framework Convention was much stronger than was typical at the time. It is an early example of the now-typical reporting and monitoring mechanism that begins, but does not end, with a state’s filing of a periodic self-report.¹¹⁷ Specifically, it requires that its member states convey to the Council of Europe’s Committee of Ministers “full information on the legislative and other measures taken to give effect to the principles set out” in the Framework Convention every five years or whenever it is otherwise requested to do so by the monitoring

political will amongst [European] states to conclude effective legally binding agreements” on minority protection required the Council of Europe to abandon efforts to amend the European Convention on Human Rights and adopt a separate convention).

114. Gerd Oberleitner, *Monitoring Minority Rights Under the Council of Europe’s Framework Convention*, in MINORITY RIGHTS IN THE ‘NEW’ EUROPE, *supra* note 102, at 71, 83.

115. Furtado, *supra* note 99, at 365.

116. Wheatley & Cumper, *supra* note 113, at 21.

117. In this sense, it is similar to the new process adopted by the U.N. in 2006 with respect to most of the human rights treaties administered under its auspices. See *Universal Periodic Review*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Oct. 18, 2012) (describing the new process of “universal periodic review,” created in 2006, which will involve a review of the human rights records of all 192 U.N. member states every four years). It also clearly differs from the type of self-reporting alone that characterized these same U.N. treaties prior to the new system.

body.¹¹⁸ After obtaining these self-reports, the Committee receives advice as to whether the member states have complied with their legal obligation from its Advisory Committee, which is composed of people with “recognized expertise in the field of the protection of national minorities.”¹¹⁹

Furthermore, the Advisory Committee is not limited to considering only the states’ self-reports. Instead, the Advisory Committee evaluates each state report alongside other relevant information, such as information submitted by NGOs and other entities, as well as information it may have gleaned on its own from an independent investigation. It then prepares an opinion that it submits first to the state—which has a right to draft a reply—and then to the Committee of Ministers.¹²⁰ After receiving the opinion, the Committee of Ministers must “consider and adopt its conclusions concerning the adequacy of the measures taken by” the subject member state.¹²¹ In addition, the Committee “may also adopt recommendations in respect of the Party concerned.”¹²² Generally, the Committee’s conclusions and recommendation are then made public alongside the Advisory Committee opinion and the member state’s reply.¹²³

118. Framework Convention, *supra* note 81, art. 25(1)–(2); Rules Adopted by the Committee of Ministers on the Monitoring Arrangements Under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities, Res. 97(10), E.T.S. No. 157, ¶21 (Sept. 17, 1997) [hereinafter Resolution 97(10)] (changing requirement that states submit reports on a “periodic” basis to every five years).

119. *Id.* art. 26(1). “The Framework Convention’s Advisory Committee, which is comprised of eighteen independent experts, plays a major role in the monitoring mechanism. The Advisory Committee conducts country visits and issues detailed reports on the Framework Convention’s implementation.” Korkeakivi, *supra* note 91, at 143.

120. The Advisory Committee is expressly authorized to “request additional information from the Party whose report is under consideration,” to “hold meetings” with state representatives, and receive and invite information from “sources other than state reports,” such as NGOs and other interested entities. Resolution 97(10), *supra* note 118, ¶¶ 29–30. “This process gives the Advisory Committee significant freedom to investigate the practices of States Parties, not only by following up with the state, but by verifying the data with organizations inside and outside the state’s borders.” Furtado, *supra* note 99, at 366.

121. Resolution 97(10), *supra* note 118, ¶ 24.

122. *Id.*

123. *Id.* ¶ 25.

As is typical of this type of monitoring mechanism, publication and continued monitoring (followed by additional cycles of publication and monitoring) are the only consequences of non-compliance. While the Advisory Committee can recommend actions that would bring the state into compliance, it lacks the authority to compel implementation of its recommendations. Accordingly, from shortly after its entry into force, concern was expressed that, although the Advisory Committee “can publicize state non-compliance with the [Framework] Convention and offer recommendations that would bring states into conformity with its requirements, it cannot mandate cooperation. It expands the conception of rights to which minorities are entitled, but cannot ensure that these prerogatives will be respected.”¹²⁴ As a result, it provoked concern that “even if the Framework Convention’s reporting system achieves its potential, it will still be subject to its own inherent limitation.”¹²⁵

3. *The Rights of Roma in Europe*

Although the question of which groups are “national minorities” under the Framework Convention remains a point of contention, a great number of minority groups in Europe are potentially covered by the treaty.¹²⁶ While many of these are located only within the borders of a single member state, several of these groups are dispersed across the European Union. One such group—Roma—faces particularly intense discrimination throughout the EU.¹²⁷ A poverty-stricken minority group frequently castigated by politicians as a serious threat to public safety, the Roma are now the subject of an intense polit-

124. Furtado, *supra* note 99, at 369.

125. *Id.*

126. See generally Julie Ringelheim, *Minority Rights in a Time of Multiculturalism—The Evolving Scope of the Framework Convention on the Protection of National Minorities*, 10 HUM. RTS. L. REV. 99, 112–17 (2010) (discussing positions taken on what constitutes a “national minority” by member states to the Framework Convention and by the Advisory Committee).

127. See *Spotlighting the Widespread Discrimination Against Roma and Victims of Caste Systems*, THE INT’L MOVEMENT AGAINST ALL FORMS OF RACISM AND DISCRIMINATION, July 7, 2011, <http://www.imadr.org/wordpress/wp-content/uploads/2013/01/No.-8-UN.pdf> (discussing recent wave of hate crimes against Roma, including several murders in the past few years).

ical debate among European nations.¹²⁸ This Subsection first lays out the broad issues surrounding policies relating to Roma in Europe, then discusses claims brought by Roma before the European Court of Human Rights. The treatment of these claims demonstrates the impact in that Court of the Framework Convention and Reports and recommendations promulgated pursuant to it.

Even as issues relating to minority rights remain prominent at the international level¹²⁹ and even as the Framework Convention on the Protection of National Minorities has now been in force for well over a decade,¹³⁰ opposition to multiculturalism at the domestic level has again become a notable political issue throughout Europe.¹³¹ While Muslims are often

128. See *Bulgarian Minister's Roma-Crime Link Unacceptable: EU*, EUBUSINESS.COM, Sept. 27, 2010, <http://www.eubusiness.com/news-eu/immigration-roma.6ag/> ("The treatment of the Roma population in Europe has grown into an EU-wide row after France launched a crackdown on illegal camps, deporting hundreds of Gypsies back to Romania and Bulgaria since July [2010] The issue overshadowed an EU summit this month after the EU's top justice official threatened to launch legal action against France over the measures [while] France argues that it respects EU laws and says more needs to be done to integrate Roma in their home countries.").

129. Perhaps the most recent notable international example is the United Nations Peacekeeping effort following the recent succession of South Sudan. See, e.g., S.C. Res. 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005) (establishing United Nations Mission in the Sudan); see also UNITED NATIONS MISSION IN THE SUDAN, <http://www.un.org/en/peacekeeping/missions/unmis/> (last visited Oct. 15, 2012) (providing information about UNMIS' mission).

130. The Framework Convention entered into force in February 1998. See Framework Convention, *supra* note 81. While 43 Member states to the Council of Europe have signed it, only 38 have ratified. The United Kingdom is among the non-ratifying states, while France has neither signed nor ratified it.

131. For discussion of the issue of multiculturalism in Europe, see, for example, John F. Burns, *Prime Minister Criticizes British "Multiculturalism" as Allowing Extremism*, N.Y. TIMES (Feb. 5, 2011), http://www.nytimes.com/2011/02/06/world/europe/06britain.html?_r=0; *British PM: Multiculturalism Has Failed*, MSNBC.COM (Feb. 6, 2011), http://www.msnbc.com/id/41444364/ns/world_news-europe/t/british-pm-multiculturalism-has-failed/; Samantha Knights, *Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights*, in LEGAL PRACTICE AND CULTURAL DIVERSITY, *supra* note 90, at 284–85; Damian Thompson, *London Riots: This Is What Happens When Multiculturalists Turn a Blind Eye to Gang Culture*, THE TELEGRAPH (LONDON), (Aug. 8, 2011), <http://blogs.telegraph.co.uk/news/damianthompson/100100087/london-riots-this-is-what-happens-when-multiculturalists-turn-a-blind-eye-to-gang-culture/>.

targeted in political attacks, other minority groups also remain deeply unpopular in various European countries. Some of these groups are unpopular in a particular country, where political disagreements may relate to their specific cultural claims in the context of domestic law and policy.¹³² But other groups, such as Roma, suffer from broad-based political unpopularity that rivals Muslims.

Roma as a group have been historically persecuted and continue to face widespread discrimination across the EU.¹³³ Even today, Roma are often perceived “as ‘crooks [who] will steal or swindle’ and social parasites with ‘deviant traits.’”¹³⁴

The anti-multiculturalism backlash can be seen in the United States as well. For example, fears that a form of multiculturalism will insinuate itself into U.S. policy underlie the anti-Sharia movement that has taken hold in various state legislatures and become recent fodder for *The New York Times* and National Public Radio. See Andrea Elliott, *The Man Behind the Anti-Sharia Movement*, N.Y. TIMES (July 30, 2011), www.nytimes.com/2011/07/31/us/31shariah.html?_r=1&pagewanted=print (noting that “[s]ince last year, more than two dozen states have considered measures to restrict judges from consulting Shari’a, or foreign and religious laws more generally. The statutes have been enacted in three states so far.”); see also *Fresh Air: Who’s Behind the Movement to Ban Sharia Law?* (WHYY radio broadcast Aug. 9, 2011), <http://www.npr.org/2011/08/09/139168699/whos-behind-the-movement-to-ban-shariah-law> (detailing how Brooklyn lawyer David Yerushalmi has been influential in convincing prominent Republicans, state lawmakers, and government officials of the danger of Shari’a law).

