



Winter 1-1-2005

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Recommended Citation

David Keane, *INTERNATIONAL LAW AND THE ETHNICITY OF IRISH TRAVELLERS*, 11 Wash. & Lee Race & Ethnic Anc. L. J. 43 (2005).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol11/iss1/4>

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INTERNATIONAL LAW AND THE ETHNICITY OF IRISH TRAVELLERS

David Keane*

I. INTRODUCTION

Irish Travellers are a minority community indigenous to Ireland who have existed on the margins of Irish society for centuries. They share common cultural practices, such as nomadism, early marriage, and a tradition of self-employment. They have distinct rituals of death and cleansing, and their own language, Gammon or Cant. The Irish Traveller Movement estimates that there are 25,000 Travellers currently living in the Republic of Ireland.¹

In Paragraph three of its first National Report to the UN Committee on the Elimination of Racial Discrimination (CERD), submitted in March 2004, the Irish Government states that, "In regard to the scope of the Report it should be noted that Irish Travellers do not constitute a distinct group from the population as a whole in terms of race, colour, descent or national or ethnic origin."² While the statement applies to the five grounds specified in Article I(1) of the International Convention on the Elimination of Racial Discrimination (ICERD), i.e. race, colour, descent, or national or ethnic origin, it represents an express denial of the ethnicity of Travellers.³ In a

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¹ Travellers have always experienced a high level of exclusion and discrimination within Irish society. Census figures published in June 2003 point to unemployment at nearly 75% (compared to 9% amongst the general populace), while only one third have been educated beyond primary level (compared to 80% amongst the general populace). The life expectancy of Travellers is low—just over 3% of the Traveller population is over sixty-five years of age (compared to 11% of the general populace). Living conditions greatly reduce the life expectancy of Travellers, in particular inadequate provision of group housing schemes, and poorly serviced halting sites. See CENSUS 2002—VOLUME 8 IRISH TRAVELLER COMMUNITY (Ireland Government Publications Office 2004).

² Office of the High Commissioner of Human Rights, *International Convention on the Elimination of All Forms of Racial Discrimination Status of Ratification (2004)*, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Feb. 25, 2005). Ireland ratified the International Convention on the Elimination of Racial Discrimination (ICERD) in December 2000, having signed the Convention in 1968. Ireland's First National Report was submitted in March 2004, and is due to be examined by the U.N. Committee on the Elimination of Racial Discrimination (CERD) in March 2005. An earlier draft of the Report stated that "the Government is aware that members of the Traveller Community suffer discrimination on the basis of social origin." This statement was removed following protests from Travellers' representatives. See Kieron Wood, *Travellers and Ethnicity*, SUNDAY BUS. POST, April 11, 2004.

³ The statement in the ICERD Report follows on from earlier Reports to treaty-monitoring bodies: In Ireland's First Report to the Human Rights Committee, examined in 1993, the Government stated: "Some of the bodies representing Travellers claim that members of the community constitute a

letter to the President of the Irish Human Rights Commission, the Minister for Justice, Equity and Law Reform stated, "the Government is not prepared to include in the [CERD] Report a statement it does not believe in, namely that Travellers are ethnically different from the majority of the Irish people."⁴ Therefore, Paragraph three of Ireland's First Report would seem to place Irish Travellers outside the protection of the ICERD.

In the late twentieth century, the concept of 'ethnicity' took on a new importance in two contexts. In the first instance, the 1994 Rwandan genocide witnessed the re-emergence, after fifty years, of the 'crime of crimes.' The 1948 Convention on the Punishment and Prevention of Genocide defines genocide in the *chapeau* of its Article 2 as ". . . intent to destroy, in whole or in part, a national, ethnical, racial or religious group" The second is the political policy denoted by the term 'ethnic cleansing,' which entered the international lexicon in 1992 to describe the situation in the former Yugoslavia. It is beyond the scope of this paper to discuss either of these tragic events, as the purpose of this is to signal the renewed

distinct ethnic group . . . Travellers do not constitute a distinct group from the population as a whole in religion, language or race. They are not a Romany or Gypsy people." See *Initial Report of Ireland*, U.N. Human Rights Committee (U.N. CCPR), 48th Sess., 1236th mtg., U.N. Doc. CCPR/C/68/Add.3 (1993). Ireland's First Report to the Committee on the Rights of the Child, examined in 1996, held in its paragraph 609: "Some of the bodies representing Travellers claim that members of the Community constitute a distinct ethnic group. Members of the Travelling Community are protected by the Convention irrespective of membership of any ethnic group." See *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Addendum: Ireland*, U.N. Committee on the Rights of the Child (U.N. CRC), 17th Sess., 437th mtg., U.N. Doc. CRC/C/11/Add.12 (1996), available at <http://www.hri.ca/fortherecord1997/documentation/tbodies/crc-c-11-add12.htm> (last visited Feb. 27, 2005). Ireland's First Report to the Committee on Economic, Social and Cultural Rights, examined in 1997, stated in its paragraph 20 that "Travellers do not constitute a distinct group from the population as a whole with regard to religion, language or race . . . it does not appear to be of particular significance whether their rights relate to their alleged status as an ethnic group or to their social origin." See *Implementation of the International Covenant on Economic, Cultural and Social Rights, Initial Reports Submitted by State Parties under articles 16 and 17 of the Covenant, Addendum: Ireland*, U.N. Economics & Social Council (U.N. CESCR), 12th Sess., 16th mtg., U.N. Doc. E/1990/5/Add.34 (1999), available at <http://www.hri.ca/fortherecord1999/documentation/tbodies/e-1990-5-add34.htm> (last visited Feb. 27, 2005). Ireland's First Report under the European Framework Convention on National Minorities, examined in 2001, found: "Their culture and way of life, of which nomadism is an important factor, distinguishes Travellers from the sedentary (settled) population. While Travellers do not constitute a distinct group from the population as a whole in terms of religion, language or race, they are, however, an indigenous minority who have been part of Irish society for centuries. The Government fully accepts the right of Travellers to their cultural identity, regardless of whether they may be described as an ethnic group or national minority." *Report Submitted by Ireland Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities*, Council of Europe, ACFC/SR(2001)006 (2001), available at [http://www.coe.int/T/E/human_rights/minorities/2_FRAMEWORK_CONVENTION_\(MONITORING\)/2_Monitoring_mechanism/3_State_reports/1_First_cycle/1st_SR_Ireland.asp#TopOfPage](http://www.coe.int/T/E/human_rights/minorities/2_FRAMEWORK_CONVENTION_(MONITORING)/2_Monitoring_mechanism/3_State_reports/1_First_cycle/1st_SR_Ireland.asp#TopOfPage) (last visited Feb. 28, 2005).

