

Still No Place to Go: Nomadic Peoples' Territorial Rights in Europe

I. INTRODUCTION

Nomadism is often viewed as something from the past, a style of life that is gradually disappearing with development and 'civilisation'. In this idea of so-called 'civilisation', nomadism represents a transition from the Neolithic hunter to the sedentary farmer. There is a very large body of literature, especially from the eighteenth century, regarding the virtues of the settled way of life; authors such as Vattel, Locke and Hegel have argued for what can be described as the 'agricultural argument'.¹ The agricultural argument that infused the development of international law was based on the idea that only agriculture could be regarded as a basis for a real land tenure system. Thus, nomadic peoples were not regarded as really occupying the land. Based on this idea, international law has been developed in a fashion that valorizes settled societies. Under international law, only states have a title to their territory as only states can exercise effective control over such territory.² Nomadic peoples do not have a right over their territory as they just 'wander' over it, and therefore legally, nomadic societies have not been considered to effectively control their territories.³ *A priori*, it could seem paradoxical to claim that nomadic peoples should have a right over their traditional territories as they do not have a territory, as such, but move through different territories. However, for nomadic peoples, the possibility to travel through their traditional territory is central to their survival and, thus, the right to access such territory is crucial. At the heart of the issue of territorial entitlement is the fundamental issue of whether nomadic peoples have the right to remain nomads or whether they should settle down. Legally, one of the central issues is the right of nomadic peoples to have access to halting sites. The question is

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1 T. Flanagan, "The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy", 22 *CJPS* (1989), 589-602.

2 See Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Ashgate, Aldershot, 2003).

3 On this issue see ICJ, *Western Sahara* (Request for Advisory Opinion), ICJ Report (1975), 12, (Advisory Opinion of October 16).

to appreciate whether in Europe such a right for nomadic people exists, and whether under international and European human rights norms there is a right to halting sites or temporary transient halting sites for nomadic peoples.

Nomadism has been present in Europe for centuries. The incursions of nomads into settled civilizations in Europe peaked with the Mongol incursions during the thirteenth, fourteenth and early fifteenth centuries. Once in Europe, these groups maintained their nomadic way of life and have continued to travel throughout different regions of Europe. Even though the origins of nomadism in Europe are often associated with the arrival of Roma/Gypsies from the East, it should be highlighted that present nomadic groups in Europe are not only the descendants of peoples that came to Europe in the fourteenth and fifteenth century – for example, the Irish Travellers are indigenous to the island of Ireland. There are several nomadic or semi-nomadic⁴ communities in Europe, such as the Nenets in Russia, the Sami in the Scandinavian countries, the Roma/Gypsies⁵ and the Travellers in Ireland. However, in most European states, there has been a large movement towards a policy of forced settlement of nomadic groups. Nomadism is certainly on the decline, but some groups in Europe want to maintain their way of life as nomadic or semi-nomadic peoples.⁶ For these disparate nomadic groups that still exist in Europe, one of the central issues is whether nomadic peoples have the right to move through territories as they traditionally have done.⁷

The purpose of the article is to focus on the role of European institutions working on human rights related issues – such as the OSCE, the Council of Europe and the EU – in the protection of nomadic peoples' way of life.⁸ In particular, the Council of Europe (CoE) has adopted several resolutions and recommendations specifically concerning nomadic communities in Europe.⁹ This article will focus on the situation of the Roma and the Travellers who are facing threats to their nomadic lifestyle, which often leads

4 Semi-nomadic peoples are peoples who move seasonally but have permanent homes for part of the year, see for example, Recommendation Rec (2004)14 of the Committee of Ministers, which refers to semi-nomadic peoples as peoples who set up their winter residence for a maximum period of six months and then move on.

5 The term 'Roma' refers to the peoples that are often designated as 'Gypsy' or 'Sinti'. For an informed discussion on this issue, see Jean-Pierre Liegeois and Nicolae Gheorghe, "Roma/Gypsies: A European Minority", MRG International Report 95/4 (1995).

6 For example, as regards Roma/Gypsy communities, it is estimated that 20% to 40% of the Roma population in Europe retain a nomadic or semi-nomadic lifestyle, see *ibid.*, at 16.

7 Note in this regard that this article is dealing with peoples that have been traditionally regarded as nomadic peoples, thus not with the later phenomenon of new traveller communities.

8 Regarding the terminology used in this article, it is important to point out that references to Europe are in the wide understanding of the concept of all the countries that are part of the Council of Europe.

9 See Assembly Recommendation 563 (1969) on the situation of Gypsies and other travellers in Europe; Committee of Ministers Resolution (75)13 on the social situation of nomads in Europe and Recommendation No. R (83)1 on stateless nomads and nomads of undetermined nationality; Standing Conference of Local and Regional Authorities of Europe Resolution 125 (1981) on the role and responsibility of local and regional authorities in regard to the cultural and social problems of populations of nomadic origin.

to violent confrontation with the settled communities of the different European countries.¹⁰ The Roma/Gypsies, especially, have been the victims of discrimination in several European countries. In 1993, the Parliamentary Assembly of the Council of Europe adopted a report highlighting that as “one of the very few non-territorial minorities in Europe Gypsies need special protection”.¹¹

This article will then explore how European institutions working on issues related to minority rights are trying to establish a balance between the need to provide appropriate accommodation for nomadic peoples – while preserving their right to remain on the move – with the need for mechanisms to be in place to address illegal encampments. It will then be examined how these institutions have developed an approach based on a right to halting facilities under which states have a duty to ensure halting facilities for nomadic peoples.

A Recommendation of the Committee of Ministers of the Council of Europe on the movement and encampment of Travellers in Europe highlights the dual legal approach to the right for nomadic peoples to remain nomads. The Committee's Recommendation mentions the right to freedom of movement and the right to preserve and develop specific cultural identities as a basis for a right for Roma/Gypsies who wish “to continue to lead a traditional nomadic or semi-nomadic lifestyle”.¹² The article explores how European institutions have developed such a dual approach to the right of nomadic peoples to remain on the move. It argues that a territorial right for nomadic peoples has been developed, firstly, through references to cultural rights and, secondly, under the banner of freedom of movement. Thus, based on this assumption, the article will examine, first, the legal approach based on the right of nomadic peoples to enjoy their own way of life and, second, the interaction between freedom of movement and the right of nomadic peoples to remain nomads.

