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**THE RIGHT TO CULTURALLY APPROPRIATE ACCOMMODATION FOR
TRAVELLERS IN IRELAND: TOWARDS A HYBRID APPROACH**

by

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A thesis submitted to the University of Birmingham
for the degree of DOCTOR OF PHILOSOPHY

**Birmingham Law School
University of Birmingham
September 2017**

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Abstract**THE RIGHT TO CULTURALLY APPROPRIATE ACCOMMODATION FOR
TRAVELLERS IN IRELAND: TOWARDS A HYBRID APPROACH****Ruth Gallagher**

Despite the existence of a robust international human rights legal framework, Traveller accommodation continues to be a complex and controversial area of human rights in Ireland. Among the many challenges are a lack of delivery of existing legislative obligations, the criminalisation of nomadism, political volatility and an enduring and institutionalised racism. Collectively, these difficulties have resulted in a form of assimilation in practice among Irish Travellers.

In order to unpack this complexity and explore routes to improved delivery of accommodation, this thesis moves past doctrinal and policy accounts of Traveller accommodation rights to an empirically-informed analysis of what takes place in practice. This thesis is centrally concerned with the question of how the international human right to culturally appropriate housing is operationalised in Ireland in the case of Traveller accommodation and how that operationalisation might be improved upon. I argue that, to the extent that it is operationalised, this is done through hybrid structures that are often informal or, at least, not formally constituted. This implicates the sub-question: would a formal recognition of hybridity result in improved operationalisation of this right? I argue that it would.

Acknowledgements

Firstly, I owe a deep sense of gratitude to my supervisor, Professor Fiona de Londras, who encouraged me to consider a PhD in the first place. Her intellect, energy and commitment are inspiring and her patient encouragement, constructive criticism, good humour and relentless optimism were key to me in completing this research. Thank you also to my secondary supervisor, Dr Adrian Hunt, for his thoughtful feedback at the later stages of writing. I feel very lucky to have had such an overwhelmingly positive supervision experience. Thank you also to Louise Beirne BL, Professor Colin Clark, Dr Chris McInerney and Dr Liam Thornton for insightful suggestions on content and other kinds of reassurance. Special thanks are due to the interview participants who gave so generously of their time.

Thank you, from the bottom of my heart, to my three wonderful children, Hazel, Robbie and Ivan, for their love, loyalty, patience and support during the past five years. Between master's degrees and PhD, I have been studying for pretty much all of their lives. I hope that they and future generations will have the opportunity to live in a fair and equal world where human rights are fully realised. Thank you also to my parents, siblings and extended family for believing that I would get there in the end. One of my earliest childhood memories is of my father's desk piled high with books and papers. His own PhD in 1971 is still the largest doctorate I have ever seen. The fact that he became so seriously ill in the final stages of my writing made this all the more poignant. Thank you also to my lovely supportive neighbours, Deirdre and Fergus for filling me with coffee, to my dear friend Avril Hutch for her support, and to my 'Walking Women' friends for our in-depth discussions while out on the Wicklow Way.

Special thanks are due to my friends and colleagues in the Irish Human Rights and Equality Commission who continue to inspire, particularly Emily Logan and Kevin De Barra, for cheering from the sidelines and encouraging me in my research. My gratitude to my former colleagues in Amnesty International Ireland; especially 'the Amnesty women': Louise Beirne, Olive Moore, Aoife Ruane, Dr Roja Fazaeli, Dr Melanie Hoewer and Marita Cummins, who have become cherished friends since the days of the rickety Amnesty offices in Fleet Street in 2003, where we wore our coats at our desks because of the cold. Those in the Irish human

rights civil society sector – particularly Traveller organisations – are admirable for their long-standing and tireless commitment to human rights and social justice. I am constantly in awe of the warmth, generosity, pride and resilience of Travellers in Ireland, in spite of everything.

Thank you to Rhonda Reynolds for her patient interview transcription and to Máire O'Dwyer of 'Perfectly Write' for excellent final proofreading. I am grateful to my fellow PhD students at Durham University and the University of Birmingham, particularly to my PhD buddy Maeve O'Rourke, the Facebook Group 'PhD and Early Career Researcher Parents', and various Twitter friends. Completing a PhD is a solitary road and encouragement from fellow students is vital along the way.

Ruth Gallagher
September 2017

Table of Abbreviations

AITHS	All Ireland Traveller Health Study
AP	Assistant Principal Officer in the Irish Civil Service
ATD	All Together in Dignity
CAT	United Nations Convention Against Torture
CEDAW	United Nations Convention on the Elimination of all forms of Discrimination Against Women
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
COE	Council of Europe
CRC	United Nations Convention on the Rights of the Child
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DFAT	Department of Foreign Affairs and Trade
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECSR	Council of Europe, European Committee on Social rights
ECtHR	European Court of Human Rights
ENAR	European Network against Racism Ireland
ENNHRI	European Network of National Human Rights Institutions
Equinet	European Network of Equality Bodies
ERRC	European Roma Rights Centre
ESA	Equal Status Acts
ESCR	European Committee of Social Rights
ESRI	Economic and Social Research Institute
EU	European Union
FCPNM	Council of Europe Framework Convention for the Protection of National Minorities
FEANTSA	European Federation of National Organisations Working with the Homeless

FIDH	Fédération Internationale des Droits de L'homme/International Federation for Human Rights
FRA	European Union Agency for Fundamental Rights
GANHRI	Global Alliance of National Human Rights Institutions
GRETA	Council of Europe's Group of Experts on Action Against Trafficking in Human Beings
HEO	Higher Executive Officer in the Irish Civil Service
HLG	High- Level Group on Traveller Issues
HRC	United Nations Human Rights Committee
ICCPR	United Nations International Covenant on Civil and Political Rights
ICESCR	United Nations International Covenant on Economic, Social and Cultural Rights
ICSH	Irish Council for Social Housing
IHRC	Irish Human Rights Commission
IHREC	Irish Human Rights and Equality Commission
IMF	International Monetary Fund
IPA	Institute of Public Administration
ITM	Irish Traveller Movement
LGMA	Local Government Management Agency
LTACC	Local Traveller Accommodation Consultative Committee
NESC	National Economic and Social Council
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NIHRC	Northern Ireland Human Rights Commission
NITRIS	National Traveller and Roma Inclusion Strategy
NMRF	National Mechanisms for Reporting and Follow-up
NTACC	National Traveller Accommodation Consultative Committee
NTMAC	National Traveller Monitoring and Advisory Committee
NTWF	National Traveller Women's Forum
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPRE	Operational Platform for Roma Equality
OSCE	Organization for Security and Co-operation in Europe

PO	Principal Officer in the Irish Civil Service
TAP	Traveller Accommodation Programme
TD	Teachta Dála; Deputy or member of Dáil Éireann
TIG	Traveller Inter Agency Group
UK	United Kingdom
UNGP	United Nations Guiding Principles on Business and Human Rights
UPR	Universal Periodic Review of the United Nations

Table of Irish Language Terms

An tArd Chláraitheoir — The High Registrar

An Bord Uchtála — The Adoption Board

An Garda Síochána — Ireland's national police force

Garda – Police officer

Gardaí – Police officers plural

Oireachtas — Irish parliament, consisting of Dáil Éireann (lower house), Seanad Éireann (upper house), and the President of Ireland

Taoiseach — Irish Prime Minister

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Introduction

1. Introduction

One of the great failures in housing policy over the years towards Travellers is a kind of a slow burn towards assimilation. . . . you are talking about the polar caps melting, I think we are at a melting stage.¹

Travellers are an indigenous, ethnic minority group of people in Ireland with a shared history, culture and language.² The definition of ‘Travellers’ adopted by the Oireachtas for the purposes of the Equal Status Acts 2000–2015 states:

‘Traveller community’ means 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.³

¹ Interview with David Joyce, barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

² Understanding ‘ethnicity’ in legal terms as the two-part test set out in *Mandla v Dowell Lee* [1982] UKHL 7. The issue of recognition of Traveller ethnicity was ongoing for several decades, with repeated calls for recognition by Traveller groups and international treaty-monitoring bodies, gathering momentum in the past 10 years. In late 2013 and early 2014, the Houses of the Oireachtas Joint Committee on Justice, Defence and Equality of the 31st Dáil invited submissions from, and held public hearings with, stakeholders and relevant groups and issued a report in April 2014 recommending the recognition of Traveller ethnicity, <http://www.oireachtas.ie/parliament/media/committees/justice/Report-on-Traveller-Ethnicity.pdf> accessed 14 June 2017. In late 2016, the Joint Committee on Justice and Equality of the 32nd Dáil held a similar set of hearings and followed with the publication of another *Report on the Recognition of Traveller Ethnicity* in January 2017, <http://www.oireachtas.ie/parliament/media/committees/justice/Report-on-the-Recognition-of-Traveller-Ethnicity-20-01-17.pdf> accessed 14 June 2017. Traveller recognition was finally formally recognised in Ireland in March of this year. See Department of the Taoiseach, ‘Travellers Recognised as an Ethnic Group Within the Irish Nation’, Media Release, 1 March 2017. http://www.merrionstreet.ie/en/News-Room/News/Travellers_Recognised_as_an_Ethnic_Group_Within_the_Irish_Nation.html#sthash.Ixouwoh0.dpu accessed 14 June 2017. Recognition of Irish Travellers as a minority ethnic group has been official in the UK since the case of *O’Leary v Allied Domecq* (County Court 29 August 2000).

³ Equal Status Acts 2000–2015, s 2(1).

The number of people enumerated as Irish Travellers in the 2011 Census is 29,573, or 0.6% of the population of Ireland.⁴ This number was an increase of 32% since the census of 2006 although, as the Economic and Social Research Institute (ESRI) notes, it is strictly speaking not possible to compare the 2006 and 2011 results because of evidence of ‘under-coverage’ of Travellers in 2006.⁵ A different number again was recorded in the All Ireland Traveller Health Study (AITHS), published in 2010, which documented 36,224 Travellers living in the Republic of Ireland.⁶

Travellers in Ireland have significantly poorer health outcomes than the population as a whole,⁷ and the AITHS recorded high mortality rates and low life expectancy among the community.⁸ One of the most alarming results of the AITHS study in 2010, however, was the finding that there had been no increase in life expectancy for male Travellers since the last large-scale study of Traveller health was conducted in 1987.⁹ Life expectancy at birth for female Travellers is equivalent to that of the general population in the early 1960s and the rate of suicide is six times the rate of the general population, accounting for 11% of all Traveller deaths.¹⁰

Irish Travellers experience high levels of discrimination, unemployment, income poverty and deprivation, and widespread educational disadvantage.¹¹ The 2011 Census recorded that 70% of Travellers had stopped attending full-time education by the age of 15 years; only 8.2% of

⁴ Central Statistics Office, Census 2011 Profile 7 Religion, Ethnicity and Irish Travellers – Ethnic and cultural background in Ireland, <http://www.cso.ie/en/census/census2011reports/census2011profile7religionethnicityandirishtravellers-ethnicandculturalbackgroundinireland/> accessed 5 August 2017. Census 2016 figures are due to be published in 2017. See <http://www.ucd.ie/issda/data/allirelandtravellerhealthstudy/> accessed 14 July 2017.

⁵ Dorothy Watson, Oona Kenny and Frances McGinnity, *A Social Portrait of Travellers in Ireland* (Economic and Social Research Institute 2017), x.

⁶ See All Ireland Traveller Health Study Team, School of Public Health, Physiotherapy and Population Science, University College Dublin, *Our Geels: All Ireland Traveller Health Study: Summary of Findings* (Department of Health and Children 2010) <http://www.lenus.ie/hse/handle/10147/115606> accessed 5 August 2017.

⁷ See <http://www.cso.ie/en/census/census2011reports/census2011profile7religionethnicityandirishtravellers-ethnicandculturalbackgroundinireland/> accessed 5 August 2017.

⁸ See All Ireland Traveller Health Study Team, School of Public Health, Physiotherapy and Population Science, University College Dublin, *Our Geels: All Ireland Traveller Health Study: Summary of Findings* (Department of Health and Children 2010) <http://www.lenus.ie/hse/handle/10147/115606> accessed 5 August 2017.

⁹ The previous census of Travellers was conducted in November 1986, with component statistics calculated for the calendar year following the census, 1987. See Joseph Barry and Leslie Daly, *The Travellers' Health Status Study: Census of Travelling People* (Health Research Board 1988).

¹⁰ See All Ireland Traveller Health Study Team, School of Public Health, Physiotherapy and Population Science, University College Dublin, *Our Geels: All Ireland Traveller Health Study: Summary of Findings* (Department of Health and Children 2010) <http://www.lenus.ie/hse/handle/10147/115606> accessed 5 August 2017.

¹¹ See, generally, Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963); Oona Kenny and Frances McGinnity, *A Social Portrait of Travellers in Ireland* (Economic and Social Research Institute 2017), <https://www.esri.ie/pubs/RS56.pdf> accessed 20 July 2017.

Travellers had completed second-level education and just 1% of Travellers had completed third-level education. Traveller women and girls experience significant gender inequality. The same census also documented an unemployment rate of 84% among Travellers.¹²

Since 1998, several UN and Council of Europe bodies and committees have voiced multiple concerns and made many recommendations in relation to shortcomings with Traveller accommodation in Ireland.¹³ These range from generalised concerns in relation to how Travellers are disadvantaged in accessing accommodation in the first instance¹⁴ to more specific concerns in relation to the criminalisation of ‘trespassing’;¹⁵ the effects of

¹² Central Statistics Office, Census 2011 Profile 7 Religion, Ethnicity and Irish Travellers – Ethnic and cultural background in Ireland, <http://www.cso.ie/en/census/census2011reports/census2011profile7religionethnicityandirishtravellers-ethnicandculturalbackgroundinireland/> accessed 5 August 2017.

¹³ The term ‘accommodation’ rather than ‘housing’ is used throughout the thesis, to allow for the many types of accommodation accessed by Travellers: (1) Traveller-specific accommodation such as halting sites or group housing schemes; (2) non-Traveller-specific accommodation such as standard housing (privately owned, rented or shared) or via voluntary housing bodies; (3) accommodation with or without local authority assistance in social housing, state-operated rental schemes or on transient sites or unauthorised sites. Types of accommodation adapted from Gráinne O’Toole, *Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building a Better Future for Traveller Accommodation* (Irish Traveller Movement 2009) 13. Interview participant Martin Collins said ‘I would say that I am not comfortable with the term housing, particularly from a Traveller perspective. I think it is a very ethnocentric term ... I think it reflects a certain view of the world and a certain value base for certain communities.’ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’. Interview participant Anastasia Crickley says ‘... we tend to use the term “the right to accommodation” and that’s deliberate as well, because ... increasingly it does mean housing, but it may not also mean housing ... if you asked that question 30 years ago, you’d specifically not be meaning housing at all, anyone involved in Traveller accommodation issues would have talked about the right to shelt[er], the right to group housing, the right to nomadic style housing, or mobile trailer facilities or the right to standard housing.’ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

¹⁴ Committee on the Rights of the Child, Concluding observations on the initial periodic report of Ireland, 4 February 1998, CRC/C/15/Add85, at 14 and 34; Committee on Economic, Social and Cultural Rights, Concluding observations on the initial periodic report of Ireland, 14 May 1999, E/C12/1/Add35, at 20; Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of Ireland, 5 June 2002, E/C12/1/Add77, at 32; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 78; Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Ireland adopted on 10 October 2012, ACFC/OP/III(2012)006, at 30; European Committee Against Racism and Intolerance, *ECRI Report on Ireland* (Fourth Monitoring Cycle), adopted 5 December 2012, CRI(2013)1, at 92; *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 43.

¹⁵ Human Rights Committee, Concluding observations on the third periodic report of Ireland, 30 July 2008, CCPR/C/IRL/CO/3, at 23; UN Human Rights Committee, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4, at 23; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 69.

accommodation that is not culturally appropriate¹⁶ or respectful of nomadism;¹⁷ gaps in the collection of statistical data and conduct of research;¹⁸ underuse and underallocation of funding;¹⁹ lack of sanctions against local authorities who fail to take measures to provide accommodation;²⁰ inadequate conditions in halting sites;²¹ legislative framework governing evictions;²² and the effects of evictions in practice.²³

The UN Committee on the Elimination of Racial Discrimination, in its 2005 Concluding Observations on the examination of Ireland's combined third and fourth periodic reports to the Committee, said there is a need to ensure adequate protection of the right to accommodation for Travellers and to ensure access to 'accommodation suitable to their lifestyle'.²⁴ In 2011, the same committee made an almost identical recommendation, noting 'with regret the poor outcomes in the fields of health, education, housing, employment for Travellers as compared to the general population. (art. 5(e))' and recommending 'concrete measures are undertaken to improve the livelihoods of the Traveller community by focusing on improving students' enrolment and retention in schools, employment and access to health care, housing and transient sites'.²⁵ There is little doubt that by the time that Ireland comes to be examined by this committee again in 2018, yet another similar recommendation will be made.

¹⁶ This term will be explored and defined in Chapter 1.

¹⁷ Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Committee on the Elimination of Racial Discrimination, Concluding observations on the third and fourth periodic reports of Ireland, 10 March 2011, CERD/C/IRL/CO/3-4, at 13; Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3, at 27; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 69–70.

¹⁸ Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of Ireland, 5 June 2002, E/C.12/1/Add.77, at 33; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 79;

¹⁹ Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3, at 27; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 15, 69 and 70.

²⁰ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 3 March 2017, CEDAW/C/IRL/CO/6-7, at 48–49.

²¹ *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 86–92.

²² *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 135–147.

²³ *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 164–167.

²⁴ Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21.

²⁵ Committee on the Elimination of Racial Discrimination, Concluding observations on the third and fourth periodic reports of Ireland, 10 March 2011, CERD/C/IRL/CO/3-4, at 13.

In the past 100 years in Ireland, there has been a rollercoaster of approaches in relation to Traveller accommodation, from assimilation measures,²⁶ to interculturalism, to criminalisation and back once more to assimilation, although perhaps more recently by stealth than by explicit policy. The 1960s saw the establishment of the Commission on Itinerancy, which recommended the assimilation of Travellers into the general population, in order ‘to reduce to a minimum the disadvantage to themselves and to the community resulting from their itinerant habits’.²⁷ By the 1990s, some progress had been made towards recognising the importance of culturally appropriate accommodation. The Housing (Traveller Accommodation) Act of 1998 which resulted, as will be seen later on in the thesis, from the 1995 *Report of the Task Force on the Travelling Community*, requires each local authority to conduct an assessment of Traveller housing needs in their area, and to adopt a five-year Traveller Accommodation Programme.²⁸ It also established national and local consultative committees.²⁹ For the first time in any relevant legislation, the 1998 Act introduced transient, seasonal provisions.³⁰ The case of *O’Reilly and Others v Limerick County Council* in 2006 reaffirmed that the statutory duty imposed by the 1998 Act is mandatory, not just aspirational.³¹ However, the overseeing National Traveller Accommodation Consultative Committee has no authority to ensure that local authorities are meeting targets set in their Traveller Accommodation Plans and the Act has been widely criticised as lacking ‘teeth’ in the form of sanctions or penalties.³²

While Traveller Accommodation Programmes may provide for Traveller-specific accommodation in theory, each group housing scheme or halting site is still subject to local planning permission and possible objections. Proposed developments can be voted against when a ‘Development Plan’ is in preparation.³³ Additionally, while the provision of Traveller

²⁶ Understanding ‘assimilation’ as the widespread absorption into mainstream, or ‘settled’ society by abandoning nomadism and encouraging a move into standard housing, as per Michelle Norris and Nessa Winston, ‘Housing and Accommodation of Irish Travellers: From Assimilationism to Multiculturalism and Back Again’ (2005) 39 *Social Policy and Administration* 802.

²⁷ Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963) 11.

²⁸ Sections 6–10, Housing (Traveller Accommodation) Act 1998.

²⁹ At ss 19 and 20, respectively, Housing (Traveller Accommodation) Act 1998.

³⁰ At s 6, Housing (Traveller Accommodation) Act 1998.

³¹ *O’Reilly and Others v Limerick County Council* [2006] IEHC 174.

³² Darren O’Donovan notes that the Act ‘relies entirely upon judicial oversight’ to enforce delivery targets set in Traveller Accommodation Plans. See Darren O’Donovan, ‘Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights’ (2016) 16 *International Journal of Discrimination and the Law* 5, 8. Several participants interviewed for this research also referred to a lack of sanctions in the Act as being problematic. This is explored more fully in Chapter 3.

³³ Provided for in sections 7–9, Planning and Development Acts 2000 to 2006. See ‘Development Plans’, Department of Housing, Planning and Local Government, <http://www.housing.gov.ie/local-government/development-management/development-plans/development-plans> accessed 19 September 2017.

Accommodation Programmes are set out in legislation,³⁴ they are also subject to approval by local elected officials.³⁵ Indeed a proposed Traveller site may be objected to multiple times, before finally receiving planning permission, if at all.³⁶ This may result in current Traveller-specific accommodation being located in areas that are inaccessible, isolated from local services, transport links, education and health facilities. Locations may include remote industrial estates not designated as residential areas, sometimes close to environmental hazards.³⁷ The provision of transient units envisaged in the 1998 Act has not been met.³⁸ Traveller organisations have reported that all of the transient units built since 1998 are being used as emergency accommodation and many for permanent accommodation.³⁹ While it may be appropriate that all additions to the built environment require planning permission and scrutiny, it might be argued that perhaps those designed for Travellers ought not be subject to approval by local politicians.

Travellers – and particularly those encamped on unauthorised locations – are vulnerable to forced evictions. An ‘illegal’ encampment on the banks of the River Dodder in Dublin in 2001 gave rise to high-profile media coverage of litter problems in the surrounding area and associated cleaning costs incurred by the local authority, South Dublin County Council.⁴⁰ The Housing (Miscellaneous Provisions) Act was introduced in 2002, making trespass a criminal, rather than a civil, offence,⁴¹ thus effectively criminalising nomadism. Section 24 of the 2002 Act amended the Criminal Justice (Public Order) Act 1994 by making it a criminal offence to

³⁴ Provided for in Part II of the Housing (Traveller Accommodation) Act 1998.

³⁵ While temporary sites are not subject to the ‘Part 8 process’, any permanent Traveller-specific accommodation is subject to the Part 8 Planning process under the Local Government (Planning & Development) Regulations 2001 to 2007 and the Planning and Development Acts 2000 to 2006, as amended.

³⁶ Shane Phelan, ‘Proposed Traveller housing site faces 93 objections, including the effect on views and property prices’ *Irish Independent* (Dublin, 20 October 2015).

³⁷ See KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-specific Accommodation* (NTACC and the Housing Agency 2014), https://housing.ie/getattachment/Our-Publications/Housing-Management/Why-Travellers-Leave-Traveller-Specific-Accommodation_FINAL.pdf accessed 16 February 2016.

³⁸ As provided for in s 10(3)(c) Housing (Traveller Accommodation) Act 1998. The accompanying Explanatory Memorandum, under ‘Form and Content of Accommodation Programmes’, states ‘In preparing programmes regard must be had to the accommodation needs which have been identified including the need for transient halting sites and the distinct needs and family circumstances of travellers.’

³⁹ The Irish Traveller Movement 2014 *Report to the UN Committee on Economic, Social and Cultural Rights* states: ‘a need was identified by the authorities several years ago for 1,000 units of transient accommodation, today there is not one single site in Ireland with an operating unit of transient accommodation. Those that are described as transient accommodation including 47 units are actually being used as emergency sites and do not operate as transient sites.’ See Irish Traveller Movement, *Report in Response to Ireland’s Third Examination under the International Covenant on Economic Social and Cultural Rights* (Irish Traveller Movement 2014) 14.

⁴⁰ The Dodder incident is explored more fully in Chapters 1 and 3 and was believed to have given rise to the rapid enactment of the 2002 Housing (Miscellaneous Provisions) Act of 2002.

⁴¹ Section 24, Housing (Miscellaneous Provisions) Act 2002.

enter and occupy privately or publicly owned land without the consent of the owner.⁴² No written notice is needed and large powers of discretion are awarded to Gardaí under this legislation. Evictions can also be made under other pieces of legislation⁴³ with little notice given and no right to appeal the decision.

Nomadism is a feature of Traveller life and, although many Travellers are no longer nomadic, nomadism remains a distinguishing feature of Traveller culture. Article 3(1) of the Irish Constitution speaks of uniting ‘all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions’.⁴⁴ ‘Given that nomadism is acknowledged as a tradition of the Irish traveller[sic]’ says Dualta Roughneen, ‘it would be anathema to the Constitution to eliminate the possibility of the Irish Traveller living a peripatetic existence.’⁴⁵ Yet an accepted offer of standard housing may be used by local authorities in Ireland as an attempt to successfully accommodate Travellers. For example, in its Common Core Document to the UN, last updated in 2014, the Irish state claimed:

Standard housing is allocated by local authorities on the basis of a scheme of letting priorities and Travellers have the same access to standard housing as the general population.

[. . .]

There has been a significant increase in the number of families living in private rented accommodation demonstrating that the private rental market has become much more open to Traveller tenants.⁴⁶

The state has also claimed that, by being free to live in any kind of accommodation they chose, Travellers are, as such, adequately accommodated:

The vast majority of Travellers are accommodated in standard housing.
Travellers are free to express a preference for any form of accommodation

⁴² Section 24, Housing (Miscellaneous Provisions) Act 2002.

⁴³ Such as s 69 Roads Act 1993 and s 30 Local Government (Sanitary Services) Act 1948.

⁴⁴ Constitution of Ireland, Article 3(1).

⁴⁵ Dualta Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State* (Cambridge Scholars Publishing 2010) 15.

⁴⁶ United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, paras 219–220. It is unclear whether these figures are proven or that this is an extrapolated finding.

through the assessment of needs process. The 2013 Housing Needs Assessment indicates that only 2% of households on the housing waiting list require Traveller-specific accommodation. These requirements are being addressed in the current course of the 2014–2018 Traveller Accommodation Programmes. Most of those who qualified for Social Housing (89%) did not have a specific accommodation requirement.⁴⁷

While a figure of 2% appears, on the surface, to be low, it may be artificially low.⁴⁸ Despite arguments by the state that a move to private rented accommodation is increasingly the norm, this has been attributed by Travellers to the lack of available culturally appropriate accommodation, rather than being linked to a preference for that type of accommodation *per se*,⁴⁹ as well as a possible fear that refusing support might mean a removal from the housing list. The Traveller community has also experienced marked demographic change in the last two decades. Between 2002 and 2013, the number of Traveller families increased from 6,289 to 9,899, an increase of 3,610 families.⁵⁰ This also has significant implications for the provision of Traveller-specific accommodation, where local authorities should ideally should prepare for an increase in the number of Traveller families requiring accommodation as well as accommodating existing Traveller families living in unsuitable accommodation.

Despite fiscal constraints associated with the financial downturn between 2008 and 2013, which reduced the capital allocation to Traveller accommodation from €40 million to €4

⁴⁷ United Nations Committee on Economic, Social and Cultural Rights, Reply of Ireland to the List of Issues in relation to its third periodic report, 8 April 2015, E/C.12/IRL/Q/3/Add.1, at paras 64–66. These paragraphs are in response to question 16, under the heading of Article 11 – The right to an adequate standard of living, in the CESCR Committee’s List of Issues. Question 16 states ‘Please provide information on results achieved by the implementation of the National Action Plan for Social Inclusion 2007–2016 in addressing consistent poverty and the risk of poverty, particularly among children and families with children, and especially lone-parent families, Travellers and Roma.’ See United Nations Committee on Economic, Social and Cultural Rights, List of issues in relation to the third periodic report of Ireland, 17 December 2014, E/C.12/IRL/Q/3.

⁴⁸ In his recent PhD study on models of local participatory governance, including Local Traveller Accommodation Consultative Committees (LTACCs), Cian Finn notes ‘[t]he dispute over the accommodation preferences of Travellers’ as being a ‘source of distrust between local authorities and Traveller representatives’. Cian Finn, ‘Deepening participation, deepening local democracy? The state of local participatory governance in Ireland’ (PhD thesis, University of Limerick 2017), 175.

⁴⁹ KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-Specific Accommodation* (NTACC and the Housing Agency 2014). See also *ERRC v Ireland* (No. 100/2013), a Collective Complaint under the Revised European Social Charter for failure to fulfil Ireland’s statutory obligations under the Housing (Traveller Accommodation) Act 1998 to provide Traveller-specific accommodation and implementing regressive evictions legislation.

⁵⁰ KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-Specific Accommodation* (NTACC and the Housing Agency 2014) 7.

million,⁵¹ there has been criticism recently of ‘a consistent underspend or failure to draw down the full amount of the funding allocated to Traveller Accommodation Plans at local level’.⁵² An underspend of 36% of the Traveller accommodation budget allocated to local authorities was reported between 2008 and 2013,⁵³ and an underspend of €1.2 million in 2016 alone.⁵⁴ The government’s ‘Action Plan for Housing and Homelessness’, published in July 2016,⁵⁵ promised ‘an expert, independent review’ of capital and current funding for Traveller-specific accommodation, from the year 2000, adding that where targets have not been met, an analysis will be carried out of the ‘underlying reasons, in order to identify the particular challenges that need to be addressed to underpin future progress’.⁵⁶ The review, which is – at the time of writing – unpublished, has already been highlighted in the media as containing evidence of local authorities not meeting their targets for a considerable period of time.⁵⁷ One TD, Eoin Ó Broin, recently attributed underspends on accommodation to ‘Traveller prejudice’ by local

⁵¹ An equivalent of 90% reduction. Capital funding for Traveller accommodation has fallen from €35 million in 2010 to €3 million in 2014. Minister of State for Housing, Jan O’Sullivan TD, Parliamentary Questions: Written Answers [25088/14], 12 June 2014, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014061200059#WR000400> accessed 12 August 2016.

⁵² Irish Human Rights and Equality Commission (2015) *Report to UN Committee on Economic, Social and Cultural Rights on Ireland’s Third Periodic Review* at 70, <http://www.ihrec.ie/download/pdf/icescrreport.pdf> accessed 12 August 2016.

⁵³ See testimony of Ronnie Fay, Pavee Point, appearance before Oireachtas Joint and Select Committees: Committee on Housing and Homelessness, Thursday, 19 May 2016, <https://www.kildarestreet.com/committees/?id=2016-05-19a.44> accessed 12 August 2016.

⁵⁴ Jack Power, ‘Over €1.2m in Traveller housing funding left unspent’ *Irish Times* (Dublin, 5 May 2017).

⁵⁵ Following the 2016 General Election, a new dedicated Minister for Housing was appointed to ‘accelerate the delivery of the committed €3.8 billion Social Housing Strategy and ramp up the supply of private housing’. See Department of the Taoiseach, *A Programme for Partnership Government* (Department of the Taoiseach 2016) 33, http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf accessed 21 May 2017. The Department of Housing, Planning, Community and Local Government is responsible for the creation of policy, legislation and funding in relation to all Traveller accommodation. See Minister for Housing, Planning and Local Government, Simon Coveney TD, Department of Environment, Community and Local Government Written Answers, Thursday, 16 June 2016, ‘Traveller Accommodation’, <https://www.kildarestreet.com/wrans/?id=2016-06-16a.391> accessed 21 May 2017, where Minister Coveney states: ‘My Department’s role is to ensure that there are adequate structures and supports in place to assist the authorities in providing [Traveller] accommodation, including a national framework of policy, legislation and funding.’

⁵⁶ Department of Housing, *Action Plan for Housing and Homelessness* (Department of Housing 2016) 55, http://rebuildingireland.ie/Rebuilding%20Ireland_Action%20Plan.pdf accessed 21 May 2017. In May 2017, the Irish Traveller Movement reported ‘RSM PACEC LIMITED was appointed by the housing agency in September 2016 to carry out a review of provision of Traveller accommodation under all TAPS from 2000 to date. This came from an action in the State’s strategy “Rebuilding Ireland”. Consultation took place with Local Authorities and some Traveller organisations. The NTACC has received a very brief presentation on its findings to date. The first draft of this research will be circulated to the NTACC very soon and be discussed at their next meeting on May 24th. There will be an NTACC sub group established (ITM will be a member of this subgroup), to review the findings and develop key recommendations which will be approved by the NTACC and given to the Minister on the key findings from the research’, ITM eBulletin 16 May 2017.

⁵⁷ Kitty Holland, ‘Traveller housing targets have not been met in 18 years’ *Irish Times* (Dublin, 14 September 2017).

authorities.⁵⁸ TD Bríd Smith, a former chairperson of the Dublin City Council Local Traveller Accommodation Consultative Committees (LTACC), supported this view, saying she was ‘shocked’ at the underspend of €14 million of the Traveller accommodation budget between 2009 and 2011, but attributed this to racism on the part of local representatives:

This is a deeply rotten racist reactionary political attitude towards the community . . . This is what we must begin to break down. The fish rots from the head but the cure will also come from politicians giving a lead locally and nationally.⁵⁹

The ‘virulence and persistence of anti-Traveller racism’ has been well documented by many scholars writing about Travellers,⁶⁰ with many non-Travellers continuing to say that Irish Travellers themselves are somehow to blame for their own outcomes.⁶¹ If media reporting is accurate, the recent independent review will, when published, show evidence of ‘significant deterioration’ in the quality and standard of Traveller accommodation, as well as indicating that ‘anti-Traveller prejudice at local authority level may be hampering progress’.⁶² As activist and former Director of the Irish Traveller Movement Brigid Quilligan says:

My young son is 13 years of age and attends a good school that has good policies, yet everyday he must correct someone who uses the word ‘knacker’ and act like an advocate for his community. Can [you] imagine the weight on a 13 year old’s shoulders?⁶³

No matter how many boxes we tick or how much we fulfil our requirements and responsibilities in Irish society, we still experience discrimination and prejudice in every area of life on a daily basis. People justify racism against us by stating we bring it on ourselves. That is what the general Irish population thinks about us

⁵⁸ Michael Staines, ‘Local authorities accused of Traveller prejudice’ (Newstalk website, 7 May 2017) <http://www.newstalk.com/Local-authorities-accused-of-Traveller-prejudice-> accessed 21 May 2017.

⁵⁹ Deputy Bríd Smith, Dáil Debates, Traveller Ethnicity (Statements), 1 March 2017.

⁶⁰ David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (Policy Press 2013) 59, citing a variety of sources, such as Robbie McVeigh, Sinead Ni Shúinéar, Jane Helleiner and others.

⁶¹ Robbie McVeigh, Expert Witness Testimony in the case of *O’Leary v Allied Domecq* (Central London County Court, 29 August 2000).

⁶² Kitty Holland, ‘Traveller housing targets have not been met in 18 years’ *Irish Times* (Dublin, 14 September 2017).

⁶³ Brigid Quilligan, Statement to Houses of the Oireachtas Joint Committee on Justice, Defence and Equality, *Report on the Recognition of Traveller Ethnicity*, April 2014 (Houses of the Oireachtas 2014) 18.

and we know this. We feel the hate, as do our children. We see the hate in the media and displayed by people in positions of responsibility, politicians, judges, the police, teachers and doctors. We feel, see and experience it on a daily basis.⁶⁴

2. The research question

In theory, the framework of international human rights law treaties and provisions exclusively identify the state as the entity that is required to respect, protect and fulfil rights at domestic level. In reality, however, human rights are put in place, or ‘operationalised’,⁶⁵ through a variety of state and non-state actors in many blended or hybrid ways. This ‘hybridity’⁶⁶ can raise certain anxieties but also has transformative potential.

The empirical core of this thesis is an understanding of what happens to human rights in practice in the case of Traveller accommodation in Ireland, beyond what is set out in law and policy. The primary research question is: How is the international human right to culturally appropriate accommodation put in place in Ireland in the case of Traveller accommodation? This implicates the sub-question: how might this operationalisation be improved? Through an in-depth analysis of how Traveller accommodation is operationalised in Ireland, the research shows that this operationalisation displays hybrid characteristics and argues that a formal recognition of this hybridity has potential to improve on how the right to culturally appropriate accommodation is operationalised.

The research makes three important and original contributions to knowledge in this area:

1. It provides a comprehensive exploration of how the right to culturally appropriate accommodation is seen in a domestic setting, in this case the situation of Traveller accommodation in Ireland, a contribution of particularly Irish interest;

⁶⁴ Brigid Quilligan, statement to Houses of the Oireachtas Joint Committee on Justice, Defence and Equality, *Report on the Recognition of Traveller Ethnicity*, April 2014 (Houses of the Oireachtas 2014) 2–3.

⁶⁵ Understanding ‘to be operationalised’ or ‘operationalisation’ as the act of moving from the abstract provisions of international human rights law towards the translation, implementation and monitoring of rights in the domestic context. This framework is fully explored and established in Chapter 2.

⁶⁶ Understanding ‘hybridity’ as the process of bringing together multiple elements to make something new, as well as the product of that process, in ways which challenge previous power dynamics. Hybridity is explored more fully in Chapter 4.

2. It explores the role played by non-state actors in how rights are given effect to domestically, both those who are allocated responsibility by the state as well as non-state actors who assume responsibility in a more unprompted way. These are two contexts which are relatively under-explored in the case of Traveller accommodation and in the responsibility of non-state actors more generally around rights delivery in Ireland; and
3. It develops theoretically sound conceptions of both ‘operationalisation’ and ‘hybridity’ in the human rights context which are of broader applicability.

The thesis thus makes local and international, theoretical and practical contributions to knowledge in an original and innovative way.

3. Core argument

Although ‘operationalisation’ is a term that is widely used, including by the United Nations, it is a vague and under-theorised concept in human rights scholarship and discourse and has been the subject of little systematic consideration. The effective operationalisation of the right to culturally appropriate accommodation in the case of Traveller accommodation should mean the opportunity to live in secure accommodation that is informed by choice, that is sustainable, and that meets cultural needs, with people consulted and involved in where they live.⁶⁷ Yet, despite policy and legislative developments, Ireland has failed to provide sufficient accommodation for Travellers, in the form of Traveller-specific accommodation on halting sites and group housing schemes, or transient halting sites.⁶⁸ It has failed to develop a set of

⁶⁷ Gráinne O’Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

⁶⁸ Committee on the Rights of the Child, Concluding observations on the initial periodic report of Ireland, 4 February 1998, CRC/C/15/Add.85, at 14 and 34; Committee on Economic, Social and Cultural Rights, Concluding observations on the initial periodic report of Ireland, 14 May 1999, E/C.12/1/Add.35, at 20; Committee on Economic, Social and Cultural Rights, Concluding observations on the Second periodic report of Ireland, 5 June 2002, E/C.12/1/Add.77, at 32; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 78; Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Ireland adopted on 10 October 2012, ACFC/OP/III(2012)006, at 30; European Committee Against Racism and Intolerance, *ECRI Report on Ireland* (Fourth Monitoring Cycle), adopted 5 December 2012, CRI(2013)1, at 92; *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 43.

enforcement measures to ensure that the Traveller Accommodation Programmes are fully implemented⁶⁹ and it has failed to keep Traveller halting sites maintained to acceptable standards with access to adequate sanitation, running water and power.⁷⁰ According to the Traveller rights group the Irish Traveller Movement, Traveller accommodation ‘has reached an all-time crisis in Ireland’.⁷¹

The thesis sets out the context for the ineffective operationalisation of this right by generating insight into how Ireland fails to meet its international obligations in the specific case of Traveller accommodation. It establishes that a right to culturally appropriate accommodation exists in international human rights law and a central part of Traveller ethnicity rests upon this right. However, the Irish state is not effectively operationalising this right and, as a result, there are major gaps in the enjoyment of it in Ireland.

To understand how and why this right is not enjoyed to the extent envisaged by the international human rights framework, it is necessary to understand what occurs within the structural and procedural aspects of how this right is given effect to, or operationalised, and to seek a greater understanding of what is envisaged by the international human rights legal framework. Three key concepts in human rights law are of importance when we consider how rights are put into practice: operationalisation, implementation and enforcement. We know that these concepts are interlinked, yet each suffers from a definition gap and the distinction between the terms is unclear, with a lack of clarity in the guidance that is offered to states on how rights should ideally be operationalised.

The thesis develops a theoretically sound understanding of ‘operationalisation’ as a concept within the human rights framework by bringing together sources from international and regional human rights law in order to identify how operationalisation is conceived of within these frameworks, as well as examining other disciplinary perspectives on operationalisation. Coming to an understanding of the concept of operationalisation was vital for the purposes of applying this knowledge in the context of Traveller accommodation. By way of examining that

⁶⁹ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 3 March 2017, CEDAW/C/IRL/CO/6-7, 48–49.

⁷⁰ *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 86–92.

⁷¹ Irish Traveller Movement (2013) Fact Sheet on Accommodation, http://itmtrav.ie/uploads/Fact_sheet_on_accommodation_Nov_2013.pdf accessed 30 January 2016.

guidance, as well as guidance offered in other disciplines, it will be theorised that operationalisation is accessed (1) by translating, through the creation of laws and policies; (2) by implementing, through the creation of domestic bodies with rights mandates, the allocation of resources and the actual delivery of rights; and (3) by monitoring or measuring. These three characteristics of operationalisation are separated for the purposes of elucidation. In reality, however, they work concurrently and synchronously, are interrelated and interlinked.

This theoretical operationalisation framework is then applied in practice to the translation, implementation and monitoring of the right to culturally appropriate accommodation in the context of Traveller accommodation. Empirical evidence for this is gathered by way of qualitative, semi-structured, one-to-one interviews with (1) state actors, in the form of senior government officials; (2) non-state actors in domestic civil society who are staff in Traveller non-governmental organisations or otherwise involved in the provision of Traveller accommodation; and (3) non-state actors in international civil society, in the form of experts at both United Nations and Council of Europe level. The interviews uncover many hidden facets of human rights operationalisation via the direct observations and experience of the interviewees, pointing to a range of shortcomings in the manner in which Traveller accommodation rights are operationalised in Ireland. It will be seen that some interviewees feel the international treaty-monitoring systems are disappointingly flawed in both the vagueness of treaty body recommendations and the passive ways in which the Irish state has responded to these obligations.

One overarching piece of learning to emerge from the interviews is how change in Traveller accommodation rights has happened slowly and in small increments and has been subject to ebbs and flows over the years. Interviewees spoke of how legal remedies have their place, but are limited in terms of broader applicability. Legislative provisions have the potential to bring about quite significant change but only if they are properly enforced and followed up and have built-in sanctions for non-compliance. Interviewees said that, as important as the legal system and legislative provisions are, good policy decisions, taken by properly trained staff in a uniform way across central and local government are equally so. Some interview participants

spoke of the necessity of sticking with the issues over long periods of time in order to witness a ‘continuum of change’ in terms of Traveller accommodation rights.⁷²

A second and crucially important piece of learning emerging from the interviews is how Traveller accommodation rights have, over time, been given effect by the state and non-state actors working together in hybrid ways, whether formally or informally. This system of co-delivery is of particular interest to human rights operationalisation generally, given that the human rights framework appears to be still wedded to the notion of all responsibility beginning and ending with ‘The State’.⁷³ We know this conception is no longer the case and, in the case of Traveller accommodation, the interview findings hinted at a disconnect between the entity that is obligated, i.e. the state, and the multiplicity of entities involved in the delivery of rights, such as local authorities, government departments and officials involved in policy decisions. Therefore, even though the international human rights framework sees the state as the entity that is tasked with the responsibility of operationalising, in practice the act of operationalisation takes place by way of the state acting with non-state actors in a multitude of scenarios.

There are advantages and disadvantages to hybridity in operationalisation. In the case of Traveller accommodation, hybrid benefits can be seen when non-state actors in the form of Traveller organisations are partners in operationalisation. Despite the promising intended outcomes of hybrid structures in the operationalisation of the right to culturally appropriate accommodation as it manifests in Traveller accommodation, a lack of stability is a significant shortcoming that may have been shown to have lasting effects. The thesis shows that although hybrid operationalisation is putatively possible it experiences the weakness of informality, which makes it vulnerable to political volatility.

In the case of Traveller accommodation, the research hints that a system of co-delivery in the operationalisation of the right has mostly been more effective than not. Not only has this effectiveness been displayed, but in the context of a historically and structurally discriminated-against minority such as the Traveller community in Ireland, post-colonial theory has suggested that engaging in a hybrid approach may also be a method of re-establishing the balance of

⁷² Interviews with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

⁷³ Peter J Spiro, ‘New Players on the International Stage’ (1997) 2 Hofstra Law and Policy Symposium 19F, 24.

power, and may serve to equalise or re-imagine the relationship between the state and the minority. Hybridity in operationalisation is not uncommon in Ireland and there are hybrid models, good and bad, evident throughout the domestic landscape in areas other than Traveller accommodation. Other examples raise similar anxieties, such as the balance of power resting with the funder in the case of how funding is allocated, for example, and therefore being subject to change from year to year as exchequer funds and budgets permit. This creates further anxieties in relation to independence from government on policy issues.

In attempting to explore successful hybrid models and processes, as well as answer questions about their effectiveness in terms of operationalisation, the thesis considers 'hybridity' further, exploring its origins in other disciplines, in order to consider models and modes of enforcement. In asking and answering the question 'what does it mean to be hybrid?', insight is gained into more formalised hybrid structures that endure and the potential of a more conscious commitment to hybridity in the case of Traveller accommodation.

What hybridity means varies over time and between cultures.⁷⁴ The challenge, however, is not to come up with an all-encompassing definition of 'hybridity' but to find a way of applying the different types of hybridity to a usable framework, the operationalisation of the right to culturally appropriate accommodation in this case. In this way, the thesis focuses upon how hybridity can be used in less oppositional ways of engagement,⁷⁵ and how hybrid models of compliance which combine political, judicial and 'technocratic' elements may be more effective in facilitating compliance with human rights than orders from international courts or expert bodies.⁷⁶ A 'fit-for-purpose' hybrid approach, one which blurs boundaries, has the potential to build increased accountability, have greater financial strength and create more sustainable solutions.⁷⁷

Hybridity essentialises and forces us to focus upon 'the other', in a way. Although, as we have seen, the concept of hybridity has the potential to facilitate a move away from unhelpful binaries or 'homogenous forms', once we deal with separate forms or entities in any way, we

⁷⁴ Jan Nederveen Pieterse, 'Hybridity, so what?' (2001) 18 *Theory, Culture and Society* 219, 220.

⁷⁵ Rosa Freeman, 'Hybrid human rights' in Paul Jackson (ed), *Handbook of International Security and Development* (Edward Elgar 2014) 386, 390.

⁷⁶ Basak Cali and Anne Koch, 'Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301.

⁷⁷ J Gregory Dees and Beth Battle Anderson, 'Sector bending: blurring lines between non-profit and for-profit' (2003) 40 *Society* 16.

essentialise them, even unwillingly, resting upon the notion of ‘the other’.⁷⁸ It might be said that the non-state actor or the civil society member, in this case members of the Traveller community or Traveller organisations, might be viewed as the weaker player, or ‘the other’ in hybrid models, which might place them at a disadvantage in terms of decision-making and control of outcomes.⁷⁹ However, as can be seen in post-colonial hybrid situations, in the context of historically and structurally discriminated-against minorities, the use of hybrid approaches may also act as a pathway to re-establishing the balance of power, rebalancing the relationship between the state and the minority. In order to investigate potential routes to greater formalisation, the thesis examines models from other contexts with more formalised hybrid approaches to consider how these models might work in the context of Traveller accommodation.

Three examples are explored: (1) hybridity in housing associations in England; (2) hybridity in civil society’s role in established organisations, such as in the case of the World Bank; and (3) existing hybrid human rights mechanisms between the UN and the state. Examples of the latter are the cases of the UN Convention on the Rights of Persons with Disabilities (CRPD), Article 33, which requires that ‘Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process’ and calls for ‘participation’, rather than simply consultation,⁸⁰ and domestic implementation mechanisms of the United Nations Guiding Principles on Business and Human Rights (the ‘Ruggie Principles’).⁸¹ The models are examined against the stages whereby operationalisation

⁷⁸ See Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development*, 9, 13.

⁷⁹ See Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development*, 9, 20, where she states that the ‘consumption of and reaction to hybridity by local actors can also be quite varied and largely depends on their points of view and complex histories’ and this needs to be taken into account.

⁸⁰ United Nations Convention on the Rights of Persons with Disabilities, GA Res. 61/106 (2007), entered into force 3 May 2008. Article 33 sets out how States parties ‘shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation’ of the Convention. In this thesis, ‘participation’ is understood as that which is expressed in the Committee on the Rights of the Child’s General Comment 12, which states: ‘This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes’. The principles of ‘participation’ are, therefore, of an ‘ongoing process’, which include ‘information-sharing and dialogue’, that is ‘based on mutual respect’, where view are ‘taken into account and shape the outcome of such processes’. See UN Committee on the Rights of the Child (CRC), General Comment No 12, The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para 3.

⁸¹ *Report of the Special Representative of the Secretary-General on the Issues of Human Rights, Transnational Corporations and Other Business Enterprises*, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011, A/HRC/17/31.

already takes place, i.e. by translating, through the creation of laws and policies; by implementing, through the creation of domestic bodies with rights mandates, the allocation of resources and the actual delivery of rights; and by monitoring or measuring.

The thesis goes on to consider the implications of these more formalised models in the context of a potential hybrid model in the case of Traveller accommodation in Ireland, before concluding that the involvement of civil society as set out in Article 33.3 of the Convention has significance for Traveller accommodation. A similar mechanism in Ireland in this case might allow Ireland to move beyond the frequently criticised accommodation consultative committees, which are tasked solely with overseeing the implementation of the 1998 Act, and to a position of considering the wider intersectional issues that apply in the case of culturally appropriate Traveller accommodation. Such a mechanism is also considered in light of a statute-based Traveller accommodation agency, often proposed by Traveller organisations as a preferred central coordination model. It might be argued that the case of Travellers in Ireland is distinct in that we are not just considering the rights of a minority group, but one that is seen by many in power as some type of moral underclass, as a less deserving group, who will only be accorded rights when they first assume their responsibilities to society.

It is important to note here the role of state-established interdepartmental committees and parliamentary committees, which may undoubtedly be considered steps towards more effective state engagement with international human rights mechanisms. These bodies, however, are not strictly speaking hybrid in nature. Although they can employ methods of engagement with rights holders, either by extending invitations to interest groups to address them, or using Pre-Legislative Scrutiny in the parliamentary process, for example,⁸² these methods are not in themselves types of hybrid engagement. Decisions around types and frequency of engagement are at the discretion of the committees in question and are therefore by their nature informal and, much as in the case of already highlighted types of hybrid Traveller accommodation operationalisation methods, subject to political volatility.

⁸² Oireachtas Library and Research Service (2014) Pre-legislative Scrutiny (PLS) by Parliament, Spotlight No. 8 of 2014, https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Final_Spotlight_PLS_17Dec2014_172050.pdf accessed 25 September 2017.

As the next section will show, much research has been conducted into different aspects of Traveller rights, yet the matter of hybridity in operationalisation has not been considered to date in any meaningful way.

4. Existing literature

Although Travellers account for less than one per cent of the population in Ireland, since the 1970s a great deal has been written about their situation of disadvantage. Relatively little in-depth research or analysis has been conducted on the reasons for the non-delivery of Traveller accommodation in Ireland, however, beyond reporting on aspects of non-delivery on the part of the state, or recommendations as to why law and policy should change in this regard. This section outlines four categories of the existing literature that are of interest. First, the broader social analytical literature on Travellers more generally, including that conducted in the Irish context; secondly, research which focuses upon Traveller accommodation more specifically; thirdly, literature concerning the applicability of international human rights law in Ireland; and fourthly, literature on hybridity.

First, within a broad sociological context, in the late 1960s and early 1970s, Grattan Puxon⁸³ was one of the first authors to write on the subject of evictions and nomadism of Travellers.⁸⁴ Puxon's historical narrative, co-authored with Donald Kenrick in the 1970s,⁸⁵ laid the foundations of modern writing on 'the Gypsy problem',⁸⁶ and is of interest to this thesis given the establishment of the Commission on Itinerancy at that time⁸⁷ 'to enquire into the problem

⁸³ English journalist and activist Grattan Puxon lived for a period in Dublin in the early 1960s, founded an 'Irish Travellers' Committee' and established Ireland's first school for Travellers in Cherry Orchard in west Dublin at that time.

⁸⁴ See Grattan Puxon, 'Gypsies' (1968) 3 *Help* 6; Grattan Puxon and Venice Puxon, *The Victims (itinerants in Ireland)* (Aisti Éireannacha 1967); Grattan Puxon, *On the Road* (National Council for Civil Liberties 1969); Donald Kenrick and Grattan Puxon, *The Destiny of Europe's Gypsies* (Heinemann 1972).

⁸⁵ Donald Kenrick and Grattan Puxon, *The Destiny of Europe's Gypsies* (Heinemann 1972).

⁸⁶ See Adina Schneeweis's description of 'the Gypsy problem' as 'European societies' (historical) social and political concern in regards to, and attempt to control, the lifestyle of Gypsy / Roma communities, including nomadic or semi-nomadic existence, poverty, inadequate literacy and education, sanitation, unemployment and the handling of illegal affairs, and a general disinterest to be involved in the social system of the host country', Adina Schneeweis, 'Talking difference: discourses about the Gypsy / Roma in Europe since 1989' (PhD thesis, University of Minnesota 2009) 6.

⁸⁷ The Commission was chaired by a Supreme Court judge and made up of senior officials in various government departments, State bodies and a number of other agencies, such as the Vice-president for Leinster of the National Farmers' Association; the Director of the Dublin Institute of Catholic Sociology; a Chief Superintendent of an Garda Síochána; a County Manager; two Chief Medical Officers; a former chief inspector for the Department of Education; and the Chairman of the General Council of the Committees of Agriculture. There were no Traveller representatives. See Irish Traveller Movement, *Review of the Commission on*

arising from the presence in the country of itinerants in considerable numbers'.⁸⁸ The problematisation of Travellers is a theme that is identified throughout the literature from this period,⁸⁹ and is mirrored throughout this thesis in various forms, from case law in the European Court of Human Rights which accepts the construction of Gypsies as a problem for domestic authorities,⁹⁰ to the Irish parliamentary debates that accompany the passage of significant legislative measures.⁹¹

In the 1970s, American sociologists and anthropologists Sharon and George Gmelch studied Irish Travellers when they lived among and photographed Traveller families on the outskirts of Dublin.⁹² Recording their fieldwork in the 1970s and 1980s while living among Travellers in Holylands in south Dublin, Sharon and George Gmelch's writing on a common ethnic identity among Travellers⁹³ is of significance within the overall discourse around ethnicity for the purposes of this research, mainly because of its claim that ethnic groups can exist in indigenous ways in any society and do not necessarily need to be from elsewhere. Cultural anthropologist Sinéad Ní Shúinéar conducted research in the late 1990s and early 2000s with Travellers all over Ireland, on all aspects of Traveller life, and on family and relationships in

Itinerancy Report (Irish Traveller Movement 2013) 3, <http://itmtrav.ie/wp-content/uploads/2017/02/ITM-Review-of-the-1963-Commission-on-Itinerancy.pdf> accessed 13 June 2017.

⁸⁸ Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963) 11.

⁸⁹ See, for example, Anthony Drummond, 'The Construction of Irish Travellers (and Gypsies) as a "Problem"' in Mícheál Ó hAodha (ed), *Migrants and Memory: The Forgotten "Postcolonials"* (Cambridge Scholars Publishing 2007); Robbie McVeigh, 'The "Final Solution": Reformism, Ethnicity Denial and the Politics of Anti-Travellerism in Ireland' (2007) 7 *Social Policy and Society* 91; Jane Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press 2000); Colin Clark and Becky Taylor, 'Is Nomadism the "problem"?' The social construction of Gypsies and Travellers as perpetrators of 'anti-social' behaviour in Britain' in Sarah Pickard (ed), *Anti-Social Behaviour in Britain: Victorian and Contemporary Perspectives* (Palgrave Macmillan 2014).

⁹⁰ As in *Buckley v UK* [1996] 23 EHRR 101. See Ralph Sandland, 'Developing a jurisprudence of difference: The protection of the human rights of travelling peoples by the European Court of Human Rights' (2008) 8 *Human Rights Law Review* 475, 483.

⁹¹ As explored in Chapter 3.

⁹² Sharon Gmelch and George Gmelch, 'The itinerant settlement movement: its policies and effects on Irish Travellers' (1974) 63 *Studies: An Irish Quarterly Review* 1; Sharon Gmelch and George Gmelch, 'The emergence of an ethnic group: the Irish tinkers' (1976) 49 *Anthropological Quarterly* 225; Sharon Gmelch, 'Economic and power relations among urban tinkers: the role of women' (1977) 6 *Urban Anthropology* 237; Sharon Gmelch, *The Irish Tinkers: the Urbanization of an Itinerant People* (Cummins Publishing Co Ltd 1977); George Gmelch and Sharon Gmelch, 'The cross-channel migration of Irish Travellers' (1985) 16 *Economic and Social Review* 287; Sharon Gmelch, 'Groups that don't want in: Gypsies and other artisan, trader and entertainment minorities' (1986) 15 *Annual Review of Anthropology* 307; Sharon Gmelch, *Nan: the Life of an Irish Travelling Woman* (WW Norton 1986). More recently, a return visit to Ireland in 2011 resulted in the publication of Sharon Gmelch and George Gmelch, *Irish Travellers: The Unsettled Life* (Indiana University Press 2015).

⁹³ See Sharon Gmelch and George Gmelch, 'The emergence of an ethnic group: the Irish tinkers' (1976) 49 *Anthropological Quarterly* 225.

particular, arguing strongly for the recognition of Travellers as a distinct ethnic group.⁹⁴ Referred to by the Equality Authority as ‘dissenting voices’ on the subject of ethnicity, two researchers are of note here. The first is Patricia McCarthy, in her unpublished Master’s thesis on Travellers and poverty in 1972, who rejected the idea that Irish Travellers were a distinct ethnic group,⁹⁵ a view that was ‘particularly influential in policy debate’ at that time,⁹⁶ but one that McCarthy herself later changed her stance upon.⁹⁷ The second is Dympna McLoughlin, who did not engage with any academic literature about ethnicity and argued that recognition of ethnicity is not useful in understanding Traveller disadvantage.⁹⁸ Interestingly also, Jane Helleiner notes that the Gmelchs’ somewhat pessimistic view of the community they lived alongside, documenting aspects of cultural breakdown and dysfunctionality, ‘often appeared to lend support to an assimilationist state settlement project even when this was not the intention of the authors’. She also remarks that English social anthropologist Judith Okely’s work in the 1970s was ‘more palatable’ to Gypsy and Traveller activists, given its more optimistic focus upon the resilience and strength of Traveller culture.⁹⁹

Okely published widely in the field of ethnic identity, culture, nomadism and sedentarism among Gypsies and Travellers, connecting social, economic and employment aspects of Gypsy life,¹⁰⁰ as well as arguing that there is much common ground shared by Gypsies, Travellers and Romany groups in the British Isles, despite unequal power relations with the settled

⁹⁴ See Sinead Ní Shúinéar, ‘Irish Travellers, ethnicity and the origins question’ in M McCann, S Ó Siocháin and J Ruane (eds), *Irish Travellers: Culture and Ethnicity* (Institute of Irish Studies, Queens University Belfast 1994); Sinead Ní Shúinéar, ‘Irish Travellers: ethnolect, alliance, control’ (University of Greenwich 2003); Sinead Ní Shúinéar, ‘Othering the Irish (Travellers)’ in Ronit Lentin and Robbie McVeigh (eds), *Racism and Anti-Racism in Ireland (Beyond the Pale 2002)*.

⁹⁵ Patricia McCarthy, ‘Itinerancy and poverty: a study in the sub-culture of poverty’ (MSocSc thesis, University College Dublin 1972).

⁹⁶ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006) 45.

⁹⁷ Patricia McCarthy, ‘The sub-culture of poverty reconsidered’ in May McCann, Séamas Ó Siocháin and Joseph Ruane (eds), *Irish Travellers: Culture and Ethnicity* (Queen’s University of Belfast/The Anthropological Association of Ireland 1994).

⁹⁸ Dympna McLoughlin, ‘Ethnicity and Irish Travellers: reflections on Ní Shúinéar’ in May McCann, Séamas Ó Siocháin and Joseph Ruane (eds), *Irish Travellers: Culture and Ethnicity* (Queen’s University of Belfast/The Anthropological Association of Ireland 1994).

⁹⁹ Jane Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press 2000) 12.

¹⁰⁰ See Judith Okely, ‘Gypsies travelling in southern England’ in EF Rehfisch (ed), *Gypsies, Tinkers and other Travellers* (Academic Press 1975); Judith Okely, *The Traveller-Gypsies* (Cambridge University Press 1983); Judith Okely, ‘An anthropological perspective on Irish Travellers’ in May McCann, Séamas Ó Siocháin and Joseph Ruane (eds), *Irish Travellers: Culture and Ethnicity* (Queen’s University of Belfast/The Anthropological Association of Ireland 1994); Judith Okely, ‘Cultural ingenuity and travelling autonomy: not copying, just choosing’ in T Acton and G Mundy (eds), *Romani Culture and Gypsy Identity* (University of Hertfordshire Press 1997); Judith Okely, ‘Traveller-gypsies and the politicised and cultural construction of difference’ (The future of multicultural Britain: meeting across the boundaries conference, Roehampton University, June 2005).

community.¹⁰¹ Given that full acknowledgement and recognition of Traveller culture and identity is a cross-cutting theme throughout the 1995 *Task Force Report on the Travelling Community*, as will be seen in Chapter 3, where the link ‘between racism and cultural difference particularly in scenarios of unequal power relationships’ is acknowledged,¹⁰² Okely’s work has resonance in the context of examining different types of power relationship in human rights operationalisation, such as those of a more blended or hybrid nature. Research exploring the connections between ethnicity and nomadism is also of interest here and of relevance to the Irish context, as seen particularly in Chapter 1 of the thesis, which makes an important link between understanding and providing for nomadism and recognition and respect for Traveller ethnicity. Colin Clark has further explored these connections,¹⁰³ maintaining that providing for nomadism and recognising it as a meaningful way of life is as important as recognising ethnicity.¹⁰⁴ This argument is important, if developed in an Irish context, in light of a protracted period of non-recognition of Traveller ethnicity in Ireland. Also significant here is the work of Dualta Roughneen,¹⁰⁵ and of David Smith and Margaret Greenfields on nomadism among Gypsies and Travellers in the UK.¹⁰⁶ Roughneen writes of how, when nomadism is denied, not only is Traveller liberty restricted or subsumed by policy measures that promote sedentarism as a dominant way of life, but autonomous Traveller identity also becomes subordinate to majority society.¹⁰⁷ This clearly has implications for power relations between Traveller and settled communities. Linking the rise of increasingly restrictive legislation with the decline of nomadism, as Smith and Greenfields do, these authors explore the impact of the mostly enforced sedentary existence of Travellers in the UK and the consequences of these changes, which they identify as ranging between two possible extremes – ‘cultural trauma’ and ‘cultural resistance’, a scenario that may be applied equally in the Irish context.¹⁰⁸

¹⁰¹ Judith Okely, *The Traveller-Gypsies* (Cambridge University Press 1983) 18.

¹⁰² *Report of the Task Force on the Travelling Community* (Government Publications Office 1995) 79.

¹⁰³ See, particularly, Colin Clark, ‘Invisible lives: the Gypsies and Travellers of Britain’ (PhD thesis, Edinburgh University 2001); Colin Clark, ‘Ethnicity, the law and Gypsy-Travellers in Scotland: which way now?’ in Sheila Salo and Csaba Prónai (eds), *Ethnic Identities in Dynamic Perspective* (Gondalot/Minority Research Institute of the Hungarian Academy of Sciences 2003) 211; Colin Clark, ‘Defining ethnicity in a cultural and socio-legal context: the case of Scottish Gypsy-Travellers’ (2006) 54 *Scottish Affairs* 39.

¹⁰⁴ Colin Clark, ‘Invisible lives: The Gypsies and Travellers of Britain’ (PhD thesis, Edinburgh University 2001) 55.

¹⁰⁵ Dualta Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State* (Cambridge Scholars Publishing 2010).

¹⁰⁶ David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (Policy Press 2013).

¹⁰⁷ Dualta Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State* (Cambridge Scholars Publishing 2010).

¹⁰⁸ David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (Policy Press 2013).

Moving specifically into the Irish context, since the 1970s there has been a body of important work conducted by domestic specialist agencies such as the ESRI¹⁰⁹ and the former Equality Authority.¹¹⁰ The ESRI reviewed Traveller disadvantage against hard statistical data provided by the 2006 census¹¹¹ and from the national Central Statistics Office survey of 2014 on perceptions of discrimination,¹¹² and these are platforms upon which government policy-making should ideally be based.¹¹³ The former Equality Authority's 2006 research *Traveller Ethnicity: An Equality Authority Report* was an important body of evidence 'at a time when there [was] considerable debate on Traveller ethnicity'.¹¹⁴ Grounded in international evidence examining Traveller ethnicity from an academic and public policy perspective, the report clearly establishes a case for the recognition of Traveller ethnicity and is important for the purpose of this thesis in that it captures conceptualisations of ethnicity and a wide body of academic research, as well as categorically recommending – as Ireland's national equality body at that time – that the government should recognise Travellers as an ethnic group,¹¹⁵ a recommendation which unfortunately took an additional 11 years to realise.¹¹⁶ Also of use here is the manner in which the Equality Authority report unpacks Hilary Tovey and Perry Share's controversial comments in their 2003 textbook *A Sociology of Ireland*,¹¹⁷ in which the authors do not necessarily address the issue of Traveller ethnicity *per se*, but do claim that the way in

¹⁰⁹ Dorothy Watson, Pete Lunn, Emma Quinn and Helen Russell, *Multiple Disadvantage in Ireland: An Analysis of Census 2006* (Equality Authority and Economic and Social Research Institute 2011); Brian Nolan and Bernard Maître, *A Social Portrait of Communities in Ireland* (Department of Social and Family Affairs 2008); Dorothy Watson, Oona Kenny and Frances McGinnity, *A Social Portrait of Travellers in Ireland* (Economic and Social Research Institute 2017). At the time of writing, another report is in preparation by the Economic and Social Research Institute, analysing data from the national Central Statistics Office survey of 2014 on perceptions of discrimination, including those towards Travellers.

¹¹⁰ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006); Damien Peelo, Aodh O'Connor and Gráinne O'Toole, *Positive Action for Traveller Employment* (Equality Authority 2008).

¹¹¹ Dorothy Watson, Pete Lunn, Emma Quinn and Helen Russell, *Multiple Disadvantage in Ireland: An Analysis of Census 2006* (Equality Authority and Economic and Social Research Institute 2011).

¹¹² At the time of writing, another report is in preparation by the Economic and Social Research Institute, analysing data from the national Central Statistics Office survey of 2014 on perceptions of discrimination, including those towards Travellers.

¹¹³ The Economic and Social Research Institute, established in 1960 and 'led by Dr TK Whitaker, who identified the need for independent research to support economic policymaking in Ireland'. See <<http://www.esri.ie/about/>> accessed 2 September 2017.

¹¹⁴ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006), foreword by Niall Crowley, former Chief Executive Officer Equality Authority.

¹¹⁵ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006) 65.

¹¹⁶ See footnote number 2 above. See also an interesting piece of research from Silvia Brandi, writing in 2013 prior to the recognition of Traveller ethnicity in Ireland, which explored the 'debate' between different groups of Travellers on the issue: Silvia Brandi, 'The intra-Traveller debate on "Traveller ethnicity" in the Republic of Ireland: A critical discourse analysis' (PhD thesis, University College Cork 2013).

¹¹⁷ Hilary Tovey and Perry Share, *A Sociology of Ireland* (2nd edn, Gill and Macmillan 2003) 469–474.

which ethnicity has been conceptualised is problematic and argue that a ‘New Social Movement’ approach might add to understanding in this area.¹¹⁸ In Irish policy circles, Robbie McVeigh is also extensively quoted for his views on ethnicity¹¹⁹ as well as the relationship between ethnicity and nomadism.¹²⁰ In his 2007 paper, Robbie McVeigh first identified the concept of ‘sedentarism’, where sedentary modes of existence are normalised while nomadism is routinely pathologised.¹²¹

Attempts have also been made to understand Travellers in contexts of health, education and child protection systems,¹²² community development,¹²³ and ‘citizenship’,¹²⁴ but of more relevance to this thesis is the body of literature on the issue of racism towards Travellers,¹²⁵ documenting the ‘virulence and persistence of anti-Traveller racism’,¹²⁶ research that was largely conducted in the 1990s and early 2000s by social scientists such as Jim MacLaughlin,¹²⁷

¹¹⁸ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006) 52–59. The controversy surrounding Tovey and Share’s comments, the Equality Authority note, is not that the concept of a New Social Movement approach is problematic *per se*, but that their research was used by Government officials in their arguments against recognition of Travellers as a distinct ethnic group.

¹¹⁹ See Robbie McVeigh, Expert Witness Testimony in the case of *O’Leary v Allied Domecq* (County Court, 29 August 2000); Robbie McVeigh, ‘Theorising sedentarism: the roots of anti-nomadism’ in Thomas Acton (ed), *Gypsy Politics And Traveller Identity* (University of Hertfordshire Press 1997) 7; Robbie McVeigh, ‘The “final solution”: reformism, ethnicity denial and the politics of anti-Travellerism in Ireland’ (2007) 7 *Social Policy & Society* 91.

¹²⁰ See Mark Donahue, Robbie McVeigh and Maureen Ward, *Misli, Crush, Misli: Irish Travellers And Nomadism* (Irish Traveller Movement and Traveller Movement Northern Ireland 2003).

¹²¹ Robbie McVeigh, ‘The “final solution”: reformism, ethnicity denial and the politics of anti-Travellerism in Ireland’ (2007) 7 *Social Policy and Society* 91, 92.

¹²² Niall McElwee, Ashling Jackson and Grant Charles, ‘Towards a sociological understanding of Irish Travellers: introducing a people’ (2003) 4 *Irish Journal of Applied Social Studies* 103. See also Gerry Whyte, ‘Welfare law – Travellers and the law’ (1988) 10 *Dublin University Law Journal* 189.

¹²³ Anastasia Crickley, Niall Crowley, and John O’Connell, ‘Community work and Travellers in Ireland: new analysis and new directions’ in *Pavee Point, Irish Travellers: new analysis and new initiatives* (Pavee Point 1992).

¹²⁴ Una Crowley and Rob Kitchin, ‘Paradoxical spaces of Traveller citizenship in contemporary Ireland’ (2007) 40 *Irish Geography* 128.

¹²⁵ See, among others, Ronit Lentin and Robbie McVeigh (eds), *Racism and Anti-Racism in Ireland* (Beyond the Pale 2002); Una Crowley and Rob Kitchin, ‘Academic “truth” and the perpetuation of negative attitudes and intolerance toward Irish Travellers in contemporary Ireland’ in Iseult Honohan and Nathalie Rougier (eds), *Tolerance and Diversity in Ireland, North and South* (Oxford University Press 2015) 153; Anastasia Crickley, *Travellers in Ireland: An Examination of Discrimination and Racism* (National Co-ordinating Committee, European Year Against Racism 1997).