⁴ Irish Human Rights Commission, *Travellers as an Ethnic Minority under the Convention on the Elimination of Racial Discrimination* 2 (2004) (discussion paper), at http://www.ihrac.ie/_fileupload/misc/Travellers_discussion_paper.doc (last visited Feb. 28, 2005).

importance of the concept of 'ethnicity' and the consequent need to identify ethnic groups. In addition, the 1948 Genocide Convention will be examined in order to ascertain more precisely the meaning and understanding within international law of the term 'ethnicity'.⁵ The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have also pronounced on the issue. The genocide scholarship points to two clear elements in the ethnicity of a group—self-identification and identification by others.⁶ The distillation of these elements will reveal that paragraph three of Ireland's First Report represents a denial of both and a violation of the international legal provisions that guard them. In relation to self-identification, the emphasis will be on the standards enumerated in the provisions of the ICERD and comments of the CERD. Identification by others will include domestic cases from the United Kingdom, which have examined the issue of the ethnicity of Irish Travellers in Great Britain and Northern Ireland and concluded that they represent an ethnic group, as well as a brief analysis of the relevant anthropological and sociological writings that assess the objective criteria for 'ethnicity' and examine whether Irish Travellers conform to that criteria.

One additional factor must be taken into account in an inquiry into the meaning of 'ethnicity'—the concept of 'race.' While 'race' is a fractious concept that has generated much literature and little consensus within the international legal sphere, a basic critique of 'race' was initiated in the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s 'Four Statements on the Race Question,' the first of which appeared in 1950, and has been consistently adhered to in the international treaties. The conflicting positions on 'race' that appear in the documents will be outlined. What emerges from the short analysis is that the interpretation of the concept of 'race' depends upon the discipline of the interpreter—'race' has a very different signification for an anthropologist than it does for a biologist. However, it is the common outlook adopted by all the contributors to the UNESCO documents that is of importance to the current study, an outlook that was followed by the drafters of the ICERD—that we are not

⁵ The International Law Commission, in its 1996 Code of Crimes against the Peace and Security of Mankind, changed the word 'ethnicity' in the Genocide Convention definition to 'ethnic' to reflect the modern English usage without affecting in any way the meaning of the provision. The Rome Statute of the International Criminal Court, which uses the 1948 Convention definition of genocide, reverted to the old term 'ethnicity' in its article 6 definition of genocide in order to reproduce exactly the 1948 definition, but uses the term 'ethnic' in every other instance. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 124 (Cambridge University Press 2000).

⁶ The formula is repeated in Irish domestic legislation. Equal Status Act, 2000 (No. 8) (Ir.), available at <http://www.gov.ie/bills28/acts/2000/a800.pdf> (last visited Feb. 28, 2005) (defining Irish Travellers in its Part 1, § 2 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." *Id.* at pt. 1, § 2 (emphasis added)).

compelled to restrict the concept of 'racism' or indeed 'racial discrimination' to the narrow biological formation of race; that 'race' is not so much a biological phenomenon as a social myth; and that the biological differences between groups should be disregarded from the standpoint of social acceptance and social action. The UNESCO statements also signal the emergence of the thesis that human groups distinguished by racial traits would be better referred to as 'ethnic groups' rather than 'races.' It is submitted that, given the events in Rwanda and the former Yugoslavia, 'ethnicity' within the current understanding of the term, rather than 'race,' has become the cardinal ground for discrimination and prejudice. Whether groups, in this case Irish Travellers are to be considered an ethnic group, and fundamentally, the process by which such a determination is to be made has become a question of great significance.

II. GENOCIDE AND THE MEANING OF 'ETHNICAL'

An ethnic group is one whose members share a common language or culture; or a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others).

*Prosecutor v. Kayishema*⁷

The terms in the 1948 Genocide Convention resist efforts at precise definition because the concepts of national, ethnical or racial groups as they appear in article two of the Convention are *a priori* imprecise.⁸ There is a degree of subjectivity in determining which groups are protected by the Convention. The offender to a certain extent can define the victim's status as a member of a protected group. Thus, the Nazis developed detailed criteria for deciding who was Jewish and who was not—as Sartre notes, "Le juif est un homme que les autres hommes tiennent pour juif: voilà la vérité simple d'où il faut partir . . . c'est l'antisémite qui fait le juif."⁹ The International Criminal Tribunal for Rwanda (ICTR) adopted this subjective approach in *Kayishema*, quoted above, when it found that an ethnic group could be "a

⁷ Prosecutor v. Kayishema, Judgement, Case No. ICTR-95-1, at ¶ 98 (ICTR May 21, 1999), available at <http://157.150.221.3/webdrawer/rec/8705/view/KAYISHEMA%20-%20RUZINDANA%20-%20JUDGEMENT.pdf> (an ethnic group is generally defined as a group whose members share a common language or culture).