132. This state of affairs characterizes the situation of Basques and Catalans in Spain, Corsicans in France, and Kurds in Iraq, Iran, Syria, and Turkey, to name just a few examples. See Michael J. Kelley, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver” – Revolutionary International Legal Theory or Return to Rule by the Great Powers*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 390 (2005).

133. See Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 919 (2010) (“For much of their histories, the Roma in Eastern Europe and African Americans traversed similar paths. Both endured centuries of slavery and were emancipated, almost simultaneously, during the mid-nineteenth century. Both continued to suffer years of discrimination, poverty, inferior housing, deficient health, and segregated education.”).

134. Iska Uzunova, Note, *Roma Integration In Europe: Why Minority Rights Are Failing*, 27 ARIZ. J. INT’L & COMP. L. 283, 302 (2010) (quoting Alvaro Gil-Robles, *Final Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on Human Rights Situation of the Roma, Sinti, and Travellers in Europe*, COUNCIL OF EUROPE (Feb. 15, 2006), at 8, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=320815&SecMode=1&DocId=941416&Usage=2>).

Emigrating from Romania and Bulgaria, where they are a significant minority population but live in conditions of severe poverty and endure “rampant discrimination,” Roma have fared no better in other countries to which they have gone in search of a better life.¹³⁵ The Italian government, for example, recently declared a state of emergency in the wake of a spate of high-profile crimes attributed to Roma.¹³⁶ In France, hundreds of Roma immigrants were recently deported in the space of a single year because of, in President Sarkozy’s words, the “problems that certain members of these communities pose to public order and safety.”¹³⁷ Police in Spain assert that “95% of children under [age] 14 that they pick up stealing on the streets are Roma” and complain that they have no effective recourse against them because the children are below the age of criminal responsibility.¹³⁸ Similar crime statistics have resulted in formal anti-Roma policies throughout Europe.¹³⁹ Recently, the issue made headlines when the European Commission, the executive arm of the European Union, chastised a Bulgarian official for calling the Roma community in Bulgaria “an incubator that generates crime” on the day that he traveled to Brussels for a conference to discuss the plight of Roma in Europe.¹⁴⁰

Furthermore, Roma cultural practices, such as arranged child marriages, have sometimes been attacked as violating the human rights of both Roma women and children.¹⁴¹ Indeed,

135. Violeta Naydenova, *Stereotyping the Roma in Bulgaria*, OPEN SOCIETY FOUNDS. (Nov. 8, 2010), <http://blog.soros.org/2010/11/stereotyping-the-roma-in-bulgaria/>.

136. Sam Bagnall, *How Gypsy Gangs Use Child Thieves*, BBC NEWS (Sept. 2, 2009), <http://news.bbc.co.uk/2/hi/8226580.stm>.

137. *Bulgarian Minister’s Roma-Crime Link Unacceptable: EU*, *supra* note 128.

138. *Id.*

139. Bagnall, *supra* note 136.

140. *Bulgarian Minister’s Roma-crime Link Unacceptable: EU*, *supra* note 128.

141. See, e.g., Jeff Timmerman, *When Her Feet Touch the Ground: Conflict Between the Roma Familistic Custom of Arranged Juvenile Marriage and Enforcement of International Human Rights Treaties*, 13 J. TRANSNAT’L L. & POL’Y 475, 480 (2004) (“In addition to possible human rights violations imbued in the notion of arranged marriage itself, Roma marriage embodies certain uncoded spousal rules and troubling gender-based social roles that potentially heighten human rights violations.”); *id.* at 479 (arguing that Roma cultural marriage traditions “pose[] a unique dilemma for international human rights scholars” because “while it is undeniably true that Roma youth are being denied the right to choose whom and when to marry in some in-

although they blame external circumstances and not Roma cultural values, even NGOs supporting the Roma agree that Roma women and children face significant obstacles compared to women and children within majority populations.¹⁴² They describe how Roma women are at a high risk of becoming victims of domestic violence, while children are often married at very young ages.¹⁴³ Children too, as recounted above, are more likely to be pressed into criminal gangs or to become victims of child trafficking.¹⁴⁴

Alongside similar efforts by other minority ethno-cultural and religious groups,¹⁴⁵ Roma and their supporters continue to demand greater recognition of cultural and other group rights at every level—locally, nationally, EU-wide, and globally—as well as increased enforcement of rights that have already been recognized. Yet, even in situations where general consensus exists respecting issues relating to minority rights, the political wrangling over issues of group protections are intense and frequently prevent progress. Even seemingly minor issues can be stumbling blocks to concerted action in this area. Early in 2011, for example, the European Union was unable to agree on a joint statement objecting to the persecution of religious minorities because of divided opinion as to whether there should be references to specific minorities, following a

stances, the Roma community itself openly embraces juvenile arranged marriage as a protectionist strategy and means of cultural, economic, and societal preservation and autonomy”).

142. THE SITUATION OF ROMA IN AN ENLARGED EUROPEAN UNION, EUROPEAN ROMA RIGHTS CENTRE, at 33–34 (last visited Oct. 18, 2012), *available at* <http://www.errc.org/en-research-and-advocacy-roma-intro.php>.

143. *See id.* (“[Romani] girls are obliged to help in the house or to get married at very young ages (from 12-17 years).”).

144. Bagnall, *supra* note 135.

145. *See, e.g.,* Michael Kimmelman, *Cultures United to Honor Separatism*, N.Y. TIMES, Nov. 11, 2010, <http://www.nytimes.com/2010/11/14/arts/14abroad.html?pagewanted=all> (describing a recent gathering of nationalist and separatist groups from around the world, some militant, including Sardinian separatists, Basque and Catalan nationalists, Melanesian Kanaks from New Caledonia, Occitanes from Provence, and members of Sinn Féin—which “looked like any small-town fair . . . [with] doting parents trailing after happy toddlers”).

bombing of a Coptic Christian church in northern Egypt in December 2010.¹⁴⁶

As the rhetoric against multiculturalism becomes more widespread and vehement, many—if not all—minority cultural groups appear to face increasingly more difficult prospects in the pursuit of their particular cultural rights agendas. Indeed, recent case law of the European Court of Human Rights concerning the rights of Muslims and Islamic groups reflects many of the same concerns about multiculturalism expressed by politicians.¹⁴⁷ Yet, despite some parallel political controversy regarding the rights of Roma in Europe, recent cases involving Roma applicants in the European Court of Human Rights suggest that these applicants have been able to press group-based claims without triggering any of the same skepticism.¹⁴⁸ In fact, the Roma have had a sharp reversal of fortune in the European Court of Human Rights in recent years, with the Court abandoning its usual standard, which is highly deferential to states, and subjecting cases involving anti-Roma policies to new, serious scrutiny. The next two Subsections discuss these cases in detail. The Court made clear in its analyses in the recent cases finding in favor of Roma applicants that such claims are distinguishable from those brought by Roma in the past, and from other contemporary decisions involving non-Roma claimants, precisely because of reporting done pursuant to the Framework Convention.

146. See David Brunnstrom, *Italy Blocks EU Statement on Religious Persecution*, REUTERS, (Jan. 31, 2011), <http://af.reuters.com/article/egyptNews/idAF LDE70U2LX20110131>.

147. See, e.g., *Zengin v. Turkey*, App. No. 1448/04 Eur. Ct. H.R. (Oct. 9, 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82580>; *Şahin v. Turkey*, App. No. 44774/98 (Nov. 10, 2005) (finding in favor of policy embracing “secularism” and concluding that applicant had no right to wear an Islamic headscarf to her medical school classes), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>; *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, ¶ 40 (Feb. 13, 2003) (characterizing a political party’s agenda as one seeking to “replac[e] the democratic order with a system based on sharia”), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936>.

148. See *infra* notes 173–183 and accompanying text for discussion of this issue.

4. *The Roma Cases: Gradual Embrace of Group-Based Claims by the European Court of Human Rights*

While recent changes in the treatment of claims brought by Roma applicants before the European Court of Human Rights have been noted by others,¹⁴⁹ this Subsection considers them specifically from the perspective of how they reflect the impact of the Framework Convention. While earlier cases involving Roma saw the Court afford a wide “margin of appreciation” to states, the more recent cases have formulated a new standard that allows Roma applicants to introduce and rely on Framework Convention Reports. This new standard permits the Court to utilize the factual findings of the Reports to justify shifting the burden of proof from the individual onto the respondent state and thereby enables individuals to mount successful challenges of policies that impact a broad segment of the Roma population.¹⁵⁰

Generally speaking, the European Court of Human Rights has been consistently deferential only to one particular kind of claim brought by groups: those brought pursuant to Article 11, which protects the freedoms of assembly and association.¹⁵¹ The Court seems to view Article 11’s guarantee of the collective right of a group to be constituted as such as the strongest, most fundamental right enjoyed by groups. It not only permits groups to bring claims on their own behalf—rather than requiring individual group members to do so as is

149. See, e.g., Greenberg, *supra* note 133, at 938–41 (discussing the wave of new litigation for Roma rights in the wake of the European Union’s adoption of the Race Equality Directive, including *D.H.*, which is often analogized to *Brown v. Board of Education*).