II. NOMADISM AS A WAY OF LIFE

Human rights law usually supports the rights of cultural minorities to exercise their own traditional lifestyle.¹³ Accordingly, the European institutions working on human rights have developed a cultural approach to the rights of nomadic peoples to perpetuate their traditional way of life. Such protection comes under the banner of cultural

10 See, for example, the case of the UK where some tabloid newspapers have incited people to “get rid of the gypsy invasion” or to “stamp on the camps”. See report of the events in *The Guardian*, “Gypsies: Out of Sites”, Saturday, 19 March 2005, 23.

11 Parliamentary Assembly, Recommendation 1203 (1993) on Gypsies in Europe, para. 9.

12 Recommendation Rec (2004)14, 1 December 2004.

13 See, for example, R. O'Keefe, “The ‘right to take part in cultural life’ under Article 15 of the ICESCR”, 47 *ICLQ* (1998), 904; see also P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002), 162-172 and 194-196; A. Eide, “Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes”, in G. Alfredsson and M. Stavropoulou (eds.), *Justice Pending: Indigenous Peoples and Other Good Causes, Essays in Honour of Erica-Irene A. Daes* (Martinus Nijhoff Publishers, Raoul Wallenberg Institute, The Hague, Vol. 10, 2002), 85.

rights, under which nomadic peoples could claim their right to nomadism as part of their cultural identity. Cultural rights provide strong support for the idea that nomadic peoples have a right to remain nomadic. Yet, protection of nomadic peoples' way of life is not limited to cultural rights – the European Court of Human Rights (ECtHR) has developed a jurisprudence on nomadic peoples' right to maintain their own way of life under the right to private and family life. In this case, a central issue is the balancing of such a right with other societal interests, an exercise in which the ECtHR has become notorious.¹⁴ The following section will explore the cultural rights approach to the protection of nomadism and, subsequently, the approach developed by the ECtHR based on the exercise of the right to private and family life.

A. *Nomadism as a Cultural Right for Minorities*

As highlighted earlier, under international human rights law, minorities have a right to cultural identity. This flows from different instruments, one of the central provisions being Article 27 of the ICCPR. The Human Rights Committee, in its General Comment on Article 27, has pointed out that with “regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life”.¹⁵ This reference to a particular way of life is significant in the case of nomadic peoples as nomadism is often perceived as “a particular way of life”. In the European context, the protection of minority groups' specific way of life must be achieved in a positive manner, in order to protect nomadic peoples' lifestyle. Norms regarding minority rights will usually apply to the situation of most nomadic groups in Europe.¹⁶ In its Recommendation 1203 (1993), the Parliamentary Assembly on Gypsies in Europe stated: “the provisions of any additional protocol or convention relating to minorities should apply to non-territorial minorities”.¹⁷

The right of minorities to enjoy their traditional way of life finds some echoes in different texts coming from some of the European institutions. In 1998, the European Commission against Racism and Intolerance adopted the General Policy Recommendation: “Combating racism and intolerance against Roma/Gypsies”. In this Recommendation, the Commission urged states “to ensure that the questions relating to ‘travelling’ within a country, in particular regulations concerning residence and town planning, are solved in a way which does not hinder the way of life of the persons concerned”.¹⁸ In Recommendation No. R (2000) 4 on the education of the Roma/Gypsy

14 Michael Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights”, 48(3) *ICLQ* (1999), 638.

15 Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5.

16 See Kristin Henrard, “The Building Blocks for an Emerging Regime for the Protection of a Controversial Case of Cultural Diversity: the Roma”, 10 *IJMG* (2004), 183-201.

17 Recommendation 1203 (1993) (1) of the Parliamentary Assembly on Gypsies in Europe (44th Ordinary Session – 4th Part – 1-5 February 1993).

18 European Commission against Racism and Intolerance adopted General Policy Recommendation No. 3 of 1998 on Combating racism and intolerance against Roma/Gypsies, CRI (98) 29 rev.

children in Europe, the Committee of Ministers of the Council of Europe called for flexible educational structures that take into account the itinerant lifestyle of certain Roma groups.¹⁹

The OSCE High Commissioner on National Minorities (HCNM) has also focused on the situation of Roma/Gypsies in Europe and has adopted an approach based on the protection of nomadic peoples' way of life. The 2000 High Commissioner's Report on the situation of Roma and Sinti in the OSCE Area stated:

It must be emphasised that whether an individual is nomadic, semi-nomadic or sedentary should, like other aspects of his or her ethnic identity, be solely a matter of personal choice. The policies of some OSCE participating States have at times breached this principle, either by making a determination of a group's fundamental lifestyle that is inconsistent with its members' choices or by making it virtually impossible for individuals to pursue the lifestyle that expresses their group identity.²⁰

The report recommended that for those Roma who "maintained a nomadic or semi-nomadic lifestyle the availability of legal and suitable parking sites was a paramount need and precondition to the maintenance of their group identity".²¹ This illustrates how an approach based on the protection of minorities' way of life can result in a practical recommendation aiming at the protection of nomadic or semi-nomadic peoples' access to halting sites that would allow the perpetuation of their nomadic lifestyle.

The Framework Convention for the Protection of National Minorities (hereinafter Framework Convention) specifically refers to cultural rights for minorities. Under Article 5 of the Framework Convention:

The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.²²

The Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) has included the protection of nomadism under the protection of minority culture. For example, in its opinion on Ireland's report, the ACFC focused on the right of the Travellers to exercise nomadism as one of the essential elements of their culture and identity, thus protected under Article 5 of the Framework Convention.²³

19 Recommendation No. R (2000) 4 of the Committee of Ministers to Member States on the education of Roma/Gypsy children in Europe, 3 February 2000.