⁸ SCHABAS, *supra* note 5, at 109.

⁹ "A Jew is a man who other men take to be a Jew: that simple truth is the starting point . . . the anti-Semite decides who is Jewish." Jean-Paul Sartre, 'Réflexions sur la question juive' 81-84 (Gallimard 1954), quoted in SCHABAS, *supra* note 5, at 110.

group identified as such by others, including perpetrators of the crimes."¹⁰ Similarly, in *Prosecutor v. Jelusic*¹¹, before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Tribunal noted:

to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community, which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.¹²

This approach is limited because the law cannot allow the crime to be defined by the perpetrator alone.¹³ Thus, the Genocide Convention requires that the group have an objective existence. In *Jelusic*, the Tribunal noted the following objective requirement: "The preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting 'stable' groups objectively defined and to which individuals belong regardless of their own desires."¹⁴

The concept of ethnicity involving the interplay of subjective and objective elements emerges from the genocide scholarship. The four terms, as they appear in the Genocide Convention, are social constructs and not scientific expressions. They overlap and help to define each other, operating like four corner posts that delineate an area within which a myriad of groups covered by the Convention find protection.¹⁵ Attempts by the Tribunals to provide an individual meaning for each term have been criticised.¹⁶ This is

¹⁰ *Prosecutor v. Kayishema*, Judgement, Case No. ICTR-95-1-T, at ¶ 95 (ICTR May 21, 1999), available at <http://157.150.221.3/webdrawer/rec/8705/view/KAYISHEMA%20-%20RIZINDANA%20-%20JUDGEMENT.pdf> (last visited Feb. 27, 2005).

¹¹ *Prosecutor v. Jelusic*, Judgement, Case No. IT-95-10-T (ICTY Dec. 14, 1999), available at <http://www.un.org/icty/jelusic/trialc1/judgement/jel-tj991214e.pdf> (last visited Feb. 27, 2005).

¹² *Id.* at ¶ 70.

¹³ SCHABAS, *supra* note 5, at 110.

¹⁴ *Jelusic*, Judgement, Case No. IT-95-10-T, at ¶ 69 (ICTY Dec. 14, 1999), available at <http://www.un.org/icty/jelusic/trialc1/judgement/jel-tj991214e.pdf> (last visited Feb. 27, 2005).

¹⁵ SCHABAS, *supra* note 5, at 111-12.

¹⁶ *Id.*

understandable in the context of genocide, for as Professor Schabas observes, there is a danger that a search for autonomous meanings for each of the four terms may weaken the overarching sense of the enumeration as a whole.¹⁷ We must therefore turn elsewhere for an objective assessment of the individual meaning of 'ethnicity.' Nevertheless, the genocide scholarship provides a key frame of reference for a discussion on the ethnicity of Irish Travellers—that any determination must take account of the subjective and objective criteria through the processes of self-identification and identification by others. Before beginning such a determination, however, we must inquire into the meaning of 'race.'

III. THE CONCEPT OF 'RACE'

The ICERD does not define 'race'—it only defines 'racial discrimination.' Racial discrimination is defined in article 1(1) as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Racial discrimination rather than race is thus the focus of the treaty. The five terms, i.e. race, colour, descent, national origin and ethnic origin, allow the Convention to apply to a wide range of groups, without recourse to controversial theories on the nature and meaning of 'race.' Discrimination based on caste, for example, has been taken to come under the rubric of descent-based discrimination.¹⁸ The approach taken in the ICERD, with its focus on racial discrimination rather than race, can be traced to four documents outlining broadly the views of anthropologists and biologists on the nature and meaning of 'race:' UNESCO's *Four Statements on the Race Question*.¹⁹ The four documents represent a progression in international

¹⁷ SCHABAS, *supra* note 5, at 112. Professor Schabas concludes that the concept of an ethnic group should be taken as being "largely synonymous with the other elements of the enumeration, encompassing elements of national, racial and religious groups within its scope." *Id.* at 127).

¹⁸ See U.N. Committee on the Elimination of Racial Discrimination (U.N. CERD), 61st Sess., 1531st mtg., U.N. Doc. CERD/C/SR.1531 (2002), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.SR.1531.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.SR.1531.En?Opendocument) (last visited Feb. 27, 2005).

¹⁹ United Nations Educational, Scientific & Cultural Organization (UNESCO), *Four Statements on the Race Question*, Com.69/II.27/A (Paris 1969), available at <http://www.refugeelawreader.org/index.d2?target=getpdf&id=137> (last visited Feb. 28, 2005). The four statements were prepared by groups of experts brought together by UNESCO in 1950, 1951, 1964 and 1969, as part of its program to make known the scientific facts of race and to combat racial prejudice. The divisions between the experts who are sourced from varying disciplines show the fractious nature of the 'race question'. Thus, the 1964 and 1967 statements were the products of the meeting of biologists, who felt under-represented by the 1950 and 1951 statements, which were recorded chiefly by anthropologists.

thinking—from the first document authored in 1950 to the last one authored in 1967. The ICERD, coming in 1968, did not engage with anthropological or biological conceptions of ‘race,’ instead recognizing the need for a pragmatic approach to tackling ‘racism.’