150. See *infra* notes 179, 183 and accompanying text.

151. Article 11 provides that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

European Convention on Human Rights, *supra* note 90, art. 11.

required under other articles of the Convention—but finds in favor of the group applicants in the large majority of cases that get to the Grand Chamber.¹⁵² The Court's jurisprudence in this area emphasizes the important role that political parties play in ensuring a vital democracy, although the Court has not limited the scope of Article 11 to include only such groups.¹⁵³

Yet, the Article 11 context is the rare exception. In other areas, the Court has generally *not* been amenable to group-based claims. One recent decision reflects the hostility of the Court to adjudicating claims brought by groups,¹⁵⁴ baldly stat-

152. Indeed, other than the *Refah Partisi* case, *supra* note 146, involving an Islamic political party that the Court was willing to assume might be willing to use violent means to accomplish its goals, the Grand Chamber has consistently found in favor of group applicants even in cases where the state justifies its contested action on the basis of public safety concerns. Thus, while the Grand Chamber has noted in the context of a claim asserted by an ethno-cultural minority group that it is “prepared to take into account . . . the difficulties associated with the prevention of terrorism,” *Socialist Party v. Turkey*, App. No. 20/1997/804/1007 Eur. Ct. H.R. (May 25, 1998), ¶ 52, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58172>, it has never accepted the defense in such a case. *See, e.g., id.*; *Freedom and Democracy Party v. Turkey*, 23885/94 Eur. Ct. H.R. (Dec. 12, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58372> (finding in favor of the pro-Kurdish Freedom and Democracy Party (ÖZDEP), which was dissolved on the basis that it had “called for a right to self-determination for the Kurds and supported their right to wage a ‘war of independence’” and stressing that the ÖZDEP’s aims—including to abolish the government’s Religious Affairs Department—were not necessarily inconsistent with democratic principles and did constitute a proper basis on which the Turkish government could justify its decision to dissolve the party); *Association of Citizens Radko and Paunkovski v. The Former Yugoslav Republic of Macedonia*, App. No. 74651/01 Eur. Ct. H.R. (Jan. 15, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90651> (rejecting state-respondent’s attempt to justify its decision to dissolve the applicant association on public safety grounds by emphasizing that it had named itself after a high-ranking Nazi official and concluding that the state could not infer that “a negation of Macedonian ethnicity is tantamount to violence, especially to violent destruction of the constitutional order”).

153. *See, e.g., Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, 14599/09 Eur. Ct. H.R. (Oct. 21, 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257> (involving claim—upheld by the European Court of Human Rights—brought by an applicant who had been banned from holding a Gay Pride March and otherwise organizing demonstrations relating to gay rights).

154. *Savez Crkava “Riječ Života” v. Croatia*, App. No. 7798/08 Eur. Ct. H.R. (Sept. 3, 2011), ¶ 125, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102173> (“The Court reiterates that solely the members of

ing that the right to education is a right “which by [its] nature [is] not susceptible of being exercised by a . . . community.”¹⁵⁵ Indeed, the Court’s general aversion to group-oriented claims was a significant factor underlying the initial effort to amend the European Convention on Human Rights and, after that failed, to draft the Framework Convention.¹⁵⁶

Despite this formal rejection of group-initiated applications in the context of cases asserting educational rights, the Court has sometimes, albeit rarely, considered the impact on groups and made decisions about groups even in education rights cases.¹⁵⁷ But these “outlier” cases are ones like *Cyprus v. Turkey*,¹⁵⁸ involving disputes between member states. It is not surprising that the Court would make an exception to its general anti-group policy in the context of claims espoused by a member state on behalf of the group.¹⁵⁹ The Court has otherwise been very reluctant to consider the impact of a state’s practices on groups as such. In cases brought by individual ap-

a religious community, *as individuals*, can claim to be victims of a violation of the right to marry or the right to education, rights which by their nature are not susceptible of being exercised by a religious community itself. Therefore, the applicant churches as religious communities cannot themselves allege a violation of either of these rights.” (emphasis added)).

155. *Id.*

156. WHEATLEY & CUMPER, *supra* note 113, at 21.

157. Indeed, the article was used in an earlier case alleging group discrimination, but as discussed below, this was a claim made on behalf of the group by a member state. *See infra* notes 158–159 and accompanying text (discussing *Cyprus v. Turkey*).

158. *Cyprus v. Turkey*, App. No. 25781/94 Eur. Ct. H.R. (May 10, 2001) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454>. In *Cyprus*, the Cypriot government alleged, amongst other things, that the children of Greek Cypriots living in northern Cyprus were not provided with secondary-education facilities, which thereby denied them the right to an education. Ruling in favor of Cyprus, the decision broadly considered the impact on the entire ethnic group on whose behalf Cyprus brought the claim.

159. Espousal of claims by states has been the traditionally accepted mechanism for enforcing claims arising under international law and continues to be non-controversial because, by its very nature, this method does not challenge the status of states as the hierarchically superior actor in the international legal order. By contrast, states have “resisted recognizing . . . other [organized] entities as bona fide international actors have preferred to see them as creatures of a particular state.” JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES* 109 (3d ed. 2010).

plicants, the Court has generally followed its expressed standard of not considering group-based education claims.

Roma who brought discrimination claims before the Court were squarely confronted by this general practice. In a series of cases going back to 1996, various Roma applicants challenged the refusal by national authorities in the United Kingdom to allow them to site their caravans on land that they owned.¹⁶⁰ The Court refused to find that the individual decisions of state officials to reject requests by Roma to use their own parcels of land to site caravans amounted to a violation of the Convention.¹⁶¹ The Court reached these outcomes without consideration of the significant impact of the decisions on the Roma as a group, despite the fact that the challenged siting decisions were coupled with the state's failure to fulfill its own domestic obligation to provide sufficient caravan sites for Roma.¹⁶² Nor did the Court express any concern that ethnic prejudice was seriously implicated despite the fact that in one case the United Kingdom justified its decision in part on the conclusion that it should "keep concentrations of sites for gypsies small, because in this way they are more readily accepted by the local community," which disliked having Roma living in

160. *E.g.*, *Smith v. United Kingdom*, App. No. 25154/94 Eur. Ct. H.R. (Jan. 18, 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59158>; *Coster v. United Kingdom*, App. No. 24876/94 Eur. Ct. H.R. (Jan. 18, 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59156>; *Lee v. United Kingdom*, App. No. 25289/94 Eur. Ct. H.R. (Jan. 18, 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59157>; *Beard v. United Kingdom*, App. No. 24882/94 Eur. Ct. H.R. (Jan. 18, 2001), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59155>; *Buckley v. United Kingdom*, App. No. 20348/92 Eur. Ct. H.R. (Sept. 29, 1996), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58076>.

161. These cases alleged violations of various articles of the Convention, including but not limited to Article 2 of Protocol No 1. With respect to the education claims, in particular, the Roma applicants asserted that their inability to utilize their private land to site their caravans impacted their children's ability to obtain an uninterrupted education in local schools of their choosing. Many of the applicants specifically wished to set up semi-permanent residences in order to facilitate their children's ability to obtain such an education in good, local schools.

162. *See, e.g.*, *Smith v. United Kingdom*, App. No. 25154/94 Eur. Ct. H.R.; *Coster v. United Kingdom*, App. No. 24876/94 Eur. Ct. H.R.; *Lee v. United Kingdom*, App. No. 25289/94 Eur. Ct. H.R.; *Beard v. United Kingdom*, App. No. 24882/94 Eur. Ct. H.R.; *Buckley v. United Kingdom*, App. No. 20348/92 Eur. Ct. H.R.

their midst.¹⁶³ Rather, the Court ignored broad issues of discrimination against the Roma and instead looked at each case with reference only to the specific and unique facts of each individual applicant's claim weighed against the broad aesthetic or environmental interests of the larger community.¹⁶⁴

The Court has changed course in fairly dramatic fashion in cases recently brought by Roma applicants. Decisions handed down in the past few years find the Court now going well beyond the particular facts of claims brought by individual applicants to evaluate practices that affect Roma as a group. It has made this adjustment not because the European Convention has been modified to embrace minority group rights (it has not been). Instead, on its face, the Court looks to another, separate treaty: the Framework Convention, discussed above.¹⁶⁵

The first of these more recent cases, *D.H. v. Czech Republic*,¹⁶⁶ was brought by applicants challenging the practice in the Czech Republic of placing Roma children in special

163. *Buckley v. United Kingdom*, App. No. 20348/92 Eur. Ct. H.R., ¶¶ 16–17.

164. *See, e.g., Smith v. United Kingdom*, App. No. 25154/94 Eur. Ct. H.R., ¶¶ 112–15; *Coster*, App. No. 24876/94 Eur. Ct. H.R., ¶¶ 111–12, 119–21; *Lee*, App. No. 25289/94 Eur. Ct. H.R., ¶¶ 110–15; *Beard*, App. No. 24882/94 Eur. Ct. H.R., ¶¶ 113–15; *Buckley*, App. No. 20348/92 Eur. Ct. H.R., ¶¶ 82–84.

165. The Roma cases may also signal a larger emerging trend favoring cultural/group-oriented claims by ethno-cultural minorities. In one recent case, *Irfan Temel v. Turkey*, App. No. 36458/02 Eur. Ct. H.R. (Mar. 3, 2009), for example, the panel concluded that the Convention was violated when a university suspended students in response to their petition seeking to have classes in the Kurdish language made available to them.