20 High Commissioner on National Minorities, "Report on the situation of Roma and Sinti in the OSCE Area", 10 March 2002, 102, at <http://www.osce.org/documents/hcnm/2000/03/241_en.pdf>.

21 *Ibid.*

22 Article 5 of the Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157.

23 Advisory Committee on the Framework Convention on National Minorities, Opinion on Ireland, ACFC/INF/OP/I(2004)003, para. 56.

Similarly, in its Opinion on the United Kingdom, the ACFC notes “with concern the lack of adequate stopping sites for Roma/Gypsies and Irish Travellers and the effect that this has on their ability to maintain and develop their culture and to preserve the essential elements of their identity, of which travelling is an important element”.²⁴ Therefore, the ACFC considers that providing sites for Roma and Travellers falls under the obligations of Article 5, i.e., as part of the right to maintain and develop their own culture.

The interrelationship between minority rights protection and the rights of nomadic peoples to maintain their specific itinerant lifestyle is thus inherent in the approach developed by the ACFC at the national level and can be seen as an indicator of a European approach towards nomadism. In this regard, the dialogue between Ireland and the ACFC is particularly enlightening as to the practical implications Article 5 of the Framework Convention will have on the right of nomadic groups to perpetuate their nomadic lifestyle.

Ireland, in its report to the ACFC, placed a significant emphasis on the situation of the Traveller community in the country.²⁵ In its report, Ireland recognized Travellers as an “indigenous minority”,²⁶ thus entitled to the protection offered by the Framework Convention. The report highlights that the Housing (Travellers Accommodation) Act 1998 states that travellers are “persons who traditionally pursued or have pursued a nomadic way of life”.²⁷ In its review of Ireland’s policy under Article 5, the ACFC affirmed that the government and the courts should bear “in mind that nomadism is one of the essential elements of the culture and identity of persons belonging to the Traveller community”.²⁸ As part of Ireland’s obligation under the Framework Convention, Ireland has pointed out that:

... the maintenance, preservation and development of Traveller culture is closely linked to the provision of suitable accommodation. This entails provision for a con-

24 Advisory Committee on the Framework Convention on National Minorities, Opinion on the United Kingdom, ACFC/INF/OP/I(2002)006, (30 November 2001), para. 40.

25 Section 2 of the Equal Status Act 2000 defines the Traveller community as: “the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland”. Housing (Travellers Accommodation) Act 1998, Section 29.

26 However, in its 2005 report to CERD, Ireland does not recognize travellers as an ethnic group. For a discussion on the impact of such classification, see Joint Committee on Foreign Affairs Sub-Committee, Thursday 4th December 2003; and CERD Concluding Observations on Ireland’s Report, UN Doc. CERD/C/IRL/CO/2, March 2005. See also David Keane, “International Law and the Ethnicity of Irish Travellers”, 2(1) *Washington and Lee Race and Ethnic Ancestry Law Journal* (Winter 2005).

27 Housing (Travellers Accommodation) Act 1998, Section 29.

28 *Ibid.*, para. 56.

tinuum of housing options ranging from service halting sites to integration into regular houses.²⁹

Thus, Ireland's policy is two-fold: providing halting sites (including transient sites) and providing accommodation. However, the accommodation policy has been criticized as being clearly aimed at the integration and settlement of Traveller communities. Criticism of Ireland's policy also came from the clear lack of appropriate halting sites coupled with the fact that an unauthorized dwelling is classified as a criminal offence. In its opinion on Ireland's report, the ACFC expressed its concern over "the criminal law provisions linked to unauthorised dwellings and the impact this has on Travellers seeking to practice their nomadic way of life despite a lack of suitable halting sites".³⁰ Also, under Article 5, the ACFC raised the danger of ghettoization of Traveller communities under the current governmental policy. The ACFC highlighted that, in providing halting sites and housing, the government should ensure that no isolation from the main community takes place. Thus, under Article 5 of the Framework Convention, states have some obligations to protect the right for nomadic communities to maintain their nomadic way of life. As Ireland's report to the ACFC illustrates, this right entails some very practical consequences, one being the establishment of halting sites for nomadic groups.

The ACFC has not limited its approach to the protection of nomadic cultures to Article 5, as it has also pointed out that cultural aspects of the Traveller communities are to be protected under other parts of the Framework Convention. A crucial aspect of Traveller communities and their nomadic lifestyle was in relation to their work. The ACFC stated in regard to Ireland's report: "Travellers have also seen their traditional areas of economic livelihood (scrap metal, horse trading, market trading, etc.) hit by changing economic and social climates". On this issue, the ACFC pointed out that "certain aspects of changes in legislation (such as in the Control of Horses Act (1996) and the Casual Trading Act (1995)) unduly hinder their ability to earn a living". The ACFC invited the Government to "examine how to promote further both traditional and new economic activities of Travellers".³¹ Overall, the ACFC's report on the situation of the Travellers in Ireland underlines the fundamental interaction between the cultural rights of minorities and the protection and promotion of nomadism. Nomadic peoples have a right to maintain their nomadic lifestyle as part of a minority right to cultural identity but also as part of states' obligations to promote cultural diversity. The report of the ACFC illustrates how states have to play a very active role in such cultural protection as they "shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect".³² As the case of the Irish Travellers shows, such an obligation has far reaching consequences for states – to promote activi-

29 Report Submitted by Ireland Pursuant to Article 25, Para. 1 of the Framework Convention for the Protection of National Minorities, ACFC/SR(2001)006.

30 Advisory Committee on the Framework Convention on National Minorities, Opinion on Ireland, ACFC/INF/OP/I(2004)003, para. 55.

31 *Ibid.*, para. 35.

32 Article 6 of the Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157.

ties that allow nomadic peoples to maintain a nomadic way of life. Thus, it could be argued that under the protection of cultural rights for minorities in Europe, there is a right for nomadic communities to exercise and maintain a nomadic lifestyle.