The egalitarian language of the first *Statement on Race*, published in 1950, describes how the biological fact of race and the myth of race should be distinguished. For all practical and social purposes, ‘race’ is not so much a biological phenomenon as a social myth. The myth of race has created an enormous amount of human and social damage. The biological differences between ethnic groups should be disregarded from the standpoint of social acceptance and social action.²⁰ In paragraph six, the Statement reads,

National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups; and the cultural traits of such groups have no demonstrated genetic connexion with racial traits. Because serious errors of this kind are habitually committed when the term ‘race’ is used in popular parlance, it would be better when speaking of human races to drop the term ‘race’ altogether and speak of ethnic groups.

While acknowledging the “good effect” of the 1950 Statement and sustaining its general conclusions, the physical anthropologists and geneticists contested some of its provisions in their ‘Statement on the Nature of Race and Race Differences’ in 1951. Man, they recognized, is distinguished as much by his culture as by his biology, and it was clear that many of the factors leading to the formation of minor races of men have been cultural. Anything that tends to prevent free exchange of genes amongst groups is a potential race-making factor and these partial barriers may be religious, social, or linguistic, as well as geographical.

However, the physical anthropologists and geneticists were careful to avoid dogmatic definitions of race and equally careful:

to avoid saying that, because races were all variable and many of them graded into each other, therefore races did not exist The physical anthropologist and the man in the street both know that races exist; the former, from the scientifically recognizable and measurable congeries of traits which he uses in classifying the varieties of man; the latter from the immediate evidence of his senses.²¹

The 1950 and 1951 statements are clearly contradictory, in that the first stresses that there is no such thing as race, while the second expressly denies this.

²⁰ UNESCO, *Statement on Race* ¶ 13 (1950).

²¹ UNESCO, *Statement on the Nature of Race and Race Differences* (1951).

While the first statement sought to define race "from a biological standpoint" and the second concerned itself with "the biological problems of race," they were both written mainly by physical anthropologists and zoologists, and it was not until 1964 that UNESCO assembled a group of biologists in Moscow to establish the nature of race from their point of view. The 1964 'Proposals on the Biological Aspects of Race' stated that there is no national, religious, geographic, linguistic or cultural group which constitutes a race *ipso facto*; the concept of race is purely biological.²²

In an article attached to the Four Statements and published in 1969, a weakness in the 1950 declaration is described, "the document has what now seems a slightly out-of-date air in that the experts were primarily concerned with the equal potential of different racial groups and did not treat explicitly the problems of contact between groups."²³ The statements from the biologists, on the other hand, were of little relevance to the world situation. In an era of increased migration and population movements, where the South African government was intensifying its efforts to enforce separation and former colonies were joining the United Nations, the reality of heightening racial tension underlined the practical inadequacies of the strict biological viewpoint.

The 1964 Proposals were significant in that they introduced the concept of 'racism:' "The biological data given above stands in open contradiction to the tenets of racism." The line is the first usage of the word 'racism' in the UNESCO documents. The use of the word is reflected in the approach adopted in the final document, the 1967 *Statement on Race and Racial Prejudice*. This Statement is much more urgent and takes account of the reality of the problem. Racism, it reads,

multifies the development of those who suffer from it, perverts those who apply it, divides nations within themselves, aggravates international conflict and threatens world peace . . . The human problems arising from so-called 'race' relations are social in origin rather than biological.²⁴

²² UNESCO, *Proposals on the Biological Aspects of Race* (1964)

²³ MICHAEL BANTON, SOCIAL ASPECTS OF THE RACE QUESTION (UNESCO 1969). The author also makes the important point that race is a relatively new idea that emerged only in the Nineteenth Century as the evidence for evolution began to accumulate. Prior to this, Europeans had generally believed in the Book of Genesis—race was an exciting idea, which scientists thought would offer the key to human history, one that would explain why the peoples of the world differed so much in their civilizations. They were wrong, but it took some years for their mistake to become apparent.

²⁴ UNESCO, *Statement on Race and Racial Prejudice* ¶ 2 & 4 (1967).

Michael Banton interprets the Statement as saying that racial prejudice and discrimination will not be stopped by the issue of cautious statements, to the effect that scientists have not yet discovered any racial differences of importance to social relations.²⁵

The 1967 signatories concluded that the foundations of racial prejudices lie in the economic and social system of a country. Furthermore, racism tends to be cumulative—discrimination deprives a group of equal treatment and presents that group as a problem. The group then tends to be blamed for its own condition, leading to further elaboration of racist theory.²⁶

Banton points out that the structure of inequality in modern industrial societies can be explained far more convincingly in social and economic rather than in genetic terms. Measures directed against racism should therefore not be conceived in isolation but as part of a wider attempt to achieve equality in respect of human rights. He points to an important difference between the first statement in 1950 and the fourth in 1967—the earlier committee maintained that human groups distinguished by racial traits would be better referred to as ‘ethnic groups’ rather than ‘races.’²⁷

There is a clear divide between the first set and second set of statements, in terms of the time period between them, the disciplines of the authors, the context of their drafting, and the theme of their contents. The second set rejected the taxonomic divisions of the physical anthropologists who had drafted the first set, and framed their belief in a biological explanation of individual human variety that was outside the classificatory meaning of the word ‘race,’ as applied to groups. In addition, the second set of statements signalled the concept of racism, and linked it to that of law, which the UN General Assembly had recognised as the best tool to combat racism as expressed through racially discriminatory laws.

IV. SELF-IDENTIFICATION AND THE CONCEPT OF ‘ETHNICITY’

The basic critique of race, whose foundations were laid in the UNESCO statements, was carried into the ICERD. We are not compelled to restrict the concept of ‘racism’ or indeed ‘racial discrimination’ to the narrow

²⁵ BANTON, *supra* note 23.