166. *D.H. v. Czech Republic*, App. No. 57325/00 Eur. Ct. H.R. (Nov. 13, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=825443&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. Just before it decided *D.H.*, the Court signaled that it was concerned about the treatment of Roma people and potentially ready to find a violation based on the mistreatment of the minority group by various states throughout Europe. The language quoted above, noting the “emerging international consensus” in favor of group protection was first used in the *Chapman* decision, in which the Court reluctantly concluded it must follow prior precedents holding that the U.K. practices did not constitute a violation of the Convention. Since then, the Court has decided a case against the United Kingdom, concluding that applicant's Article 8 rights were violated when the entire family was evicted from their land. *See Chapman v. United Kingdom*, App. No. 27238/95 Eur. Ct. H.R., ¶¶ 93–94.

schools for children with mental disabilities rather than in mainstream schools attended by the majority population.¹⁶⁷ The children's placements were determined based upon psychological tests administered by teachers, with the consent of the children's parents.¹⁶⁸ Thus, the placement decisions were ostensibly made without regard to the individual child's ethnicity and did not result in every Roma child being educated in inferior schools.¹⁶⁹ Because of this, the original panel found no violation, reasoning that the state had properly established the special schools to educate children with slight mental disabilities and not to create a separate, inferior system for Roma children.¹⁷⁰ The panel also declared that it was not the role of the Court to look beyond the established facts of each case, in which placement determinations were purportedly made on the basis of individual testing and not on the basis of the child's ethnicity.¹⁷¹ Finally, the decision noted that parents in some cases had requested that their children be transferred to these schools, and in other cases had failed to appeal the placement decisions.¹⁷²

After then being referred to and taken up by the Grand Chamber, the applicants prevailed.¹⁷³ Notably, the Grand Chamber looked not just at the circumstances of the individual children on whose behalf claims were brought, but also at the effects of the testing practice on Roma children *as a group*. The Grand Chamber began its legal analysis with the observation that "as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority . . . and therefore require special protection."¹⁷⁴ It then went on to conclude that the disproportionate assignment of Roma children to special schools

167. D.H. v. Czech Republic, App. No. 57325/00 Eur. Ct. H.R. ¶¶ 15–19.

168. *Id.* ¶ 16.

169. *Id.* ¶ 134 ("[O]ver 50% of Roma children were sent to [special] schools. Overall, a Roma child was more than 27 times more likely than a similarly situated non-Roma child to be assigned to a special schools.").

170. *Id.*

171. *Id.* ¶ 45.

172. *Id.* ¶¶ 46–48.

173. *Id.* ¶¶ 207–08.

174. *Id.* ¶ 182. Apparently, the decision has not yet had a significant impact in the Czech Republic. See Greenberg, *supra* note 132, at 998 (noting that it does "little more than confer about correcting the situation").

amounted to unlawful discrimination.¹⁷⁵ Furthermore, its reasoning did not depend on whether the state had a discriminatory intent vis-à-vis any individual child, or even the group as a whole: “[D]isproportionately prejudicial effects of a general policy or measure, though couched in neutral terms, discriminate against a group” and “such a situation may amount to ‘indirect discrimination,’ which does not necessarily require a discriminatory intent.”¹⁷⁶

Following *D.H.*, the Court decided two additional cases involving the segregation of Roma children, in Greece and Croatia. In these decisions, too, the Court’s analysis focused on the impact of the states’ actions on Roma *as a group* and not on the specific experiences of the individual applicants. In *Sampanis v. Greece*, the Court concluded that there was sufficient evidence that Greece had decided to segregate Roma children (in order to placate racist non-Roma parents who had protested Roma being allowed to attend the same classes as their own children) to justify putting the onus on Greece to disprove the inference.¹⁷⁷ Moreover, the Court refused to consider arguments relating to the alleged individual consent by the applicants to their children being separated.¹⁷⁸

In *Oršuš v. Croatia*,¹⁷⁹ the government argued that separate classes—in which only Roma children were enrolled—were created to provide special assistance to help students who lacked Croatian fluency. The Court rejected the rationale and noted that the test used to assess whether to place children placed in these classes was “not specifically designed to test the children’s command of the Croatian language.”¹⁸⁰ To the contrary, “no specific testing of the applicants’ command of the Croatian language [ever] took place.”¹⁸¹ Moreover, to the extent that Roma “were placed in separate classes because they lacked an adequate command of the Croatian language, the

175. *Id.* ¶¶ 182–83.

176. *Id.*

177. *Sampanis v. Greece*, App. No. 32526/05 Eur. Ct. H.R. (June 6, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-2052>.

178. *Id.*

179. *Oršuš v. Croatia*, App. No. 15766/03 Eur. Ct. H.R. (Mar. 3, 2010) (Grand Chamber), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97689>.

180. *See id.* ¶ 159.

181. *See id.* ¶ 116.

regular curriculum, taught in Croatian, could not possibly address their needs.”¹⁸² The Court reiterated the applicability of the burden-shifting framework it created in *D.H.*, requiring the State to defeat the presumption of illegal racial discrimination in the face of evidence demonstrating the racial correlation that resulted from the language proxy.¹⁸³

5. *The Influence of the Framework Convention’s Monitoring Mechanism on the European Court of Human Rights*

As I explain in detail below, the recent Roma cases reveal that “integrated enforcement” occurs in cases of overlapping rights and undermines standard accounts of the ineffectiveness of reporting mechanisms like the one in the Framework Convention. Opinions and recommendations made by the Framework Convention’s reporting committee have been directly utilized by the Court. The reporting mechanism has an impact well beyond what has been typically assumed or theorized through its role as helpmate to a tribunal that is generally considered a much more effective enforcer of treaty obligations.¹⁸⁴

The significant influence of the Framework Convention’s Reports can be seen in the Roma cases. Yet, the impact of the Reports is most obvious when contrasted with the lack of impact of the Framework Convention alone, which can be seen in decisions assessing claims that were brought after the Framework Convention entered into force but before any Reports issued.

At first, the Framework Convention and the rights and obligations it created did not appear to be helpful for Roma

182. See *id.* ¶ 164; see also *id.* ¶¶ 163, 166 (noting that the Roma had their curriculum reduced by as much as 30% compared with the regular class but that this was the only difference as both classes were taught only in Croatian and, “once assigned to Roma only-classes, [the applicants] were not provided with any specific programme in order to address their alleged linguistic insufficiencies”).

183. *Id.* ¶ 150.

184. While Hathaway concedes that the European Convention has a stronger enforcement mechanism than many of the other treaties she surveys, which contain only self-reporting mechanisms, she is less sanguine about its strength than are Helfer and Slaughter. Compare Hathaway, *Do Human Rights*, *supra* note 15, at 2017–18, with Helfer & Slaughter, *supra* note 76, at 300–01.

claimants in the European Court of Human Rights. In a trio of cases decided together in 2001—the first Roma cases to be decided after the Framework Convention entered into force¹⁸⁵—the Court agreed with the applicants that “there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle” and cited explicitly to the Framework Convention.¹⁸⁶ Yet, it refused to depart from the highly deferential “margin of appreciation” it had used in prior cases to ratify policies that had a discriminatory impact—and asserted that the signatory states’ inability to agree on “means of implementation” of the Framework Convention reinforced its “view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting requirements, renders the Court’s role a strictly supervisory one.”¹⁸⁷

Meanwhile, in the period between the 2001 cases and the *D.H.* decision in 2007 deciding claims against the Czech Republic, the Advisory Committee to the Framework Convention published two sweeping reports on the treatment of minorities, including Roma, by the Czech Republic. In its first report, dated January 2002, the Advisory Committee noted that many Roma who were not “mentally handicapped” were being placed in special schools designed specifically for such children. In the October 2005 report, the Advisory Committee reported, among other things, that “the education situation of Roma children remains a subject of special concern,” particularly the “unjustified placement of Roma children in ‘special’ schools” and the general isolation of Roma children within the

185. The earlier decision, *Buckley v. United Kingdom*, was decided in 1996, two years before the Framework Convention entered into force in 1998. The Framework Convention, though opened for signature already, was not mentioned in *Buckley*.

186. *Chapman v. United Kingdom*, App. No. 27238/95 Eur. Ct. H.R., ¶ 93; *accord Coster v. United Kingdom*, App. No. 24876/94 Eur. Ct. H.R., ¶ 107; *Smith v. United Kingdom*, App. No. 25154/94 Eur. Ct. H.R., ¶ 100.

187. *Chapman v. United Kingdom*, App. No. 27238/95 Eur. Ct. H.R., ¶ 94; *accord Coster v. United Kingdom*, App. No. 24876/94 Eur. Ct. H.R., ¶ 108; *Smith v. United Kingdom*, App. No. 25154/94 Eur. Ct. H.R., ¶ 101.

school systems.¹⁸⁸ The Report also concluded that being educated in these special schools “makes it more difficult for Roma children to gain access to other levels of education, thus reducing their chances of integrating in the society.” Finally, the Report also included, in a list of “Outstanding issues,” the concern that

according to non governmental [sic] sources, a considerable number of Roma children are still being placed, at a very early age, in ‘special’ schools, and that revision of the psychological tests used in this context has not had a marked impact. According to non official estimates, Roma account for up to 70% of pupils in these schools, and this—having regard to the percentage of Roma in the population—raises doubts concerning the tests’ validity and the relevant methodology followed in practice.¹⁸⁹

The Court relied heavily on the facts related in both of these reports (as well as on admissions made in the self-reports filed by the Czech Republic with the Advisory Committee),¹⁹⁰ finding them to be reliable and relevant evidence in the case.¹⁹¹ It particularly emphasized the Report’s observation that “non official” NGO data indicates that Roma comprise as many of 70% of pupils enrolled in special schools.¹⁹²

188. ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES, SECOND OPINION ON THE CZECH REPUBLIC ¶ 14 (Comm. Print 2005).

189. *Id.* ¶ 146.

190. *See* D.H. v. Czech Republic, App. No. 57325/00 Eur. Ct. H.R., ¶ 41 (quoting admission in Czech Republic report, submitted under the Framework Convention’s self-reporting requirements, that the tests administered to determine admission to special schools “are conceived for the majority population and do not take Roman[i] specifics into consideration”); *id.* ¶ 66 (noting concession by Czech authorities in one of their required self-reports under the Framework Convention that in 1999 Roma pupils made up between 80% and 90% of the total number of pupils in some special schools); ¶ 67 (noting that Czech self-report acknowledged that in 2004 “large numbers” of Roma children were still being placed in special schools”); *id.* ¶ 192 (rejecting rebuttal of applicants’ statistical evidence in part because of the concessions made in the self-reports just noted and because of the Committee’s “concluding observations of 30 March 1998 that a disproportionately large number of Roma children were placed in special schools”).