B. Nomadism as a Right to Private and Family Life

Under the European Convention of Human Rights (ECHR), there is no specific article protecting the cultural rights of minorities. Nonetheless, there is a large body of jurisprudence relating to nomadic peoples' right to exercise their nomadic way of life stemming from the ECtHR under Article 8 of the ECHR. One of the first developments came from the now extinct European Commission on Human Rights in the 1983 case of *G. and E. v. Norway* concerning a Sami community in Norway. The case highlighted that, although the ECHR does not provide specific protection for members of a minority group, Article 8 would afford protection for a member of a minority group's specific way of life.³³ Such an approach has also been adopted by the ECtHR. For example, the ECtHR has dealt with the issue of cultural way of life in the case of *The Gypsy Council and Others v. the United Kingdom*.³⁴ In this case, the applicant claimed that the decision by the British authorities to prohibit an assembly during a horse fair was especially affecting the traditional lifestyle of the concerned communities. The horse fair was an annual event primarily attended by Gypsies and Travellers and, as the applicants highlighted, the fair had taken place for at least 50 years, but probably as many as 300 years. The applicants also pointed out that such an assembly was "a significant cultural and social event in the life of the Romany Gypsy community in the United Kingdom".³⁵ The authorities had prohibited any "trespassory assembly" within a 5 mile radius around the traditional place for the fair. Such a prohibition was on the basis of public order related matters (illegal parking of cars, anti-social behaviour, etc.). The applicants argued that the prohibition order was violating their rights under Articles 8, 11, and 14 of the ECHR. The ECtHR found the case to be inadmissible based on the idea that a fair balance had been struck between the interest of the concerned individuals and the interest of society generally.³⁶ As this case underlines, one of the central issues for the judges of the ECtHR is to balance, on the one hand, the right of nomadic individuals to have their private and family life respected (including the right to preserve their nomadic way of life) and, on the other, the competitive use of lands. One of the specific features of the ECtHR jurisprudence is the reference to a state's margin of appreciation. This doctrine has been crucial in balancing the rights of nomadic peoples with states' obligations under the ECHR.

33 ECommHR, Application No. 9278/81, *G. and E. v. Norway*, decision of 3 October 1983, 35 DR 30, 35-36.

34 ECtHR, Application No. 66336/01, *The Gypsy Council and Others v. the United Kingdom*, 14 May 2002.

35 *Ibid.*

36 However, the Court did not consider the applicants' claims under Article 8. For an analysis of the case, see Alexander Morawa, "The European Court of Human Rights and Minority Rights: The 'Special Consideration' Standard In Light of *Gypsy Council*", 10 *IJMGR* (2004), 97-109.

During the mid-1990s, the ECtHR received several cases from Gypsies based in the United Kingdom who were complaining against restrictions being placed on their nomadic lifestyle by planning permission. In these cases, the ECtHR looked at the strenuous issue of competitive use of land between nomadic communities and settled communities. One of the main issues was to appreciate whether government or local authorities could refuse planning permission to Gypsies based on concerns that lands were to be used for other purposes such as landscape conservation, green belts, or any other development.

In the case of *Buckley v. the United Kingdom*, the ECtHR received its first case from a member of a Gypsy community.³⁷ The applicant had been prohibited from living in a caravan on a piece of land that she had previously bought. The denial from the authorities was notably based on a 'land-use factor'. The concerned land was protected by a structure plan, the aim of which was to protect the countryside from all but essential development and, thus, the occupation of the site by a Gypsy camp would "detract from the rural and open quality of the landscape".³⁸ National courts have previously admitted that a "change in use of land for the stationing of caravans can constitute a development".³⁹ The defendant also argued that the concentration of Gypsy caravan sites in the concerned area had reached "the desirable maximum". Mrs. Buckley alleged that, by preventing her from living with her family in caravans on her own land, the state had violated Article 8 of the ECHR. The applicant claimed that the national legislation discriminated against Gypsies by preventing her from following her traditional lifestyle as a Gypsy. Previously, the ECommHR has pointed out that "since the traditional Gypsy lifestyle involved living in caravans and travelling, the applicant's 'private life' and 'family life' were also concerned".⁴⁰

The Commission stated that forcing Gypsies to live in a designated area is equivalent to placing them or assigning them to a specific territory. The ECtHR acknowledged that the traditional lifestyle of minorities falls within the ambit of Article 8. The Court noted that the concerned land should be regarded as her "home" only on the basis that the applicant had demonstrated that she has lived on this land for a number of years. It is worth highlighting that the Court emphasized that this is a crucial requirement, thus one can wonder what would be the Court's view of nomadic Gypsies with no fixed basis. With regard to the potential violation of Article 8, based on the state's margin of appreciation, the Court found that the interference was legitimate based on "public safety", the economic wellbeing of the country, the protection of health and the protection of the rights of others.⁴¹ However, it is worth paying attention to the dissenting opinion of three of the judges, who all pointed out that the Court did not pay enough attention to the specific situation faced by Gypsy communities and that the

37 ECtHR, *Buckley v. the United Kingdom*, Judgment of 25 September 1996, Reports 1996-IV, 1271, 1276.

38 *Ibid.*, para. 14 and para. 16.

39 *Ibid.*, at para. 29.

40 *Ibid.*, para. 53.

41 *Ibid.*, para. 84.