²⁶ UNESCO, *Statement on Race and Racial Prejudice* ¶ 14 (1967). Dr. Robbie McVeigh makes a similar point in relation to the situation of Irish Travellers. He notes that, “The acceptance of Irish Traveller ethnicity suggests that Irish Traveller disadvantage should be explained in terms of not only what Irish Travellers *do* but what is *done to them*. It suggests that the attitudes and behaviour of non-Traveller society may be key problems for Irish Travellers Most settled people probably continue to blame Irish Travellers for their situation of disadvantage.” Expert Witness Testimony of Robbie McVeigh, author of *Irish Travellers and Ethnicity*, O’Leary v. Allied Domecq, at ¶ 4.3 (Aug. 29, 2000) (Unreported).

²⁷ UNESCO, *Statement on Race* ¶ 6 (1950).

biological formation of race.²⁸ With this broad notion of racism and its corollary, racial discrimination, in mind, we turn to the equally fluid notion of ethnicity.

There exists no equivalent of the UNESCO statements for ethnicity because it is not a term that carries the same historical weight as race. Nevertheless, there are principles, begun in Paris in 1950 and continued through the ICERD and the General Recommendations and Concluding Observations of CERD, that can be applied to the concept of ethnicity in general and the case of the Irish Travellers in particular.

There are three CERD documents of immediate relevance: General Recommendation VIII, XXIV, and XXVII. *General Recommendation VIII* on 'Identification with a Particular Racial or Ethnic Group' states that

having considered reports from States parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic group, [the Committee] is of the opinion that such identification shall, *if no justification exists to the contrary*, be based upon self-identification by the individual concerned.²⁹

This Recommendation introduces the element of proof. It holds that Irish Travellers, for example, are entitled under the terms of the ICERD, as interpreted by the Committee, to the right to identify themselves as an ethnic group. It places the burden of proving that they are not an ethnic group on the reporting state. It does not offer a *carte blanche* to all groups to declare themselves as an ethnic group nor does it affirm or reject the claim of the Irish Travellers that they are an ethnic group. It states that the Irish Travellers are entitled to view themselves as an ethnic group until justification to the contrary is produced. This is the product of the pragmatic approach adopted through the UNESCO statements and the ICERD Convention—it is pragmatic in that it prevents reporting states from

²⁸ The narrowness of the biological and only scientifically verifiable concept of race is reflected in the 1950 and 1951 Statements which read: "Americans are not a race, nor are Englishmen, nor Frenchmen, nor any other national group. Catholics, Protestants, Moslems, and Jews are not races, nor are groups who speak English or any other language thereby definable as a race; people who live in Iceland or India are not races; nor are people who are culturally Turkish or Chinese or the like thereby describable as races. National, religious, geographical, linguistic and cultural groups do not necessarily coincide with racial groups; and the cultural traits of such groups have no demonstrated genetic connexion with racial traits."

²⁹ *General Recommendation VIII: Identification with a Particular Racial or Ethnic Group*, U.N. CERD, 38th Sess., U.N. Doc. A/45/18 (1990), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3ae0a87b5bd69d28c12563ee0049800f?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3ae0a87b5bd69d28c12563ee0049800f?Opendocument) (last visited Feb. 27, 2005) (emphasis added). It should be noted that the right is not a group right, but rather attaches to each individual as a member of the group.

excluding certain groups from the scope and application of the treaty by refusing to acknowledge them as racial or ethnic.

Similarly, paragraph three of *General Recommendation XXIV* states that,

some States parties fail to collect data on the ethnic or national origin of their citizens or of other persons living on their territory, but decide at their own discretion which groups constitute ethnic groups or indigenous peoples that are to be recognized and treated as such. The Committee believes that there is an international standard concerning the specific rights of people belonging to such groups . . . the Committee draws to the attention of States parties that the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country's population.³⁰

This Recommendation can be linked to the justifications required by *General Recommendation VIII*—the Government alone cannot determine such justifications, they must be in accordance with an international standard.

Finally, *General Recommendation XXVII* on Discrimination against Roma provides a particular instance of the application of the Committee's thinking; paragraph three recommends that States parties "respect the wishes of the Roma as to the designation they want to be given and the group to which they want to belong."³¹ While it is not the intention to equate Roma and Irish Travellers, groups that are as different as they are similar, the recommendation is an example of the obligation on States parties to first of all allow the group to designate their own status and subsequently apply the relevant international criteria in order to ascertain whether indeed they correspond to this designation.

Do Irish Travellers identify themselves as an ethnic group? In her forward to a collection of essays on the culture and ethnicity of Irish Travellers, Mary Robinson, then President of Ireland, quotes Martin Collins, who "makes the comment in his article that we see ourselves as a distinct

³⁰ *General Recommendation XXIV: Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples*, U.N. CERD, 55th Sess., U.N. Doc. No. A/54/18. Annex V (1999), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/9ce4cbfde77a452a8025684a0055a2d0?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/9ce4cbfde77a452a8025684a0055a2d0?Opendocument) (last visited Feb. 27, 2005).