¹²⁶ David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (Policy Press 2013) 59, citing a variety of sources, such as Robbie McVeigh, Sinéad Ní Shúinéar, Jane Helleiner and others.

¹²⁷ Jim MacLaughlin, *Travellers and Ireland: Whose Country, Whose History?* (Cork University Press 1995); Jim MacLaughlin, ‘The evolution of anti-Traveller racism in Ireland’ (1996) 37 *Race and Class* 47; Jim MacLaughlin, ‘The political geography of anti-Traveller racism in Ireland: the politics of exclusion and the geography of closure’ (1998) 17 *Political Geography* 417; Jim MacLaughlin, ‘Nation-building, social closure and anti-Traveller racism in Ireland’ (1999) 33 *Sociology* 129.

Jane Helleiner,¹²⁸ Bryan Fanning¹²⁹ and Mícheál MacGréil.¹³⁰ A more recent piece in 2017 by Joel S Fetzer linked local opposition to Traveller halting sites directly to racist attitudes on the part of those who raise objections.¹³¹ Fetzer records his conversations with Bryan Fanning in 2017, where Fanning notes:

What is unusual about [anti-]Traveller racism is the vehemence of it and the extent to which it is acceptable in Irish society. You don't get sanctioned for extreme anti-Traveller comments in most social settings.¹³²

Of interest here within the overall literature is the fact that, between 2007 and 2017, apart from some research on Traveller interaction with the criminal justice system and the Irish prison system,¹³³ there is a large gap in research and writing on Irish Travellers from a sociological perspective until the Economic and Social Research Institute report of 2017.¹³⁴ This is noteworthy in the context of Chapter 3 of this thesis, where section 3.2 maps legislative and policy measures from assimilation in the 1960s to post-criminalisation in the 2010s. It might be argued that during the first two decades of the twenty-first century, a backlash can be seen against both recognition of Traveller ethnicity and Traveller accommodation rights, following

¹²⁸ See Jane Helleiner, 'Gypsies, Celts and Tinkers: colonial antecedents of anti Traveller racism in Ireland' (1995) 18 *Ethnic and Racial Studies* 532; Jane Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press 2000).

¹²⁹ Bryan Fanning, *Racism and Social Change in the Republic of Ireland* (Manchester University Press 2002); Bryan Fanning, 'Anti-Traveller racism in Ireland: violence and incitement to hatred' (Killing the Other: Racial, Ethnic, Religious and Homophobic Violence in the English Speaking World, Ecole Normale Superior de Cachan, Paris 2004).

¹³⁰ Mícheál MacGréil, *Emancipation of the Travelling People: A Report on the Attitudes and Prejudices of the Irish People Towards the Travellers Based on a National Social Survey 2007–2008* (National University of Maynooth 2010).

¹³¹ Joel S Fetzer, 'Opposition to Irish Travellers' halting sites in the Republic of Ireland: realistic group conflict or symbolic politics?' (2017) 25 *Irish Journal of Sociology* 195.

¹³² Joel S Fetzer, 'Opposition to Irish Travellers' halting sites in the Republic of Ireland: realistic group conflict or symbolic politics?' (2017) 25 *Irish Journal of Sociology* 195, 196.

¹³³ Irish Penal Reform Trust, *Travellers in the Irish Prison System: A Qualitative Study* (Irish Penal Reform Trust 2014). See also, on Irish Travellers and the criminal justice systems, Paul Gavin, 'Out of sight, out of mind: Irish prisoners in England and Wales' (2014) 11 *Irish Probation Journal* 29; Denis C Bracken, 'Probation practice with Travellers in the Republic of Ireland' (2014) 11 *Irish Probation Journal* 44; Sindy Joyce, Margaret Kennedy and Amanda Haynes, 'Travellers and Roma in Ireland: understanding hate crime data through the lens of structural inequality' in Amanda Haynes, Jennifer Schweppe and Seamus Taylor (eds), *Critical Perspectives on Hate Crime* (Palgrave Hate Studies 2017).

¹³⁴ Dorothy Watson, Oona Kenny and Frances McGinnity, *A Social Portrait of Travellers in Ireland* (Economic and Social Research Institute 2017).

on from the Miscellaneous Provisions Act of 2002.¹³⁵ This backlash is mirrored in, or perhaps even somewhat underpinned by, a lack of research in this area at that time.¹³⁶

Within the Irish literature, a pioneering piece of research on a substantial scale – the All Ireland Traveller Health Study – begun in 2008 and completed in 2010, conducted a health census of Traveller families in both Northern Ireland and the Republic of Ireland and was the first systematic study of Traveller health to be carried out in Ireland since the 1980s.¹³⁷ Over 400 Traveller women were trained as peer researchers to collect data for the study, which took three years to complete,¹³⁸ and there were high hopes that the AITHS would bring about change in outcomes for Travellers in Ireland. While the data on Travellers from the 2016 Census is still awaited at the time of writing, no significant health outcomes have been recorded or reported upon since the 2010 study. Yet the approach of peer researchers was unique at the time of this project's inception and has important implications for the empowerment of Travellers in that many of the original researchers trained in order to collect data for the original research are still employed as community development workers at local level.¹³⁹ In the North Cork Travellers Community Development Project in 2017, for example, a number of Traveller women healthcare workers are now beginning to collect data on accommodation concerns, an initiative arising from the concerns of workers carrying out regular site visits.¹⁴⁰ These healthcare workers have been trained in data collection by researchers in the School of Applied Social Studies in University College Cork and trained in human rights housing provisions by staff in the Practice and Participation of Rights non-governmental organisation.¹⁴¹

¹³⁵ Housing (Miscellaneous Provisions) Act 2002.

¹³⁶ Following Jane Helleiner's 2000 text, little is seen again in this regard (apart from the All Ireland Traveller Health Study in 2010) until 2017. See Jane Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press 2000).

¹³⁷ The previous census of Travellers took place in November 1986 and the component Traveller vital statistics were calculated for the calendar year following the census. See Joseph Barry, Bernadette Herity and Joseph Solan, *The Travellers' Health Status Study: Vital Statistics of Travelling People, 1987* (Health Research Board 1989).

¹³⁸ See All Ireland Traveller Health Study Team, School of Public Health, Physiotherapy and Population Science, University College Dublin, *Our Geels: All Ireland Traveller Health Study: Summary of Findings* (Department of Health and Children 2010), <http://www.lenus.ie/hse/handle/10147/115606> accessed 5 August 2017.

¹³⁹ For example, as witnessed first-hand by the author while a member of the board of directors of Clondalkin Community Development Project, between 2010 and 2014.

¹⁴⁰ See 'Travellers of North Cork launch accommodation rights charter', 30 May 2017 <https://youtu.be/PGI7pTYdXw8> accessed 14 July 2017.

¹⁴¹ A conference was hosted by the School of Applied Social Studies in University College Cork on 24 May 2017, at which the workers launched an 'Accommodation Rights Charter'. See <https://www.ucc.ie/en/appsoc/news/launch-of-the-travellers-of-north-cork-accommodation-rights-charter-at-ucc.html> and 'Travellers of North Cork launch accommodation rights charter', 30 May 2017 <https://youtu.be/PGI7pTYdXw8> accessed 2 September 2017.

More specifically on the subject of Traveller accommodation in Ireland, which is the second category of literature that is of interest for this thesis, the quantity and scope of published research is far narrower. As Ireland's national human rights institution, the former Irish Human Rights Commission published a study on Travellers' cultural rights in 2008, in which it assessed Traveller accommodation and nomadism as cultural rights, but interestingly only under the international standards of Article 8 of the European Convention on Human Rights and Article 5 of the Council of Europe Framework Convention for the Protection of National Minorities, and not under Article 11 of the United Nations International Covenant on Economic, Social and Cultural Rights.¹⁴² The former Commission and, more recently, the Irish Human Rights and Equality Commission, have also produced many parallel reports for international bodies, primarily at the level of the United Nations, commenting on and making recommendations around Traveller accommodation rights as part of Ireland's examination under various treaties to which it is a party.¹⁴³ With the purpose of addressing the provisions of the treaties being examined, as well as responding to questions posed by the treaty-monitoring bodies, such reports necessarily tend to be focused upon whether the state is currently fulfilling its legal obligations or not, and accommodation sits among a number of other Traveller rights under examination, as well as non-Traveller issues, depending on the treaty in question.

Traveller non-governmental organisations such as Pavee Point and the Irish Traveller Movement have authored or commissioned many reports on aspects of Traveller rights, through submissions to government¹⁴⁴ and shadow reports to international bodies, which

¹⁴² Irish Human Rights Commission, *Traveller Cultural Rights: The Right to Respect for Traveller Culture and Way of Life* (Irish Human Rights Commission 2008).

¹⁴³ For example, Irish Human Rights and Equality Commission, *Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women: Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's Combined Sixth And Seventh Periodic Reports*, January 2017, 13.1.2; Irish Human Rights and Equality Commission, *Ireland and the United Nations Convention on the Rights of the Child: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports*, December 2015, 26; Irish Human Rights and Equality Commission, *Submission to the Second Universal Periodic Review Cycle for Ireland*, September 2015, 10; Irish Human Rights and Equality Commission, *Ireland and the International Covenant on Economic, Social and Cultural Rights: Report to UN Committee on Economic, Social and Cultural Rights on Ireland's Third Periodic Review*, May 2015, 9.3; Irish Human Rights Commission, *Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, 195.

¹⁴⁴ For example, more recently, Pavee Point Traveller and Roma Centre, *Towards a National Traveller and Roma Integration Strategy 2020* (Pavee Point 2015); Pavee Point Traveller and Roma Centre, *Counting Us In – Human Rights Count! Policy and Practice in Ethnic Data Collection and Monitoring* (Pavee Point 2016); Pavee

routinely comment on the current situation of Traveller accommodation in Ireland as one with systemic and endemic problems.¹⁴⁵ In 2005, Pavee Point commissioned a piece of independent research on the impact of assimilation policies on Travellers.¹⁴⁶ The report was primarily targeted at local and community development agencies but its findings, the foreword stated, ‘are significant and pertinent to a broader range of policy-makers, service providers and public opinion shapers’.¹⁴⁷ Traveller accommodation issues are dealt with in great detail throughout the research, which notes in its findings that:

Nomadism is a core value in Travellers’ culture, but ongoing practice of it is not essential to their sense of ethnic identity, nor to settled society’s maintenance of anti-Traveller racism.

[. . .]

It is paradoxical but true that assimilationist accommodation policy and practice are core elements in the maintenance of Travellers’ exclusion.¹⁴⁸

It is noteworthy that little has changed on this front since this 2005 report. Another Pavee Point-commissioned research report of interest here is one which considers the effects of austerity on the Traveller community. Written by Brian Harvey in 2013, it notes the challenge of making ‘policies, structures and law work effectively’, noting that ‘[a]lthough the theory and practice implementation is a live one in Irish public administration, its application in this field appears to be especially weak’.¹⁴⁹ Of particular interest to this thesis, though, is the fact that Harvey is of the opinion that the community development approach adopted by Traveller groups in Ireland since the 1980s, supported by funding from the state, ‘reversed the assimilationist approach towards the Traveller community and informed the introduction of a range of

Point Traveller and Roma Centre, *Presentation to the Oireachtas Joint and Select Committees Committee on Housing and Homelessness*, 19 May 2016.

¹⁴⁵ For example, more recently, Irish Traveller Movement, *Shadow Report to Committee on Economic, Social and Cultural Rights* (Irish Traveller Movement 2014); Pavee Point Traveller and Roma Centre, *Irish Traveller and Roma Children: A Response to Ireland’s Consolidated Third and Fourth Report to the UN Committee on the Rights of the Child* (Pavee Point Traveller and Roma Centre 2015); Pavee Point Traveller and Roma Centre and National Traveller Women’s Forum, *Joint Shadow Report to CEDAW* (Pavee Point Traveller and Roma Centre 2017).

¹⁴⁶ Pavee Point, *Assimilation Policies and Outcomes: Travellers’ Experience* (Pavee Point Traveller and Roma Centre 2005).

¹⁴⁷ Pavee Point, *Assimilation Policies and Outcomes: Travellers’ Experience* (Pavee Point Traveller and Roma Centre 2005) 2.

¹⁴⁸ Pavee Point, *Assimilation Policies and Outcomes: Travellers’ Experience* (Pavee Point Traveller and Roma Centre 2005) 62.

¹⁴⁹ Brian Harvey, *Travelling with Austerity: Impacts of Cuts on Travellers, Traveller Projects and Services* (Pavee Point Traveller and Roma Centre 2013) 40.

policies, structures, initiatives and an infrastructure of organisations, leading to concrete progress in such area as education, health and accommodation'.¹⁵⁰

Shortly after the enactment of the 1998 Traveller Accommodation Act, TJ McIntyre wrote an overview of its provisions and examined its promise of delivering on Traveller-specific accommodation in Ireland.¹⁵¹ McIntyre notes the prior difficulties that had resulted from 'the overlapping responsibilities which local authorities faced in their distinct roles *qua* housing authority and *qua* planning authority',¹⁵² and the new 1998 Act, as it was at the time of McIntyre's writing, held the promise of a coordinated response to Traveller accommodation needs by local authorities in a way that had not existed to date. Little academic research on the specific topic of Traveller accommodation was conducted in the years that followed, however, apart from a historical examination of Traveller accommodation policies by social geographer Úna Crowley, written in 2009 but looking back to 'spatialized practices designed to rehabilitate, assimilate and integrate Irish Travellers (Ireland's indigenous nomadic population) into mainstream society' between 1963 and 1985.¹⁵³

Beyond the academic literature, during the same decade the primary body of work focusing on Traveller accommodation from a human rights perspective was, as previously seen, the work of the national human rights institution, the national equality body and Traveller organisations. We also see a suite of reports produced in 2008 by the Centre for Housing Research¹⁵⁴ 'to enable local authorities to develop a more responsive housing service',¹⁵⁵ entitled *Traveller Accommodation in Ireland: Review of Policy and Practice*,¹⁵⁶ *Traveller-Specific Accommodation: Practice, Design and Management*,¹⁵⁷ and *Good Practice Guidelines*:

¹⁵⁰ Brian Harvey, *Travelling with Austerity: Impacts of Cuts on Travellers, Traveller Projects and Services* (Pavee Point Traveller and Roma Centre 2013) 19.

¹⁵¹ TJ McIntyre, 'The Housing (Traveller Accommodation) Act 1998: an overview' (1999) 4 *Conveyancing and Property Law Journal* 57.

¹⁵² TJ McIntyre, 'The Housing (Traveller Accommodation) Act 1998: an overview' (1999) 4 *Conveyancing and Property Law Journal* 57, 57.

¹⁵³ Úna Crowley, 'Outside in Dublin: Travellers, society and the state 1963–1985' (2009) 35 *Canadian Journal of Irish Studies* 17.

¹⁵⁴ The Centre for Housing Research became part of the Housing Agency in 2010.

¹⁵⁵ See website of the Housing Agency, <https://housingagency.ie/Our-Publications/Archive/Traveller-Specific-Accommodation.aspx> accessed 3 September 2017.

¹⁵⁶ Dermot Coates, Fiona Kane and Kasey Treadwell Shine, *Traveller Accommodation in Ireland: Review of Policy and Practice* (Centre for Housing Research 2008).

¹⁵⁷ Kasey Treadwell Shine, Fiona Kane and Dermot Coates, *Traveller-Specific Accommodation: Practice, Design and Management* (Centre for Housing Research 2008).

Management and Maintenance of Traveller-Specific Accommodation.¹⁵⁸ As the (now) Housing Agency points out, in hosting these reports on its website:

Traveller accommodation is a difficult area for local authorities to get right. Traveller families' needs and preferences vary, can be difficult to clarify and if clear can be difficult to realise. Accessing appropriate sites throws up challenges; likewise the design and planning stages, construction, on-going management and maintenance, and inter-agency co-operation. Where Traveller-specific accommodation works well it seems to work very well, but when it does not, the results are all too visible and profound.

[. . .]

Much has been achieved in recent years in the provision of quality Traveller accommodation, but there remain too many examples of situations where policy objectives are not being realised on the ground. It has been argued in this work that focusing on quality of life may be a way to move forward in the management and maintenance of Traveller-specific accommodation.

Each of the reports references 'the development and application of an indicator system to measure various aspects of Traveller accommodation provision', saying '[i]t is hoped that the indicator system might provide a framework on which national standards could be developed and agreed'.¹⁵⁹ Although the indicator system does not appear to have been developed beyond quite a basic level, this is relevant to the current research given the consideration in Chapter 3 of how the Irish state measures the domestic application of international standards.

A significant piece of research was also funded by the (then) Department of Environment, Community and Local Government in 2009, when it funded the Irish Traveller Movement to conduct a feasibility study into the possibility of establishing a Traveller-led accommodation body.¹⁶⁰ The experience of the researcher who drafted the report (one of the interviewees for

¹⁵⁸ Fiona Kane, Kasey Treadwell Shine and Dermot Coates, *Good Practice Guidelines: Management and Maintenance of Traveller-Specific Accommodation* (Centre for Housing Research 2008).

¹⁵⁹ Dermot Coates, Fiona Kane and Kasey Treadwell Shine, *Traveller Accommodation in Ireland: Review of Policy and Practice* (Centre for Housing Research 2008), viii; Kasey Treadwell Shine, Fiona Kane and Dermot Coates, *Traveller-Specific Accommodation: Practice, Design and Management* (Centre for Housing Research 2008), ix; Fiona Kane, Kasey Treadwell Shine and Dermot Coates, *Good Practice Guidelines: Management and Maintenance of Traveller-Specific Accommodation* (Centre for Housing Research 2008), viii.

¹⁶⁰ Gráinne O'Toole, *Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building A Better Future for Traveller Accommodation* (Irish Traveller Movement 2009) 13. 'Cena

this thesis, P8) was that it ‘opened up a whole new world’ in terms of engaging with local authorities.¹⁶¹ This was put down to engagement with the government department on a positive initiative, in a way not previously encountered, which resulted in a ‘totally different dynamic’.¹⁶² The resulting Traveller-led pilot schemes, in partnership with local authorities, are explored as collaborative, hybrid models of operationalisation in Chapter 3.

Under section 19 of the 1998 Housing (Traveller Accommodation) Act, the National Traveller Accommodation Consultative Committee (NTACC) may ‘advise the Minister in relation to any general matter concerning accommodation for travellers’,¹⁶³ as well as advising on ‘general matters’ to do with ‘the preparation, adequacy, implementation and coordination of traveller accommodation programmes’.¹⁶⁴ To this end, the National Traveller Accommodation Consultative Committee has commissioned various pieces of research since its inception.¹⁶⁵ Of particular interest is the 2014 KW Research and Associates report, *Why Travellers Leave Traveller-Specific Accommodation*.¹⁶⁶ This is of relevance because of its collaborative approach. In gathering data for the research by engaging with Traveller families at local level via community development groups, the research concluded that the reporting by local authorities of overprovision of certain types of accommodation was not reflective of the first-hand experience of Travellers who were interviewed. There are also several detailed policy recommendations in the report, compiled as ‘a practical checklist for key stakeholders’,¹⁶⁷ and these have practical resonance with some of the thesis findings around implementation in Chapter 3.

– Culturally Appropriate Homes Ltd’, a Traveller-led voluntary housing body, was subsequently established in 2011 and granted Approved Housing Body status in October 2013.

¹⁶¹ Gráinne O’Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁶² Gráinne O’Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁶³ Section 19(1) Housing (Traveller Accommodation) Act 1998.

¹⁶⁴ Section 19(2)(b) Housing (Traveller Accommodation) Act 1998.

¹⁶⁵ National Traveller Accommodation Consultative Committee, *Review of the Operation of the Housing (Traveller Accommodation) Act 1998: Report by the National Traveller Accommodation Consultative Committee to the Minister for Housing and Urban Renewal* (National Traveller Accommodation Consultative Committee 2004); National Traveller Accommodation Consultative Committee, *Research into the Barriers to the Provision of Traveller Accommodation* (Weafer and Associates Research 2009); KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-Specific Accommodation* (NTACC and the Housing Agency 2014).

¹⁶⁶ KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-Specific Accommodation* (NTACC and the Housing Agency 2014).

¹⁶⁷ At 34–35.

A recent PhD study by Cian Finn on the placement of LTACCs within the context of participatory models of governance is significant here.¹⁶⁸ This significance is for two reasons: firstly, in terms of the democratic participation of marginalised groups, of interest in terms of power relations between Travellers and non-Travellers in the provision of accommodation; and secondly, in Finn's conclusion that LTACCs mostly operate as a 'box-ticking' exercise, and that 'relationships between Traveller representatives, officials, and elected representatives are argumentative, conflictual and hostile in many local authority areas'.¹⁶⁹ Chris McInerney's case study on the Tralee Town Council Regeneration Project in 2004 is also relevant here, in his examination of the relationship between Travellers and the members of the Town Council and reflection on how the active participation of community representatives in the management structures of regeneration projects is crucial to their success.¹⁷⁰

As noted earlier, a gap in academic literature specifically on the topic of Traveller accommodation in an Irish context is seen from the late 1990s onwards. In 2015, as part of an Open University discussion series on economics, Dermot Coates et al. explored Traveller 'housing' using a capabilities approach to analyse capability deprivation among Travellers and explore how difficulties around accommodation contribute to capability deprivation in the community, arguing that the effects go beyond poor accommodation provision alone.¹⁷¹ Of most relevance to this thesis, however, is a piece authored in 2016 by Darren O'Donovan, which was the first comprehensive critical analysis of the rollout of Traveller Accommodation Programmes since TJ McIntyre's article of 1999.¹⁷² O'Donovan comments on a lack of appropriate accommodation, accompanied by wide powers of eviction, and says these features have created a climate of assimilation among Irish Travellers. He argues that Article 8 of the European Convention on Human Rights (ECHR) has potential in addressing 'this cycle of discrimination', using the ECHR case of *Winterstein v France* as an example of a new level of

¹⁶⁸ Cian Finn, 'Deepening participation, deepening local democracy? The state of local participatory governance in Ireland' (PhD thesis, University of Limerick 2017).

¹⁶⁹ Cian Finn, 'Deepening participation, deepening local democracy? The state of local participatory governance in Ireland' (PhD thesis, University of Limerick 2017) 201.

¹⁷⁰ Chris McInerney, *Challenging Times, Challenging Administration: The Role of Public Administration in Producing Social Justice in Ireland* (Manchester University Press 2014) 162.

¹⁷¹ Dermot Coates, Paul Anand and Michelle Norris, *Capabilities and Marginalised Communities: The Case of the Indigenous Ethnic Minority Traveller Community and Housing in Ireland* (Open University Open Discussion Papers in Economics 2015).

¹⁷² Darren O'Donovan, 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights' (2016) 16 *International Journal of Discrimination and the Law* 5.

protection of Traveller cultural identity in the housing sphere with potential to strengthen the protection of nomadic identity under the Convention.¹⁷³

The third category of relevance to the discourse within which this thesis is placed are those writing on the international human right to housing and on the domestic application of international human rights law as it applies in Ireland generally, which is of course relevant to Traveller accommodation rights and how the international framework is applied in Ireland. In the context of the right to housing in Ireland, Padraic Kenna has authored the definitive, primary monograph on housing law and policy within the state,¹⁷⁴ in which he places the right to housing as ‘providing a real alternative model for directing State law and policy’,¹⁷⁵ and explores the challenges around implementation in this regard. Within a housing law, rights and policy framework, Kenna traces legislative developments and procedural issues around Traveller accommodation and evictions. Also of interest here are Kenna’s treatments of the concepts of minimum core obligations and progressive realisation and what they have to offer in the development and measurement of law and policy in the sphere of housing rights,¹⁷⁶ as well as his consideration of the location of the right to housing within a ‘civil and political’ versus ‘socio-economic’ debate,¹⁷⁷ and his consideration of challenges and enforceability in the translation of international housing rights within national and local contexts.¹⁷⁸ As well as several other articles of interest,¹⁷⁹ Kenna has also explored the impact of the European Convention on Human Rights Act 2003 on local authorities in Ireland and how the domestication of the Convention has raised major implementation challenges in terms of a true paradigm shift in how government in Ireland considers the provisions contained in international

¹⁷³ *Winterstein v France* (Application no 27013/07) concerned the eviction a group of voyageur Francais, a French nomadic minority. The Strasbourg court, in finding an Article 8 violation, stated that even if they are no longer nomadic, use of caravans is an integral part of many Travellers’ identity as it represents a core method of retaining their cultural heritage and Travellers therefore cannot be criticized for not having accepted social housing.

¹⁷⁴ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011).

¹⁷⁵ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 505.

¹⁷⁶ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 505. And also, in this regard, Padraic Kenna, ‘Housing rights after the Treaty of Lisbon – Are they minimum core obligations?’ (2014) 3 *Cyprus Human Rights Law Review* 13.

¹⁷⁷ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 506.

¹⁷⁸ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 534.

¹⁷⁹ Padraic Kenna and Rory Hearne, ‘Using the human rights based approach to tackle housing deprivation in an Irish urban housing estate’ (2014) 6 *Journal of Human Rights Practice* 1; Padraic Kenna, ‘What is housing need?’ (2013) 2 *Irish Community Development Law Journal* 6; Padraic Kenna, ‘The Housing (Miscellaneous Provisions) Act 2009’ (2010) 15 *Conveyancing and Property Law Journal* 2; Padraic Kenna, ‘International instruments on housing rights’ (2010) 2 *Journal of Legal Affairs Dispute Resolution Engineering Construction* 11.

human rights law.¹⁸⁰ Fiona de Londras and Cliona Kelly are also important authors here, in their definitive 2010 text on the impact of the European Convention on Human Rights on Irish law and the state's obligation to guarantee Convention rights.¹⁸¹ In 2014, Suzanne Egan, Liam Thornton and Judy Walsh edited a collection of contributions on 60 years of the Convention in Ireland in which the challenges of implementation are considered, under various subjects and thematic areas, in addition to how the Convention translated in the private sphere, which is of interest to this thesis in the context of the state's outsourcing of responsibilities for human rights to non-state actors.¹⁸²

On the domestication of socio-economic rights in Ireland more generally, the extent to which the Irish Constitution provides for the effective protection of economic, social and cultural rights and how key sources of international law take effect in Irish law were explored in 2012 by Elaine Dewhurst, Noelle Higgins and Los Watkins, who considered the inconsistency in the extent to which socio-economic rights are defined generally in Irish legislation, highlighting, in particular, difficulties with enforcement.¹⁸³ This is echoed by David Fennelly, who makes the case that the formal inclusion of further economic, social and cultural rights in Irish law is less desirable than the development of effective enforcement methods.¹⁸⁴ David Fennelly also authored an important monograph on the implementation of international law in the Irish legal system in 2014,¹⁸⁵ in which he examined how the Irish legal system gives effect to all forms of international law, including the decisions of UN Committees and the conclusions of the European Committee on Social Rights. He highlights the 'very dramatic effect on the Irish legal system and Irish society' of the jurisprudence of the European Court of Human Rights.¹⁸⁶ Suzanne Egan's 2015 edited collection is also important here in how it brings together many authors who consider implementation challenges across a variety of thematic settings, primarily those associated with the UN treaties to which Ireland is a party.¹⁸⁷ Another recent

¹⁸⁰ Padraic Kenna, 'Local authorities and the European Convention on Human Rights Act 2003' *Irish Human Rights Law Review* (Clarus Press 2010) 19.

¹⁸¹ Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall 2010).

¹⁸² Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014).

¹⁸³ Elaine Dewhurst, Noelle Higgins and Los Watkins, *Principles of Irish Human Rights Law* (Clarus Press 2012).

¹⁸⁴ David Fennelly, 'Economic, social & cultural rights in Irish Constitutional law' (Presentation to the Constitutional Convention, Dublin, 22 February 2014); David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014).

¹⁸⁵ David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014).

¹⁸⁶ David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014) 264.

¹⁸⁷ Suzanne Egan (ed), *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015).

edited collection by Laura Cahillane, James Gallen and Tom Hickey considers the power of judges to interpret the Irish Constitution in new and innovative ways, including ways that are in keeping with international human rights law.¹⁸⁸

Writing on positive duties, dualism, separation of powers, and the fundamental operational methods of the Irish legal system generally is also of relevance here, particularly when considering legal remedies for violations of Traveller accommodation rights and restrictive approaches taken by the Irish courts.¹⁸⁹ Work by authors researching administrative and accountability structures within the Irish state, such as Muiris MacCárthaigh, Colin Scott, Eoin O'Malley and Niamh Hardiman, is also of interest. They examine accountability as a characteristic of democratically elected governments and the corresponding deficits in policy implementation that may result from a lack of effective accountability.¹⁹⁰ Chris McInerney is again of interest in this regard, in exploring what he names the 'politics/bureaucracy dichotomy' and its 'complex set of relationships between elected representatives and officials', where policy-making is seen as a practice driven by the political system yet implemented by officials who may or may not necessarily agree with its direction.¹⁹¹ This has implications in terms of council housing officials and elected representatives at local authority level dealing with Traveller accommodation.

Finally, of interest in this third category are those writing in the realm of the domestication of international human rights law generally or on other jurisdictional models, such as Barbara

¹⁸⁸ Laura Cahillane, James Gallen and Tom Hickey (eds) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017).

¹⁸⁹ See Siobhán Mullally, 'Substantive equality and positive duties in Ireland' (2007) 23 *South African Journal on Human Rights* 2; Donncha O'Connell, Inaugural Editorial, *Irish Human Rights Law Review* (Clarus Press 2010), ix; Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009); Fiona Donson and Darren O'Donovan, *Law and Public Administration in Ireland* (Clarus Press 2015); Tanya Ní Mhuirthile, Catherine O'Sullivan and Liam Thornton, *Fundamentals of the Irish legal System: Law, Policy and Politics* (Round Hall 2016).

¹⁹⁰ Muiris MacCárthaigh and Colin Scott, 'A thing of shreds and patches: fragmenting accountability in a fragmented state' (Discussion Paper Series, Geary Institute, University College Dublin 2009) 1; Eoin O'Malley and Muiris MacCárthaigh (eds) *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration 2012); Niamh Hardiman and Muiris MacCárthaigh, 'The segmented state: adaptation and maladaptation in Ireland' (Presentation to ECPR Joint Sessions Workshop on 'Administrative Reform, Democratic Governance, and the Quality of Government', Rennes, April 2008).

¹⁹¹ Chris McInerney, *Challenging times, Challenging Administration: The Role of Public Administration in Producing Social Justice in Ireland* (Manchester University Press 2014) 152.

Oomen,¹⁹² Jasper Krommendijk,¹⁹³ Gauthier De Beco,¹⁹⁴ Courtney Hillebrecht¹⁹⁵ and Sandra Fredman,¹⁹⁶ as there is much to learn from other models of implementation and enforcement. Barbara Oomen, in particular, looks beyond the legal framework in the Netherlands and highlights the role of ‘actors’ or the key role of those behind ‘the politics and processes of rights implementation’.¹⁹⁷

In identifying the gaps in this existing body of literature, it is important to note that, in each of the three categories outlined above (Travellers more generally; Traveller accommodation more specifically; and the applicability of international human rights law), the literature focuses largely upon ‘the state’, *per se*, without considering, recognising or proposing the potential value of state and non-state working together in the operationalisation of human rights. This is where a fourth category is of interest when looking at possible hybrid models of operationalisation: literature on hybridity.

This fourth category is vast in scope; however, there are areas that are more relevant. Some authors in particular are of importance in the attempt to define hybridity in a way that is most relevant to the thesis. Jan Nederveen Pieterse poses the rhetorical question, ‘Hybridity, so what?’ and attempts to define its meaning over time and between cultures.¹⁹⁸ Similarly, Anita Blessing has attempted to unpack the concept of hybridity and its layers of meaning, particularly in the context of social housing.¹⁹⁹ Rosa Freeman’s framework for understanding

¹⁹² Barbara Oomen, *Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands* (Cambridge Studies in Law and Society 2013); Barbara Oomen, ‘Between rights talk and Bible speak: the implementation of equal treatment legislation in orthodox reformed communities in the Netherlands’ (2011) 33 *Human Rights Quarterly* 175.

¹⁹³ Jasper Krommendijk, ‘The impact and effectiveness of non-judicial mechanisms for the implementation of human rights’ (2011) 5 *Human Rights and International Legal Discourse* 264; Jasper Krommendijk, *The Domestic Impact of the Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* (Intersentia 2014).

¹⁹⁴ Gauthier De Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Bruylant 2010); Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (United Nations Office of the High Commissioner for Human Rights Regional Office for Europe 2014).

¹⁹⁵ Courtney Hillebrecht, ‘The domestic mechanisms of compliance with international human rights law: case studies from the inter-American human rights system’ (2012) 34 *Human Rights Quarterly* 959; Courtney Hillebrecht, ‘Implementing human rights law at home: domestic politics and the European Court of Human Rights’ (2012) 13 *Human Rights Review* 279.

¹⁹⁶ Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008).

¹⁹⁷ Barbara Oomen, *Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands* (Cambridge Studies in Law and Society 2013) 17.

¹⁹⁸ Jan Nederveen Pieterse, ‘Hybridity, so what?’ (2001) 18 *Theory, Culture and Society* 219, 245.

¹⁹⁹ Anita Blessing, ‘Magical or monstrous? Hybridity in social housing governance’ (2012) 27 *Housing Studies* 189, 194.

hybridity, as it relates to ‘third generation rights’,²⁰⁰ is of interest in how it understands hybridity as a theory, as a process, as an entity,²⁰¹ and as a type of ‘engagement with’ rather than ‘opposition to’.²⁰² Fiona de Londras moves beyond processes and products and introduces the aspect of hybridity as having something to add to power relations, which is of key importance in this thesis and later arguments made around hybridity as a tool for operationalisation.²⁰³ Jean d’Aspremont et al. have also examined power relations between state and non-state actors, suggesting that an ex-ante approach to shared responsibility might help.²⁰⁴ In examining the phenomenon of shared responsibility for outcomes among international actors who engage in harmful activity (such as environmentally damaging emissions or violations of international humanitarian law²⁰⁵), André Nollkaemper and Dov Jacobs suggest a conceptual framework that moves away from a ‘unitary regime’ towards a ‘differentiated approach’ for establishing responsibility.²⁰⁶

A general lack of analysis of power relations when considering hybridity is something that Emily Grabham has highlighted.²⁰⁷ Similarly, Jenny Peterson has highlighted how hybridity (in peacekeeping and development) downplays issues of power relations.²⁰⁸ The challenge, however, is not to define ‘hybridity’ but to seek ways of applying the concept of hybridity in the sphere of this thesis, and this has led the research towards an examination of different hybrid models in seeking greater understanding. New types of global governance, as seen in different types of regulatory regimes, offer some learning on hybridity, in terms of models, tools and modes of enforcement and Bronwen Morgan and Karen Yeung’s classic text on regulatory

²⁰⁰ ‘Collective’ or ‘people’s’ rights, rather than individual rights, according to BH Weston, ‘Human rights’ (1984) 6 *Human Rights Quarterly* 257, 283.

²⁰¹ Rosa Freeman, “‘Third generation’ rights: is there room for hybrid constructs within international human rights law?” (2013) 2 *Cambridge Journal of International and Comparative Law* 935, 935. See also Rosa Freeman, ‘Hybrid human rights’ in Paul Jackson (ed), *Handbook of International Security and Development* (Edward Elgar 2014) 388.

²⁰² Rosa Freeman, ‘Hybrid human rights’ in Paul Jackson (ed), *Handbook of International Security and Development* (Edward Elgar 2014) 386, 390.

²⁰³ Fiona de Londras, ‘Hybridity: what does it have to offer?’ (Blog Entry, 16 March 2014) <http://fdelondras.wordpress.com/2014/03/16/hybridity-what-does-it-have-to-offer/> accessed 21 June 2015.

²⁰⁴ Jean d’Aspremont, André Nollkaemper, Ilias Plakokefalos and Cedric Ryngaert, ‘Sharing responsibility between non-state actors and states in international law’ (2015) 62 *Netherlands International Law Review* 49, 50.

²⁰⁵ For example, the joint US and UK invasion of Iraq in 2003, or the hybrid United Nations/African Union forces in Darfur in 2007.

²⁰⁶ André Nollkaemper and Dov Jacobs, ‘Shared responsibility in international law: a conceptual framework’ (2013) 34 *Michigan Journal of International Law* 359.

²⁰⁷ Emily Grabham, ‘Taxonomies of inequality: lawyers, maps, and the challenge of hybridity’ (2006) 15(1) *Social and Legal Studies* 5, 18.

²⁰⁸ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 17.

regimes is influential in this regard.²⁰⁹ Fabrizio Cafaggi's exploration of Transnational Private Regulation (TPR) is of interest in how it traces new categories of rules, practices and processes emerging in the sphere of private actors, firms, NGOs and independent experts.²¹⁰ Also relevant is Deirdre Curtin and Linda Senden's identification of the issues of accountability that arise out of the hybrid mix of public-private elements in TPR.²¹¹ These newer types of 'sharing' responsibility were what first led to a consideration of more formalised hybridity in a Traveller accommodation setting. Donal Casey and Colin Scott's research around the institutionalisation or embedding of norms within organisations is also of related interest here, in their assessment that this institutionalisation is the way in which regulatory norms become crystallised and thus effective.²¹² The risk of regulatory capture is an issue to be considered in this context and the work of Declan Purcell²¹³ and Colin Scott are relevant.²¹⁴

David Mullins, Darinka Czischke and Gerard van Bortel have developed frameworks that consider 'descriptor, motivator and behaviour variables' to track the ways in which hybridity contributes to organisational behaviour in different contexts, social housing organisations in particular, arguing that it is important to understand the ways in which competing hybrid principles apply in the strategies and decisions undertaken by these types of structures.²¹⁵ In examining models of hybridity, the work of housing policy expert David Mullins is key in his writing on hybridity in housing associations in England, his having identified hybridity in the ways in which finance, governance, products and services are all carried out in housing organisations.²¹⁶ Mullins says that hybrid regimes can represent conflicting interests, where the

²⁰⁹ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 1.

²¹⁰ Fabrizio Cafaggi, 'New foundations of transnational private regulation' (2011) 38(1) *Journal of Law and Society* 20.

²¹¹ Deirdre Curtin and Linda Senden, 'Public accountability of transnational private regulation: chimera or reality?' (2011) 38(1) *Journal of Law and Society* 163.

²¹² Donal Casey and Colin Scott, 'The crystallization of regulatory norms' (2011) 38 *Journal of Law and Society*.

²¹³ Declan Purcell, 'A rough guide to Irish regulators', Competition Authority First Annual Review of Irish Regulatory Affairs, conference presentation, 26 November 2008, 1, 10, <http://www.tca.ie/EN/Promoting-Competition/Speeches--Presentations/Declan-Purcell-A-Rough-Guide-to-Irish-Regulators.aspx> accessed 14 March 2015.

²¹⁴ Colin Scott, 'Regulating everything', Inaugural lecture by Colin Scott, Professor of EU Regulation and Governance at UCD, 26 February 2008, 7.

²¹⁵ David Mullins, Darinka Czischke and Gerard van Bortel 'Exploring the meaning of hybridity and social enterprise in housing organisations' (2012) 27 *Housing Studies* 405, 409, citing Darinka Czischke, Vincent Gruis and David Mullins 'Conceptualising social enterprise in housing organisations' (2012) 27 *Housing Studies* 418.

²¹⁶ David Mullins, Darinka Czischke and Gerard van Bortel 'Exploring the meaning of hybridity and social enterprise in housing organisations' (2012) 27 *Housing Studies* 405, 407; Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan recognise increasing hybridisation over time within the provision of public housing

state meets the market and community in social housing,²¹⁷ and suggests that the development of the English regulatory regime is shown to have been strongly influenced by the interests of the providers themselves, again highlighting the important aspect of ‘regulatory capture’.²¹⁸ Also significant here is writing by Frédéric Boehm, who says a type of regulatory capture may also stretch to politicians, who might abuse regulatory powers in ways that serve their own political interests, in what Boehm calls ‘regulatory opportunism’.²¹⁹ The risk of regulatory capture in the hybrid public/private mix is also of interest to Taco Brandsen, Philip Karré and Jan-Kees Helderma, who identify concerns that commercial interests will prevail in the case of these hybrid entities and the diversification of funding and increased autonomy of management may lead hybrid organisations to lose sight of their goals and focus instead on commercial activities.²²⁰ These concerns all have a bearing when examining collaborative types of hybrid bodies with public/private interests.

In examining other hybrid models beyond that of social housing organisations, Kate Bedford’s study into the hybrid aspects of civil society’s role in established organisations, in this case the World Bank, is essential reading here.²²¹ Bedford considers whether marginalised and disadvantaged groups can bring about change within mainstream organisations by using ‘integrationist tactics’, which can be shown to serve institutional agendas as well as their

in the United States of America. See Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, at 471. They trace the transformation of US housing programmes towards what they define as greater ‘intra-organizational hybridity’ (a body displaying hybrid characteristics within its own organisational structures), ‘inter-organizational hybridity’ (the collaboration of hybrid organisations with roots in different sectors) and ‘programmatically hybridity’ (housing enterprises partnering with other organisations from different sectors to offer additional services to clients, such as rehabilitation, education or healthcare); the ‘hybridization’ of public housing in the United States towards an ‘entrenched hybridity’, at 459–460.

²¹⁷ David Mullins, Darinka Czischke and Gerard van Bortel, ‘Exploring the meaning of hybridity and social enterprise in housing organisations’ (2012) 27 *Housing Studies* 405, at 409.

²¹⁸ David Mullins ‘From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England’ (1997) 12 *Housing Studies* 301. See also Hal Pawson and David Mullins *After Council Housing: Britain’s New Social Landlords* (Palgrave Macmillan 2010) and David Mullins, ‘Housing associations’ (2010) 16 *Third Sector Research Centre, Working Paper 1* at 44, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

²¹⁹ Frédéric Boehm ‘Regulatory capture revisited – lessons from economics of corruption’ (2007) Working Paper, <http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf> accessed 3 August 2015.

²²⁰ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, at 9, http://www.hybridorganizations.com/file_download/15 accessed 12 September 2016.

²²¹ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) at xvi.

own.²²² Bedford gives an account of feminists engaging with development organisations who have become known as ‘femocrats’²²³, ‘insider advocates’ and ‘feminist policy entrepreneurs’,²²⁴ language that suggests that their presence demonstrates a hybrid space that links ‘both a government machinery and a social movement’,²²⁵ and these all have resonance for the presence of Traveller activists within more formalised types of state/non-state collaborations in the case of Traveller accommodation.

In the case of another existing hybrid human rights mechanism in international human rights, the work of Gerard Quinn is key to understanding what is envisaged by Article 33 of the UN Convention on the Rights of Persons with Disabilities, described by Quinn as having the potential to transform the ‘majestic generalities’ of the Convention into concrete reform at the domestic level.²²⁶ Some other texts by the Irish Human Rights and Equality Commission²²⁷ and Gauthier de Beco²²⁸ are also useful here when examining Article 33 models. Finally, in the case of hybrid models of operationalisation within the sphere of business and human rights, the work of Shane Darcy is key in capturing arguments for and against the justiciability of the Guiding Principles on Business and Human Rights at domestic level and how this has implications for this model as one to consider in the case of Traveller accommodation.²²⁹

²²² Naila Kabeer (2000) ‘From feminist insights to an analytical framework: an institutional perspective on gender inequality’ in Naila Kabeer and Ramya Subrahmanian (eds) *Institutions, Relations, and Outcomes: Frameworks and Case Studies for Gender-Aware Planning* (Zed Books 2000), at 33.

²²³ Carol Miller and Shahra Razavi (eds) *Missionaries and Mandarins: Feminist Engagement with Development Institutions* (Intermediate Technology Publications 1998) at 7.

²²⁴ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009), at xvii, citing Carol Miller and Shahra Razavi (eds) *Missionaries and Mandarins: Feminist Engagement with Development Institutions* (Intermediate Technology Publications 1998) at 2.

²²⁵ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009), at xvii.

²²⁶ Gerard Quinn, ‘Resisting the “temptation of elegance”: can the Convention on the Rights of Persons with Disabilities socialise states to right behaviour?’ in Gerard Quinn and Oddny Mjoll Arnardóttir (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 217.

²²⁷ Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, at 7, <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/>, accessed 5 November 2016.

²²⁸ Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (United Nations Office of the High Commissioner for Human Rights Regional Office for Europe 2014) 46.

²²⁹ Shane Darcy, ‘Key issues in the debate on a binding business and human rights instrument’ (Business and Human Rights in Ireland Blog, 12 April 2015), <https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/> on 5 November 2016.

In summary, much has been written on aspects of Traveller life in Ireland under the broad heading of disadvantage, yet relatively little research or analysis has been conducted on the reasons for non-delivery on Traveller accommodation, beyond the recording of the detail of non-delivery on the part of the state and recommendations as to why law and policy should change in this regard, but without a move deeper into the origins of non-delivery in any meaningful way.

Also of importance in the context of the existing literature, as has been seen above, is how it focuses largely on ‘the state’ *per se* as being primarily responsible for giving effect to human rights, without considering the role played by non-state actors who either are allocated responsibility around rights delivery by the state or who assume responsibility themselves in other ways. While much has been written on the concept of ‘hybridity’ in a range of settings, the existing literature does not recognise or propose the potential value of hybridity in the operationalisation of rights and thus this thesis is an important development in the conception of ‘hybridity’ in the human rights context, which is of broader applicability.

5. Methodology

This thesis employs three different research methodologies in order to answer the research question: doctrinal, socio-legal and empirical.

Firstly, a legal doctrinal analysis is conducted by way of a close examination of materials across human rights law at international and regional levels, including treaties, general comments and concluding observations, legislation, case law and international reports, mostly derived from both print and electronic sources and databases.²³⁰ This analysis was combined with a secondary analysis of the core existing legal scholarship as outlined in the previous section, which includes the broader social analytical literature on Travellers more generally and in an Irish context; research which focuses upon Traveller accommodation more specifically;

²³⁰ Understanding ‘doctrinal’ analysis as an analysis of what law *is*, as opposed to what law *should be*. Mike McConville and Wing Hong Chui define doctrinal legal research as ‘... research which asks what the law is in a particular area ... the researcher’s principal ... aim is to describe a body of law and how it applies ... the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment.’ Mike McConville and Wing Hong Chui (eds) *Research Methods for Law* (2nd edn, Edinburgh University Press 2017), 21.

literature concerning the applicability of international human rights law in Ireland; and literature on hybridity. As Chapter 1 will establish, however, such perspectives do not help us to assess the ways in which the right to culturally appropriate accommodation is applied at a local level and in a domestic context.

Secondly, the research engages in a socio-legal analysis of the ‘disconnect’ between the legal and policy standards around culturally appropriate accommodation and what happens in practice, i.e. when the right is operationalised.²³¹ Given that one part of the research question focuses on what has happened to date and the other on how it might be improved, this thesis has merged an academic enquiry with a knowledge and experience of the practice context, thus providing a strong rationale for the adoption of a socio-legal research approach. Denis Galligan claims that ‘law exerts authority over society and yet, in so doing, is restrained and influenced by society’.²³² In the case of this research, the human right to culturally appropriate accommodation is itself a distinct phenomenon which may influence and affect the attitudes and behaviour of state actors, but which is also influenced and affected by society in real ways.²³³ Given that a socio-legal theoretical approach ‘locates legal practices within the context of the other social practices which constitute their immediate environment’,²³⁴ such an approach helps to frame analysis of how the human right to culturally appropriate accommodation is translated in law and policy, how it is implemented in practice, how it is measured, and ultimately assists in trying to understand the gaps that arise.

Thirdly, empirical evidence²³⁵ was gathered by way 13 qualitative, semi-structured, one-to-one interviews conducted with individuals who have experience in various aspects of Traveller accommodation.²³⁶ Participants were asked (1) what ‘effectively realising the right to housing’

²³¹ An approach that, Caroline Morris and Cian Murphy say, contrasts with doctrinal analysis in how it ‘...situates laws and legal analysis in a social (some would say societal) context. In contrast with black letter analysis, the socio-legal approach looks beyond legal doctrine to understand law as a social phenomenon or type of social experience.’ Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011), 35.

²³² Denis Galligan, *Law in Modern Society* (Oxford University Press 2006) 4. See also Denis Galligan, *Introduction in Socio-Legal Studies in Context: The Oxford Centre Past and Future* (Blackwell 1995); HLA Hart, *The Concept of Law* (Clarendon 1961); Niklas Luhmann, *Law as a Social System* (Oxford 2004); Nicola Lacey, ‘Normative reconstruction in socio-legal theory’ (1996) 5 *Social Legal Studies* 131.

²³³ See Reza Banakar’s criticism of socio-legal research in ‘Having one’s cake and eating it: the paradox of contextualisation in socio-legal research’ (2011) 7 *International Journal of Law in Context* 487.

²³⁴ Nicola Lacey, ‘Normative reconstruction in socio-legal theory’ (1996) 5 *Social Legal Studies* 132.

²³⁵ Peter Schuck defines ‘empirical research’ in law as ‘the uncovering of facts about how individuals and institutions within our legal culture actually behave’. See Peter Schuck, ‘Why Don’t Law Professors Do More Empirical Research?’ (1989) 39, *Journal Legal Education*, 323.

²³⁶ Interviews were mostly between 45-60 minutes long, were recorded by Dictaphone and transcribed.

means, as well as their view on (2) any barriers and (3) any facilitators to effective realisation.²³⁷ They were asked (4) if they had any involvement in processes that might follow the issuing of concluding recommendations on Traveller accommodation by the UN Committee on the Elimination of all Forms of Racial Discrimination,²³⁸ and if this is, in their experience, how an issue of compliance or non-compliance (with international human rights law) is approached. Lastly, they were asked of (5) any experience they might have in the ways in which has Ireland attempted to translate international human rights law on housing into concrete ways within the State and how Ireland measured the ways in which international human rights law on housing has been put in place or given effect to. Different software packages were considered for the purposes of analysing the interview data, however in the end the interviews coded manually.²³⁹

In this respect, the interviews were a way of supplementing other data collection methods.²⁴⁰ Interview participants were divided into roughly three categories (for the purpose of

²³⁷ ‘Effectiveness’ is widely used within human rights discourse but without a single definition, and therefore is open to challenge, but may loosely be defined as an action that accomplishes its specific aim. See Yuval Shany, ‘Assessing the Effectiveness of International Courts: A Goal Based Approach’ (2012) 106 *American Journal of International Law* 225, 230. Shany says to be effective, we need to identify what the goals are (of the Courts, in this case), the desired outcome and what might be a reasonable timeframe.

²³⁸ In 2005, on the occasion of Ireland’s examination on its combined first and second report on the International Covenant on the Elimination of All Forms of Racial Discrimination, the CERD Committee recommended: ‘While noting the efforts made so far by the State party with regard to the situation of members of the Traveller community in the field of health, housing, employment and education, the Committee remains concerned about the effectiveness of policies and measures in these areas (art. 5 (e)). The Committee recommends to the State party that it intensify its efforts to fully implement the recommendations of the Task Force on the Traveller community, and that all necessary measures be taken urgently to improve access by Travellers to all levels of education, their employment rates as well as their access to health services and to accommodation suitable to their lifestyle.’ See CERD/C/IRL/CO/2 at 21. In 2011, an almost identical recommendation was made by the same Committee on the occasion of Ireland’s combined third and fourth report under the Covenant. See CERD/C/IRL/CO/3-4 at 13.

²³⁹ This was conducted by hand, using a coding schedule of seven key thematic areas suggested by a combination of (a) the interview questions asked and (b) other areas that came up in the course of the interviews that were not strict answers to the questions posed. The seven areas were: (1) Effective realisation; (2) Barriers; (3) Facilitators; (4) Processes; (5) Measurement; (6) “other” aspects (to operationalisation); and (7) “would be” facilitators. Combinations of word searches were used to analyse the interview transcripts according to these themes and passages of the transcripts were tagged accordingly. See Alan Bryman, *Social Research Methods* (5th Edn, Oxford University Press 2016), 292, for a discussion on the categorisation of themes, in which Bryman acknowledges that ‘when the process of coding is thematic, a more interpretative approach needs to be taken’.

²⁴⁰ ‘Making qualitative data is ridiculously easy’ says Lyn Richards, ‘...[t]he challenge is not so much making data but rather making useful, valuable data, relevant to the question being asked, and reflecting usefully on the process of research’. Richards describes ‘data’ as ‘the “stuff” you work with, the records of what you are studying’. By selecting and using these records as evidence which is to be analysed, the researcher transforms the records into ‘data’. Lyn Richards, *Handling Qualitative Data: A Practical Guide* (Sage Publications 2005) (ebook, page number not available).

triangulation)²⁴¹ and in-depth interviews were conducted with (1) state actors, in the form of senior government officials involved in political structures, local government or policy-making;²⁴² (2) non-state actors in domestic civil society advocacy organisations and community development organisations concerning Traveller rights or otherwise involved in the provision of Traveller accommodation; and (3) non-state actors in international civil society, in the form of experts at both United Nations and Council of Europe level with experience of international human rights legal oversight and reporting mechanism perspectives.²⁴³

Some of those interviewed happened to be Travellers themselves who were employed in a professional capacity in relevant organisations; however, Travellers living in sub-standard accommodation were not interviewed for two reasons: (1) to avoid ‘consultation fatigue’ with those who have been interviewed many times for existing research projects that, to date, have not resulted in significant change;²⁴⁴ and (2) the information on operationalisation fell within the experience and expertise of individuals with a perspective on the formation of policy around Traveller accommodation, both within the state and non-state sector.

In relation to the number of interviews carried out for the purpose of this thesis, Sarah Elsie Baker and Rosalind Edwards, in attempting to answer the question ‘How many qualitative interviews is enough?’, conclude that the answer is ‘it depends’. It depends upon the discipline, resources, time available, institutional requirements, how important the question is to the

²⁴¹ As in the mixing of types of data so that diverse viewpoints may cast more light on a topic. In 1978, Martin Denzin identified four types of triangulation of data; investigator triangulation; triangulation of theories and of methodologies. See Norman Denzin, *The Research Act* (McGraw-Hill 1978).

²⁴² A total of four different invitations to participate were made to the (then) Department of Environment, Community and Local Government between March 2014 and June 2015, to the Minister (at the time), to the Secretary General of the department, and to two senior officials in the Housing Division, by way of email, followed up by phone calls. None of the requests to participate were accepted.

²⁴³ Interviews were conducted on the basis of guiding questions prepared in advance and tailored to the three sub-groups above. Consent was sought by email, with consent forms supplied in advance to the participants and also in hard copy prior to interviews. Research was verbally explained to each participant prior to the interview with interviews and recording proceeded with only when informed consent was provided. Participants were informed that they had the right to withdraw at any point, either during the interview or afterwards and their data could be removed, both in research and in any further publications.

²⁴⁴ See UK Improvement Service Briefing Note No 19 on Consultation for definition of ‘consultation fatigue’, which says ‘When faced with too much consultation, particularly if it lacks focus or relevance to them, the report found that people can switch off from participating. Community and voluntary organisations are particularly susceptible to “consultation fatigue” (a term coined by SDLP politician Mark Durkan MP, Foyle, as far back as 2000 in a Northern Ireland Assembly debate), because they are often viewed as key stakeholders, yet often lack the time, capacity and resources to respond fully or even at all.’ Available <http://www.improvementservice.org.uk/elected-members-development/> accessed 6 December 2013.

research, and whether the focus of the research ‘is on commonality or difference’.²⁴⁵ Baker and Edwards say that the number of interviews that are needed may change as the researcher learns more and revises their ideas.²⁴⁶ In the case of the research for this thesis, 24 potential participants were approached; a final 13 participated; an additional 5 agreed to participate but did not respond to follow up correspondence; 3 responded but did not wish to participate and a further 3 did not respond to any correspondence. Participants were selected by nomination (rather than snowballing or randomisation) and a presumption was against anonymity.²⁴⁷ Upon final checking with participants for the use of their quotes, one participant opted to change their status to anonymous. The 13 final participants were.²⁴⁸

Category	Name	Position or Responsibility
Domestic State Actors ²⁴⁹	Colin Wrafter	Director, Human Rights Unit, Department of Foreign Affairs and Trade
	Katherine Zappone	Independent Senator
	Dessie Ellis	Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing
	Deaglán Ó Briain	Principal Officer, Department of Justice and Equality
	‘P9’	Senior official involved in operationalisation at a government level

²⁴⁵ Sarah Elsie Baker and Rosalind Edwards, *How Many Qualitative Interviews Is Enough? Expert Voices and Early Career Reflections on Sampling and Cases in Qualitative Research* (National Centre for Research Methods Review Paper 2012) 42. Available http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf accessed 21 July 2017.

²⁴⁶ Sarah Elsie Baker and Rosalind Edwards, *How Many Qualitative Interviews Is Enough? Expert Voices and Early Career Reflections on Sampling and Cases in Qualitative Research* (National Centre for Research Methods Review Paper 2012) 6. In Baker and Edwards’ own methodological approach to answering the question ‘how many qualitative interviews is enough?’, their sample of expert opinions sought ended up at 14 (see p 4 of their work). There is logic to calculating the ideal sample size, says Mark Mason, stating ‘Qualitative samples must be large enough to assure that most or all of the perceptions that might be important are uncovered, but at the same time if the sample is too large data becomes repetitive and, eventually, superfluous.’ See Mark Mason, ‘Sample size and saturation in PhD studies using qualitative interviews’, 11 Forum Qualitative Sozialforschung / Forum Qualitative Social Research, 3 <http://nbn-resolving.de/urn:nbn:de:0114-fqs100387> accessed 25 September 2017.

²⁴⁷ Participants were offered the right to be anonymous if they chose. If a participant chose to remain anonymous, a participant number would be assigned and the participant referred to at all times by that number.

²⁴⁸ All participant job titles/roles are correct at the time of interview in 2014. Some participants have subsequently left these positions or changed responsibilities.

²⁴⁹ Several attempts were made to set up an interview with officials in the (then) Department of the Environment, as the core government department responsible for policy on Traveller accommodation. Between July and November 2014, written correspondence and telephone calls were made both to the Minister for the Environment at the time and to officials at three different levels of authority within the department. In late November, a response was received that no one was in a position to participate. A verbal conversation was held with another department official in June 2015, who indicated that he might be in a position to participate in an interview. Follow-up correspondence in this instance did not result in any further engagement from the department and, following discussion between the author and her PhD supervisor, it was decided to not pursue this further.

Domestic Non-State Actors	Martin Collins	Co-Director, Pavee Point Traveller and Roma Centre
	Damien Peelo	Director, Irish Traveller Movement
	Gráinne O'Toole	Researcher for CENA Feasibility Study
	David Joyce	Barrister and Traveller activist
International Non-State Actors	Colm O'Conneide	Member, European Committee on Social Rights
	Anastasia Crickley	Chairperson, United Nations Committee on the Elimination of Racial Discrimination
	Aoife Nolan	Professor of International Human Rights Law, Nottingham University
	Leilani Farha	United Nations Special Rapporteur on the Right to Housing

In the case of this research, there was a risk that the interview results might not be generalisable because the sample size was small and the participants were not chosen randomly. The risk was offset by the case study purpose of seeking insight into a specific rights area and because the participants were chosen specifically for their experience and expertise in the area, which made the small sample number appropriate in this instance. It is worth also considering if there were any additional risks resulting from the fact that the interviewer, by way of professional relationship, personally knew many of the participants.²⁵⁰ For example, in the case of qualitative clinical nursing research, Angelica Orb, Laurel Eisenhauer and Dianne Wynaden say that some ethical considerations may be raised when a researcher is known to their research subjects.²⁵¹ These may include the possibility of obtaining more detailed responses due to a closer relationship and the trust of participants. Conversely, these authors also claim, the known researcher may get also less information, if participants feel as if they have been persuaded into taking part.²⁵² In the case of this thesis, however, the personal relationships allowed the interviewer greater access to the participants and did not raise any ethical considerations, as participants were all individuals with profiles in the public domain on Traveller issues or aspects of operationalisation. In this regard, the personal relationship aspect was noted during

²⁵⁰ Through the author's professional role in, firstly, Amnesty International Ireland, and subsequently in the Irish Human Rights and Equality Commission. The work of McConahay, Hardee and Batts in the 1980s is of interest here, who considered whether personal relationships may have the potential to influence the answers given in interviews, as a result of a 'demand characteristic' bias. McConahay, Hardee and Batts concluded that the answer to the question 'Has racism declined?' depended upon how prejudice was measured and who did the measuring. See John McConahay, Betty Hardee and Valerie Batts, 'Has racism declined in America? It depends on who is asking and what is asked' (1981) 25 *Journal of Conflict Resolution* 563.

²⁵¹ Angelica Orb, Laurel Eisenhauer, Dianne Wynaden, 'Ethics in qualitative research' (2001) 331 *Journal of Nursing Scholarship* 96, citing PA Field and JM Morse, *Nursing Research: The Application of Qualitative Approaches* (Chapman and Hall 1992).

²⁵² See, generally, PJ Allmark, J Boote, E Chambers, A Clarke, A McDonnell, A Thompson and A Tod, 'Ethical issues in the use of in-depth interviews: literature review and discussion' (2009) 5 *Research Ethics Review* 48.

the ethical approval process. Full ethical approval was sought and granted from the Ethics Research Committee at Durham University,²⁵³ and subsequently re-endorsed by the Research Support Group at the University of Birmingham, following transfer of the author in 2015.

It is important to note, at this point, the limitations of this research. The Traveller and Roma Rights organisation Pavee Point says that due to similarities in culture and traditions ‘ . . . in the arena of international policy, various nomadic groups are often considered together; it is not uncommon for policy to be directed jointly at Gypsies, Roma, Sinti and Traveller people’.²⁵⁴ This is particularly visible in the academic discourse from the United Kingdom. For the purposes of this thesis, only Travellers within the Republic of Ireland were considered and, although examples of legislative approaches²⁵⁵ and jurisprudence from other jurisdictions are used illustratively where appropriate, the Roma community in Ireland is not considered.

One other issue is important to note here, when considering literature on Traveller rights. As Adina Schneeweis points out, writing about Travellers, Gypsies and Roma is generally done by non-Roma writers,²⁵⁵ and this is no different in the Irish context. Writing as an Irish non-Traveller, this author is acutely aware of the ‘reams and reams of academic papers written by settled people about Travellers’²⁵⁶ and the risk of misrepresentation that this brings, particularly in an Irish setting where racism towards Travellers is so deeply ingrained. Research for this thesis began in 2012 with a focus upon the wider topic of operationalisation of international human rights law in the domestic structures of the state and an intention to carry out a mapping study of how international human rights law is operationalised in Ireland more generally. In order to bring greater depth to the research, in the second year a case study on Traveller accommodation was designed as a way of focusing upon a single rights area in more detail. The quantity of material and data gathered turned out to be so vast that the case study – over time – became the core of the thesis itself. Perhaps if the research had begun solely in the context of Traveller accommodation, a different approach might have been more appropriate from the outset, allowing for a greater representation of the voice of Travellers in Ireland. However, as set out in the next section on methodology, operationalisation of human rights in Ireland falls within the experience and expertise of individuals both within the state and non-

²⁵³ Whilst a PhD candidate at Durham University, between 2012 and 2015.

²⁵⁴ See <http://www.paveepoint.ie/what-we-do/programmes/roma/>, accessed 14 November 2014.

²⁵⁵ Adina Schneeweis, ‘Talking difference: discourses about the Gypsy / Roma in Europe since 1989’ (PhD thesis, University of Minnesota 2009) 68.

²⁵⁶ Traveller writer and activist, Rosaleen McDonagh, in email correspondence with the author, 25 July 2017.

state sectors. It is hugely encouraging to note here that three PhD studies are currently being undertaken by Irish Travellers, on the topics of (1) how anti-Traveller racism shapes young people's use of and movement through urban public space,²⁵⁷ (2) the politics of disabled Traveller identity,²⁵⁸ and (3) the history of Traveller engagement with human rights in Ireland.²⁵⁹ Given the dominance of non-Traveller researchers on Traveller issues in Ireland, this is hopefully the beginning of a new era in this regard.

6. Chapter outline

Following the introduction, Chapter 1 outlines the fundamental issue with which this thesis is concerned: the fact that Travellers in Ireland do not fully enjoy their internationally protected right to culturally appropriate accommodation. It does this by outlining the important role that nomadism plays, establishing that a right to culturally appropriate accommodation exists in international human rights law and this right is intertwined with both ethnicity and nomadism. The purpose of this chapter is to demonstrate this situation as a multi-layered, complex problem that has historical ethnic, legal and political aspects, in which Ireland's conventional approach in domestic law, policy and practice to date has not been effective. Chapter 1 establishes that, despite the knowledge that the right exists within the international human rights legal framework, a doctrinal perspective alone does not help us to assess the ways in which the right is applied at a local level and in a domestic context.

When international treaty-monitoring bodies consider whether or not a human right is being fulfilled, they often speak of the right being 'operationalised', 'enforced' or 'implemented', yet these terms are rarely defined. With this in mind, Chapter 2 attempts to understand obligations placed upon states in relation to how they give effect to rights in the domestic context, in law, policy and practice, the chapter thus playing a core role in the thesis in establishing the 'lens' through which a right may be viewed in a domestic context. This chapter asks 'what does it mean to operationalise a right?' and claims that 'operationalisation' of an international human

²⁵⁷ Sindy Joyce, examining how anti-Traveller racism shapes young people's use of and movement through urban public space and looking at their tactics for negotiating that space (PhD thesis, University of Limerick, in progress).

²⁵⁸ Rosaleen McDonagh, 'From shame to pride – the politics of disabled traveller identity' (PhD thesis, Northumbria University, in progress).

²⁵⁹ Thomas McCann, 'An exploration of the Traveller Struggle in Ireland for human rights from the 1960s to the present' (PhD thesis, Maynooth University, in progress).

right takes place only when that right has been (1) translated into domestic instruments through law and policy; (2) implemented through the creation of institutions, resourcing and direct provision of services; and (3) monitored or measured in some way. Chapter 2 then proceeds to focus upon the three features – translating, implementing and monitoring – more generally in an Irish setting. This three-part understanding of operationalisation then provides the framework through which the operationalisation of the right to culturally appropriate accommodation for Travellers in Ireland is investigated, analysed and critiqued in Chapter 3.

The purpose of Chapter 3 is – using the three-part framework established in the previous chapter – to establish if, and how, the right to culturally appropriate accommodation is operationalised in Ireland. This is critical in the thesis, given that there are conflicting views on this issue as between what international human rights bodies have repeatedly said about Traveller accommodation in Ireland and how the Irish state itself views the case. By unpacking operationalisation within the single rights area of Traveller accommodation and viewing it in terms of translating, implementing and monitoring, it is possible to move beyond the narrower doctrinal view that the right to culturally appropriate accommodation is given effect to by law alone and consider instead how it operates in practice. Looking at this right in practice, particularly when supported by the interview data, the evidence appears to suggest that Ireland has a domestic system of operationalisation which displays hybrid characteristics but that this hybridity is informal and subject to political volatility and other outside influences. This informality, in itself, thus creates barriers to how the right is translated, implemented and monitored.

Chapter 4 further considers ‘hybridity’ and its benefits and shortcomings in other settings. This chapter asks and answers the question ‘what does it mean to be hybrid?’ In unpacking the advantages and disadvantages of other hybrid models, insight is gained into more formalised hybrid structures that endure and the potential of a more conscious commitment to them. The purpose of this chapter is to explore whether other more formalised hybrid mechanisms might offer solutions for more effective operationalisation than that which currently takes place in Traveller accommodation, particularly in terms of addressing inequalities in power dynamics. This chapter claims that a more formalised hybrid approach to operationalisation could provide insulation against political influence, inconsistency and informality in how the right is operationalised.

In order to test potential routes to greater formalisation, Chapter 5 then goes on to examine specific examples of more formalised hybrid models against the context of Traveller accommodation. Three models are considered: (1) hybridity in housing associations in England; (2) hybridity in civil society's role in established organisations, such as in the case of the World Bank; and (3) existing hybrid human rights mechanisms between international frameworks and the state, such as in the cases of the monitoring mechanisms of the UN Convention on the Rights of Persons with Disabilities, Article 33, and the domestic implementation mechanisms of the United Nations Guiding Principles on Business and Human Rights (the 'Ruggie Principles'). The purpose of Chapter 5 is to identify the suitability of these three models in the previously unexplored context of Traveller accommodation.

In the conclusion, the thesis determines that the development of a mechanism similar to a CRPD Article 33 model might provide a means to more effective operationalisation in the case of Traveller accommodation in Ireland. A model of this kind would require additional, more specific, provisions to flow from the international human rights legal framework that outlines the right to culturally appropriate accommodation, with a corresponding mechanism reflected in the domestic legal and policy framework. Further research could outline what such a mechanism might usefully entail, in terms of structure and process.

Chapter 1 – The Right to Culturally Appropriate Accommodation for Travellers

1.1 Introduction: ‘a difficult and controversial area of public policy’

Travellers have occupied ‘the bottom rung of Ireland’s social and economic ladder’ for generations.¹ This chapter will set out the core issue of the thesis: how Travellers in Ireland do not fully enjoy their internationally protected right to culturally appropriate accommodation but also that that this issue is one that is complex and has had a difficult history. The role of this chapter is, therefore, to act as a benchmark against which later chapters will be considered. In order to do so, the chapter will first establish what is meant by ‘culturally-adequate’ accommodation, identifying three features of (1) construction in ways that enable cultural identity; (2) protecting against discrimination; and (3) not infringing upon nomadic life. It will then consider these features in an Irish context. This consideration establishes that, while the Housing (Traveller Accommodation) Act 1998 has to a degree translated the right into law and practice, a lack of delivery – influenced by institutionalised racism and budget underspends – coupled with a risk of evictions and the criminalisation of nomadism has resulted in a form of assimilation. In 2009, the European Union Agency for Fundamental Rights commissioned a number of country studies for a comparative report on housing conditions of Roma and Travellers in Member States.² In a summary that remains true today, the report stated:

Traveller accommodation remains a difficult and controversial area of public policy in Ireland. Among the many issues are the apparent gaps, weaknesses and

¹ Sharon Bohn Gmelch and George Gmelch, *Irish Travellers: The Unsettled Life* (Indiana University Press 2014) 1.

² Increasingly in recent decades, the European Union has grouped together nomadic groups within Europe under the umbrella term ‘Roma’, to include Traveller, Sinti, Gypsies and other nomadic groups. See European Commission Justice Sector website, ‘Who are the Roma?’, which states, ‘Roma is the term commonly used in EU policy documents and discussions, although it encompasses diverse groups that include names like Roma, Gypsies, Travellers, Manouches, Ashkali, Sinti and Boyash.’ Available http://ec.europa.eu/justice/discrimination/roma/index_en.htm accessed 23 June 2017.