Court should have followed the Commission's reasoning.⁴² Judges Repik, Lohmus and Pettiti highlighted the fact that Gypsy communities deserve special measures, particularly in relation to their right to travel and access to halting facilities, and that the Court had missed out on its first opportunity to address the discrimination faced by Gypsy communities throughout Europe.⁴³

The situation was particularly regrettable as the situation of Gypsy communities in the United Kingdom was deteriorating. As the HCNM pointed out in his 2000 report:

Under current law, Gypsies have three options for lawful camping: parking on public caravan sites – which the Government acknowledges to be insufficient; parking on occupied land with the consent of the occupier; and parking on property owned by the campers themselves. The British Government has issued guidance to local authorities aimed at encouraging the last approach. In practice, however, and notwithstanding official recognition of their special situation and needs, many Gypsies have encountered formidable obstacles to obtaining the requisite permission to park their caravans on their own property.⁴⁴

The ECtHR had the occasion to deal with the issue of Gypsy rights under Article 8 of the ECHR as, in January 2001, the Court took four different decisions that all reached the same conclusion: that Article 8 does protect the traditional way of life of Gypsies but that in all these cases the government had established a right balance between national interest and Gypsy rights.⁴⁵ In the case of *Chapman v. the United Kingdom*, the applicant also argued that there had been a violation of Article 8 based on the refusal of planning permission to allow her to live in her caravan on her own land.⁴⁶ The applicant and her family highlighted the fact that she had followed an itinerant lifestyle for many years but that, due to family health considerations and education of her children, the applicant took the step of buying land on which to station her caravans with security.

42 The Commission was asked to deal with a similar issue in the case of *Carol and Steven Smith v. the United Kingdom*. In this case the applicants complained that the government, by refusing to grant them planning permission to occupy their own land with their caravan, hindered them from pursuing their traditional way of life as gypsies. However, in light of the Court's judgment in the case of *Buckley v. the United Kingdom*, the applicants agreed to their case being struck out. See ECommHR, Application No. 22902/93, *Carol and Steven Smith v. the United Kingdom*, 21 January 1997.

43 See Partly Dissenting Opinion of Judge Repik, Partly Dissenting Opinion of Judge Lohmus and Dissenting Opinion of Judge Pettiti. See also ECtHR, Application No. 26662/95, *Varey v. the United Kingdom*, 21 December 2000.

44 High Commissioner on National Minorities, "Report on the situation of Roma and Sinti in the OSCE Area", 10 March 2002, 116, at <http://www.osce.org/documents/hcnm/2000/03/241_en.pdf>.

45 See ECtHR, Application No. 25154/94, *Jane Smith v. the United Kingdom*, 18 January 2001; Application No. 25289/94, *Lee v. the United Kingdom*, 18 January 2001; Application No. 24876/94, *Coster v. the United Kingdom*, 18 January 2001; and Application No. 24882/94, *Beard v. the United Kingdom*, 18 January 2001.

46 ECtHR, Application No. 27238/95, *Chapman v. The United Kingdom*, 18 January 2001.

However, planning permission for this was refused and they were required to leave. As in the previous case, the Court admitted that this constituted a violation of her right under Article 8.1 but the Court appreciated that this was “in accordance with the law”, pursuing a legitimate aim or aims and as being “necessary in a democratic society” in pursuit of that aim or aims. Thus, the Court found that the restriction to Article 8 of the ECHR was proportionate to the legitimate aim of preservation of the environment (the applicant’s land was located on a green belt). The Court followed its own jurisprudence and found that the restriction was legitimate. The Court stated that:

This would be tantamount to imposing on the United Kingdom, as on all the other Contracting States, an obligation by virtue of Article 8 to make available to the Gypsy community an adequate number of suitably equipped sites. The Court is not convinced, despite the undoubted evolution that has taken place in both international law, as evidenced by the framework convention, and domestic legislations in regard to protection of minorities, that Article 8 can be interpreted as implying for States such a far-reaching positive obligation of general social policy.⁴⁷

However, seven of the judges expressed a different opinion in their joint dissenting opinion, stating:

We would recall however that, although the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, there may in addition be positive obligations inherent in an effective ‘respect for private and family life and home’. The boundaries between the State’s positive and negative obligations do not lend themselves to precise definition and, indeed, in particular cases such as the present, may overlap.⁴⁸

Thus, based on Article 8, the judges stated that inaction from the government in this case failed to respect the balance between the interests of the individual Gypsy and the community. In their dissenting opinion, the judges highlighted that the applicant’s lifestyle gave a wider scope to Article 8 as her situation as a nomadic Gypsy invited special consideration.⁴⁹ In the more recent *Connors* decision from 2004, the Court refined its approach. In this case, which dealt with an eviction from a camp, the ECtHR stated:

The Court would not under-estimate the difficulties of the task facing the authorities in finding workable accommodation solutions for the gypsy and traveller population and accepts that this is an area in which national authorities enjoy a margin of appreciation in adopting and pursuing their social and housing policies. The complexity of the situation has, if anything, been enhanced by the apparent shift in habit in the gypsy population which remains nomadic in spirit if not in actual or constant practice. The authorities are being required to give special consideration to a sector of the

47 *Ibid.*, para. 98.

48 Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Stráznická, Lorenzen, Fischbach and Casadevall, *ibid.*, at para. 2.

49 On this issue, see Alexander Morawa, “The European Court of Human Rights ...”.

population which is no longer easy to define in terms of the nomadism which is the *raison d'être* of that special treatment.⁵⁰

Thus, as regards specific treatment or 'special consideration', the Court highlighted that national institutions could make a distinction between Gypsies who are still leading a nomadic lifestyle and those who have settled. However, in this case that once again involved the British authorities, the ECtHR pointed out that the legislation "places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle". Despite this recent case in which the government was found to be in violation of Article 8 (for an eviction), the fact that the Court took four decisions all going in the same direction shows that the Court was willing to establish a firm jurisprudence that leaves more space to consideration of national interest than the right of individual Gypsies. However, on the other hand, the fact that so many cases were brought to the Court proves the need for human rights protection of Gypsies' way of life in the UK and elsewhere in Europe. Overall, in cases relating to nomadic peoples, the ECommHR has had a more progressive approach whereas the Court continues to regard states as enjoying a wide margin of appreciation. This approach seems to say that the public/general requirement (i.e., in a democratic society) is that nomadism should be controlled for the benefit of the general population. One can regret such a position as the European Court, the eldest and one of the most recognized regional human rights institutions, could have established a legal precedent in terms of nomadic peoples' rights to follow their own way of life. Instead, the Court has used the smokescreen of the national interest to refuse to enter fully the debate on the right to follow a nomadic way of life in a society where the majority is settled. This raises questions regarding the adequacy of the European Convention in protecting the rights of Roma/Gypsies to follow a particular way of life. Even though the Convention was drafted in 1950, the Court has shown that the text was alive and able to integrate issues that were not in existence at the time of its drafting. One of the best illustrations of such strength could be found in the ECtHR approach to environmental protection.⁵¹ Although the Court developed a broad approach to Article 8 in cases relating to environmental protection and adopted a large understanding of the concept of family and private life, the Court has missed this opportunity in cases involving nomadic peoples. As stated above, while there are no specific provisions dealing with the protection of minority groups' way of life under the Convention, the Court has been able to ensure such protection through its dynamic interpretation of the text. However, the analysis of the very narrow interpretation of Article 8 by the Court when dealing with nomadic peoples shows that there is a lack of adequate protection for nomadic groups within the European Convention. In comparison, the approach developed under the Framework Convention seems far more adequate. In this respect, it is hoped that the ECtHR will develop a more forward looking jurisprudence as regards the rights for nomadic peoples to maintain their traditional itinerant lifestyle.