191. *Id.* ¶¶ 66–76.

192. *Id.* ¶ 18.

While the Reports were influential mainly as evidence, the impact of the Framework Convention in these cases went farther. First, returning to its statement from *Chapman* (quoted above) regarding “the emerging international consensus amongst the Contracting States of the Council of Europe” concerning the special needs of minorities,¹⁹³ the Court this time abandoned its previous conclusion that the failure of agreement on “means of implementation” of the Framework Convention indicated it should continue to apply a broad margin of appreciation in this area. Instead, the Court now cited *Chapman* to support its legal conclusion that “the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyles both in the relevant regulatory framework and in reaching decisions in particular cases.”¹⁹⁴

Furthermore, in determining that there was a serious and continuing group-wide problem that merited special consideration, the Court relied on the striking statistical evidence in the reports. It also relied on this statistical evidence to justify shifting the burden to the states to *disprove* discrimination. That is, the fact that such a significant number of students were impacted throughout the Czech Republic suggested that the applicant was more likely than not suffering from a discriminatory practice. Accordingly, the applicant could rely on the statistical evidence reported in the Advisory Committee opinion, and the state was ordered to prove that it was not engaging in racial discrimination.

The more recent Roma cases confirm that *D.H.* is not an outlier.¹⁹⁵ In *Oršuš v. Croatia*,¹⁹⁶ the Grand Chamber again relied on a series of opinions (this time relating to Croatia) promulgated by the Framework Convention’s Advisory Com-

193. *Id.* ¶ 181.

194. *Id.*

195. The short interim opinion from a three judge panel issued in *Sampanis v. Greece* does not mention the Framework Convention at all, although the panel uses a similar standard, relying on the evidence that the decision by Greek authorities to segregate Roma children had been done for racist reasons to justify shifting the burden to Greece to disprove the inference. *Sampanis v. Greece*, App. No. 32526/05 Eur. Ct. H.R. (June 6, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-2052>.

196. *Oršuš v. Croatia*, App. No. 15766/03 Eur. Ct. H.R.

mittee.¹⁹⁷ Furthermore, it did so despite the weaker statistical evidence (compared with *D.H.*) related in those opinions, concluding that, even assuming no

discriminatory intent on the part of the relevant State authorities, the fact that the measure in question was applied exclusively to the members of a singular ethnic group, coupled with the alleged opposition of other children's parents to the assignment of Roma children to mixed classes, calls for an answer from the State to show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary, and proportionate.¹⁹⁸

It again cited *Chapman* for the proposition that it would take legal cognizance of the "vulnerable position of Roma/Gypsies" based on "the emerging consensus amongst the Member States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle."¹⁹⁹

6. *The Impact of the Framework Convention Reports on the European Court of Human Rights*

As discussed in Part II, interaction between the Framework Convention and the European Court of Human Rights should not be surprising. The Court frequently reviews and assimilates the laws and legal analyses of various European legal systems as part of its mandate.²⁰⁰ The same state parties have undertaken binding legal obligations under both of the conventions and are thus engaged with both enforcement mechanisms. The subject matter of each treaty is to a large extent overlapping.²⁰¹ While the Framework Convention recognizes many affirmative rights of national minorities that would not

197. *Id.* ¶¶ 68–70.

198. *Id.* ¶ 155.

199. *Id.* ¶ 148.

200. KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 44–45 (2008).

201. The Framework Convention, for example, recognizes many of the same rights as the European Convention on Human Rights, including the freedoms of association, assembly, religion, the separate right to "manifest his or her religion or belief," and "equal opportunities for access to education," Framework Convention, *supra* note 81, arts. 7, 8, 12.

overlap with the non-discrimination rights recognized by the European Convention on Human Rights, the basic point of both documents is to ensure many of the same types of human rights—assembly, associational, religious, and educational rights to name just a few—are respected by European member states.²⁰²

Perhaps what is more surprising is *how* significantly the Framework Convention has impacted the European Court of Human Rights' jurisprudence in the context of Roma claims. The impact of the monitoring mechanism—especially the factually comprehensive and legally binding nature of its reports—is particularly significant. The Court has relied heavily *not* just on the legal rights or obligations recognized by the Framework Convention as the basis for its conclusion that it should subject states to special scrutiny in their treatment of minority groups generally, and of Roma in particular.²⁰³ The first Roma decisions after the Framework Convention entered into force do note the new treaty's existence and even go so far as to recognize that the Framework Convention represents an "emerging consensus" among (at least most of) its member states on the issue of minority group rights.²⁰⁴ Yet, what was more significant to the Court's ultimate decision to take cognizance of the "emerging consensus" on minority rights and jettison its generally deferential "margin of appreciation" standard were the very specific findings respecting the actual circumstances of the Roma—the one minority group that was by then the subject of detailed opinions issued by the Advisory Committee to the Framework Convention.²⁰⁵

202. Compare, e.g., European Convention on Human Rights, *supra* note 90, arts. 9, 11, with Framework Convention, *supra* note 81, art. 7.

203. Compare, e.g., Chapman v. United Kingdom, App. No. 27238/95 Eur. Ct. H.R., ¶ 93, with D.H. v. Czech Republic, App. No. 57325/00 Eur. Ct. H.R.

204. Chapman v. United Kingdom, App. No. 27238/95 Eur. Ct. H.R., ¶ 93; accord Coster v. United Kingdom, App. No. 24876/94 Eur. Ct. H.R., ¶ 107; Smith v. United Kingdom, App. No. 25154/94 Eur. Ct. H.R., ¶ 100.

205. Indeed, the statistical information itself, with numbers well above 50% of the Roma population, is what the D.H. decision relies on to shift the burden of proof to the Czech Republic. D.H. v. Czech Republic, App. No. 57325/00 Eur. Ct. H.R., ¶ 163. While the statistical evidence was less significant in Oršuš, the Court notes that, because it indicated less than 50% of the population was impacted, it alone would not have been sufficient. Instead, other evidence suggesting a discriminatory purpose justified the court's decision to shift the burden. Oršuš v. Croatia, App. No. 15766/03 Eur. Ct. H.R.,

These opinions included very specific and detailed facts, which were gleaned from a wide-ranging investigation of many sources, including the respondent-state itself.²⁰⁶ These facts revealed widespread discrimination that impacted a large majority of Roma in the precise context in which the *D.H.* applicants were asserting claims. It was not the general legal recognition of a minority group right in the Framework Convention itself, but rather the facts reported in the Advisory Committee's detailed Reports, as well as the legal conclusions drawn from these facts by another enforcement entity vested by the Czech Republic with the formal legal authority to make such findings, that persuaded the Court to adopt enhanced scrutiny of the state-respondent in *D.H.*

In short, the opinions generated by the Advisory Committee provided the Court with a significant factual record that it could assimilate and add to the factual record provided by the parties. These opinions, moreover, were generated by an entity that the member states had created precisely to undertake such fact-finding missions, and this provided the resulting opinions with an authority that made them (1) more difficult for the states to contest and (2) more influential to the Court, compared with the same opinion provided by some other source, such as an *amici* or other expert.²⁰⁷ Indeed, even opinions from the most well-respected *judicial* authority would, at least in some ways, be far less persuasive if the member state had not similarly consented to that court's direct authority over it. In fact, it appears that the authority vested by the states in the Advisory Committee allowed the European Court of Human Rights to rely on its findings to justify decisions that otherwise would have been more susceptible to criticism as inappropriately political attempts to recognize and elevate a

¶¶ 152–53. Thus, going forward, presumably opinions by the Advisory Committee showing discriminatory *impact* will justify shifting the burden to the respondent states only in cases where more than 50% of the group to which applicant belongs is shown to be affected.

206. *D.H. v. Czech Republic*, App. No. 57325/00 Eur. Ct. H.R., ¶ 41 (quoting admission in the Czech Republic's self-report).

207. The type of legitimacy enjoyed by an institution created and recognized as legitimate by the states themselves is of the highest magnitude. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 726, 751–58 (1988) (describing the origins of international institutions' legitimacy in state action and consent, then evaluating the states' subsequent recognition of the superiority of those international institutions).

right that the member states had chosen not to add directly into the European Convention.²⁰⁸

In addition, the existence of substantial fact-finding *about an entire group* allowed the Court to make another significant jurisprudential move. In the context of Roma education policy, the Court effectively shifted from what it generally considered to be a highly individualized inquiry to one that, although formally deciding an individual claim, made legal findings with respect to an entire ethnic group. This is a significant departure from its usual practice, in which “the group dimension of an individual complaint is too often not sufficiently taken into account, despite its crucial importance for cases concerning members of” minority groups.²⁰⁹

In fact, the substantial and ongoing fact-finding undertaken by the Advisory Committee not only allowed the Court to adopt a group-based approach, it very likely allowed it do so *much more easily* than even direct amendment of the European Convention would have. That is, even had direct amendment been a realistic possibility—which it clearly was not—the proposed amendment demonstrates that it would have taken the form of treaty language generically recognizing the rights of minority groups.²¹⁰ It would not have provided details respecting how the European Court of Human Rights was to implement that right.²¹¹ That state of affairs, of course, would have been very similar to those facing the Court when it decided *Chapman* and its companion cases (just after the entry into force of the Framework Convention but before any Advisory Committee reports had been issued) and refused to depart from its generally wide “margin of appreciation” in Roma cases based on the bare existence of new rights created by the Framework Convention. While the Court might have been somewhat less reluctant to apply new rights recognized within its own treaty, the existence of these new rights would likely

208. Helfer & Slaughter, *supra* note 76, at 304 (“Thus the legitimacy of . . . the [European Convention on Human Rights]’s judgments . . . depend[s] in large part on [its] ability to generate an accurate factual record.”).