³¹ *General Recommendation XXVII: Discrimination against Rome*, U.N. CERD, 57th Sess., U.N. Doc. A/55/18 (2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/11f3d6d130ab8e09c125694a0054932b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/11f3d6d130ab8e09c125694a0054932b?Opendocument) (last visited Feb. 27, 2005).

ethnic group."³² At this point, it may be stated that paragraph three of Ireland's First National Report 2003, which says "that Irish Travellers do not constitute a distinct group from the population as a whole in terms of race, colour, descent or national or ethnic origin," violates the ICERD, as interpreted by the CERD, in that it negates the right of the Travelling Community to identify themselves as an ethnic group. This identification can be refuted using objective criteria, and international standards—however the right to self-identification precedes such potential justifications. First, it must be accepted that Irish Travellers consider themselves an ethnic group. Only then can the issue of whether or not they are an ethnic group be engaged with. It is to this second question that we now turn our attention, but it must be stressed that the results of the forthcoming brief investigation do not compromise the initial requirement that the Irish Government accept the right of self-identification for each individual member of the Travelling Community.³³

V. IDENTIFICATION BY OTHERS— ARE IRISH TRAVELLERS AN ETHNIC GROUP?

The Human Rights Committee, in paragraph 5.2 of General Comment 23, states, "The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria." The approach taken by the ICTR in the *Prosecutor v. Kayishema* case examined above combined two elements in the determination of ethnicity—self-identification and identification by others. The first is not difficult to ascertain and has been satisfied in relation to Irish Travellers. The second is more complex, in that it depends upon who the 'others' are—in the context of genocide, and in the particular context of the Rwandan genocide, the Tribunal identified the perpetrators as perhaps the most important 'others' to be taken into account and made a specific reference to this effect. Similarly, the ICTY, while stressing the need for objective verifications, appears to place more emphasis on "the point of view of those persons who wish to single that group out from the rest of the community," i.e. the perpetrators, in the evaluation of the status of a national, ethnical or racial group.

³² Mary Robinson, Foreword, in *IRISH TRAVELLERS: CULTURE AND ETHNICITY* (Mary McCann, et al. eds., Anthropological Association of Ireland 1994). The Traveller support groups also state that Irish Travellers identify themselves as an ethnic group. For example, Pavee Point defines Travellers on its website as "a nomadic Irish ethnic group."

³³ See also *IRISH TRAVELLERS: CULTURE AND ETHNICITY*, *supra* note 32, at xxvi ("Whatever one's position on these disputed issues, they point to the need for further ethnographic, historical and linguistic research. But, as pointed out earlier, the subjective nature of ethnicity means that the claim to ethnic distinctiveness is not something to be denied until 'validated' by such research." *Id.*)

It is submitted that such an approach, while perhaps appropriate for a court or tribunal faced with the crime of genocide, should be subordinated to the writings of objective 'others' in the case of the determination of a group's ethnicity outside the domain of criminal law. Anthropologists and sociologists are in a position to provide the international standard or objective criteria alluded to by the treaty-monitoring bodies in their general recommendations and comments. We turn briefly to explore these writings on the question of whether Irish Travellers objectively constitute an ethnic group.

Sinéad Ní Shúinéar begins her analysis with a standard definition of the term 'ethnic group' by the anthropologist F. Barth:

The term ethnic group is generally understood in anthropological literature to designate a population which is biologically self-perpetuating, shares fundamental cultural values realised in overt unity of cultural form, makes up a field of communication and interaction, and has a population which defines itself, and is defined by others, as constituting a category distinguishable from other categories of the same order . . . The itemised characteristics imply: racial difference, cultural difference, social separation, language barriers and spontaneous and organised enmity.

She analyses each section of the definition, and concludes that Irish Travellers meet each requirement. For example, under shared fundamental cultural values, she notes self-employment, nomadism, and strict segregation of the pure and impure. Language barriers are twofold—both Travellers' use of English and their use of their own language, Gammon or Cant. She cites the reports in the print media of attacks on Traveller camps and the deliberate blocking off and destruction of any and all possible camp sites by boulders (officially termed 'landscaping') as evidence of spontaneous and organised enmity. She concludes, through an application of each component of the definition to the situation of the Irish Travellers, that they fulfil all the objective criteria to qualify as an ethnic group.³⁴

Ní Shúinéar subsequently addresses the issue of the origins of Irish Travellers—the conclusion that they constitute an ethnic group seems to imply a specific origin outside that of the 'settled' community.³⁵ Popular

³⁴ Sinéad Ní Shúinéar, *Irish Travellers, Ethnicity and the Origins Question*, in *IRISH TRAVELLERS: CULTURE AND ETHNICITY* 54-60 (Mary McCann, et al. eds., Anthropological Association of Ireland 1994).

³⁵ Tracing the origins of nomadic peoples is extremely problematic. Ní Shúinéar cites some of the "charming legends;" for example, in England, the term 'Egyptian' was the first known classification for the group of people later referred to as gypsies, and was subsequently used as a defining label for gypsies and non-gypsies alike. See David Mayall, Working Paper, *Defining the Gypsies: Ethnicity, Race and Representation* (Presented to International Conference on Minority Rights, Leiden 1990).

speculation includes Phoenician tinsmiths, the Lapps, armourers to the ancient kings of Ireland, famine victims, pre-Celtic gold workers, victims of Cromwell, or Picts.³⁶ Conventional wisdom, however, focuses on the Famine or Cromwell. These two theories are rejected outright, primarily on the evidence of language, which places the Irish Travellers as being well established at the time of the Famine.³⁷ She concludes by describing the debate over the origins of Irish Travellers as "political controversies masquerading as academic ones."³⁸ Conflicting assertions also come from within the travelling community itself—one side sees the need to assert the distance between the origins of the travelling community and the settled community, and the other sees such assertions as removing them even further from the main settled group and consequent responsibility for their well-being. The main conclusion reached, however, is that the academic debate surrounding origin is little more than a smokescreen—validity and difference ought to be accepted outright.