50 ECtHR, Application No. 66746/01, *Connors v. the United Kingdom*, 27 May 2004, para. 93.

51 See Desgagné, "Integrating Environmental Values into the European Convention on Human Rights", 89(2) *AJIL* 263 (1995).

III. NOMADISM AS A RIGHT TO FREEDOM OF MOVEMENT

Nomadism is about moving freely, thus it seems logical that a central way to protect an eventual right to nomadism would come under the banner of a right to freedom of movement. In the European context, two issues relating to freedom of movement are relevant when exploring the right for nomadic peoples to freely move across Europe (either within the boundaries of one state or across the boundaries of different states). First, a central issue of concern for nomadic people is the discriminatory impact of migration policies, as most European countries' migration policies put some restrictions on their freedom of movement. The second interesting development within Europe, as regards freedom of movement for nomadic peoples, is the gradual evolution towards the recognition of a right to encampment for nomadic peoples.

A. Limiting Nomadism under Migration Policies

Recent policies at the European level regarding migration have greatly affected the freedom of movement of nomadic peoples within European countries. As Liegeois and Gheorghe highlight:

It should be borne in mind that nomadism, sometimes in the form of ongoing migration, is a fundamental factor in the lifestyle of a significant number of Roma/Gypsy communities.⁵²

According to the authors, there are two forms of nomadism in this regard: a 'structural nomadism' (due to certain forms of social and economic organization) and a 'reactive nomadism' that arises from outside factors such as eviction, regulations, economic opportunities, etc. They point out that these two sets of factors combine to determine the actual movement of nomadic peoples.⁵³ Particularly with the enlargement of the European Union, there has been a phenomenon of fear of a 'Roma/Gypsy invasion from the East'. In reaction to this – and despite the fact that Roma are often fleeing countries of origin, where they are the victims of particularly harsh and restrictive anti-migration policies,⁵⁴ in order to escape discrimination and persecution – several countries of the EU have put in place specific restriction laws and policies as regards the migration of Roma communities from Central and Eastern Europe.⁵⁵ The European Roma Rights Center (ERRC) has highlighted that Roma are facing discriminatory practices even tougher than those in the countries they are often escaping from, in which cases of serious harm by public officials or members of racist groups have been reported along with

52 Liegeois and Gheorghe, "Roma/Gypsies ...", 16.

53 *Ibid.*, 17.

54 See European Roma Rights Center, "Protecting Romani Refugees around Europe: A Position Paper by the European Roma Rights Center", 19 October 2000, at <<http://www.errc.org/cikk.php?cikk=382>>.

55 On this issue, see European Roma Rights Center, "Fortress Europe", 2 *Roma Rights Quarterly* (2002).

extreme levels of discrimination.⁵⁶ For example, the ERRC reported that in the case of the Roma, the British authorities appeared to have additionally demanded from carriers the provision of information on race. As the report noted: “according to reports in the domestic and international media, in October 1999, employees of Czech Airlines stated that British immigration officials had requested information on the ethnicity of Czech citizens travelling to Britain on Czech Airlines flights and they had been providing it, marking lists with ‘G’ for ‘Gypsy’, ‘for years’”.⁵⁷ Such discriminatory practices were also extended to Roma communities fleeing Kosovo when they were facing ethnic cleansing. The UN High Commissioner for Refugees (UNHCR) has been advocating “the recognition of Kosovo Roma as refugees or persons in need of international protection”.⁵⁸ Despite such calls, many countries have put in place specifically restrictive migration policies for Roma. For example, Cahn notes that Germany has put in place a policy of collective expulsion of Roma who came from the former Yugoslavia, as he points out that “every five Yugoslav citizens slated for expulsion from Germany are Romani, despite the fact that Roma comprise not more than 8% of the general population of Serbia and Montenegro”.⁵⁹ This phenomenon is a growing trend in all the European countries writes Cahn, and he concludes that this is mostly based on the fact that “Roma are widely perceived to be ‘nomads’, a mysterious wandering folk with no links or loyalties other than to kin and clan, and with a propensity to crime and fraud”.⁶⁰ In 2004, in its Concluding Observations on Germany’s report, the UNHRC expressed “its concern at reports that Roma are disproportionately affected by deportation and other measures to return foreigners to their countries of origin”.⁶¹ The Committee reminded Germany that the “State party should guarantee the principle of non-discrimination in its practice relating to deportation and return of foreigners to their countries of origin”.⁶² This practice of collective expulsion is not limited to Germany and several countries of the EU have embarked on such policies when dealing with Roma. It should be noted that Article 4 of Protocol No. 4 to the ECHR states: “Collective expulsion of aliens is prohibited”.⁶³ This article has been tested in front of the ECtHR in a case in which the applicants, a family of Slovak nationals of Roma origin, alleged that the Belgian authorities had violated Article 4 of Protocol 4.⁶⁴ The applicants argued “that the orders

56 European Roma Rights Center, “Protecting Romani Refugees ...”.

57 *Ibid.*

58 See United Nations High Commissioner for Refugees, “UNHCR Statement to the 57th Session of the Committee on the Elimination of Racial Discrimination: Thematic Discussion on Roma”, 15 August 2000.