209. KRISTIN HENRARD, *DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION* 144 (2000).

210. See *supra* text accompanying notes 93–94 (discussing failed efforts to amend the European Convention to recognize minority group rights).

211. See Eur. Parl. Ass., *supra* note 101.

not have compelled it to depart from its usual “margin of appreciation” standard. Indeed, the Court routinely applies a similarly deferential “margin of appreciation” in contexts in which the European Convention directly vests the applicant with the right being asserted.²¹² The justification for doing so in *D.H.* was linked directly, not to a new *right*, but to new *data* showing the enormous percentage of Roma affected by non-compliant educational policies and the accompanying legal conclusion of non-compliance rendered by the Advisory Committee.²¹³ Thus, the recognition of a right alone, whether in a related treaty or in the European Convention itself, would likely not have been sufficient to convince the Court that its traditional measure of deference was no longer appropriate.

Unlike the Framework Convention, moreover, the European Convention has no Commission tasked with undertaking ongoing, broad-based compliance investigations. Presumably, had minority rights been incorporated into the European Convention directly, the Convention’s own investigatory Commission would have been able, at the most, to investigate the specific claims asserted by particular applicants. But this more limited investigation would have been far less likely to uncover the widespread nature of the discriminatory practices alleged. Historical data would have had to be compiled retroactively. Even had that been possible, the data might have been less useful when viewed retrospectively than it was when the Advisory Committee was considering it in contemporaneous connection with the events, and then reconsidering it in routine, follow-up investigations.

Nor would the same data necessarily have been as compelling had it been conveyed by an NGO directly, rather than as part of an official Advisory Committee report. While the NGOs that reported data to the Advisory Committee could have presented it directly to the Court as an *amicus*, in that context the data would have lacked the authoritative status it gained once it was reported by an official entity vested with the authority to render opinions regarding the compliance of states

212. See, e.g., *Şahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R., ¶ 122. See generally Y. ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (2002) (recounting all decisions in which the doctrine has been applied).

213. See *D.H. v. Czech Republic*, App. No. 57325/00 Eur. Ct. H.R.

with their Framework Convention obligations. In fact, earlier, the same NGO *amicus* in *Chapman* and its companion cases was unable to persuade the Court to take the position that it ultimately accepted in reliance on the Advisory Committee reports—reports that were themselves based, in part, on the same NGO's data.

Thus, the Roma cases demonstrate how these two different types of enforcement mechanisms work together in a manner that allows each to have a broader impact, and as a result to promote broader compliance, than either can do alone. On the one hand, the European Convention retains all its tools, including an adversarial system that allows parties and interveners to bring relevant factual and legal arguments to the attention of the judges, supplemented by the Commission's ability to provide independent investigation of these same factual claims. But, in addition, it is supplemented by an independent fact-finder that provides not only historical context—even as it is continuously monitoring and updating its findings—but also a broader perspective that is official and authoritative and takes account of a larger picture than is usually presented to the European Court of Human Rights by a single applicant.

The ability to impact the decision-making of the Court, in turn, provides states with additional incentives to comply with the Advisory Committee's recommendations—incentives that would not be present if integrated enforcement were not a possibility. Whether such compliance will occur in fact remains to be seen. It is still in the early days since the Roma decisions have become final and as yet it is unknown precisely how the utilization of the Advisory Committee's opinions will play out in the Court's future case law. Similarly, it is unknown how effective the Roma decisions may prove to be in providing additional incentives to prompt state compliance with recommendations made in the Advisory Committee opinions. More data is necessary before this part of the "integrated enforcement" model would be testable via cases brought in the European Court of Human Rights.

B. *Integrated Enforcement in the Inter-American Court of Human Rights*

The recent *Cotton Field* decision by the Inter-American Court of Human Rights also relies heavily on reporting to es-

tablish important background facts. These background facts provide a contextual lens through which the Court can then view the individual facts established by the claimants and find them to be a product of state discrimination against women. Moreover, the *Cotton Field* case involves multiple overlapping treaties—at the global as well as at the regional level—each separately obligating the state of Mexico to respect and/or promote women’s rights.

This Subsection proceeds to describe the integration of various other treaty mechanisms in the Inter-American Court’s *Cotton Field* decision. It does so by discussing, first, the background findings reporting rampant gender discrimination by Mexico. It then shows that the Court relies explicitly on the factual data collected by various reports to establish a context against which to consider the facts established by the claimants. Without this factual background, the Court would have found it difficult to find that these facts demonstrated a clear violation of the state’s obligation to protect women’s rights. The factual background established in various reports created under the auspices of a number of separate treaty bodies not only allows the Court to do so, but makes it very difficult for the state of Mexico to argue with the allegations that it had fostered—and failed to take steps to help dismantle—a strong culture of violence against women in Ciudad Juárez, or to convince the Court that the claims in *Cotton Field* were not a part of the pervasive pattern for which the state of Mexico was responsible.

1. *Women’s Rights in Ciudad Juárez Leading up to the Cotton Field Murders*

As the Court recounts in its decision, national and international attention has been focused on a culture of violence against women in Ciudad Juárez that “has prevailed since 1993, and the deficient State response to these crimes.”²¹⁴ Several entities that the Court cites have documented the situation.

One of these, the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, visited and reported on

214. González et al. v. Mexico (The Cotton Field Case), Case Nos. 12.496, 12.497, 12.498, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 206 (Nov. 16, 2009), ¶ 114 (quoting the Commission).

Mexico in 1999 after having requested an invitation from the Mexican government to conduct a fact-finding country visit for several years. The specific mandate of the Rapporteur was in response to its receipt of information from government entities, NGOs, and individuals regarding “Acteal, El Bosque, Aguas Blancas, and El Charco, and a series of murders of mostly young women in Ciudad Juárez, Chihuahua.”²¹⁵ In her report, specifically relating to Ciudad Juárez, the Special Rapporteur noted that between 1993 and 1999, there had been a total of 193 cases of murder, mostly of young women.²¹⁶ After conducting a visit and speaking to victim’s family members and to the Special Prosecutor, the Special Rapporteur found that there was “deliberate inaction of the Government to protect the lives of its citizens because of their sex.”²¹⁷

A few years later, in 2001, the Special Rapporteur on the Independence of Judges and Lawyers also investigated allegations relating to the situation in Ciudad Juárez.²¹⁸ While in Mexico, the Special Rapporteur met with government officials, lawyers, judges, NGOs, and private individuals.²¹⁹ One issue emphasized by the Rapporteur related to the role of the government in investigating the Ciudad Juárez murders. Specifically, the Special Rapporteur noted, “there was a great lack of sensitivity on the part of the police and prosecutors, who even went as far as to blame the women for their alleged low moral standards.”²²⁰ The Special Rapporteur went on to say that she

215. Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, *Visit to Mexico* ¶ 1, U.N. Doc. E/CN.4/2000/3/Add.3 (Nov. 25, 1998) (by Asma Jangahir). The Special Rapporteur is specifically tasked with responding to alleged cases of improper executions, including those for which the state is directly responsible, as well as those that occur because the state has not fulfilled its obligation to actively prevent and respond to extrajudicial killings carried out by private parties who are not instrumentalities of the state. See *Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution: Introduction*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx> (last visited Nov. 24, 2012).

216. Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, *supra* note 215, ¶ 85.

217. *Id.* ¶ 89.

218. Special Rapporteur on the Independence of Judges and Lawyers, *Eighth Rep. on the Independence of Judges and Lawyers*, U.N. Doc. E/CN.4/2002/72/Add.1 (Jan. 24, 2002) (by Dato’Param Kumaraswamy).

219. *Id.* ¶¶ 1–3.

220. *Id.* ¶ 161.

“was amazed to learn of the total inefficiency, incompetency, indifference, insensitivity and negligence of the police who investigated these cases earlier.”²²¹ In her final recommendation, the Special Rapporteur instructed Mexico to thoroughly investigate each of the unsolved murders in Ciudad Juárez.²²²

Just a year later, after receiving information from hundreds of NGOs and individuals, the Special Rapporteur on the Rights of Women, established by the Inter-American Commission on Human Rights, also visited Mexico to gather information relating to the rights of women in Ciudad Juárez.²²³ The visit focused on the grave situation of violence against women in that area, specifically the unsolved murders and disappearances.²²⁴ Following the visit, the Rapporteur published “The Situation of The Rights of Women in Ciudad Juárez, Mexico: The Right to Be Free from Violence and Discrimination.”²²⁵ In the report the Rapporteur concluded that Mexico’s “failure to investigate, prosecute and punish the perpetrators of these killings, sexual crimes and domestic violence against women in Ciudad Juárez contributes to a climate of impunity that perpetuates such violence.”²²⁶

Later that same year (in late 2002), the Committee on the Elimination of Discrimination Against Women²²⁷ received a communication from two NGOs—Equality Now and Casa Amiga—requesting that the Committee conduct an investigation regarding the murders and disappearances of young wo-

221. *Id.*

222. *Id.* ¶ 192(p).

223. COMM’N ON HUMAN RIGHTS, SPECIAL RAPORTEURSHIP ON THE RIGHTS OF WOMEN, THE SITUATION OF THE RIGHTS OF WOMEN IN CIUDAD JUÁREZ, MEXICO: THE RIGHT TO BE FREE FROM VIOLENCE AND DISCRIMINATION (2003), *available at* <http://www.cidh.oas.org/annualrep/2002eng/chap.vi.juarez.htm>.

224. *Id.* ¶ 1.

225. *Id.* ¶ 2.

226. *Id.* ¶ 166.