Ní Shúinéar's conclusion is contested by McLoughlin, who challenges her application of Barth's definition.³⁹ For example, with respect to shared cultural values, McLoughlin gives the example of a religious order, which lives in poverty, chastity and obedience, sharing values and commitments. In relation to language, she uses the example of native Irish speakers, who are a distinctive element of Irish society, but certainly not an ethnic group.⁴⁰ Finally, spontaneous and organised enmity is not confined to Irish Travellers—religious minorities have suffered similarly, as have drug addicts and the mentally ill. In conclusion, she states that to dispute the claim to ethnicity is not to undermine the sense of group solidarity and individual identities held by travelling people. Travellers do constitute a

³⁶ Ní Shúinéar, *supra* note 34, at 64.

³⁷ This point stems primarily from the research of Jared Harper of the University of Georgia, who studied the language of Irish Traveller communities in the Southern States of the United States, descendants of those who had emigrated at the time of the Famine. This group had evolved separately from their Irish counterparts for a century and a half, but what is unique and common to both groups must have existed before they split in the Nineteenth Century of 300 words collected from the Irish Travellers in Georgia, well over a quarter were recognised by Travelling women in Dublin. The account books of a County Antrim vicar, kept from 1672-1680, contain frequent references to 'tinklars' or 'tinkers', and of transactions with them. D. Kenrick, in answer to his question 'How Old are the Irish Travellers?' (Occasional Papers of the Romani Institute No.2, revised version 1979), recites an English law passed in 1243 aimed at curtailing the "wandering Irish," and another in 1413 under Henry V. See generally Ní Shúinéar, *supra* note 34, at 60-70.

³⁸ Ní Shúinéar, *supra* note 34, at 64.

³⁹ Dympna McLoughlin, *Ethnicity and Irish Travellers: Reflections on Ní Shúinéar*, in IRISH TRAVELLERS: CULTURE AND ETHNICITY 78-95 (Mary McCann, et al. eds., Anthropological Association of Ireland 1994).

⁴⁰ This point, however, can be disputed on the grounds that "the non-ethnic status of this population can be attributed to a process of Irish nation-building that equated the Gaelic language with the core of the nation despite its minority status." See JANE HELLEINER, IRISH TRAVELLERS: RACISM AND THE POLITICS OF CULTURE 7 (University of Toronto Press 2000).

distinct group within Irish society. To wish that their process of engagement in the broader society should be on their own terms is not an excessive demand.

Dr. Robbie McVeigh, in his expert testimony in *O'Leary & Others v. Allied Domecq & Others*,⁴¹ points out that "most 'ordinary people' assume that Irish Travellers are not an ethnic group; most 'experts' assume that they are."⁴² He accepts the importance of McLoughlin's argument as one of the few attempts to conceptualise opposition to the notion of Irish Traveller ethnicity. However, her argument is not strong and coherent; "it is a rather poor attempt to critique and deconstruct the concept of ethnicity itself, rather than a more specific examination of the merits of Irish Traveller ethnicity."⁴³ McVeigh focuses on the House of Lords case of *Mandla v. Dowell Lee*,⁴⁴ which had to consider the meaning of the terms 'ethnic origins' and 'ethnic group' and laid out the essential and non-essential characteristics needed for a group to be considered an ethnic group in the United Kingdom.

In *Commission for Racial Equality v. Dutton*,⁴⁵ the Court of Appeal had to determine whether English gypsies constituted a 'racial group.' Lord Justice Nicholls said that while gypsies "are no longer derived from what in biological terms, is a common racial stock . . . that of itself does not prevent them from being a racial group as widely defined in the Act [the Race Relations Act 1976]." He continued, "The material provision in the Act of 1976 is concerned with ethnic origins, and 'ethnic' is not used in that Act in a strictly biological or racial sense." The European Court of Human Rights, in *Chapman v. United Kingdom*,⁴⁶ found that "[T]he Applicant's occupation

⁴¹ *O'Leary v. Allied Domecq*, (Aug. 29, 2000) (Unreported).

⁴² Expert Witness Testimony of Robbie McVeigh, author of *Irish Travellers and Ethnicity*, *O'Leary and Others v. Allied Domecq and Others*, at ¶ 4.3 (Aug. 29, 2000) (Unreported).

⁴³ *Id.* at ¶ 7.6.

⁴⁴ *Mandla v. Dowell Lee*, [1983] 2 A.C. 548 (H.L. 1983). Lord Fraser of Tullybelton, giving the leading judgment in the House of Lords, said: "For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to these two essential characteristics, the following characteristics are in my opinion, relevant: (1) either a common geographical origin, or descent from a small number of common ancestors; (2) a common language, not necessarily peculiar to the group; (3) a common literature peculiar to the group; (4) a common religion different from that of neighbouring groups or from the general community surrounding it; (5) being a minority or being an oppressed or a dominant group within a larger community . . ."

⁴⁵ *Comm'n for Racial Equality v. Dutton*, [1989] Q.B. 783 (Eng. C.A. 1988).

⁴⁶ *Chapman v. United Kingdom*, [2001] 33 Eur. Ct. H.R. 18.

of her caravan is an integral part of her ethnic identity as a gypsy, reflecting the long tradition of that minority of following a travelling lifestyle."⁴⁷

These cases were in relation to English gypsies and can be distinguished as such, but *O'Leary & Others v. Allied Domecq & Others*⁴⁸ before the Central London County Court in 2000, involved a number of Irish Travellers, who had been refused service in five public houses in northwest London. The allegation of discrimination did not centre on the fact that the appellants were Irish, but that they were Irish Travellers, for one of the pubs in question catered for an almost exclusively Irish clientele.⁴⁹ It was agreed that the court should decide as a preliminary question whether Irish Travellers constituted a "separate ethnic group" for the purposes of the 1976 Race Relations Act. Following six days of expert evidence, of which some excerpts have been quoted above, the court applied the *Mandla v. Dowell Lee* criteria and held that Irish Travellers met the two essential conditions laid down in that case by 1) possessing a long shared history which distinguished them from other groups (the court held that a history traced back to at least the middle of the 19th century was sufficient to fulfil the *Mandla* test), and 2) having a distinct cultural tradition of their own.