59 Claude Cahn, “Racial Preference Racial Exclusion: Administrative Efforts to Enforce Separation of Roma and Non-Roma in Europe through Migration Controls”, 5 *EJML* (2004), 479-490, at 481.

60 *Ibid.*, 482.

61 Concluding Observations of the Human Rights Committee: Germany. 4 May 2004. UN Doc. CCPR/CO/80/DEU, para. 21.

62 *Ibid.*

63 Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 46, entered into force 2 May 1968.

64 ECtHR, Application No. 51564/99, *Čonka v. Belgium*, 5 February 2002.

for their expulsion reflected the authorities' determination to deal with the situation of a group of individuals, in this instance Roma from Slovakia, collectively".⁶⁵ In this case, the ECtHR found that Belgium had violated Article 4 of Protocol 4. Overall, nomadic communities in Europe are increasingly facing some restriction of movement between the different countries of the CoE, and as highlighted above, such restrictions are often in violation of the principle of non-discrimination.

The restriction of movement of nomadic peoples is not limited to movement across borders as nomadic peoples are often faced with restrictions of movement within the borders of the country in which they live. Several countries have imposed restrictions on the movement of nomads within their own territories. Even though these communities are often citizens of the state in which they reside, they are required to produce travelling documents. For example, in France, different laws targeting travelling communities (*gens du voyage*) impose an obligation for any nomadic family to attach itself to a specific municipality (*commune de rattachement*).⁶⁶ In practice, such an obligation means that nomadic groups would have to settle down, as without such specific attachment to a municipality the authorities would not issue a title allowing circulation within the national territory.⁶⁷ Such law is clearly a way of forcing nomadic groups to settle down and to control nomadism. This is part of a policy of assimilation, which is based on the idea that nomadic peoples have to settle down.⁶⁸ European institutions have started to express their concern over such internal restrictions on the freedom of movement of nomadic groups. Paragraph 14 of Recommendation (2004)14 of the Committee of Ministers held that member states should:

... in the case of circulating on the national territory, refrain from requiring of national Travellers documents other than ordinary-law identity papers and/or documents authorising an itinerant economic activity (hawker's professional card) in countries in which such papers are required.⁶⁹

The Committee also invites states to allow nomadic peoples to have their official place of residence at the address of an individual or association.⁷⁰ Another related issue comes from the fact that in several European countries it remains problematic for nomadic peoples to get access to full citizenship as national laws rely on permanent residency. In its Concluding Observations on the Russian Federation's report, the CESCR expressed its concerns about reports that highlighted the fact that Roma "face particular difficulties in obtaining personal identification documents, including registration of res-

65 *Ibid.*, para. 56.

66 See *Les gens du voyage* (Paris : Editions des journaux officiels, 2003).

67 Violaine Carrère and Christophe Daadouch, "Les gens du voyage en mobilité surveillée", 46 *Plein Droit* (Septembre 2000).

68 Violaine Carrère, "Des papiers pour circuler, des papiers pour stationer ...", 35 *Plein Droit* (Septembre 1997).

69 Recommendation Rec (2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe, para. 14.

70 *Ibid.*, para. 16.

idence”.⁷¹ Several countries in Europe have a similar legislation that recognizes the rights of nomadic peoples only if they settle down. Thus, as regards the interaction between freedom of movement and nomadism, in general, nomadic peoples are facing a double burden on the exercise of their right to freedom of movement. First, externally through the specific restriction on movement across different countries and, second, internally as some states impose internal restrictions on nomadic peoples’ right to move within their own territories. As regards their right to remain on the move, for nomadic peoples in Europe the issue is often that they have no place to go. In all European countries, the countryside and the outskirts of the cities have signs that emphasize that nomadic peoples are not welcome to stay. As a result, nomadic peoples are often confined to illegal encampments, which in many countries is classified as a criminal offence. Municipalities across Europe are relying on national legislation on urbanization to evict Roma or Travellers and to restrict nomadism.⁷² In response to this, one of the recent legal developments comes through the recognition of the right to encampment for nomadic peoples.

B. *Towards a Right to Encampment*

As highlighted above, one of the cornerstones of the European approach to the protection of nomadism is through the promotion of a state obligation to provide halting sites for nomadic communities. However, there is no right to halting sites as such under human rights law. So far, this article has argued that such rights flow from cultural rights, yet there is another facet to an eventual right to halting sites which is developing under housing rights. At first this could seem paradoxical as housing rights are synonymous with being sedentary and attached to one place and there is certainly a risk of pushing nomadic groups into a forcibly settled life by focusing on a narrow approach to housing rights. Yet recent practices of both European and international institutions demonstrate the emergence of a right to encampment as part of an enlarged right to housing for nomadic communities.

The Committee on the Elimination of Racial Discrimination (CERD) has paid specific attention to housing rights for Roma in its General Comment 27. Of particular relevance is the right of the Roma to keep their traditional nomadic lifestyle, and the Committee recommends that states “take measures for offering Roma nomadic groups or Travellers camping places for their caravans, with all necessary facilities”.⁷³ The Committee, in its Concluding Observations to the United Kingdom report, pointed out that the discrimination faced by Roma/Gypsies/Travellers was notably reflected

71 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation. 12/12/2003. E/C.12/1/Add.94. (Concluding Observations/Comments), para. 12.

72 For an overview of national situations, see John O’Connell, “Roma/Gypsies/Travellers of Europe: An Examination of Discrimination and Racism”, Report for Conference in Leuven, Belgium, 17-19 January 1998.