227. The Committee is comprised of independent experts charged with monitoring states’ compliance with the Convention on the Elimination of All Forms of Discrimination against Women. *See Committee on the Elimination of Discrimination Against Women: Membership*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cedaw/membership.htm> (last visited Sept. 20, 2012) (listing the membership of the Committee).

men in Ciudad Juárez.²²⁸ After conducting preliminary research, the Committee traveled to Mexico to meet with various politicians, diplomats, NGOs, and individuals nearly a year later.²²⁹ The Committee's report focused first on the violence facing women generally and then critiqued the inaction of the Mexican government regarding the murders and disappearances.²³⁰ After conducting its investigation, the Committee concluded that the situation in Ciudad Juárez was a "grave and systematic violation[] of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women."²³¹

Finally, in 2005, the U.N. Special Rapporteur on Violence Against Women²³² traveled to Mexico to investigate widespread allegations of violence against women.²³³ The Rapporteur focused the visit on the disappearances and murders of young women in Ciudad Juárez and concluded that a denial of justice had resulted from "[t]he indifference, negligence or even deliberate obstructionism that the state authorities have initially shown in dealing with the murders of hundreds of women in Ciudad Juárez."²³⁴

228. U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, U.N. Doc. CEDAW/C/2005/Op.8/MEXICO (2005), available at <http://www.unhcr.org/refworld/docid/4a54bc0e1a.html>.

229. *Id.* ¶¶ 9–17.

230. *Id.* ¶¶ 22–86, 87–158.

231. *Id.* ¶ 259.

232. This position was created in 1994 by the United Nations Commission on Human Rights. See *Special Rapporteur on Violence Against Women, Its Causes and Consequences*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx> (last visited Nov. 28, 2012).

233. Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women (Addendum)*, U.N. Doc. E/CN.4/2006/61/Add.4 (Jan. 13, 2006) (by Yakin Ertürk).

234. *Id.* ¶ 65.

2. *The Cotton Field Murders and the Response of the Mexican Authorities*

Three such victims were Laura Berenice Ramos Monárrez, Claudia Ivette González, and Esmeralda Herrera Monreal.²³⁵ At the time of their deaths, these young women were seventeen, twenty, and fifteen years old, respectively.²³⁶

All three young women disappeared between September and October, 2001.²³⁷ While their families reported their disappearances to the authorities immediately after each went missing, they were all told that they would need to wait seventy-two hours before their daughters would be considered to have disappeared.²³⁸ Furthermore, state officials in each of the cases were dismissive of the families' concerns that their daughters were victims of foul play.²³⁹ Instead, the authorities in each case told the families they were likely out with a boyfriend or "having a good time."²⁴⁰ In one case, the authorities told a victim's mother that "if anything happened to her, it was because she was looking for it, because a good girl, a good woman, stays at home."²⁴¹ Another of the victim's mothers was told that "all the girls who get lost, all of them, go off with their boyfriend or want to live alone."²⁴²

The bodies of all three young women were found in the same cotton field on November 6, 2001.²⁴³ According to the Commission, their bodies "had been subjected to particular brutality" and the "way in which [their bodies] were found suggests that they were raped and abused with extreme cruelty."²⁴⁴ Because of the passage of time between the young women's deaths and their bodies' discovery, it was not possible for an autopsy to reveal the precise cause of death.²⁴⁵ How-

235. Cotton Field, Case Nos. 12.496, 12.497, 12.498, Judgment, Inter-Am. Ct. H.R., ¶¶ 165–67.

236. *Id.*

237. *Id.*

238. *Id.* ¶¶ 176, 179–81.

239. *See id.* ¶¶ 187–202 (describing steps the families took to alert police of their fears and the state officials' reaction to the families' concerns).

240. *Id.* ¶ 197.

241. *Id.* ¶ 198.

242. *Id.* ¶ 200.

243. *Id.* ¶ 209.

244. *Id.* ¶ 210.

245. *Id.* ¶ 212.

ever, the conditions in which the bodies were found—tied up and mutilated, with signs suggesting sexual violence—indicated that the victims experienced “severe physical and mental suffering” before they died.”²⁴⁶ The record “makes it . . . impossible to know whether the perpetrators were public officials or private individuals” and the Court refused to “presume that there were in fact public officials involved [in the murders].”²⁴⁷

3. *The Influence of Reporting and Monitoring on the Court’s Analysis*

Both the structure of the *Cotton Field* decision, and its extensive citations to reporting and monitoring conducted under the auspices of a number of other treaty mechanisms, demonstrate the significant impact reporting had on the Court’s decision. The impact can be seen throughout the opinion, as the Court acknowledges and relies on these reports explicitly and frequently.

The Court begins its discussion of the relevant facts with a section entitled “Context.” This section recounts in detail the factual findings of the several reports described above, emphasizing that “[v]arious national and international human rights monitoring mechanisms have been following the situation in Ciudad Juárez and have called the international community’s attention to it.”²⁴⁸ It then cites to factual findings from all of these reports—with allegations made by the parties sprinkled in—to flesh out the broader factual context that existed in Ciudad Juárez during the years surrounding the 2001 murders of the three victims whose claims are the ones actually before the Court. Specifically, it recounts factual findings derived from all these reports spanning from 1993 to 2005 regarding a number of categories, including: the number of women who were killed;²⁴⁹ the typical profile of the victims of these killings (i.e., young women between the ages of 15 and 23);²⁵⁰ the similar characteristics and sexual nature of the murders;²⁵¹ and

246. *Id.* ¶¶ 219–21.

247. *Id.* ¶ 242.

248. *Id.* ¶ 116.

249. *Id.* ¶¶ 114–21.

250. *Id.* ¶¶ 122–23.

251. *Id.* ¶¶ 124–27.

the root causes of the culture of violence against women in Ciudad Juárez.²⁵² The Court then cites to the “foregoing” to make broad factual findings that,

in general, [the murders of women between 1993 and 2005] have been influenced, as the State has accepted, by a culture of gender-based discrimination which, according to various probative sources, has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities. In this regard, the ineffective responses and the indifferent attitudes that have been documented in relation to the investigations of these crimes should be noted, since they appear to have permitted the perpetuation of the violence against women in Ciudad Juárez.²⁵³

It is against this backdrop—in fact, directly following it in its opinion—that the Court relates the allegations regarding the specific factual circumstances surrounding the disappearances, killings, and investigations of the three victims whose claims it is considering in the case. The Court’s specific findings about the investigation of the three young women’s disappearances and murders directly track the generic findings regarding investigatory policies that were established in the reports it cited and relied upon in the prior section of the opinion. Thus, the Court is able to find—as described in Part II.B.2 above—that each of the murders in the case before it precisely conforms to the broader pattern of violence against women established in the cited reports.

The Court then follows the same structure in rendering its legal conclusions. It begins by recounting the legal conclusions reached by the various reporting bodies, observing that “national and international reports agree that the prevention of the murder of women in Ciudad Juárez, and also the response to these killings, has been ineffective and insufficient.”²⁵⁴ It then draws legal conclusions about the actions of

252. *Id.* ¶¶ 128–45.

253. *Id.* ¶ 164.

254. *Id.* ¶ 273; *see also id.* ¶ 275 (quoting U.N. Special Rapporteur on Extrajudicial Executions who noted that “the deliberate inaction of the Government to protect the lives of its citizens because of their sex . . . had indirectly ensured that the perpetrators would enjoy impunity for such crimes”);

the public officials with respect to the particular crimes at issue, holding that “an obligation of strict due diligence arises in regard to reports [made by their families] of missing women, with respect to search operations during the first hours and days.”²⁵⁵ This due diligence obligation requires, “[a]bove all, . . . that police authorities, prosecutors and judicial officials take prompt, immediate action by ordering, without delay, the necessary measures to determine the whereabouts of the [missing] victims” and conduct an “immediate effective investigation”—which Mexico did not do in these cases where it “merely carried out formalities” and indicated that there was no reason that the reports that these women were missing should “be dealt with urgently and immediately.”²⁵⁶ The Court ultimately concludes that the gender stereotyping in which authorities engaged by refusing to investigate, or even to take seriously, the women’s disappearances was “one of the causes and consequences of gender-based violence against women” and therefore was a violation of the Inter-American Convention on Human Rights.²⁵⁷

4. *The Integration of Reporting and Monitoring in the Cotton Field Decision*

The heavy reliance on the factual and legal conclusions of the various reports detailing the culture of violence against women in Ciudad Juárez appears to have been crucial to the ultimate finding that Mexico was in breach of its human rights obligations in connection with the three murders at issue in the case. It seems unlikely, if not impossible, that the facts of the individual families’ interactions with authorities would have been by themselves sufficient to lead to a finding that the state had violated its human rights obligations.

To begin with, the existence of numerous reports produced by different human rights enforcement entities—all of which concluded that the police in Ciudad Juárez engaged in

id. ¶ 276 (noting that in 2003 the CNDH had concluded that “more than five years after having issued [Recommendation No. 44], the social phenomenon has not been controlled” and the crime rate against women has continued to rise).

255. *Id.* ¶ 283.

256. *Id.* ¶¶ 283–84.

257. *Id.* ¶ 402.

a practice during this timeframe of behaving in precisely the manner alleged by the three families—bolstered the families’ allegations and testimony’s credibility. Even if the same factual record had been established in the absence of the reports, it would have been less securely tethered to a solid factual foundation on which legal conclusions of state responsibility were based. Indeed, the decision makes clear that the State is responsible for a “culture” of violence. Without reports that put these three incidents in context, it would have been hard to discern whether the authorities were acting consistent with a widespread state culture or in an exceptional way.