With respect to the non-essential criteria set out in the *Mandla* judgment, the court held that Irish Travellers did share "a common geographical origin, or descent from a small number of common ancestors." They had a common language, Gammon or Cant, and while they did not have a common written literature, they did have a common oral tradition. Justice Goldstein added that they were "undoubtedly a group which suffers disadvantage, discrimination and prejudice." The court stated that "our conclusions clearly are that we are satisfied that the *Mandla* criteria are satisfied in this case, and therefore Irish travellers may be properly identified as an ethnic minority, so we answer the preliminary question in the affirmative."

VI. CONCLUSION

The ICTR and ICTY have found that in order to determine whether a group constitutes an ethnic group or not, two factors must be examined—self-identification and identification by others. The parameters of these two

⁴⁷ *Id.* at ¶ 73.

⁴⁸ *O'Leary v. Allied Domecq* (Aug. 29 2000) (Unreported).

⁴⁹ The Irish Minister for Justice, Equality and Law Reform stated at a session of the Oireachtas Sub-Committee on Human Rights (11 March 2004) that the recognition by the courts and government of the UK extended only to *Irish Travellers*, implying that the key factor might be their Irish origin. *See* Irish Human Rights Commission, *supra* note 4, at 8. In *Allied Domecq*, the court noted that one of the pubs which had refused entry to the Travellers in that case was itself patronised by "settled" Irish people so that the discrimination complained about was not based on the complainants' Irishness. *Id.*

requirements have been explored. Irish Travellers identify themselves as an ethnic group. They are identified by others as being an ethnic group. These 'others' include objective experts in the sociological and anthropological fields, as well as the courts in the United Kingdom. 'Identification by others' could also be used in the pejorative sense in which it is employed in the international tribunals, to denote those who have identified and stigmatised Irish Travellers as a separate ethnic group. The evidence is in the generations of discrimination experienced by Irish Travellers in access to services, employment, education and housing, which has been nominally abolished through recent domestic legislation in the Republic of Ireland.⁵⁰

The Irish Government's position on the ethnicity of Irish Travellers is an entrenched one. It has much support from the print media, and it is fair to conjecture that it represents the majority viewpoint in the country. Nevertheless, it is submitted that it is an incorrect one. It is difficult to understand the reasons for the denial of ethnicity, given that no cogent reasons have been forwarded for the argument. The Irish Human Rights Commission concludes that the refusal to recognise Travellers as a group with a distinct ethnic origin suggests that the Government might claim that they are not covered by the EU Race Directive,⁵¹ which appears to provide some protections additional to existing anti-discrimination law.⁵² The Commission also points out that the current position expressed in paragraph three of the Report serves to exclude Irish Travellers from the ambit of articles 1(4) and 2(2) of the ICERD, and the requirement that the State Party shall, when the circumstances so warrant, take special and concrete measures in the social, economic and cultural fields to ensure the adequate protection and development of certain racial groups—i.e. affirmative action.

It is difficult to accept that this would be the motivation behind the Government's position. There is little impetus on behalf of the treaty-monitoring bodies to require governments to construct affirmative action policies. Articles 1(4) and 2(2) of the ICERD allow States Parties to set up such policies but do not compel them to do so, as evidenced by the phrase "when the circumstances so warrant" in article 2(2) ICERD. The provisions act as a guarantee that affirmative action policies would not violate the non-discrimination principle contained in the Convention. The argument in relation to the EU Race Directive does not take into account the fact that the

⁵⁰ In particular, the Equal Status Act, 2000 (No. 8) (Ir.), and the Employment Equality Act, 1998 (No. 21) (Ir.), available at <http://www.irishstatutebook.ie/ZZA21Y1998.html> (last visited Feb. 28, 2005), which forbid discrimination on nine grounds including 'membership of the Travelling community'.

⁵¹ European Council Directive of 29 June 2000, implementing the principle of equal treatment on grounds of racial and ethnic origin, 2000 O.J. (L 180). The Directive prohibits direct or indirect discrimination "based on racial or ethnic origin."

⁵² Irish Human Rights Commission, *supra* note 4, at 11.

Government has consistently held the same position on the issue for some time, long before the drafting of the 2000 Directive.

The importance of the debate ought not to be understated. On an international level, it is imperative that the United Nations instruments and institutions debate the issue of ethnicity and strive towards a more precise meaning of the term. The growth in importance of the concept is attributable to the post-war redundancy of 'race' as an explanatory concept, due in no small part to the UNESCO statements. Thus, with race deemed inappropriate to explain obvious cultural, social and political differences and the tensions associated with those differences, ethnicity has filled an analytical gap.⁵³ The Rwandan genocide against an ethnic group and the policy of 'ethnic cleansing' in the former Yugoslavia highlight the need for an international dialogue on the meaning of ethnicity similar to that initiated by UNESCO in 1950 on the concept of 'race.'

Domestically, in Ireland, the tension exists between the majority settled population and the minority Travelling population. That tension is very much low key on an international scale, but the consistent, repeated official denial of the ethnicity of Travellers, without any serious effort to engage with the issue, is at a minimum curious. It is perhaps masking something deeper than a strongly held semantic viewpoint.

⁵³ See Testimony of Robert McVeigh, *supra* note 42, at ¶ 5.1.