Groups themselves may resist this nomenclature. See Brian Belton’s criticism of the rise of this discourse of increasing homogeneity around Traveller identity in Brian Belton, *Gypsy and Traveller Ethnicity: The Social Generation of an Ethnic Phenomenon* (Routledge 2005).

strengths of government policy; the overall approach adopted by the government in relation to Traveller accommodation; the position of Travellers in Irish society and more recently the gap between the policy agreed upon at a national level and implementation at a local level.³

The Commission on Itinerancy was established in June 1960,⁴ ‘to enquire into the problem arising from the presence in the country of itinerants in considerable numbers’ and consider steps that might be taken ‘to provide opportunities for a better way of life for itinerants’; to ‘promote their absorption into the general community’; and ‘to reduce to a minimum the disadvantage to themselves and to the community resulting from their itinerant habits’.⁵ As the Irish Traveller Movement notes, everything in the Commission’s work ‘looks not at the problems Travellers face in Ireland, but the problems Travellers “cause”’.⁶ As the first, formally established policy position on Travellers in Ireland, the Commission’s report produced three years later in 1963 focused upon identifying methods of assimilating Travellers into the general population in order to eliminate the ‘problems’ caused by Traveller lifestyles, linking the decline of traditional practices such as horse trading and the selling and repair of pots and pans with ‘[lack of] demand for the particular kinds of goods they have been accustomed to trade in in the past years’⁷ and the rise of ‘economic, educational, health and social problems inherent in their way of life’.⁸ The Commission’s report set the framework for policy development around Travellers in Ireland for the two decades which followed.⁹

³ Philip Watt and Karla Charles, *Ireland – RAXEN National Focal Point Thematic Study, Housing Conditions of Roma and Travellers* (EU Fundamental Rights Agency 2009) 4, <http://fra.europa.eu/sites/default/files/frauploads/584-RAXEN-Roma%20Housing-Irelanden.pdf> accessed 11 August 2016. RAXEN is the EU Fundamental Rights Agency’s group of National Focal Points involved in gathering information and data on racism and xenophobia in EU Member States.

⁴ The Commission was chaired by a Supreme Court judge and made up of senior officials in various government departments, state bodies and a number of other agencies, such as the Vice-president for Leinster of the National Farmers’ Association; the Director of the Dublin Institute of Catholic Sociology; a Chief Superintendent of an Garda Síochána; a County Manager; two Chief Medical Officers; a former chief inspector for the Department of Education; and the Chairman of the General Council of the Committees of Agriculture. There were no Traveller representatives. See Irish Traveller Movement, *Review of the Commission on Itinerancy Report* (Irish Traveller Movement 2013) 3, <http://itmtrav.ie/wp-content/uploads/2017/02/ITM-Review-of-the-1963-Commission-on-Itinerancy.pdf> accessed 13 June 2017.

⁵ Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963) 11.

⁶ Irish Traveller Movement, *Review of the Commission on Itinerancy Report* (Irish Traveller Movement 2013) 2, <http://itmtrav.ie/wp-content/uploads/2017/02/ITM-Review-of-the-1963-Commission-on-Itinerancy.pdf> accessed 13 June 2017.

⁷ Address of Charles J Haughey, TD, Parliamentary Secretary to the Minister for Justice, to the inaugural meeting of the Commission on Itinerancy on 1 July 1960 in Government Buildings, Merrion Street, Dublin; see Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963), Appendix 1, 113.

⁸ Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963) 11.

⁹ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006) 14.

Both historically and contemporarily, Travellers have been largely excluded from politics and spheres of influence and decision-making within the Irish state, their experience being a situation of endemic and structural disempowerment,¹⁰ but they are also subject to prejudice and racist attitudes at a local level in relation to accessing accommodation, and this came out strongly in interviews conducted for the purposes of this research. The cumulative effects of these features has resulted in what is, effectively, assimilation in practice or a fulfilment – whether intended or not – of the aims of the 1960 Commission. In light of the fact that a series of legal and policy approaches over the last 50 years, including a specific statutory legal obligation, have not addressed this problem, this chapter goes on to establish the need for an innovative approach, arguing that actions beyond straightforward legal reform are required in order to effect substantial change in this area.

The next section turns to an examination of how the concept of culturally appropriate accommodation is set out in international human rights law, in order that subsequent sections may identify gaps that exist in how this right is enjoyed by Travellers in Ireland.

1.2 Culturally appropriate accommodation in international human rights law

The term ‘culturally appropriate’ is widely used in the literature surrounding Traveller issues, but not routinely strictly defined. For example, under the heading ‘Culture [sic] Appropriate Accommodation’, the Irish Traveller-led voluntary housing body Cena states on its website:

When referring to Traveller-specific accommodation, it is generally accepted that this means

- Permanent Halting Sites
- (Temporary Halting Sites)

¹⁰ Understanding ‘empowerment’ as ‘a process by which individuals gain mastery or control over their own lives and democratic participation in the life of their community’, Marc Zimmerman and Julian Rappaport, ‘Citizen participation, perceived control, and psychological empowerment’ (1988) 16 *American Journal of Community Psychology* 725, 726. Iris Marion Young says ‘Empowerment is an open concept, a concept of publicity rather than privacy. Agents who are empowered with a voice to discuss ends and means of collective life, and who have institutionalized means of participating in those decisions, whether directly or through representatives, open together onto a set of publics where none has autonomy. Empowerment means, at minimum, expanding the range of decisions that are made through democratic processes.’ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 251.

- Group Housing Schemes and
- Transient sites.¹¹

The terms ‘culturally appropriate’ and ‘culturally adequate’ are often used interchangeably in literature around Traveller accommodation. In this thesis, the term ‘culturally appropriate’ is used throughout and is understood as emerging from a combination of international provisions, as will be seen in this section. A query might be raised about a tendency within the thesis to shift between civil and political rights enforcement and social and economic rights enforcement. Much has been made, as will be seen in the literature, of difficulty with the status of social and economic rights. However, as will be seen in this section, rights enforcement discussions may emerge from Article 8 case law of the European Court of Human Rights. Therefore, in the context of this discussion, it is worth noting that operationalisation issues are the same regardless of the category of right in question.

The purpose of this section is to define what this right is. A survey of the jurisprudence of the UN and the Council of Europe suggests that there are three key principles or elements to the internationally protected right: (1) it must enable the expression of cultural identity; (2) states must move beyond the mere guarantee of identical treatment in how a person accesses accommodation; and (3) nomadism should be facilitated.

Cultural adequacy, cultural identity and cultural appropriateness

In 1948, a collective of United Nations member states agreed that everyone had the right to an adequate standard of living and that that standard included, among other things, housing.¹² The International Covenant on Economic, Social and Cultural Rights,¹³ the ‘principal instrument for the protection of economic, social and cultural rights within the United Nations human rights system’,¹⁴ was drawn up alongside the International Covenant on Civil and Political

¹¹ See <http://cena.ie/culture-appropriate-accommodation/>, accessed 14 June 2017. Cena’s full title is ‘Cena–Culturally Appropriate Homes Limited’.

¹² Universal Declaration of Human Rights, adopted 10 Dec 1948, GA Resolution 217A (III) 3 UN GAOR, UN Doc. A/810, at 71 (1948), Article 25(1).

¹³ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec 1966, entered into force 3 Jan 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967).

¹⁴ Allan Rosas and Martin Scheinin, ‘Implementation mechanisms and remedies’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001) 425, 426.

Rights in 1966, in order to transform the aspirations of the Universal Declaration on Human Rights into covenants that could be binding upon states. The primary article dealing with housing, Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.¹⁵

This was later reinforced by the United Nations Human Rights Council which considered the principle of progressive realisation as it relates to the right to housing, stating that:

States have the primary responsibility to ensure the full realization of all human rights and to endeavour to take steps, (. . .), with a view to progressively achieving the full realization of the right to housing as a component of the right to an adequate standard of living.’¹⁶

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities states that ‘national policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities’,¹⁷ particularly when, according to the Office of the UN High Commissioner for Human Rights, ‘indigenous peoples’ are more likely than any other group in UN member states to live in inadequate housing or experience discrimination in the housing market:¹⁸

Of particular concern is their generally poor housing situation (especially compared to majority populations), including inadequate basic services, their

¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec 1966, entered into force 3 Jan 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967), Article 11.

¹⁶ UN Human Rights Council, ‘Adequate housing as a component of the right to an adequate standard of living’, UN Ref Doc A/HRC/RES/25/17, 2014.

¹⁷ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, A/RES/47/135, Article 5(1).

¹⁸ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 21, The Human Right to Adequate Housing, November 2009, Fact Sheet No. 21/Rev.1, para 27.

vulnerability as groups affected by displacement, the insecure tenure they often have over their traditional lands, and the culturally inappropriate housing alternatives often proposed by the authorities.¹⁹

Frequently referenced in any discussions around the right to housing is General Comment No. 4 from the UN Committee on Economic, Social and Cultural Rights, which expands upon Article 11 of the Covenant, stating that the right to adequate housing is more than a right to a roof over one's head and should not be viewed as a commodity, 'rather it should be seen as the right to live somewhere in security, peace and dignity'.²⁰ The obligation on the state to ensure that housing and supporting policies are adequate extends to ensuring that accommodation is culturally adequate and enables the expression of cultural identity; the General Comment continued:

(g) Cultural adequacy. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.²¹

By outlining the three qualities of: ways of construction; building materials used; and supporting policies, the General Comment goes some distance towards giving guidance to states as to what cultural adequacy might look like, yet guidance from treaty-monitoring bodies to states under review obviously varies from state to state.²²

¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, para 8(g).

¹⁹ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 21, The Human Right to Adequate Housing, November 2009, Fact Sheet No. 21/Rev.1, para 28.

²⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, para 7. General Comment No. 4 on the right to housing expands on the provisions of Article 11(1) in the Covenant, saying adequate housing has the seven qualities: legal security of tenure; availability of services, materials facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. General Comment No. 4 also says that states must give priority to social groups living in unfavourable conditions by giving them particular consideration.

²¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, para 8(g).

²² See, for example, Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 17 February 2017, CERD/C/ITA/CO/19-20, para 21(b) which states the Committee's concerns in relation to 'The fact that Roma, Sinti and Camminanti communities continue to live in segregated camps or housing areas with substandard accommodation, many

Beyond 'the mere entitlement to a house'

At a regional level of rights protection, the Council of Europe's European Social Charter of 1961²³ and the Revised European Social Charter of 1999 which has gradually taken its place,²⁴ contain a comprehensive scope of socio-economic rights, and have established a supervisory mechanism for states parties,²⁵ overseen by the European Committee on Social Rights.²⁶ Article 15 deals with overcoming barriers to accessing housing for persons with disabilities, as

unsuitable for human habitation, and in remote areas distanced from basic services, including health care and schools', recommending at 22(c) 'Review and amend national, regional and municipal housing legislation, policies and practices to ensure that they do not discriminate against Roma, Sinti and Camminanti in the enjoyment of their rights, in particular their access to social housing and other forms of housing benefit'; Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 14 September 2011, CERD/C/GBR/CO/18-20, in which the Committee 'deeply regrets the State party's insistence on proceeding immediately with the eviction of the Gypsy and Traveller community at Dale Farm in Essex before identifying and providing alternative culturally appropriate accommodation for members of these communities' at 28; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland, 3 October 2016, CERD/C/GBR/CO/21-23, which recommends the state to 'Ensure the provision of adequate and culturally appropriate accommodation and stopping sites as a matter of priority throughout the State party and regularly publish the net increase of pitches for Gypsies and Travellers created through the Traveller Pitch Fund', at 25(b); Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12–30 August 2013), CERD/C/SWE/CO/19-21 which recommends, at 20(e), that Sweden 'Increase access to adequate housing for Roma without discrimination and segregation, including by facilitating access to public and low-cost housing and improving the living conditions of Roma'.

²³ Council of Europe, European Social Charter, 18 October 1961, ETS 35. The European Social Charter is largely considered to be a counterpart to the European Convention on Human Rights. It contains 31 articles on economic and social rights, and includes some cultural rights, but its history of drafting means workers' rights comprise a relatively large proportion.

²⁴ Council of Europe, European Social Charter (Revised) 3 May 1996, ETS 163. For up-to-date details on signatures, ratifications and reservations on the Charter and Revised Charter see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=bMJSHMUn, accessed 14 June 2017.

²⁵ Council of Europe, European Social Charter (Revised) 3 May 1996, ETS 163, Part IV. Ireland ratified the European Social Charter in October 1964 and the Revised Charter in November 2000, but with derogations, in particular all sections of RESC Article 31, which contains the right to housing. A declaration from the Permanent Representative of Ireland in November 2000 said 'In view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of this article at this time. However, Ireland will follow closely the interpretation to be given to the provisions of Article 31 by the Council of Europe with a view to their acceptance by Ireland at a later date.' See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p_auth=bMJSHMUn&coeconventions_WAR_coeconventionsportlet_en_Vigueur=false&coeconventions_WAR_coeconventionsportlet_searchBy=state&coeconventions_WAR_coeconventionsportlet_codePays=IRE&coeconventions_WAR_coeconventionsportlet_codeNature=10, accessed 14 June 2017.

²⁶ Legal conformity with the European Social Charter is overseen by a committee of independent experts, the European Committee of Social Rights (ECSR). Its process of examining of states is more judicial in its style than that of UN treaty-monitoring bodies, issuing findings of conformity or non-conformity (versus the recommendations or concluding observations of its UN equivalent).

part of their right to independence, social integration and participation in the life of the community; Article 16 deals with the ‘provision of family housing’ as part of the right of the family to social, legal and economic protection; Article 23 deals with the ‘provision of housing suited to their needs and their state of health or of adequate support for adapting their housing’ under the right of elderly persons to social protection; Article 30 requires states to promote ‘effective access’ to housing, among other entitlements, as part of the right to protection against poverty and social exclusion; and Article 31 entitled ‘The Right to Housing’, states:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.²⁷

The Committee has also noted an important degree of overlap between the various Charter articles that protect the right to housing.²⁸ The necessity for states to work towards a coordinated domestic housing framework featured strongly in their decision in *FEANTSA v France*, where it states that although ‘the actual wording of Article 31 of the Charter cannot be interpreted as imposing on states an obligation of “results”’, it does note that the rights contained in the Charter ‘must take a practical and effective, rather than purely theoretical, form’.²⁹ The Committee goes on to say that these practical measures oblige states to:

- (a) adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving goals laid down by the Charter;
- (b) maintain meaningful statistics on needs resources and results;
- (c) undertake regular reviews of the impact of the strategies adopted;
- (d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;

²⁷ Council of Europe, European Social Charter (revised) 1999, ETS 163, Article 31.

²⁸ In its decision in *ERRC v Bulgaria* in 2006, for example, the Committee states’ [...] as many other provisions of the Charter, Articles 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing. In this respect, the notions of adequate housing and forced eviction are identical under Articles 16 and 3.’ See No. 31/2005 *ERRC v Bulgaria*, Decision on the Merits, 18 October 2006, at 6, http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp accessed 14 June 2017.

²⁹ *FEANTSA v France*, Complaint No. 39/2006, Decision on the Merits, 5 December 2007, para 55.

(e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.³⁰

The core of this interpretation, therefore, according to Committee on Social Rights Secretary Régis Brillat is that it includes qualitative aspects, quantitative aspects and financial aspects,³¹ with the emphasis of bringing the right into the domestic context as far as possible, as in the taking of the ‘appropriate steps’ set out in the ICESCR’s Article 11. Interviewee P1, who is a member of the Committee on Social Rights, stressed the significance of both *FEANTSA* and *ADT v France*³² as ‘quite significant reference points in the housing rights context’, and as elaborating what the right to housing requires. In these cases, P1 said, the Charter rights violation was ‘[w]hat France was not doing in terms of failing to implement some sort of transparent objective system, of allocating housing’ and the need for ‘some sort of reasonably structured, developed, transparent guidance for local authorities’.³³

In an evolving jurisprudence in the last few decades, the Council of Europe Committee on Social Rights has also expanded understandings of the right to housing. In several collective complaints brought by the European Roma Rights Centre and International Federation of Human Rights, the Committee has held that Greece, Italy, France, Belgium and most recently Ireland are all in violation of various articles of the Charter in relation to the insufficiency and inadequacy of the types and conditions of accommodation available to either Roma or Traveller communities.³⁴ The European Roma Rights Centre claims that the Committee on Social Rights has expanded its jurisprudence in recent years to beyond ‘the mere entitlement to a house’,

³⁰ *FEANTSA v France*, Complaint No. 39/2006, Decision on the Merits, 5 December 2007, para 56.

³¹ Régis Brillat, ‘Contemporary housing issues in a changing Europe’ (International housing law, rights and policy conference, National University of Ireland, Galway, April 2012) <https://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjRiqqCpsDUAhVK7hoKHbIIAwwQFggnMAA&url=https%3A%2F%2Fwww.nuigalway.ie%2Fmedia%2Fhousinglawrightsandpolicy%2FRegis-Brillat-Speech.docx&usq=AFQjCNE3HoxFiPDq3BEFQmdq3t9WgijkUw&sig2=9ZNpoLnpXPp6KAqfupw2cw> accessed 14 June 2017.

³² Case of *ATD Fourth World v France*, Complaint No. 33/2006, which alleged violations of the right to housing of persons living in extreme poverty.

³³ Interview with Colm O’Cinneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as ‘Participant No. 1’ or ‘P1’.

³⁴ *European Roma Rights Centre (ERRC) v Greece*, Complaint No. 15/2003, 8 June 2005; *European Roma Rights Centre (ERRC) v Italy*, Complaint No. 27/2005, 7 December 2005; *European Roma Rights Centre (ERRC) v France*, Complaint No. 51/2008, 20 June 2010; *FIDH v Belgium*, Complaint No. 62/2010, 31 July 2012; *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013.

making it ‘clear that the right to housing should be interpreted as a right to adequate housing’,³⁵ as well as also showing increasing concern in relation to the provision of culturally appropriate accommodation.³⁶

Some general principles of nomadism were identified and agreed upon by the Committee of Ministers of the Council of Europe back in 2005, in its Recommendation on improving the housing conditions of Roma and Travellers in Europe,³⁷ including that:

Member states should affirm the right of people to pursue sedentary or nomadic lifestyles, according to their own free choice. All conditions necessary to pursue these lifestyles should be made available to them by the national, regional and local authorities in accordance with the resources available and to the rights of others and within the legal framework relating to building, planning and access to private land.³⁸

[. . .]

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.³⁹

In the case of *ERRC v France* in 2008, the European Committee on Social Rights found that the failure to implement legislation requiring municipalities to set up permanent camp sites for Travellers compelled Travellers to make use of illegal sites and exposed them to the risk of forcible eviction, and that ‘merely guaranteeing identical treatment as a means of protection

³⁵ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, 6, citing the case of *European Roma Rights Centre (ERRC) v Greece*, Complaint No. 15/2003, Decision on the Merits, 8 December 2004, 8.

³⁶ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, para 12.

³⁷ Council of Europe, Recommendation Rec (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, 23 February 2005.

³⁸ Council of Europe, Recommendation Rec (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, 23 February 2005, para 3.

³⁹ Council of Europe, Recommendation Rec (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, 23 February 2005, para 33.

against any discrimination is not sufficient'.⁴⁰ In the case of *FIDH v Belgium* in 2012, however, the Committee also noted that:

It is reasonable for states to introduce regulations on the establishment of public caravan sites for Travellers and for it to be necessary to acquire authorisation (in this case, planning permission) to be allowed to set up public sites for Travellers or to be able to install a caravan on private property. Nonetheless, it is for the state, in its planning legislation and in its individual decisions, to show due regard for the specific circumstances of Travellers so as to enable them to live, in so far as possible, in accordance with their traditions and cultural identity while striking the right balance between this and the public interest.⁴¹

Positive obligations and 'the home'

The focus of the European Convention on Human Rights is primarily what may be defined as 'civil and political' rights and the Convention does not protect socio-economic rights *per se*, perhaps limiting the types of reasoning and argumentation found in such cases. The concept of the 'justiciability' of socio-economic rights, or whether these rights may or may not be suitable for resolution by the courts, arises many times throughout this thesis.⁴² Indeed, Liam Thornton notes the 'significant weariness' of the European Court on Human Rights in interpreting the Convention as protecting socio-economic rights.⁴³ However, as Malcolm Langford notes, '[t]he question of "justiciability" has featured strongly in the struggle to legitimize economic, social and cultural (ESC) rights', yet '[t]he bases for non-justiciability can vary greatly . . . , from technical legal criteria through to prudential concerns over institutional competence and democratic legitimacy'.⁴⁴ In answering the question 'should the ECHR be used to protect socio-

⁴⁰ *European Roma Rights Centre (ERRC) v France*, Complaint No. 51/2008, Decision on the Merits, 19 October 2009, para 84.

⁴¹ *FIDH v Belgium*, Complaint No. 62/2010, Decision on the Merits, 21 March 2012, para 135.

⁴² The concept of justiciability or non-justiciability decides when a matter may or may not be suitable for resolution by the courts. A matter presented to the courts must be capable of 'judicial' resolution, rather than being 'political' in nature. See a most recent detailed discussion in Malcolm Langford, 'Judicial Review in national courts', in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 417.

⁴³ Liam Thornton, 'The European Convention on Human Rights: A socio-economic rights charter?' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014) 227.

⁴⁴ Malcolm Langford, 'Judicial review in national courts', in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 417, at footnote 1.

economic rights?', Fiona de Londras and Kanstantsin Dzehtsiarou say that there is clearly space for socio-economic rights to be protected in a practical sense; however, whether such rights ought to be protected is another matter.⁴⁵ De Londras and Dzehtsiarou note that arguments around justiciability of socio-economic rights reflect a belief that such rights are somehow 'legally less important' than civil and political rights,⁴⁶ and this is perhaps evidenced in the ways in which socio-economic rights are largely brought into the domestic realm within states, as seen in the next section in the case of Ireland.

Viewed collectively, jurisprudence from the European Court of Human Rights in the past 30 years could be said to be indicative of a shift towards a greater appreciation of the importance of recognising cultural appropriateness in Traveller accommodation cases, particularly with a view to preventing evictions. A review of judgments can be helpful in determining how far the Strasbourg Court believes states should go in both respecting or providing nomadism, as well as preventing against evictions. States are ordinarily provided with a narrow margin of appreciation with respect to evictions.⁴⁷

For example, the eviction from an unauthorised site was held by the Court to be a justifiable interference with the applicants' Article 8 rights in the 1996 case of *Buckley v UK*.⁴⁸ Called 'the first Gypsy case that has ever got to Strasbourg',⁴⁹ Mrs Buckley had purchased the land where her family's three caravans were parked and made a retrospective planning application to keep them there, but was refused by the District Council and refused again on appeal, on the grounds of motorway safety. The Court found that 'the means employed (by the authorities) to achieve the legitimate aims pursued [the interests of the community as a whole] cannot be regarded as disproportionate'.⁵⁰ In *Buckley*, the Court found that the Buckleys' caravan, albeit

⁴⁵ Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave Macmillan, forthcoming, 2017).

⁴⁶ Such as in the example of the right to private and family life contained in Article 8 of the Convention being developed in a way that recognises the right for someone to live in a way that accords with their cultural practice, as in the case of *Winterstein v France*, no. 27013/07, 17 October 2013.

⁴⁷ Padraic Kenna, 'Local authorities and the European Convention on Human Rights Act 2003' *Irish Human Rights Law Review* (Clarus Press 2010) 19.

⁴⁸ *Buckley v UK* [1996] 23 EHRR 101. Ms Buckley had purchased the land upon which she and her family had parked three caravans and made a retrospective planning application. She was refused planning permission by the District Council, and also on appeal on the basis of highway safety and planning concerns. Ms Buckley was offered the opportunity to move to an authorised site 700 metres away, but refused due to threats of violence and over-crowding on the authorised site.

⁴⁹ Louise Jury and Clare Garner, 'Draw round the caravans, the gypsy [sic] way of life may be going forever' *The Independent* (London, 25 February 1996).

⁵⁰ *Buckley v UK* [1996] 23 EHRR 101, 84.

‘illegally’ placed on their land, was a home within the meaning of Article 8, but was satisfied that the authorities had weighed up the competing issues and given sufficient reasons for their decisions, which they claimed were taken in the enforcement of planning for safety, environment and public health reasons. The Court stated that ‘Article 8 does not necessarily go so far as to allow individuals’ preferences as to their place of residence to override the general interest’,⁵¹ and the Court appeared to accept a construction of “Gypsies” as *per se* being a problem for domestic authorities’.⁵² However, as dissenting Judge Pettiti notes, the Strasbourg Court is forced in these types of cases to accept reports submitted to them at face value, yet in reality the situation is far more complex for a family trying to pursue a Traveller way of life:

. . . the deliberate superimposition and accumulation of administrative rules (each of which would be acceptable taken singly) result, firstly, in its being totally impossible for a Gypsy family to make suitable arrangements for its accommodation, social life and the integration of its children at school and, secondly, in different government departments combining measures relating to town planning, nature conservation, the viability of access roads, planning permission requirements, road safety and public health that, in the instant case, mean the Buckley family are caught in a ‘vicious circle’.⁵³

If the decision in *Buckley* was a disappointing one, in terms of recognition of Traveller accommodation rights, it appears that the friendly settlement in the case of *Varey v UK* in the year 2000 appears to indicate some sort of progress in this regard.⁵⁴ In *Varey*, the applicants alleged that planning and enforcement measures taken against them because of their occupation of their own land in their caravans were a violation of their Article 8 rights as well as their Article 14 rights resulting from discrimination against them as Gypsies.⁵⁵ One year later, in *Chapman v UK* in 2001, the applicant was again unsuccessful, but the case has been referred to as indicating ‘an emerging consensus on the special needs of minorities’,⁵⁶ and the Court stated:

⁵¹ *Buckley v UK* [1996] 23 EHRR 101, 81.

⁵² Ralph Sandland, ‘Developing a jurisprudence of difference: The protection of the Human Rights of Travelling peoples by the European Court of Human Rights’ (2008) 8 Human Rights Law Review, 475, 483.

⁵³ *Buckley v UK* [1996] 23 EHRR 101, dissenting opinion of Judge Pettiti.

⁵⁴ *Varey v UK*, Application no. 26662/95, 2000.

⁵⁵ There was a friendly settlement of the case and a payment of £60,000 to the applicants.

⁵⁶ Luke Clements, ‘An emerging consensus on the special needs of minorities: the lessons of Chapman v. UK’, European Roma Rights Centre, 15 August 2000 <http://www.errc.org/article/an-emerging-consensus-on-the-special-needs-of-minorities-the-lessons-of-chapman-v-uk/1711> accessed 14 June 2017.

. . . the applicant's occupation 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 . . . Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.⁵⁷

[T]he vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs . . . To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.⁵⁸

In *Connors v UK* in 2004⁵⁹ a Traveller family was evicted from a transient site where they had lived for most of a 14-year period. Unable to find a lawful alternative location, the Connors family was effectively left homeless when evicted by the Council via a summary eviction process that had no procedural safeguards or justification for interference with their Article 8 rights. Unlike *Buckley*, the applicants in *Connors* were successful, where it was found that a lack of safeguards in this type of eviction was an unjustifiable interference with their Article 8 rights, one which 'places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle'.⁶⁰ It might be argued that *Connors* was a breakthrough in terms of articulating a positive duty on states to ensure that their laws and practices do not infringe on nomadic life or other aspects of Traveller culture. The Court was critical of the state for the existence of 'a statutory scheme which permitted the summary eviction of the applicant and his family', saying that '[a]n interference will be considered "necessary in a democratic society" for a legitimate aim only if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued'.⁶¹

⁵⁷ *Chapman v UK* (Application no. 27238/95), para 73.

⁵⁸ *Chapman v UK* (Application no. 27238/95), para 96.

⁵⁹ *Connors v UK* (Application no. 66746/01).

⁶⁰ *Connors v UK* (Application no. 66746/01), para 94.

⁶¹ *Connors v UK* (Application no. 66746/01), para 81.

The application in *Codona v UK* in 2006 was deemed inadmissible, however, in what Darren O'Donovan names 'the high watermark of the Court's formal equality approach';⁶² the positive obligation principle of *Chapman* was recalled by the Court when it pointed out that a positive obligation stretched only to circumstances where appropriate accommodation was available:

Following *Chapman*, the Court does not rule out that, in principle, Article 8 could impose a positive obligation on the authorities to provide accommodation for a homeless Gypsy which is such that it facilitates their 'Gypsy way of life'. However, it considers that this obligation could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not 'suitable' for the cultural needs of a Gypsy.⁶³

More sympathetic responses to the disadvantage experienced by Travellers can be seen in more recent cases, where Article 8 violations were found in *Yordanova v Bulgaria* in 2012⁶⁴ and *Winterstein v France* in 2013.⁶⁵ *Yordanova* displays a significant shift in the Court's views on proportionality from its position in the *Buckley* case of 1996. In *Yordanova*, where the Bulgarian authorities had planned to evict a group of Roma people from a settlement on municipal land, the Court criticised the state for not recognising 'the applicants' situation as an outcast community and one of the socially disadvantaged groups'.⁶⁶ Such groups, the Court said, should be provided with assistance to ensure that they enjoy the same housing rights as

⁶² Darren O'Donovan, 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights' (2016) 16 *International Journal of Discrimination and the Law* 5, 10.

⁶³ *Codona v UK* (Application no. 485/05), para 23.

⁶⁴ *Yordanova and Others v Bulgaria* (Application no. 25446/06), perhaps somewhat influenced by the case in 2009 of the individual complaint of *SID v Bulgaria*, made to the UN Human Rights Committee under the Optional Protocol to ICCPR, claiming violations of Articles 2, 17 and 26 because of the forced eviction and demolition of a number of houses owned by members of the Roma Community located in the Municipality of Burgas, which the authorities claimed were built without proper permits. The complaint was found inadmissible by the UN Human Rights Committee, because of a lack of enough detailed information from the applicants. The joint dissenting opinion of Yuval Shany and Christine Chanet makes a number of important points about forced evictions as arbitrary interferences in a person's home under ICCPR Article 17, noting that 'the vast majority of evicted individuals did not receive alternative accommodation, and that, due to the unofficial status of their dwellings, many residents, who have been living there for a number of years, could not obtain the documentation needed to apply for municipal housing.' Both Mr Shany and Ms Chanet were 'of the view that the state party failed to show that due regard was given to the consequences of the forced evictions, and, in particular, to the alternative housing needs of the evicted individuals and to the unique difficulties emanating from their unofficial status'. See *SID v Bulgaria*, Decision adopted by the Committee at its 111th session (7–25 July 2014), CCPR/C/111/D/1926/2010, at Appendix I. The facts of this case resonate in the Irish context.

⁶⁵ *Winterstein v France* (Application no. 27013/07, 17 October 2013).

⁶⁶ *Winterstein v France* (Application no. 27013/07, 17 October 2013, 129).

the rest of the population. Similar consideration was given in *Winterstein*, a case where eviction proceedings were brought against a number of Traveller families who had been living in an unauthorised site for many years, where the Court held that, although there is a margin of appreciation afforded to states in areas where economic policy applies, where Traveller rights are involved the Court is more likely to intervene:

. . . the vulnerable position of Roma and travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases . . . to this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the way of life of the Roma and travellers . . .⁶⁷

As third-party intervener in *Winterstein*, the European Roma Rights Centre pointed out that the Court's definition of 'home', within the meaning of Article 8 of the Convention, included reference to neither the legal status of the inhabitant nor the physical characteristics of the dwelling, and therefore a trailer or caravan was as much of a 'home' as any other structure and should only be removed under the same conditions as 'ordinary' houses, including access to the same types of remedies.⁶⁸

In a significant departure from *Codona*, the Court in *Winterstein* emphasised that Travellers who do not accept the offer of standard social housing over Traveller accommodation cannot be criticised for wishing to be accommodated in culturally appropriate accommodation,⁶⁹ indicating considerable progress in the seven years between judgments. However, the Court could go further. As Darren O'Donovan notes, 'By increasing the burden of justification upon States and insisting upon a holistic appraisal of housing disputes, the ECtHR can, after a history of hesitation, fashion an effective role for itself in the protection of Traveller/Roma housing rights.'⁷⁰

⁶⁷ *Winterstein v France* (Application no. 27013/07), 17 October 2013, para 76. See also: *South Buckinghamshire District Council v Porter, Gillow v UK* (1989) 11 EHRR 335 (Dale Farm case). See also other ECtHR housing cases more generally: *Larkos v Cyprus* 1999; *Moldova v Romania* 2004; *McCann v the United Kingdom* 2008; *Kay and Others v the United Kingdom* 2010; *Bjedov v Croatia* 2012.

⁶⁸ *Winterstein v France* (Application no. 27013/07), para 66.

⁶⁹ *Winterstein v France* (Application no. 27013/07), para 91, referencing the Court's decision in the case of *Stenegry and Adam v France* (Application no. 40987/05).

⁷⁰ Darren O'Donovan, 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights' (2016) 16 *International Journal of Discrimination and the Law* 5, 19.

Evictions

On the subject of evictions, the Strasbourg Court has said that domestic legislation must provide for an examination of proportionality and decision-making procedures which offer safeguards against disproportionate interference and consider the question of what is necessary in a democratic society.⁷¹ Evictions of vulnerable groups, such as Travellers, should take place only if alternative accommodation has been provided. Caravans and mobile accommodation ‘should be subject to demolition or removal under the same conditions as “ordinary” houses, including access to a court or administrative body which would adjudicate on the legality of the demolition taking the applicable principles into account’.⁷² Travellers should not be penalised for not accepting an offer of standard social housing over Traveller accommodation.⁷³

Evictions bring about only temporary solutions for authorities, the European Committee on Social Rights says, in the long term having ‘deeply negative implications on the life situation of those concerned’.⁷⁴ They are costly and traumatic, having a disproportionately negative effect on children,⁷⁵ disrupting children’s education and hindering their social integration.⁷⁶ Even the constant threat of eviction itself can result in psychological trauma.⁷⁷ As Council of Europe Commissioner for Human Rights Nils Muiznieks notes:

Local authorities should more carefully consider the benefits of investing in long-term, human rights compliant solutions rather than spending huge sums on evictions, which do not bring about lasting solutions.⁷⁸

⁷¹ *Yordanova and Others v Bulgaria* (Application no. 25446/06), para 144.

⁷² *Winterstein v France* (Application no. 27013/07), para 66.

⁷³ *Winterstein v France* (Application no. 27013/07), para 91.

⁷⁴ Operational Platform for Roma Equality (OPRE) (consisting of members European Network of National Human Rights Institutions (ENNHRI), the European Network of Equality Bodies (Equinet), the European Union Agency for Fundamental Rights (FRA) and the Council of Europe (CoE), as well as associate partners, including the OSCE’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the UN’s Office of the High Commissioner for Human Rights (OHCHR)) ‘Joint statement on evictions of Roma and Travellers in Europe’, 29 June 2017, 1, <https://rm.coe.int/1680682b0a> accessed 14 June 2017.

⁷⁵ Operational Platform for Roma Equality, ‘Joint statement on evictions of Roma and Travellers in Europe’, 29 June 2017, 1.

⁷⁶ Nils Muiznieks, ‘Travellers – time to counter deep-rooted hostility’, Human Rights Comment, 4 February 2016 (Council of Europe 2016).

⁷⁷ Operational Platform for Roma Equality, ‘Joint statement on evictions of Roma and Travellers in Europe’, 29 June 2017, 1.

⁷⁸ Nils Muiznieks, ‘Travellers – time to counter deep-rooted hostility’, Human Rights Comment, 4 February 2016 (Council of Europe 2016).

In a joint statement in 2016, the Operational Platform for Roma Equality Platform (OPRE) partners⁷⁹ stated that throughout Europe, Roma and Travellers – particularly those living in informal settlements, slums or halting sites – face a disproportionately high threat of eviction, and note that evictions are justifiable ‘only in the most exceptional circumstances’, for example, in the case of a ‘substantial and legitimate’ security or environmental risk.⁸⁰ In addition to the conditions specified by the CESCR Committee, the OPRE members go on to say that if an eviction should need to take place (1) it must be carried out for the purpose of promoting general welfare in a democratic society; (2) it must be proportionate; (3) it be ‘non-discriminatory’; and (4) it must take into account the need for progressive realisation of the right to adequate housing.⁸¹

These features chime with what the UN Committee on Economic Social and Cultural Rights has said about the situation of forced evictions, on which it issued a separate General Comment on this issue in 1997.⁸² The Committee says ‘forced evictions’ are those that involve ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to appropriate forms of legal or other protection’.⁸³ The General Comment sets out how certain procedural protections should be applied in relation to forced evictions, such as: (a) consultation with those affected; (b) adequate and reasonable notice prior to eviction; (c) information on the proposed evictions and on the alternative purpose for which the land will be used; (d) government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in bad weather or at night; (g) provision of legal remedies; and (h) provision of legal aid to seek

⁷⁹ Operational Platform for Roma Equality (OPRE) (consisting of members European Network of National Human Rights Institutions (ENNHRI), the European Network of Equality Bodies (Equinet), the European Union Agency for Fundamental Rights (FRA) and the Council of Europe (CoE), as well as associate partners, including the OSCE’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the UN’s Office of the High Commissioner for Human Rights (OHCHR)) ‘Joint statement on evictions of Roma and Travellers in Europe’, 29 June 2017, 1, <https://rm.coe.int/1680682b0a> accessed 14 June 2017.

⁸⁰ Operational Platform for Roma Equality, ‘Joint statement on evictions of Roma and Travellers in Europe’, 29 June 2017, 1.

⁸¹ Operational Platform for Roma Equality, ‘Joint statement on evictions of Roma and Travellers in Europe’, 29 June 2017, 1, 3.

⁸² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

⁸³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, para 3.

redress from the courts,⁸⁴ creating an important mechanism that states party to the Convention should ideally adopt in their domestic legal frameworks. In summary, therefore, there is something offered towards our understanding of the right to culturally appropriate accommodation in each of the examples given so far in this chapter. The next section attempts to draw these together and characterise the right in a way that is most useful to the thesis.

Characterising the right to culturally appropriate accommodation

In summary, therefore, a right to housing that is culturally adequate or culturally appropriate can be seen across a number of international human rights instruments, from the UN Covenant on Economic, Social and Cultural Rights, to the Revised European Social Charter, to the European Convention on Human Rights, yet the precise nature of this cultural appropriateness is not always strictly defined, nor is the degree to which states are obliged to provide for it. This section outlines the three distinct features of culturally appropriate accommodation that have emerged from the previous sections for the purposes of clarifying obligations in the Irish context which follow later in the chapter, i.e. culturally appropriate accommodation (1) must enable the expression of cultural identity; (2) must move beyond the mere guarantee of identical treatment in how a person accesses accommodation; and (3) must facilitate nomadism.

Firstly, for housing to be culturally adequate, the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.⁸⁵ The specific circumstances of Travellers should be taken into account ‘so as to enable them to live, in so far as possible, in accordance with their traditions and cultural identity’.⁸⁶ Occupying a caravan is ‘an integral part of . . . ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle’ and therefore measures which affect this have a wider impact than on the right to respect for a home; they can also affect the ability to maintain life as a Traveller in accordance with Traveller

⁸⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, para 15.

⁸⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant) 13 December 1991, E/1992/23, para 8(g).

⁸⁶ *FIDH v Belgium*, Complaint no. 62/2010, Decision on the Merits, 21 March 2012, para 135.

traditions.⁸⁷ Also, sufficiently close and continuous links with occupied land means that a place can be interpreted as ‘home’, ‘regardless of the question of the lawfulness of the occupation under domestic law’.⁸⁸

Secondly, protecting against discrimination by ‘merely guaranteeing identical treatment’ is not enough to fulfil the right.⁸⁹ States should recognise the situation of Travellers as ‘an outcast community and one of the socially disadvantaged groups’.⁹⁰ The vulnerable position of Travellers as a minority means special consideration ‘should be given to their needs and their different lifestyle both in the relevant regulatory planning framework’ and in reaching decisions in particular cases, thus imposing a positive obligation on Contracting States to facilitate their way of life.⁹¹ We saw, in the case of the ECHR, that a person’s Article 8 rights are ‘of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community’.⁹² The ‘deliberate superimposition and accumulation of administrative rules’ can make it impossible for Travellers to make suitable arrangements for their accommodation, with this affecting their private and family life.⁹³ But it could also be argued that the same principle also applies more broadly to an international right that goes beyond the ‘mere’ ECHR Article 8 right in question.

Thirdly and finally, it is up to the state to ensure that their laws and practices do not infringe on nomadic life, or other aspects in keeping with Traveller culture, particularly the potential for summary eviction, which ‘places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle’.⁹⁴ In her pioneering work in the 1970s and 1980s, social anthropologist Judith Okely conducted extensive fieldwork with Travellers and Gypsies,

⁸⁷ *Chapman v UK* (Application no. 27238/95), para 73.

⁸⁸ *Winterstein v France* (Application no. 27013/07), para 69.

⁸⁹ *European Roma Rights Centre (ERRC) v France*, Complaint no. 51/2008, Decision on the Merits, 19 October 2009, para 84.

⁹⁰ *Winterstein v France* (Application no. 27013/07), para 129.

⁹¹ *Winterstein v France* (Application no. 27013/07), para 76. See also: *South Buckinghamshire District Council v Porter*; *Gillow v UK* (1989) 11 EHRR 335 (Dale Farm case). See also other ECtHR housing cases more generally: *Larkos v Cyprus* 1999; *Moldovan v Romania* 2004; *McCann v the United Kingdom* 2008; *Kay and Others v the United Kingdom* 2010; *Bjedov v Croatia* 2012. See also *Chapman* 33 EHRR 399, 427, para 96, ‘the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs ... To this extent there is thus a positive obligation imposed on the contracting states by virtue of Article 8 to facilitate the gipsy way of life.’

⁹² *Winterstein v France* (Application no. 27013/07), para 67.

⁹³ *Buckley v UK* [1996] 23 EHRR 101, dissenting opinion of Judge Pettiti.

⁹⁴ *Connors v UK* (Application no. 66746/01), para 94.

publishing widely on this subject,⁹⁵ and noting that Traveller and Gypsy ‘culture’ is not self-contained, but is dependent upon, and interrelated with, the wider economy and with non-Travellers and non-Gypsies.⁹⁶ Okely notes that Travellers and Gypsies in the UK have become ‘increasingly sedentarized’ as movement patterns that relied on temporary stopping places are blocked off and no longer available, forcing the community to secure permanent sites.⁹⁷ This has had a knock-on effect on the types of seasonal, informal work available to Travellers, who perhaps cannot now risk losing a secure, permanent site, also of relevance in an Irish context.⁹⁸

1.3 The right to culturally appropriate accommodation in Ireland

Having established the three key elements of culturally appropriate accommodation in international human rights law as: enabling the expression of cultural identity, moving past guarantees of identical treatment, and facilitating nomadism, the chapter now moves to determine the meaning of the right as understood in the particular context of Irish Travellers. In the opinion of P8, for an Irish Traveller to have a right to culturally appropriate accommodation, this should mean ‘being able to live in secure accommodation that is informed by choice, that is sustainable, that meets cultural needs . . . and where people are consulted and involved in where they live’.⁹⁹

⁹⁵ See Judith Okely, ‘Gypsies travelling in southern England’ in EF Rehfisch (ed) *Gypsies, Tinkers and other Travellers* (Academic Press 1975); Judith Okely, *The Traveller-Gypsies* (Cambridge University Press 1983); Judith Okely, ‘An anthropological perspective on Irish Travellers’ in M McCann, S Ó Síocháin and J Ruane (eds), *Irish Travellers: Culture and Ethnicity* (Institute of Irish Studies, Queens University Belfast 1994); Judith Okely, ‘Cultural ingenuity and travelling autonomy: Not copying, just choosing’ in T Acton and G Mundy (eds), *Romani Culture and Gypsy Identity* (University of Hertfordshire Press 1997); Judith Okely, ‘Traveller-gypsies and the politicised and cultural construction of difference’ (Cromen conference ‘The future of multicultural Britain: meeting across the boundaries’, Roehampton University, June 2005).

⁹⁶ In this case Okely says, ‘the word “culture” can be variously defined to cover the totality of the Gypsies’ social and economic organisation or be restricted to beliefs and rituals’, Judith Okely, *The Traveller-Gypsies* (Cambridge University Press 1983) 33.

⁹⁷ Judith Okely and Gustaaf Houtman, ‘The Dale Farm eviction: interview with Judith Okely on Gypsies and Travellers’ (2011) 27 *Anthropology Today* 27, 27.

⁹⁸ ‘While the Gypsies’ economy has for centuries exploited geographical mobility, they no longer do the seasonal fruit and vegetable picking on which UK farmers historically depended. They cannot risk losing the enforced security of a site place. Farmers increasingly depend on foreign, often trafficked, labourers. Some of my former site neighbours are now housed, but disoriented and depressed.’ See Judith Okely and Gustaaf Houtman, ‘The Dale Farm eviction: interview with Judith Okely on Gypsies and Travellers’ (2011) 27 *Anthropology Today* 27, 27.

⁹⁹ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

This section now takes the features of culturally appropriate accommodation as established in the international context and looks at their applicability in Ireland, exploring how socio-economic rights are generally given effect to in Ireland, and the implications for this when looking at an Irish right to housing. This is followed by an examination of how nomadism appears to be considered in an Irish context and legislated for, by way of Traveller accommodation legislation. The section continues by establishing that the effects of a lack of delivery of Traveller Accommodation Plans provided for in this legislation, followed by the criminalisation of nomadism, and institutionalised racism, have resulted in an effective assimilation of Travellers in practice. Given the establishment, in the previous section, that a right to culturally appropriate accommodation exists in international human rights law, the purpose of this section is to establish the significant gaps that are seen around its enjoyment in Ireland.

The domestication of socio-economic rights in Ireland

David Fennelly notes that the Irish Constitution ‘was drafted, and approved, at a time when economic, social and cultural rights had not achieved the recognition and high profile they now enjoy in regional and international human rights instruments’.¹⁰⁰ The extent to which the Irish Constitution provides for the effective protection of economic, social and cultural rights, both directly¹⁰¹ and indirectly¹⁰² has been extensively debated¹⁰³ as well as being interpreted in different ways by the courts, as will be seen in this section.

Article 40.3.1 provides that the state ‘ . . . guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’.¹⁰⁴ The state is also obliged, by Article 40.3.2, to protect by its laws ‘ . . . as best it may from unjust attack

¹⁰⁰ David Fennelly, ‘Economic, social & cultural rights in Irish Constitutional Law’ (Presentation to the Constitutional Convention, Dublin, 22 February 2014).

¹⁰¹ Such as free primary education in Article 42.4 and secure accommodation for children under Article 42.5.

¹⁰² As the equality guarantee in Article 40.1.

¹⁰³ See, generally, Elaine Dewhurst, Noelle Higgins and Los Watkins, *Principles of Irish Human Rights Law* (Clarus Press 2012); Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014); Tanya Ní Mhúirthile, Catherine O’Sullivan and Liam Thornton, *Fundamentals of the Irish legal System: Law, Policy and Politics* (Round Hall 2016); Laura Cahillane, James Gallen and Tom Hickey (eds) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017).

¹⁰⁴ Constitution of Ireland, Article 40.3.1.

and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen'.¹⁰⁵ Although these articles are the basis for unenumerated rights provisions within the Constitution,¹⁰⁶ Irish courts have largely, to date, rejected socio-economic rights as being implicit within these protections.¹⁰⁷ For example, in the 1989 case of *O'Reilly v Limerick Corporation*, regarded as 'the origin of the contemporary and dominant approach of the Irish Supreme Court to socio-economic rights',¹⁰⁸ the applicants claimed an infringement of their constitutional rights and that the local authority (at the time) Limerick Corporation had a statutory duty under the 1966 Housing Act to provide serviced halting sites for Travellers.¹⁰⁹ The case relied upon the doctrine of separation of powers,¹¹⁰ with Costello J stating that there was no duty under the 1966 Act to provide such halting sites because a court could not ' . . . adjudicate on a claim by an individual that he has been deprived of what is his due'. Costello J continued:

[T]he concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of

¹⁰⁵ Constitution of Ireland, Article 40.3.2.

¹⁰⁶ In *Ryan v Attorney General* [1965] IR 294, where Kenny J stated '[w]hen dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens ...', para 312. Kelly called *Ryan* a 'constitutional milestone of enormous importance', GW Hogan and GF Whyte, *J M Kelly: The Irish Constitution* (Tottel Publishing 2004), para 7.3.59. See also Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 549. See also an interesting recent piece by Gerard Hogan, reflecting on 50 years since *Ryan*, where he contends that the Ryan doctrine, in its open-ended nature, creates difficulties for the Irish legal system, as well as deflecting attention away from the actual text of the Constitution: The Hon. Mr Justice Gerard Hogan, 'Unenumerated personal rights and the legacy of *Ryan v Attorney General*', in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 49, 49–50.

¹⁰⁷ See later in this section for a discussion of the recent important case of *NHV v Minister for Justice and Equality* [2017] IESC 35, in which the Supreme Court ruled that the absolute prohibition on seeking employment under the Refugee Act 1996 is contrary to the constitutional right to seek employment.

¹⁰⁸ Aoife Nolan, 'Ireland: The separation of powers vs socio-economic rights' in Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press 2008) 295, at 295.

¹⁰⁹ *O'Reilly v Limerick Corporation* [1989] ILRM 181.

¹¹⁰ Gerry Whyte, 'Draft paper by Gerry Whyte, Law School, Trinity College Dublin' (Irish Human Rights Commission conference on economic, social and cultural rights, Dublin, December 2005), accessed www.ihrec.ie/download/doc/ecrgerardfwhyte.doc 5 August 2017. 'Separation of powers', in its theoretical definition, is the principle that a government should be divided into independent entities, each having separate functions with limited controls. It originated with Montesquieu, a French political thinker of the seventeenth century. Montesquieu (1689–1755) produced his work *The Spirit of the Laws* in 1748, during the enlightenment. He divided the French classes into a system of checks and balances (his term) of three sovereignties; the Monarchy, the Aristocracy and the Commons. See Baron De Montesquieu, *The Spirit of the Laws* (Colonial Press 1748) <https://archive.org/stream/spiritoflaws01montuoft#page/n9/mode/2up> accessed 5 August 2017. The Irish Constitution has adopted this model and a separation of powers between the legislature, executive and judiciary is referred to in Article 6.

distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.¹¹¹

The judgment in *O'Reilly* was subsequently endorsed by the Supreme Court in cases such as *MhicMhathúna v Attorney General*,¹¹² *Sinnott v Minister for Education*¹¹³ and *TD v Minister for Education*.¹¹⁴ In *TD v Minister for Education*, Keane CJ set out his ‘ . . . greatest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as “socio-economic rights” to be unenumerated rights guaranteed by Article 40’.¹¹⁵ In the same case, Murphy J said there was no obligation on the state ‘ . . . to provide accommodation, medical treatment, welfare or any other form of socio-economic benefit for any of its citizens however needy or deserving’.¹¹⁶

The apparent reluctance of the Irish courts to give effect to socio-economic rights as constitutional rights might be associated with a perception that doing so would usurp the legislative function of incorporating international law as provided for by the Constitution.¹¹⁷ The Supreme Court has referred to an ‘unmistakable distinction between domestic and international law’ in the Irish Constitution, saying that if the government wished the terms of an international agreement to have the force of domestic law it could ‘ask the Oireachtas to pass the necessary legislation’.¹¹⁸

The largest impediment to the Irish courts in giving effect to socio-economic rights as constitutional rights is, of course, dualism. Unlike monism, where ratified international law is translated automatically, dualist states say their courts will not recognise ratified, international provisions unless they are legislated for. The Irish state repeatedly draws attention to its dualist stance when interacting with international human rights mechanisms,¹¹⁹ dualism being cited as

¹¹¹ *O'Reilly v Limerick Corporation* [1989] ILRM 181, 194.

¹¹² *MhicMhathúna v Attorney General* [1995] 1 IR 484.

¹¹³ *Sinnott v Minister for Education* [2001] 2 IR 545.

¹¹⁴ *TD v Minister for Education* [2001] 4 IR 259.

¹¹⁵ *TD v Minister for Education* [2001] 4 IR 259 at 282.

¹¹⁶ *TD v Minister for Education* [2001] 4 IR 259 at 316.

¹¹⁷ It was speculated to this effect by P3, who felt that the doctrine of separation of powers was possibly an impediment to applying international standards in Ireland. Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹¹⁸ *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97.

¹¹⁹ See, for example, Ireland’s Common Core Document to the United Nations in 2014, which states ‘Ireland has a dualist system under which international agreements to which Ireland becomes a party do not become part

a barrier to the domestic standing of international human rights law in Ireland, where the Constitution will always take precedence, ‘and all of these international agreements are subservient to the Constitution’.¹²⁰ Under Article 29(6) of the Constitution, Ireland has a dualist system in relation to international and regional agreements and maintains a distinction between domestic and international law which has been strictly interpreted by the courts.¹²¹

It could be said, however, that the courts have largely refused to incorporate international standards ‘by the back door’ of judicial interpretation, in deference not to the doctrine of separation of powers, *per se*, but to dualism as defined in the Constitution. For example, in the cases of *Re Ó Laighléis*¹²² and *Kavanagh v Governor of Mountjoy Prison*¹²³ this was taken to mean that international human rights treaties to which the state was party did not form part of domestic law and therefore could not confer rights on individual citizens in domestic law. In *Re Ó Laighléis* the Supreme Court refused to give effect to the European Convention on Human Rights because Maguire CJ held that ‘the Oireachtas has not [at that time] determined that the [Convention] is to be part of the domestic law of the state’.¹²⁴ It is clear that, in the event of any conflict between the provisions of international instruments and those in the domestic context, the provisions of Article 29(6) mean that domestic provisions will not be overruled.¹²⁵ However, the Irish courts have shown willingness to ‘consider the terms of such international

of domestic law unless so determined by the Oireachtas through legislation.’ United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc. HRI /CORE/IRL/2014, para 96.

¹²⁰ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹²¹ Article 29.6 of the Irish Constitution provides that ‘[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]’.

¹²² *Re Ó Laighléis* [1960] IR 93.

¹²³ *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97. See also Charles Lysaght, ‘The status of international agreements in Irish domestic law’ (1994) 12 Irish Law Times 171.

¹²⁴ *Re O’Laighléis* [1960] IR 93. In this case, the Irish Supreme Court held that it could not give effect to the European Convention on Human Rights because it was not part of domestic law. and this interpretation of the Convention continued until the enactment of the European Convention on Human Rights Act of 2003. Hogan and Whyte argue that international treaties may be indirectly given effect to by way of the actions of the Executive, or due to a presumption of compatibility of the domestic legal framework with international obligations. See GW Hogan and GF Whyte, *J M Kelly: The Irish Constitution* (Tottel Publishing 2004), para 5.3.125, citing *Fakih v Minister for Justice* [1993] 2 IR 427. The Law Reform Commission in Ireland is undertaking an examination of the application of international obligations in domestic law in light of Ireland’s dualist system.

¹²⁵ See *amicus curiae* submission on behalf of the Irish Human Rights Commission in the case of *Lawrence & Others v Ballina Town Council & Others*, 1 October 2007, at 2.1, https://www.ihrec.ie/download/doc/sub_amicus_lawrence.doc, accessed 13 July 2017. *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008).

instruments with a view to informing their understanding of the applicable constitutional standards'.¹²⁶

The meaning of constitutional provisions 'is rarely static or self-evident', however, says Fiona de Londras, arguing for a form of innovation which can result from judicial activism.¹²⁷ A more recent significant watershed in acknowledging socio-economic rights in the Irish courts took place by way of the Supreme Court ruling in the case of *NHV v Minister for Justice and Equality*,¹²⁸ involving a challenge appeal to the legal ban preventing an asylum-seeking man from working or seeking employment because of his status.¹²⁹ The Supreme Court examined the absolute prohibition on seeking work¹³⁰ against the background that there is no limitation on the length of time the asylum process can take.¹³¹ The Supreme Court ruled that, in circumstances where there is no time limit on the asylum process, then the absolute prohibition on seeking employment under the Refugee Act 1996 is contrary to the constitutional right to seek employment.¹³²

Of most interest to this chapter, however, is the fact that the presiding judge in *NHV*, O'Donnell J, cites ICESCR provisions to support his findings:

The appellant cites an extract from the UN Committee on Economic Social and Cultural Rights which encapsulates the idea that a right to work, or at least to be

¹²⁶ See *amicus curiae* submission on behalf of the Irish Human Rights Commission in the case of *Lawrence & Others v Ballina Town Council & Others*, 1 October 2007, at 2.2. The *Lawrence* *amicus* submission refers to a number of cases in which either the instruments themselves, or the principles contained therein, are referenced, such as *State (Healy) v Donoghue* [1976] IR 325; *Heaney v Ireland* [1994] 3 IR 593; and *Rock v Ireland* [1997] 3 IR 484.

¹²⁷ Fiona de Londras, 'In defence of judicial innovation and constitutional evolution' in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 9.

¹²⁸ *NHV v Minister for Justice and Equality and Ors* [2017] IESC 35.

¹²⁹ See Irish Human Rights and Equality Commission *amicus curiae* submission, [https:// www.ihrec.ie/right-work-people-direct-provision-commission-welcomesupreme-court-decision](https://www.ihrec.ie/right-work-people-direct-provision-commission-welcomesupreme-court-decision), accessed 9 September 2017.

¹³⁰ Which is currently found in s 16(3)(b) of the International Protection Act 2015, but was found in s 9(4) of the Refugee Act 1996 when the legal proceedings commenced.

¹³¹ Ireland has opted out of the EU Recast Directive 2013/33/EU which requires that member states allow asylum seekers to work where a first instance decision has not been made within nine months of an initial application.

¹³² *NHV v Minister for Justice and Equality* [2017] IESC 35. The Supreme Court in May 2017 ruled that the absolute prohibition on seeking employment under the Refugee Act 1996 is contrary to the constitutional right to seek employment but in an unusual (for the Irish Courts) 'remedy' offered 'a suspended declaration of invalidity' where the Court did not invalidate the provision, but instead deferred its ruling so that the state could instead make a legislative response that would resolve the issue.

allowed to work is closely connected to those rights specifically enumerated and protected:

“The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his /her development and recognition within the community.” (General Comment No. 18 on the Right to Work, adopted on 24th November 2005, at para. 1)

It is not necessary to endorse every aspect of this to recognise that the thinking is broadly consistent with that which was the background to the Constitution.¹³³

It is certainly unusual, until this date, to see either a UN treaty or one of the General Comments referenced in this manner. There has been both a lack of agreement on interpretation of the standing of the views of the UN treaty-monitoring committees themselves in their recommendations and observations, and a lack of support generally from government officials on the provisions they contain. P2, for example, said ‘[a]nd of course it is in this grey area called soft law. And it is funny because the more people argue that soft law [really] is law, it is a counterproductive argument.’¹³⁴ P12 drew a comparison between the court-based system of the European Convention on Human Rights, which must be complied with, and UN Committees, ‘and the Committee can say anything it likes and it is supposed [that we] take it seriously but it is not binding, it is not law. And a lot of it is opinion and poorly informed opinion.’¹³⁵ P12 continued:

Again, without prejudice to whether there is any international human rights law that applies to Traveller accommodation, I think one of the things that people within the system are clear about is the difference between soft law, which is the

¹³³ *NHV v Minister for Justice and Equality* [2017] IESC 35, 16.

¹³⁴ Interview with Colin Wrafter (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as ‘Participant No. 2’ or ‘P2’.

¹³⁵ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as ‘Participant No. 12’ or ‘P12’.

term used in the United Nations context and an actual law. And sometimes in the domestic debate that distinction is not so clear.¹³⁶

In 2014, Independent Dáil deputy Thomas Pringle brought forward a Private Member's Bill which would add text to Article 45 of the Irish Constitution to the effect that:

[T]he State shall progressively realise, subject to its maximum available resources and without discrimination, the rights contained in the International Covenant on Economic, Social and Cultural Rights. This duty shall be cognisable by the Courts.¹³⁷

Deputy Pringle's speech sought to dispel 'myths' about the justiciability of socio-economic rights and referred to the separation of powers, progressive realisation, reasonableness, and justiciability as an accountability mechanism, as well as the experience of other countries in this regard, such as South Africa.¹³⁸ The Bill was opposed by the government,¹³⁹ which raised concerns about the separation of powers and the allocation of resources. In the parliamentary debate, Minister Stanton said:

There is no doubt that the question of the suitability of the Constitution as a vehicle for providing for the detailed rights provided in the International Covenant on Economic, Social and Cultural Rights is a significant question that requires careful consideration. For example, the incorporation of the covenant in the Constitution would have the effect of transferring to the Judiciary the power to review decisions of the Government and Oireachtas affecting the allocation of resources. Decisions on resource allocation and taxation are at the heart of the politics of democracy and, as legislators, we all have a fundamental responsibility to make these decisions. Placing them beyond the control of the Government and Oireachtas and under the aegis of the courts would result in the electorate losing its say on issues

¹³⁶ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'.

¹³⁷ Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014.

¹³⁸ Thomas Pringle TD, Dáil Éireann Debates, 19 May 2015. Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014, Second Stage, Vol 879, No. 1, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015051900034> accessed 27 August 2017.

¹³⁹ By deputy Helen McEntee TD and Minister for State David Stanton TD.

such as the maximum level of resources the State should deploy at any particular time or what competing priorities would utilize available resources.¹⁴⁰

‘The more concretised social and economic rights standards are, the better’ said P1 at interview.¹⁴¹ The next section now looks to how concretised a right to housing is in an Irish context and what implications this might have for the right to culturally appropriate accommodation.

Concretising an Irish right to housing

During 2014, when some of these interviews were conducted, the Constitutional Convention was underway.¹⁴² The establishment of the Convention was sanctioned by a resolution of both Houses of the Oireachtas, which also set out eight specific topics that would be examined and reported upon by members.¹⁴³ These topics provided the substance of the Convention’s first six reports.¹⁴⁴ The Oireachtas resolution stated that, having completed work on the initial items to be addressed, the Convention could also report on any other matter it chose. Members chose an additional two issues: a seventh report was produced on Dáil reform and an eighth on constitutional protection for economic, social and cultural rights. In this additional eighth

¹⁴⁰ Minister of State at the Department of Justice and Equality (Deputy David Stanton), Dáil Debates, Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014: Second Stage [Private Members], 19 May 2015.

¹⁴¹ Interview with Colm O’Cinneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as ‘Participant No. 1’ or ‘P1’.

¹⁴² The Constitutional Convention was, according to its Chairman, ‘a new venture in participative democracy in Ireland tasked with considering certain aspects of the Irish Constitution to ensure that it is fully equipped for the 21st Century and making recommendations to the Oireachtas on future amendments to be put to the people in referendums’. See www.constitution.ie It was made up of 100 members, a mixture of 66 randomly chosen members of the public, 33 parliamentarians, and an independent chairperson, who met from 1 December 2012 to 31 March 2014.

¹⁴³ See Convention on the Constitution, Terms of Reference of the Constitutional Convention, Resolution of the Houses of the Oireachtas, July 2012, https://www.constitution.ie/Documents/Terms_of_Reference.pdf accessed 10 September 2017.

¹⁴⁴ The topics determined by the Oireachtas included reducing the Presidential term of office to five years; lowering the national voting age to 17 years; reviewing the Dáil electoral system; allowing citizens resident outside the state the right to vote in Presidential elections; providing for same-sex marriage; amending the Constitutional provision on the role of women in the home; encouraging greater participation of women in public life; increasing the participation of women in politics; and removing of the offence of blasphemy from the Constitution.

report, 85% of the Convention members voted to amend the Constitution to provide stronger protection for economic, social and cultural rights.¹⁴⁵

The discussions and recommendations in relation to socio-economic rights, including housing, were seen as ‘of central importance to the Convention’ by P4,¹⁴⁶ with the Convention providing ‘a bit of a momentum’ around the translation of socio-economic rights through the Constitution, particularly in light of a general ambivalence towards socio-economic rights in Ireland.¹⁴⁷ Embedding socio-economic rights in the Constitution would, according to P3, ‘I presume, enable groups and individuals to seek to have their rights to accommodation vindicated through the courts’,¹⁴⁸ and might provide a foundation for the right to housing in terms of law making,¹⁴⁹ particularly given that the provision of culturally appropriate accommodation is not necessarily always the subject of significant resources.¹⁵⁰

While the right to private property is guaranteed in Article 43 of the Constitution, there is no constitutional recognition or statutory definition of the right to adequate housing or shelter in Ireland.¹⁵¹ Although the right to private property has been interpreted as extending beyond the

¹⁴⁵ See also Tanya Ní Mhuirthile, Catherine O’Sullivan and Liam Thornton, *Fundamentals of the Irish legal System: Law, Policy and Politics* (Round Hall 2016) 92. During Dáil debates, then Minister for State at the Department of the Taoiseach, Deputy Paul Keogh TD, stated: ‘Briefly, it recommends that the State progressively realise economic, social and cultural, ESC, rights subject to maximum available resources, that this duty be cognisable by the courts, and that specific additional rights be inserted into the Constitution: housing rights, social security rights, rights to essential health care, rights of people with disabilities, linguistic and cultural rights and rights covered in the International Covenant on Economic, Social and Cultural Rights. Obviously this recommendation raises substantial questions. They include, for example, questions such as the suitability or otherwise of the Constitution as a vehicle for providing for detailed rights in these areas, the possible cost, and the fact that there is already power by legislation to confer rights and determine expenditure via primary and secondary legislation and an elected and accountable Government and Oireachtas and that, unlike the Constitution, such legislation can be varied as needed and as availability of resources allows.’ See Paul Keogh TD, Minister for State at the Department of the Taoiseach, Dáil Éireann Debates, 14 January 2016, *Convention on the Constitution Final Reports Statements*, Vol 902 No. 2, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016011400039> accessed 10 September 2017.

¹⁴⁶ Interview with Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’.

¹⁴⁷ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

¹⁴⁸ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹⁴⁹ Interview with Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’; interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

¹⁵⁰ Interview with Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

¹⁵¹ Irish Human Rights Commission, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document* (Irish Human Rights Commission 2005) 113.

ownership of ‘immovable property’,¹⁵² it does not include the right to ‘a home’.¹⁵³ There were mixed views among interviewees as to what the status of housing rights should be in Ireland. If a right to housing were more explicitly incorporated at constitutional level, P4 felt that it could provide for realistic incremental change.¹⁵⁴ Yet P4 also did not consider the state to be strictly obliged to provide housing for all, but rather the conditions for ensuring that everyone has a home:

I think it *does* mean that the people have a right to the . . . to the conditions and also . . . supports to ensure that they have some form of housing . . . but at the same time it is, that doesn’t mean to say that the state has an obligation to provide everyone with a home or a house but that the state has an obligation to ensure that there are . . . ongoing conditions [to ensure that everyone does have home].¹⁵⁵

Others believed that there is no official or absolute right to housing at it stands in Ireland today,¹⁵⁶ and that, due to the superior status of the Constitution over international standards in domestic law, ‘all of these international agreements are subservient to the Constitution’.¹⁵⁷ Several participants mentioned constitutional protection of rights as having the potential to strengthen protection domestically.¹⁵⁸ If there were a right to adequate accommodation protected at constitutional level, ‘it would give people confidence to have their needs met . . . whether through policy at local authority level or if that failed then through the courts’,

¹⁵² In *East Donegal Co-Operative Limited v Attorney General* [1970] IR 317 to contractual rights, and more recently in *Dellway Investments Limited v NAMA* [2011] IESC 13, which noted the right to ownership of goods.

¹⁵³ The 1996 Constitution Review Group argued against giving social rights constitutional recognition for a number of reasons, including justiciability and separation of powers. See Constitution Review Group, *Report of the Constitution Review Group* (Stationery Office 1996) 210–211. Padraic Kenna says Irish housing law and policy has difficulties addressing the concept of ‘home’ beyond the ‘quantifiable claims of developers, creditors, investors, property owners or capital market issues’, adding ‘of course, for some people, the notion of home as involving only a physical structure carries little or no significance’, noting that for people who are nomadic the notions of community and relationships surpass physical relationships. See Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 114, 115.

¹⁵⁴ Interview with Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’.

¹⁵⁵ Interview with Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’.

¹⁵⁶ Interviews with Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’ and with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹⁵⁷ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹⁵⁸ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’, Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’, David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’ and Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

according to P3.¹⁵⁹ Establishing a solid foundation at constitutional level would build a solid base and ‘bring us a little closer to the notion of justiciability’, P4 said.¹⁶⁰ P9 did not agree, saying:

You can see posters around Dublin that say you have a right to housing, and you go well, I don’t know how you do that because these are political decisions . . . I just think these things are very complicated and I think can be worked out but, simply by saying, ok we are just going to sign a Convention or draft legislation saying there is a right to housing or changing the Constitution does nothing. That is not going to change anything in the short to medium or even long term.¹⁶¹

A right to housing as it concerns Traveller accommodation has been raised in a number of domestic Irish cases,¹⁶² and has been tested in relation to (1) clarifying adequate conditions;¹⁶³ (2) clarifying the performance of the duties of housing authorities;¹⁶⁴ and (3) clarifying obligations around the provision of the accommodation itself.¹⁶⁵ While these cases are explored in more detail in Chapter 3, it is worth noting here that, within the context of the broader right to housing, there were mixed views among interview participants as to whether a solid foundation at constitutional level would result in greater justiciability for this right in Ireland.¹⁶⁶

¹⁵⁹ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹⁶⁰ Interviews with Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’ and David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

¹⁶¹ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

¹⁶² Such as *County Meath VEC v Joyce* [1997] 3 IR 402; *O’Reilly v Limerick Corporation* [1989] ILRM 181; *Doherty v South Dublin County Council* [2007] 1 IR 246; *O’Donnell (a minor) & Others v South Dublin City Council & Others* [2007] IEHC 204; *McDonagh v Kilkenny County Council* [2007] IEHC 350; *Fingal County Council v Gavin & Others* [2007] IEHC 444; *Dooley v Killarney Town Council* [2008] IEHC 242; *O’Donnell v South Dublin County Council* [2007] IEHC 204; *O’Donnell v South Dublin County Council* [2008] IEHC 454; *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008).

¹⁶³ *Burke v Dublin Corporation* [1991] IR 341. However, as was also seen in *O’Reilly v Limerick Corporation*, Costello J said that if a local authority fails to comply with its statutory obligations with regard to housing needs, the courts have no power to order the Minister of the Environment to exercise these powers. See *O’Reilly v Limerick Corporation* [1989] ILRM 181, 189.

¹⁶⁴ *County Meath VEC v Joyce* [1997] 3 IR 402.

¹⁶⁵ *Ward & Others v South County Council* [1996] 3 IR 195; *O’Donnell v South Dublin County Council* [2007] IEHC 204; *O’Donnell v South Dublin County Council* [2008] IEHC 454; *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008).

¹⁶⁶ For example, P3, P4 and P10 all felt that it would, with P3 saying ‘it would give people confidence to have their needs met . . . whether through policy at local authority level or if that failed then through the courts’. See interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’. P4 did not agree, saying he did not believe that a Constitutional change would not have any effects.

Such justiciability would, of course, also have implications for the right to culturally appropriate accommodation. The next section examines how nomadism appears to be considered in an Irish context and legislated for, by way of Traveller accommodation legislation.