73 CERD, General Recommendation XXVII, ‘Discrimination against Roma’, 57th Session, 16 August 2000.

by “poor housing conditions” and the “lack of available camping sites”.⁷⁴ In its 1996 Concluding Observations, the Committee noted:

Special concern is also expressed for the Irish Traveller community, whose situation affects their right to public health care and social services under article 5(e). It is noted that the policy of designating land for the use of Travellers has contributed to their lower standard of living and has curtailed their freedom of movement by limiting the places which they might inhabit.⁷⁵

In General Comment 27, the CERD also highlighted that states should develop and implement “policies to avoid segregation of Roma communities in housing”, and that states should “act against discriminatory practices by local authorities and private owners with regard to taking up residences and access housing, to act against local measures denying residence, and refrain from placing Roma in camps outside populated areas that are isolated and without access to health care and other facilities”. These concerns find some echoes in the Concluding Observations of the CESCR. In its report on Ireland it stated:

The Committee is concerned that: (a) many new households cannot secure adequate and affordable housing; and (b) some 1,200 families of the traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted.⁷⁶

At the European level, the debate as regards the right of housing for Roma/Travellers communities has been much more developed. The European institutions have started to formally label a right to encampment as part of an enlarged approach to housing rights. The Committee of Ministers adopted a Recommendation “on improving the housing conditions of Roma and Travellers in Europe”.⁷⁷ In the guiding principles, the Committee insisted that “Member states should affirm the right of people to pursue sedentary or nomadic lifestyles, according to their own free choice”. The Committee of Ministers invited states to establish a specific legal framework for housing rights for Roma/Travellers. As regards the situation of nomadic communities, the Committee of Ministers stated:

74 CERD, UN Doc. CERD/C/63/CO/11, 18 August 2003, para. 22.

75 CERD, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, 48th Session, 1996, para. 15.

76 CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, 5 June 2002, UN Doc. E/C.12/1/Add.77, para. 20. E/C.12/1/Add.77. (Concluding Observations/Comments).

77 Recommendation Rec (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe.

Member states should develop a comprehensive policy and legal framework related to housing, which is necessary for sedentary and itinerant people (in accordance with the geographical specificity) to exercise their right to adequate housing.⁷⁸

Finally, as regards the specificity of housing rights for nomadic Roma/Travellers, the Committee highlighted that:

Member states should ensure that an adequate number of transit/halting sites are provided to nomadic and semi-nomadic Roma. These transit/halting sites should be adequately equipped with necessary facilities including water, electricity, sanitation and refuse collection. **The physical borders or fences should not harm the dignity of the persons and their freedom of movement.**⁷⁹

Similarly, Recommendation 14 of the Committee of Ministers affirms that member states should “provide for the right of encampment in their domestic legal system in instruments that are legally binding, *treating it in the same way as the right to decent housing*”.⁸⁰ This last part of the sentence points towards an important aspect of housing rights that echoes comments from the CESCR. The CESCR in its General Comment on the right to adequate housing pointed out that:

In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.⁸¹

The Committee highlighted that it is the concept of adequacy, in particular, that should be taken into consideration. The Committee laid down seven criteria to ensure that the housing offered is adequate, and one of the criteria is particularly relevant in the case of nomadic peoples, namely: cultural adequacy of the housing available. In the words of the Committee, housing “must appropriately enable the expression of cultural identity and diversity of housing”.⁸² In this regard, and based on the preceding discussion on the interaction between cultural rights and a nomadic way of life, it could be argued that in the case of nomadic peoples the right to housing would refer to a right to a proper encampment site. From such a perspective it is submitted that there may be an emerging standard on a right to housing broadly framed to include the right to encampment for nomadic peoples. Based on the recommendations of the Council of Europe Committee of Ministers, such rights would include: the freedom of choice as regards the location of sites, access to proper and adequate sanitary conditions as well as easier access to

78 *Ibid.*, para. 10.

79 *Ibid.*, para. 33.

80 Recommendation Rec (2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe, para. 28 (emphasis added).

81 The right to adequate housing (Art.11 (1)): 13/12/91. CESCR General Comment 4. (General Comments).

82 *Ibid.* para. 8.

existing health infrastructures and services. However, it has to be borne in mind that as regards such an evolution towards a right to encampment, the developments are recent and limited, for the most articulated policy comes from the Committee of Ministers of the Council of Europe in its recommendations in 2004 and 2005. Thus, it remains to be seen whether an evolution towards a right to encampment for nomadic peoples could be further developed legally by national and international courts.

IV. CONCLUSION

In the introduction to this article, a central question put forward was to determine whether in Europe there exists a right for nomadic peoples to perpetuate their nomadic lifestyle. The answer is not straightforward as there is no right to nomadism as such but, as demonstrated, such a right flows mainly from the protection of minority cultural identity. Yet, the specificity of the European protection for nomadic peoples comes from the emergence of a right to encampment. In this area, Europe is leading the way as nomadic peoples in other regions have not been recognized as having such a right. However, despite the existence of an emerging body of law from the European institutions, national implementation remains scarce and, in most situations, nomadic peoples are still under the constraint of abandoning their nomadic lifestyle. In the majority of the European countries, there are fewer and fewer legal camping spaces available for nomads and the political answer to this problem is to criminalize nomadic communities that are using illegal sites. As the HCNM stated in his report: "The effect is to place nomadic Roma in the position of breaking the law – in some countries, committing a crime – if they park in an unauthorized location, even though authorized sites may not be available".⁸³ As the 2004 pre-election campaign in the UK has demonstrated, the issue of providing lands for nomadic peoples is still a burning issue that leads to high levels of intolerance between the different communities.⁸⁴ Nomadic peoples in Europe, – especially Roma/Gypsies and Traveller communities – are facing a high level of racism. A large part of such racism is embedded in the misunderstanding between nomadic and settled societies. This article has shown that, at the European level, there is an emerging body of law as regards the right of nomadic peoples to perpetuate their traditional way of life. It is certain that the implementation of the emerging body of European law will play a positive role in overcoming the general discrimination faced by nomadic groups. However, despite this slow legal evolution, the political will to put in practice such law is lacking in most of the countries of the CoE and most of the nomadic groups in Europe still have no place to go to.

83 HCNM, "Report and Recommendations on the Situation of Roma ...", 112.

84 See reports of the events in *The Guardian*, "Gypsies: Out ...", 23.