Moreover, the reports—and prior statements made in the context of the reporting efforts—effectively precluded Mexico from making many arguments they otherwise might have made. For example, while Mexico tried to deny that the murders of women in Ciudad Juárez conformed to a pattern of gender-based motivations, the Court pointed out that it had admitted as much to the CEDAW Committee, conceding that the motives for the murders were “all influenced by a culture of discrimination against women.”²⁵⁸

Because most of the Court’s factual findings are made in the context of such concessions, it is also hard to imagine that Mexico could credibly contest the Court’s ultimate findings and the conclusions it derives from them. This is particularly so given that the findings the Court makes are with respect to the murders of three individuals only and are completely consistent with the generic factual background that Mexico is forced to concede was a reality during the relevant time period. In addition, any legal conclusions that might be novel, in terms of the scope of human rights obligations imposed on Mexico compared to interpretations of Mexico’s obligations by the reporting entities that have already opined, constitute a relatively small, incremental step. Indeed, Mexico responded to the decision by creating a reparations fund for the victims of human rights violations, including the prevailing applicants in the case.²⁵⁹ While it has taken some action to comply with the decision, Mexico has been less successful at rectifying the

258. *Id.* ¶ 132.

259. Carson Osberg, *Mexican Congress Approves Reparations Fund for Victims of Human Rights Violations To Comply with Inter-American Court Judgments*, THE HUMAN RIGHTS BRIEF (Mar. 11, 2011), <http://hrbrief.org/2011/03/mexi->

underlying issues that caused the femicides.²⁶⁰ As with the Roma cases in the European Court of Human Rights, the decision is so recent that it remains to be seen precisely what its longer-term impact will be.

III. THE FUTURE OF INTEGRATED ENFORCEMENT

These recent decisions are examples of integrated enforcement in practice. Considering human rights enforcement from an integrated perspective is likely to become ever more important as the human rights treaty regime complex, like many other regime complexes, grows more and more complex. As the number of human rights treaties and institutional stakeholders multiplies, the number of potentially overlapping enforcement mechanisms also increases. As more reports come into existence²⁶¹—and as new human rights treaties and related entities emerge, as has recently been occurring in Southeast Asia²⁶²—decisions embodying integrated enforcement are likely to become more prevalent. The collection of more and more data, and a deeper and richer historical record of human rights practices around the world, will enhance the ability of human rights courts to contextualize claims brought by individuals.

The potential impact of integrated enforcement, and particularly the consequent effect that integrating reports into binding decisions has had on state behavior, should be explic-

can-congress-approves-reparations-fund-for-victims-of-human-rights-violations-to-comply-with-inter-american-court-judgments/.

260. Alexandra Harrington, *Revisiting Cotton Field Amid Continuing Violence*, INTLAWGRRLS (July 20, 2012, 6:00 AM), <http://www.intlawgrrls.com/2012/07/revisiting-cotton-field-amid-continued.html>. Harrington explains,

[t]o date, the Court has not released a compliance report for the *Cotton Field* case; this makes it difficult to understand the mechanisms that Mexico has attempted to put into place since the decision. Even without such a report, however, it is evident that the measures put in place have not had the intended practical effect, and that Ciudad Juárez is an extremely dangerous place for women and girls who are not involved with crime or cartels but rather seek to go about with their daily lives.

Id.

261. See *supra* notes 9–12 and accompanying text (describing some of the new reporting systems in the international sphere).

262. See *supra* notes 5–8 and accompanying text (describing the reporting mechanism of ASEAN).

itly incorporated into research evaluating human rights treaties. In addition to theoretical projects like this one, empirical projects might evaluate whether the effectiveness of treaties supported by reporting and monitoring is affected by the potential or actual integration of such reports into coercive adjudicative decisions.²⁶³ Different reports and reporting entities might be examined to analyze whether the type of factual information collected by the reports affects whether they are integrated into the decisions of different tribunals;²⁶⁴ whether international human rights courts are more likely to do so than domestic courts;²⁶⁵ and whether a reporting entity's reputation or connection to the adjudicative mechanism contributes either to the likelihood of reports being integrated or to the treatment of reports when they are.

As the potential benefits reports and reporting mechanisms might bring to adjudication become more apparent, integrated enforcement should be consciously considered as part of the treaty design process. This is particularly important at a structural level, i.e., when states and other stakeholders are negotiating the type of mechanism or mechanisms that should be created when a treaty is being drafted or amended. But, more broadly, because reporting committees are most likely to be influential when they are respected entities in their own right—and are therefore more likely to persuade a tribunal that might hesitate to find a violation in a close case without a prior determination—it may be particularly crucial to structure the process by which a monitoring committee is constituted. It may be a delicate balance to create a committee that is both expert and neutral—and perceived as such—but

263. Cf. Goodman & Jinks, *supra* note 17, at 692 (speculating that the threat of coercive sanctions will drive “underground” information that states might otherwise be willing to disclose to monitoring or reporting committees).

264. Lupu argues that reports dealing with “personal integrity rights violations”—such as disappearances, torture, and extrajudicial killings—are particularly likely to rely on evidence that would be considered non-admissible in the domestic context. See Lupu, *supra* note 21, at 14–15 (discussing the use of hearsay evidence and anonymous witnesses, for example).

265. Cf. NANCY A. COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010) (arguing that international tribunals are more likely than domestic courts to rely on inadequate evidentiary bases to support criminal convictions in cases of mass atrocities).

that is also able to maintain the respect and trust of the state parties whose behavior it is monitoring.

Ideally, human rights advocates should reconsider whether “strong” courts alone are always (or, indeed, ever) the best solution. While courts are an important component of integrated enforcement, the importance of separate reporting structures is just as crucial. Mechanisms could be intentionally constructed along lines similar to the *de facto* model exhibited by the Framework Convention, rather than simply attempting to include new substantive rights within the ambit of an existing (or new) human rights court.

Likewise, the potential scope and impact of reports—and the value of multiple reporting entities in an integrated enforcement system—should be reconsidered. Most notably, the recent proposal to improve the various U.N. human rights mechanisms encourages the adoption of “[a] comprehensive strategic plan . . . to provide for increased efficiency and cost effectiveness.”²⁶⁶ To be sure, part of the reform proposal acknowledges many of the benefits of integration. One of the proposals, for example, envisions a system of universal human rights enforcement divided between a World Human Rights Court and a World Commission of Human Rights.²⁶⁷ Moreover, the Commission, which is essentially a super-monitoring committee with all the functions inherent in such a body, would be established to enhance the decision-making function of the Court via its continuous development of a broad factual record.²⁶⁸

More problematically, however, the proposed Committee would serve as a “subsidiary body.”²⁶⁹ As such, it would be unable to serve as a formally co-equal legal authority that the Court could utilize to bolster its legal and factual conclusions in close cases. Furthermore, to the extent that its decisions were likely to prove influential, the Committee as an appendage to the Court might be less likely to be insulated from the consequences of finding violations in politically contentious,

266. See, e.g., M. Cherif Bassiouni, *A Critical Introduction Assessment of the UN Human Rights Mechanisms*, in *NEW CHALLENGES FOR THE U.N. HUMAN RIGHTS MACHINERY*, *supra* note 46, at 11.

267. Frouville, *supra* note 46, at 265.

268. *Id.*

269. *Id.*

or otherwise close, cases. It would simply lack the independent expert mandate that currently characterizes the best reporting mechanisms and allows them to provide crucial and detailed information, along with institutional credibility, to bolster the capacity of adjudicative mechanisms.

In general, greater efficiencies and synergies among U.N. components are laudable goals. Yet, even if it can be achieved, allowing the “human rights system [to] become an integrated whole in order to have each component of the system benefit from the work of other components”²⁷⁰ may come at a cost. Whatever shape such reforms might actually take, consolidation is likely to result in fewer in-depth reports by issue-area experts, or at least fewer reports overall, as well as fewer reports generated by independent entities. As such, there are likely to be fewer opportunities for integration with adjudicative tribunals, both domestic and international. In short, consolidating all of the U.N. treaty bodies into a single entity may reduce the possibility of interconnectedness and thereby impede the development of international law through integrated enforcement.

No matter what further reforms may occur, the United Nation’s new UPR system has just completed its first full cycle and is embarking on a follow-up reporting cycle. The new UPR reports cover the full range of human rights obligations recognized in the various U.N. human rights treaties and cover all U.N. member states, not just the select few singled out to be subject to investigation by Special Rapporteurs. Consequently, the number of states that may become subjects of integrated enforcement could explode in the near future. Evaluating whether (and if so, why, when, and how) such reports will be utilized by other enforcement mechanisms—from international human rights tribunals to domestic courts that adjudicate human rights claims to other reporting and monitoring mechanisms—is as important as studying the extent to which these reports impact states more directly.

CONCLUSION

In designing human rights treaties, reporting mechanisms should not be viewed as incompatible rivals of adjudicative en-

270. Bassiouni, *supra* note 266, at 11.

forcement nor as ineffective compromises. Rather, because the substantive obligations in human rights treaties overlap with similar obligations found in many other treaties, human rights courts can and do rely on reporting done by reporting and monitoring bodies. While their lack of formal authority to compel state action in response to their findings can be seen as a weakness when compared with the ability of human rights courts to order states to pay reparations or take other actions in response to findings of violations, monitoring mechanisms also have strengths that can be harnessed by the courts that rely on them.

As human rights enforcement appears to be headed towards increasing reliance on adjudication as a mechanism for enforcement, the creators of future treaties should bear in mind the benefits of reporting—and the consequent downsides of a world in which reporting has completely disappeared in favor of a “stronger” system of adjudication. In fact, adversarial tribunals may be wary of finding a violation without stronger, broader evidence—or in the absence of another co-equal enforcement mechanism’s parallel finding. Far from being inherently weak, reporting and monitoring may significantly contribute—not just by providing factual information that can be used by domestic institutions to impact state behavior, but also at the international level—and serve as a vital partner to human rights courts.