Understanding and providing for nomadism

Nomadism is a distinguishing feature of Traveller life and to be nomadic clearly has certain marked implications for the type of housing or accommodation a person occupies. Yet the very concept of nomadism can be difficult for non-Travellers to fully understand and this can be problematic in terms of provision for it in law. P5, a non-Traveller who had worked for many years with Travellers, said he recognised that Travellers can find it a challenge to fully articulate what nomadism means to them and he, as a settled person, sometimes found it difficult ‘to really understand then what that spirit was about . . . that, desire to live unfettered by settled norms, it seemed more than just a choice, it was as if it were in the genes’.¹⁶⁷

As was shown earlier in this chapter, there is little doubt that nomadism and ethnicity are intertwined. Considering how nomadism is provided for in an Irish context is an important step in considering the gaps in the right to culturally appropriate accommodation in Ireland. Nomadism has been described as a ‘cornerstone of Traveller culture and identity’,¹⁶⁸ fulfilling certain psychological, social, economic and cultural purposes in the lives of Travellers, and as a mindset that permeates every aspect of Travellers’ lives.¹⁶⁹

In the case of *Lawrence v Ballina Town Council* in 2008, the High Court found that the Council had not breached the Lawrences’ ECHR Article 8 rights when it had evicted the family from

¹⁶⁷ Interview with Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’. Judith Okely echoes this when she speaks of the 1960 UK government census which ‘naively asked nomadic Gypsies, “Why do you travel?” as if the core to a taken-for-granted lifestyle could be given a simplistic one-off answer to outsiders. Proof of this embedded complexity may be understood by non-Gypsy readers if considering the difficulty I faced when the Gypsy children would ask me, “What’s it like living in a house?”’ See Judith Okely, Foreword, David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (2013 Policy Press), xiii.

¹⁶⁸ Interview with Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

¹⁶⁹ Michael McDonagh, ‘Nomadism in Irish Travellers’ identity’ in May McCann, Séamas Ó Síocháin and Joseph Ruane (eds), *Irish Travellers: Culture and Ethnicity* (Institute of Irish Studies 1994) 97.

an illegally occupied site.¹⁷⁰ The Lawrences claimed damages were due to them for the negative health effects and disruption to their children's education during the eight-year period they were camped in a swimming pool car park because no other accommodation was available. In this case, the link between nomadism and ethnicity was argued by the former Irish Human Rights Commission, who appeared as *amicus curiae*, and claimed that a number of constitutional provisions,¹⁷¹ when read together, 'create a constitutional environment in which respect is to be afforded to Traveller values and ways of living'.¹⁷² These views have been endorsed in both judicial pronouncements¹⁷³ as well as in legislation, such as the first legal definition of Travellers in section 13 of the Housing Act 1988. This defined Travellers as 'persons who traditionally pursued or have pursued a nomadic way of life',¹⁷⁴ while the definition adopted by the Oireachtas, as was seen in the Introduction to the thesis, included mention of a 'people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland'.¹⁷⁵

Despite this definition, in which it is implicit that Irish Travellers share a distinct set of characteristics,¹⁷⁶ the Traveller community was not recognised as a distinct ethnic group¹⁷⁷ in

¹⁷⁰ *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008). See also Anna-Marie Flynn, 'Council wins Traveller accommodation case', *Mayo News*, 5 August 2008, <http://www.mayonews.ie/news/4703-council-wins-traveller-accommodation-case>, accessed 14 July 2017.

¹⁷¹ Such as 'dignity' in *Re a Ward of Court (No. 2)* [1996] 2 IR 79; 'privacy' in *McGee v Attorney General* [1974] IR 284, *Norris v Attorney General* [1984] IR 36 and *Kennedy v Ireland* [1987] IR 58; and the equality guarantee of Article 40.1 as seen in *Quinn's Supermarket v Attorney General* [1972] IR 1.

¹⁷² See *amicus curiae* submission on behalf of the Irish Human Rights Commission in the case of *Lawrence & Others v Ballina Town Council & Others*, 1 October 2007, at 3.6, https://www.ihrec.ie/download/doc/sub_amicus_lawrence.doc, accessed 13 July 2017.

¹⁷³ By Denham J in the case of *Re FO'D, An Infant; Southern Health Board v An Bord Uchtála* [2000] 1 IR 165, 179, in which the adoption of a child – deemed to be neglected – of married Traveller parents was contested by the parents. Denham J said, 'There is no doubt that it is a matter of great importance to take care in placing a child in a family of different cultural ethnic background – to ensure that the child's interests are served. These interests may include knowledge of his social, cultural and ethnic background.'

¹⁷⁴ Section 13, Housing Act 1988, as amended by s 29, Housing (Travellers Accommodation) Act 1998.

¹⁷⁵ Equal Status Acts 2000–2015, s 2(1).

¹⁷⁶ Anthropologist Fredrik Barth says ethnic groups are (1) biologically self-perpetuating (you are a Traveller at birth, but cannot become one); (2) share fundamental cultural values; (3) have a field of communication and interaction; and (4) have a membership which identifies themselves, and are identified by others as having a category distinguishable from other categories. See Fredrik Barth, *Ethnic Groups and Boundaries: The Social Organization of Cultural Difference* (Waveland Press 1969).

¹⁷⁷ Understanding 'ethnicity' in legal terms as the two-part test set out in *Mandla v Dowell Lee* [1982] UKHL 7. The issue of recognition of Traveller ethnicity was ongoing for several decades, with repeated calls for recognition by Traveller groups and international treaty-monitoring bodies gathering momentum in the past ten years. In late 2013 and early 2014, the Houses of the Oireachtas Joint Committee on Justice, Defence and Equality of the 31st Dáil invited submissions from, and held public hearings with, stakeholders and relevant groups and issued a report recommending the recognition of traveller ethnicity in April 2014, <http://www.oireachtas.ie/parliament/media/committees/justice/Report-on-Traveller-Ethnicity.pdf> accessed 14 June 2017. In late 2016, the Joint Committee on Justice and Equality of the 32nd Dáil held a similar set of hearings and followed with the publication of another *Report on the Recognition of Traveller Ethnicity* in

Ireland until 1 March 2017.¹⁷⁸ Perhaps the substantial delay in the recognition of ethnicity in Ireland, 17 years after recognition in the UK, might be evidence of an Irish political stubbornness and suspiciousness around the entitlements of ethnic groups,¹⁷⁹ or of a broken link between ethnicity, nomadism and accommodation, as it were. Colin Clark argues that accommodating nomadism and recognising it ‘as a valid and meaningful way of life’ is as important as recognising ethnicity.¹⁸⁰ Viewing Clark’s argument in an Irish context, it may also be possible that non-recognition of ethnicity in Ireland has been interlinked with a rejection of nomadism. In fact, one of the interviewees for this research, P9, disagreed completely with the concept of a separate ethnicity, saying, ‘There isn’t a shred of evidence that Travellers are a distinct group . . . I view it as just a political tactic being used, I don’t think there is any scientific evidence for it.’¹⁸¹

Given that the interviews for this research were conducted prior to the Irish recognition of ethnicity in March 2017, the issue of ethnicity and its non-recognition by the state was raised by several interview participants as being a source of frustration,¹⁸² but several also commented

January 2017, <http://www.oireachtas.ie/parliament/media/committees/justice/Report-on-the-Recognition-of-Traveller-Ethnicity-20-01-17.pdf> accessed 14 June 2017.

¹⁷⁸ Department of the Taoiseach, ‘Travellers recognised as an ethnic group within the Irish nation’, Media release, 1 March 2017, http://www.merriestreet.ie/en/News-Room/News/Travellers_Recognised_as_an_Ethnic_Group_Within_the_Irish_Nation.html#sthash.Ixouwoh0.dpu accessed 14 June 2017. Recognition of Irish Travellers as a minority ethnic group has been official in the UK since the case of *O’Leary v Allied Domecq* (County Court, 29 August 2000).

¹⁷⁹ Ronit Lentin points out that in 1943 during the Holocaust in Nazi Germany, the Irish state allowed only a small number of Jewish refugees into Ireland and, on July 9 1943, Oliver J Flanagan TD in his maiden speech in the Dáil said: ‘There is one thing that Germany did, and that was to rout the Jews out of their country. Until we rout the Jews out of this country it does not matter a hair’s breadth what orders you make. Where the bees are there is the honey, and where the Jews are there is the money.’ See Dáil debates, 9 July 1943, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1943070900009?open=document> accessed 23 June 2017. Seventy years later his son, Charlie Flanagan TD, wrote in the *Irish Times* that, while acknowledging Travellers’ disadvantage, granting ethnic status to Irish Travellers would be dangerous and lead to members not regarding themselves as ‘being Irish at all’. See Charlie Flanagan, ‘Separate status for Travellers a misguided idea’ *Irish Times* (Dublin, 1 February 2013). Ronit Lentin, ‘Travellers’ ethnic status – again’, Blog Entry, 7 February 2013, <http://www.ronitlentin.net/2013/02/07/travellers-ethnic-status-again/> accessed 24 June 2017. Charlie Flanagan was appointed Minister for Justice and Equality in the 32nd Dáil on 14 June 2017.

¹⁸⁰ Colin Clark, ‘Invisible lives: the Gypsies and Travellers of Britain’ (PhD thesis, Edinburgh University 2001) 55.

¹⁸¹ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

¹⁸² Interviews with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’; Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’; Gráinne O’Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’; Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’; Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as ‘Participant No. 7’ or ‘P7’; and Deaglán Ó

on the relationship between ethnicity recognition and accommodation.¹⁸³ P6 said an acknowledgment of Travellers' ethnicity might allow Travellers to access any type of accommodation they wished, while still maintaining their identity, and also offer protection in the event of being discriminated against in accessing housing.¹⁸⁴ P6 also felt, however, that formal recognition would not deliver anything additional, 'very little, beyond what's currently on the table. In fact, nothing, to be really precise.'¹⁸⁵ P6 pointed out that an acknowledgement of ethnicity was already implicit when Ireland reported to the Council of Europe under the Framework Convention of the Protection of National Minorities and under CERD, saying 'Ireland puts Travellers into both of those, which in a way implicitly acknowledges that Travellers experience racism and that Travellers have a separate status.'¹⁸⁶ Somewhat similarly, P12, a senior civil servant, was doubtful that the recognition of ethnicity would oblige the state to make any additional provisions in terms of the provision of accommodation:

Sociologically they are, if they want to be. It's a matter of they are for self-identification. Next question is well what does that actually mean? And some of the suggestions that have come from the positive side of the debate seem to think that there is a set of international laws and a set of international obligations that will oblige the state to do all sorts of things including resourcing a nomadic lifestyle. I can't see any of that.¹⁸⁷

Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'.

¹⁸³ Interviews with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'; and Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as 'Participant No. 4' or 'P4'.

¹⁸⁴ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

¹⁸⁵ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'. Ms Crickley also drew comparisons between Travellers and indigenous Canadian communities and the Sami community in Northern Europe.

¹⁸⁶ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

¹⁸⁷ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'. At the time of recognition in March 2017, the matter of no further investment or cost implications was mentioned by both the Taoiseach and the Minister of State for Equality in their Dáil statements, the Taoiseach, Enda Kenny, stating that recognition 'will create no new individual, constitutional or financial rights', and Minister for Equality David Stanton stating 'this is a hugely important and symbolic gesture that is very important to Travellers, but it has no legislative implications, creates no new rights and has no implications for public expenditure'. See statements by An Taoiseach Enda Kenny and Minister of State at the Department of Justice and Equality David Stanton, Dáil Debates, 1 March 2017. Deputy Mick Wallace added: 'The gesture of recognition of Traveller ethnicity will mean nothing if the Government does not change its policies relating to Travellers and if it continues to fail to discrimination-proof all new legislation and policy.'

There is a difference, however, between simply ‘not really understanding’ the concept of nomadism and explicitly rejecting it. In February 2017, a number of Galway City Councillors publicly stated that Galway city’s halting sites are ‘a failed entity’ and ‘an unmitigated disaster’, with one councillor saying ‘I don’t agree with halting sites and never will.’¹⁸⁸ It could be argued that (1) if a separate and distinct ethnicity is a contested matter, and (2) the concept of nomadism is misunderstood or even rejected, then (3) the requirement for or acknowledgement of a particular type of accommodation is likely to be problematic. Indeed, Robbie McVeigh first identified the concept of ‘sedentarism’, whereby sedentary modes of existence are normalised and reproduced at the same time as nomadism is repressed and pathologised.¹⁸⁹ Nomadism is frequently linked to anti-social behaviour such as ‘litter, tax avoidance, noise, crime, welfare fraud, illiteracy and truancy’¹⁹⁰ and this is evident in the development of later legislative provisions in Ireland.

Further to this then is a recognition of nomadism but a rejection of the idea that there is any obligation on the state to expressly provide for it in any way; such was the view of P9:

. . . should the State provide you with facilities that allow you to travel during summer, you go? Well now, in my view, no. There are plenty of private people who get caravans and travel around the country, again it is not an accommodation issue . . . I am not sure why the State should provide [it for] me. Or else you pay like anybody else. The State can provide a serviced site, but you make a contribution to it.¹⁹¹

Nomadism has changed for Travellers too, and P10 questioned if many Travellers themselves wished to continue to pursue a nomadic way of life:¹⁹²

¹⁸⁸ Dara Bradley, ‘City’s halting sites are “a failed entity”, according to councillors’ *Connacht Tribune* (Galway, 27 February 2017).

¹⁸⁹ Robbie McVeigh, ‘The “final solution”: reformism, ethnicity denial and the politics of anti-Travellerism in Ireland’ (2007) 7 *Social Policy & Society* 91, 92.

¹⁹⁰ Colin Clark and Becky Taylor, ‘Is nomadism the “problem”? The social construction of Gypsies and Travellers as perpetrators of “anti-social” behaviour in Britain’ in Sarah Pickard (ed), *Anti-Social Behaviour in Britain: Victorian and Contemporary Perspectives* (Palgrave Macmillan 2014).

¹⁹¹ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’. P9 also noted that for most Travellers the issue of nomadism ‘really is a very minor issue’. This was also the view of Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as ‘Participant No. 12’ or ‘P12’, who felt that there is no obligation on the state to support nomadism by resourcing a nomadic lifestyle that involves having more than one place to live.

¹⁹² Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

I am not sure if all Travellers do and I am not sure if all Travellers consider nomadism as a valid way of life. I personally do and I think it should be resourced. But I think we have got to a stage where the state now can validly say well Travellers don't want to travel or certainly not to the extent that I might say it or others might say it and that is what they have achieved. I think they have achieved it through a creeping policy of assimilation over a period of 30 years. I have now come to the stage where I am not sure if nomadism can survive without a more *proactive* intervention from the State and if nomadism isn't what defines Travellers then what defines them? ¹⁹³

Yet, despite the assimilation measures of the 1960s Commission on Itinerancy which sought to eliminate nomadism and promoted 'absorbing' Travellers as the 'final solution' to this 'problem',¹⁹⁴ it could be argued that a right to culturally appropriate accommodation is translated into domestic law in Ireland by way of the Housing (Traveller Accommodation) Act 1998.¹⁹⁵ The 1998 Act's Long Title states that it is '[a]n act . . . to make provision for the accommodation needs of Travellers, to provide for the appointment of a National Traveller Accommodation Consultative Committee and Local Traveller Accommodation Consultative Committees and to provide for related matters'.¹⁹⁶ One of the Terms of Reference of the 1995 Task Force was '[t]o analyse nomadism in modern Irish society and to explore ways whereby mutual understanding and respect can be developed between the travelling community and the

¹⁹³ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as 'Participant No. 10' or 'P10'.

¹⁹⁴ Robbie McVeigh, 'The "final solution": reformism, ethnicity denial and the politics of anti-Travellerism in Ireland' (2007) 7 *Social Policy & Society* 91, 92.

¹⁹⁵ Housing (Traveller Accommodation) Act 1998. The state's Common Core Document to the UN states: 'Government policy in relation to the accommodation of Travellers is implemented through the Housing (Traveller Accommodation) Act 1998.' See United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc. HRI /CORE/IRL/2014, para 217. Robbie McVeigh notes the difference between Ireland and the UK in this regard, where the 1988 Housing Act (at s 13) 'regards Travellers as a people who are nomadic (regardless of ethnicity) and the Northern Ireland 1997 Race Relations Order which defines Travellers as a 'racial group' (almost regardless of nomadism)'. See Robbie McVeigh, 'The "final solution": reformism, ethnicity denial and the politics of anti-Travellerism in Ireland' (2007) 7 *Social Policy & Society*, 91, 92. The Department of Justice and Equality has maintained that the 1998 Traveller Accommodation Act represents a 'planned, integrated and comprehensive response to meet the accommodation needs of Travellers'; see Department of Justice and Equality, 'Background document on the development of a revised national Traveller and Roma inclusion strategy in Ireland', June 2015, <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/nationalinclusionstrategy-en> accessed 14 June 2016.

¹⁹⁶ Housing (Traveller Accommodation) Act 1998.

settled community’,¹⁹⁷ and the Task Force final report made several recommendations containing practical suggestions as to where Irish public services might have consideration for nomadism.¹⁹⁸ Many of these recommendations were not adopted,¹⁹⁹ however, the Task Force made a number of very detailed recommendations around accommodation,²⁰⁰ including the provision of transient sites to facilitate nomadism,²⁰¹ and this concept did emerge as a provision in the 1998 Act.²⁰² We saw earlier how TJ McIntyre drew attention to ‘the overlapping responsibilities’ of being both housing authority and planning authority and how this could lead to confusion around whether authorities were obliged to include proposed halting site locations in their development plans.²⁰³ Preparation for the Act, says McIntyre, went ahead

¹⁹⁷ Department of the Environment, *Report of the Task Force on the Travelling Community* (Department of the Environment 1995) 10.

¹⁹⁸ Such as at the Report’s recommendation CR8.6 ‘That the nomadic element of the Traveller way of life would be accommodated in the delivery of information and case support through initiatives such as a free phone service and regular outreach clinics’; at CR16.1 ‘That the Irish Government would press for the specific inclusion of the cultural rights of nomadic groups including Irish Travellers. within a proposed new Protocol on Minority Cultural Rights to be drafted for the European Convention on Human Rights and that this would be done in consultation with Traveller organisations’; at CR18 ‘The Electoral Act 1992 makes residence within a constituency a pre-requisite for registration and as such, nomadism can disenfranchise Travellers as the legislation stands.’; at ER6, that ‘A system of patient held records should be introduced nationwide ... It is envisaged that it would make a particular contribution to improving continuity of care for Travellers who are nomadic’; and at FR60 ‘In order to address the problems faced by those Traveller children who change schools because of the nomadic way of life of their families, a Traveller book exchange system needs to be put in place and resources also need to be provided to primary schools to enable them to purchase new text books for these children.’ See Department of the Environment, *Report of the Task Force on the Travelling Community* (Department of the Environment 1995).

¹⁹⁹ See Department of Justice, Equality and Law Reform, *First Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (Stationery Office 2000), which states ‘The Report shows that over the past five years there has been a lack of adequate progress at local level and that approximately one quarter of all Travellers continue to live out their daily lives in difficult conditions’, iv, <http://www.justice.ie/en/JELR/TaskForceRpt1.pdf/Files/TaskForceRpt1.pdf>, accessed 14 July 2017; and Department of Justice, Equality and Law Reform, *Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (Department of Justice, Equality and Law Reform 2005), which states ‘The Report shows that considerable financial and staff resources have been allocated and progress has accelerated in several sectors over the past five years. Yet approximately one quarter of all Travellers continue to live out their daily lives in difficult conditions’, <http://www.justice.ie/en/JELR/Pages/Traveller-task-force-implementation-2nd-report>, accessed 14 July 2017. Ironically, both progress reports note the most significant progress in each of the intervening five-year periods as being the establishment of the administrative measures necessary to implement the recommendations.

²⁰⁰ A total of 49 recommendations, DR1-DR49 of the Report; see Department of the Environment, *Report of the Task Force on the Travelling Community* (Department of the Environment 1995).

²⁰¹ DR7 (a) recommended the established of a ‘network of transient halting sites’ which ‘should be provided simultaneously with the other types of accommodation facilities as an integral part of a National Programme’.

²⁰² At s 29, which amended s 13 of the 1988 Housing Act allowing the authorities to ‘provide, improve, manage and control sites for caravans used by persons to whom this section applies, including sites with limited facilities for the use by such persons otherwise than as their normal place of residence’, albeit using the word ‘may’ instead of ‘shall’. See s 29, Housing (Traveller Accommodation) Act 1998.

²⁰³ TJ McIntyre, ‘The Housing (Traveller Accommodation) Act 1998: an overview’ (1999) 4 *Conveyancing and Property Law Journal* 57. McIntyre says the courts ultimately took the view that failure to include a location in a development plan would preclude the construction of a site at that location. See *Keogh v Galway Corporation (No. 1)* [1995] 3 IR 457; *Roughan v Clare County Council* (HC, 18 December 1998).

despite an intervening change of government and brought about ‘a comprehensive reform of the law in this area’.²⁰⁴ However, despite the recommendations of the Task Force that legislation should ‘define Travellers in a manner that acknowledges their distinct culture and identity’,²⁰⁵ the 1998 Act refers to the ‘distinct needs’ of Travellers,²⁰⁶ and ‘annual patterns of movement’,²⁰⁷ rather than specifying cultural or nomadic identity *per se*. The existence of a framework that does not fully understand or account for the cultural needs of Travellers is likely to be problematic from the outset and this can be seen when, even where there are obligations around Traveller accommodation (such as those in the 1998 Act), they are not delivered upon, which will be seen in the next section.

Traveller Accommodation Programmes

The 1998 Act requires local authorities to make an assessment of the accommodation needs of Travellers in their area,²⁰⁸ and then prepare and adopt a five-year accommodation programme, specifying the needs and setting out the types of accommodation it proposes to address them.²⁰⁹ The programme must also include implementation measures²¹⁰ and include the need for transient halting sites.²¹¹ In 1999, shortly after enactment of the 1998 Act, TJ McIntyre argued that the requirement for Traveller Accommodation Programmes (TAPs) in the Act was a positive move in how it placed a statutory duty upon local authorities to implement it and ‘discourages recalcitrance on the part of housing authorities by providing a yardstick against which their progress (or lack thereof) . . . can be measured’.²¹² Indeed the parliamentary debates at the time indicated this to be the intention of the legislators:

²⁰⁴ TJ McIntyre, ‘The Housing (Traveller Accommodation) Act 1998: an overview’ (1999) 4 *Conveyancing and Property Law Journal* 57, 58.

²⁰⁵ Department of the Environment, *Report of the Task Force on the Travelling Community* (1995 Department of the Environment), at 85, Recommendation CR1.

²⁰⁶ At s 10(3)(b).

²⁰⁷ At s 10(3)(c).

²⁰⁸ At s 6.

²⁰⁹ At s 7. Section 14 provides that, where members fail to adopt a programme by the date specified, a county or city manager must do so, by order, within one month. The introduction of five-year Traveller Accommodation Programmes in the 1998 Act are reinforced by the Planning and Development Act 2000, which introduced a provision, at s 10(1), that local authorities should make specific provision for Traveller Accommodation Programmes when drawing up their overall strategy for the proper planning and sustainable development of the area.

²¹⁰ At s 10(2)(e).

²¹¹ At s 10(3)(c).

²¹² TJ McIntyre, ‘The Housing (Traveller Accommodation) Act 1998: an overview’ (1999) 4 *Conveyancing and Property Law Journal* 57, 58. McIntyre says that s 31 of the 1998 Act operates on the same principle, and amends s 50 of the Local Government Act 1991 in requiring local authorities to include in their annual reports details on how they have implemented their Traveller Accommodation Programme.

I am confident that the new Act, accompanied by the guidelines to be issued shortly, will provide a new impetus and a more focused approach to meeting the accommodation needs of travellers in a spirit of greater understanding on the part of local authorities, travellers and the public.²¹³

Darren O'Donovan says the first 'negative trend' under the Act is 'the failure to secure timely, adequate provision of Traveller accommodation since 1998' and the reliance entirely on judicial oversight to enforce the requirement on local authorities to implement the TAP.²¹⁴ To date, there have been four TAPs since the enactment of the 1998 Act.²¹⁵ At the beginning of the first cycle of TAPs in 2001, the Irish Traveller Movement (ITM) published a critique in which it drew attention to a wide degree of difference in the type and quality of plan produced by different local authorities.²¹⁶ In its report, ITM highlighted a general lack of assessment procedures; the use of vague and non-committal language; a lack of recognition of nomadism; a lack provision of transient sites; and a lack of implementation details, targets and timescales.²¹⁷ Criticism has continued of subsequent TAPS and this featured strongly in interviews conducted for this research.²¹⁸ P8 said:

²¹³ Tom Moffat TD, Minister of State at the Department of Health and Children (speaking on behalf of then Minister of State with responsibility for housing and urban renewal, Deputy Bobby Molloy), Dáil Éireann Debates, 14 October 1998, Adjournment Debate – Traveller Accommodation, Vol 495, No. 2 <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1998101400029?openDocument#> accessed 27 August 2017.

²¹⁴ Darren O'Donovan, 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights' (2016) 16 *International Journal of Discrimination and the Law* 5, 8.

²¹⁵ Local Authorities adopted the fourth round of plans on 30 April 2014, to run from 2014–2018.

²¹⁶ Kathleen Fahey, 'A lost opportunity – a critique of the local authority Traveller Accommodation Programmes' (Irish Traveller Movement 2001), <http://itmtrav.ie/uploads/publication/alostopportunity.pdf> accessed 12 August 2016.

²¹⁷ Kathleen Fahey, 'A lost opportunity – a critique of the local authority Traveller Accommodation Programmes' (Irish Traveller Movement 2001), <http://itmtrav.ie/uploads/publication/alostopportunity.pdf> accessed 12 August 2016. For example, Dublin City Council's 2014–2018 Traveller Accommodation Programme stated 'It is the City Council's view that firstly, transient sites should only be provided following the full provision of the Traveller specific requirement of Travellers indigenous to the Dublin City Council administrative area and secondly, only if there is demand for them.' See Dublin City Council, Traveller Accommodation Programme 2014–2018, s 2(I).

²¹⁸ Interviews with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as 'Participant No. 10' or 'P10'; Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as 'Participant No. 7' or 'P7'; and Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'. Section 16(1) of the 1998 Act states that local authorities shall 'take any reasonable steps as are necessary' to implement their TAP. See further in Chapter 3 for a more detailed discussion on the matter of 'reasonableness'.

[T]he Government are very good at showing on paper how good they are...we have a lot of very good policies in place. So on paper they will say look, we have provision for a network of transient sites in law but the local authorities have done their assessment and they have said there is no demand for them . . . if you look at the accommodation strategy, it is not bad at all, it is easy to work with but we couldn't get [it] delivered.²¹⁹

In 2013, the European Roma Rights Centre took a complaint against Ireland to the European Committee on Social Rights in which it claimed that statistics of families awaiting accommodation showed the situation around the delivery of accommodation 'remains dire'.²²⁰ This included an overall lack of delivery of the target numbers of Traveller-specific accommodation,²²¹ transient sites operating as temporary sites instead of for transient purposes,²²² incidents of considerable overcrowding,²²³ and poorly maintained and sometimes seriously below standard conditions on existing sites.²²⁴ Several interview participants were critical of government officials and their role in the provision of Traveller accommodation,²²⁵ speaking of a gap between the policy-makers and those seeking accommodation:

²¹⁹ Interview with Gráinne O'Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

²²⁰ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, para 95.

²²¹ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, paras 97–102.

²²² *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, para 96. Irish Traveller Movement, *Shadow Report to Committee on Economic, Social and Cultural Rights* (Irish Traveller Movement 2014) states 'today there is not one single site in Ireland with an operating unit of transient accommodation', 14.

²²³ According to the National Traveller Accommodation Consultative Committee's 2013 annual report, there has been an increase in the numbers of Traveller families living on unauthorised sites and in shared accommodation, with the number of families sharing accommodation increasing from 451 in 2010 to 663 in 2013. Pavee Point believes that Traveller families are responding to the national housing crisis by moving from private rented accommodation, which is reporting a decrease in Traveller numbers, to unauthorised sites or shared accommodation. See Department of Justice and Equality, *National Traveller and Roma Inclusion Strategy, 2017–2021* (Department of Justice and Equality 2017) 13.

²²⁴ Senator Colette Kelleher, during the 'Fire Safety in Traveller Accommodation' Seanad Debates, 19 October 2016, stated 'In our home city of Cork, there is a halting site in Blackpool called Spring Lane that was built for ten families but now houses 30. Many families remain without water or toilets, some families continue to live in old damp mobile homes and all of the families live with overcrowding on a daily basis. Even though almost 100 children live on the site they have nowhere to play.' See also Olivia Kelleher, 'Cork Traveller halting site "chronically overcrowded"' *Irish Times* (Dublin, 31 May 2016), which states 'Cork Traveller Women's Network (CTWN) and the Traveller Visibility Group (TVG) have called for the development of quality, long-term, culturally appropriate accommodation for families living at the Spring Lane halting site. The groups described Spring Lane as "chronically overcrowded", with more than 30 families occupying a space initially built for 10. "While some very necessary emergency work was carried out over the last year, a long-term plan to deal with this crisis is essential. "The reality of life on Spring Lane site is that many families remain without water or toilets, some continue to live in old damp mobile homes, all families live with daily overcrowding, and the almost 100 children on site continue to have no safe place to play."'

²²⁵ Interview with Gráinne O'Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'; interview with Leilani Farha, UN Special Rapporteur on the Right to Housing

[T]he disparity between the people responsible for housing, policies, programmes and laws and related policies and the people experiencing the disadvantage, the vulnerability and the violations. And is that part of the problem? It must be, it must be on some level.²²⁶

In addition, overall budgets allocated to Traveller accommodation have been cut, and there are reports of consistent underspend on those budgets allocated at local level.²²⁷ As will also be seen in Chapter 3, a government commitment to addressing the current homelessness crisis²²⁸ has perhaps given the issue of homelessness priority over any Traveller accommodation crisis.²²⁹ This has implications for Travellers and their access to accommodation in two ways: firstly, in a possible prioritisation of budget and policy focus by government upon homelessness rather than on Traveller accommodation, and secondly, Travellers who move into private rented accommodation are also exposed to a lack of housing generally, as well as being exposed to racism and discrimination in accessing that type of accommodation. This will be seen later in Chapter 3.

Coupled with a lack of delivery of existing Traveller Accommodation Plans and their lack of acknowledgement of nomadism is the important issue of evictions from unauthorised sites and changes in the law around where Travellers can legally park while they are living a nomadic existence. This is explored in the next section.

(Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'; interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'; interview with Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as 'Participant No. 11' or 'P11'; interview with Colm O'Conneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as 'Participant No. 1' or 'P1'.

²²⁶ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'.

²²⁷ See Chapter 3 of this thesis for a more detailed discussion on budget allocation and budget underspend.

²²⁸ Department of the Environment, Community and Local Government, 'Homelessness policy statement' (Department of the Environment, Community and Local Government 2013)

<http://www.environ.ie/en/PublicationsDocuments/FileDownload.32434,en.pdf> accessed 6 December 2015.

²²⁹ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as 'Participant No. 9' or 'P9'.

Evictions and the criminalisation of nomadism

Insofar as the 1998 Act translated the right to culturally appropriate accommodation into law, the Housing (Miscellaneous Provisions) Act of 2002 has removed it again. Section 24 of the 2002 Act – soon becoming known as ‘the criminal trespass legislation’²³⁰ – amended the Criminal Justice (Public Order) Act 1994 by making it an offence to enter and occupy privately or publicly owned land without the consent of the owner,²³¹ and to place an ‘object’ or ‘any temporary dwelling’ (in other words a caravan or trailer) which ‘obstructs or interferes with the use or enjoyment by any person of any public or private amenity or any public or private facility’ such as public parks, open areas or any other recreational facilities.²³²

The former Irish Human Rights Commission felt that a proportionate legislative response on the part of the Irish state at that time would have been to restrict the offence of trespass to private land, not extending it to entry onto and occupation of public lands.²³³ However, this new provision now had the effect of making nomadism a crime, rebranding it, according to William Binchy at the time, as ‘a capricious desire rather than an authentic expression of human need’.²³⁴ The 2002 Act did not include any reference to Traveller ethnicity or nomadism, but was passed in advance of a general election and was ‘widely believed by Traveller groups that the legislation was specifically aimed at Travellers and came about as a direct result of an encampment on the banks of the river Dodder in Dublin in 2001’.²³⁵ Although the

²³⁰ Irish Traveller Movement, Report in Response to *the European Commission against Racism and Intolerance, Ireland’s Fourth Monitoring Round* (Irish Traveller Movement 2015), at 23. Section 24 of the 2002 Act amended the Criminal Justice (Public Order) Act 1994 by making it an offence to enter and occupy privately or publicly owned land without the consent of the owner. The 1994 Act covers a wide range of public order offences and gives the Gardaí many powers to deal with offences and crowd control. Section 19(F) of the 1994 Act empowered the Garda Síochána to remove any ‘object’ (understood to mean a trailer or caravan). The 2002 Act amended ‘object’ to include ‘any temporary dwelling’, which Gardaí may dispose of, if not claimed within one month of being possessed.

²³¹ Section 24, Housing (Miscellaneous Provisions) Act 2002.

²³² Section 21, Housing (Miscellaneous Provisions) Act 2002, amending s 10 (as amended by the Housing (Traveller Accommodation) Act 1998) of the Housing (Miscellaneous Provisions) Act 1992.

²³³ See *amicus curiae* submission on behalf of the Irish Human Rights Commission in the case of *Lawrence & Others v Ballina Town Council & Others*, 1 October 2007, at 5.63, https://www.ihrec.ie/download/doc/sub_amicus_lawrence.doc, accessed 13 July 2017.

²³⁴ William Binchy, ‘Travellers and trespass laws’, Letter, *Irish Times* (Dublin, 3 April 2002).

²³⁵ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, para 27. Padraic Kenna says that the impact of ECHR jurisprudence in relation to Traveller accommodation is significant in the issues it raises around security of tenure, for example, the 2004 case of *Connors v UK* (Application no. 66746/01). See Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 820. In a press release by the Irish government on 25 May 2002 it was claimed that introduction of the 2002 Act was necessary because ‘the existing powers in the housing acts to remove unauthorised encampments from public places were inadequate to deal with the large encampments that we [the Irish Government] have seen in the past year or two’. Anthony Drummond says the Irish Traveller Movement attributed the quote to a press release titled,

encampments were not strictly speaking ‘illegal’, Travellers parked there were perceived to be ‘a social nuisance’ and ‘unauthorised’,²³⁶ and were the subject of a great deal of media criticism.²³⁷ Traveller groups were angry at the new legislation, claiming it was in breach of the Constitution’s equality provisions.²³⁸ Travellers feared the Act would allow local authorities to evict Travellers from public land without any further responsibility to provide alternative suitable accommodation.²³⁹ During the final stages of the passage of the 2002 Act, one parliamentarian noted an important connection between the passage of this Act and the non-implementation of the 1998 Act, questioning whether additional legislation was in fact a solution to such encampments:

‘Government meets Traveller organisations’, Press release from Department of the Environment and Local Government, May 2002, but ‘the actual press release could not be located’. See Anthony Drummond, ‘The construction of Irish Travellers (and Gypsies) as a “problem”’ in Mícheál Ó hAodha (ed), *Migrants and Memory: The Forgotten “Postcolonials”* (Cambridge Scholars Publishing 2007) 2, 8. In its *amicus* submission on the *Lawrence* case, the former Irish Human Rights Commission notes the Plaintiffs’ submissions as referring to the same press release. The press release itself is not referenced. See *amicus curiae* submission on behalf of the Irish Human Rights Commission in the case of *Lawrence & Others v Ballina Town Council & Others*, 1 October 2007, at 5.44.

²³⁶ Dualta Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State* (Cambridge Scholars Publishing 2010) 91. See Minister of State at the Department of the Environment and Local Government (Mr D Wallace), Dáil Debates, Housing (Miscellaneous Provisions) (No. 2) Bill, 2001: Report and Final Stages: ‘I ask the House to accept this amendment [Official amendment No. 16 provides for the insertion of a new part in the Criminal Justice (Public Order) Act 1994] which provides an effective mechanism to deal with the type of large-scale unauthorised encampments which have emerged in the past year or two.’

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2002032700011> accessed 29 July 2016.

²³⁷ See, for example, Tim O’Brien, ‘Car wrecks found in river near encampment’ *Irish Times* (Dublin, 31 December 2001). See also MA Farragher, ‘Degradation of the Dodder’, Letter, *Irish Times* (Dublin, 14 November 2001), which states ‘I have no sympathy for these freeloaders. Many of them have homes elsewhere in Ireland or England. They have 01 registered vehicles, colour televisions, luxury caravans. It is ironic that anyone who throws a cigarette butt on the street can be fined £50, yet Travellers can devastate a whole area With Absolute Impunity.’

²³⁸ At Article 40(1), which states ‘All citizens shall, as human persons, be held equal before the law.’ See Treacy Hogan, ‘Traveller fury as McAleese signs tougher trespass laws’ *Irish Independent* (Dublin, 11 April 2002), <http://www.independent.ie/irish-news/traveller-fury-as-mcaleese-signs-tougher-trespass-laws-26051272.html> accessed 5 August 2017. Despite the recognition of ‘diversity of identities’ found in Article 3(1) of the Irish Constitution, Dualta Roughneen says that the 2002 Act would most likely not be found unconstitutional using an interpretation of the 1977 case *Dooley v Attorney General* [1977] IR 205. In *Dooley*, a challenge was brought to the Prohibition of Forcible Entry and Occupation Act 1971, claiming that it favoured landowners. The Court found that the Act was not unconstitutional, as it applied to everyone equally, regardless of their occupation. See Dualta Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State* (Cambridge Scholars Publishing 2010) 90.

²³⁹ Joe Humphreys, ‘Use of law against Travellers “unjust”: study claims that trespass legislation is being used unfairly against Travelling community’ *Irish Times* (Dublin, 24 November 2003), <http://www.irishtimes.com/news/use-of-law-against-travellers-unjust-study-claims-that-trespass-legislation-is-being-used-unfairly-against-travelling-community-1.394386> accessed 29 July 2016.

Problems are being encountered, particularly during the summer months, with very large encampments of what are called ‘Traveller traders’ and the occupation of public spaces, football fields and so on. There are also problems regarding the occupation, in some cases, of private land and payments being demanded before people leave that land. In fairness to everybody concerned, those problems must be addressed.

The question arises as to whether we should address those problems by way of additional legislation. Many of the difficulties arise because insufficient accommodation has been provided for Travellers . . . The principal problem of illegal or unauthorised Traveller encampments remains due to the provision of insufficient accommodation, notwithstanding the passing of the required legislation and the fact that local authorities adopted the Traveller accommodation plans. That, if anything, should demonstrate the difference between passing legislation, adopting plans on paper and implementing them. We can pass all the legislation we like – it may look very well politically for the Government sponsoring the legislation – but how are we to enforce it? Legislation exists to deal with unauthorised encampments but it is not being enforced as will be the case with this legislation. It is sad, at a time when we have the worst housing crisis in the history of this state, that the biggest amendment being made to this legislation deals with unauthorised Traveller encampments.²⁴⁰

The hurried passage of the legislation was also remarked upon by another deputy in the final stages of the Oireachtas debate as:

. . . an incredible way to attempt to progress legislation in Dáil Éireann. It is highly insulting to the elected representatives of all the Irish people to present such a far-reaching measure that most of us received a few hours before the

²⁴⁰ Deputy Eamon Gilmore, Dáil Debates, Housing (Miscellaneous Provisions) (No. 2) Bill, 2001, Report and Final Stages, 27 March 2002, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2002032700011> accessed 29 July 2016.

debate and to attempt to ram it through the Dáil, after a few hours of discussion.²⁴¹

In addition to the ‘criminal trespass’ legislation, a number of other provisions in law also place barriers in the way of nomadic life, including:

- the issuing of ‘Section 10 Notices’,²⁴² which allow for the removal of *temporary dwellings*,²⁴³
- being made to move on under the Roads Act 1993;²⁴⁴
- having your caravan or trailer demolished under the Planning and Development Act 2000;²⁴⁵
- being subjected to an order or bye-law by ‘a sanitary authority’ under the Local Government (Sanitary Services) Act 1948;²⁴⁶ and
- being served notice to ‘abate the nuisance’ if you are residing in a caravan under the Public Health (Ireland) Act 1878, as amended by the Environmental Protection Agency Act 1992.²⁴⁷

²⁴¹ Deputy Joe Higgins, Dáil Debates, Housing (Miscellaneous Provisions) (No. 2) Bill, 2001, Report and Final Stages, 27 March 2002, <http://www.oireachtas-debates.gov.ie/D/0551/D.0551.200203270010.html> accessed 2 July 2017.

²⁴² Under the Housing (Miscellaneous Provisions) Act 1992, as amended by the Housing (Traveller and Accommodation) Act 1998 and the Housing (Miscellaneous Provisions) Act 2002. In 1998, this Act was amended by the Housing (Traveller Accommodation) Act 1998 to ensure Travellers had access to sufficient alternative accommodation in the event of an eviction as prescribed for in the legislation, and further amended in 2002 by the Housing (Miscellaneous Provisions) Act 2002 where s 10(c) now extended the circumstances under which a housing authority may serve notice to incidences where the ‘use and enjoyment’ of nearby amenities are affected.

²⁴³ ‘Temporary dwelling’ is defined, in s 10 of the Housing (Miscellaneous Provisions) Act 1992, as ‘any tent, caravan, mobile home, vehicle or other structure or thing (whether on wheels or not) which is capable of being moved from one place to another, and (a) is or was used for human habitation, either permanently or from time to time, or (b) was designed, constructed or adapted for such use’.

²⁴⁴ Section 69(1)(a) of the Roads Act 1993 states that ‘Any person who without lawful authority erects, places or retains a temporary dwelling on a national road, motorway, busway or protected road shall be guilty of an offence’.

²⁴⁵ Section 46 of the Planning and Development Act 2000 allows planning authorities or local authorities to demolish or remove structures, including caravans, if they are ‘unauthorised developments’.

²⁴⁶ Section 31 of the Local Government (Sanitary Services) Act 1948 allows for the demolition of ‘unsanitary structures’.

²⁴⁷ Section 111 of the Public Health (Ireland) Act 1878, as amended by the Environmental Protection Agency Act 1992 allows a local authority to serve notice on a person living in a caravan in the council’s functional area, requesting that they ‘abate the nuisance’. Failure to do so to the satisfaction of the local authority may result in an application before the District Court.

Collectively, as P11 noted, ‘the trespass legislation [and] the various pieces of legislation, have effectively made it impossible for Travellers to park legally anywhere in the country’.²⁴⁸ Evictions, or at least the constant threat of them, are a direct risk to nomadism as it is impossible to be nomadic in precarious circumstances, leaving Travellers with a choice of either abandoning the practice of nomadism, or parking ‘illegally’.²⁴⁹ As seen earlier in this chapter, forced evictions must be carried out only under strict conditions and should take account of a number of procedural safeguards.²⁵⁰ However, several of these international provisions can be problematic when applied in the context of evictions in an Irish setting. For example, Travellers may be camped on public land and be subject to an eviction notice from a local authority, yet they are, at the same time, awaiting the provision of properly serviced Traveller accommodation by the same local authority. There is no doubt that this dual role creates ‘a conflict between a local authority as an accommodation provider, while at the same time using their powers to deprive Traveller families of a place to live’.²⁵¹ It is a conflict that has not been explored to date, in terms of the dynamics of power relations between Travellers as rights holders and the state as a bearer of duties.

As noted above, there is a raft of legislation available to authorities to evict Travellers from unauthorised encampments. Section 10 of the 1992 Housing Act is widely used to facilitate eviction and allows authorities to evict the owners, with just 24 hours’ notice, if their caravan is parked within a five-mile radius of an official halting site or within a one-mile radius of any Traveller accommodation.²⁵² An owner who does not cooperate can be fined, prosecuted or

²⁴⁸ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

²⁴⁹ In response to a report in the Bucks Free Press, where the mayor of High Wycombe is reported as commenting on a local encampment, saying ‘I don’t think there is a lot you can do. If they were squirrels you would cull a few, unfortunately you can’t cull human beings.’ The Gypsy, Roma and Traveller Police Association (GRTPA) tweeted ‘Perhaps if we had places to stop we wouldn’t need to either abandon our culture or stop in places we shouldn’t’, 15 April 2017, https://twitter.com/GRTPA_UK/status/853129591510249472 accessed 15 July 2017. See Jasmine Rapson, ‘Next mayor, cllr Brian Pearce, slammed for “inciting racism” after joking about traveller cull’, 14 April 2017, http://www.bucksfreepress.co.uk/news/15223659.Next_mayor_slammed_for_inciting_racism_after_joking_about_traveller_cull/?ref=twshr&shareimg=6231060# accessed 15 July 2017.

²⁵⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

²⁵¹ Irish Traveller Movement, *Legal Pack for Solicitors* (Irish Traveller Movement 2017) 32, <http://itmtrav.ie/wp-content/uploads/2017/03/ITM-Legal-Pack.pdf> accessed 3 July 2017. This conflict is also noted by TJ McIntyre. See TJ McIntyre, ‘The Housing (Traveller Accommodation) Act 1998: an overview’ (1999) 4 *Conveyancing and Property Law Journal* 57, 57.

²⁵² Section 10, Housing (Miscellaneous Provisions) Act 1992, entitled ‘Removal of temporary dwellings from certain locations’.

imprisoned.²⁵³ Eviction provisions under the ‘trespass law’, or Housing (Miscellaneous Provisions) Act of 2002, are even more severe. Under section 24 of the Act, no notice period is required and, in unprecedented new powers, all that is required of Gardaí is ‘reason to believe’ that the person is committing a trespass offence.²⁵⁴ Gardaí may arrest without warrant for offences and may remove ‘objects’ without restriction, and fines and imprisonment are specified for offences.²⁵⁵ The 2002 provision was introduced at a time when ‘over 1,000’ Traveller families, despite being included in Traveller Accommodation Programmes, were waiting for Traveller-specific accommodation to become available, as well as there being no genuine provision for nomadism within the state. In essence, these families ‘were guilty of trespass on public land through no fault of their own’.²⁵⁶

The Irish Traveller Movement conducted monitoring of the Act’s effects for one year post-enactment and found that there was no evidence that the legislation was being used against any group other than Travellers, in spite of the legislation not naming them. What the Irish Traveller Movement did find was that the effects of the evictions carried out under the Act indicated severe disruption to children’s education, as well as affecting the mental and physical welfare of the Traveller families who found themselves moved from place to place and, in addition, ‘the opportunity for the overall social integration of these families is severely impaired if not destroyed’.²⁵⁷ Anthony Drummond also makes the point that, a year after the trespass legislation was introduced, the European Convention on Human Rights Act 2003 was signed into law in Ireland. During this time, An Garda Síochána had carried out a review of compliance of their work with the upcoming legislation, while at the same time evicting hundreds of Travellers from illegal encampments all around the country.²⁵⁸ Fifteen years on, incidents of eviction are still undocumented and therefore the Act’s usage is not monitored, nor are its disproportionate effects on this one particularly marginalised group recorded.²⁵⁹ There is no automatic recourse to any independent legal review or legal assistance for those who have

²⁵³ Under s 10(12), Housing (Miscellaneous Provisions) Act 1992.

²⁵⁴ Housing (Miscellaneous Provisions) Act 2002, amending the Criminal Justice (Public Order) Act 1994.

²⁵⁵ Section 24, Housing (Miscellaneous Provisions) Act 2002.

²⁵⁶ Irish Traveller Movement, *Progressing the Provision of Traveller Accommodation to Facilitate Nomadism: A Discussion Document* (Irish Traveller Movement undated) 8.

²⁵⁷ Irish Traveller Movement, *An Analysis of the use of the Housing (Miscellaneous Provisions) Act, 2002* (Irish Traveller Movement 2003) 6.

²⁵⁸ Anthony Drummond, ‘Human rights and anti-trespass laws on the island of Ireland’ (Social justice and human rights in the era of globalisation: between rhetoric and reality conference, Katolic University, Leuven, Belgium, August 2006).

²⁵⁹ Irish Traveller Movement, *An Analysis of the use of the Housing (Miscellaneous Provisions) Act, 2002* (Irish Traveller Movement 2003) 10.

been evicted under its provisions. In all of these provisions, the Act fails to meet several of the procedural safeguards set out in the CESCR Committee's General Comment No. 7.²⁶⁰

In addition to the criminalisation of nomadism, the presence of institutionalised racism, as will be shown in the next section, has acted as a significant roadblock to the provision of culturally appropriate accommodation and contributed to the gaps that are seen around its enjoyment in Ireland.

Institutionalised racism

While many accounts of Irish government policy on Traveller accommodation begin, Jane Helleiner says, with seeing the Commission on Itinerancy as an 'understandable starting point for contemporary discussion', it is also important not to disregard a longer history of anti-Traveller racism and prejudice that preceded the 1960s,²⁶¹ as well as to acknowledge views that at this time Ireland was undergoing an intense period of modernisation and that an official discourse of dealing with 'the Itinerant problem' might align with this narrative.²⁶²

Racism, as experienced by Travellers in many forms, was cited several times by interview participants for this research as a barrier to the effective realisation of the right to culturally appropriate accommodation.²⁶³ The 'virulence and persistence of anti-Traveller racism has been a core theme in the writing of many scholars and Traveller activists', say Smith and Greenfields.²⁶⁴

²⁶⁰ As set out in the previous section on evictions.

²⁶¹ Jane Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press 2000) 75. See also, more generally on this subject, Helleiner at Chapter 2, 'Menace to the social order': anti-Traveller racism, 1922–59', 51.

²⁶² Jane Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press 2000) 75. Helleiner notes that the introduction of what was essentially a national Traveller settlement policy coincided with the opening up of the Irish economy that began with the first Programme for Economic Expansion, begun in 1957, led by then Taoiseach Seán Lemass and senior civil servant TK Whitaker, <http://opac.oireachtas.ie/AWDData/Library3/Library2/DL006590.pdf> accessed 14 June 2017.

²⁶³ Interviews with Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'; Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as 'Participant No. 11' or 'P11'; Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'; and Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'.

²⁶⁴ David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (Policy Press 2013) 59, citing a variety of sources, such as Robbie McVeigh, Sinead Ní Shuinéar, Jane Helleiner and others.

Robbie McVeigh supports the view that ‘Most settled people probably continue to blame Irish Travellers for their situation of disadvantage.’²⁶⁵ This practice of blame, says Martha Nussbaum, has influenced modern culture, where ‘a good member of society is a producer’ and ‘bad people don’t pay their way’.²⁶⁶ It might be argued that racist attitudes towards Travellers in Ireland can contribute to views that the community is somehow undeserving of adequate accommodation, or as deserving of their plight.²⁶⁷ McVeigh notes that ‘racist anti-nomadism or sedentarism has carried with it a constant genocidal logic’ and that the work of the Commission on Itinerancy was not ‘an unfortunate faux pas’ but instead a deliberate action on the part of the state to ‘absorb’ Travellers as part of the ‘final solution’ of dealing with this problem.²⁶⁸ Correspondingly, an acceptance of Irish Traveller ethnicity (in the United Kingdom, in this case) would acknowledge that ‘Irish Traveller disadvantage should be explained in terms of not only what Irish Travellers do but what is done to them’ and that the attitudes and behaviour of non-Travellers are key in this regard.²⁶⁹

The attitudes of local elected officials play a key part in what happens with the allocation of accommodation at local level. Under section 14 of the 1998 Act, ‘where a relevant housing authority fails to adopt an accommodation programme’, a county manager can do so in its place.²⁷⁰ There is no evidence that this has happened in practice since enactment. Thus, responsibility for the adoption of TAPs lies fully with local politicians. This, combined with the dual role of a local authority as a planning authority, means that local politicians play a significant and important part in what happens with Traveller accommodation at a local level. As P3 noted, the ‘lack of political will’ is key:

We actually have a very good legislative and policy context in relation to Traveller accommodation, we really do and there are some good structures there in terms of at local level you have the LTACCs then you have the National

²⁶⁵ Robbie McVeigh, Expert Witness Testimony in the case of *O’Leary v Allied Domecq* (County Court, 29 August 2000).

²⁶⁶ Martha Nussbaum (2008), interviewed in ‘Examined Life’, documentary, directed by Astra Taylor. See extract on <https://www.youtube.com/watch?v=cbcGbflpFzI>, accessed 24 October 2015.

²⁶⁷ See, for example, Gene Kerrigan, ‘The policy of leaving things as they are’, *Irish Independent*, 25 October 2015; and Joe Joyce, ‘We Irish proclaim moral superiority but look at how we treat our outcasts’, *Guardian*, 25 October 2015.

²⁶⁸ Robbie McVeigh, ‘The “final solution”: reformism, ethnicity denial and the politics of anti-Travellerism in Ireland’ (2007) 7 *Social Policy & Society*, 91, 92.

²⁶⁹ Robbie McVeigh, Expert Witness Testimony in the case of *O’Leary v Allied Domecq* (County Court, 29 August 2000).

²⁷⁰ Section 14, Housing (Traveller Accommodation) Act 1998.

Traveller Accommodation Consultative Committee, so you have the infrastructure at local and national level, you have the policy and legislative context which, you know, is a great enabler around Traveller accommodation but the problem is that in an Irish context, and this is the age old problem, is the lack of implementation, lack of political will.²⁷¹

Reports of overtly racist remarks on the part of politicians appear on a fairly consistent basis in the Irish media. In 2013, for example, one Donegal county councillor was reported as saying ‘I am not a racist or a bigot, but I believe Travellers should live in isolation.’²⁷² The same year a fellow Donegal councillor was reported as saying that Travellers could ‘be sent to Spike Island for all I care’.²⁷³ Also in 2013, a TD is reported as having written to constituents to assure them Travellers would not be moved into their area.²⁷⁴ In the 2014 local elections, one candidate’s canvassing literature stated that she would, if elected, object to a local proposed Traveller accommodation development ‘because I consider it a misuse of taxpayers’ resources’.²⁷⁵ An Irish Traveller Movement spokesperson has linked these actions to populism,²⁷⁶ saying ‘The difficulty is where politicians are reliant on votes, it is not popular for them to be voting in Traveller accommodation.’²⁷⁷

In addition to the attitudes of elected officials, local settled communities can, and do, display openly racist attitudes by submitting objections to planning permission for halting or group

²⁷¹ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

²⁷² Greg Harkin, ‘I am not a bigot, says councillor in storm over €230,000 luxury house for Travellers’ *Irish Independent* (Dublin, 18 January 2013), <http://www.independent.ie/irish-news/i-am-not-a-bigot-says-councillor-in-storm-over-230000-luxury-house-for-travellers-28960199.html> accessed 4 July 2017.

²⁷³ “‘I’m glad it’s behind me now” – says McEniff’ *Derry Journal* (Derry, 3 September 2013), <http://www.derryjournal.com/news/politics/i-m-glad-it-s-behind-me-now-says-mceniff-1-5450249> accessed 4 July 2017.

²⁷⁴ ‘Minister for the Environment Phil Hogan didn’t see any reason to apologise either over a letter he wrote to his Co Kilkenny constituents last year, assuring them that a Traveller family would not be moved into their area.’ See Jennifer O’Connell, ‘Our casual racism against Travellers is one of Ireland’s last great shames’ *Irish Times* (Dublin, 27 February 2013), <https://www.irishtimes.com/life-and-style/people/our-casual-racism-against-travellers-is-one-of-ireland-s-last-great-shames-1.1315730> accessed 4 July 2017.

²⁷⁵ Josepha Madigan, Fine Gael Candidate, Local Election Stillorgan Ward, 23 May 2014, election leaflet. Ms Madigan was subsequently elected as a TD in the 2016 general election.

²⁷⁶ Marian Duggan, ‘Pervasive racism: how public and political responses to a recent tragedy in Ireland’s Traveller Community were shaped by anti-Traveller hostility’ (International Network for Hate Studies, Blog entry, 9 November 2015), <http://www.internationalhatestudies.com/pervasive-racism-public-political-responses-recent-tragedy-irelands-traveller-community-shaped-anti-traveller-hostility/> accessed 4 July 2017.

²⁷⁷ Shane Phelan, ‘Local authorities “letting politics get in way of Traveller housing”’ *Irish Independent* (Dublin, 17 October 2015), <http://www.independent.ie/irish-news/news/local-authorities-letting-politics-get-in-way-of-traveller-housing-34116893.html> accessed 5 August 2017.

housing scheme sites in their ‘settled’ neighbourhoods. For example, in October 2015, ten people, including five children, died in a fire on a temporary halting site in the suburb of Carrickmines, south Dublin, where they had been living with very basic services for over seven years while waiting for the provision of a permanent halting site. An outpouring of sympathy in response to the deaths was quickly replaced by a protest on the part of local, non-Traveller residents to the proposed replacement site in the area, prompting new debates around racist attitudes towards Travellers.²⁷⁸ Traveller organisations were highly critical of careless media reporting, saying this was irresponsible and had given a platform to racist views:

Five days after a tragedy of greater proportion in terms of loss of life with victims not even buried Irish media outlets have gone into a frenzy of victim blaming allowing through their social media sites a river of vitriol that perpetuates stereotypes of Travellers as heavy drinking noisy louts that wreck property and show no respect for their neighbours.²⁷⁹

Commenting at the time, Martin Collins, said:

[A]s a Traveller man, I have never witnessed such depth of hostility and hate towards my community as I have on this occasion. I think this small number of individuals in this estate are completely and utterly void of any humanity and any compassion. And I think their actions are only compounding the stress and the trauma that these Traveller families are already enduring.²⁸⁰

²⁷⁸ Kitty Holland, ‘Will Carrickmines be a turning point in the treatment of Travellers?’ *Irish Times* (Dublin, 17 October 2015) <http://www.irishtimes.com/news/social-affairs/will-carrickmines-be-a-turning-point-in-treatment-of-travellers-1.2394836> accessed 24 October 2015; Joe Joyce, ‘We Irish proclaim moral superiority but look at how we treat our outcasts’ *Guardian* (London, 24 October 2015) http://www.theguardian.com/commentisfree/2015/oct/25/dublin-fire-we-irish-treat-travellers-as-outcasts-joe-joyce?CMP=share_btn_tw accessed 24 October 2015; Gene Kerrigan, ‘The policy of leaving things as they are’, *Sunday Independent* (Dublin, 24 October 2015) <http://www.independent.ie/opinion/columnists/gene-kerrigan/the-policy-of-leaving-things-as-they-are-34138646.html> accessed 24 October 2015.

²⁷⁹ David Joyce, Blog post shared by Irish Traveller Movement, 15 October 2015, https://www.facebook.com/permalink.php?story_fbid=10153559642753260&id=160681543259 accessed 24 October 2015.

²⁸⁰ Broadsheet, ‘I’d urge the residents to search deep inside their conscience’, 14 October 2015, <http://www.broadsheet.ie/2015/10/14/id-urge-the-residents-to-search-deep-inside-their-conscience/> accessed 4 July 2017.

Assimilation in practice

A lack of delivery on Traveller Accommodation Programmes, combined with budget underspends, the criminalisation of nomadism, and the presence of institutionalised racism, could be said to have three primary consequences: (1) a move by Travellers to private rented accommodation, (2) a decrease in traditional livelihoods and cultural practices, and (3) a decrease in nomadism, resulting in what is effectively a ‘climate of constructive assimilation’ of Travellers in Ireland,²⁸¹ as will be shown in this section.

Firstly, the numbers of Travellers now living in private rented housing has increased significantly over the past ten years and the number of Traveller families in local authority halting sites has declined, both in absolute numbers and relative to other types of accommodation.²⁸² Without very detailed data analysis, it is difficult to fully ascertain if this is as a direct consequence of the lack of availability of Traveller-specific accommodation. P9 felt that this cause and effect cannot be precisely proven and that Travellers may be more likely to have opted for private rented housing accommodation anyway in recent decades²⁸³ Many of the Traveller civil society organisations have supported the view that this is directly due to a lack of availability of official Traveller-specific accommodation coupled with the risk of eviction from unofficial sites and a lack of provision for nomadism via transient sites,²⁸⁴ as well as the precariousness of the accommodation that is available, where sites are either overcrowded or in poor condition, or both.²⁸⁵ An additional side effect of a move to private

²⁸¹ Darren O’Donovan, ‘Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights’ (2016) 16 *International Journal of Discrimination and the Law* 5, 8.

²⁸² KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-Specific Accommodation* (NTACC and the Housing Agency 2014) 7–8. See also, Irish Traveller Movement, ‘Traveller Accommodation – key statistics’, <http://itmtrav.ie/strategic-priorities/accommodation/statistics/> accessed 15 July 2017.

²⁸³ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

²⁸⁴ See, generally, Pavee Point, *Assimilation Policies and Outcomes: Travellers’ Experience* (Pavee Point 2005); Irish Traveller Movement, *Shadow Report to Committee on Economic, Social and Cultural Rights* (Irish Traveller Movement 2014) 16; Irish Traveller Movement, *Report in Response to the European Commission against Racism and Intolerance (ECRI) Ireland’s Fourth Monitoring Round* (Irish Traveller Movement 2015) 22; Pavee Point Traveller and Roma Centre and National Traveller Women’s Forum, *Joint Shadow Report to CEDAW* (Pavee Point Traveller and Roma Centre and National Traveller Women’s Forum 2017) 19.

²⁸⁵ Such as that reported by the primary healthcare workers of the community development group Travellers of North Cork (TNC) who, supported by the Belfast-based Participation and the Practice of Rights (PPR) organisation, ‘carried out extensive research among the North Cork Traveller community to reveal the nature and extent of the unacceptable accommodation conditions members of our community have had to live with for decades’. See Travellers of North Cork launch accommodation rights charter, <https://youtu.be/PGI7pTYdXw8> accessed 14 July 2017.

rented accommodation is the severe effects of the current housing crisis where housing is at a premium.²⁸⁶ Travellers in this case suffer a double disadvantage, since housing is both expensive and in short supply but also difficult to come by, given the levels of racism and discrimination experienced by Travellers.²⁸⁷ Smith and Greenfields say that a transition into permanent housing can also be accompanied by a number of additional consequences for Travellers who may have not lived in this type of accommodation before, such as a limit on individual autonomy, culture shock and anxiety at the loss of the collective solidarity that comes with traditional types of Traveller accommodation, and difficulties with a move to ‘what is frequently an alien type of accommodation while simultaneously having to deal with an unfamiliar and foreign set of circumstances.’²⁸⁸

Secondly, Traveller accommodation is closely linked to certain livelihood activities such as the keeping of horses, scrap metal work, recycling, or other types of trade,²⁸⁹ and therefore ‘restrictive accommodation provision’ whereby local authorities do not provide work space beside accommodation space has had a knock-on effect on livelihoods, with only a minority of Travellers remaining economically active.²⁹⁰ For example, responding to the consultation process for South Dublin County Council’s Draft Traveller Accommodation Plan for 2014–2018, the Irish Traveller Movement points out ‘There is no mention of specific economic activity which Travellers work in and usually have beside there [sic] area of accommodation such as horses, scrap, etc. The TAP does . . . not acknowledge the ethnicity of Travellers and

²⁸⁶ See, generally, Rory Hearne and Mary Murphy, *Investing in the Right to a Home: Housing, HAPs and Hubs* (Maynooth University 2017).

²⁸⁷ Difficulty in accessing private rented housing may result in Travellers leaving private rented accommodation and taking up residence in ‘unauthorized sites’ instead. Pavee Point says ‘It is clear that Traveller families are responding to the accommodation crisis by relocating to sites that are already overcrowded, unsafe and inhabitable.’ See Pavee Point, ‘Presentation to the Oireachtas Committee on Housing and Homelessness’, 19 May 2016, 3, <http://www.paveepoint.ie/wp-content/uploads/2015/04/Ronnie-Fays-Opening-Statement-Oireachtas-Committee-on-Housing-and-Homelessness-19th-May-2016.pdf>, accessed 14 July 2017.

²⁸⁸ David Smith and Margaret Greenfields, *Gypsies and Travellers in Housing: The Decline of Nomadism* (Policy Press 2013) 109.

²⁸⁹ Dermot Coates, Paul Anand and Michelle Norris, *Capabilities and Marginalised Communities: The Case of the Indigenous Ethnic Minority Traveller Community and Housing in Ireland* (Open University Open Discussion Papers in Economics 2015) 14.

²⁹⁰ The Irish Traveller Movement *Report to the Committee on Economic, Social and Cultural Rights* in 2014 states ‘Both the Casual Trading Act, 1995 and the Control of Horses Act, 1996 had a severely negative impact on Travellers’ economic activities, neither piece of legislation was adequately poverty proofed at any stage. Restrictive accommodation provision, where local authorities refuse to provide work space beside accommodation space (as is culturally appropriate) and the ongoing attacks on nomadism exacerbate this problem. As a result, only a minority of Travellers have remained economically active within the Traveller economy.’ Irish Traveller Movement, *Shadow Report to Committee on Economic, Social and Cultural Rights* (Irish Traveller Movement 2014) 10–11.

their nomadic nature.’²⁹¹ The ownership of horses ‘has a cultural, social and economic importance for Travellers’ and cannot be separated from the issue of accommodation.²⁹² Horse ownership has been called ‘the last most tangible link back to the Traveller nomadic way of life’,²⁹³ and provides independence, status and important social interaction through attendance at fairs.²⁹⁴ The Control of Horses Act 1996 allowed for local authorities to introduce bye-laws which designate areas as ‘control areas’ for horses, in which stricter conditions apply to the keeping of horses.²⁹⁵ It is legislation that has not facilitated horse ownership,²⁹⁶ and has been named as having a ‘detrimental effect on Traveller economy, culture and social pursuits’.²⁹⁷ In research commissioned by the NTACC in 2014, entitled *Why Travellers Leave Traveller-Specific Accommodation*, some Travellers interviewed for the research linked a growth in feuding between Travellers to the fact that most Traveller-specific accommodation now precludes Traveller men keeping horses or engaging in self-employment that involves horses.²⁹⁸

Thirdly, and of most significance in the relationship with culturally appropriate accommodation, the practice of nomadism is disappearing. If well-maintained halting sites are largely unavailable, a person who accesses secure and suitable accommodation is less likely to leave it and travel during the summer months, for fear their accommodation will not

²⁹¹ Letter, Colette Spears, Irish Traveller Movement, 27 November 2013, to South Dublin County Council re South Dublin County Council’s Draft Traveller Accommodation Plan 2014–2018.

²⁹² *Report of the National Traveller Horse Ownership Seminar*, Cork, 21 March 2013, 10, <http://tvgcork.ie/sites/default/files/downloadableResources/TVGHORSESEMINARMarch2013.pdf> accessed 7 July 2017.

²⁹³ Chrissie O’Sullivan, Coordinator of the Traveller Visibility Group, Cork, *Report of the National Traveller Horse Ownership Seminar*, Cork, 21 March 2013, 6, <http://tvgcork.ie/sites/default/files/downloadableResources/TVGHORSESEMINARMarch2013.pdf> accessed 7 July 2017.

²⁹⁴ Department of Justice, Equality and Law Reform, *Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (Department of Justice, Equality and Law Reform 2005) 264.

²⁹⁵ Section 17, Control of Horses Act 1996. In *Gerard Burke v South Dublin County Council* [2011] No. 653 JR, the High Court issued an important judgment for horse owners in April 2013 which clarifies the powers local authorities have under the Control of Horses Act 1996. An authority may no longer demand upfront payment of pound fees for the release of an unlicensed horse that has been impounded.

²⁹⁶ Martin Collins, Pavee Point, *Report of the National Traveller Horse Ownership Seminar*, Cork, 21 March 2013, 6, <http://tvgcork.ie/sites/default/files/downloadableResources/TVGHORSESEMINARMarch2013.pdf> accessed 7 July 2017.

²⁹⁷ Pavee Point, *Submission on the Control of Horses Act 1996*, following animal welfare conference in Dublin Castle, May 2014, September 2014, 3, <http://www.paveepoint.ie/wp-content/uploads/2013/11/Submission-on-the-Control-of-Horses-Act-1996.pdf> accessed 14 July 2017.

²⁹⁸ KW Research and Associates, National Traveller Accommodation Consultative Committee, *Why Travellers Leave Traveller-Specific Accommodation* (NTACC and the Housing Agency 2014) 37.

be available upon their return.²⁹⁹ Nomadism has decreased following the physical ‘bouldering up of places that Travellers can park’ and the introduction of legislation that criminalised parking in public places,³⁰⁰ which has also been called a form of ‘ethnic cleansing’.³⁰¹ P9 said that the original policy of assimilation that the Commission of Itinerancy advocated back in 1963 ‘has actually come to pass’,³⁰² saying that it was never the intention to assimilate Travellers by moving them into the private sector on a large scale, but in practice this is what has happened.³⁰³ This was echoed by P10, who again spoke of ‘cultural genocide’:

Now I personally feel that the itinerancy report which came out in 1963 was certainly . . . a kind of a cultural *genocide* . . . not to use a physical attempt to kill off Travellers, but it certainly was going to culturally sort of wipe them out in some way, through settlement.³⁰⁴

1.4 Conclusion

This chapter has demonstrated that the situation around Traveller accommodation in Ireland is a highly complex one, with a lengthy and difficult history. It is clear that this complex situation requires a more innovative approach than the legal and policy remedies offered to date. This thesis argues that another possible approach is worthy of consideration here. This approach is to look beyond a simple binary model, where the state is the gatekeeper of rights and the Traveller community is a passive rights holder, to a more blended approach to rights delivery.

This chapter has considered the right to culturally appropriate accommodation and the meaning of what it is to be ‘culturally adequate’, as well as trying to understand the implications of

²⁹⁹ Judith Okely and Gustaaf Houtman, ‘The Dale Farm eviction: interview with Judith Okely on Gypsies and Travellers’ (2011) 27 *Anthropology Today* 27.

³⁰⁰ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

³⁰¹ Colin Clark, ‘The systematic enclosure of land where traditional stopping places for Travellers could be found in the UK is a form of ethnic cleansing’, Tweet, 15 April 2017.

³⁰² Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

³⁰³ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

³⁰⁴ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

nomadism and evictions. Three distinct features of culturally appropriate accommodation were identified: (1) for housing to be culturally adequate, it must be constructed in a way that enables cultural identity; (2) protecting against discrimination by the guarantee of identical treatment is not enough; and (3) it is up to the state to ensure that laws and practices do not infringe on nomadic life. The chapter went on to consider these features in an Irish context; there is inconsistency in the ways in which socio-economic rights are defined generally in Irish legislation but in the right to housing in particular. It was established that not alone is nomadism a contested concept in Ireland but it has even been explicitly rejected at times. The 1998 Act and the adoption of Traveller Accommodation Plans have gone some short distance in translating a right to culturally appropriate accommodation into law and practice, but an overall lack in the delivery of such plans has continued to be problematic, not least because of localised, institutionalised racism and budget underspends. This lack of delivery, coupled with the risk of evictions and the criminalisation of nomadism has effectively resulted in a practice of assimilation.

We have seen in this chapter how there is a need for more than simple legal measures to effect a substantial change in outcomes for the community. There is a lever in the internationally protected right to culturally appropriate accommodation that Ireland is subject to, and therefore, in order to overcome some of the challenges with the limitations of the domestic legal sphere, it makes sense to consider how a more innovative approach might be possible by unpacking the requirements of the international obligation, in terms of the domestication or operationalisation of rights. Chapter 2 sets out a theoretical understanding of ‘operationalisation’ by exploring operationalisation guidance from across the United Nations and Council of Europe systems, and considering how this operationalisation framework might apply in practice in the case of Traveller accommodation.

Chapter 2 – Understanding the State’s Obligations

2.1 Introduction

Chapter 1 demonstrated that the provision of Traveller accommodation in Ireland is a multi-layered, complex problem that has historical, ethnic, legal and political dimensions, as well as being a problem in relation to which Ireland’s conventional approach in domestic law, policy and practice to date has not been effective. In Chapter 1 it was established that the internationally recognised right to culturally appropriate accommodation is relevant when considering the failure to provide culturally appropriate accommodation to Travellers in Ireland, particularly as nomadism – a central part of Traveller ethnicity – is intertwined with this right, yet a doctrinal perspective alone is not sufficient to assess the ways in which the right is applied at a local level and in a domestic context. Moving past a doctrinal perspective, as this thesis does, enables a richer analysis of how the right operates in practice rather than solely in theory. In order to do so, this chapter now considers what it means to operationalise a right. When international treaty-monitoring bodies consider whether or not a human right is being fulfilled, they speak of the right being ‘operationalised’, ‘enforced’ or ‘implemented’. All three terms are connected, and are often used interchangeably,³⁰⁵ yet each suffers from a definition gap.³⁰⁶

³⁰⁵ The Icelandic Human Rights Center, a human rights civil society coalition, states ‘It is often difficult to make a clear distinction between “supervision” and “implementation” of human rights, and no consistent international terminology is used. In human rights literature, protection, supervision, monitoring, and implementation are terms often used indiscriminately to cover both the mechanisms established to determine whether the standards are adhered to, on the one hand, and actual compliance by states with those standards, on the other.’ See Icelandic Human Rights Center website, ‘Implementation’, <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/implementation> accessed 10 August 2017.

³⁰⁶ For example, UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Swaziland, A/HRC/19/6/Add.1*, 6 March 2012, para 6, notes the acceptance of a recommendation from Canada ‘To operationalise the policy there is a National Plan of Action on children which runs from 2011–2015’ yet there is no further clarity on what this might entail. See also UN General Assembly, Note by the Secretary-General: Trafficking in persons, especially women and children, A/66/283, 9 August 2011, para 26, which states ‘The Special Rapporteur was encouraged by solid commitments expressed by a number of States during the interactive dialogue at the Human Rights Council to operationalize this right at the national level’ and goes on to list very diverse examples such as ‘Norway, for instance, noted that the provision of essential information to victims of trafficking in an appropriate manner is often a challenge and pledged to use the Special Rapporteur’s report as an inspiration for improvement. Australia mentioned important changes to programmes to support for trafficked persons, including the provision of an extended period for reflection and recovery. The Philippines also informed the Special Rapporteur that its anti-trafficking legislation provides for the establishment of a national trust fund that uses fines and properties confiscated from convicted traffickers to provide trafficked

With this in mind, Chapter 2 now addresses the nebulous concept of operationalisation in order to consider how it is envisaged that international human rights law might be given effect to in the domestic law, policy and practice of Traveller accommodation rights. This chapter asks ‘what does it mean to operationalise a right?’ and asserts that the operationalisation of an international human right takes place when that right has been (1) translated into domestic instruments through law and policy; (2) implemented through the creation of institutions, resourcing and direct provision of services; and (3) has been, and can continue to be, monitored or measured in some way. This three-part distillation of operationalisation is then taken forward throughout the thesis as the framework through which the operationalisation of the right to culturally appropriate accommodation for Travellers in Ireland is investigated, analysed and critiqued. The chapter plays a key part in the thesis, as its unpacking of international human rights legal obligations provides an analytical framework against which it is possible to assess what happens in reality regarding the right to culturally appropriate accommodation in Ireland.

2.2 The ‘relative purgatory’ of socio-economic rights

Before seeking to answer the question of what it means to operationalise a right, it is worth briefly looking at some of the language and principles used when we speak of giving effect to socio-economic rights, as these provide some depth and context to the intention of how such rights should operate in practice. As we have seen in the previous chapter, there has been notable progress in the development of socio-economic rights in international law since their recognition in the Universal Declaration of Human Rights in 1948,³⁰⁷ giving rise to the UN system of advancing the right to housing, among other socio-economic rights.³⁰⁸ However, it has been claimed that no other treaty is violated as frequently as the International Covenant on Economic, Social and Cultural Rights.³⁰⁹ Scott Leckie claims that the lack of concern around

persons with a variety of services for their recovery, such as emergency shelters, counselling, free legal services, medical and psychological treatment. Other States, such as Brazil, the Republic of Korea and Greece, shared with the Special Rapporteur information on their efforts geared towards the realization of the right to an effective remedy, such as the provision of counselling, housing, health care and legal assistance.’

³⁰⁷ See Eibe Riedel, Gilles Giacca and Christophe Golay, ‘The development of economic, social and cultural rights in international law’ in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 48.

³⁰⁸ See, generally, Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights: A Text Book* (Martinus Nijhoff 2001).

³⁰⁹ Scott Leckie, *Violations of Economic, Social and Cultural Rights*, SIM Special No. 20 (Netherlands Institute of Human Rights 1997) 2.

socio-economic rights, such as the right to housing, is arguably more to do with the status of socio-economic rights as human rights generally, whereby opponents will continue to dispute their ‘legal validity’.³¹⁰ This is a practice which has perhaps kept economic, social and cultural rights ‘wallowing in the relative purgatory of global efforts to secure human rights’.³¹¹

The UN Committee on Economic, Social and Cultural Rights General Comment³¹² No. 9 sets out the obligations placed upon states parties by the Covenant, saying that the predominant obligation of states is to ‘give effect to the rights recognized [in the Covenant]’.³¹³ There is little doubt that the effective implementation of human rights is key to carrying out the ‘majority’s promise to the minorities’.³¹⁴ We frequently hear criticism of the ‘gap’ between the aspirations of human rights treaties and how they are implemented,³¹⁵ or calls for better implementation of human rights at domestic level,³¹⁶ with the understanding that the rights in question will become more tangible or accessible to rights holders as a result of their

³¹⁰ Scott Leckie, ‘The UN Committee on Economic, Social and Cultural Rights and the right to adequate housing: towards an appropriate approach’ (1989) 11 *Human Rights Quarterly* 522, 526.

³¹¹ Scott Leckie, *Violations of Economic, Social and Cultural Rights*, SIM Special No. 20 (Netherlands Institute of Human Rights 1997) 2.

³¹² As well as its primary function of overseeing states parties adherence to the Covenant, the Committee on Economic, Social and Cultural Rights (CESCR), similar to other UN treaty monitoring bodies, also has the practice of adopting General Comments in relation to the Covenant, which expand on the Covenant’s provisions.

³¹³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural rights, UN Doc. E/C.12/1998/24, 3 December 1998, para 1.

³¹⁴ In *Taking Rights Seriously*, Ronald Dworkin stated: ‘The institution of rights is therefore crucial, because it represents the majority’s promise to the minorities that their dignity and equality will be respected. When the division among the groups are most violent, then this gesture, if law is to work, must be most sincere.’ See Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Academic 1977) 205.

³¹⁵ For example, in the UN Committee on the Rights of Persons with Disabilities, *Draft Guidelines on the establishment of Independent Monitoring Frameworks and their participation in the work of the Committee* (20 April 2016) the CRPD Committee encourages independent monitoring frameworks to actively engage and contribute at all stages of the reporting procedure including the issuing of reports which will address ‘outstanding implementation gaps and possible measures to overcoming them’. See <http://www.ohchr.org/Documents/HRBodies/CRPD/GuidelinesIMF.doc> accessed 15 August 2017. See also an ambitious three-year project completed by the Scottish Human Rights Commission in 2012 in the development of Scotland’s National Action Plan for Human Rights, which conducted an extensive scoping exercise in order to identify key ‘human rights gaps’ and uncovered what the Scottish Human Rights Commission refers to as a ‘distinct gap between perception and reality’; see Scottish Human Rights Commission, ‘Getting it right? Human rights in Scotland’ (2012), at 16. The project also states ‘It was found that in terms of structural steps, that is the operation of law and institutions, references to human rights were frequent and explicit in the Scottish context. However, regarding process steps, that is the enactment of policies and strategies, very few are currently rights based in nature although there was some potential identified. Outcomes, it was found, contained the greatest risk to the realisation of human rights in Scotland – that is where human rights can actually make a difference to the day to day lives of people in the country’, 10–11.

³¹⁶ For example, the 1998 Scotland Act requires both Scottish government and parliament to take into account a range of international human rights obligations by ‘observing and implementing’ them. See Scotland Act 1998, Schedule 5 para 7 (2).

‘implementation’.³¹⁷ It might be argued that the difficulty of effective implementation does not always lie in states’ unwillingness to put rights into practice, but in the challenge of translating the sometimes vague and abstract norms of human rights into enforceable mechanisms on domestic level. The Office of the UN High Commissioner for Human Rights has recognised this challenge:

Human rights standards and principles as a value-based, prescriptive narration, essentially anchored in the legalistic language of the treaties, are not always directly amenable to policymaking and implementation. They have to be transformed into a message that is more tangible and operational.³¹⁸

Throughout the literature, we frequently see the use of four key terms or principles when describing the nature of some of the obligations placed upon states in speaking of socio-economic rights: ‘respect, protect, fulfil’; ‘progressive realisation’; ‘minimum core obligations’; and ‘non-retrogression’.³¹⁹ Each of these terms or principles can provide valuable insight into the intentions behind these obligations, as will be seen in this section.

³¹⁷ See, for example, a BBC report of Scotland’s ‘Action Plan to plug gaps in Scottish human rights provision’ in an ‘attempt to fill gaps in existing human rights provision.’ See <http://www.bbc.com/news/uk-scotland-20128965> accessed 14 August 2017. See also opening remarks by former UN High Commissioner for Human Rights Navi Pillay at a press conference during her mission to Algeria, <http://reliefweb.int/report/algeria/opening-remarks-un-high-commissioner-human-rights-navi-pillay-press-conference-during> accessed 14 August 2017.

³¹⁸ UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (Office of the High Commissioner for Human Rights 2012) HR/PUB/12/5, 2.

³¹⁹ For example, on the concept of ‘respect, protect and fulfil’, see generally Mary Dowell-Jones, *Contextualising the International Covenant On Economic, Social and Cultural Rights: Assessing The Economic Deficit* (Martinus Nijhoff Publishers 2004); Eibe Riedel, Gilles Giacca and Christophe Golay ‘The development of economic, social and cultural rights in international law’ in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 3–48; Asbjørn Eide, ‘Economic, social and cultural rights as human rights’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Text Book* (Martinus Nijhoff 2001). On the matter of progressive realisation, see International Covenant on Economic, Social and Cultural Rights, Article 2(1) as well as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, June 1986, in UN Commission on Human Rights, E/CN.4/1987/17: Annex, and UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The nature of States parties obligations (Art 2, para 1) 14 December 1990, E/1991/23, paras 1–2. See also Philip Alston and Gerard Quinn, ‘The nature and scope of states parties’ obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156, 172; Aoife Nolan, Bruce Porter and Malcolm Langford, ‘The justiciability of social and economic rights: an updated appraisal’, Paper presented to the Human Rights Consortium of Northern Ireland (Belfast, March 2007); Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon 1995) 151. The Economic, Social and Cultural Rights Committee’s General Comment No. 3 also introduced the principle of ‘minimum core obligations’ and ‘non-retrogression’. Minimum Core Obligations are articulated further in the 1998 Maastricht Guidelines; see Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly*, 691.

Respect, protect and fulfil: a ‘trichotomy of obligations’

The first term of interest here is the ‘respect, protect and fulfil’ framework, described as an attempt by the international human rights legal apparatus to undertake the transformation of human rights into the domestic arena,³²⁰ one which ‘suggests an arrangement whereby national legal orders incorporate and apply human rights norms’,³²¹ and a way of understanding what is required of any state party to the UN International Covenant on Economic, Social and Cultural Rights.³²² Although, as Eibe Riedel and others point out, the typology does not actually form part of the original Covenant itself, it is a term that has been in use since the late 1990s.³²³ Mary Dowell-Jones says this ‘trichotomy of obligations’ originated in the work of Henry Shue and entered into UN usage in the debate around the right to food that preceded ICESCR General Comment No. 12 on the Right to Adequate Food in 1999, the first General Comment to use the term.³²⁴ The CESCR Committee reiterated their acceptance of this tripartite set of obligations upon states in 2008 in regard to all human rights in General Comment No. 19, on the Right to Social Security,³²⁵ This tripartite distinction has also been adopted within the Maastricht Guidelines.³²⁶

³²⁰ Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing The Economic Deficit* (Martinus Nijhoff Publishers 2004) 28.

³²¹ Larry Backer, ‘On the evolution of the United Nations “protect-respect-remedy” project: the state, the corporation and human rights in a global governance context’ (2011) 9 Santa Clara Journal of International Law 37, 43.

³²² Although the same typology is equally valid in terms of civil and political rights, as has been highlighted in Eibe Riedel, Gilles Giacca and Christophe Golay ‘The development of economic, social and cultural rights in international law’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 3, 18, footnote 52, citing Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd edn, NP Engel 2005) 37.

³²³ As opposed to Article 2(1) of the International Covenant on Civil and Political Rights, which states that each party will undertake ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction’ the rights it contains. Riedel et al. note that Manfred Nowak interprets ‘to ensure’ as also encompassing to protect and to fulfil. See Eibe Riedel, Gilles Giacca and Christophe Golay ‘The development of economic, social and cultural rights in international law’ in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 3, 18, footnote 55.

³²⁴ See Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing The Economic Deficit* (Martinus Nijhoff Publishers 2004) 29. See also, generally, Asbjørn Eide, ‘Economic, social and cultural rights as human rights’ in Asbjørn Eide, Catarina Krause, and Allan Rosas, *Economic, Social and Cultural Rights: A Text Book* (Martinus Nijhoff 2001) 23.

³²⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19, The Right to Social Security, UN Doc.. E/C.12/GC/19, 4 February 2008, para 43.

³²⁶ ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 Human Rights Quarterly 691.

Thus, in the case of culturally appropriate accommodation rights, we can look beyond negative intrusions and more towards the state's obligations as set out in Chapter 1. This would entail ensuring that accommodation (1) enables the expression of cultural identity; (2) moves beyond the mere guarantee of identical treatment in how it is accessed; and (3) facilitates nomadism. Applying the tripartite framework in the case of culturally appropriate accommodation for example, the obligation to 'respect' might suggest the interpretation of a duty upon the state not to interfere with the enjoyment of the right and to ensure that third parties do not violate the right, such as in the case of evictions or an over-reliance on private rented accommodation by housing providers. 'Protecting' accommodation rights might involve ensuring that individuals can access and achieve those rights via structured judicial and administrative routes. To 'fulfil' means employing any governmental means necessary to establish the political, economic and social systems and infrastructure that need to be in place for people to access the rights.³²⁷ The UN High Commissioner for Human Rights has said, in the case of the right to housing, that ideally this involves giving sufficient recognition to the right in domestic political and legal systems, including through national and regional strategies that benefit from consultation, transparency, accountability and other processes,³²⁸ a process which also applies in the case of culturally appropriate accommodation.

Following his appointment as Special Representative of the United Nations Secretary General on the issue of human rights, transnational corporations and other business enterprises in 2005, Professor John Ruggie developed the United Nations Framework for Business and Human Rights in 2008 and the accompanying United Nations Guiding Principles on Business and Human Rights (the 'Ruggie Principles') in 2011.³²⁹ A core part of the Ruggie principles is how they seek to address limitations in the degree to which the human rights framework addresses and engages with non-state actors in relation to business.³³⁰ No mechanism is built into the UN Framework to deal with the case of a business enterprise that violates human rights and there have been calls for an international treaty to address the gaps in international regulatory

³²⁷ Eibe Riedel, Gilles Giacca and Christophe Golay 'The development of economic, social and cultural rights in international law' in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) 3, 19.

³²⁸ UN Office of the High Commissioner for Human Rights and UN Habitat, *The Right to Adequate Housing*, Fact Sheet No. 21/Rev.1 (Office of the High Commissioner for Human Rights 2009) 33.

³²⁹ *Report of the Special Representative of the Secretary-General on the Issues of Human Rights, Transnational Corporations and Other Business Enterprises*, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, A/HRC/17/31.

³³⁰ See Aoife Nolan, 'Not fit for purpose? Human rights in times of financial and economic crisis' (2015) 4 *European Human Rights Law Review* 358.

regimes in holding powerful business actors to account.³³¹ When Ruggie's mandate ended in 2011, a Working Group on Business and Human Rights was established by the UN Human Rights Council,³³² but, as the Irish Centre for Human Rights points out, no reference was made in its mandate to developing binding rules that could be addressed to business enterprises, 'most certainly a serious shortcoming'.³³³ In addition to the operation of judicial and non-judicial mechanisms within the state, however, the Principles do envisage state and non-state actors working together in overseeing the domestic implementation of National Action Plans on Business and Human Rights,³³⁴ which, as we see later in Chapter 5, is of interest in terms of hybrid domestic models of operationalisation.

Progressive realisation

The second principle of interest in moving out of the 'relative purgatory' of socio-economic rights, is that of 'progressive realisation'. Described as the 'linchpin of the ICESCR',³³⁵ it is found in Article 2(1) of the Covenant which, albeit of an 'obscure and imprecise nature',³³⁶ sets out the nature of states parties' obligations:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³³⁷

³³¹ See, forthcoming, Surya Deva and David Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017).

³³² Human Rights Council, Resolution A/HRC/17/4, 6 July 2011.

³³³ Irish Centre for Human Rights, *Human Rights in Ireland: Context, International Standards and Recommendations* (Irish Centre for Human Rights 2012) 19.

³³⁴ Danish Institute for Human Rights, *National Action Plans on Business And Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (Danish Institute for Human Rights 2014) 58.

³³⁵ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon 1995) 106.

³³⁶ Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon 1995) 3.

³³⁷ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967), Article 2(1).

At the time the Covenant entered into force, the concept of ‘progressive realisation’ and reference to the allocation of resources raised concerns that states parties might interpret this provision as a way of not fulfilling obligations.³³⁸ This has particular resonance when considering both the limitations in state resources allocated to Traveller accommodation in an Irish context, as well as the underspend or failure to draw down allocated funding at local level. In an attempt to clarify the resources question, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights³³⁹ were adopted in 1987, the result of an attempt by a group of international experts to consider the scope of state obligations.

In an authoritative view on how states parties might achieve progressive realisation of socio-economic rights to the maximum of their available resources, the expert group rejected the idea that these aspects limit in any way the efficacy of the rights contained in the Covenant.³⁴⁰ While the concept of progressive realisation was created with the aim of considering the complexities around differing economic circumstances in the states parties to the Covenant,³⁴¹ another concern it raises is that it may also make compliance with the Covenant difficult to measure.³⁴² By 1990, perhaps providing further clarity in this regard, in its General Comment No. 3, the Committee on Economic, Social and Cultural Rights recommended that the steps taken by states towards realisation should be ‘ . . . deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant’.³⁴³ The collection of disaggregated data is an important tool in monitoring the progressive realisation of rights, in that it can feed into the introduction of targeted measures at state level, as well as tracking delivery on such targets over time, as will be seen later in this chapter.

³³⁸ Philip Alston and Gerard Quinn, ‘The nature and scope of states parties’ obligations under the international covenant on economic, social and cultural rights’ (1987) 9 Human Rights Quarterly 156, 172.

³³⁹ The Limburg Principles on the Implementation of the ICESCR, UN Doc. E/CN.4/1987/17, Annex.

³⁴⁰ The Limburg Principles on the Implementation of the ICESCR, UN Doc. E/CN.4/1987/17, Annex.

³⁴¹ Aoife Nolan, Bruce Porter and Malcolm Langford, ‘The justiciability of social and economic rights: an updated appraisal’, Paper presented to the Human Rights Consortium of Northern Ireland (Belfast, March 2007) 10.

³⁴² Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon 1995) 151.

³⁴³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The nature of States parties obligations (Art. 2, par.1) 14 December 1990, E/1991/23, para 1–2. While the Limburg Principles are not referenced in General Comment 3, it appears to address many of the same issues, such as justiciability, progressive realisation and available resources.

Minimum core obligations

The third principle of interest when examining Traveller accommodation rights is that of ‘minimum core obligations’. The Economic, Social and Cultural Rights Committee’s General Comment No. 3 also introduced the principle of ‘minimum core obligations’,³⁴⁴ described as the ‘floor’ below which human rights protections should not be permitted to fall.³⁴⁵ Stating that ‘[a] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party’,³⁴⁶ the Comment goes some way towards dispelling the myth of resource-dependent rights, stating that a minimum core obligation to ensure some essential level of each right is expected of every state party to the Covenant. There is also a requirement to demonstrate that every effort has been made to use all resources available in attempts to satisfy this obligation. General Comment No. 3 states:

If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.³⁴⁷

This is further articulated in the 1998 Maastricht Guidelines, which say at No. 13:

In determining which actions or omissions amount to a violation of an economic, social or cultural rights, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations.³⁴⁸

³⁴⁴ Also initiated in the Limburg Principles on the Implementation of the ICESCR, UN Doc. E/CN.4/1987/17, Annex, 25.

³⁴⁵ Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 9.

³⁴⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The nature of States parties obligations (Art. 2, par.1) 14 December 1990, E/1991/23, para10.

³⁴⁷ CESCR General Comment No. 3, ‘The Nature of States Parties’ Obligations’, at para 9.

³⁴⁸ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 1997, http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html. The Guidelines can also be found, accompanied by a commentary, in *Human Rights Quarterly* (1998) 20, 691.

Non-retrogression

Finally, General Comment No. 3 introduces an approach to dealing with ‘deliberately retrogressive measures’,³⁴⁹ one that is now known as the doctrine of non-retrogression.³⁵⁰ For any such retrogressive measures to be ‘permissible’, states must justify their usage while ensuring that the maximum of available resources are used.³⁵¹

While there is no categorical answer to the question of whether Ireland has enough resources to meet its Convention obligations, any retrogressive measures require an explanation that is based on a human rights analysis. The lack of a clear alignment of state budgetary policies with human rights commitments makes it difficult to categorically state the cost of fulfilling obligations under the Convention. An Oireachtas Committee on Budgetary Oversight was established in Ireland in July 2016 ‘to enhance the role of the Oireachtas in the budgetary formation process’.³⁵² The 2016 ‘Programme for Partnership Government’ for the first time explicitly set out in a programme for government a ‘process of budget and policy proofing as a means of advancing equality, reducing poverty and strengthening economic and social rights’ under ‘Reforming the Budget Process’.³⁵³ It remains to be seen what the wider implications of this process will be, and how they might translate into the sphere of resourcing Traveller accommodation.

³⁴⁹ Saying such measures would ‘require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’. See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The nature of States parties’ obligations (Art 2, para 1) 14 December 1990, E/1991/23, para 9.

³⁵⁰ Aoife Nolan, Nicholas Lusiani and Christian Courtis, ‘Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic, social and cultural rights’ in Aoife Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) 132.

³⁵¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The nature of States parties’ obligations (Art. 2, par.1) 14 December 1990, E/1991/23, para 9. Although, notably, in 2012 the CESCR Committee issued a ‘Letter to States Parties to the ICESCR’. See Chairperson of the CESCR, ‘Letter Dated 16 May 2012, addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights’ (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW. The letter has been said to shift the interpretation of the doctrine of non-retrogression towards a model of emergency ‘accommodation’. See Ben TC Warwick, ‘Socio-economic rights during economic crises: a changed approach to non-retrogression’ (2016) 65 *International and Comparative Law Quarterly*, 249, 251.

³⁵² See http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/bo/ accessed 16 September 2017.

³⁵³ Department of the Taoiseach, *A Programme for Partnership Government* (Department of the Taoiseach 2016) 16, http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf accessed 20 August 2017.

In summary, each of the four principles described in this section contribute to an overall sense of how rights might ideally operate in practice, rather than in theory alone, and provide a certain richness to the intentions of the international human rights framework when it speaks about giving effect to socio-economic rights. Collectively, however, they do not describe what it means for a state to operationalise such rights. In order to understand what this operationalisation might mean, the next section looks to the guidance offered by the international mechanisms and unpacks its component parts, exploring more deeply what the intentions are when international bodies communicate to states that they should be ‘translating’, ‘implementing’ or ‘monitoring’ the rights in question.

2.3 What does it mean to ‘operationalise’ a right?

The terms ‘to operationalise’ and ‘the operationalisation of human rights’ are found throughout UN treaty-based and charter-based mechanisms, from the High Commissioner to Special Rapporteurs, and across the treaty body system.³⁵⁴ Yet, as we have seen, the terms are largely undefined in international human rights law. It might be argued that such ‘operationalisation’ refers to the means by which states can fully respect, protect and fulfil their obligations under international human rights; however, this still does not give clarity on what these ‘means’ might contain. The purpose of this section is to unpack ‘operationalisation’ by seeing its component parts.

The term operationalisation appears in many other disciplines apart from human rights law and, in some instances, is defined in ways that are helpful.³⁵⁵ For example, we see operationalisation

³⁵⁴ Such as UN Office of the High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (Office of the High Commissioner for Human Rights 2012) 12; Office of the High Commissioner for Human Rights Management Plan 2012–2013 at 51, 73 and 81; Human Rights Treaties Division Newsletter Nos 16–17, April – September 2012 at 1 and 17; UN General Assembly, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Anand Grover, 12 April 2011, A/HRC/17/25, 8, 9, 11 and 18; UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review of Swaziland*, 6 March 2012, A/HRC/19/6/Add.1, at 3; CEDAW Response to List of Issues and Questions Austria, 29 September 2006, CEDAW/C/AUT/Q/6/Add.1, at 5; CERD Concluding observations of the Committee on the Elimination of Racial Discrimination on Uruguay, 10 March 2011, CERD/C/URY/CO/16-20, at 2 and 4; UN General Assembly, *Trafficking in persons, especially women and children*, Note by the Secretary-General, 9 August 2011, A/66/283 at 8 and 9; CESCR General Comment No. 2, *International technical assistance measures* (Art. 22), at Article 8.

³⁵⁵ For example: business and management science, development, geography, sociology, information technology, reproductive healthcare, politics, philosophy, psychology and research methodology.

defined as ‘the process of translating theoretical concepts into more practical and observable or measurable forms’,³⁵⁶ as well as something which moves ‘from the abstract level to the empirical level, where variables rather than concepts are the focus’.³⁵⁷ Operationalisation has also been defined as ‘. . . the process of strictly defining variables into measurable factors. [It] defines fuzzy concepts and allows them to be measured, empirically and quantitatively’, allowing others to follow the same methodology.³⁵⁸ Measuring progress or data is a key element of operationalisation across a number of other disciplines, conceived of as a process that happens by setting indicators or appropriate tools for use in the measurement process as well as the gathering of accurate and reliable data from multiple sources.³⁵⁹

These general principles of operationalisation may also be applied when attempting to develop a theoretically sound understanding of operationalisation as a concept within the human rights framework. International law is unambiguous when it says that treaty obligations placed upon signatory states are binding. The Vienna Convention of the Law of Treaties states, in the context of a ‘General rule of interpretation’, that ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.³⁶⁰ However, within both international and regional frameworks, we see language used in relation to operationalisation that can be relatively abstract and possibly unhelpful to the states tasked with giving effect to these obligations in

³⁵⁶ Jan Jonker and BJW Pennink, *The Essence of Research Methodology: A Concise Guide for Master and PhD Students in Management Science* (Springer-Verlag 2010) 51, cite various scientific sources, such as ‘[t]he creation of rules which indicate when an instance of a concept has empirically occurred.’

³⁵⁷ Michael S Lewis-Beck, Alan Bryman, Tim Futing Liao (eds), *The Sage Encyclopedia of Social Science Research Methods* (Thousand Oaks 2004).

³⁵⁸ Martyn Shuttleworth, ‘Operationalization’ (2008) <https://explorable.com/operationalization> accessed 12 February 2017. This is also witnessed in the field of computer science and information technology, where ‘operationalisation’ is again seen as a process which requires norms to have ‘an operational semantics that is concrete and that connects with the ontology of the institutional actions’. See Huib Aldewereld, Frank Dignum, Andrés García-Camino, Pablo Noriega, Juan Antonio Rodríguez-Aguilar and Carles Sierra, ‘Operationalisation of norms for electronic institutions’ (2007) 4386 *Lecture Notes in Computer Science*, at 163.

³⁵⁹ See, for example, Paola Bollini and Katharina Quack-Lötscher, ‘Guidelines-based indicators to measure quality of antenatal care’ (2013) *Journal of Evaluation in Clinical Practice*, 1; Jungah Bae, Dorothy M Daley, and Elaine B Sharp, ‘Understanding city engagement in community-focused sustainability initiatives’ (2013) 15 *Cityscape: A Journal of Policy Development and Research*, 143–16; Sascha Wüstenberg, ‘Nature and validity of complex problem solving’ (PhD thesis, Ruprecht-Karls-Universität Heidelberg 2013); Solomon Messing and Sean J Westwood, ‘Friends that matter: how social distance affects selection and evaluation of content in social media’ (2012) Conference presentation, Midwest Political Science Association, Chicago, April 2012, 25; Hester Duursema, ‘Strategic leadership: moving beyond the leader-follower dyad’ (PhD thesis, Erasmus University 2013); and Myrna Q Mallari and Myrel M Santiago, ‘The research competency and interest of accountancy faculty among state colleges and universities in region III’, (2013) 2(1) *Review of Integrated Business and Economics* 51.

³⁶⁰ Vienna Convention of the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969), at Article 31(1).

practice, although this vagueness has arguably lessened over time with the evolution of progressively more specific and focused instruments.³⁶¹ For example, General Comment No. 5 (2003) of the Committee on the Rights of the Child, entitled ‘General measures of implementation of the Convention on the Rights of the Child’ extends to 73 articles,³⁶² ranging from ‘development of a children’s rights perspective throughout government, parliament and the judiciary’ to legislative measures, to developing a comprehensive national strategy rooted in the Convention which:

. . . must not be simply a list of good intentions; it must include a description of a sustainable process for realizing the rights of children throughout the State; it must go beyond statements of policy and principle, to set real and achievable targets in relation to the full range of economic, social and cultural and civil and political rights for all children.³⁶³

P6 noted the use of the term ‘operationalisation’ as a useful lens through which to view rights in the domestic context of the state:

I think the term you’ve used, *operationalising*, is a useful one because, I think, at national and international levels, we’ve become very focussed on the notion of implementation and I think it’s begun to obscure, in a way, what we are actually talking about. If you were to talk about implementing, for example, in terms of

³⁶¹ At the time of the foundation of the United Nations in the 1940s, despite its aspirational aims, a certain reticence can be seen in the nature of guidance afforded to member states. The United Nations Charter signed in 1945 gave power to the UN General Assembly to act in several ways that may have binding effects on member states, such as ‘make recommendations’, ‘issue negotiations’, ‘consider and approve’. Yet Article 2(7) also states: ‘Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. See Charter of the United Nations, adopted 26 June 1945, entered into force 24 Oct 1945, as amended by GA Res 1991 (XVIII) 17 Dec 1963, entered into force 31 Aug 1965 (557 UNTS 143); 2101 of 20 Dec 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (XXVI) of 20 Dec 1971, entered into force 24 Sept 1973 (892 UNTS 19). Jurgen Habermas refers to a ‘tension between the principles of the Charter and the actual human rights standards of many member states’, saying ‘At the level of principles, the coupling of the UN Charter with the Declaration of Human Rights is a revolutionary step. The international community is thereby placed under the obligation to spread and implement worldwide the same principles that are so far embodied within constitutional states only.’ See Jurgen Habermas, ‘Dispute on the past and future of international law: transition from a national to a postnational constellation’, Presentation at the World Congress of Philosophy, Istanbul, August 2003, 5.

³⁶² UN Committee on the Rights of the Child (CRC), General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para 6) 27 November 2003, CRC/C/2003/5.

³⁶³ CRC General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para 6) CRC/GC/2003/5, 27 November 2003, at 32.

Traveller accommodation in Ireland, you would say the Traveller Accommodation Act and the provisions whereby local authorities are supposed to provide Traveller accommodation . . . that the demands of the international standards have been met. But actually, if you look at how that has been *operationalised*, and you take it to the next stage, you find that the local authorities don't do it, that it's obfuscated, that there are political concerns that get in the way and all sorts of other things.³⁶⁴

At this point, it is perhaps useful to acknowledge, perhaps, that there is a difference between difficulties, on the part of states, in attempting to understand what a rights obligation is because of problems with the way in which it is expressed in international instruments, and difficulties, on the part of states, in operationalising the right even when they do understand what the obligation is. On occasion these difficulties may overlap and this differentiation is what leads us to seek out a practical approach to understanding whether, when, and how international law is actually complied with by the state. The analytical framework that follows is thus the attempt to flesh out the component parts of operationalisation as a general concept.

The sections that follow examine how the sources of various structures of international human rights law focus upon and articulate understandings of the translation, implementation and monitoring of human rights in their guidance, paying particularly attention to the ways in which this guidance might apply to the right to culturally appropriate accommodation.

Translating through law and policy

Seven of the nine core United Nations treaties contain at least one article that offers some form of instruction to states parties on how they should broadly give effect to the treaty provisions through law, policy or both.³⁶⁵ This practice of calling for domestic legal and policy measures

³⁶⁴ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

³⁶⁵ See International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, reprinted in 6 ILM 368 (1967), at Article 2(2), which states 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'; International Convention on the Elimination of All Forms of Racial Discrimination, GA Resolution 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014(1966), 660 UNTS 195,

may be seen throughout the different decision-making bodies of the international and regional human rights framework, from treaty-monitoring bodies in their General Comments,³⁶⁶ Concluding Observations,³⁶⁷ and findings of individual complaints,³⁶⁸ to the ‘soft’ guidance of

entered into force Jan. 4, 1969, at Article 2(1)(c) which states ‘Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists’; Convention on the Elimination of All Forms of Discrimination against Women GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), at Article 2(a), which states ‘To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation’, at Article 2(b), which states ‘To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women’, and at Article 2(c), which states ‘To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination’, and at Article 2(f), which states ‘To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’, and Article 2(g), which states ‘To repeal all national penal provisions which constitute discrimination against women’; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85, reprinted in 23 ILM 1027 (1984), minor changes reprinted in 24 ILM 535 (1985), at Article 2(1), which states ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’; Convention on the Rights of Persons with Disabilities, adopted 13 Dec. 2006, G A Res. 61/106, 61 UN GAOR, Supp. (No. 49), UN Doc. A/RES/61/106/AnnexI, at 65 (2006), at Article 4(1)(a), which states ‘To adopt all appropriate legislative, administrative and other measures’, Article 4(1)(b), which states ‘To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’, and Article 4(1)(c) which states ‘To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes’; International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature 6 February 2007, UN Doc. A/61/488 (entered into force 23 December 2010), at Article 4, which states ‘Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law’ (further provisions in Articles 5–10 contain instructions to states about establishing penalties and other measures); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA res. 45/158, annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990), at Article 9, which states ‘The right to life of migrant workers and members of their families shall be protected by law.’

³⁶⁶ CERD and CEDAW Committees refer to ‘General Recommendations’ rather than General Comments. ‘It would be difficult to imagine a more oddly and even misleadingly named instrument than a “General Comment”’ says Philip Alston, remarking that these tools are far from general and more than comments. See Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press 2007) 873.

³⁶⁷ ‘Arguably, the issuance of concluding observations is the single most important activity of human rights treaty bodies’ says Michael O’ Courtney, providing ‘... an opportunity for the delivery of an authoritative overview of the state of human rights in a country and for the delivery of forms of advice which can stimulate systemic improvements.’ See Michael O’Flaherty, ‘Towards integration of United Nations human rights treaty-body recommendations – the rights-based approach model’ (2006) 24 *Netherlands Quarterly of Human Rights* 589, 560.

³⁶⁸ ‘It is through individual complaints that human rights are given concrete meaning’ says the Office of the UN High Commissioner for Human Rights, continuing ‘[i]n the adjudication of individual cases, international norms that may otherwise seem general and abstract are put into practical effect.’ See Office of the High Commissioner for Human Rights, ‘Individual Complaints Procedures under the United Nations Human Rights Treaties’, Fact Sheet No. 7/Rev. 2 (United Nations 2013), at 1, <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf> accessed 27 February 2017.

mandated experts,³⁶⁹ and the findings of the regional courts.³⁷⁰ For example, in 2005 in the individual complaint of *LR et al. v Slovak Republic*, the Committee on the Elimination of Racial Discrimination observed that the practical realisation of many economic, social and cultural rights, including the right to housing, ‘ . . . will initially depend on and indeed require a series of administrative and policy-making steps by the State party’s competent relevant authorities’.³⁷¹ In order to ensure that legislative or other measures are adequate to meet the requirements of the Convention, states are encouraged to review their domestic legislation and policies to assess their compatibility and move towards amending or repealing any that are inconsistent.³⁷²

For the most part, guidance from the international mechanisms concerning legislative measures identifies three important principles. Firstly, states should create new legislation to meet the requirements of the treaty in question,³⁷³ with explicit mention of the groups affected.³⁷⁴ Secondly, states should either modify, strengthen or abolish existing laws where they are not appropriate,³⁷⁵ and, thirdly, states should adopt policy measures at domestic level in order to ensure full compliance with obligations under the instrument in question.³⁷⁶

³⁶⁹ Such as the UN High Commissioner for Human Rights, the ‘special procedures’ mechanisms of the UN the Secretary General of the Council of Europe, the Council of Europe Commissioner for Human Rights and President of the European Court of Human Rights, at the level of the Council of Europe.

³⁷⁰ Such as the European Court of Human Rights, which interprets the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as per Article 32(1) of the Convention.

³⁷¹ *LR et al. v Slovak Republic*, 2005, CERD/C/66/D/31/2003, at 10.6.

³⁷² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, 9.

³⁷³ See, for example, Convention on the Elimination of All Forms of Discrimination against Women GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), Article 2(b); International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967), Article 2(1); UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 1 (2014), Article 12: Equal recognition before the law, 19 May 2014, CRPD /C/GC/1, 25–31.

³⁷⁴ UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, 17.

³⁷⁵ Convention on the Elimination of All Forms of Discrimination against Women GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), Article 2(a); International Convention on the Elimination of All Forms of Racial Discrimination, GA Resolution 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014(1966), 660 UNTS 195, entered into force Jan. 4, 1969, at Article 2(1)(c); Concluding observations of the Human Rights Committee: Ireland, 30 July 2008, CCPR/C/IRL/CO/3, 9; UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, 24.

³⁷⁶ For example, the Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on harmful practices, 2014, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18 states ‘The objective of the present joint general recommendation/general comment is to clarify the obligations of States parties to the Conventions by providing authoritative guidance on legislative, policy and other appropriate measures that must be taken to ensure full compliance with their obligations under the Conventions to eliminate harmful practices’

In relation to housing, in its General Comment on the Right to Adequate Housing, the UN Committee on Economic, Social and Cultural Rights notes that the right to adequate housing is ‘constitutionally entrenched’ in some states³⁷⁷ but ‘the role of formal legislative and administrative measures should not be underestimated’ even though many measures related to housing will involve the allocation of resources.³⁷⁸ The Committee outlines domestic legal remedies as possibly including:

(a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems, it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.³⁷⁹

at para 2; and the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23 states ‘Many of the measures that will be required will involve resource allocations and policy initiatives of a general kind’ at para 15.

³⁷⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, 16. The Committee goes on to say in this paragraph that it is ‘particularly interested in learning of the legal and practical significance of such an approach’.

³⁷⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, 15. General Comment No. 4, adopted in 1992, cites paras 66–67 of the UN Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987, which provides detailed ‘legislative options leading to appropriate laws and regulations in the shelter sector’ (at para 66), such as ‘need to review land legislation in a comparative framework’, ‘adopting innovative legislation from other countries’, studying the ‘economic impact of laws, regulations and codes’, considering the creation of ‘special codes and standards for housing and infrastructure in low-income settlements, which can be upgraded over time’ with the cooperation of ‘legal advisers, national legal experts, officials involved in enforcement and legislators’, with ‘active public campaigns, organized and promoted by those with a direct interest in creating a regulatory environment’. Para 67 of the Global Strategy goes on to call for high-priority revision of building infrastructure codes and regulations.

³⁷⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, 17.

General Comment No. 4 does not set out any specific measure, structure or mechanism that states should provide in relation to the cultural adequacy of housing; however, the Committee on the Elimination of Racial Discrimination regularly comments on shortcomings in law and policy in relation to the housing needs of Travellers, Roma, Sinti and other ethnic minority groups that have been traditionally discriminated against in terms of their housing and accommodation needs.³⁸⁰ In the Committee's Concluding Observations on Finland's periodic report in 2012, for example, in relation to the 'situation of the Sámi', the Committee recommends that Finland '... enhance the decision-making powers of the Sámi Parliament'³⁸¹ with regard to the cultural autonomy of Sámi, including rights relating to the use of land and resources in areas traditionally inhabited by them'.³⁸² States should ensure that discrimination and discriminatory practices 'are combated through adequate legislation' and that specific provisions exist in the civil law of a state to this end, 'particularly in the fields of employment, housing and education'.³⁸³

This was echoed by the European Court of Human Rights in the case of *Connors v UK* in 2004, where the Court was critical of the state for the existence of 'a statutory scheme which

³⁸⁰ See, for example, Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 17 February 2017, CERD/C/ITA/CO/19-20, at para 21(b), which states the Committee's concerns in relation to 'The fact that Roma, Sinti and Camminanti communities continue to live in segregated camps or housing areas with substandard accommodation, many unsuitable for human habitation, and in remote areas distanced from basic services, including health care and schools', recommending at 22(c) 'Review and amend national, regional and municipal housing legislation, policies and practices to ensure that they do not discriminate against Roma, Sinti and Camminanti in the enjoyment of their rights, in particular their access to social housing and other forms of housing benefit'; Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 14 September 2011, CERD/C/GBR/CO/18-20, in which the Committee 'deeply regrets the State party's insistence on proceeding immediately with the eviction of the Gypsy and Traveller community at Dale Farm in Essex before identifying and providing alternative culturally appropriate accommodation for members of these communities' at 28; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland, 3 October 2016, CERD/C/GBR/CO/21-23, which recommends the state to 'Ensure the provision of adequate and culturally appropriate accommodation and stopping sites as a matter of priority throughout the State party and regularly publish the net increase of pitches for Gypsies and Travellers created through the Traveller Pitch Fund', at 25(b); Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session (12–30 August 2013), CERD/C/SWE/CO/19-21, which recommends, at 20(e), that Sweden 'Increase access to adequate housing for Roma without discrimination and segregation, including by facilitating access to public and low-cost housing and improving the living conditions of Roma.'

³⁸¹ *The Act on the Sámi Parliament* (Ásahus sámedikki birra 1727/1995) established the Finnish Sámi Parliament or Saamelaiskäräjät. See website of the Finnish Sámi Parliament <http://www.samediggi.fi> accessed 16 April 2017.

³⁸² Committee on the Elimination of Racial Discrimination in its Concluding observations on Finland's twentieth to twenty-second periodic reports in 2012, CERD/C/FIN/CO/20-22.

³⁸³ European Committee Against Racism and Intolerance, ECRI General Policy Recommendation No. 3 on Combating racism and intolerance against Roma/Gypsies, adopted 6 March 1998, 4.

permitted the summary eviction of the applicant and his family’ as one which ‘places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle’.³⁸⁴

Guidance from the international framework states that legislative provisions ought to be present at all levels of domestic law. In some instances, giving effect to a treaty’s provisions at the level of national constitutions is referred to, including that a constitution might ‘embody the principle’ of a convention,³⁸⁵ ‘enshrine’ such principles,³⁸⁶ or ‘even involve constitutional changes’, if necessary.³⁸⁷ As well as constitutional provisions, provisions should be present throughout civil, administrative, criminal and common law,³⁸⁸ and effect given to treaty provisions in administrative proceedings.³⁸⁹ Legislative provisions may be at a level of technical detail as precise, for example, as the licensing regime emanating from a set of planning laws that has a disproportionate effect on certain groups, such as the metal scrappage laws in the UK have on members of the Gypsy and Traveller communities:

ECRI recommends that the licensing regime under the Scrap Metal Dealers Act 2013 is revised to allow Gypsies and Travellers to apply for licenses on a regional rather than local basis to allow them to pursue this trade across a range of local authorities without incurring excessive fees.³⁹⁰

Legislative provisions may also be reflected in a state’s planning process, for example:

³⁸⁴ *Connors v United Kingdom*, Application no. 66746/01, 2004 (2005) 40 EHRR 9, 94.

³⁸⁵ Article 2(a) of the Convention on the Elimination of All Forms of Discrimination against Women, e GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980) states that a state party should ‘embody the principle of the equality of men and women in their national constitutions’.

³⁸⁶ European Commission against Racism and Intolerance General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, CRI(2003)8, at II(2), which states that ‘The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.’

³⁸⁷ Council of Europe, ‘Remarks on the supervision of the execution by the Committee of Ministers: new working methods’ in *Supervision of the execution of judgments and decisions of the European Court of Human Rights*, 10th Annual Report of the Committee of Ministers (2016) 284–285, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680706a3d> accessed 16 April 2017. See also European Committee Against Racism and Intolerance, ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002, II, 2, 5–6 on ‘Constitutional law’.

³⁸⁸ European Committee Against Racism and Intolerance, ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8, adopted 13 December 2002.

³⁸⁹ In the case of the best interests of the child, Article 12 of the Convention. See UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para 1) 29 May 2013, CRC /C/GC/14, 15(a).

³⁹⁰ *ECRI Report on the United Kingdom (fifth monitoring cycle)* 4 October 2016, CRI(2016)38, 104.

ECRI recommends that the new planning definition in England of Gypsy and Traveller is replaced with the previous one of 2012, that sufficient pitches are provided according to the needs of these communities, and that alternatives to eviction, such as the negotiated stopping policy in the city of Leeds, are promoted and replicated elsewhere.³⁹¹

The Committee of Ministers of the Council of Europe states that, in the case of former violations, legislation should be provided or amended to ensure that such violations do not recur:

The obligation to take general measures aims at preventing violations similar to the one(s) found and may, depending on the circumstances, imply a review of legislation, regulations and/or judicial practice. Some cases may even involve constitutional changes. In addition, other kinds of measures may be required such as the refurbishing of a prison, increase in the number of judges or prison personnel or improvements of administrative procedures.³⁹²

Types of policy or administrative measures suggested include ‘rights-based, multisectoral strategies’ and National Action Plans based around a systematic and integrated approach to law and policy development that will avoid fragmentation,³⁹³ in consultation with groups affected; for example:

³⁹¹ *ECRI Report on the United Kingdom (fifth monitoring cycle)* 4 October 2016, CRI(2016)38, 98.

³⁹² Council of Europe, ‘Remarks on the supervision of the execution by the Committee of Ministers: new working methods’ in *Supervision of the execution of judgments and decisions of the European Court of Human Rights*, 10th Annual Report of the Committee of Ministers (2016) 284–285, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680706a3d> accessed 16 April 2017. It has been suggested that domestic operationalisation of a regional court’s rulings is dependent on the willingness and ability of domestic courts to enforce them. See Courtney Hillebrecht, ‘The domestic mechanisms of compliance with international human rights law: case studies from the inter-American human rights system’ (2012) 34 *Human Rights Quarterly* 959, 970.

³⁹³ UN Committee on the Rights of the Child (CRC), General comment No. 7 (2005): Implementing child rights in early childhood, 1 November 2005, CRC/C/GC/7, 22; UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, 18; Council of Europe Recommendation Rec(2005)4 of the Committee of Ministers on improving the housing conditions of Roma and Travellers in Europe, 23 February 2005 states ‘Member states should ensure that, within the general framework of housing policies, integrated and appropriate housing policies targeting Roma are developed. Member states should also allocate appropriate means for the implementation of the mentioned policies in order to support national poverty reduction policies’, at II(1).

ECRI strongly recommends that the authorities draw up, in consultation with Gypsy, Traveller and Roma groups, a detailed programme of integration strategies and measures to address the disadvantage suffered by all three of these communities in England, Wales, Scotland and Northern Ireland, including concrete targets, timeframes, and resources, in all areas of daily life, such as education, employment, health care and accommodation, in particular addressing the shortage of caravan sites.³⁹⁴

Policy decisions, actions and services provided by the private sector are also included in this.³⁹⁵ For example, in 2016, the Committee on the Rights of the Child in its Concluding Observations on Ireland's combined third and fourth periodic reports under the Convention on the Rights of the Child expressed concerns that asylum-seeking or refugee children in privately run accommodation centres were not covered by national standards relating to other children's care settings.³⁹⁶

Guidance also includes ensuring the creation or making available of domestic remedies or redress,³⁹⁷ or sanctions where appropriate,³⁹⁸ as well as requiring states to provide information in their periodic reporting on the legislative, judicial and administrative measures they have adopted to give effect to treaty provisions³⁹⁹ and the decisions taken by tribunals or institutions dealing with treaty violations.⁴⁰⁰ We saw earlier how the UN Committee on Economic, Social and Cultural Rights, for example, sees domestic legal remedies around the right to housing as

³⁹⁴ *ECRI Report on the United Kingdom (fifth monitoring cycle)* 4 October 2016, CRI(2016)38, 109.

³⁹⁵ As, for example, in the case of the provision of children's services. See UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para 1) 29 May 2013, CRC/C/GC/14, 15(c).

³⁹⁶ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, 65. The Committee recommended that Ireland 'take the necessary measures to bring its asylum and refugee policy, procedures and practice into line with its international obligations', at 66.

³⁹⁷ See, generally, Council of Europe, Committee of Ministers, Recommendation (2004)6 on the Improvement of Domestic Remedies, 12 May 2004. See also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural rights, UN Doc. E/C.12/1998/24, 3 December 1998, Article 2.

³⁹⁸ UN Convention on the Elimination of All Forms of Discrimination against Women, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), at Article 2(b).

³⁹⁹ International Convention on the Elimination of All Forms of Racial Discrimination, GA Resolution 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014(1966), 660 UNTS 195, entered into force Jan. 4, 1969, Article 9.

⁴⁰⁰ UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation VII Relating to the Implementation of Article 4 Legislation to Eradicate Racial Discrimination, 23 August 1985, A/40/18, Article 3.

including measures such as legal appeals mechanisms, compensation, complaints against illegal actions and even class actions.⁴⁰¹

The obligation to take general measures aimed at preventing violations may, says the Committee of Ministers of the Council of Europe, include a review of legislation, regulations or judicial practice.⁴⁰² This could include the process of judicial review.⁴⁰³ In this case, judicial review has the potential, perhaps, to act as a form of ‘regulatory constitutionalism’ that encourages states to change their rights-realising behaviour,⁴⁰⁴ rather than the more traditional process which has a structuring or limiting effect on government more generally.⁴⁰⁵

In summary, therefore, we see the requirement that, for states to give effect to international provisions, they should create new laws or modify existing ones, as well as adopting policy measures. Legal measures should ideally range from constitutional embodiment, if necessary, through to legislative and regulatory provisions. States should also ensure that discriminatory practices are combatted in law and policy. Finally, policy or administrative measures can range from national strategies to National Action Plans, but they should have a systematic and integrated approach, and include consultation with, and participation of, those affected by the measures.

In order to fully give effect to rights at domestic level, however, states need to go further than translating rights through law and policy. International standards are necessarily written at a

⁴⁰¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23.

⁴⁰² Council of Europe, ‘Remarks on the supervision of the execution by the Committee of Ministers: new working methods’ in *Supervision of the execution of judgments and decisions of the European Court of Human Rights*, 10th Annual Report of the Committee of Ministers (2016) 283, at 284, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680706a3d> accessed 16 April 2017.

⁴⁰³ Judicial review ‘may be defined as the means whereby the courts examine the legality of all public actions including their own’, Mark De Blacam, *Judicial Review* (2nd edn, Tottel Publishing 2009) 3. Conventional judicial review procedure is governed by Order 84 of the Rules of the Superior Courts 1986–2011, <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument> accessed 21 April 2017, which includes amendments made by SI 691 of 2011: Rules of the Superior Court (Judicial Review) 2011, [http://www.courts.ie/rules.nsf/SuperiorAmdLookup/No84-S.I.+No.+691+Of+2011:+Rules+Of+The+Superior+Courts+\(Judicial+Review\)+2011](http://www.courts.ie/rules.nsf/SuperiorAmdLookup/No84-S.I.+No.+691+Of+2011:+Rules+Of+The+Superior+Courts+(Judicial+Review)+2011) accessed 21 April 2017; and SI 345 of 2015: Rules of the Superior Court (Judicial Review) 2011, [http://www.courts.ie/rules.nsf/SuperiorAmdLookup/No84-S.I.+No.+691+Of+2011:+Rules+Of+The+Superior+Courts+\(Judicial+Review\)+2011](http://www.courts.ie/rules.nsf/SuperiorAmdLookup/No84-S.I.+No.+691+Of+2011:+Rules+Of+The+Superior+Courts+(Judicial+Review)+2011) accessed 21 April 2017.

⁴⁰⁴ As favoured by Fiona de Londras, ‘Counter-terrorism judicial review as regulatory constitutionalism’ in Fiona de Londras and Fergal Davis (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014) 32, 36.

⁴⁰⁵ David Feldman, ‘Judicial review: a way of controlling government?’ (1988) 66 *Public Administration* 21.

level of abstraction, given that they are often negotiated compromises between states; therefore, bringing those rights into a domestic context requires consideration of how they might be translated into a more localised legal system. On this point, the 2014 joint General Recommendation/General Comment from the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women on harmful practices is clear when it says that ‘enactment of legislation alone’ is not sufficient in addressing the requirements of the recommendation, and that legislation must therefore be supplemented with a comprehensive set of measures to facilitate its implementation, enforcement and follow up, as well as measurement of the results achieved.⁴⁰⁶ With this in mind, the next section looks to what takes place beyond the realm of law and policy.

Implementing through structures, resources and services

In addition to the enactment of laws and the creation of policy, guidance from the international mechanisms also suggests that states should give effect to the provisions contained within instruments through (1) the creation of structures such as ‘institutions and national machinery’;⁴⁰⁷ (2) the resourcing of these institutions through the provision of funding for staffing and operational and programmatic costs, as well as resourcing the provision of rights more generally; and (3) the direct provision or delivery, by the state via its agents, of services that fulfil the human rights of individual rights holders.

Scholars, national human rights institutions and civil society organisations have argued that the implementation of guidance from international bodies is more likely to be facilitated if the relevant domestic institutions are made aware of them.⁴⁰⁸ Such relevant institutions should

⁴⁰⁶ Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on harmful practices, 2014, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, 41.

⁴⁰⁷ ‘Institutions and national machinery’ is the sub-heading to the section describing Ireland’s domestic infrastructure overseeing human rights in Ireland, in Ireland’s Common Core Document to the UN. United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc. HRI /CORE/IRL/2014, paras 100–130.

⁴⁰⁸ See, generally, Jasper Krommendijk, ‘The impact and effectiveness of non-judicial mechanisms for the implementation of human rights’ (2011) 5 *Human Rights and International Legal Discourse* 264; Jasper Krommendijk, *The Domestic Impact of the Effectiveness of the Process of State Reporting under UN Human Rights Treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* (Intersentia 2014); Gauthier De Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Bruylant 2010); Human Rights Law Centre and International Service for Human Rights, ‘Domestic

ideally include those bodies and structures that have the authority and capacity to give effect to the recommendations, i.e. the executive arm of government; parliamentarians; national human rights institutions and ombudsbodies; and the judiciary.⁴⁰⁹ Rather than, or in addition to, separate parliamentary and executive committees, some guidance calls for the establishment of domestic mechanisms that provide a follow-up facility for the purposes of monitoring compliance with rights at domestic level.⁴¹⁰

In addition to translation via the enactment of laws and the creation of policy, states implement international human rights law by establishing domestic bodies that are mandated to protect human rights, such as national human rights institutions, routinely referred to as ‘a bridge between international human rights standards and their implementation at the national level’.⁴¹¹ The 1991 ‘Paris Principles’, which set out how national human rights institutions ought to function, state that such bodies should ‘promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation’.⁴¹² National human rights institutions have been called ‘a core part of human rights protection within any member state, particularly in scrutinising legislation and the actions of the executive’⁴¹³ as well as ‘natural partners for

implementation of UN human rights recommendations: a guide for human rights defenders and advocates’ (2013),

https://www.ishr.ch/sites/default/files/article/files/domestic_implementation_of_un_human_rights_recommendations_-_final.pdf accessed 19 March 2017; as well as Irish Human Rights and Equality Commission, *Submission to the Committee on Economic, Social and Cultural Rights on the Examination of Ireland’s Third Periodic Report under the International Covenant on Economic, Social and Cultural Rights* (2015) 23; Irish Human Rights and Equality Commission, *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland’s combined sixth and seventh periodic reports* (2017) 28.

⁴⁰⁹ Human Rights Law Centre and International Service for Human Rights, ‘Domestic implementation of UN Human Rights Law Centre and International Service for Human Rights, *Domestic implementation of UN human rights recommendations: A guide for human rights defenders and advocates* (Human Rights Law Centre and International Service for Human Rights 2013) 11–15,

https://www.ishr.ch/sites/default/files/article/files/domestic_implementation_of_un_human_rights_recommendations_-_final.pdf accessed 27 August 2017.

⁴¹⁰ These models are discussed further in section 3.4 ‘Monitoring compliance with rights’.

⁴¹¹ Richard Carver, ‘A new answer to an old question: national human rights institutions and the domestication of international law’ (2010) 10 *Human Rights Law Review* 1, 2. Carver says that, despite a ‘bridging role [that] has been so axiomatic and self-evident ... little attention has been paid to the question of how exactly NHRIs carry out this function as agents of international law within the domestic governmental system’.

⁴¹² Principles relating to the status and functioning of national institutions for protection and promotion of human rights (endorsed by UN Commission for Human Rights Res. 1992/54, 3 March 1992, annexed to GA Res. A/RES/48/134, 20 December 1993, A/RES/48/134) 3(b)).

⁴¹³ Katherine Zappone, ‘Improving co-operation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues’ Council of Europe Parliamentary Assembly report, Doc. 13506, 30 April 2014, 4,

<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20554&lang=EN> accessed 22 August 2017.

parliaments’,⁴¹⁴ a view set out in the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments.⁴¹⁵ In their guidance, various UN bodies regularly encourage states to establish independent national human rights institutions in compliance with the Paris Principles, where they do not exist already, or to strengthen those that do exist.⁴¹⁶ The Brighton Declaration, resulting from the high-level conference of all Council of Europe states parties to the European Convention on Human Rights in 2012, echoed this.⁴¹⁷ It follows that, with the creation of institutions, such institutions must also be adequately resourced in order to carry out their functions effectively in terms of their powers, mandate and financial and staffing capabilities,⁴¹⁸ and their work should not be restrained at times of budget cuts.⁴¹⁹ In addition to

⁴¹⁴ Katherine Zappone, ‘Improving co-operation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues’ Council of Europe Parliamentary Assembly report, Doc. 13506, 30 April 2014,

<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20554&lang=EN>

accessed 22 August 2017, 1, citing Dr Des Hogan, at the hearing held at the meeting of the Committee on Equality and Non-Discrimination on 1 October 2013.

⁴¹⁵ Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments, 22–23 February 2012. UN Human Rights Council, *National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary-General*, 1 May 2012, A/HRC/20/9, Annex: Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (Belgrade, 22–23 February 2012) 17–21.

⁴¹⁶ UN Human Rights Committee, Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October–2 November 2012), CCPR/C/106/3, 3; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XVII on the establishment of national institutions to facilitate the implementation of the Convention, 19 March 1993, UN Doc. A/48/18 at 116; UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 10, The role of national human rights institutions in the protection of economic, social and cultural rights, E/C.12/1998/25, 10 December 1998; UN Committee on the Rights of the Child (CRC), General comment no. 2 (2002): The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15 November 2002, CRC/GC/2002/2.

⁴¹⁷ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (2012), para 11,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593071> accessed 10 March 2017. The Brighton Declaration notes, however, the principle of ‘subsidiarity’ and that national authorities are best placed to evaluate local needs and conditions, 11. This principle is reiterated in the Brussels Declaration of 2015. See High-level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility, Brussels Declaration, 27 March 2015, 1,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593072> accessed 10 March 2017.

⁴¹⁸ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XXVIII on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 19 March 2002, A/57/18, at preamble which states ‘*Taking note* of the recognition by the World Conference of the important role that national human rights institutions play in combating racism and racial discrimination, and of the need to strengthen such institutions and provide them with greater resources’. See also Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, 12–30 August 2013, CERD/C/SWE/CO/19-21, at para 9; Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 14 September 2011, CERD/C/GBR/CO/18-20, at para 14.

⁴¹⁹ Committee on the Elimination of Racial Discrimination, Concluding observations on the third and fourth periodic reports of Ireland, 10 March 2011, CERD/C/IRL/CO/3-4, at para 11.

national human rights institutions, however, states can also create topic-specific institutions, such as disability commissions,⁴²⁰ or poverty-proofing institutions.⁴²¹

A state's budget, as well as its taxation regime, has a significant effect on how human rights are operationalised and a lack of departmental resources is often cited by states as a barrier to translating from the international to the domestic.⁴²² The UN Special Rapporteur on Housing points out that this would never be a difficulty in relation to a criminal justice system: 'No one is going to say "oh no, they don't need Courts! They don't need a justice system!"; however, resources would be unlikely to be prioritised in creating a complaints mechanism for housing rights.'⁴²³

The protection of rights by the state must not be dependent on available resources.⁴²⁴ As we have seen earlier in this chapter, the UN Covenant on Economic, Social and Cultural Rights is unambiguous when it calls upon states to take the necessary steps to discharge their obligations under the treaty 'to the maximum of its available resources'.⁴²⁵ Where 'a lack of resources and chronic under-funding' are affecting the protection of rights, such as delays in criminal proceedings, for example, additional or supplementary budgetary resources should be made

⁴²⁰ Such as the Commission for the Rights of Persons with Disability in Malta which, among other functions, is tasked with being the independent monitoring mechanism for the UN Convention on the Rights of Persons with Disabilities in that country, in keeping with Article 33 of the Convention and its role is to protect, promote and monitor the implementation of the Convention in line with Article 33.2. See <http://crpd.org.mt/>, accessed 15 July 2017.

⁴²¹ Such as the former Combat Poverty Agency in Ireland, which was established as a statutory body under the Combat Poverty Agency Act 1986, in order to increase awareness and understanding of poverty and inform government policy in relation to tackling poverty in Ireland. The Agency was wound up in 2009 and its functions integrated into the Department of Social Protection. See <http://www.combatpoverty.ie/>, accessed 15 July 2017.

⁴²² Interviews with Colin Wrafter (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as 'Participant No. 2' or 'P2' and Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'.

⁴²³ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'.

⁴²⁴ UN Human Rights Committee (HRC), CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty) 10 April 1992, at para 4; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, at para 8.

⁴²⁵ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967), Article 2(1). The Committee's General Comment No. 3 goes into great detail on various aspects of how these obligations might work in practice, such as without discrimination (at para 1), in a manner that is not retrogressive (at para 9), taking minimum core obligations into account (at para 10), and protecting the vulnerable at times of resource constraints (at para 12). See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The nature of States parties obligations (Art. 2, par.1) 14 December 1990, E/1991/23 and also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, at para 14.

available by the state.⁴²⁶ But individuals lacking resources should not be limited in claiming their rights, and should be able to access their rights irrespective of their income.⁴²⁷

States can implement rights by allocating ‘adequate human and financial resources’ to appropriate educational strategies in relation to those rights,⁴²⁸ the provision of healthcare,⁴²⁹ the supply of housing,⁴³⁰ the provision of special measures for persons belonging to national minorities,⁴³¹ the resourcing of strategies,⁴³² and services more generally.⁴³³ Guidance from treaty bodies even goes as far as identifying how states might consider certain rights in national budgets.⁴³⁴ ‘Resources’ can also refer to the ownership or control of physical resources, rather than those of monetary value, such as the ownership of natural resources by indigenous peoples,⁴³⁵ or the access, more generally, to ‘natural and common resources’ such as water,

⁴²⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, at 27. See, for example, UN Human Rights Committee Concluding observations, Democratic Republic of Congo, CCPR/C/COD/CO/3 (2006), at para 21, Central African Republic, CCPR/C/CAF/CO/2 (2006), at para 16.

⁴²⁷ UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 20 August 2004, A/60/18 at para 1(b); UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, at para 7.

⁴²⁸ Such as intercultural education towards the eradication of hate speech, UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 35, Combating racist hate speech, 26 September 2013, CERD/C/GC/35, at para 33.

⁴²⁹ UN Committee on the Rights of the Child (CRC), General comment No. 3 (2003): HIV/AIDS and the rights of the child, 17 March 2003, CRC/GC/2003/3, at 40(b).

⁴³⁰ Council of Europe, Committee of Ministers, Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, 23 February 2005, at paras 3 and 40; International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967), Article 11; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, at paras 4, 7, 8(b) 8(e) 10, 12, 14 and 15; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, at paras 8 and 16.

⁴³¹ Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157, at para 62.

⁴³² European Committee Against Racism and Intolerance, *Report on the United Kingdom (fifth monitoring cycle)*, CRI(2016)38, at para 109.

⁴³³ UN Committee on the Rights of the Child (CRC), General comment No. 7 (2005): Implementing child rights in early childhood, 1 November 2005, CRC/C/GC/7, at paras 20, 23, 31, 34 and 38.

⁴³⁴ UN Committee on the Rights of the Child (CRC), General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para 6) CRC/GC/2003/5, 27 November 2003, at paras 9, 31, 45 and 51–52; UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, at para 20; UN Committee on the Rights of the Child (CRC), General comment No. 19 (2013) on public budgeting for the realization of children’s rights, 20 July 2016, CRC /C/GC/19.

⁴³⁵ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XXIII on the rights of indigenous peoples, 18 August 1997, A/52/18, at para 5; UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 34, Racial discrimination against people of African descent, 8 August–2 September 2011, CERD/C/GC/34, at para 4(a). See also, for example, Committee

sanitation and energy.⁴³⁶

Guidance from the international mechanisms also sometimes directs states to fulfil certain rights via more direct action, such as the refurbishing of a prison,⁴³⁷ or putting in place social welfare, healthcare and community services.⁴³⁸ It can include guidance on the construction of houses or accommodation for rights holders in a way that takes account of cultural adequacy,⁴³⁹ the direct provision of culturally appropriate accommodation to Gypsy and Traveller communities,⁴⁴⁰ or practical measures to implement policies in a way that will have concrete results for vulnerable groups, such as Roma communities' access to the labour market and housing.⁴⁴¹ As part of providing for structures, resources and services, states can also establish mechanisms that provide for consultation with and participation of rights holders,⁴⁴² and also for more formal mechanisms such as social partnership structures or national dialogues.⁴⁴³

on the Elimination of Racial Discrimination in its Concluding observations on Finland's twentieth to twenty-second periodic reports in 2012, CERD/C/FIN/CO/20-22, at para 11.

⁴³⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, at para 8(b).

⁴³⁷ Council of Europe, 'Remarks on the supervision of the execution by the Committee of Ministers: new working methods' in *Supervision of the execution of judgments and decisions of the European Court of Human Rights*, 10th Annual Report of the Committee of Ministers (2016) 283–292, at 285, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680706a3d> accessed 16 April 2017.

⁴³⁸ UN Committee on the Rights of the Child (CRC), General comment No. 7 (2005): Implementing child rights in early childhood, 1 November 2005, CRC/C/GC/7, at paras 24, 26, 27, 31 and 34.

⁴³⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant) 13 December 1991, E/1992/23, at para 8(g); Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 14 September 2011, CERD/C/GBR/CO/18-20, at 25(b).

⁴⁴⁰ Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 14 September 2011, CERD/C/GBR/CO/18-20, at para 28; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth and twentieth periodic reports of Italy, 17 February 2017, CERD/C/ITA/CO/19-20, at para 21(b); Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland, 3 October 2016, CERD/C/GBR/CO/21-23, 25(b); Committee on the Elimination of Racial Discrimination, Concluding observations on First and Second Periodic Reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at para 21; Committee on the Elimination of Racial Discrimination, Concluding observations on Third and Fourth Periodic Reports of Ireland, 4 April 2011, CERD/C/IRL/CO/3-4, at para 13.

⁴⁴¹ Committee on the Elimination of Racial Discrimination in its Concluding observations on Finland's twentieth to twenty-second periodic reports in 2012, CERD/C/FIN/CO/20-22, at para 15; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, 12–30 August 2013, CERD/C/SWE/CO/19-21, at para 20(e).

⁴⁴² UN Office of the High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (Office of the High Commissioner for Human Rights 2012) 85.

⁴⁴³ For example, the UN Committee on the Rights of the Child's General Comment No. 12, in relation to Article 12 of the Convention on the Rights of the Child concerning the right of the child to be heard, notes opportunities for children's participation at local level in local youth parliaments, municipal children's councils and ad hoc consultations, but also notes that these sorts of structures may allow for only a relatively small number of children to engage. The UN Committee recommends that children should be supported to establish their own

In summary, therefore, as well as the creation of law and policy, giving effect to human rights can and should take place by way of the creation of national institutions and other kinds of bodies that are mandated to protect rights; by the allocation of human and financial resources to these bodies, to physical infrastructure and to the provision of services or to the rollout of strategies; as well as the provision of services themselves. However, both of the previous ‘component parts’ of operationalisation are intrinsically linked to the process of measurement. Measuring progress or data is also a key element of operationalisation across a number of other disciplines, conceived of as a process that happens through setting indicators or appropriate tools for use in the measurement process as well as the gathering of accurate and reliable data from multiple sources.⁴⁴⁴ In the context of human rights obligations, assessment of a state’s compliance with such obligations can happen in a number of ways and the next section now turns to this topic.

Measuring compliance with rights

According to the Office of the High Commissioner for Human Rights (OHCHR), human rights monitoring is the ‘systematic gathering of information with a view to evaluating compliance with human rights commitments’.⁴⁴⁵ The terms ‘monitoring’, ‘monitoring and evaluation’ and ‘measuring’ are all used interchangeably in this regard. For the purposes of this thesis, the terms ‘measuring’ or ‘measurement’ are used. A recommendation on ‘systematic work for implementing human rights at the national level’ from former Commissioner Thomas Hammarberg in 2009 sets out steps that member states may take for the purpose of ‘systematic

child-led organisations and initiatives, which should contribute the child’s perspectives on a range of matters such as design, transport, health and other services. See Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, at paras 127 and 128.

⁴⁴⁴ See, for example, Paola Bollini and Katharina Quack-Lötscher, ‘Guidelines-based indicators to measure quality of antenatal care’ (2013) *Journal of Evaluation in Clinical Practice*, 1; Jungah Bae, Dorothy M Daley, and Elaine B Sharp, ‘Understanding city engagement in community-focused sustainability initiatives’ (2013) 15 *Cityscape: A Journal of Policy Development and Research* 143; Sascha Wüstenberg, ‘Nature and validity of complex problem solving’ (PhD thesis, Ruprecht-Karls-Universität Heidelberg 2013); Solomon Messing and Sean J Westwood, ‘Friends that matter: how social distance affects selection and evaluation of content in social media’ (2012) Conference presentation, Midwest Political Science Association, Chicago, April 2012, 25; Hester Duursema, ‘Strategic leadership: moving beyond the leader-follower dyad’ (PhD thesis, Erasmus University 2013); and Myrna Q Mallari and Myrel M Santiago, ‘The research competency and interest of accountancy faculty among state colleges and universities in region III’, (2013) 2 *Review of Integrated Business and Economics* 51.

⁴⁴⁵ UN Office of the High Commissioner for Human Rights, *Report on Implementation of Economic, Social and Cultural Rights* (Office of the High Commissioner for Human Rights 2009) E/2009/90, 4.

human rights implementation’,⁴⁴⁶ such as conducting a baseline study; carrying out inclusive and participatory dialogue; developing human rights indicators; collecting reliable data; and using these steps to ‘develop a national human rights action plan or strategy where the main human rights concerns are identified and suitable measures to address these problems are set’.⁴⁴⁷

Assessing how a state complies with socio-economic rights presents a number of ‘complex challenges’, more empirical than legal, say Edward Anderson and Marta Foresti.⁴⁴⁸ How do we know, the authors ask, what a ‘sufficient step’ is, when it is taken by a state? And how do we know that such a step would achieve rights realisation in one area without lowering it in another, for example?⁴⁴⁹ Anderson and Foresti say that compliance with socio-economic rights should not be seen as insurmountable and suggest three actions that can assist: firstly, the use of tools or indicators; secondly, the creation of partnerships or other kinds of domestic structures that can act as monitors; and thirdly, the gathering of data. The ‘OPERA’ framework (named ‘because it triangulates Outcomes, Policy Efforts and Resources to make an overall Assessment’) developed by the Centre for Economic and Social Rights (CESR) is another

⁴⁴⁶ Commissioner for Human Rights, *Recommendation on systematic work for implementing human rights at the national level*, CommDH(2009)3, 5, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da952> accessed 10 March 2017.

⁴⁴⁷ Commissioner for Human Rights, *Recommendation on systematic work for implementing human rights at the national level*, CommDH(2009)3, 9, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da952> accessed 10 March 2017. Hammarberg suggested that action plans should be debated and adopted by parliaments to ensure continuity and human rights planning should be coordinated with budgetary processes so that proper funding can be secured. Human rights should be integrated into ‘the ordinary work’ of public administration and at local authority level and a ‘human rights culture’ fostered by human rights education and training and accessible awareness-raising measures, at 15–16. Closely related to ‘Recommendations’, and also in keeping with Article 8 of the resolution, are ‘Opinions’, in which the Commissioner can build on the provisions of international instruments, see <https://www.coe.int/en/web/commissioner/opinions> accessed 10 March 2017. The 2009 Opinion Concerning Independent and Effective Determination of Complaints against the Police contains a detailed description of the structure, functions and operations of independent police complaints bodies. The Opinion expands on recent progress in human rights law, policy and practice but, more importantly, goes further than the Strasbourg Court’s jurisprudence. ‘As an accompaniment to the European Code of Police Ethics the Commissioner’s Opinion represents an important contribution to the development of policy’, says Graham Smith. See Graham Smith, ‘Every complaint matters: Human Rights Commissioner’s opinion concerning independent and effective determination of complaints against the police’ (2010) 38 *International Journal of Law, Crime and Justice*, 59, 61.

⁴⁴⁸ Edward Anderson and Marta Foresti, ‘Assessing compliance: the challenges for economic and social rights’ (2009) 1 *Journal of Human Rights Practice* 469, 469.

⁴⁴⁹ Edward Anderson and Marta Foresti, ‘Assessing compliance: the challenges for economic and social rights’ (2009) 1 *Journal of Human Rights Practice* 469, 470.

practical framework that brings together both tools and techniques into a single methodology.⁴⁵⁰

Setting indicators

Development of a national human rights action plan, with associated benchmarks and indicators, is one method for a state to monitor its own fulfilment with regard to rights,⁴⁵¹ and also for national human rights institutions, civil society actors and the private sector to use as a monitoring tool.⁴⁵² Care is needed, however, to ensure linkage with other national development frameworks, such as those emanating from the United Nations Development Programme, International Monetary Fund or World Bank, ‘to ensure that human rights concerns are not unwittingly quarantined in a separate “sector”’.⁴⁵³ The Office of the High Commissioner suggests that states should develop indicators of differing typologies⁴⁵⁴ in order to measure across multiple categories⁴⁵⁵ for full effect when feeding into a national plan on human rights.⁴⁵⁶

The United Nations and regional mechanisms have made progress in recent years around the development of indicators as tools for the measurement of human rights.⁴⁵⁷ The UN High Commissioner for Human Rights has urged treaty bodies to make Concluding Observations

⁴⁵⁰ Center for Economic and Social Rights, *The OPERA Framework: Assessing compliance with the obligation to fulfil economic, social and cultural rights* (CESR 2012), iii.

⁴⁵¹ United Nations High Commissioner for Human Rights (2016) National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms, HR/PUB/16/1, 23–24. See also UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, 18.

⁴⁵² United Nations High Commissioner for Human Rights (2016) National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms, HR/PUB/16/1, 22–23.

⁴⁵³ United Nations High Commissioner for Human Rights (2002) Handbook on National Human Rights Plans of Action, Professional Training Series No. 10, HR/P/PT/10, 2, www.ohchr.org/Documents/Publications/training10en.pdf accessed 21 April 2017.

⁴⁵⁴ Namely: quantitative and qualitative indicators; fact-based and judgement-based indicators; performance and compliance indicators; and benchmarks. See UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (Office of the High Commissioner for Human Rights 2012) HR/PUB/12/5, 16–20.

⁴⁵⁵ Such as structures, processes and outcomes.

⁴⁵⁶ UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (Office of the High Commissioner for Human Rights 2012) HR/PUB/12/5, 34–36.

⁴⁵⁷ See OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments: a Conceptual and Methodological Framework* (HRI/MC/2006/7, 11 May 2006); OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights* (HRI/MC/2008/3) and *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, Geneva 4–29 July 2011 (E/2011/90) and Council of Europe Commissioner for Human Rights, viewpoint 17/08/09: ‘Serious implementation of human rights standards requires defined benchmarking indicators’.

that are more ‘short, focused and concrete’ for the purposes of being more conducive to measurement on the part of stakeholders.⁴⁵⁸

Establishing domestic mechanisms or dialogues

Former UN High Commissioner for Human Rights Navi Pillay called for member states to establish standalone ‘standing national reporting and coordination mechanisms’ (SNRCMs) that could act as a national focal point and ensure consultation but also a level of coordination between relevant stakeholders both in the preparation of state reports and in the following up of Concluding Observations.⁴⁵⁹ In this regard, there is a key role to be played by non-governmental organisations and civil society non-state actors. Anderson and Foresti speak of ‘a constructive dialogue’ that could take place between practitioners, ‘thinkers’ and policy-makers at national level in order to identify practical proposals and solutions to how socio-economic rights are put in place.⁴⁶⁰ This is the kind of process that has the potential to play a key role in the treaty-monitoring process at domestic level.

More recently, UN High Commissioner Zeid Ra’ad Al Hussein has called for states to invest in the establishment of ‘national mechanisms for reporting and follow up’ (NMRFs) as a way of ‘bringing international and regional human rights norms and practices directly to the national level’, given that ‘the essence of the reporting process is nationally driven’, a process which requires political commitment and dedicated resources.⁴⁶¹ Similarly, the Committee of Ministers of the Council of Europe suggests the establishment of ‘an inter-institutional network with a rapid response capacity’ with the purpose of collecting information to feed into the drafting of action plans and reports to respond to the execution of judgments from the Court.⁴⁶²

⁴⁵⁸ UN Office of the High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (Office of the High Commissioner for Human Rights 2012) 60.

⁴⁵⁹ UN Office of the High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (Office of the High Commissioner for Human Rights 2012) 85.

⁴⁶⁰ Edward Anderson and Marta Foresti, ‘Assessing compliance: the challenges for economic and social rights’ (2009) 1 *Journal of Human Rights Practice* 469, 476.

⁴⁶¹ United Nations High Commissioner for Human Rights (2016) ‘National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms’, HR/PUB/16/1, iii. See also, more generally, the study which informed this guide, United Nations High Commissioner for Human Rights (2016) *Study on State Practices of Engagement with International Human Rights Mechanisms*, HR/PUB/16/1/Add.1.

⁴⁶² See Directorate General of Human Rights and Rule of Law Directorate of Human Rights, Department for the Execution of Judgments of the European Court of Human Rights, ‘Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights’ (Council of Europe 2015),

A number of individual international instruments also specify the establishment of monitoring mechanisms at domestic level, such as the Convention on the Elimination of Discrimination against Women, which speaks of requiring states to ‘ensure the national implementation of international instruments and decisions of international and regional justice systems relating to women’s rights and establish monitoring mechanisms for the implementation of international law’.⁴⁶³ Another example is the Committee on Racial Discrimination, which recommends that states ‘establish national commissions or other appropriate bodies’ to facilitate implementation of the Convention, including monitoring.⁴⁶⁴ Both the UN Convention on the Rights of Persons with Disabilities⁴⁶⁵ and the Optional Protocol to the Convention against Torture⁴⁶⁶ require states parties to establish national mechanisms at state level which will have the purpose of facilitating implementation and, in the case of the Disability Convention, this domestic mechanism is of interest in how it specifies a formal role for disabled persons in the mechanism.

There may be a risk that a state would consider the establishment of a national human rights institution as fulfilling the role of a domestic reporting mechanism and, in this case, the Office of the High Commissioner makes a clear distinction between the two.⁴⁶⁷ The OHCHR states that national mechanisms for reporting and national human rights institutions are ‘different but complementary’; a national human rights institution is ‘an independent, State-funded organization, with a constitutional or legislative basis and a mandate to promote and protect human rights at the national level’ whereas ‘a national mechanism for reporting and follow up . . . is a mechanism or structure that is fully part of the Government’.⁴⁶⁸ Both institutions are

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592206> accessed 21 April 2017, 13.

⁴⁶³ UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 33 (2015) on women’s access to justice, 23 July 2015, CEDAW/C/GC/33, at para 56(e).

⁴⁶⁴ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XVII on the establishment of national institutions to facilitate the implementation of the Convention, 19 March 1993, A/48/18.

⁴⁶⁵ Convention on the Rights of Persons with Disabilities, adopted 13 Dec. 2006, G A Res. 61/106, 61 UN GAOR, Supp. (No. 49), UN Doc. A/RES/61/106/AnnexI, at 65 (2006). Article 33 of the Convention sets out how States parties ‘shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation’ of the Convention.

⁴⁶⁶ UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199.

⁴⁶⁷ United Nations High Commissioner for Human Rights (2016) ‘National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms’, HR/PUB/16/1.

⁴⁶⁸ United Nations High Commissioner for Human Rights (2016) ‘National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms’,

ideally part of a domestic human rights system, ‘which also includes an independent and effective judiciary and a functioning administration of justice, a representative national parliament with parliamentary human rights bodies; and a strong and dynamic civil society’.⁴⁶⁹ However, the civil society organisation, the Centre for Economic and Social Rights, supports the view of the Office of the High Commissioner that national human rights institutions are ‘key collaborators in the development and use of quantitative monitoring methodologies’, given that they have a legally defined relationship with the state, as well as having a broader set of ‘tools’ than either civil society or the judiciary, and are therefore key to measuring compliance at domestic level.⁴⁷⁰

One of the primary methods for measuring a state’s compliance with rights is how the courts view the degree of fulfilment of that state’s obligations in the case of the instruments to which it is a party. This is carried out by the administration of civil and criminal law, by ruling on breaches of constitutional rights and freedoms, and by judicial review. An independent judiciary tasked with overseeing and upholding human rights through a system of judicial review is an important strand, in this regard, and this is also provided for in international treaties.⁴⁷¹ Of course, the upholding of human rights provisions in court rulings is dependent on the willingness and ability of domestic courts to enforce those rights.⁴⁷² The role of the courts is itself limited to ‘justiciable’ matters and the concept of justiciability or non-justiciability decides when a matter or may not be suitable for resolution by the courts. In addition, the judicial review process has limited potential as a rights-protecting mechanism,

HR/PUB/16/1, 3. See also, for example, the establishment in France of a national consultation procedure, established by the Ministry of Foreign Affairs, which coordinates the execution of judgments of the European Court of Human Rights between the national human rights institution (National Consultative Commission for Human Rights (CNCDH)) and other human rights bodies such as the Human Rights Defender (DDD) and the Controller-General for Places of Deprivation of Liberty (CGLPL). The Ministry of Foreign Affairs transmits any judgments finding a violation of the Convention to these bodies for their views on measures to be taken for the execution of judgments, in order to prepare action plans. Once action plans are drawn up they are also sent to the French Parliament for information. See Council of Europe, ‘Appendix 6 – Actions and developments relevant for execution’ in *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 10th Annual Report of the Committee of Ministers (2016) 272, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680706a3d> accessed 16 April 2017.

⁴⁶⁹ United Nations High Commissioner for Human Rights (2016) ‘National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms’, HR/PUB/16/1, 3.

⁴⁷⁰ Center for Economic and Social Rights, *Enhancing the Capacity of National Human Rights Institutions to Monitor Economic, Social and Cultural Rights* (CESR Concept Note 2010) [unpublished], 1.

⁴⁷¹ As stated in Article 9(3) of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.

⁴⁷² Courtney Hillebrecht, ‘The domestic mechanisms of compliance with international human rights law: case studies from the inter-American human rights system’ (2012) 34 *Human Rights Quarterly*, 959, at 970.

given that it is concerned with the process of decision-making, rather than the substance or merits of the decision in question. An overly restrictive interpretation of dualism by a state, as was seen in Chapter 1 in the Irish context, may result in a dominant narrative of required legislative or constitutional incorporation of international human rights law before the courts can ‘monitor’ any compliance with such instruments.

Gathering data

Gathering of statistical data, as a form of measurement, can be key to the process of national plans on human rights, particularly when feeding into a baseline study as part of that plan.⁴⁷³ For example, the European Union Agency for Fundamental Rights and European Court of Human Rights say statistical data plays an important role for rights holders when making discrimination claims:

It [data] is particularly useful in proving indirect discrimination, because in these situations the rules or practices in question are neutral on the surface. Where this is the case it is necessary to focus on the effects of the rules or practices to show that they are disproportionately unfavourable to specific groups of persons by comparison to others in a similar situation. Production of statistical data works together with the reversal of the burden of proof: where data shows, for example, that women or disabled persons are particularly disadvantaged, it will be for the State to give a convincing alternative explanation of the figures.⁴⁷⁴

Guidance on the gathering of data for the purposes of monitoring is seen across the international and regional human rights frameworks, from the collection of data on hate speech⁴⁷⁵ to the

⁴⁷³ United Nations High Commissioner for Human Rights (2002) Handbook on National Human Rights Plans of Action, Professional Training Series No. 10, HR/P/PT/10, 63, which states ‘It is important to provide disaggregated data, including for race, gender and other criteria, so that the incidence of discrimination is apparent. Where such indicators and information are not available, the national action plan may ultimately include plans to collect the necessary data regularly.’

www.ohchr.org/Documents/Publications/training10en.pdf accessed 21 April 2017.

⁴⁷⁴ European Union Agency for Fundamental Rights and European Court of Human Rights, Handbook on European non-discrimination law (2011), ‘Role of statistics and other data’, 129, at 129.

⁴⁷⁵ European Commission Against Racism and Intolerance, *ECRI Report on the United Kingdom* (fifth monitoring cycle), 4 October 2016, CRI(2016)38, at para 69. ECRI also recommends the recording of data on racist incidents where sentences have been dropped through the process of accepting guilty pleas.

recording of racist incidents.⁴⁷⁶ Indeed, the Committee on the Elimination of Racial Discrimination has a General Recommendation devoted to the collection of data,⁴⁷⁷ and generally requests that states reporting to the Committee provide both quantitative and qualitative data on factors affecting the enjoyment of rights by vulnerable groups in particular, such as women, non-citizens and indigenous peoples.⁴⁷⁸ Several other UN treaty bodies also

⁴⁷⁶ European Commission Against Racism and Intolerance, *ECRI Report on Ireland* (fourth monitoring cycle) 19 February 2013, CRI(2013)1, at para 23, which states ‘ECRI strongly encourages the Irish authorities to improve and to supplement the existing arrangements for collecting data on racist incidents and the follow-up given to them by the criminal justice system. In this respect, it draws the authorities’ attention to the section of its General Policy Recommendation No. 11 on combating racism and racial discrimination in policing which concerns the role of the police in combating racist offences and monitoring racist incidents.’ See, accordingly, European Commission Against Racism and Intolerance, *ECRI General Policy Recommendation no 11 on Combating Racism and Racial Discrimination in Policing*, adopted on 29 June 2007, CRI(2007)39.

⁴⁷⁷ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XXIV concerning Article 1 of the Convention, 27 August 1999, A/54/18, relating to information on the demographic composition of the population, which states ‘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’, at para 3 and ‘The Committee recalls general recommendation IV, which it adopted at its eighth session in 1973, and paragraph 8 of the general guidelines regarding the form and contents of reports to be submitted by States parties under Article 9, paragraph 1, of the Convention (CERD/C/70/Rev.3), inviting States parties to endeavour to include in their periodic reports relevant information on the demographic composition of their population, in the light of the provisions of Article 1 of the Convention, that is, as appropriate, information on race, colour, descent and national or ethnic origin’, at para 4.

⁴⁷⁸ David Weissbrodt, ‘The approach of the committee on the elimination of racial discrimination to interpreting and applying international humanitarian law’ (2010) 19 *Minnesota Journal of International Law*, 327, at 339, citing, for example, CERD, Concluding observations the Committee on the Elimination of Racial Discrimination, Uzbekistan, 15, CERD/CJUZH/CO/5, 4 April 2006, which states ‘The Committee regrets that insufficient information was provided ... on the number of women of non-Uzbek ethnic origin occupying positions of responsibility within the State party’s administrative, political or private sector . . . (t)he State party should provide further information on these issues, including disaggregated statistical data by sex, ethnic origin, occupational sector, and functions assumed.’ See also, for example, CERD’s Concluding observations on Finland’s twentieth to twenty-second periodic reports in 2012 (CERD/C/FIN/CO/20-22), which, under the heading of ‘Demographic composition of the population’, recommends that the state ‘collect and provide the Committee with reliable and comprehensive statistical data on the ethnic composition of its population and economic and social indicators disaggregated by ethnicity and gender, including data on Sámi indigenous peoples, other minority groups and immigrants, in order to enable the Committee to evaluate the enjoyment of civil, political, economic, social and cultural rights by various groups of its population’; and its Concluding observations on Mexico combined sixteenth and seventeenth periodic reports in 2012 (CERD/C/MEX/16-17) ‘requests the State party to provide information on the subject in its next periodic report, which should be more substantive and shorter, with tables, data and information to clarify the progress made in implementing the Committee’s recommendations’.

offer guidance to states on the collection and use of data, as a form of measurement,⁴⁷⁹ or on other forms of measurement.⁴⁸⁰

In summary, therefore, we see guidance from the international framework on the importance of systematic work for implementing human rights at national level, something that can be particularly challenging in complexity when it comes to socio-economic rights. States should ideally work towards developing indicators as tools for measurement, as well as establishing standalone national reporting mechanisms or other forms of ‘constructive dialogue’ at national level. Two international instruments which specify the establishment of formal monitoring mechanisms at domestic level, the UN CRPD and the UN Optional Protocol to the Convention against Torture are of interest here in how they demonstrate that there is no reason in principle

⁴⁷⁹ For example, UN Committee on the Rights of the Child (CRC), General comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/C/2003/4 at para 13 (‘data collection’); UN Committee on the Rights of the Child (CRC), General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para 6) 27 November 2003, CRC/C/2003/5, at paras 48–50, which speak to several areas not contained in the original UN Convention on the Rights of the Child, such as the collection and use of disaggregated data that may enable the identification of particular discrimination against children; UN Committee on the Rights of the Child (CRC), General comment No. 7 (2005): Implementing child rights in early childhood, 1 September 2005, CRC/C/GC/6, at para 90–100 (‘Training, data and statistics’); UN Committee on the Rights of the Child (CRC), General comment No. 7 (2005): Implementing child rights in early childhood, 1 September 2005, CRC/C/GC/6, at para 39 (‘Data collection and management’); UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9 at 19 (‘Data collection and statistics’); UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children’s rights in juvenile justice, 25 April 2007, CRC/C/GC/10, at para 98–99 (‘Data collection, evaluation and research’); UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 9 (1989) Statistical data concerning the situation of women, which ‘[r]ecommends that States parties should make every effort to ensure that their national statistical services responsible for planning national censuses and other social and economic surveys formulate their questionnaires in such a way that data can be disaggregated according to gender, with regard to both absolute numbers and percentages, so that interested users can easily obtain information on the situation of women in the particular sector in which they are interested’; UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 17 (1991) Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product, which recommends that states ‘[i]nclude in their reports submitted under Article 18 of the Convention information on the research and experimental studies undertaken to measure and value unremunerated domestic activities, as well as on the progress made in the incorporation of the unremunerated domestic activities of women in national accounts’, at (e); Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on harmful practices, 2014, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, at para VII(A) (‘Data collection and monitoring’).

⁴⁸⁰ For example, UN Committee on the Rights of the Child (CRC), General comment no. 1, The Aims of Education, 17 April 2001, CRC/GC/2001/1, at para 22; UN Committee on the Rights of the Child (CRC), General comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Arts 19; 28, para 2; and 37, inter alia) 2 March 2007, CRC/C/GC/8, at 50–52 (‘Monitoring and evaluating’); and UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, 27 February 2007, CRC/C/GC/9 at 24 (‘Independent monitoring’).

that non-state actors cannot be involved in the measurement of compliance with rights. These models are more fully explored in later chapters.

Operationalisation as a process of translating, implementing and monitoring

To conclude, across a range of disciplinary perspectives, we have seen that operationalisation has the characteristics of making specific that which is vague or general, or translating from the abstract to the concrete, also requiring specific mechanisms of measurement in order to be effective. These characteristics can be seen emerging again in the guidance offered by the international and regional human rights legal frameworks: in the General Comments, Concluding Observations and jurisprudence of the UN treaty-monitoring bodies and in the ways in which the Council of Europe expects signatories to the European Convention on Human Rights to give effect to its provisions in domestic law and to act upon the findings of judgments from the European Court of Human Rights at Strasbourg.

Firstly, in this guidance we see the desire for states parties to move from the abstract through translating the provisions of international instruments into law and policy. We have seen the call for human rights standards and principles, despite ‘not always [being] directly amenable to policymaking and implementation’, ‘to be transformed into a message that is more tangible and operational’.⁴⁸¹ We have seen the requirement for states to take ‘appropriate legislative and other measures, including sanctions where appropriate’,⁴⁸² but also to modify or abolish existing laws in a way that embodies principles of the treaties in national constitutions.⁴⁸³ This can include ‘particularly the adoption of legislative measures’⁴⁸⁴ or the creation of judicial or administrative mechanisms, or the conducting of investigations for past violations.⁴⁸⁵ We have seen calls for ways that can act as ‘a more rigorous approach in seeking to tackle systemic violations’ of the treaties in question.⁴⁸⁶ Secondly, we have also seen in this guidance a call

⁴⁸¹ UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (Office of the High Commissioner for Human Rights 2012) HR/PUB/12/5, 2.

⁴⁸² Convention on the Elimination of All Forms of Discrimination against Women GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), at Article 2(b).

⁴⁸³ Convention on the Elimination of All Forms of Discrimination against Women GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), at Article 2(a).

⁴⁸⁴ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 993 UNTS 3, reprinted in 6 ILM 360 (1967), Article 2(1).

⁴⁸⁵ UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, at Articles 4, 6, 13 and 15.

⁴⁸⁶ Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2011) 85. Since 2004, the pilot procedure has been used where the legal issue in question has already been determined in a

for states parties to implement the principles by the ‘creation of appropriate judicial and administrative mechanisms for addressing claims of rights violations’,⁴⁸⁷ or by making ‘programmatically and institutional improvements’.⁴⁸⁸ Finally, we have also seen in this guidance the desire for states parties to conduct some form of measurement of compliance with the rights in question, by establishing ‘monitoring mechanisms for the implementation of international law’⁴⁸⁹ or by creating ‘standing national reporting and coordination mechanisms’.⁴⁹⁰ Such ‘systematic work for implementing human rights at the national level’⁴⁹¹ might include the development of indicators, the collection of data, or the development of national human rights action plans.⁴⁹²

These three characteristics of operationalisation have been divided out thus far in this chapter for the purposes of exposition. In reality, however, they work concurrently and synchronously, and are interrelated and interlinked. For example, a state may translate an international human rights treaty domestically through statute and a national human rights institution may be tasked with informing and influencing the making of that statute, but judicial decisions will inform the content of subsequent reiterations of the same law. In addition, as has been stated, litigation is a particularly limited juridical method of measuring or monitoring the law, although it is a form of monitoring all the same.

previous case. The Court may, in a pilot judgment, set out a framework for general measures to be taken by states. In some recent cases subject to the pilot judgment procedure, the Court does appear to have begun instructing states on which individual or general measures they should take around the execution of judgments. While delivering pilot judgments shows the Court’s awareness of systemic problems, the resulting judgments will still need to be followed up by the Committee of Ministers for supervision. In pilot judgments, the Court waits for the State’s response to before it deals with similar cases. If the respondent state still fails to adopt measures to correct the violation in a pilot judgment, the Court must continue to examine all cases pending before it which have presented with the same issue. See *Ocalan v Turkey* (2005) 41 EHRR 45; *Broniowski v Poland* (2005) 40 EHRR 21; *Sejdovic v Italy* App No. 56581/00 (2006); *L v Lithuania* (2008) 46 EHRR 22; *Zengin v Turkey* (2008) 46 EHRR 44; *Burdov (No. 2) v Russia* App No. 59498/00 (2009) and *Gluhaković v Croatia* App No. 21188/09 (2011).

⁴⁸⁷ UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, at Articles 4, 6, 13 and 15.

⁴⁸⁸ UN Office of the High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (Office of the High Commissioner for Human Rights 2012) 61.

⁴⁸⁹ CEDAW (2015) General recommendation No. 33 on women’s access to justice, para 56(e).

⁴⁹⁰ UN Office of the High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (Office of the High Commissioner for Human Rights 2012) 85.

⁴⁹¹ Commissioner for Human Rights, ‘Recommendation on systematic work for implementing human rights at the national level’ ‘CommDH(2009)3’, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806da952> accessed 10 March 2017.

⁴⁹² See Graham Smith, ‘Every complaint matters: Human Rights Commissioner’s opinion concerning independent and effective determination of complaints against the police’ (2010) 38 *International Journal of Law, Crime and Justice* 59, 61.

In addition, it follows that the three characteristics of translation, implementation and monitoring may be only partially or erratically in place within a state, or even not present at all. While the international literature largely focuses upon the state as the entity that legislates, implements and measures at domestic level, the rights in question are not all related to state functions, and therefore there is no reason in principle that at least some of these cannot be co-delivered in conjunction with non-state actors, particularly, as we have seen, in the case of measurement.

The section that follows now turns to a consideration of how the three characteristics are seen more broadly in an Irish context.

2.4 Operationalising in the Irish context

This section turns to the features of translating, implementing and monitoring and explores how these features translate more generally in the Irish context. The purpose of this analysis is to seek out patterns and provide an analytical framework that may be applied against shortcomings in the operationalisation of the right to culturally appropriate accommodation in the case of Traveller accommodation in Ireland more specifically, an analysis which takes place in Chapter 3.

Translating through law and policy in Ireland ⁴⁹³

As we have seen in this chapter, one of the primary ways in which international human rights bodies envisage a state's operationalisation of human rights provisions is by the creation of domestic legislation.⁴⁹⁴ Of relevance here are the difficulties with the domestication of

⁴⁹³ The Law Society of Ireland speaks of 'three spheres of human rights protection in Ireland' within a hierarchy of, firstly, the Constitution and domestic legislation; secondly, the incorporation of international human rights law; and, thirdly, European Union law. See Bríd Moriarty and Eva Massa (eds), *Law Society of Ireland: Human Rights Law* (4th edn, Oxford University Press 2012) 16.

⁴⁹⁴ The Republic of Ireland is a constitutional democracy which has governed itself since 1922. Ireland has had two constitutions since independence: The Constitution of the Irish Free State (Saorstát Éireann) adopted in 1922, and Bunreacht na hÉireann, The Constitution of Ireland, adopted in 1937. The most recent 1937 Constitution provided that the sole and exclusive power of law-making in Ireland is delegated to the Oireachtas,

international human rights provisions, as we saw in Chapter 1 in the cases of *Re Ó Laighléis*⁴⁹⁵ and *Kavanagh v Governor of Mountjoy Prison*,⁴⁹⁶ where the view was taken that international human rights treaties to which the state was party did not form part of domestic law and therefore could not confer rights on individual citizens in domestic law. As was also seen in Chapter 1, the Irish state continually emphasises its dualist stance when interacting with international human rights mechanisms.⁴⁹⁷ The Irish state's stance on dualism has been criticised by Donncha O'Connell as essentially a political move. It is a move, in O'Connell's opinion, that is not in keeping with de Valera's intentions for the spirit of the Constitution as it was drafted:

. . . dualism is no more than an enabling mechanism in the Constitution that invites Parliament to achieve a greater integration of municipal and international law by means of legislative or constitutional incorporation. This understanding of dualism is consistent with a fair appreciation of the aptitude of the Constitution's primary framer, De Valera, in the international domain. He was an avowed nationalist and a capable internationalist. When judges restate their understanding of the relevant provision of De Valera's constitution—Article 29.6, which requires some act of legislative incorporation before an international instrument can be enforced by a court—they are not objecting to international law *per se* but, rather, describing the absence of a necessary political act required in a dualist system. The real issue is, therefore, political.⁴⁹⁸

consisting of the three elements of the Office of President, Dáil Éireann and Seanad Éireann, at Article 15.2.1. In theory, therefore, the state may act only where the people have delegated their power to do so. Ireland is a common law jurisdiction, meaning that the Courts can make law through its jurisprudence, according to certain principles. An important qualification exists in relation to EU law in the Irish legal system. Since Ireland's joining of the EU (EEC) in 1973, following a constitutional referendum, all EU treaties have been approved through the referendum process, as a result of *Crotty v An Taoiseach* [1987] IR 713.

⁴⁹⁵ *Re Ó Laighléis* [1960] IR 93 (SC).

⁴⁹⁶ *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97 (SC). See also Charles Lysaght, 'The status of international agreements in Irish domestic law' (1994) 12 *Irish Law Times* 171.

⁴⁹⁷ See, for example, Ireland's Common Core Document to the United Nations in 2014, which states 'Ireland has a dualist system under which international agreements to which Ireland becomes a party do not become part of domestic law unless so determined by the Oireachtas through legislation.' United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 96.

⁴⁹⁸ Donncha O'Connell, Inaugural Editorial, *Irish Human Rights Law Review* (Clarus Press 2010), ix, at xiii. See further opinion on this, Aoife Nolan, 'It is the Government's job to protect rights, not the courts' *Irish Times* (Dublin, 7 January 2013), who argues that 'The primary responsibility for protecting and implementing economic and social rights rests with our elected representatives, not the courts' but writing these rights into the Constitution would 'make clear the priorities that government decision-making on policy, law and resource

While Ireland has ratified six core UN human rights treaties,⁴⁹⁹ and signed a further two,⁵⁰⁰ only a limited number of international human rights provisions have been incorporated into domestic law, either partially or entirely.⁵⁰¹ Of importance here, however, is the incorporation of the European Convention on Human Rights into Irish law by way of the European Convention on Human Rights Act 2003, which, as we have seen, has significance for Traveller accommodation rights, given that section 3 of the 2003 Act effectively creates a new ground of judicial review with reference to the Convention.⁵⁰²

Of interest in this regard is how the Irish Human Rights and Equality Commission Act 2014 introduces a new obligation on public bodies (including local authorities):

42 (1) A public body shall, in the performance of its functions, have regard to the need to—

allocation should reflect, in good times and bad.’ See, more recently, a Private Members’ Bill introduced by Deputy Thomas Pringle in May 2015 entitled ‘Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014’ which proposed to legislate for the state to ‘progressively realise, subject to its maximum available resources and without discrimination, the rights contained in the International Covenant on Economic, Social and Cultural Rights and that this duty will be cognisable by the courts’, following a vote at the Constitutional Convention in February 2014, where 85% of the members of the Convention voted in favour of amending the Constitution to reflect the protection of economic, social and cultural rights. See Dáil Debates, 19 May 2015. The Bill did not progress past the Second Stage, yet enabled many interesting socio-economic rights matters to be put on Dáil record during the debates. See <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017032200037?openDocument#SS00300> accessed 22 April 2017.

⁴⁹⁹ International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; Convention on the Rights of the Child.

⁵⁰⁰ Convention on the Rights of Persons with Disabilities, and International Convention for the Protection of All Persons from Enforced Disappearance.

⁵⁰¹ For example, Diplomatic Relations and Immunity Act 1967 gave force in Irish law to the Vienna Convention on Diplomatic Relations; Protection of Children (Hague Convention) Act 2000 gave force in Irish law to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996; Criminal Justice (United Nations Convention Against Torture) Act 2000 gave force in Irish law to certain articles of the Convention Against Torture; Genocide Act 1973 gave force in Irish law to certain articles of the UN Convention on the Prevention and Punishment of the Crime of Genocide; and the Refugee Convention was implemented via the 1996 Refugee Act. An example of constitutional incorporation was the Twenty-first Amendment of the Constitution which introduced a ban on the death penalty and removed textual references to capital punishment; approved by referendum on 7 June 2001 and signed into law on 27 March 2002. Also, as a Member State of the European Union, Ireland is bound by the Charter of Fundamental Rights of the European Union. The Law Reform Commission is currently examining the application of Ireland’s international obligations in domestic law, with specific focus on the State’s dualist approach arising from Article 29.6 of the Constitution of Ireland. See Law Reform Commission website at <http://www.lawreform.ie/welcome/6-international-law.383.html> accessed 11 March 2017.

⁵⁰² Section 3, European Convention on Human Rights Act 2003.

- (a) eliminate discrimination,
- (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
- (c) protect the human rights of its members, staff and the persons to whom it provides services.⁵⁰³

Public bodies are also obliged to set out, in their strategic plans and statements, their assessment of the human rights and equality issues they believe to be relevant to their functions,⁵⁰⁴ and to report annually on what they have done to address these issues.⁵⁰⁵ It remains to be seen how local authorities – as public bodies – will take the obligation on board in relation to their duties around Traveller accommodation, but this provides at least the first combined equality and human rights public sector duty to be introduced in domestic legislation in an EU member state.⁵⁰⁶

Perhaps it is useful at this stage to distinguish, in the Irish context, between (1) non-justiciable socio-economic rights that have not been incorporated into Irish law, such as many of the provisions of ICESCR; (2) justiciable civil and political rights that have not been incorporated; and (3) justiciable and incorporated civil and political rights, such as the ECHR Article 8 rights. The Irish government has repeatedly stated that its practice is to ensure that when a treaty enters into force, the state is already in a position to meet all of its obligations in relation to the instrument, and therefore adopts what might be classified as a ‘narrative policy framework’⁵⁰⁷

⁵⁰³ Section 42(1), Irish Human Rights and Equality Commission Act 2014.

⁵⁰⁴ Section 42(2)(a), Irish Human Rights and Equality Commission Act 2014.

⁵⁰⁵ Section 42(2)(b), Irish Human Rights and Equality Commission Act 2014. Under s 42(3) of the 2014 Act, the Commission may give guidance to public bodies and under s 42(4) may issue guidelines or codes of practice. Sections 42(5)–(10) give stronger powers to the Irish Human Rights and Equality Commission to invite a public body to carry out a review and prepare an action plan, where they have not performed their functions in a way that is consistent with s 42(1). However, s 42(11) states that ‘Nothing in this shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under subsection (1)’, which limits these powers to a degree.

⁵⁰⁶ Equality and Rights Alliance (2015) ‘A new public sector equality and human rights duty: Setting Standards for the Irish Equality and Human Rights Infrastructure’, at 2, <http://www.eracampaign.org/uploads/A%20New%20Public%20Sector%20Duty%20March%202015.pdf> on 6 December 2015.

⁵⁰⁷ A Narrative Policy Framework (NPF) is a theory of the policy process first identified by Michael Jones and Mark McBeth in their 2010 piece ‘A narrative policy framework: clear enough to be wrong?’, which defines policy narratives as having specific elements that are generalisable across different contexts. Michael Jones and Mark McBeth, ‘A narrative policy framework: clear enough to be wrong?’ (2010) 28 Policy Studies Journal 329.

of ‘sign first, then legislate, then ratify’ to international treaties.⁵⁰⁸ In relation to the issue of non-ratification being raised on a continual basis by various UN treaty bodies, a former senior government official has said:

Under our system, international human rights treaties are not directly applicable and we don’t ratify until we pass legislation. And that is always an issue and every time we go before a treaty-monitoring body they say the human rights law should be directly applicable, treaties should be directly applicable, and we say no we have a dualist system.⁵⁰⁹

Ireland’s national human rights institution⁵¹⁰ has articulated the opinion that the arguments against incorporation on the part of the Irish state do not stand up to legal scrutiny, with the example of Ireland’s incorporation of a number of international treaties as testament to this.⁵¹¹ In addition, and perhaps regardless of this, whether the provisions are domestically incorporated or not, the Irish state cannot ‘invoke its Constitution, or any other domestic law

⁵⁰⁸ For a recent statement of this policy, see Ireland’s Universal Periodic Review Interim Report, March 2014, at para 106.1, which states (in relation to recommendations by other states for Ireland to ratify the Convention on the Rights of Persons with Disabilities), ‘Ireland does not become party to treaties until it is first in a position to comply with the obligations imposed by the treaty in question, including by amending domestic law as necessary’. See <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx> accessed 19 August 2017. This narrative is visible in the dialogue between UN treaty body committee members and senior government officials at a number of treaty body examinations attended, namely Ireland’s first and second universal periodic review examinations in 2011 and 2016 respectively; at Ireland’s fourth periodic examination under the International Covenant on Civil and Political Rights in 2014; at Ireland’s third periodic examination under the International Covenant on Economic, Social and Cultural Rights in 2015; at Ireland’s combined third and fourth periodic examination under the UN Convention on the Rights of the Child in 2016; and at Ireland’s combined sixth and seventh periodic reports under the UN Convention on the Elimination of All Forms of Discrimination Against Women in 2017. See also Ireland’s Common Core Document to the United Nations in 2014, which states in relation to ratification of the UN Convention on the Rights of Persons with Disabilities regarding which a ten-year gap has emerged since signature of the treaty by Ireland in 2007: ‘It is the Government of Ireland’s intention to ratify the Convention as quickly as possible, taking into account the need to ensure that all necessary legislative and administrative requirements under the Convention are being met.’ United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 79.

⁵⁰⁹ Interview with Colin Wrafter (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as ‘Participant No. 2’ or ‘P2’.

⁵¹⁰ Irish Human Rights Commission, *Submission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Report under the International Covenant on Civil and Political Rights*, June 2014, para 4, <https://www.ihrec.ie/app/uploads/download/pdf/20140616113130.pdf> accessed 20 August 2017.

⁵¹¹ For example, the Diplomatic Relations and Immunity Act 1967 gave effect in domestic law to the Vienna Convention on Diplomatic Relations; the Protection of Children (Hague Convention) Act 2000 gave effect to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996; the Criminal Justice (United Nations Convention Against Torture) Act 2000 gave effect to certain articles of the Convention Against Torture; and the Genocide Act 1973 gave effect to certain articles of the UN Convention on the Prevention and Punishment of the Crime of Genocide.

as rationale for failure to comply' with the provisions of international human rights treaties to which it is a party. This is not simply an academic view,⁵¹² but is also codified in the Vienna Convention on the Law of Treaties, and is therefore accurate as a matter of international law.⁵¹³ David Fennelly points out that, while international law allows 'considerable freedom to internal legal systems in their approach to its implementation', this freedom is not without limits.⁵¹⁴ The principles of state responsibility are clearly set out by the International Law Commission in its Articles on Responsibility for States for Internationally Wrongful Acts, which states that a state 'may not rely on the provisions of its own internal law as justification for its failure to comply with its obligation'.⁵¹⁵ Importantly, though, Hogan and Whyte also note that it is not always necessary for the government to rely on statutory provisions in order to exercise their power, and do so frequently in relation to 'the conclusion of international agreements, without having to have recourse to legislation'.⁵¹⁶

The government says it refers all new draft legislation to the Office of the Parliamentary Counsel at the Office of the Attorney General for testing of its compliance with human rights.⁵¹⁷ The precise criteria followed by the Attorney General's office in assuring such compliance are not transparent, therefore evidence is not immediately visible that the office goes beyond mere compliance and addresses the positive obligations that underpin many international instruments.⁵¹⁸ Following ratification, however, international instruments are rarely directly referenced in domestic legislation, even where such legislation is in keeping

⁵¹² See 'The UN and the Eighth Amendment', Letter, *Irish Times* (Dublin, 23 June 2016), from a group of 61 legal academics and other legal professionals in relation to the UN Human Rights Committee decision in the case of *Amanda Mellet v Ireland*. The letter states 'It is immaterial to Ireland's responsibility under international law that the relevant treaties have not been incorporated into domestic law or that as such the decisions of the committee are not necessarily enforceable in Irish courts. Under international law a lack of enforcement options under domestic law, or the fact that under domestic law the committee's decision is not binding, can never be used as justification for non-compliance.'

⁵¹³ Article 26 of the Vienna Convention of the Law of Treaties states that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' Vienna Convention of the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, reprinted in 8 ILM 679 (1969).

⁵¹⁴ David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014) 1–39.

⁵¹⁵ Article 32, Articles on Responsibility for States for Internationally Wrongful Acts, International Law Commission. See David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014) 1–40.

⁵¹⁶ GW Hogan and GF Whyte, *J M Kelly: The Irish Constitution* (Tottel Publishing 2004), para 5.1.18.

⁵¹⁷ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'. The website of the Office of the Attorney General states that 'the mission of the Office of the Parliamentary Counsel to the Government (OPC) is to draft Bills on behalf of the Government, and statutory instruments on behalf of the Government and Ministers of the Government, to a consistently high standard.' See Office of the Attorney General, mission statement, <http://www.attorneygeneral.ie/pc/pc.html> accessed 19 August 2017.

⁵¹⁸ See John McManus, 'A Government addicted to legal advice' *Irish Times* (Dublin, 24 February 2016).

with the provisions of the instrument in question.⁵¹⁹ One international treaty body member says:

Regional and international human rights instruments that have been ratified are not quoted in domestic legislation, ‘ . . . as if there’s a reticence, or a concern . . . in case you might get caught by it.’⁵²⁰

The Oireachtas also has a significant role to play in the incorporation of international human rights law and how legislative proposals are shaped, through the process of Pre-Legislative Scrutiny carried out by parliamentary committees.⁵²¹ In theory, this provides an opportunity for external parties to give their views on the human rights implications of draft legislation;⁵²² however, this process still means that external views on such implications are voluntarily provided by relevant stakeholders rather than being actively sought by the government.⁵²³

Of course, the process of operationalisation by the translation of international human rights law does not happen solely via legislation incorporating it, whether partially or entirely. In many ways, this translation also happens through the adoption of policy. ‘Policy’ has been defined in multiple ways, including both the means of doing something and the goals,⁵²⁴ in other words

⁵¹⁹ See, for example, the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill 2016, which outlined a provision (at Head 2) to provide the Irish Human Rights and Equality Commission with the function ‘to act as the independent mechanism to promote, protect and monitor implementation of the Convention’. The Bill as published (retitled as the ‘Disability (Miscellaneous Provisions) Bill 2016’) makes no reference either to the independent mechanism or to the Convention on the Rights of Persons with Disabilities more broadly. See Irish Human Rights and Equality Commission, Supplementary Observations on the Disability (Miscellaneous Provisions) Bill 2016, January 2017, 4, <https://www.ihrec.ie/app/uploads/2017/01/Supplementary-Observations-on-Disability-Miscellaneous-Provisions-Bill-2016.pdf> accessed 19 August 2017.

⁵²⁰ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

⁵²¹ A general scheme of a bill prepared by a government department sets out a bill’s detailed intended provisions and is published for public consultation or parliamentary scrutiny, as appropriate. A final bill that is legally drafted must be considered by both houses of the Oireachtas during five separate stages, which allows opportunity for debate and amendments to be made, before enactment. A system of ‘pre-legislative scrutiny’ was introduced to the Houses of the Oireachtas in 2011 and formalised in parliamentary procedure in November 2013 ‘to strengthen the capacity of the Houses of the Oireachtas to hold government to account’.

See Houses of the Oireachtas ‘Spotlight on pre-legislative scrutiny’ (Library and Research Service 2014) 1, https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Final_Spotlight_PL_S_17Dec2014_172050.pdf accessed 19 August 2017.

⁵²² Such as civil society actors, the national human rights institution and other state agencies who may have an interest in the outcome.

⁵²³ Apart from the provision contained in s 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014, under which ‘either of its own volition or on being so requested by a Minister of the Government, to examine any legislative proposal and report its views on any implications for human rights or equality’.

⁵²⁴ Christopher Weible, ‘Introducing the scope and focus of policy process research and theory’ in Paul Sabatier and Christopher Weible (eds), *Theories of the Policy Process* (Westview Press 2014) 3, 4.

‘a formal decision or plan of action adopted by an actor . . . to achieve a particular goal’.⁵²⁵ The making of policy can be ‘the actions of government and the intentions that determine those actions’,⁵²⁶ but it can also be the ‘nonactions’ of that government ‘or an equivalent authority’.⁵²⁷ What then does monitoring of the effectiveness of such policy-making have to do with the operationalisation of human rights?⁵²⁸ Accountability has always been a characteristic of democratically elected governments, and ‘policy implementation deficits’ are, among other things, frequently attributed to problems to do with accountability.⁵²⁹ ‘More accountability will not necessarily ensure better accountability’ in the administration of the state, however, says Muiris MacCárthaigh.⁵³⁰ MacCárthaigh notes that when the Office of the Information Commissioner was established in 1997,⁵³¹ and the Standards in Public Office Commission established in 2001,⁵³² each followed a period of public criticism of political and administrative corruption in Ireland, yet ‘grafting new arrangements onto old structures’ does not necessarily achieve better governance.⁵³³

In theory, as one senior Irish civil servant said, ‘politicians create laws and policies, as civil servants we just implement them’.⁵³⁴ This has been echoed by the Irish government, which, in the past, has stated that ‘ministers should be responsible for policy and public service managers

⁵²⁵ David Richards and Martin Smith, *Governance and Public Policy in the UK* (Oxford University Press 2002) 1.

⁵²⁶ Thomas Birkland, *An Introduction to the Policy Process: Theories, Concepts and Models of Public Policy Making* (3rd edition, Routledge 2015) 8, quoting Clarke E Cochrane et al, *American Public Policy, An Introduction* (6th edn, St Martin’s Press 1999).

⁵²⁷ Christopher Weible, ‘Introducing the scope and focus of policy process research and theory’ in Paul Sabatier and Christopher Weible (eds), *Theories of the Policy Process* (Westview Press 2014) 4.

⁵²⁸ If ‘policy’ is defined as ‘whatever governments choose to do or not to do’. See Thomas Birkland, *An Introduction to the Policy Process: Theories, Concepts and Models of Public Policy Making* (3rd edn, Routledge 2015) 18, quoting Thomas Dye, *Understanding Public Policy* (7th edn, Prentice Hall 1992).

⁵²⁹ Muiris MacCárthaigh, ‘Governance and accountability: the limits of new institutional remedies’ in Niamh Hardiman (ed) *Irish Governance in Crisis* (Manchester University Press 2012) 23.

⁵³⁰ Muiris MacCárthaigh, ‘Governance and accountability: the limits of new institutional remedies’ in Niamh Hardiman (ed) *Irish Governance in Crisis* (Manchester University Press 2012) 27.

⁵³¹ The Office of the Information Commissioner is an independent non-parliamentary office which reviews decisions made by public bodies in relation to Freedom of Information requests. See <http://www.oic.gov.ie/en/> accessed 19 August 2017. While the Freedom of Information Commissioner is appointed by the Houses of the Oireachtas and reports to both Houses, he or she is independent of both Houses and is not accountable to them.

⁵³² The Standards in Public Office Commission is accountable to the Houses of the Oireachtas, with functions which include supervising the disclosure of interests and compliance with tax clearance requirements, the disclosure of donations and election expenditure, the expenditure of state funding received by political parties and the registration of lobbying. See <http://www.sipo.ie/en/> accessed 19 August 2017.

⁵³³ Muiris MacCárthaigh, ‘Governance and accountability: the limits of new institutional remedies’ in Niamh Hardiman (ed) *Irish Governance in Crisis* (Manchester University Press 2012) 29. MacCárthaigh lists ‘old’ forms of accountability as ombudsbodies and the Comptroller and Auditor General.

⁵³⁴ During a panel discussion at the third annual Irish Criminal Justice Agencies Conference, 28 June 2016, on the theme ‘Evidence-informed decision making: putting research into practice in criminal justice’. As witnessed by the author, 28 June 2016.

for delivery'.⁵³⁵ In practice, the process of policy-making is often more complex, says Paul Cairney:

We may associate policymaking with elected officials, but most policy is carried out by government bureaucracies and a range of – governmental, quasi-non-governmental and non-governmental – delivery organisations.⁵³⁶

Fiona Donson and Darren O'Donovan support this view, noting that generally in Ireland any executive action that affects constitutional or legal rights is required to have some form of legislative authorisation rather than discretionary decision-making being permitted, otherwise such action will be subject to judicial review.⁵³⁷ However, such review is likely to be minimal.⁵³⁸ The authors are critical of the degree to which the Irish executive enjoys 'narrow *ultra vires*' or unauthorised decision-making, a practice which should ideally 'provoke reflection upon the parliamentary process in Ireland'.⁵³⁹

As we have seen, Hogan and Whyte are of the view that it is not always necessary for the government to rely on statutory provisions in order to exercise its power, and often does so in the case of international agreements. Hogan and Whyte do go further to note that 'legislation is required before the executive may import any obligation or burden on citizens'.⁵⁴⁰ However,

⁵³⁵ Department of the Taoiseach, Programme for Government 2011, stating 'We will pin down accountability for results at every level of the public service – from Ministers down – with clear consequences for success and failure. Ministers should be responsible for policy and public service managers for delivery', 1, 27, http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Programme_for_Government_2011.pdf accessed 19 August 2017. By 2016, the Programme for Partnership Government states, ambitiously, 'For each policy challenge that the new Government prioritises there should be a clear, unambiguous high level ambition attached to it to help ensure clarity of purpose and clarity of measurement for all stakeholders.' See Department of the Taoiseach, *A Programme for Partnership Government* (Department of the Taoiseach 2016) 3, http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf, accessed 21 May 2017.

⁵³⁶ Paul Cairney, *The Policy of Evidence-Based Policymaking in the UK* (Palgrave 2016).

⁵³⁷ Under Article 34.2 of the Irish Constitution, jurisdiction over judicial review in the Irish legal system lies with the High Court at first instance, on appeal with the Court of Appeal, and with final appeal at the Supreme Court.

⁵³⁸ Such as in the example of the Irish Born Child Administrative Scheme for Immigrant Residency 2005 (IBC/05) created by the then Department of Justice, Equality and Law Reform, which allowed a number of foreign national parents of children born in the State prior to 1 January 2005 to apply for leave to remain. In the case of *Bode v Minister for Justice* [2008] 3 IR 663, a 'relatively rare judicial examination of an executive scheme', the Court found that those who were unsuccessful under the scheme were in the same legal position as they might have been prior to application. See Fiona Donson and Darren O'Donovan, *Law and Public Administration in Ireland* (Clarus Press 2015) 332.

⁵³⁹ Fiona Donson and Darren O'Donovan, *Law and Public Administration in Ireland* (Clarus Press 2015) 329.

⁵⁴⁰ GW Hogan and GF Whyte, *J M Kelly: The Irish Constitution* (Tottel Publishing 2004), para 5.1.18.

the Irish courts have been careful to defend the right of the executive to make policy, in a number of high-profile cases.⁵⁴¹

In summary, in both its legislating and policy-making around international human rights law, Ireland could be said to be cautious and relatively conservative, with a considerable amount of leeway given to the executive branch of government in this regard, seeing international human rights law standards as minima rather than as ceilings of rights protection.

Implementation in Irish structures, resources and services

As established earlier, a state also operationalises international human rights standards through the creation of structures within its jurisdiction that deal with the protection of rights, by resourcing these structures, and by the provision of services that directly fulfil certain rights. In its Common Core Document to the UN, the Irish state lists a wide range of ‘institutions and national machinery’ under its domestic framework for the protection of rights at national level.⁵⁴² The relevant paragraphs are introduced with the statement: ‘The Government recognizes the importance of independent complaints, monitoring and inspection bodies and has established the following such bodies . . .’⁵⁴³ A total of 25 ‘bodies’ are listed in the paragraphs that follow.⁵⁴⁴

1.	Human Rights Commission and the Equality Authority
2.	Equality Tribunal
3.	Irish Human Rights and Equality Commission
4.	National Employment Rights Authority
5.	Health Service Executive
6.	Child and Family Agency
7.	Health and Safety Authority
8.	National Disability Authority

⁵⁴¹ Such as *MhicMhathúna v Attorney General* [1995] 1 IR 484, *Sinnott v Minister for Education* [2001] 2 IR 545, and *TD v Minister for Education* [2001] 4 IR 259.

⁵⁴² Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, 100–130.

⁵⁴³ Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, 100.

⁵⁴⁴ As this Common Core Document dates from 2014, some of the bodies included either no longer exist or have changed names. For example, the Human Rights Commission and the Equality Authority have merged into the Irish Human Rights and Equality Commission, and the Equality Tribunal and the National Employment Rights Authority have been merged into the Workplace Relations Commission. The Child and Family Agency has been renamed as Tusla. As of mid 2017, the Department of Foreign Affairs and Trade indicated that the Common Core Document was ‘being updated’.

9. Mental Health (Criminal Law) Review Board
10. Ombudsman, Information Commissioner and Commissioner for Environmental Information
11. Ombudsman for the Defence Forces
12. Garda Síochána Ombudsman Commission
13. Ombudsman for Children
14. Data Protection Commissioner
15. Press Ombudsman and Council
16. Monitoring Group on National Action Plan on United Nations Security Council Resolution 1325
17. An Coimisinéir Teanga (The Language Commissioner)
18. Inspector of Prisons
19. Health Information and Quality Authority
20. Financial Services Ombudsman
21. Mental Health Commission and Inspectorate of Mental Health Services
22. Citizens' Information Board
23. Money, Advice and Budgeting Service (MABS)
24. Private Residential Tenancies Board (PRTB) and the Rent Tribunal
25. Civil Society

Of interest here is the fact that ‘civil society’ is listed as one of the institutions and part of the national machinery that protect rights at national level. The narrative entry in this regard states:

Ireland is fully committed to a pluralistic and open democracy and values the role played by a diverse and inclusive civil society in this regard.

[. . .]

Successive Governments have attached much importance to the role of the NGO community in the area of human rights. In order to provide a formal framework for a regular exchange of views between the Department of Foreign Affairs and Trade and representatives of the NGO community, the Joint DFAT/NGO Standing Committee on Human Rights was established, comprising representatives of NGOs and experts, as well as officers of the Department. In addition to the Committee, a Forum on Human Rights, to which all interested NGOs are invited, is held annually.⁵⁴⁵

Elsewhere in the Common Core Document, listed under ‘Role of Civil Society and Non-Governmental Organizations’, the document states:

⁵⁴⁵ Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, 131.

Ireland has a strong and active NGO community who play a central role in human rights education. They provide vital information to Government about human rights issues which affect people at the grassroots level, through specific Government forums with NGOs as well as on a more general level. At the same time, they serve to educate the public about the human rights programmes and protection available to them. Consultation with NGOs forms a central part of the human rights reporting mechanism.⁵⁴⁶

This view of the role of civil society as a key part of the domestic human rights architecture was supported in some of the interviews carried out for the thesis; for example, P10 said:

. . . in terms of what the reform agenda is, it's the dynamic that is internal. It is political parties and what they want to achieve within government, and it is well run campaigns by particular NGOs who have a good case and make it in an intelligent way and who win friends and influence people, as distinct from those who don't.⁵⁴⁷

This chimes with what P13 said in relation to the role of domestic civil society as a key actor in bringing rights 'home' into the domestic arena:

I always say international law is only as good as the domestic advocates because it is on the backs of civil society to bring this stuff home and push it, it seems to me, especially in those states where there is no apparatus.

[. . .]

I also think, you know, full-on advocacy by local groups is, like, necessary. I mean, I don't see this stuff taking hold without civil society being fully engaged and there is an education piece there too for sure. In that you know a lot of people don't know that social and economic things are right you know, so there is the education piece. But I do find that in my experience low-income communities always know when they are being wronged and they have a

⁵⁴⁶ Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, 157.

⁵⁴⁷ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'.

visceral sense of what they are entitled to and it is never, never more than any human rights lawyer would say you are entitled to.⁵⁴⁸

As seen earlier in the chapter, implementation in structures, resources and services also requires a state to commit resources in order to allow these bodies to execute their powers and mandate. For example, in the CEDAW committee's Concluding Observations to Ireland on its recent examination on its combined sixth and seventh reports, the Committee recommended 'that the State party allocate sufficient budgetary and human resources to the Irish Human Rights and Equality Commission in order to discharge its functions effectively'⁵⁴⁹ and that the state '[c]ontinue to strengthen effective coordination and the provision of adequate resources to the Gender Equality Division, which acts as the national machinery for the advancement of women'.⁵⁵⁰ Various powers assigned to the Irish Human Rights and Equality Commission under the 2014 Act, set out in section 10 of the Act, could also be said to have given effect to this recommendation.⁵⁵¹

In Ireland, while the Departments of Finance and Public Expenditure are tasked with managing the economy by raising revenue and overseeing public expenditure, the Irish Constitution explicitly allocates duties to the Dáil in relation to the approval of financial legislation and spending on the part of the executive.⁵⁵² Distributional assessments of proposed tax and welfare measures are conducted through a Social Impact Assessment of the annual budget.⁵⁵³ Such assessments are currently based upon the tax/welfare microsimulation model 'SWITCH' developed by the Economic and Social Research Institute,⁵⁵⁴ however, and not explicitly driven

⁵⁴⁸ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'.

⁵⁴⁹ CEDAW/C/IRL/CO/6-7, 3 March 2017, para 17.

⁵⁵⁰ CEDAW/C/IRL/CO/6-7, 3 March 2017, para 19.

⁵⁵¹ Section 10(2), Irish Human Rights and Equality Commission Act 2014.

⁵⁵² Article 28.4.1 of the Irish Constitution states that 'The Government shall be responsible to Dáil Éireann.' Dáil Éireann is also provided with a financial oversight function, through Articles 17.1, 21.1 and 28.4.4.

⁵⁵³ See Department of Social Protection, 'Social impact assessment of the welfare and income tax measures in Budget 2017, research briefing, November 2016, <https://www.welfare.ie/en/downloads/SocialImpact2017.pdf> accessed 19 August 2017.

⁵⁵⁴ 'SWITCH' is a microsimulation tax-benefit model (Simulating Welfare and Income Tax Changes), which examines a wide range of 'what if' questions concerning the impact of policy changes on tax, welfare, pensions and health. See www.esri.ie/research/taxation-welfare-and-pensions accessed 17 March 2017. While in the region of 75% of budget spending in the Irish state is on social welfare, health and education, Ireland was severely affected by the 2008 global economic and financial crisis and the period of austerity measures that followed had negative human rights implications from the Troika programme that was put in place at that time. Many regressive measures imposed during this period are still in place. Government funding accounts for almost two-thirds of income for the community and voluntary sector. This funding was reduced by 35% over the period 2008–2014, a figure that is four times the overall reduction in government spending during the same

by the provisions of any of the human rights treaties to which Ireland is a party; such an assessment is not the same as a human rights impact assessment.⁵⁵⁵

A state also fulfils, to varying degrees, certain rights by the direct delivery of services. For example, it fulfils the right to education by educating children, young people and adults in pre-schools, schools, universities and non-formal education settings, or the right to health by providing healthcare in hospital and non-hospital settings, or the right to housing by providing social housing, housing assistance and emergency homeless accommodation. For example, in its Common Core Document to the UN, Ireland says, in relation to health services:

Statutory responsibility for the provision of health services is vested in the Health Service Executive under the Health Act, 2004 which provides that the Health Service Executive has the responsibility to manage and deliver, or arrange to be delivered on its behalf, health and personal social services.⁵⁵⁶

In summary therefore, the Irish state sees its national human rights infrastructure or architecture as comprising a range of bodies and institutions which protect human rights at national level, but also its civil society. The state's resourcing of these bodies and of its national human rights

period (7.1%). Funding cuts coincided with the wind-down of two large philanthropic organisations, Atlantic Philanthropies and the One Foundation, which had dominated the human rights civil society sector for almost ten years. Cuts to state funding as well as philanthropic funding ironically occurred at a time that saw a sharp rise in the number of rights-holders needing to access the services of these charity and community organisations.⁵⁵⁵ Fiona Dukelow and Mary Murphy say that, in terms of redistribution, the state has played a relatively minimal role in Ireland, where what has emerged is 'a reliance on a mixed economy of welfare with strong emphasis on familial (predominantly female) and voluntary (predominantly religious) sources of welfare services.' See Fiona Dukelow and Mary Murphy, 'Welfare states: how they change and why' in Fiona Dukelow and Mary Murphy (eds) *The Irish Welfare State in the Twenty-First Century* (Palgrave Macmillan 2016). The need for enhanced engagement by the Oireachtas in scrutiny of the budgetary process was raised by the OECD in its 'Review of Budget Oversight by Parliament: Ireland', November 2015, which asked the question 'How can parliamentary scrutiny enhance trust in the fairness and effectiveness of public policy-making?', at 5, <http://www.oecd.org/ireland/review-of-budget-oversight-by-parliament-ireland.htm> accessed 17 March 2017. For the first time explicitly set out in a programme for government, in the Government's 'Programme for Partnership Government' in 2016, a 'process of budget and policy proofing as a means of advancing equality, reducing poverty and strengthening economic and social rights' is set out, under 'Reforming the Budget Process'. This section continues 'We will ensure the institutional arrangements are in place to support equality and gender proofing in the independent fiscal and budget office and within key government departments and to draw on the expertise of the Irish Human Rights and Equality Commission (IHREC) to support the proofing process.' See Department of the Taoiseach, *A Programme for Partnership Government* (Department of the Taoiseach 2016) 16, http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf, accessed 20 August 2017.

⁵⁵⁶ Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, para 109.

institution is part of how the state implements human rights in Ireland, as well as via the direct delivery of services.

Many human rights organisations, in addition to Ireland's national human rights institution, have been highly critical of the degree to which rights-related services are delivered in Ireland.⁵⁵⁷ This begs the question, how can we establish that the right is being fulfilled to the highest standard in a manner that is compatible with the provisions in international instruments? It appears the answer is that it cannot be established, unless such standards are measured against some sort of measurement framework.

Measuring Ireland's compliance with rights

This section deals with three aspects of how Ireland's compliance with international human rights is measured: firstly, Ireland's compliance with the core UN treaties to which it is a party; secondly, Ireland's compliance with the Council of Europe mechanisms to which it is a party; and thirdly, the types of national structures in place within the Irish state for measuring compliance with human rights instruments at domestic level.

Ireland's compliance with UN treaties

In the case of Ireland's third report under the UN Covenant on Civil and Political Rights in 2008, despite the Committee's somewhat vaguely worded Concluding Observations, as mentioned above, the Committee requested the state to provide, within one year, relevant information on its implementation of the recommendations made around the issues of possible rendition flights through Irish airports, conditions of detention in prisons and discriminatory

⁵⁵⁷ See, for example, more generally, Children's Rights Alliance, Report Card 2017, http://childrensrights.ie/sites/default/files/submissions_reports/files/Report%20Card%202017%20FULL.pdf accessed 17 March 2017; Amnesty International Report 2016–2017, 'Ireland', in *The State of the World's Human Rights*, 200; https://www.amnesty.ie/wp-content/uploads/2017/02/air201617-english_2017-02-08_11-21-28-advance-final.pdf accessed 17 March 2017; Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports, December 2015'; Irish Human Rights and Equality Commission, *Submission to the Committee on Economic, Social and Cultural Rights on the Examination of Ireland's Third Periodic Report under the International Covenant on Economic, Social and Cultural Rights* (2015); Irish Human Rights and Equality Commission, *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports* (2017); and Lorna Siggins, 'Treating healthcare as a human right' *Irish Times* (Dublin, 2 February 2015) <http://www.irishtimes.com/life-and-style/health-family/treating-healthcare-as-a-human-right-1.2079852> accessed 17 March 2017.

practices in primary education.⁵⁵⁸ There followed a series of letters from the Committee's appointed rapporteur on Ireland, as the Committee was not satisfied, firstly (and secondly) that the request had been replied to, and subsequently the Committee was not satisfied with the measures taken by the state in its one-year follow-up report on these issues.⁵⁵⁹ By the time of the sixth letter from the Committee to Ireland in April 2012, the rapporteur somewhat frustratedly pointed out that, seeing as the due date for Ireland's fourth periodic report was fast approaching in July 2012, the state should include additional information in this report on the measures taken around the inspection of possible rendition flights through Irish airports.⁵⁶⁰ Essentially, this dialogue of disagreement on the operationalisation of this treaty right lasted for the entire four-year gap between two periodic reports. While this protracted engagement could be said to have been unhelpful, it might be argued that at least the Committee did not relent in its intention to force the state into action on a matter of compliance.⁵⁶¹

Ireland has been described as 'relatively obedient' in meeting its reporting obligations and in its routine sending of high-level delegations to engage in dialogue with the committees at the time of examination.⁵⁶² States choosing to interpret the Concluding Observations as 'mere advice' has been recognised as a feature of the UN treaty-monitoring process, however.⁵⁶³ An

⁵⁵⁸ Concluding observations of the Human Rights Committee: Ireland, 30 July 2008, CCPR/C/IRL/CO/3, 25.

⁵⁵⁹ See these communications between the Rapporteur and the Irish state at:

<http://www2.ohchr.org/english/bodies/hrc/docs/Ireland98.pdf>

http://www2.ohchr.org/english/bodies/hrc/docs/Letter_Ireland.pdf

http://www2.ohchr.org/english/bodies/hrc/docs/followup/Ireland_09052011.pdf

http://www2.ohchr.org/english/bodies/hrc/docs/followup/IrelandFU93_aug2011.pdf and

http://www2.ohchr.org/english/bodies/hrc/docs/Ireland_FU_November2011.pdf accessed 26 February 2017.

⁵⁶⁰ <http://www2.ohchr.org/english/bodies/hrc/docs/followup/IrelandFUApril2012.pdf> accessed 26 February 2017.

⁵⁶¹ Ireland was examined again by the Human Rights Committee on its fourth periodic report under ICCPR in 2014. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the Committee requested Ireland to provide, within one year, relevant information on its implementation of the Committee's recommendations made in relation to historical institutional abuse of women and children, symphysiotomy, and conditions of detention. A follow-up letter was sent from the Rapporteur to the State in April 2016, see http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_FUL_IRL_23626_E.pdf accessed 26 February 2017. The state responds on one more occasion to this request, in June 2016, see http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_AFR_IRL_24421_E.pdf accessed 26 February 2017. Thereafter the conversation ceases, leading to the assumption that the Committee is satisfied with this response.

⁵⁶² Suzanne Egan, 'The UN human rights treaty system' in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 55, 74.

⁵⁶³ See Jasper Krommendijk 'The impact and effectiveness of non-judicial mechanisms for the implementation of human rights' (2011) 5 *Human Rights and International Legal Discourse* 264, where Krommendijk comments on the Netherlands' fourth periodic examination under CEDAW: 'the Minister recognized that the "advice" of CEDAW is taken seriously, but that this does not mean that all the advice and comments will be adopted one-on-one', 280.

‘air of official complacency’ around the treaty-monitoring process generally⁵⁶⁴ might be said to be more acute when it comes to the nature of how the state views the status of Concluding Observations. One senior Irish government official commented that a UN treaty-monitoring body does not have the powers of a court, for example:

[S]ome of it comes down to confusion between international law, and what it says, and opinions about what it should be, and what it should say. The role of human rights committees and others is not necessarily one that gives great clarity in that. So, for example, the European Convention on Human Rights is a Court-based system. The Convention means what the Court says it means and the Court makes the decision. We swallow hard and we comply with it. The International Covenant on Civil and Political Rights is a Committee-based system and the Committee can say anything it likes and it is supposed [that we] take it seriously, but it is not binding, it is not law. And a lot of it is opinion and poorly informed opinion.⁵⁶⁵

Since Ireland ratified the Optional Protocol to the International Covenant on Civil and Political Rights at the same time as the Covenant in 1989,⁵⁶⁶ six complaints have been brought against Ireland to the Human Rights Committee.⁵⁶⁷ Of these complaints, three were found by the Committee to be admissible and were examined on their merits, and in two cases violations were found. It is interesting to note here that the individual who brought the 1998 case *Kavanagh v Governor of Mountjoy Prison*, in relation to fair trial and the Special Criminal Court,⁵⁶⁸ also brought an additional case in 2002 claiming that the state had made no movement towards providing him with any remedy in the case of the Committee’s finding of a violation

⁵⁶⁴ Suzanne Egan, ‘The UN human rights treaty system’ in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 55, 74.

⁵⁶⁵ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as ‘Participant No. 12’ or ‘P12’.

⁵⁶⁶ Ireland also ratified the Second Optional Protocol to ICCPR aiming to abolish the death penalty in 1993.

⁵⁶⁷ No complaints have been made against Ireland to any other treaty body individual mechanism. The six complaints brought against Ireland to the Human Rights Committee are (1) *Patrick Holland v Ireland*, CCPR/C/58/D/593/1994, in relation to effective remedy in the Special Criminal Court (deemed inadmissible); (2) *Joseph Kavanagh v Ireland*, CCPR/C/71/D/819/1998, in relation to fair trial and the Special Criminal Court (violation of Article 26 found); (3) *Dáithí Ó Colchúin v Ireland*, CCPR/C/77/D/1038/200, in relation to voting for non-residents (deemed inadmissible); (4) *Joseph Kavanagh v Ireland*, CCPR/C/76/D/1114/2002, in relation to effective remedy for the breach of Article 26 already found by the Committee in his earlier case (deemed inadmissible); (5) *Michael O’Neill and John Quinn v Ireland*, CCPR/C/87/D/1314/2004, in relation to early release of prisoners under the Good Friday Agreement (admissible but no violation); and (6) *Amanda Jane Mellet v Ireland*, CCPR/C/116/D/2324/2013, in relation to termination of pregnancy in a foreign country (violations of Articles 7, 17 and 26 found).

⁵⁶⁸ *Joseph Kavanagh v Ireland*, CCPR/C/71/D/819/1998. See also, on this case, Charles Lysaght, ‘The status of international agreements in Irish domestic law’ (1994) 12 *Irish Law Times* 171.

of his Article 26 rights. The decision in the second *Kavanagh* case states that (following the first case) ‘the Minister for Justice, Equality and Law Reform offered the author £1,000 in acknowledgment of the Committee’s views, without specifying whether it was compensation, a contribution to legal costs, or for some other purpose’.⁵⁶⁹

Over a decade later, a subsequent interaction with the UN Committee appeared to be taken more seriously by the Irish state. In 2016, a finding was made by the Human Rights Committee against Ireland in the case of *Amanda Jane Mellet v Ireland*, regarding the effects of the petitioner’s having had to terminate her pregnancy in a foreign country, whereby Ms Mellet’s Article 7, 17 and 26 rights were violated.⁵⁷⁰ In its views, the Committee tells the state that it ‘wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views’.⁵⁷¹

Following publication of the Committee’s views, the Minister for Health stated ‘When I read the report from the UNHR Committee I found the experience [Amanda Mellet] went through deeply upsetting’ and continued, in his remarks, to set out clearly how it was understood that the state was required to give effect to the Committee’s recommendations:

In their conclusion of Ms Mellet’s case, the UNHR Committee requested the State to amend its law on termination of pregnancy, to ensure that healthcare providers are in a position to supply full information on safe abortion services, and to provide Ms Mellet with adequate compensation and to make available to her any psychological treatment she requires.⁵⁷²

⁵⁶⁹ The decision in the second *Kavanagh* case states that (following the first case) ‘the Minister for Justice, Equality and Law Reform offered the author £1,000 in acknowledgment of the Committee’s Views, without specifying whether it was compensation, a contribution to legal costs, or for some other purpose’ (Mr Kavanagh claims he returned the cheque to the Minister). See Human Rights Committee, Decision on Communication No. 1114/2002, CCPR/C/76/D/1114/2002, 2.6.

⁵⁷⁰ *Amanda Jane Mellet v Ireland*, CCPR/C/116/D/2324/2013. Violations were found in the case of Article 7 (torture or cruel, inhuman or degrading treatment or punishment), Article 17 (arbitrary or unlawful interference with privacy, family, home or correspondence) and Article 26 (prohibition of discrimination).

⁵⁷¹ *Amanda Jane Mellet v Ireland*, CCPR/C/116/D/2324/2013, 7.12.10.

⁵⁷² Department of Health, ‘Statement from Minister for Health Simon Harris TD regarding the United Nations Human Rights Committee in the case of Ms Amanda Mellet’, Press release 31 November 2016, <http://health.gov.ie/blog/press-release/statement-from-minister-for-health-simon-harris-td-regarding-the-united-nations-human-rights-committee-in-the-case-of-ms-amanda-mellet/> accessed 4 March 2017.

Minister Harris then went on to describe the state's convening of the Citizens' Assembly and the Assembly's consideration of the Eighth Amendment of the Constitution⁵⁷³ as evidence of steps towards reforming the law in this regard. The Minister continued then in relation to compensation and support services:

With regard to measures directly relating to Ms Mellet in acknowledgement of the Committee's views, the State has offered Ms Mellet an ex gratia sum of €30,000. I will also direct the Health Service Executive to ensure that Ms Mellet will have timely access to all appropriate psychological services provided by the Health Service Executive.⁵⁷⁴

In addition to the Minister for Health's response, the Minister for Justice remarked 'we have to take this very seriously. We signed up to this covenant',⁵⁷⁵ the seriousness perhaps evident by the fact that compensation was paid on this occasion.

One of the primary ways in which a state is measured on its compliance with UN treaties which require the submission of a periodic report is in the Concluding Observations and recommendations from the committees which oversee the processes.⁵⁷⁶ The periodic reporting process also allows civil society organisations and national human rights institutions to submit detailed shadow and parallel reports – also measuring compliance – to the committees. Given that a state can, in essence, be examined only on the basis of the information it submits to a committee (either in report form, or as part of interactive dialogue sessions, or as offered to bodies who complete country visits), the presence of shadow and parallel reports are important

⁵⁷³ In July 2016, the Houses of the Oireachtas passed a motion to establish a Citizens' Assembly to 'make a report and recommendation on the matter [Article 40.3.3] ... to the Houses of the Oireachtas, which on receipt will refer the report for consideration to a Committee of both Houses which will in turn bring its conclusions to the Houses for debate'. See 'Citizens' Assembly: Motion', Parliamentary Debates: Dáil Éireann, 13 July 2016.

⁵⁷⁴ Department of Health, 'Statement from Minister for Health Simon Harris TD regarding the United Nations Human Rights Committee in the case of Ms Amanda Mellet', Press release 31 November 2016, <http://health.gov.ie/blog/press-release/statement-from-minister-for-health-simon-harris-td-regarding-the-united-nations-human-rights-committee-in-the-case-of-ms-amanda-mellet/> accessed 4 March 2017. Part of Ms Mellet's complaint related to the denial of health care and bereavement support in her case, care which is available to women who may have a fatal foetal abnormality but who choose to carry to full term instead of terminating the pregnancy.

⁵⁷⁵ Sarah Bardon, Elaine Edwards and Suzanne Lynch, 'UN criticism of abortion regime to be taken seriously, Fitzgerald says' *Irish Times* (Dublin, 9 June 2016) <http://www.irishtimes.com/news/politics/un-criticism-of-abortion-regime-to-be-taken-seriously-fitzgerald-says-1.2678763> accessed 4 March 2017.

⁵⁷⁶ See s 2.3 of this chapter.

measuring tools. The process that Ireland uses to compile its state reports has been criticised as casual and minimal:

I don't think there is anything specifically or if it does every now and again some HEO [Higher Executive Officer] will get a memo from his AP [Assistant Principal Officer] or PO [Principal Officer] to say 'Jaysus we better submit something to that shower . . . do something'. And someone will do something, and that's about the height of it in the Department. They send it up to the AP, and the AP sends it to the PO and the Secretary General says 'that's fine to go, reply to it'.⁵⁷⁷

Ireland's compliance with the Council of Europe mechanisms

As seen earlier in this chapter, one of the primary methods for monitoring a state's compliance with rights is how the courts view the degree of fulfilment of that state party's obligations. In the case of the European Convention on Human Rights, there are two parts to implementation of the Convention in Ireland: firstly, the execution of Convention Article 46 judgments from the Strasbourg Court⁵⁷⁸ and, secondly, incorporation of the Convention in the European Convention on Human Rights Act 2003, as will be shown in this section.

Ireland's record on operationalisation of the findings of the Strasbourg Court have been mixed.⁵⁷⁹ The state has been found in violation of Convention rights before the Grand Chamber of the European Court of Human Rights on three occasions recently. In *McFarlane v Ireland* (2010),⁵⁸⁰ *A, B and C v Ireland* (2010)⁵⁸¹ and *O'Keefe v Ireland* (2014) the Grand Chamber considered the issue of theoretical rather than actual constitutional remedies, as advanced by the state.⁵⁸² All three cases involved Convention rights that could not be claimed in the domestic courts; however, only the *A, B and C* judgment has been executed to the satisfaction

⁵⁷⁷ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as 'Participant No. 9' or 'P9'.

⁵⁷⁸ Article 46 of the ECHR states, at 46(1), 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

⁵⁷⁹ See, generally, Suzanne Egan and Aidan Forde, 'From judgment to compliance: domestic implementation of the judgments of the Strasbourg Court' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014) 17.

⁵⁸⁰ *McFarlane v Ireland*, Application no. 31333/05, Judgment of 10 September 2010.

⁵⁸¹ *A, B and C v Ireland*, Application no.25574/05, Judgment of 16 December 2010.

⁵⁸² *O'Keefe v Ireland*, Application no. 35810/09, 28 January 2014.

of the Committee of Ministers by the introduction of legislation, albeit in a very limited fashion, through the Protection of Life during Pregnancy Act 2013.⁵⁸³ In the case of *O’Keeffe*, the Court found that the state failed to protect the applicant from sexual abuse by her primary school teacher and that Ms O’Keeffe did not have an effective remedy against the state.⁵⁸⁴ In the case of *O’Keeffe* and other judgments, Ireland has submitted a number of action plans in order to implement the judgments and, in some cases, lengthy exchanges between the Committee of Ministers and the state have taken place over several years before the Committee was satisfied that the judgment was fully executed.⁵⁸⁵ Following judgment in the *O’Keeffe* case, Louise O’Keeffe herself has been highly critical of the state’s interpretation of what was required of it following the decision of the Court, describing the Irish government’s settlement offer to children who were abused in school as ‘discrimination of the highest order’.⁵⁸⁶

While the Irish state has engaged reasonably regularly with the process of submitting action plans to the Committee of Ministers,⁵⁸⁷ it could be claimed that the practical approach taken

⁵⁸³ This has been the subject of much criticism. See, for example, Máiréad Enright, Vicky Conway, Fiona de Londras, Mary Donnelly, Ruth Fletcher, Natalie McDonnell, Sheelagh McGuinness, Claire Murray, Sinéad Ring, Sorcha úí Chonnachtaigh, ‘Abortion law reform in Ireland: a model for change’, (2015) 5(1) *feminists@law*. See also a dedicated issue of the *Irish Journal of Legal Studies*, 3(3) 2013, in particular Ivana Bacik, ‘Legislating for Article 40.3.3’ at 18–35. The matter of giving effect to the *A, B and C* judgment is, however, essentially completed at the level of the Strasbourg Court, now that the Committee of Ministers has accepted the enactment of legislation as evidence that the Irish state has given effect to the ruling.

⁵⁸⁴ The Irish Human Rights and Equality Commission expressed concerns that the judgment was too narrowly interpreted by the state with respect to the scope of the definition of victim. See *Ireland and the United Nations Convention on the Rights of the Child: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland’s Combined Third and Fourth Periodic Reports*, December 2015, at 18–19,

https://www.ihrec.ie/app/uploads/download/pdf/ireland_and_the_united_nations_convention_on_the_rights_of_the_child.pdf accessed 4 March 2017. In October 2016, the IHREC submitted a communication to the Council of Europe in accordance with Article 46, paragraph 2 of Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies). The Commission submitted a request to the Council of Europe that the case of *O’Keeffe v Ireland* be referred back to the European Court of Human Rights, as the Commission believes the state has adopted an unduly narrow approach to the category of ‘victim’. See ‘Commission challenges government on failure to offer settlements to abuse victims’, Press release, 17 October 2016, <https://www.ihrec.ie/commission-challenges-government-failure-offer-settlements-abuse-victims/> accessed 4 March 2017.

⁵⁸⁵ See <http://www.coe.int/en/web/execution/submissions-ireland> accessed 4 March 2017.

⁵⁸⁶ The Irish state argued that the ECHR decision applies only to people who were abused only after an initial complaint was made against a teacher and no action was taken. See *TheJournal.ie*, “‘Discrimination of the highest order’ – Louise O’Keeffe shocked by State offer to abuse victims”, <http://www.thejournal.ie/school-abuse-victim-settlements-1838090-Dec2014/> accessed 11 March 2017. The Irish Human Rights and Equality Commission has called for the case of *O’Keeffe v Ireland* to be referred back to the European Court of Human Rights, saying the State has adopted an unduly narrow approach to the category of ‘victim’. See <https://www.ihrec.ie/commission-challenges-government-failure-offer-settlements-abuse-victims/> accessed 10 March 2017.

⁵⁸⁷ See Dáil debates, Department of Education and Skills, ‘European Court of Human Rights Judgments’, written answer 26 January 2016, <https://www.kildarestreet.com/wrans/?id=2016-01-26a.1121> accessed 4 March 2017.

by the Irish state in providing a follow-up remedy to victims by offering out-of-court settlements to survivors of child sexual abuse via the State Claims Agency is a low threshold upon which to vindicate the rights of the victims in question. Given that the State Claims Agency, a body which operates with a commercial remit to provide asset and liability management services to government under the National Treasury Management Agency (Amendment) Act 2000,⁵⁸⁸ has the purpose of ensuring that ‘the State’s liabilities in relation to personal injury and property damage claims, and the expenses of the SCA in relation to their management, are contained at the lowest achievable level’,⁵⁸⁹ it appears that ensuring value for money takes precedence over giving effect to the provisions contained in the Convention.⁵⁹⁰

The second method of giving effect to the provisions of the Convention at domestic level is its incorporation into domestic law. While the Convention provides a route for individuals to bring an application to the Court at Strasbourg, the Convention is ‘an international agreement between its signatory States’ where the states in question take on to guarantee the Convention rights to individuals who reside within their borders, ‘rather than an agreement between those individuals and the State’.⁵⁹¹ The Convention itself does not require its signatories to incorporate it domestically; however every Council of Europe member state had done so by the year 2000, apart from Ireland.⁵⁹²

⁵⁸⁸ National Treasury Management Agency (Amendment) Act 2000.

⁵⁸⁹ See State Claims Agency ‘About us’, <http://stateclaims.ie/about-us/> accessed 4 March 2017.

⁵⁹⁰ Article 13 of the ECHR provides: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority.’ The Council of Europe’s Directorate General of Human Rights makes the point that when judgments are responded to effectively at domestic level, fewer cases should ideally make their way to the Court: ‘Rapid and adequate execution has, of course, an effect on the influx of new cases: the more rapidly general measures are taken by States Parties to execute judgments which point to a structural problem, the fewer repetitive applications there will be.’ Directorate General of Human Rights, Applying and supervising the ECHR: Guaranteeing the effectiveness of the European Convention on Human Rights, Collected texts (Council of Europe 2004), at 27, https://www.coe.int/t/dghl/standardsetting/cddh/Publications/reformcollectedtexts_e.pdf accessed 10 March 2017.

⁵⁹¹ Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall 2010) 5.

⁵⁹² In some member states, this took place through legislation but in monist states the Convention could be relied upon in the domestic courts. See Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall 2010) 6.

In Ireland, the Convention was finally incorporated in quite a restricted manner⁵⁹³ through the European Convention on Human Rights Act 2003, following a ‘marked hesitancy’⁵⁹⁴ and possibly only as a response to the political imperative of the 1998 Belfast/Good Friday Agreement in the setting of a peace agreement in Northern Ireland which required an equivalence of rights protection both north and south of the border.⁵⁹⁵ The 2003 Act’s limitations have been widely documented by legal scholars.⁵⁹⁶ In section 5(1) of the European Convention on Human Rights Act 2003, for example, a superior court can make a ‘declaration of incompatibility’, i.e. that that a statutory provision or rule of law is incompatible with the state’s obligations under the Convention if it finds that no other legal remedy is adequate or available.⁵⁹⁷ The limited effect of this provision was demonstrated through the state’s inaction in the case of *Foy v An tArd Chláraitheoir and Ors*,⁵⁹⁸ where in 2007 the High Court found a

⁵⁹³ Marie-Luce Paris names the 2003 Act ‘the HRA 1998’s non-identical twin’, one which ‘signals a less ambitious purpose than the HRA 1998 which was intended to transform the conception of rights protection by the judiciary and political branches at domestic level in the UK’. See Marie-Luce Paris ‘The European Convention on Human Rights: implementation mechanisms and compliance’, in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 87, 103.

⁵⁹⁴ Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall 2010) 7.

⁵⁹⁵ Marie-Luce Paris ‘The European Convention on Human Rights: implementation mechanisms and compliance’, in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 87, at 102. The Good Friday Agreement (or ‘Belfast Agreement’ or ‘British–Irish Agreement’ or ‘Northern Ireland Peace Agreement’) was agreed in Belfast on Good Friday, 10 April 1998. It consisted of two inter-related documents: (1) A Multi-party Agreement by most of the political parties in Northern Ireland; and (2) the British–Irish Agreement, an international agreement between Ireland and the UK, the legal element of the Good Friday Agreement, whereby the two Governments affirmed their commitment to support and/or implement the provisions of the Multi-Party Agreement. There are several parts within the Agreement that are expressly dependent upon the European Convention on Human Rights as a shared minimum standard, see Strand 1, 5(b); ‘United Kingdom Legislation’ paras 2 and 4, Comparable Steps by the Irish Government’ at paragraph 9. See Good Friday Agreement, <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf> accessed 10 March 2017.

⁵⁹⁶ See, more generally, O’Connell et al, ‘ECHR Act 2003: a preliminary assessment of impact’ (Law Society and Dublin Solicitors Bar Association 2006); Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall 2010); Suzanne Kingston and Liam Thornton, ‘A report on the application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: evaluation and review’ (Law Society and Dublin Solicitors Bar Association, 2015); Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014); Marie-Luce Paris ‘The European Convention on Human Rights: implementation mechanisms and compliance’, in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 87. A particular criticism of the method of incorporation in Ireland is that it is contrary to the position adopted by the United Kingdom under the Human Rights Act 1998 (section 6(3) of which provides that ‘public authority’ includes – (a) a court or tribunal, and (b) any person certain of whose functions are of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament). In the Irish context, the Courts are specifically excluded from the definition of organs of state (as equivalent to a UK ‘public authority’), with the effect that there is not a corresponding positive obligation on the Court to ensure that rights guaranteed by the Convention are taken into consideration.

⁵⁹⁷ European Convention on Human Rights Act 2003, at s 5(1). See Fiona de Londras ‘Declarations of incompatibility under the ECHR Act 2003: a workable transplant?’ (2014) 35 Statute Law Review 50, 50.

⁵⁹⁸ *Foy v An tArd Chláraitheoir and Ors* [2007] IEHC 470.

declaration of incompatibility in relation to the applicant's inability to seek recognition of their preferred gender in Ireland, yet it took the state a further eight years to enact legislation to this effect in the form of the Gender Recognition Act 2015.⁵⁹⁹

Irish courts appear reasonably willing to engage with the Convention at domestic level, particularly since its incorporation in the 2003 Act. However, Cliona Kelly argues that 'there is still room for improvement' in how the Act is used in domestic courts, and it has, in the past, been pleaded incorrectly.⁶⁰⁰ In 2007, James MacGuill argued that 'both the Courts and the Irish Legislature are now very Strasbourg conscious'. He continued, 'I believe there is ample evidence to suggest the Courts will go to considerable lengths to find constitutional rights which have a clear parallel with Convention rights rather than finding the Convention rights on a stand alone basis.'⁶⁰¹ By 2015, the 2003 Act was forming 'part of the regular arguments in domestic judicial proceedings' and being invoked in an increasing number of areas of law.⁶⁰²

The attention given to the shortcomings of section 5 of the 2003 Act has been said to divert attention away from sections 2 and 3, which have remained underused in the domestic courts,⁶⁰³ further limiting the operationalisation of the Convention domestically. Section 3 explicitly regulates the manner in which public bodies routinely perform their functions, and is perhaps the most important provision from the viewpoint of domestic human rights operationalisation. Subject to the limitations expressed in the Act, public bodies are required to perform their functions in accordance with the requirements of the Convention and a system of remedies is provided for failure to do so. If an individual believes that their Convention rights have been

⁵⁹⁹ Gender Recognition Act 2015, at www.oireachtas.ie/documents/bills28/acts/2015/a2515.pdf. Ireland was the last EU member state to introduce gender recognition provisions. Under s 5, another declaration of incompatibility was made in the case of *Dublin City Council v Donegan/Gallagher*, in which the Supreme Court found that summary eviction proceedings of local authority tenants under the Housing Acts was incompatible with the Convention. The Housing Act 2014 now addresses this issue and puts in place a new process that takes into account the Convention rights of the tenant.

⁶⁰⁰ Cliona Kelly, 'Maximising the potential of the European Convention on Human Rights Act 2003: the interpretative obligation and the importance of framing' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014). See also, generally, Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall 2010).

⁶⁰¹ James MacGuill, 'The impact of recent ECHR changes on the Constitution', lecture to the conference 'Rebalancing criminal justice in Ireland: a question of rights', University College Cork, 29 June 2007.

⁶⁰² Marie-Luce Paris 'The European Convention on Human Rights: implementation mechanisms and compliance', in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 87, 104.

⁶⁰³ Marie-Luce Paris 'The European Convention on Human Rights: implementation mechanisms and compliance', in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 87, 105.

infringed, they can rely directly on the Act, seeking either judicial review of any decision on the part of the body in question, or a remedy in the form of compensation.⁶⁰⁴

Domestic structures for measuring compliance

Measurement of compliance also happens at parliamentary level. In Ireland, there are a number Oireachtas Committees which consider issues of relevance to human rights, for example, the Committee on Justice and Equality, the Committee on Children and Youth Affairs, the Committee on Education and Skills, the Committee on Health, the Committee on Housing, Planning, Community and Local Government, the Committee on Social Protection, and the Committee on Housing and Homelessness.⁶⁰⁵ Parliamentary oversight in Ireland could be enhanced by the establishment of a full Oireachtas Committee for Human Rights and Equality that cuts across all parties and Houses of the Oireachtas. Many scholars of Irish political theory have been critical of the Oireachtas as a monitor of government failing to hold to account both core government departments and agencies.⁶⁰⁶ The Irish electoral system incentivises elected officials to focus on their constituency business in order to get re-elected, and it has been claimed that this aspect of the Irish political landscape causes politicians to neglect their

⁶⁰⁴ European Convention on Human Rights Act 2003, at s 3. While successful court outcomes might be said to be a measure of operationalisation of the Convention, the Act also has other impacts on the human rights landscape in the state. It could be said that lawyers are perhaps more likely to use human rights language or principles in their representations and how they challenge public authorities. Some matters may never come before the courts but an individual may have been in a position of relying on the Act and the duty under s 3. The impact of the Act is also seen in the drafting of legislation by state officials, legislative drafters and the Office of the Attorney General and in the debates of the Houses of the Oireachtas during the passage of legislation. It could be said that drafters are less likely to draw up legislation that is incompatible with the provisions of the Convention.

⁶⁰⁵ See full list of current parliamentary committees at http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list accessed 17 March 2017. On 3 December 2014, a parliamentary committee, the Joint Sub-Committee on Human Rights relative to Justice and Equality matters, was established under the Joint Committee on Justice, Defence and Equality. Unfortunately the sub-committee's mandate did not reach beyond matters strictly pertaining to the Department of Justice and Equality. The Joint Sub-Committee met three times in 2015 and did not have the opportunity to meet in 2016 before the Parliament was dissolved on 3 February 2016. The Sub-Committee on Human Rights was not re-established when new parliamentary committees were established in June 2016 following the 2016 general election.

⁶⁰⁶ Shane Martin, 'Monitoring Irish government' in Eoin O'Malley and Muiris MacCárthaigh (eds), *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration 2012) 152, 159, citing Muiris MacCárthaigh, *Accountability in Irish Parliamentary Politics* (Institute of Public Administration 2005); Muiris MacCárthaigh 'Parliamentary scrutiny of departments and agencies' in Muiris MacCárthaigh and Maurice Manning (eds) *The Houses of the Oireachtas: Parliament in Ireland* (Institute of Public Administration 2010); Eunan O'Halpin, 'The Dáil Committee of Public Accounts, 1961–1980' (1985) 32 Administration 283; Michael Gallagher, 'The Oireachtas: President and parliament' in Michael Gallagher and John Coakley (eds) *Politics in the Republic of Ireland* (Routledge 2009); and Mary Murphy, 'Reform of Dáil Éireann: the dynamics of parliamentary change', *Parliamentary Affairs* (2006) 59, 437.

parliamentary duties.⁶⁰⁷ However, it appears many aspects of the Irish parliamentary system do act as effective accountability mechanisms in the case of the operationalisation of human rights, such as the committee system above, the system of parliamentary questioning and the Pre-Legislative Scrutiny process.⁶⁰⁸

In Ireland, three domestic structures are of note here: (1) the parliamentary committee that deals with matters related to justice in the state; (2) an interdepartmental government committee which has a commitment to human rights; and (3) the enforcement and compliance powers of the Irish Human Rights and Equality Commission.

In relation to the first structure, some interesting observations were made by P4, a former member of Ireland's Joint Oireachtas Committee on Justice, Defence and Equality, who remarked on the lack of awareness among fellow members of the Joint Committee at the time of Ireland's fourth examination under the UN Covenant on Civil and Political Rights in 2014, expressing her surprise that the members had simply never seen any of the suite of documents related to the examination:

. . . I just put on the table . . . here's the fourth report [to the UN Committee] of the review of Ireland's implementation of its obligations; here's the list of issues . . . report from the Committee; and here's the State's response to those lists of issues . . . I put that in front of Senators and they were like . . . 'Wow! Can we have those?'

. . . to see if we can become a committee which amends our references to include human rights as part of our work . . . I would view this then as a huge step forward, in terms of parliamentarians taking responsibility for and utilising the international frameworks to guide our law making, particularly in the context of the legislative process.⁶⁰⁹

⁶⁰⁷ Paul Hosford, 'Poll: Is it time to revamp the way we elect TDs?', *The Journal*, 12 February 2015, <http://www.thejournal.ie/poll-change-to-electoral-system-1934139-Feb2015/> accessed 17 March 2017.

⁶⁰⁸ See section 2.3 of this chapter.

⁶⁰⁹ Interview with Katherine Zappone (then) Independent Senator (Dublin, 8 April 2014), referred to as 'Participant No. 4' or 'P4'. The Joint Committee, subsequent to this interview, did establish a Sub-Committee on Human Rights Relative to Justice and Equality Matters. The Joint Sub-Committee met three times in 2015 and did not have the opportunity to meet in 2016 before the Parliament was dissolved on 3 February 2016. The

Under Dáil Éireann Standing Rules, a parliamentary committee may examine and make recommendations on proposed legislation, but amendments that ‘could have the effect of imposing or increasing a charge upon the revenue may not be moved by any member, save a member of the Government or Minister of State’ in line with Article 17.2 of the Irish Constitution. This means that, while Committees can consult with experts in relation to human rights issues, they are not mandated to consider the human rights and equality implications of policy or legislation, which has implications for operationalisation.⁶¹⁰

In addition to this Oireachtas Committee, the second domestic structure of interest here is the interdepartmental government committee which has a commitment to human rights, the purpose of which according to the state is to ‘improve the coherence of the promotion and protection of human rights’ and ‘assist progress towards the ratification by Ireland of key international human rights treaties and timely reporting to UN human rights bodies’.⁶¹¹ At its first meeting, the Committee stated that it would meet two to three times a year.⁶¹² There has not been any evidence that this is the case, however, and the committee has not, to date, issued any external output that demonstrated that it is involved in the monitoring of rights, follow up of Concluding Observations, or other aspects of rights operationalisation.

Sub-Committee on Human Rights was not re-established when new parliamentary committees were established in June 2016 following the 2016 general election. See, however, remarks of David Stanton TD, Dáil Éireann Debates, 22 March 2017, Thirty-fifth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2016: Second Stage [Private Members] (Continued), Vol 943, No. 2, in which Deputy Stanton remarked ‘When I was Chairman of the Committee on Justice and Equality we established a sub-committee on human rights in the justice and equality area. Many parliaments have committees which deal specifically with human rights and perhaps we should consider doing likewise’. David Stanton TD, Dáil Éireann Debates, 22 March 2017, Thirty-fifth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2016: Second Stage [Private Members] (Continued), Vol 943, No. 2, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017032200045?openDocument> accessed 27 August 2017.

⁶¹⁰ Dáil Éireann (2016) *Standing Orders Relevant to Public Business together with the Oireachtas Library & Research Service Rules*, Dublin: Houses of the Oireachtas, 178(3), <http://www.oireachtas.ie/parliament/media/about/standingorders/Consolidated-version-of-all-of-the-Standing-Orders-of-Dáil-Éireann,-17-January-2017.pdf> accessed 26 February 2017.

⁶¹¹ Department of Foreign Affairs and Trade, *The Global Island: Ireland’s Foreign Policy for a Changing World* (2015) available at: <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/ourwork/global-island/the-global-island-irelands-foreign-policy.pdf>. See also Department of Foreign Affairs and Trade, ‘Minister McHugh convenes Inter Departmental discussions on Human Rights’, Press release 25 January 2017, which states ‘the objective of the Committee is to improve the coherence of the promotion and protection of human rights in Ireland’s Foreign Policy. It is also mandated with assisting progress towards ratification by Ireland of key international human rights treaties and reporting to the United Nations and Council of Europe human rights monitoring bodies’, <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2017/january/minister-mchugh-discussions-human-rights/> accessed 26 February 2017.

⁶¹² Department of Foreign Affairs and Trade, ‘Minister Sherlock chairs First Meeting of the Inter-Departmental Committee on Human Rights’, 25 March 2015, <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2015/march/minister-chairs-human-rights-committee/> accessed 17 March 2017.

Domestic follow-up processes for giving effect to the findings of international bodies generally have been criticised by the bodies themselves. For example, the European Social Rights Committee experiences being ‘ . . . told by states, our national policies are ok, they are not being implemented at a local level. We just turn around and go, “well, your obligation is to implement, it’s a state obligation, not one vested in local authorities.”’⁶¹³ As we have seen earlier in this chapter, this has been echoed by the UN Special Rapporteur on Housing, who said that without a domestic apparatus for dealing with Concluding Observations, ‘international law is only as good as the domestic advocates . . . Because it is on the backs of civil society to bring this stuff home and push it, it seems to me.’⁶¹⁴

The third body of interest here is the Irish Human Rights and Equality Commission, which, in addition to its parallel reporting obligations, also has a number of ‘enforcement and compliance’ functions set out under Part 3 of the 2014 Act in relation to human rights and equality matters within the state. These include the power to invite an industry or section within the State to carry out an equality review or action plan,⁶¹⁵ and to serve ‘a substantive notice’ if it appears this provision is not being met,⁶¹⁶ as well as to draft codes of practice in furtherance of the protection of human rights⁶¹⁷ or the elimination of discrimination.⁶¹⁸ Since its establishment in 2014, it appears that these powers have not yet been used to date.⁶¹⁹

This section has dealt with three aspects of how Ireland’s compliance with international human rights are measured: in its engagement with United Nations treaty obligations, in its engagement with Council of Europe instruments, and in how it has created certain domestic mechanisms for the monitoring or measurement of human rights. In examining these models, we saw that Ireland is generally ‘relatively obedient’ in how it engages with the mechanisms of the UN treaty-monitoring bodies overall, and the state has undergone quite a significant shift in the seriousness with which it has engaged with the individual complaints procedures

⁶¹³ Interview with Colm O’Cinneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as ‘Participant No. 1’ or ‘P1’.

⁶¹⁴ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as ‘Participant No. 13’ or ‘P13’.

⁶¹⁵ Section 32, Irish Human Rights and Equality Commission Act 2014.

⁶¹⁶ Section 33, Irish Human Rights and Equality Commission Act 2014.

⁶¹⁷ Section 31(1)(a), Irish Human Rights and Equality Commission Act 2014.

⁶¹⁸ Section 31(1)(b), Irish Human Rights and Equality Commission Act 2014.

⁶¹⁹ At the time of writing, September 2017.

between the *Kavanagh* case in 1998⁶²⁰ and the *Mellet* case in 2016.⁶²¹ In relation to how Council of Europe standards are complied with, Ireland's record on the execution of ECHR Article 46 judgments from the Strasbourg Court is mixed, with the bar resting at a minimal level. The nature of Ireland's incorporation of the Convention by way of the European Convention on Human Rights Act 2003 has been criticised yet has significance for Traveller accommodation rights, given that section 3 of the 2003 Act effectively creates a new ground of judicial review with reference to the Convention,⁶²² obliging organs of the state to carry out their functions in a way that is compatible with the European Convention on Human Rights.

2.5 Conclusion

Chapter 2 opened with an examination of four human rights principles: respect, protect and fulfil; progressive realisation; minimum core obligations; and non-retrogression; and saw how they contribute to an overall sense of how rights might ideally operate in practice rather than in theory alone. This chapter has attempted to answer the question 'what does it mean to operationalise a right?' by examining the way in which the international human rights framework anticipates that rights might be given effect to in law, policy and practice within a state in order to critically examine what is entailed by such 'operationalisation'. It established that the enactment of legislation alone is insufficient and that legislation must be supplemented with a comprehensive set of measures to facilitate its implementation, enforcement and follow up, as well as monitoring and evaluation of the results achieved. In addition to law and policy, international guidance directs states to give effect to international human rights standards by creating structures or national 'machinery'; by resourcing these structures as well as resourcing the provision of rights more generally; and by the direct provision or delivery of services that fulfil the rights of individuals within the state. Measuring progress or data is also a key element of operationalisation, and this can take place by setting indicators and measuring their progress, by establishing domestic mechanisms or dialogues, and by the gathering of data. In conclusion, therefore, unpacking the requirements of international obligations has facilitated an understanding of the component parts of human rights operationalisation, with the chapter establishing that operationalisation of an international human right takes place generally when that right (1) has been translated into domestic instruments; (2) has been implemented through

⁶²⁰ *Joseph Kavanagh v Ireland*, CCPR/C/71/D/819/1998.

⁶²¹ *Amanda Jane Mellet v Ireland*, CCPR/C/116/D/2324/2013.

⁶²² Section 3, European Convention on Human Rights Act 2003.

those instruments and any surrounding regulatory framework; and (3) has been (and can be) measured.

These components were then looked at in an Irish context in order to ascertain the levels of engagement by the Irish state. In this way, it was observed that the Irish state operationalises in a manner that can be erratic and sometimes informal, yet that has perhaps evolved somewhat more progressively over the past three decades. In both its legislating and policy-making around international human rights law, Ireland could be said to be cautious and relatively conservative, with a considerable amount of leeway given to the executive branch of government in this regard, allowing a ‘narrow *ultra vires*’ in this regard. We also saw how the Irish state sees its domestic human rights infrastructure established by way of a range of bodies and institutions, but also that civil society plays a key role here. The state’s resourcing of these bodies and its national human rights institutions is part of how it implements human rights in Ireland, as well as via the direct delivery of services. This chapter noted how Ireland has a history of reasonable compliance with treaty body processes; however, the repeated nature of recommendations is problematic.

In examining how Ireland complies with international human rights instruments, we saw that Ireland is generally ‘relatively obedient’ but has shifted quite significantly in its engagement with individual complaints procedures between *Kavanagh* in 1998⁶²³ and *Mellet* in 2016.⁶²⁴ In the measuring of compliance that happens at parliamentary and interdepartmental levels, again the chapter showed mixed outputs. The chapter’s understanding of operationalisation more generally, as well as Ireland’s broad human rights architecture, provides context and gives shape to the enquiry that will be undertaken in considering how the right to culturally appropriate accommodation is operationalised in the case of Traveller accommodation in Ireland, which now follows in Chapter 3.

⁶²³ *Joseph Kavanagh v Ireland*, CCPR/C/71/D/819/1998.

⁶²⁴ *Amanda Jane Mellet v Ireland*, CCPR/C/116/D/2324/2013.

Chapter 3 – Operationalisation in Practice: Traveller Accommodation in Ireland

3.1 Introduction: ‘a need for urgent measures’ or full compliance?

We have already seen that Travellers in Ireland experience systemic challenges in accessing and fulfilling their internationally protected right to culturally appropriate accommodation. Chapter 1 showed that this multi-layered, complex problem has deep roots in historical, ethnic, legal and political spheres and is one in which Ireland’s usual approach in domestic law, policy and practice have not worked. Chapter 2 subsequently looked within the human rights framework in order to understand what a state’s obligations are when rights are brought into the domestic context, and established a framework for viewing operationalisation at a domestic level. Chapter 3 now views this operationalisation framework in practice as it applies in the case of Traveller accommodation.

The purpose of this chapter is to establish if, and how, the right to culturally appropriate accommodation is operationalised. This is important, given that there are conflicting views on this issue between what international human rights mechanisms have repeatedly said about Traveller accommodation in Ireland and how the Irish state itself views the case. On the side of the international bodies, since the enactment of the Traveller Accommodation Act 1998, several UN and Council of Europe bodies and committees have voiced multiple concerns and made many recommendations in relation to shortcomings with Traveller accommodation in Ireland, saying that there is ‘a need for urgent measures’ to be taken on the part of the Irish state.¹ Concerns range from generalised ones in relation to how Travellers are disadvantaged in accessing accommodation in the first instance;² to more specific concerns in relation to the

¹ Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, recommends ‘all necessary measures be taken urgently to improve access by Travellers to all levels of education, their employment rates as well as their access to health services and to accommodation suitable to their lifestyle’, at 21.

² Committee on the Rights of the Child, Concluding observations on the initial periodic report of Ireland, 4 February 1998, CRC/C/15/Add.85, at 14 and 34; Committee on Economic, Social and Cultural Rights, Concluding observations on the initial periodic report of Ireland, 14 May 1999, E/C.12/1/Add.35, at 20; Committee on Economic, Social and Cultural Rights, Concluding observations on the Second periodic report of Ireland, 5 June 2002, E/C.12/1/Add.77, at 32; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 78; Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Council of Europe, Advisory Committee on the Framework

criminalisation of trespass resulting from the 2002 Act;³ the effects of accommodation that is not culturally appropriate or respecting of nomadism;⁴ gaps in the collection of statistical data and conducting of research;⁵ the use and allocation of funding;⁶ the lack of sanctions against local authorities who fail to take measures to provide accommodation;⁷ inadequate conditions in halting sites;⁸ the legislative framework governing evictions;⁹ and the effects of evictions in practice.¹⁰

In sharp contrast to the views of the international bodies, the response of the Irish state is that its efforts are ‘fully compliant’.¹¹ In its Common Core Document, Ireland states that it recognises ‘the special position’ of Travellers in ‘a range of legislative, administrative and institutional provisions’ in relation to Traveller health, education and accommodation.¹² Similar language echoes throughout many other recent Irish state reports to international

Convention for the Protection of National Minorities, Third Opinion on Ireland adopted on 10 October 2012, ACFC/OP/III(2012)006, at 30; European Committee Against Racism and Intolerance, ECRI Report on Ireland (Fourth Monitoring Cycle), adopted 5 December 2012, CRI(2013)1, at 92; European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 43.

³ UN Human Rights Committee, Concluding observations on the third periodic report of Ireland, 30 July 2008, CCPR/C/IRL/CO/3, at 23; UN Human Rights Committee, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4, at 23; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 69.

⁴ Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Committee on the Elimination of Racial Discrimination, Concluding observations on the third and fourth periodic reports of Ireland, 10 March 2011, CERD/C/IRL/CO/3-4, at 13; Committee on Economic, Social and Cultural Rights, Concluding observations on the Third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3, at 27; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 69–70.

⁵ Committee on Economic, Social and Cultural Rights, Concluding observations on the Second periodic report of Ireland, 5 June 2002, E/C.12/1/Add.77, at 33; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 79.

⁶ Committee on Economic, Social and Cultural Rights, Concluding observations on the Third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3, at 27; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 15, 69 and 70.

⁷ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 3 March 2017, CEDAW/C/IRL/CO/6-7, at 48–49.

⁸ European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 86–92.

⁹ European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 135–147.

¹⁰ European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 164–167.

¹¹ European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013, Submission of the Government on the Merits, Case No. 3, 28 February 2014, at 32.

¹² United Nations, Common core document forming part of the reports of States parties Ireland (2014) HRI/CORE/IRL/2014, 207.

bodies.¹³ For example, Ireland responded to the recent collective complaint brought before the European Committee for Social Rights by the European Roma Rights Centre, by stating:

The provision of suitable and secure accommodation for the Travelling Community is a priority for the Irish government. Its efforts in this area are fully compliant with the standard required by the Committee for the achievement of complex and costly goals.¹⁴

A difference in views between international bodies and the Irish state is not uncommon throughout Ireland's human rights record, as was seen in Chapter 2.¹⁵ While the use of the operationalisation framework may also be generalised in its applicability, in both an Irish context and beyond, Chapter 3 unpacks operationalisation within the single rights area of Traveller accommodation, using the three-part framework of translating, implementing and monitoring for the purposes of moving beyond the narrower doctrinal view of culturally appropriate accommodation as being given effect to by law alone and considering instead how it operates in practice.

¹³ See, for example: Committee on the Elimination of Discrimination against Women, Combined sixth and seventh periodic reports of States parties due in 2016, Ireland, 30 September 2016, CEDAW/C/IRL/6-7, 257–259, which states 'Successive Governments have recognized the special position of Travellers in a range of legislative, administrative and institutional provisions designed to protect their rights and improve their position', at 257; Committee on the Rights of the Child, Combined third and fourth periodic reports of Ireland due in 2009, Ireland, 26 January 2015, CRC/C/IRL/3-4, 554–557, which states 'Since the enactment of the 1998 legislation, each local authority has concluded two successive Traveller Accommodation Programmes and is currently working towards the conclusion of its third round of programmes. Significant progress has been made in the delivery of Traveller accommodation during this time', at 555; Human Rights Council, Working Group on the Universal Periodic Review, Twelfth session, Geneva, 3–14 October 2011, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1*, Ireland, 22 July 2011, A/HRC/WG.6/12/IRL/1, 135, which states 'Significant progress has been made in the provision of Traveller accommodation in recent years'; Committee on the Elimination of Racial Discrimination Summary record of the 2063rd meeting held at the Palais Wilson, Geneva, on Tuesday, 22 February 2011, CERD/C/SR.2063, 42–44, which states 'Progress had been made in recent years in implementing policies affecting Travellers in the areas of housing, education, employment and health care', at 42; Second periodic report of States parties due in 2004, Addendum, Ireland, 24 June 2004, CERD/C/460/Add.1, Appendix entitled 'Legislative, administrative and other initiatives taken to combat discrimination against the traveler [sic] community', 24–31, which states 'All the main elements of that Strategy were incorporated in the Housing (Traveller Accommodation) Act 1998 which put in place a comprehensive legislative framework within which the accommodation needs of Travellers are being addressed', at 24.

¹⁴ European Committee of Social Rights, *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Submission of the Government on the Merits, Case No. 3, 28 February 2014, 32.

¹⁵ For example, in the one-year follow up procedure asked of Ireland by the UN Human Rights Committee at the time of Ireland's third examination under the International Covenant on Civil and Political Rights in 2008, or in the follow up procedures required by the Committee of Ministers to the Strasbourg case of *O'Keefe v Ireland* in 2014.

Given that there are clearly significantly conflicting views between the international human rights bodies and the state, is it possible to fully assess how Ireland operationalises the right to culturally appropriate accommodation in the case of Traveller accommodation? The sections which follow take the previously established three-part framework of translation, implementation and monitoring set up in Chapter 2 and apply these operationalisation features in the specific context of Traveller accommodation.

In Chapter 2, an interesting feature that emerged when exploring what the international guidance has to say on human rights operationalisation was how it does, in some instances, envisage state and non-state actors working together, in a hybrid fashion, in overseeing the domestic implementation of human rights. This hybridity is seen again here in Chapter 3, where situations of co-delivery or the involvement of entities beyond the state *per se* (government departments, local authorities, etc) are seen throughout the chapter. We can also see that where there is hybridity it appears to produce some more effective results from the perspective of substantive fulfilment of the right. This suggests that hybridity may hold some potential for the more effective operationalisation of human rights in Ireland. Where this hybridity exists in the case of Traveller accommodation rights, it appears to be beneficial for the Traveller community in Ireland. It is rarely fully formalised or institutionalised, however, and is also subject to political volatility and other outside influences, which collectively have a negative effect on how the right is translated, implemented and monitored.

3.2 Translation through law and policy

This section now turns to a deeper exploration of how this right is translated through law and policy in Ireland. As we have seen in Chapter 2, the actual enforceability of international human rights law is often said to depend on the domestic legal and constitutional framework for transposition, i.e. whether a state operates a monist or dualist legal tradition.¹⁶ Attitudes around dualism and translation of international instrument also find their way into discussions on the issue of Traveller accommodation. Some of the interview participants for this research expressed views that the Concluding Observations and other guidance from international

¹⁶ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 547.

bodies do not have the force of law or are something of a ‘grey area’.¹⁷ Interestingly, two of the interviewees who held these views were senior government officials and a third was a Traveller activist. While the guidance from international bodies may have a moral or political force, or the ‘ability to embarrass Ireland’s . . . reputation’,¹⁸ it was also seen as ‘opinions’ which ‘are interesting and should be taken seriously but are not law’.¹⁹ It is reasonable to assume that attitudes on dualism as an obstacle or something problematic may have a direct influence on how the provisions are translated in the Irish context. Chapter 1 discussed the lack of strict constitutional provision for housing or culturally appropriate accommodation *per se* in Ireland, creating a normative gap at the highest level of rights protection within the state.

This section considers how the changes in approach since the 1960s have had significant effects on Traveller accommodation in Ireland.²⁰ All housing legislation in Ireland applies equally to Travellers and non-Travellers and both were, strictly speaking, treated alike in law for the purposes of housing allocation until the 1980s.²¹ However, the policy and legislative landscape affecting Traveller accommodation has changed quite radically in approach since the 1960s. Given that, as Coates et al note, much of Traveller accommodation policy in Ireland ‘has evolved at least in part on foot of recommendations emerging from reports prepared by independent bodies’,²² it is worth examining the approach and composition of these bodies as

¹⁷ Interviews with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as ‘Participant No. 2’ or ‘P2’; Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’; and Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as ‘Participant No. 12’ or ‘P12’.

¹⁸ Interviews with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as ‘Participant No. 2’ or ‘P2’.

¹⁹ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as ‘Participant No. 12’ or ‘P12’, also saying ‘. . . [a]nd a lot of it is opinion and poorly informed opinion’.

²⁰ In the late 1990s, John O’Connell identified policies affecting Travellers as divided into three phases, each phase being associated with a key publication analysing the issues of the time and setting out strategies for change: (1) Assimilation phase 1963 (Report of the Commission on Itinerancy, 1963); (2) Integration phase 1980–1990 (Report of the Travelling People Review Body, 1983); (3) Intercultural phase 1990 (Report of the Task Force on Travelling People, 1995). See John O’Connell, ‘Policy issues in Ireland’ in Orla Egan (ed), *Minority Ethnic Groups In Higher Education In Ireland – Proceedings of Conference held in St. Patrick’s College, Maynooth, 27 September 1996* (Higher Education Equality Unit 1997), <http://www.ucc.ie/publications/heeu/Minority/minority.htm> accessed 10 November 2014. John O’Connell’s 1997 analysis predated the Housing (Traveller Accommodation) Act 1998 and measures which followed. I have updated O’Connell’s ‘phases’ in this section, in order to take account of the later policy and legislative developments.

²¹ Housing Act 1988, which gave new powers to Local Authorities to provide for serviced halting sites, at section 13(1).

²² Dermot Coates, Fiona Kane and Kasey Treadwell Shine, *Traveller Accommodation in Ireland: Review of Policy and Practice* (Centre for Housing Research 2008) 37.

a way of assessing which approaches have been welcomed by Travellers and by international human rights mechanisms as preferable.

Assimilation in the 1960s and 1970s

The 1960s saw a noteworthy move towards treating Travellers differently in law, in terms of their accommodation. While we see no specific mention of Travellers in legislation until the 1980s, there is little doubt that other legislation was used prior to this where necessary to address issues to do with Traveller accommodation, as local authorities saw fit.²³ Of major consequence to the matter of culturally appropriate Traveller accommodation at this time was the establishment of the Commission on Itinerancy in June 1960.²⁴ Its remit was ‘to enquire into the problem arising from the presence in the country of itinerants in considerable numbers’ and to consider steps to be taken:

- (a) to provide opportunities for a better way of life for itinerants
- (b) to promote their absorption into the general community
- (c) pending such absorption, to reduce to a minimum the disadvantage to themselves and to the community resulting from their itinerant habits.²⁵

The Commission sponsored two census collections, in 1960 and 1961, for the purposes of their research.²⁶ The publication of the report of the Commission three years later in 1963 became

²³ For example, section 2(9) of the City and County Management (Amendment) Act 1955 allowed for a City or County Manager to deal ‘forthwith with any situation which he considers is an emergency situation’ and section 4 of the same Act entitled ‘Requisition that a particular thing be done’, allowed for elected officials to override any planning decisions. This was referred to in the Second Stage debate for the 1988 Housing Act, ‘Section 27 amends section 3 of the City and County Management (Amendment) Act 1955, to enable a local authority manager to undertake works which he regards as urgent and necessary to provide a reasonable standard of accommodation for any person. This measure has been retained from the 1985 Bill and is in effect designed to help with the provision by local authorities of accommodation for travellers. The serious problem of the travellers requires some measure such as this.’ Ger Connolly TD, Minister of State at the Department of the Environment, Dáil Éireann Debates, 2 June 1988, Housing Bill 1988, Second Stage, Vol 381, No. 6, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail1988060200006> accessed 27 August 2017.

²⁴ The Commission was chaired by a Supreme Court judge and made up of senior officials in various government departments and state bodies. There were no Traveller representatives.

²⁵ Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963) 11.

²⁶ Significantly, any counts of Travellers at this time (as happened previously in 1944, 1952 and 1956) were routinely carried out by An Garda Síochána. See David B Rottman, A Dale Tussing and Miriam M Viley, *The Population Structure and Living Circumstances of Irish Travellers: Results from the 1981 Census of Traveller Families* (Economic, Social and Research Institute 1986) 2.

the first state-published policy position on Travellers,²⁷ and as such was a significant milestone in how the Irish state viewed Traveller culture, lifestyle and ethnicity at the time.²⁸ The Commission's ultimate aim was to deal with the Traveller 'problem' by the elimination of nomadic practices and the ultimate assimilation of Travellers.

Advertisements calling for submissions were placed by the Commission in 'national daily and local newspapers', and announcements made on national radio, but these did not appear to take account of literacy difficulties.²⁹ The 1963 report states that '[i]t was evident at an early stage that itinerants were unlikely to come forward to the Commission with information as to their way of life or their views and attitudes generally'.³⁰ In a rather paternalistic fashion, the section on 'Sources of Information' continues:

The Commission were further satisfied that it would be unwise and undesirable to proceed with their consideration of the problems without making direct contact with a representative number of itinerant families and that the only feasible course was for the Commission to visit the itinerants in their encampments.³¹

The Irish Traveller Movement notes this choice as 'bizarre in the least',³² given that the visits were unannounced and were facilitated by a member of staff of the local council, at the time Dublin Corporation, whose job it usually was to move on the Travellers in question from unauthorised sites.³³ A number of site visits were carried out, and seemingly informal engagements occurred between members of the Commission and Travellers,³⁴ yet few accounts or views from these visits are recorded in the final report. From its inception, the Commission on Itinerancy lacked any joint approach with Travellers in finding solutions to what were

²⁷ Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963).

²⁸ Described as 'cultural genocide' by David Joyce. See interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as 'Participant No. 10' or 'P10'.

²⁹ Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963) 14.

³⁰ Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963) 99.

³¹ Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963) 29.

³² Irish Traveller Movement, Review of the Commission on Itinerancy Report (Irish Traveller Movement 2013) at 4.

³³ Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963) 29. Although the Commission notes that they were 'greatly impressed by the manner in which [Mr William Reynolds] performed his difficult duty efficiently but without the use of force and by the humane and charitable interest which he took in the families and in their problems.'

³⁴ 'Individual members of the Commission availed of several opportunities in their everyday work to interview itinerant families in various areas. In all, it is estimated that approximately 300 families were visited by different members of the Commission at one time or another during the period of the work of the Commission', Department of Social Welfare, Report of the Commission on Itinerancy (Stationery Office 1963), 30.

considered its aims. From the scarce information available in the report, engagements from visits to sites did not appear to contribute to any of the report's final recommendations.³⁵

As has been seen throughout this thesis, the Commission on Itinerancy has been widely cited throughout the academic literature, setting the tone for state discourse for many decades. Given the Commission's mandate, it is little surprise that out of its 11 members, not one was a Traveller or a representative of the Traveller community of any kind, the members being 'drawn almost exclusively from those in positions of power within the state'.³⁶

Integration in the 1980s

In the 1980 case *McDonald v Feely*,³⁷ the Housing Act 1966³⁸ was interpreted as placing a duty on statutory authorities 'to look to the housing needs of those unable to provide for themselves'. No explicit reference is made to the actual provision of the accommodation itself, although mention is made of fitness for habitation and overcrowding,³⁹ yet O'Higgins J interpreted this duty to prepare housing schemes as something that '... would seem to involve a corresponding duty' in terms of Traveller accommodation. As seen earlier in this section, however, the Act was challenged in *O'Reilly v Limerick Corporation*⁴⁰, when Costello J refused to grant an order directing the Corporation to provide serviced halting sites, saying the authority did not have to give effect to every proposal in their programme.⁴¹

³⁵ Irish Traveller Movement, Review of the Commission on Itinerancy Report (Irish Traveller Movement 2013), at 4.

³⁶ As the Irish Traveller Movement notes, 'the Committee is drawn almost exclusively from those in positions of power within the state, such as a Judge of the High Court (chair of the Committee); the Vice-president for Leinster of the National Farmers' Association; the Director of the Dublin Institute of Catholic Sociology; a Chief Superintendent of an Garda Síochána; a County Manager; two Chief Medical Officers; a former chief inspector for the Department of Education and the chairman of the General Council of the Committees of Agriculture', Irish Traveller Movement, Review of the Commission on Itinerancy Report (2013 Irish Traveller Movement), at 3, <http://itmtrav.ie/wp-content/uploads/2017/02/ITM-Review-of-the-1963-Commission-on-Itinerancy.pdf> accessed 13 June 2017.

³⁷ Referred to in *McDonald v Feely & Ors* (SC, 23 July 1980), where O'Higgins CJ, commenting on the threatened eviction of a Traveller family who had camped on the land of the plaintiff, said such an eviction could hardly be regarded as appropriate action by a Housing Authority.

³⁸ This Act consolidated the approximately 50 pieces of legislation governing housing in Ireland and imposed a statutory duty on local authorities to provide housing in certain circumstances, allowing a local authority to provide social housing, and obliging them to make an assessment of housing needs at least once every five years. See section 53(1) Housing Act 1966.

³⁹ Sections 53(1)(a) and (b) Housing Act 1966.

⁴⁰ [1989] ILRM 181.

⁴¹ [1989] ILRM 181, at 196. Note that Costello J subsequently stepped back from this position in the case of *O'Brien v Wicklow UDC* (HC, 10 June 1994). See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration 2015), at 360, footnote 72. See also Tanya

In 1981, the Travelling People Review Body was established jointly by the then Minister for the Environment and Minister for Health and Social Welfare ‘to review current policies and services for the travelling people and to make recommendations to improve the existing situation’.⁴² In an inaugural meeting of the Body, addressed by both ministers, the Group was asked to examine a range of different issues, including ‘the needs of travellers who wish to continue the nomadic way of life’ and ‘the organisational arrangements to ensure that travellers are represented in decision-making affecting them at local and national level’.⁴³

The language of the Review Body report is more considered and respectful than that of the 1960s Commission report, and the former Equality Authority suggested that its terms of reference signalled a move away from the more extreme assumptions of the Commission towards a different understanding of Traveller identity, particularly given the inclusion of a section in the final report entitled ‘Who are Today’s Travellers?’, in which it unpicked and criticised the definitions used in the *Commission on Itinerancy Report*.⁴⁴ The Review Body report stated:

The term ‘traveller’ is used here to designate membership of the identifiable group referred to and not just to make the distinction between a nomadic way of life and a more settled one. The abandonment of the nomadic way of life does not automatically entail the renunciation of the traveller ethic nor integration with the settled community. Integration, if it is to occur, is a long and complex experience.⁴⁵

The Review Body deliberated on submissions received ‘from a number of individuals and organisations’ and made visits to a number of counties where they met with local authorities,

Ní Mhuirthile, Catherine O’Sullivan and Liam Thornton, *Fundamentals of the Irish legal System: Law, Policy and Politics* (Round Hall 2016) 280.

⁴² Department of the Environment and Department of Health and Social Welfare, *Report of the Travelling People Review Body* (Stationery Office 1983) 7.

⁴³ Department of the Environment and Department of Health and Social Welfare, *Report of the Travelling People Review Body* (Stationery Office 1983), 3.

⁴⁴ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006) 16.

⁴⁵ Department of the Environment and Department of Health and Social Welfare, *Report of the Travelling People Review Body* (Stationery Office 1983) 6.

health boards, schools, training centres, elected representative, ‘and travellers’.⁴⁶ They also ‘visited authorised sites and roadside camps of travellers in the area’.⁴⁷ In this review, there was clearly a departure from the 1960s Commission in that this body argued against assimilation. The report does recommend that group housing should be built to accommodate extended Traveller families, as well as serviced halting sites; however, it also recommends that such sites should be kept to a minimum,⁴⁸ and states:

It cannot be emphasised too much that the over-riding consideration in the provision of services for travellers is that permanent accommodation should be made available for every family aspiring to it, both as a fundamental right and to ensure effective participation in social, educational and other services.⁴⁹

After the Report was published, a Task Force of Ministers of State issued a statement of ‘Government Policy in Relation to Travelling People’ in July 1984, which detailed a ‘comprehensive programme to provide accommodation and other services for travellers’ but which would also aim ‘to integrate the travellers and the settled community’.⁵⁰ Following a recommendation from the Review Body, in 1984 the government committed to clarifying in legislation what the responsibilities of housing authorities should be in relation to Travellers, as well as ensuring that these responsibilities were met.⁵¹

In the legislation which eventually resulted, the Housing Act 1988, there was some progress towards considering nomadism as a way of life. This was the first piece of legislation to expressly mention Travellers as a group with particular accommodation needs.⁵² Travellers were not explicitly included in any Irish housing policy or legislation until this time despite the fact, as Padraic Kenna points out, that every other vulnerable group in Irish society appears

⁴⁶ Department of the Environment and Department of Health and Social Welfare, Report of the Travelling People Review Body (Stationery Office 1983) 9.

⁴⁷ Department of the Environment and Department of Health and Social Welfare, Report of the Travelling People Review Body (Stationery Office 1983) 10.

⁴⁸ Department of the Environment and Department of Health and Social Welfare, Report of the Travelling People Review Body (Stationery Office 1983) 21.

⁴⁹ Department of the Environment and Department of Health and Social Welfare, Report of the Travelling People Review Body (Stationery Office 1983) 33.

⁵⁰ Committee to Monitor the Implementation of Government Policy on Travelling People, First report: Committee to monitor the implementation of Government policy on Travelling people (Department of Health 1985) at 25–38. The Monitoring Committee was established in 1984 and issued six reports before being dissolved in 1993.

⁵¹ Equality Authority, Traveller Ethnicity: An Equality Authority Report (Equality Authority 2006) 20.

⁵² In s 13 Housing Act 1998 (later amended by s 29 Housing (Traveller Accommodation) Act 1998).

throughout housing reports and legislation over time, from tuberculosis sufferers to newly-weds.⁵³ The 1988 Housing Act gave new powers to local authorities to provide for serviced halting sites,⁵⁴ section 13(1) stating that it applies ‘to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life’.⁵⁵ Compared to the provisions of the 1966 Act, the local authority now had additional powers in relation to Travellers:

S 13(2): A housing authority may provide, improve, manage and control sites for caravans used by persons to whom this section applies, and may carry out any works incidental to such provision, improvement, management or control, including the provision of services for such sites.⁵⁶

Important, though, is the use of ‘may’ in section 13(2) rather than ‘shall’ in this section of the Act, implying a power rather than an obligation upon the Authority. Laffoy J held in *Ward and Others v South Dublin County Council*⁵⁷ that the sites in question to be provided by South Dublin County Council ‘must be permanent and the quality of services available must be the same as the quality of services for those provided with homes’,⁵⁸ i.e. the provision of sites was mandatory, not permissive. In the same case, Justice Laffoy also stated, however, that ‘[i]t is not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its statutory functions’.⁵⁹

In a departure from the practice of the Commission on Itinerancy, 3 of the 23 members of the Travelling People Review Body were Travellers.⁶⁰ It could be argued that the consideration of nomadism and Traveller accommodation needs might be evidence of a more hybrid approach

⁵³ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 52.

⁵⁴ As well as measures to deal with homelessness, in s 10, are measures to deal with accommodation unfit for human habitation, in s 9(2)(c), and a number of other vulnerable groups, at s 9(2)(c), including young persons leaving institutional care, those in need of accommodation for medical or compassionate reasons, persons who are elderly or disabled, and those who could not reasonably meet the cost of the accommodation which they are occupying or to obtain a suitable alternative.

⁵⁵ Housing Act 1988. Section 13(1) states ‘This section applies to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life,’ and states that councils ‘may provide, improve, manage and control sites for caravans’.

⁵⁶ Section 13(2) Housing Act 1988.

⁵⁷ *Ward v South Dublin County Council* [1996] 3 IR 195.

⁵⁸ *Ward v South Dublin County Council* [1996] 3 IR 195, para 202.

⁵⁹ *Ward v South Dublin County Council* [1996] 3 IR 195, para 203.

⁶⁰ ‘The Review Body considers that in the light of experience and current knowledge the concept of absorption is unacceptable, implying as it does the swallowing up of the minority traveller group by the dominant settled community, and the subsequent loss of traveller identity.’ Department of the Environment and Department of Health and Social Welfare, *Report of the Travelling People Review Body* (Stationery Office 1983) 13.

between Travellers and non-Travellers in this instance. Albeit minimal representation in number, it is noteworthy all the same.

Interculturalism in the 1990s

In the 1990s, we see an important move towards a trend of including Traveller-specific organisations⁶¹ in discussions around policy formulation – a departure from ‘the moralising rhetoric’ of the 1960s towards ‘a process of “accommodating” Travellers and Travellers helping themselves, and having a responsibility towards the national community, the environment and the locality’.⁶²

Of most significance in the 1990s, and of meaningful influence on the future of Traveller accommodation, the (then) Department of Equality and Law Reform established the Government Task Force on the Travelling Community in June 1993.⁶³ In terms of co-delivery,

⁶¹ Such as Pavee Point, Irish Traveller Movement, National Traveller Women’s Forum Exchange House and the Parish of the Travelling People.

⁶² Una Crowley and Rob Kitchin, ‘Paradoxical spaces of Traveller citizenship in contemporary Ireland’ (2007) 40 *Irish Geography* 128, 131. Coates et al note that: ‘Traveller accommodation policy outputs in the period between the 1983 Travelling People Review Body report and the 1995 Task Force report show three trends. First, there is a much greater increase again in the number of families accommodated on halting sites. Second, there is a substantial increase in the numbers being accommodated in group housing schemes. In just nine years (from 1981 to 1990) 233 families were accommodated in these schemes (DoEHLG, various years), compared with the 459 families being accommodated in standard housing in this same period (the Review Body recommended the provision of 1,400 such houses from 1982 to 1987). A third trend is that the numbers of families living on the roadside still do not significantly differ from the start to the end of this period. As with the 1963 report what actually happens in this period in terms of the accommodation of Traveller families appears to run counter to the recommendations of the 1983 report, and indeed to policy directives enacted on foot of these recommendations’. See Kasey Treadwell Shine, Fiona Kane and Dermot Coates, *Traveller-Specific Accommodation: Practice, Design and Management* (Centre for Housing Research 2008) at 39, <http://docplayer.net/372315-Traveller-specific-accommodation-practice-design-and-management.html> accessed 30 July 2017.

⁶³ The Terms of Reference of the Task Force were (1) To advise and report on the needs of travellers and on Government policy generally in relation to travellers, with specific reference to the co-ordination in policy approaches by Government Departments and local authorities; (2) To make recommendations, for consideration by relevant Ministers, to ensure that appropriate and coordinated planning is undertaken at national and local level in the areas of Housing, Health, Education, Equality, Employment, Cultural and anti-discrimination areas; (3) To draw up a strategy for consideration by relevant Ministers, to define and delineate the respective roles and functions of relevant statutory bodies which cater for the needs of travellers, including recommendations for ensuring that services are provided for travellers in all local authority areas, and likewise throughout the functional area of each local authority; (4) To report on implementation of measures to meet the Government target of providing permanent serviced caravan site accommodation for all traveller families who require it by the year 2000. Pending the realisation of that target, to report on arrangements whereby temporary serviced caravan sites should be provided by local authorities for traveller families who require them; and to examine and report on the costings of such sites and to advise and report on the most efficient use of resources in the provision of such sites; (5) To explore the possibilities for developing mechanisms including statutory mechanisms to enable travellers to participate and contribute to decisions affecting their lifestyle and environment; (6) To analyse nomadism in modern Irish society and to explore ways whereby mutual understanding and respect can be developed between the travelling community and the settled community; and

high hopes were held for the Task Force and its significance;⁶⁴ this was seen as the first time that the Irish government listened to and recognised a specific need around Traveller accommodation.⁶⁵ Welcomed by the UN Human Rights Committee at the time of Ireland's first examination under the International Covenant on Civil and Political Rights in 2008,⁶⁶ its purpose was to advise and report on Traveller needs, and on government policy, as it related to the Traveller community in general. The Task Force's 1995 report extended to over 300 pages and made 380 recommendations,⁶⁷ including 52 recommendations on accommodation alone.⁶⁸ The report ultimately led to the enactment of the Housing (Traveller Accommodation) Act of 1998,⁶⁹ thus showing '... that we have got the government to listen and recognise the need for Traveller accommodation to be different'.⁷⁰ The Task Force was seen as '... a departure from seeing Travellers as a sub-set of poverty and dropouts from the famine and it was the first time Travellers were involved at that national level in negotiating its report';⁷¹ this became a starting point for the Department in producing guidance on Traveller accommodation for local

(7) To report and make recommendations to the Minister on any other matters affecting the general welfare of travellers. See Department of Justice, Equality and Law Reform, Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community (Department of Justice, Equality and Law Reform 2005).

⁶⁴ Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

⁶⁵ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

⁶⁶ UN Human Rights Committee, Concluding observations on the initial periodic report of Ireland, 3 August 1993, CCPR/C/79/Add.21, which states that the Committee 'welcomes the establishment of ... a Task Force that also includes members of the "Travelling Community" to advise on the special needs of that community', at para 5.

⁶⁷ Department of Justice, Equality and Law Reform, Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community (Department of Justice, Equality and Law Reform 2005) 11–53.

⁶⁸ Department of Justice, Equality and Law Reform, Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community (Department of Justice, Equality and Law Reform 2005) 17–24.

⁶⁹ At the time of enactment, Minister of State at the Department of the Environment and Local Government (Mr Molloy) said: 'We are almost at the end of the debate on this Bill. It was initiated some time ago and goes back to the decision of former Minister, Mervyn Taylor, to set up the task force. Deputy McManus acted as chairman of the task force before being appointed Minister of State. As Minister of State she played an important role and took the recommendations of the task force into account', Housing (Traveller Accommodation) Bill 1998, Seanad Bill amended by Dáil, Report and Final Stages, 2 July 1998.

⁷⁰ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

⁷¹ Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

authorities,⁷² with this guidance making specific recommendations for the provision of serviced halting sites.⁷³

The Housing (Traveller Accommodation) Act 1998 requires each local authority to conduct an assessment of the housing needs of Travellers who qualify for housing support in the area and to adopt a five-year Traveller Accommodation Programme (TAP) on the basis of this assessment.⁷⁴ Sections 19 and 20 of the Act provide for the appointment of a National Traveller Accommodation Consultative Committee (NTACC) to advise the Minister (for Environment/Housing) on ‘general matters concerning the preparation, adequacy, implementation and coordination of Traveller Accommodation Programmes’.⁷⁵ The Act also provides for the establishment of Local Traveller Accommodation Consultative Committees (LTACC),⁷⁶ bodies that must be consulted in relation to Traveller Accommodation Plans.⁷⁷ For the first time in any relevant legislation, transient, seasonal provisions were also specified. Section 6 of the Act requires housing authorities, when carrying out an assessment under section 9 of the 1988 Housing Act, to assess the need for halting sites in the area in question. In carrying out this assessment, authorities should have regard to both the number of Travellers in the area and the need for halting sites with limited facilities (referred to in section 13 of the Act of 1988) in relation to the annual patterns of movement of Travellers, as they move to locations other than their normal place of residence.⁷⁸ Section 29, which amends section 13 of the 1988 Act, notes that ‘[t]his section applies to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life’.⁷⁹

⁷² Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

⁷³ Department of Justice, Equality and Law Reform, Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community (Department of Justice, Equality and Law Reform 2005).

⁷⁴ Sections 6–10 Housing (Traveller Accommodation) Act 1998.

⁷⁵ Section 19 Housing (Traveller Accommodation) Act 1998. The Planning and Development Act 2000 also places the onus on local authorities to make specific provision for a Travellers when drawing up their five-year development plans. Section 10(2)(i) Planning and Development Act 2000 states a development plan shall include objectives for, among other items, ‘(i) the provision of accommodation for travellers, and the use of particular areas for that purpose’.

⁷⁶ Section 21, Housing (Traveller Accommodation) Act 1998.

⁷⁷ At the time of enactment, Minister of State at the Department of the Environment and Local Government (Mr Molloy) said: ‘One of the main objectives of the Bill is the improvement in the existing arrangements for consultation between local authorities, travellers and the public’, Housing (Traveller Accommodation) Bill 1998, Seanad Bill amended by Dáil, Report and Final Stages, 2 July 1998.

⁷⁸ Section 6 Housing (Traveller Accommodation) Act 1998.

⁷⁹ Section 29 Housing (Traveller Accommodation) Act 1998.

A reading of the long title of the Act might suggest, initially, that this was a progressive piece of legislation,⁸⁰ and the Act was referred to in positive terms by several interview participants,⁸¹ who described it as ‘. . . a reasonably good piece of legislation, it has all the right elements’⁸² and one that ‘goes much further than the previous policy positions’.⁸³ Even though the Act has not addressed local structural racism or local community collective discrimination, on paper and as a legal precedent it has been ‘helpful’.⁸⁴ P3 said that, to the best of his knowledge, Ireland was the only EU member state to have a specific piece of legislation to speak to the accommodation needs of Roma or Travellers,⁸⁵ while P10 noted that the specific mention of provision for transient sites and provision for nomadism in legislation ‘[should be] normal, I suppose, in terms of international human rights’.⁸⁶

It could be argued that sections 7–18 of the 1998 Act translate the right to culturally appropriate accommodation by way of policy, in the requirement they place upon local authorities to prepare and adopt five-year plans for Traveller Accommodation Programmes to meet the accommodation needs of Travellers.⁸⁷ However, section 16 of the Act states that the authority shall ‘take any reasonable steps as are necessary’ when implementing this Programme.⁸⁸ It is

⁸⁰ ‘An act to amend and extend the housing acts, 1966 to 1997, the local government (planning and development) acts, 1963 to 1998, the local government act, 1991, to make provision for the accommodation needs of travellers, to provide for the appointment of a national traveller accommodation consultative committee and local traveller accommodation consultative committees and to provide for related matters.’ See Housing (Traveller Accommodation) Act 1998.

⁸¹ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’; Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’; David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’; and Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

⁸² Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

⁸³ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

⁸⁴ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

⁸⁵ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

⁸⁶ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

⁸⁷ The introduction of five-year Traveller Accommodation Programmes in the 1998 Act was reinforced by the Planning and Development Act 2000, which introduced a provision, at section 10(1), that local authorities should make specific provision for Traveller Accommodation Programmes when drawing up their overall strategy for the proper planning and sustainable development of the area.

⁸⁸ Section 16(1) Housing (Traveller Accommodation) Act 1998. The Explanatory Memorandum to the 1998 Act also states, under ‘Purpose of the Act’, at (d) that one of the purposes is ‘to require housing authorities to take reasonable steps to secure the implementation of traveller accommodation programmes for their functional area’.

interesting how the term ‘reasonable steps’ perhaps mirrors the vagueness of guidance offered by many international human rights legal instruments and bodies, as discussed in Chapter 2, although the term ‘reasonable steps’ is not unusual legislative language in Ireland.⁸⁹ A lack of sanctions for non-compliance by local authorities in the provision of accommodation has been generally seen as a difficulty since the enactment of the 1998 Act and was cited as such by interviewees.⁹⁰ For example, P10 said:

I suppose the biggest criticism you could say of it, it didn’t put teeth into the Act, they didn’t kind of have any *sanction*, you know you can have a lovely programme, you can have your plans and you can have your scope all set out but again, you know, if you don’t acknowledge that there is, nimbyism exists and that a lack of political will exists well then you have to have some sort of stick to beat the local authorities with and unfortunately the Traveller Accommodation Act doesn’t have that stick . . . There is a couple of carrots in it but there is no stick in it and that is the problem.⁹¹

Darren O’Donovan notes the Act’s failure to secure adequate accommodation as being ‘attributable to the statute’s language of reasonableness, and the absence of express equality or cultural rights underpinnings’.⁹² O’Donovan says that the Act, crucially, ‘relies entirely upon judicial oversight to enforce this provision. With the duty framed in terms of rationality, the Irish judiciary has been reluctant to enforce positive obligations of provision’ he says.⁹³ He does not point to any direct evidence to support this assertion in his 2016 piece, however, and further exploration in research to support this claim might be useful.

⁸⁹ Of note, an advanced search of www.irishstatutebook.ie returns 317 Acts and 275 statutory instruments as containing this term.

⁹⁰ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’; Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’; David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

⁹¹ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

⁹² Darren O’Donovan, ‘Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights’ (2016) 16 *International Journal of Discrimination and the Law* 5, 8.

⁹³ Darren O’Donovan, ‘Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights’ (2016) 16 *International Journal of Discrimination and the Law* 5, 8.

P3 and P5 both felt that if there was political will at national government level to impose some sort of sanctions or penalties on local authorities who did not fulfil their obligations, this would be a positive development.⁹⁴ At the time the interviews were conducted in 2014, proposals were announced for the new five-year accommodation plans in 2014 to include a mid-term review and annual budgetary targets and this was seen as a welcome development by P3.⁹⁵

While the 1998 Act provides for a National Traveller Accommodation Strategy with the aim of delivering Traveller-specific accommodation and halting sites, each one is still subject to local planning permission and objections from the local settled community, where racist attitudes towards Travellers can and do prevail. Accommodation and sites are often provided in areas that are isolated from local services and transport links.⁹⁶ In this regard, the role of politicians (as local elected officials with oversight of local planning decisions) was cited by several interview participants as a significant obstacle in terms of operationalisation,⁹⁷ ranging from a ‘lack of political will’, fear of losing votes, institutionalised racism in local government and ‘NIMBYism’.⁹⁸ P3 said:

We actually have a very good legislative and policy context in relation to Traveller accommodation, we really do and there are some good structures there in terms of

⁹⁴ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

⁹⁵ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

⁹⁶ In a 2008 research study carried out on behalf of the Centre for Housing Research, it was found that the majority (33 of 40) of sites or group housing schemes had some form of environmental hazard nearby (electricity pylon, telephone masts, dumps, major roads, industrial pollution). Most schemes studied did not have access to emergency equipment or phone services, or provisions for green spaces, and had no or out-of-date emergency equipment. See Kasey Treadwell Shine, Fiona Kane and Dermot Coates, *Traveller-Specific Accommodation: Practice, Design and Management* (Centre for Housing Research 2008) xvi, <http://docplayer.net/372315-Traveller-specific-accommodation-practice-design-and-management.html> accessed 12 August 2016.

⁹⁷ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’; Colm O’Cinneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as ‘Participant No. 1’ or ‘P1’; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’; Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’; David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

⁹⁸ ‘NIMBY’ is an acronym for ‘Not In My Back Yard,’ a term used to describe a person who resists unwanted development in their own neighbourhood, in this case any form of Traveller accommodation. See Una Mullally, ‘NIMBYism is the national sport of south Dublin’, *Irish Times* (Dublin, 19 October 2015), <http://www.irishtimes.com/opinion/una-mullally-nimbyism-is-the-national-sport-of-south-dublin-1.2396172> accessed 4 December 2015.

at local level you have the LTACCs then you have the National Traveller Accommodation Consultative Committee, so you have the infrastructure at local and national level, you have the policy and legislative context which, you know, is a great enabler around Traveller accommodation but the problem is that in an Irish context, and this is the age old problem, is the lack of implementation, lack of political will.⁹⁹

It might be said that this lack of political will was evidenced by the outcome of the ‘Citizen Traveller’ public campaign launched in October 1999, growing out of the 1995 *Report of the Task Force on Travelling People*, which recommended the need for improved levels of contact between Travellers and settled communities. The Citizen Traveller campaign did not survive and was wound up by government in 2002 with the view that it had not ‘. . . fully embraced the objectives of the Task Force, or of the government, in funding the campaign and that it had represented the Traveller perspective exclusively . . .’ and did not address the concerns of the settled community.¹⁰⁰

Although the 1995 *Report of the Task Force on Travelling People* contained many good recommendations in terms of Traveller accommodation and created high expectations among the Community, its challenge would prove to be implementation:¹⁰¹

. . . even [at] the time of the Task Force I remember being over at a conference in Wales and the Department of the Environment were there and the Equality Authority. Just on paper, it sounded like a great place and I was in the audience and I just said to them ‘it is great what we have achieved and what we have on paper, but honestly the implementation is crippling us’, and I still say that.¹⁰²

⁹⁹ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

¹⁰⁰ Department of Justice, Equality and Law Reform (2002) ‘Value for money and management audit of the Citizen Traveller Campaign and the preparation of a report on financial position’, October 2002, at 29, <http://www.justice.ie/en/JELR/citizentraveller.pdf/Files/citizentraveller.pdf> accessed 11 November 2014.

¹⁰¹ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁰² Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

When the Task Force was established in 1993, 4 of its 18 members belonged to Traveller representative bodies.¹⁰³ Many of the interviewees for this research mentioned the Task Force report as an important mechanism for progressing Traveller rights in Ireland.¹⁰⁴ P8 said it was the first time Travellers were involved at national level in negotiating a report.¹⁰⁵ As well as the 78 submissions to the Task Force listed, a number of which were from Traveller organisations,¹⁰⁶ there were also a number of other interactions with Traveller-specific organisations,¹⁰⁷ and it is clear throughout the report that their views were taken on board. Several of the recommendations made in the 1995 report point towards greater inclusion and participation of Travellers in the decisions that affect them.¹⁰⁸ In a departure from any previous review body, the 1995 report contains a detailed set of recommendations for the proposed establishment of a Traveller accommodation agency with quite significant powers, which should include Travellers in its board of directors.¹⁰⁹ At the time of the *Second Progress Report* on the 1995 Task Force, issued in 2005, it is noted that ‘Since the first Report in 1995, there is evidence that particular sectors of government activity, notably accommodation and the Health and Education Sectors are working in a more strategic way and consulting more with the Traveller community.’¹¹⁰

¹⁰³ Department of Justice, Equality and Law Reform, *Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (Department of Justice, Equality and Law Reform 2005), 8–9.

¹⁰⁴ Interviews with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

¹⁰⁵ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁰⁶ Department of Justice, Equality and Law Reform, *Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (Department of Justice, Equality and Law Reform 2005) Appendix 1, 305.

¹⁰⁷ Department of Justice, Equality and Law Reform, *Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community* (Department of Justice, Equality and Law Reform 2005) Appendix 2, 308.

¹⁰⁸ For example, in relation to recommendations around accommodation, DR21 recommends ‘Existing official temporary sites should be upgraded where appropriate, to the standard of permanent halting sites or transient sites, on the basis of consultation’; and DR30 recommends, concerning a proposed amendment of section 8 of the 1988 Housing Act, which deals with the estimate of accommodation requirements in an area, ‘to require the local authority to have regard to consultation with and submissions from Travellers and local Traveller organisations in making this estimate’. See Department of the Environment, *Report of the Task Force on the Travelling Community* (1995 Department of the Environment) at 19 and 22 respectively.

¹⁰⁹ Department of the Environment, *Report of the Task Force on the Travelling Community* (Department of the Environment 1995), at 19–20.

¹¹⁰ *Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community*, December 2005, at 7.

Many expectations were raised by the establishment of the 1995 Task Force and its importance as a blended mechanism for the oversight of and progression towards improved Traveller rights in Ireland.¹¹¹ A clear line can be drawn from the 1995 *Report of the Task Force on Travelling People*¹¹² to the enactment of the Housing (Traveller Accommodation) Act of 1998, which made some progress towards a recognition of nomadism, albeit in law and in a limited fashion.

Criminalisation in the 2000s

By the 2000s, the establishment of a further two national bodies provided overall guidance on the monitoring of progress on Traveller issues. The first of these, the High Level Group on Traveller Issues, was established in 2003, with the purpose of advising the Taoiseach.¹¹³ A second body, the National Traveller Monitoring and Advisory Committee (NTMAC), was established in 2007 with the purpose of ‘advis[ing] Government on the role of the state sector in providing services and supports for Travellers’.¹¹⁴ While the establishment of both bodies

¹¹¹ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹¹² Report of the Task Force on the Travelling Community (Government Publications Office 1995).

¹¹³ See Report of the High Level Group on Traveller Issues (2006),

<http://www.justice.ie/en/JELR/HLGReport.pdf/Files/HLGReport.pdf> accessed 28 March 2015. See UN Committee on the Elimination of All Forms of Racial Discrimination, Combined 3rd and 4th Reports of Ireland, CERD/C/IRL/3-4, at para 22, which states: ‘In December, 2003, at the request of the Taoiseach (Prime Minister of Ireland), a High Level Group on Traveller Issues was established under the aegis of the Cabinet Committee on Social Inclusion. Its remit is to ensure that the relevant statutory agencies involved in providing the full range of services to Travellers, would focus on improving the integrated practical delivery of such services. The High Level Group is a way of giving an additional focus on Traveller Issues to the official support structure for the Cabinet Committee on Social Inclusion.’ The State also sets out in its response to the ERRC Collective Complaint: Council of Europe: ‘Its recommendations have resulted, inter alia, in the creation of County Development Board Traveller Interagency Groups in each Local Authority area so as to improve consultation with Travellers and improve the provision of services to Travellers in a local area.’ European Committee of Social Rights, *European Roma Rights Centre v Ireland*, Collective Complaint No. 100/2013, Case No. 3, para 35.

¹¹⁴ See Department of Justice and Equality Press release: ‘Minister Fahey announces New National Traveller Monitoring and Advisory Committee’, 5 April 2007, which states: ‘The function of the NTMAC is complementary to the High Level Group on Traveller Issues, the Senior Officials Group which advises Government on the role of the state sector in providing services and supports for Travellers. The concept of a national consultative forum was approved by Government in March 2006 in the context of publication of the Report of the High Level Group. The NTMAC will provide a forum where the views of a wide cross section of stakeholders can be expressed. Minister Fahey commented that “International monitoring groups from the Council of Europe and the United Nations have stressed the importance of constructive dialogue and I share their concern that we would work together in a constructive manner. The advice and reports of this new Committee will, I believe, make an important contribution to helping the Government to determine future policy and strategy development.”’ <http://www.justice.ie/en/JELR/Pages/PR07000650> accessed 29 March 2015. See Irish State response to the ERRC Collective Complaint: Council of Europe: ‘Another important body in Ireland’s Traveller policy framework is the National Traveller Monitoring and Advisory Committee which was established in 2007. It provides an inclusive forum for all of the social partners and seven out of its twenty nine members are Traveller representatives. This has provided a very positive context for dialogue and for pursuing

was welcomed by Traveller groups, their scope has also been criticised. For example, in its Shadow Report to the UN CERD Committee on the occasion of Ireland's combined third and fourth examination under the Convention in 2011, Pavee Point remarked:

The government's report also refers to the High Level Group on Traveller Issues (para 22, p.166), but fails to mention that this group still comprises no Traveller representatives. Also of concern is the fact that this group, seen as the key government forum for policy and service development in relation to Travellers had not met in over 30 months, from May 2008 to November 2010.¹¹⁵

In the same report, in relation to the NTMAC, Pavee Point states '[w]hilst Pavee Point welcomes this development and the inclusion of Travellers on the Committee, it remains purely an advisory body with no power and no authority to make decisions'.¹¹⁶

As set out in Chapter 1, of most significance in law and policy during this decade was the manner in which the Housing (Miscellaneous Provisions) Act was introduced in 2002, making trespass a criminal rather than a civil offence.¹¹⁷ The Act was introduced without consultation with the National Traveller Accommodation Consultative Committee, avoiding the partnership consultation process in place at the time and provoking a lot of anger among the Traveller community.¹¹⁸ The 2002 Act does not include any reference to Traveller ethnicity or nomadism and, in conjunction with the 1993 Roads Act,¹¹⁹ effectively renders nomadism impossible

the overall effort to deliver better outcomes for Travellers. This body coordinates a number of National Traveller consultative committees including the NTACC and reports key concerns to the Minister for Justice every 2 years.' European Committee of Social Rights, *European Roma Rights Centre v Ireland*, Collective Complaint No. 100/2013, Case No. 3, at para 36.

¹¹⁵ See Pavee Point (2011) *A Response To Ireland's Third and Fourth Report on the International Convention On The Elimination Of All Forms Of Racial Discrimination (CERD)*, at 18. It is also worth noting, at this point, the establishment of Traveller Interagency Groups (TIGs) in order to find ways of securing better outcomes for Travellers (a framework which resulted from the recommendations of the HLG's 2006 Report). See Report of the High Level Group on Traveller Issues (2006) <http://www.justice.ie/en/JELR/HLGReport.pdf/Files/HLGReport.pdf> accessed 28 March 2015. These TIGs deal with the full range of services for Travellers, yet have no statutory basis, unlike the previously established Local Traveller Accommodation Consultative Committees (LTACCs), which have a narrower focus on Traveller accommodation.

¹¹⁶ See Pavee Point (2011) *A Response To Ireland's Third and Fourth Report on the International Convention On The Elimination Of All Forms Of Racial Discrimination (CERD)*, at 18.

¹¹⁷ Section 24 Housing (Miscellaneous Provisions) Act 2002. See previous discussion in Chapter 1.

¹¹⁸ Treacy Hogan, 'Traveller fury as McAleese signs tougher trespass laws', *Irish Independent*, 11 April 2002 (2002 Independent Newspapers).

¹¹⁹ Section 69(1) of the Roads Act 1993.

outside of authorised temporary halting sites on local authority land or with the agreement of a private owner.

The enforcement of 2002 Act now had the potential to disrupt children's education and access to social services and to prevent the social integration of families into communities, thus contravening several international obligations.¹²⁰ The Act's provisions mean that temporary dwellings may now be removed (rather than just moved) if they are: located within a one-mile radius of any other Traveller housing; causing a nuisance or obstruction; creating a risk to water or other services; or obstructing public amenities.¹²¹ Gardaí may remove caravans,¹²² and bring the owners before the District Court, charged with trespass.¹²³ If families do not move immediately they may be arrested and their homes impounded. Gardaí are granted powers to act without summons or court order (such direction does not need to be in writing) even if the local authority is in breach of its statutory obligations.¹²⁴ The effects of Housing (Miscellaneous Provisions) Act of 2002 and the process behind its introduction were criticised by several interview participants:¹²⁵ 'The reality is they have criminalised nomadism, Travellers are afraid to go on the road', said P8.¹²⁶

Despite the recognition of diversity found in Article 3(1) of the Irish Constitution, Duala Roughneen says that the 2002 Act would most likely not be found unconstitutional, using an interpretation of the 1977 case *Dooley v Attorney General*.¹²⁷ In *Dooley*, a challenge was brought to the Prohibition of Forcible Entry and Occupation Act 1971, claiming that it favoured

¹²⁰ Article 12 of the International Convention on Civil and Political Rights (CCPR) states that everyone shall have 'liberty of movement and freedom to choose his residence'; UN Convention on the Rights of the Child entitles children to 'standards of living adequate for the child's physical, mental, spiritual, moral and social development'; European Convention for Protection of Human Rights and Fundamental Freedom, Protocol 1 Article 1 refers to the right to 'peaceful enjoyment of possessions'; Article 8 refers to respect for private and family life. ICESCR General Comment No. 7. The Right to Adequate Housing – forced evictions.

¹²¹ Section 21(c)(i)–(iii) Housing (Miscellaneous Provisions) Act 2002.

¹²² Section 19F(1) Housing (Miscellaneous Provisions) Act 2002, when a person fails to comply with an order to leave the land concerned.

¹²³ Section 19H Housing (Miscellaneous Provisions) Act 2002.

¹²⁴ Section 19E Housing (Miscellaneous Provisions) Act 2002.

¹²⁵ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'; Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'; Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as 'Participant No. 11' or 'P11'.

¹²⁶ Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

¹²⁷ *Dooley v The Attorney General* [1977] IR 205. Perhaps the 2002 Act might now be worth testing in court, following recognition of Traveller ethnicity.

landowners. The Court found that the Act was not unconstitutional, as it applied to everyone equally, regardless of their occupation. A similar interpretation of the 2002 Act, however, says Roughneen, would be based on what Travellers *do*, i.e. travel, rather than on travelling being a part of who they *are*, i.e. nomadic.¹²⁸ One parliamentarian noted that the 2002 Miscellaneous Provisions Act (criminalising nomadism), which was enacted before the lifetime of current Oireachtas committee that she was a member of, ‘would never happen now’,¹²⁹ emphasising a recent move towards ‘political reform in a way that committees can effectively hold government to account in the process of law making’.¹³⁰

At roughly the same time as the backward step that was the 2002 Act, Ireland’s domestic human rights infrastructure was taking a forward step following the incorporation of the European Convention of Human Rights into Irish law by way of the European Convention of Human Rights 2003, allowing Convention rights to be considered before the Irish courts. The 2003 Act was seen by P10 as beneficial, ‘particularly from a legal practitioner’s perspective’ as a way of raising interest in rights and housing rights particularly.¹³¹ This may be seen in the case of *O’Donnell v South Dublin County Council* in 2007, where the High Court found in favour of a Traveller family with three severely disabled members, Laffoy J holding that South Dublin County Council’s failure to provide a second mobile home for the family was a breach of the Council’s duties under the 2003 Act.¹³² In a later case of the same name in 2008, Edwards J followed Laffoy J’s ruling in the earlier case, finding that the failure to address overcrowding in accommodation that arose from the caravan adaptations made for a family member with a physical disability was a violation of the plaintiff’s Article 8 Convention rights.¹³³ While these cases are positive examples of legal remedies, Gerry Whyte notes that they also demonstrate that a legal remedy alone achieves ‘relatively little for Travellers beyond putting pressure on the local authorities to provide caravans for Travellers with serious physical disabilities’.¹³⁴

¹²⁸ Dualta Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State*, (Cambridge Scholars Publishing 2010), at 90.

¹²⁹ Interview with Katherine Zappone, (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’.

¹³⁰ Interview with Katherine Zappone, (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’.

¹³¹ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

¹³² *O’Donnell v South Dublin County Council* [2007] IEHC 204.

¹³³ *O’Donnell v South Dublin County Council* [2008] IEHC 454.

¹³⁴ Gerry Whyte, ‘Public interest litigation in Ireland’, in Tiyanjana Maluwa (ed) *Law, Politics and Rights: Essays in Memory of Kader Asmal* (Martinus Nijhoff 2014) 272.

It is unsurprising that the early 2000s saw a significant disimprovement in the relationship between the state and the Traveller community after the trespass legislation was enacted. This significant legislative change took place without any consultation with Travellers, given the difficult and divisive nature of the issue.¹³⁵

Post-criminalisation in the 2010s

The decade that began in 2010 saw a positive development when the (then) Department of Environment, Community and Local Government funded the Irish Traveller Movement to conduct a feasibility study into the establishment of a Traveller-led accommodation organisation.¹³⁶ ‘Cena – Culturally Appropriate Homes Ltd’¹³⁷ is a Traveller-led voluntary housing body that was established in 2011 and granted Approved Housing Body status in October 2013.¹³⁸ The experience of the researcher involved in the initial feasibility study was that it ‘opened up a whole new world’ in terms of engaging with local authorities.¹³⁹ This was put down to the parties meeting on a positive initiative, in a way not previously encountered, which resulted in a ‘totally different dynamic’.¹⁴⁰ Led by a board of directors consisting of both of Travellers and non-Travellers, Travellers are involved in every stage of the Cena planning process: at pre-development stage, in engaging with the relevant authority on site development; in structured consultation at the design stage; and post development, in a system of ‘ongoing support’ with the local authority in question.¹⁴¹ Two Cena-led pilot schemes are in planning,

¹³⁵ At the time of the second (and final) progress report on the 1995 Task Force, it was noted that ‘many Travellers genuinely feel that the Traveller Community has suffered a number of high profile reversals such as the amendment of the public order legislation through the Housing (Miscellaneous Provisions) Act 2002 and the change of forum for hearing of discrimination cases, involving licensed premises, from the Equality Tribunal to the District Court’. See Second Progress Report of the Committee to Monitor and Co-Ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community, December 2005, at 7.

¹³⁶ Gráinne O’Toole, Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building a better future for Traveller Accommodation (Irish Traveller Movement 2009) 13.

¹³⁷ ‘Cena’ translates as ‘house’ in Gammon or Cant.

¹³⁸ Under s 6 of the Housing (Miscellaneous Provisions) Act 1992.

¹³⁹ Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁴⁰ Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁴¹ The nature of ‘ongoing support’ is envisaged as an ongoing dialogue between Cena residents and the local authority. Presentation by Accommodation Worker Brigie Casey, Offaly County Council Local Traveller Accommodation Consultative Committee, 7 September 2017.

in partnership with local authorities.¹⁴² At the time of writing, a Cena pilot site in Offaly consisting of four culturally appropriate housing units is at an advanced stage of planning and is likely to be completed at the end of 2018.¹⁴³

To conclude, therefore, on the translation of the right to culturally appropriate accommodation through law and policy, this section has shown how different legislative and policy approaches since the 1960s have had significant effects on Traveller accommodation in Ireland. The assimilation measures of the 1960s, with no involvement of Travellers in any kind of consultation process, became the dominant policy approach to Traveller accommodation until the 1980s. The establishment of the Travelling People Review Body in 1981 signalled a different understanding of Traveller identity,¹⁴⁴ and also included Travellers as members of the Body itself. In the legislation that followed this particular body's establishment, the Housing Act 1988, we see the first acknowledgment of Travellers as having particular accommodation needs.¹⁴⁵ The inclusion and participation of Travellers was continued in the establishment of the Task Force on the Travelling Community in June 1993,¹⁴⁶ which was noted by many of the interviewees for this research as an important mechanism for progressing Traveller rights in Ireland,¹⁴⁷ particularly in the emergence of the Housing (Traveller Accommodation) Act 1998.¹⁴⁸ Conversely, by the 2000s, as we have seen in this section, this collaboration between Travellers and the state is reversed again around the enactment of the 'trespass' legislation. In the examples of the structures of the Travelling People Review Body and the Task Force on the Travelling Community, we see instances of hybridity, yet these might be said to be state dominated, whereas the later example of Cena – albeit at a relatively early stage of development – might be said to mitigate this balance, being Traveller-led.

¹⁴² Kitty Holland, 'Housing association led by Travellers targets new homes' Irish Times (Dublin, 23 September 2015), <http://www.irishtimes.com/news/social-affairs/housing-association-led-by-travellers-targets-new-homes-1.2362026> accessed 30 July 2017.

¹⁴³ In conversation with former Cavan County Council Manager Jack Keyes, 12 September 2017. Mr Keyes has acted as a consultant to the Cena project since 2013.

¹⁴⁴ Equality Authority, *Traveller Ethnicity: An Equality Authority Report* (Equality Authority 2006) 16.

¹⁴⁵ In section 13 Housing Act 1998 (later amended by s 29 Housing (Traveller Accommodation) Act 1998).

¹⁴⁶ For the Terms of Reference of the Task Force see n 80. See Department of Justice, Equality and Law Reform, Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community (Department of Justice, Equality and Law Reform 2005).

¹⁴⁷ Interviews with Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as 'Participant No. 9' or 'P9'.

¹⁴⁸ Housing (Traveller Accommodation) Act 1998.

3.3 Implementing through structures, resources and services

As was established in Chapter 2, as well as giving effect through the enactment of laws and the creation of policy, guidance from the international mechanisms also suggests that states should give effect to the provisions contained in international instruments through: the creation of structures, such as national human rights institutions and other rights-protecting national machinery; resourcing these institutions through the provision of funding for staffing, operational and programmatic costs, or resourcing the provision of rights more generally; and the direct provision or delivery, from the state via its agents, of services that fulfil the human rights of individual rights holders. These three aspects of implementation are viewed now in the case of Traveller accommodation.

Creating domestic bodies with rights mandates

As we saw in Chapter 2, a state also operationalises through the creation of structures within its jurisdiction that deal with the protection of rights. In its Common Core Document to the UN, the Irish state lists a number of ‘institutions and national machinery’ under its domestic framework for the protection of rights at a domestic level.¹⁴⁹

In Ireland, the Irish Human Rights and Equality Commission Act 2014 merged the former Irish Human Rights Commission and the former Equality Authority into a single entity.¹⁵⁰ Section 2(1)(a) of the 2014 Act defines ‘human rights’ as ‘the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution’.¹⁵¹ Perhaps significantly, given the previously mentioned attitudes of state officials to the incorporation and status of international human rights provisions, section 2(1)(b) includes in this definition ‘the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party’.¹⁵² The Commission and its former manifestations have engaged with and challenged the state on its record on Traveller accommodation consistently over the

¹⁴⁹ Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, 131.

¹⁵⁰ The roles of both bodies as national human rights institution and national equality body are retained in the newly merged institution.

¹⁵¹ Irish Human Rights and Equality Commission Act 2014, section 2(1)(a).

¹⁵² Irish Human Rights and Equality Commission Act 2014, section 2(1)(b).

past two decades.¹⁵³ In addition, both the current body and its former entities have appointed Travellers as Board or Commission members at each cycle of membership, as well as repeatedly calling for the recognition of Traveller ethnicity in Ireland, drawing attention to the relationship between ethnicity and nomadism and its effects on Traveller accommodation.¹⁵⁴ The ‘public sector duty’ introduced by section 42 of the Irish Human Rights and Equality Commission Act 2014 was set out in Chapter 2 and, as we have seen, requires public bodies to set out, in their strategic plans and statements, their assessment of the human rights and equality issues relevant to their functions,¹⁵⁵ and to report annually on measures to address these issues.¹⁵⁶ In time it will be seen how local authorities take the obligation on board in relation to the duties they are mandated to carry out around Traveller accommodation.¹⁵⁷ Following the Carrickmines tragedy in 2014, the Commission highlighted concern around the state of emergency accommodation being provided by local authorities.¹⁵⁸

¹⁵³ For example, Irish Human Rights and Equality Commission, Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women: Submission to the United Nations Committee on the Elimination of Discrimination *Against Women on Ireland’s combined sixth and seventh periodic reports*, January 2017, at 13.1.2; Irish Human Rights and Equality Commission, Ireland and the United Nations Convention on the Rights of the Child: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland’s Combined Third and Fourth Periodic Reports, December 2015, at 26–27; Irish Human Rights and Equality Commission, Submission to the Second Universal Periodic Review Cycle for Ireland, September 2015, at 10; Irish Human Rights and Equality Commission, Ireland and the International Covenant on Economic, Social and Cultural Rights: Report to UN Committee on Economic, Social and Cultural Rights on Ireland’s third periodic review, May 2015, at 9.3; Irish Human Rights Commission, Submission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Report under the International Covenant on Civil and Political Rights, June 2014 at 195–197; Irish Human Rights Commission, Traveller Cultural Rights: The Right to Respect for Traveller Culture and Way of Life (Irish Human Rights Commission 2008); Equality Authority, Traveller Ethnicity: An Equality Authority Report (Equality Authority 2006). The Irish Human Rights Commission appeared as *amicus curiae* in the High Court proceedings *Lawrence & Ors v Ballina Town Council & Ors* in February 2008. The Equality Authority also appeared as *amicus curiae* in the proceedings, which concerned a challenge to the Housing (Miscellaneous) Provisions Act 2002. The case was part settled at the commencement of the hearing.

¹⁵⁴ For example, Irish Human Rights Commission, Submission on the Recognition of the Traveller Community as an Ethnic Minority in the State, January 2013, at 10; Equality Authority, Traveller Ethnicity: An Equality Authority Report (Equality Authority 2006), 11–41; Irish Human Rights Commission, Travellers as an Ethnic Minority under the Convention on the Elimination of Racial Discrimination: A Discussion Paper, 24 March 2004, at 10 and 16.

¹⁵⁵ Section 42(2)(a), Irish Human Rights and Equality Commission Act 2014.

¹⁵⁶ Section 42(2)(b), Irish Human Rights and Equality Commission Act 2014. Under section 42(3) of the 2014 Act, the Commission may give guidance to public bodies and under section 42(4) may issue guidelines or codes of practice. Sections 42(5)–(10) give stronger powers to the Irish Human Rights and Equality Commission to invite a public body to carry out a review and prepare an action plan, where they have not performed their functions in a way that is consistent with section 42(1). However, section 42(11) states that ‘Nothing in this section shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under subsection (1)’, which limits these powers to a degree.

¹⁵⁷ Equality and Rights Alliance (2015) ‘A new public sector equality and human rights duty: setting standards for the Irish equality and human rights infrastructure’, at 2, <http://www.eracampaign.org/uploads/A%20New%20Public%20Sector%20Duty%20March%202015.pdf> accessed 6 December 2015.

¹⁵⁸ Irish Human Rights and Equality Commission (2015) Statement by the Irish Human Rights and Equality Commission in response to recent tragedies at a temporary Traveller halting site at the Glenamuck Road in

The Commission could be said to be a hybrid structure in terms of the composition of its membership, which, the 2014 Act says, should ‘broadly reflect the nature of Irish society’.¹⁵⁹ The Commission is an ‘A-status’ national human rights institution, compliant with the UN Paris Principles, which speak of how such bodies should ensure a ‘procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights . . .’¹⁶⁰ In this case, we can see the example of the hybrid ‘pluralism’ contained in the Paris Principles enshrined in the 2014 Act. In 2013, following the appointment of the members designate of the newly merged body, Thomas Pegram commented that ‘[t]he expert calibre and diverse profiles of the 14 Commissioner designates bodes well for the future public standing of the new body’.¹⁶¹

We saw in Chapter 2 how ‘civil society’ was listed as part of the state infrastructure for the protection of human rights, where ‘Ireland is fully committed to a pluralistic and open democracy and values the role played by a diverse and inclusive civil society in this regard’.¹⁶² The work of parliamentary committees is also of note here as an implementation structure, highlighted by the state as ‘numerous Joint Oireachtas Committees which consider issues of importance to human rights and public affairs’.¹⁶³ In relation to such committees, P4 felt that any degree of human rights technical knowledge on the part of parliamentarians could be

South Dublin, issued 23 October 2015, <http://www.ihrec.ie/news/2015/10/23/statement-by-the-irish-human-rights-and-equality-c/> accessed 23 July 2016.

¹⁵⁹ Irish Human Rights and Equality Commission Act 2014, at section 13(13).

¹⁶⁰ United Nations Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly resolution 48/134 of 20 December 1993, at para 1. This paragraph goes on to list the types of bodies that might be included in the composition of members, such as non-governmental organisations, trade unions and professional bodies,

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> accessed 1 September 2016.

¹⁶¹ Thomas Pegram, ‘Bridging the divide: the merger of the Equality Authority and the Irish Human Rights Commission’ (Policy Institute, University of Dublin, Trinity College Dublin 2013) at 16. The former Irish Human Rights Commission had been criticised for being ‘too pragmatic when it might have been “more muscular” in its statements and interactions’. See Donncha O’Connell (citing Fiona de Londras) ‘Rights body should have bigger impact’, *Irish Times* (Dublin, 11 July 2011). No external assessment has been conducted to date on the work of the new body from which it might be determined whether success in carrying out its new mandate is as a result of, or in any connected with, the hybrid or blended nature of the membership of its Commission.

¹⁶² Common core document forming part of the report of States parties: Ireland, UN Doc HRI /CORE/IRL/2014, 131.

¹⁶³ United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 132.

helpful, and lead to a greater likelihood of engagement in the treaty body processes.¹⁶⁴ The fact that, at the time of interviewing, one of the members of the Houses of the Oireachtas Joint Committee on Justice, Defence and Equality had recently announced his Traveller heritage, making him the first TD from a Traveller background,¹⁶⁵ was seen as important to the work of that Committee in its hearings on the recognition of Traveller ethnicity.¹⁶⁶ Within the overall context of political reform, the Justice Committee and how it does its work was seen as important, ‘. . . trying to become more powerful, more effective on the provision of oversight’.¹⁶⁷

Another form of implementation via structures or bodies might be said to be the core government department, currently the Department of Housing, Planning and Local Government.¹⁶⁸ The Department’s 2016–2019 Statement of Strategy identifies, under its ‘section 42’ public sector duty obligations,¹⁶⁹ ‘the provision of housing for Travellers’ as one of ‘the most pertinent aspects of its business to which human rights and equality considerations apply’.¹⁷⁰ In addition, a number of agencies with specific housing remits come under its aegis, such as the Housing and Sustainable Communities Agency, the Local Government Management Agency, An Bord Pleanála, the Housing Finance Agency and the Private Residential Tenancies Board.¹⁷¹ The department also has a role in ensuring ‘that there are

¹⁶⁴ Interview with Katherine Zappone, (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’. Senator Zappone referenced her own previous experience as a member of the former Irish Human Rights Commission.

¹⁶⁵ See Kitty Holland, ‘The road to recognising ethnic rights of Travellers’, Irish Times (Dublin, 6 December 2015).

¹⁶⁶ Interview with Katherine Zappone, (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’. See Report on the Recognition of Traveller Ethnicity (Houses of the Oireachtas, Joint Committee on Justice, Defence and Equality 2014), <http://www.oireachtas.ie/parliament/media/committees/justice/Report-on-Traveller-Ethnicity.pdf> accessed 6 December 2015.

¹⁶⁷ Interview with Katherine Zappone, (then) Independent Senator (Dublin, 8 April 2014), referred to as ‘Participant No. 4’ or ‘P4’.

¹⁶⁸ The department states that ‘We are the Government department that is responsible for housing, planning, community and local government. Our Mission is to support: the sustainable and efficient delivery of well-planned homes; effective local government; and vibrant inclusive communities. See <http://www.housing.gov.ie/> accessed 30 May 2017.

¹⁶⁹ Section 42 Irish Human Rights and Equality Commission Act 2014.

¹⁷⁰ Department of Housing, Planning, Community and Local Government, Statement of Strategy 2016–2019 (Department of Housing, Planning, Community and Local Government 2016) 7.

¹⁷¹ Department of the Environment, Community and Local Government, 2015 Annual Report, at 6, http://www.housing.gov.ie/sites/default/files/publications/files/annual_report_2015.pdf accessed 12 August 2016. The Department’s 2011 Housing Policy Statement states: ‘Our vision for the future of the housing sector in Ireland is based on choice, fairness, equity across tenures and on delivering quality outcomes for the resources invested. The overall strategic objective will be to enable all households access good quality housing appropriate to household circumstances and in their particular community of choice.’ See Department of Environment, Community and Local Government (2011) Housing Policy Statement, <http://www.housingagency.ie/Regulation/Housing-Policy-Statement-2011.pdf> accessed 12 August 2016.

adequate structures and supports in place to assist the authorities in providing [Traveller] accommodation, including a national framework of policy, legislation and funding'.¹⁷² In addition to the core department, local authorities are key players in the structural landscape for the implementation of services in this area. Traveller organisations have called for the establishment of a statutory Traveller agency with powers to approve and enforce local authority five-year Traveller Accommodation Plans.¹⁷³ P3 suggested that Traveller accommodation should be taken out of the hands of the local authorities entirely and allocated to a separate body, in a manner similar to Northern Ireland in the late 1960s and early 1970s with the establishment of a non-sectarian Northern Ireland Housing Executive.¹⁷⁴ The establishment of a central agency was a recommendation of the 1995 Task Force¹⁷⁵ and has been called for by Traveller organisations several times since the 1990s.¹⁷⁶ Three other interview participants supported this as something that would be a positive development in terms of oversight.¹⁷⁷ In terms of hybrid or blended types of operationalisation, perhaps such a body would have the potential for Traveller representation among members of its governance and executive structures, yet such a body would still be required to deal with local authorities and the established planning mechanisms throughout the state. Some of the challenges this might pose are dealt with further in Chapter 5, which considers hybrid models of operationalisation in more detail.

¹⁷² See Simon Coveney TD, Minister for Housing, Planning and Local Government, Written Answers [16587/16] 16 June 2016 'Traveller Accommodation', Vol 913, No. 3 <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016061600061#WRM01550> accessed 27 August 2017.

¹⁷³ See Pavee Point appearance before Oireachtas Joint and Select Committees Committee on Housing and Homelessness, Thursday, 19 May 2016, <https://www.kildarestreet.com/committees/?id=2016-05-19a.44> accessed 12 August 2016.

¹⁷⁴ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'.

¹⁷⁵ Department of the Environment, *Report of the Task Force on the Travelling Community* (Department of the Environment 1995) at 124, <http://www.lenus.ie/hse/handle/10147/560365> accessed 28 November 2016.

¹⁷⁶ See, for example, the Irish Traveller Movement Shadow report to Ireland's first CERD examination in 2005 which states: 'The State should establish a National Traveller Accommodation Agency as outlined in the Report of the Task Force on the Travelling Community 1995 to ensure a centrally driven approach which would address the current fundamental weakness in the National Traveller Accommodation Strategy', *Report in Response to Ireland's First Examination under the International Covenant on the Elimination of Racial Discrimination* (Irish Traveller Movement 2005) 22.

¹⁷⁷ Interviews with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'; Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

Allocating resources

In its Common Core Document, the state says that ‘[s]ignificant funding has been made available for the provision of Traveller-specific accommodation’.¹⁷⁸ This is a statement echoed in many recent interactions with the United Nations and Council of Europe, where it would appear that the state considers annual spending on Traveller accommodation as more than sufficient.¹⁷⁹ In addition to the direct funding of TAPs, it could be said that the resourcing of staff in departments that deal with aspects of Traveller accommodation is also a form of implementation, likewise, staff who provide administrative support to the Houses of the Oireachtas and in local authorities.¹⁸⁰ There have been significant overall reductions in capital funding to TAPs in recent years, however, with a reduction in allocation from €40 million to €4 million between the years 2008 and 2013, the equivalent of a 90% reduction.¹⁸¹ The

¹⁷⁸ See United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 219, which states: ‘Significant funding has been made available for the provision of Traveller-specific accommodation. In the period covered by the first programmes (2000 to 2004), € 130 million was expended on such accommodation (new and refurbished). In the period covered by the second programme (2005 to 2008), an additional € 142.55 million was spent on the provision of Traveller specific accommodation. € 49.026 million has been spent in the period 2009 – 2012.’

¹⁷⁹ See, for example: European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland, Complaint No. 100/2013, Submission of the Government on the Merits, Case No. 3, 28 February 2014, which states ‘Not only has Ireland has made every effort to provide adequate accommodation for Travellers in a manner consistent with the above-recited jurisprudence, but it also provides a second source of ring-fenced funding for Traveller-specific accommodation which operates in tandem with the Social Housing budget afforded to all citizens of Ireland’, at 12; UN Committee on Economic, Social and Cultural Rights, List of issues in relation to the third periodic report of Ireland, Replies of Ireland to the list of issues, 8 April 2015, E/C.12/IRL/Q/3/Add.1, which states ‘[t]he Department of the Environment, Community & Local Government provides 100% funding to local authorities for Traveller-specific accommodation’, at 65. Similarly, Ireland’s Second Universal Periodic Review report states ‘Some €400m has been invested in Traveller-specific accommodation in the past 15 years. €5.5m will be provided in 2016 for Traveller-specific accommodation, representing an increase of €1.2m (28%) on the 2015 capital provision,’ UN Human Rights Council, Working Group on the Universal Periodic Review, Twenty-fifth session, 2–13 May 2016, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Ireland, 9 February 2016, A/HRC/WG.6/25/IRL/1, at 139, and this is typical of the type of reporting on funding allocated to Traveller accommodation, i.e. stated without placement in an overall context.

¹⁸⁰ The number of staff serving in the Department at year end 2015 equated to 721 Whole Time Equivalent posts, according to Department of the Environment, Community and Local Government, 2015 Annual Report, at 6, http://www.housing.gov.ie/sites/default/files/publications/files/annual_report_2015.pdf accessed 12 August 2016. The number of staff employed in local government in Ireland stood at 28,882 in December, 2015. See National Oversight and Audit Commission, Local Government Efficiency Review Reforms, NOAC Report No. 5 – April 2016, at 4, <http://noac.ie/wp-content/uploads/2016/05/NOAC-LGER-Report.pdf> accessed 12 August 2016.

¹⁸¹ Capital funding for Traveller accommodation has fallen from €35 million in 2010 to €3 million in 2014. Jan O’Sullivan TD, Minister of State for Housing, Written Answers [25088/14], 12 June 2014 ‘Traveller Accommodation’ Vol 843, No. 6 <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2014061200059#WR000400> accessed 27 August 2017.

government has stated that capital funding for Traveller accommodation has been restored to €9 million in 2017.¹⁸²

In addition, as seen in Chapter 1, there have been reports of ‘a consistent underspend or failure to draw down the full amount of the funding allocated to Traveller Accommodation Plans at local level’,¹⁸³ with up to an underspend of 36% between 2008 and 2013 of the allocated Traveller accommodation budgets by local authorities,¹⁸⁴ including a reported underspend of €1.2 million in 2016 alone.¹⁸⁵ As was noted in the introduction to the thesis, an independent review of capital and current funding for Traveller-specific accommodation has been in progress in 2017 but the final report of this review has not yet been published.¹⁸⁶ Media coverage has hinted that the report points to a shortfall on targets for some time.¹⁸⁷ One of the difficulties at a local authority level with spending of funding, in the view of one elected official, is that funds towards Traveller accommodation are not allocated in to each local authority in a block allocation each year.¹⁸⁸ As part of the current process of funding allocation, each local authority must apply to the Department of Housing separately each time for local Traveller accommodation needs, including maintenance, with the effect of making the Department of Housing the final decision maker on such matters. Thus, when projects are not approved, the funding remains ‘unallocated’ and it appears that the underspend was the fault of the local authority. The elected official in this case felt that it would be more helpful and less bureaucratic if Traveller accommodation funding was allocated in its entirety to the local

¹⁸² Eoghan Murphy TD, Minister for Housing, Written Answers [37455/17], 11 September 2017 ‘Traveller Accommodation.

¹⁸³ Irish Human Rights and Equality Commission (2015) Report to UN Committee on Economic, Social and Cultural Rights on Ireland’s third periodic review, at 70, <http://www.ihrec.ie/download/pdf/icescrreport.pdf> accessed 12 August 2016.

¹⁸⁴ See testimony of Ronnie Fay, Pavee Point appearance before Oireachtas Joint and Select Committees Committee on Housing and Homelessness, Thursday, 19 May 2016, <https://www.kildarestreet.com/committees/?id=2016-05-19a.44> accessed 12 August 2016.

¹⁸⁵ Jack Power, ‘Over €1.2m in Traveller housing funding left unspent’ Irish Times (Dublin, 5 May 2017).

¹⁸⁶ Department of Housing, *Action Plan for Housing and Homelessness* (Department of Housing 2016), 55, http://rebuildingireland.ie/Rebuilding%20Ireland_Action%20Plan.pdf accessed 21 May 2017. In May 2017, the Irish Traveller Movement reported ‘RSM PACEC LIMITED was appointed by the housing agency in September 2016 to carry out a review of provision of Traveller accommodation under all TAPS from 2000 to date. This came from an action in the State’s strategy ‘Rebuilding Ireland’. Consultation took place with Local Authorities and some Traveller organisations. The NTACC has received a very brief presentation on its findings to date. The first draft of this research will be circulated to the NTACC very soon and be discussed at their next meeting on May 24th. There will be a NTACC sub group established, (ITM will be a member of this subgroup), to review the findings and develop key recommendations which will be approved by the NTACC and given to the Minister on the key findings from the research.’ ITM eBulletin 16 May 2017.

¹⁸⁷ Kitty Holland, ‘Traveller housing targets have not been met in 18 years’ *Irish Times* (Dublin, 14 September 2017).

¹⁸⁸ According to Councillor John Carroll, Offaly County Council, in conversation with the author, 7 September 2017.

authority each year (in the same manner as funding for roadworks and maintenance, for example) which would allow each authority to prioritise spending on Traveller accommodation, where and when it was required, at a local level. The allocation of this resourcing is state-controlled, thus the balance of power rests with the state. P5 spoke of a site entirely funded and constructed by Travellers themselves in Kildare:

Beautiful place, with the electricity, the tarmac, they plotted it off, and they did it without planning permission which, unfortunately, because they knew they'd never get it, but they did it, they invested themselves, they did it all . . . no cost to the state. They paid their bills to the ESB, everything else . . . so they applied for retention of planning permission, they didn't get it.¹⁸⁹

One noteworthy aspect of the approach by a Traveller-led voluntary housing body such as Cena, is that they will be able to source private sector funding with a corresponding level of independence from the state.¹⁹⁰ In summary, the resourcing of state-built, culturally appropriate Traveller accommodation has been subject to severe cuts and marked underspends in recent years, and this has been problematic for the community in terms of this aspect of operationalisation.

Providing services

In addition to providing resources for rights, the state – also in varying degrees – constructs, maintains and delivers services to official and unofficial halting sites, group housing schemes and transient sites, thus implementing by actual rights delivery. In reality, however, the direct provision of services in this way is subject to a host of external factors which may influence the degree of such direct delivery. Firstly, elected officials can object to proposed developments at the 'Development Plan' stage.¹⁹¹ Secondly, while Traveller Accommodation Programmes are outlined in Part II of the 1998 Act,¹⁹² these must also be approved by the

¹⁸⁹ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

¹⁹⁰ Of course this has the potential to bring other associated challenges.

¹⁹¹ Provided for in sections 7–9, Planning and Development Acts 2000 to 2006. See 'Development Plans', Department of Housing, Planning and Local Government, <http://www.housing.gov.ie/local-government/development-management/development-plans/development-plans> accessed 19 September 2017.

¹⁹² Provided for in Part II of the Housing (Traveller Accommodation) Act 1998.

Council in question. Thirdly, although temporary sites are not subject to the ‘Part 8 process’, any permanent Traveller-specific accommodation will be subject to the Part 8 Planning process under the Local Government (Planning & Development) Regulations 2001 to 2007 and the Planning and Development Acts 2000 to 2006, as amended.¹⁹³ It is not unusual for proposed Traveller sites to be objected to multiple times, at local level.¹⁹⁴

If accommodation is provided in areas that are isolated from local services, transport and other essential infrastructure, this is highly likely to impact on the extent to which such accommodation actually fulfils the provision of culturally appropriate accommodation or housing in the first place.¹⁹⁵ Halting site design varies between local authorities, but mostly consists of a number of units or bays where a caravan, mobile home or trailer can be parked. A fully serviced site will ideally have electricity, washing facilities and sanitary services, and should be in compliance with fire safety and building regulations.¹⁹⁶ Poor management,¹⁹⁷ lack of training,¹⁹⁸ lack of institutional mechanisms¹⁹⁹ and different approaches by different authorities,²⁰⁰ however, have each proven to be difficulties with the direct provision of accommodation, with proper maintenance of accommodation and halting sites referenced by interviewees as a particular difficulty.²⁰¹ Several interview participants identified difficulties

¹⁹³ Planning and Development Act 2000.

¹⁹⁴ Shane Phelan, ‘Proposed Traveller housing site faces 93 objections, including the effect on views and property prices’ *Irish Independent* (Dublin, 20 October 2015).

¹⁹⁵ See 2008 research study carried out on behalf of the Centre for Housing Research, it was found that the majority (33 of 40) of sites or group housing schemes had some form of environmental hazard nearby (electricity pylon, telephone masts, dumps, major roads, industrial pollution). Most schemes studied did not have access to emergency equipment or phone services, or provisions for green spaces and had no or out-of-date emergency equipment. See Kasey Treadwell Shine, Fiona Kane and Dermot Coates, *Traveller-Specific Accommodation: Practice, Design and Management* (Centre for Housing Research 2008) xvi, <http://docplayer.net/372315-Traveller-specific-accommodation-practice-design-and-management.html> accessed 12 August 2016.

¹⁹⁶ See Department of the Environment and Local Government (undated), ‘Guidelines Residential Caravan Parks for Travellers,’ <http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownload%2C18185%2Cen.pdf> accessed 12 August 2016.

¹⁹⁷ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁹⁸ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁹⁹ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²⁰⁰ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²⁰¹ Interviews with Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as ‘Participant No. 7’ or ‘P7’; David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

in relation to officials tasked with the direct delivery of Traveller accommodation at local level.²⁰² P8 said:

[T]here is no underlying commitment or cultural change within these types of institutions that were charged with delivering that. And that is the fundamental failure that we are seeing across the board with people who have been charged with the delivery and the capacity to deliver . . . There is legislation in place but they flouted that and they were allowed do that so there was no driving mechanism in place that could support Travellers to realise their right to appropriate and sustainable accommodation that was managed properly and delivered properly to them.²⁰³

As seen in section 3.2 of this chapter, the establishment of the approved Traveller-led housing body Cena has been a positive development in this regard, in terms of engaging with local authorities, yet its progress has been slow.²⁰⁴

An overly weighted focus upon ‘authorised’ versus ‘unauthorised’ halting sites, as has been the case in recent decades, diverts attention from the direct provision of culturally appropriate accommodation. As we have seen in Chapter 1, both the understanding of nomadism and the facilitation of it were identified as being difficulties.²⁰⁵ Secure accommodation facilitates nomadism by enabling Travellers to exercise their right to be nomadic and those who live in secure accommodation are most inclined to be nomadic during the summer months, because of their secure base for the winter months.²⁰⁶ We also saw in Chapter 1 how, while transient accommodation was provided for by the 1998 Act, the actual provision of transient sites never

²⁰² Interviews with Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as ‘Participant No. 7’ or ‘P7’; Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’; David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’; Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as ‘Participant No. 11’ or ‘P11’; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

²⁰³ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²⁰⁴ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²⁰⁵ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

²⁰⁶ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

became a reality.²⁰⁷ The commitment to the provision of transient sites varies, and while some local authorities may agree in principle with their provision, there is no uniform practice.²⁰⁸ As P8 stated:

Local authorities have ‘felt [culturally appropriate accommodation] was an add-on, something they were being required to do. They didn’t get it. They felt . . . it is a lifestyle choice and why should they be expected to do anything more to deliver on that.’²⁰⁹

Dublin City Council’s most recent Traveller Accommodation Programme states:

It is the City Council’s view that firstly, transient sites should only be provided following the full provision of the Traveller-specific requirement of Travellers indigenous to the Dublin City Council administrative area and secondly, only if there is demand for them.²¹⁰

The effects of the restriction of nomadism and its assimilating effects on Travellers can possibly be offset, said P10, by group housing schemes that facilitate Travellers living together, thus preserving Traveller culture.²¹¹ There has been misunderstanding about how Travellers may wish to use their living space in a culturally appropriate way, said P6.²¹² We saw this in Chapter 1, which discussed a decrease in traditional livelihoods and cultural practices and difficulties experienced in the keeping of horses.

²⁰⁷ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

²⁰⁸ Dermot Coates, Fiona Kane and Kasey Treadwell Shine, *Traveller Accommodation in Ireland: Review of Policy and Practice* (Centre for Housing Research 2008) 30.

²⁰⁹ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²¹⁰ Dublin City Council, *Traveller Accommodation Programme 2014–2018*, section 2(I). The (former) Department of the Environment and Local Government ‘Guidelines for Accommodating Transient Traveller Families’ (undated) states ‘It is not the intention to impose uniform solutions since situations may vary considerably in character across the country; therefore, the Guidelines should be applied in a flexible manner’, at 2.

²¹¹ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

²¹² Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

Darren O'Donovan identifies what he names three 'formative events' in how Travellers are excluded from appropriate accommodation: 'the eviction notice, the offer of standard housing and the delayed accommodation plan',²¹³ and the move to private rented accommodation was referenced throughout the interviews conducted for this research. We saw in Chapter 1 how the state considers that 'the majority of Travellers already live in standard housing'.²¹⁴ The 1981 'Census of Traveller Families' recorded a significant move to urban living at this time, with living conditions noted by the ESRI as symbolic of being 'caught in a classic vicious cycle':

The more squalid and unsanitary their living conditions, the more despised and outcast they become. The more unpopular they are, the greater the community pressure not to provide them with serviced and approved halting sites or standard housing, and indeed the more pressure there is for them to be forced to move on. These pressures result, in short, in still more deplorable living conditions, and the cycle continues. The provision of adequate and acceptable accommodation must be seen as the critical factor in breaking this vicious cycle.²¹⁵

Research carried out on behalf of the National Traveller Accommodation Consultative Committee in 2009 found, however, that Travellers argued that the assessment of needs 'does not accurately capture the demand for Traveller-specific accommodation and that many Travellers opt for standard housing because they believe it is their only realistic chance of securing permanent accommodation'.²¹⁶ This was echoed by P9 and P10, who stated that the recent large-scale movement of Travellers into private rented accommodation is having a significant effect overall on Traveller accommodation, and on nomadism in particular.²¹⁷ A

²¹³ Darren O'Donovan, 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights' (2016) 16 *International Journal of Discrimination and the Law* 5, 19.

²¹⁴ United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 222.

²¹⁵ David B Rottman, A Dale Tussing and Miriam M Viley, *The Population Structure and Living Circumstances of Irish Travellers: Results from the 1981 Census of Traveller Families* (Economic, Social and Research Institute 1986) at 60.

²¹⁶ Weafer and Associates (2009) *Research into the Barriers to the Provision of Traveller Accommodation*, National Traveller Accommodation Consultative Committee, at 12, <http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownload%2C25606%2Cen.pdf> accessed 12 August 2016.

²¹⁷ Interviews with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as 'Participant No. 10' or 'P10'; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as 'Participant No. 9' or 'P9'.

third of Traveller households are now living in the private rented sector, which, according to P9, is a massive shift in numbers in the last decade from Traveller-specific accommodation.²¹⁸

P10 said that while many young Travellers families availed of private rented accommodation between 2000 and 2010, many of these families are now seeking Traveller-specific accommodation once again.²¹⁹ Several interview participants spoke of a number of recent housing issues that also affect Travellers,²²⁰ whether Traveller-specific or not. Travellers have been affected by the same cutbacks in terms of allowances²²¹ and also affected by the ‘crisis’ in housing.²²² P7 and P10 felt that an increase in state building of social housing would also have a knock-on positive effect on Travellers, ‘. . . it comes down to bricks and mortar . . . you have to get back to building and I firmly believe that’.²²³ P3 felt that the establishment of a system of ‘dual housing lists’, i.e. Travellers being permitted to keep their names on both Traveller-specific accommodation waiting lists as well as mainstream housing lists, would be a welcome response in this regard.²²⁴

In this section we have seen how the Irish state has given effect to the right to culturally appropriate accommodation by the creation of structures which are directly concerned with the delivery of the right; by the resourcing of these institutions; and by the direct provision or delivery of the accommodation itself. We have seen some positive moves in terms of the mandating and resourcing of Ireland’s national human rights institution and national equality body and their decades-long focus upon the issue of Traveller accommodation, but also a repeated request by Travellers and Traveller organisations for the establishment of a dedicated

²¹⁸ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

²¹⁹ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

²²⁰ Interviews with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’; Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’; Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as ‘Participant No. 7’ or ‘P7’; Senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

²²¹ Interview with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’.

²²² Interview with Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as ‘Participant No. 7’ or ‘P7’.

²²³ Interviews with David Joyce, Barrister and Traveller activist (Dublin, 12 May 2014), referred to as ‘Participant No. 10’ or ‘P10’; Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as ‘Participant No. 7’ or ‘P7’.

²²⁴ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

state agency to oversee the provision of Traveller accommodation. We have seen the depletion of resources allocated by the state to Traveller accommodation, but we have also seen a persistent move towards Travellers living in private rented accommodation.

Finally, the third element in the three-part operationalisation framework refers to how states monitor or measure compliance with rights. The next section explores how this applies in the case of Traveller accommodation.

3.4 Measuring compliance with rights

As was established in Chapter 2, measurement is considered important in the practice of human rights and is an essential feature of the operationalisation process. Much progress is seen in recent decades on the development of indicators as measurement tools and the systemic collection of data. This section now turns to the measurement of compliance in the matter of Traveller accommodation, including that carried out by the Courts; processes that flow from international bodies and frameworks; processes that are facilitated by domestic bodies or entities; and, lastly, measurement that is facilitated by the collection of data.

Traveller accommodation cases before the Irish courts

The right to housing as it concerns Traveller accommodation has been raised in a number of domestic Irish cases,²²⁵ but has been tested domestically in three ways that are of significance to this research: (1) clarifying what comprises adequate conditions; (2) clarifying the performance of the duties of housing authorities; and (3) clarifying obligations around the provision of the accommodation itself.

Firstly, housing conditions were dealt with in *Burke v Dublin Corporation* in 1991, where the Supreme Court held that the letting of a house that was not new contained an implied warranty

²²⁵ Such as *County Meath VEC v Joyce* [1997] 3 IR 402; *O'Reilly v Limerick Corporation* [1989] ILRM 181; *Doherty v South Dublin County Council* [2007] 1 IR 246; *O'Donnell (a minor) & Others v South Dublin City Council & Others* [2007] IEHC 204; *McDonagh v Kilkenny County Council* [2007] IEHC 350; *Fingal County Council v Gavin & Others* [2007] IEHC 444; *Dooley v Killarney Town Council* [2008] IEHC 242; *O'Donnell v South Dublin County Council* [2007] IEHC 204; *O'Donnell v South Dublin County Council* [2008] IEHC 454; *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008).

that the accommodation was fit for human habitation.²²⁶ The Court said there was a continuing obligation upon the housing authority to eradicate unfit or uninhabitable housing in their areas and a duty to substitute habitable houses for it. If a housing authority was negligent in carrying out this duty, then a plaintiff might be entitled to damages.²²⁷

Secondly, the duties of housing authorities have been clarified in some cases, such as *County Meath VEC v Joyce* in 1997, when Flood J said that local housing authorities had a duty under the Housing Acts to perform their statutory functions in a rational and reasonable manner. In *Joyce*, where a local housing authority failed to act in adopting a Traveller Accommodation Plan, there was found to be a breach of statutory duty.²²⁸

Thirdly, the provision of accommodation has also been dealt with in some cases of interest, such as in *Ward and Others v South County Council*, where Laffoy J held that ‘those sites must be permanent and the quality of services available must be the same as the quality of services for those provided with homes’, i.e. the provision of sites was mandatory, not permissive.²²⁹ In a further case of interest, that of *O’Donnell v South Dublin County Council* in 2007, Laffoy J held that the Council’s failure to provide adequate accommodation for a Traveller family was a failure of the Council’s duties under section 3 of the European Convention on Human Rights Act, given that a number of the family members were severely disabled.²³⁰ In a subsequent case of the same name, *O’Donnell v South Dublin County Council* in 2008, Edwards J followed Laffoy J’s ruling in the earlier case and held that the state’s failure to deal with overcrowding in a caravan adapted to facilitate a family member’s disability was a breach of their Article 8

²²⁶ *Burke v Dublin Corporation* [1991] IR 341.

²²⁷ However, as we have seen in *O’Reilly v Limerick Corporation*, Costello J said that if a local authority fails to comply with its statutory obligations with regard to housing needs, the courts have no power to order the Minister of the Environment to exercise these powers. See *O’Reilly v Limerick Corporation* [1989] ILRM 181, 189.

²²⁸ Required under s 13 of the 1988 Housing Act, at the time of this case, and later amended by the 1998 Traveller Accommodation Act. See *County Meath VEC v Joyce* [1997] 3 IR 402.

²²⁹ *Ward and Others v South County Council* [1996] 3 IR 195.

²³⁰ *O’Donnell v South Dublin County Council* [2007] IEHC 204, a case concerning three Traveller applicants suffering from the medical condition Hurler’s Syndrome. The applicants needed assistance with basic daily activities, yet their accommodation was a caravan on an unofficial halting site, where ten people shared two bedrooms. The family had requested permanent halting site accommodation but the Council had initially offered settled accommodation, which was refused by the family. The Council subsequently was in the process of building a permanent site for the family but was delayed by local planning objections. Laffoy J noted that there was no direct Strasbourg jurisprudence on when provision was necessary in order to facilitate meaningful exercise of Article 8 rights. Nevertheless, the Court was willing to recognise that there could be a positive duty to provide ‘where special circumstances cause a direct interference of a serious kind in family life’, citing *Doherty v South Dublin County Council* [2007] 2 IR 696, para 36.

rights.²³¹ Although both *O'Donnell* cases are undoubtedly of importance, their scope is limited, as Gerry Whyte points out, given that both cases concerned plaintiffs who had quite severe disabilities.²³² In the case of *Lawrence v Ballina Town Council*, later in 2008, an extended family lost their case in which they claimed damages were due to them for the negative health effects and disruption to their children's education during the eight-year period they were camped in a swimming pool car park because no other accommodation was available.²³³

A legally held Irish right to housing, as dealt with in the three ways listed above, is therefore visible in the Irish courts, yet could not be relied upon in any meaningful way. Cases have tended to be extreme in circumstances, such as relying on disability or other factors as seen above. Such cases beg the question: if cases were taken by Travellers whose circumstances did not involve disabled family members, would the same principles apply? There is no direct jurisprudence on the point at this time and, if there was, it is unclear if there would be enough of a case to argue a lack of culturally appropriate accommodation. As was seen in Chapter 1, there is perhaps an opportunity for the judicial development of such rights, as seen in the recent case of *NHV v Minister for Justice and Equality*.²³⁴ In terms of the case law generally around Traveller rights, the legal unit set up in the Irish Traveller Movement in 2003, funded by Atlantic Philanthropies, was an important milestone in the active pursuit of *pro bono* strategic litigation on Traveller issues in Ireland.²³⁵ Other independent legal centres such as FLAC, Northside Community Law Centre and Ballymun Community Law Centre were also

²³¹ *O'Donnell v South Dublin County Council* [2008] IEHC 454. Edwards J however refused to order that another caravan be provided for by the Council but did order that temporary accommodation be provided to the family pending their placement in permanent accommodation.

²³² Gerry Whyte, 'Public interest litigation in Ireland and the European Convention on Human Rights Act 2003', in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014) 257, 275.

²³³ *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008). See also Anna-Marie Flynn, 'Council wins Traveller accommodation case', *Mayo News*, 5 August 2008 <http://www.mayonews.ie/news/4703-council-wins-traveller-accommodation-case> accessed 14 July 2017.

²³⁴ As in the case of *NHV v Minister for Justice and Equality* [2017] IESC 35, included in Chapter 1, involving a challenge appeal to the legal ban preventing an asylum-seeking man from working or seeking employment because of his status. The Supreme Court ruled that the absolute prohibition on seeking employment under the Refugee Act 1996 is contrary to the constitutional right to seek employment in May 2017 but in an unusual (for the Irish Courts) 'remedy' offered 'a suspended declaration of invalidity' where the Court did not invalidate the provision, but instead deferred its ruling so that the State could instead make a legislative response that would resolve the issue. See David Kenny, 'Guest post: David Kenny on *NVH v Minister for Justice*', *Constitution Project @ UCC Blog*, accessed <http://constitutionproject.ie/?p=621> 30 July 2017.

²³⁵ See Carol Coulter, 'Legal unit set up to deal with Travellers' interests' *Irish Times* (Dublin, 18 June 2003). The ITM Legal Unit was initially funded as a pilot project and eventually became the ITM Independent Law Centre in 2009. The Centre formally ceased operating in 2011/2012, due to a lack of funding.

advocating on Traveller accommodation cases from the late 1970s onwards.²³⁶ It is noteworthy that all of these organisations are non-governmental and their capacity is limited in terms of pursuing public interest litigation in Ireland.²³⁷

Funding and resources are perhaps not such a difficulty for the Irish Human Rights and Equality Commission as they are for civil society organisations. As well as legal powers carried over from the Irish Human Rights Commission Act 2000 (such as the power to carry out inquiries,²³⁸ to appear as *amicus curiae*,²³⁹ and to provide legal assistance),²⁴⁰ section 41 of the Irish Human Rights and Equality Commission Act 2014 also provides for the Commission to institute proceedings ‘in respect of any matter concerning the human rights of any person or class of persons’.²⁴¹ While there may be an issue around the necessary standing (or *locus standi*) on the part of the Commission in taking a case or cases related to Traveller accommodation, there may be opportunities for the Commission to consider section 41 cases that have implications for the large number of Travellers living in sub-standard accommodation.

Measurement by international bodies

Chapter 2 examined Ireland’s compliance with rights generally, both at the level of the UN and the Council of Europe, and concluded that Ireland has a history of reasonably good compliance with treaty body processes. However, the continuous resurfacing of recommendations from international bodies both in Concluding Observations and other findings could be said to be evidence that the Irish state’s attention to the content of these recommendations is casual, at best.²⁴² Taking part in international reporting procedures is an important part of the work of Traveller organisations and P3 said ‘ . . . we see these processes as being very, very important . . . we always furnish shadow reports because we contest what the government will be saying

²³⁶ Pdraig O’Morain, *Access to Justice for All: The History of the Free Legal Advice Centres 1969–2003* (Free Legal Advice Centres 2003) 31.

²³⁷ Free Legal Advice Centre, *Public Interest Law in Ireland – the reality and the potential*, Conference Proceedings (Free Legal Advice Centres 2003) 23.

²³⁸ Section 35, Irish Human Rights and Equality Commission Act 2014.

²³⁹ Section 10(2)(e), Irish Human Rights and Equality Commission Act 2014.

²⁴⁰ Section 40, Irish Human Rights and Equality Commission Act 2014.

²⁴¹ Section 41, Irish Human Rights and Equality Commission Act 2014.

²⁴² Suzanne Egan, ‘The UN human rights treaty system’ in Suzanne Egan (ed) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015), 55, 80. Egan also notes the view on this issue made by Deirdre Fottrell, ‘Reporting to the UN Human Rights Committee – a ruse by any other name’ (2001) 4 *ILT* 61.

in their report obviously'.²⁴³ As well as the issuing of shadow or parallel reports, Traveller organisations see the value of being present for hearings at UN treaty body examinations and the possibility of having informal meetings with the members of treaty-monitoring bodies for the purposes of trying to lobby on their issues, saying 'if it wasn't for these international human rights monitoring bodies . . . I think it is plausible to think that the situation could be a lot worse',²⁴⁴ ' . . . because they hate the embarrassment of it, you know and it's kind of sometimes the only stick we have to beat them with'.²⁴⁵ P12, a senior civil servant, noted that the 'international scrutiny' enables those within the system to make a case to a cabinet minister about difficulties they may be trying to overcome.²⁴⁶

'I think we are great for recommendations . . . but follow-ups is another story', said P7.²⁴⁷ P11 notes that if the state had engaged in any sort of significant follow-up process, it would be up front about this in its response to the UN Committee at its next periodic examination and 'if that is not there I think the silence should be significant'.²⁴⁸ P11 also cited a possible disconnect between the Department of Foreign Affairs and the Department of Justice and Equality:

I would be interested in seeing to what extent there is buck-passing between the Human Rights Unit and the DOJ and what gets lost in the buck-passing as it were. This isn't just for Traveller rights issues; other human rights issues get passed between those bodies as well. Because the Human Rights Unit has nothing to do with operationalisation, really, it is Foreign Affairs-focussed whereas Justice is, you know, the one that cracks the whip essentially.²⁴⁹

'Proceduralism' is also a feature here, where the easiest aspects of housing rights standards, such as participation, are implemented: 'Participation is the easiest thing to do, you have a

²⁴³ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'.

²⁴⁴ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'.

²⁴⁵ Interview with Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

²⁴⁶ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as 'Participant No. 12' or 'P12'.

²⁴⁷ Interview with Dessie Ellis, Dublin North West Constituency Dáil Éireann TD and Sinn Féin Spokesperson on Housing (Dublin, 25 April 2014), referred to as 'Participant No. 7' or 'P7'.

²⁴⁸ Interview with Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as 'Participant No. 11' or 'P11'.

²⁴⁹ Interview with Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as 'Participant No. 11' or 'P11'.

meeting, everyone participates . . . it's a very important aspect of the right. It's also the easiest thing to implement. It is also something that may have often had no impact at all.'²⁵⁰

Government officials say that the work is complex.²⁵¹ And a lack of department resources may be used as an excuse for not translating from the international to the domestic.²⁵² The UN Special Rapporteur on Housing says this would never be a difficulty in relation to a criminal justice system: 'no one is going to say "oh no, they don't need Courts! They don't need a justice system!"' This is particularly the case when it comes to complaints mechanisms for housing rights.²⁵³ There may also be resistance to a rights agenda, as it implies a different framework or a different lens for officials.²⁵⁴ This may be daunting as it is asking states to introduce a framework that they are not using currently.²⁵⁵

In contrast to the model where the European Committee of Social Rights (ECSR) is 'forced' to make a finding of either a violation or non-violation, the UN Committee on Economic, Social and Cultural Rights 'identifies problem areas and expresses concern'.²⁵⁶ In many ways the UN approach may be more useful 'because it doesn't drag you into the trenches of actually saying is this a formal violation or not . . . but it does mean sometimes there is a focus on data collection, a focus on trends, a focus on outcomes, but less of a focus on what's actually . . . what's actually going wrong'.²⁵⁷

²⁵⁰ Interview with Colm O'Conneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as 'Participant No. 1' or 'P1'.

²⁵¹ Interview with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as 'Participant No. 2' or 'P2'.

²⁵² Interview with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as 'Participant No. 2' or 'P2'; Deaglán Ó Briain, Participant No. 12, at 8.

²⁵³ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'.

²⁵⁴ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

²⁵⁵ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as 'Participant No. 13' or 'P13'.

²⁵⁶ Interview with Colm O'Conneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as 'Participant No. 1' or 'P1'.

²⁵⁷ Interview with Colm O'Conneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as 'Participant No. 1' or 'P1'.

Measurement by domestic bodies

Mixed views were expressed by interviewees around committees such as the National Traveller Accommodation Consultative Committee (NTACC) and National Traveller Monitoring and Advisory Committee (NTMAC) as monitoring bodies. P3 said:

So, [the NTACC] actually does inform and it does have some influence when we are negotiating and developing policies and programmes so I think it has an impact . . . but not to the extent that you would like, it is not a panacea, it is just another way of moving things forward from our point of view.²⁵⁸

P5 and P6 both cited the domestic Traveller Committees as potential and actual ways of measuring compliance with international mechanisms.²⁵⁹ '[T]hese committees . . . help you sit down and match progress' but become 'battlegrounds for fighting about other Traveller issues'.²⁶⁰ Having the NTMAC committee in place might itself might be used, by the state, as an example of what it has done about monitoring the implementation of the Traveller accommodation legislation.²⁶¹ An independent chairperson for the National Traveller Monitoring Committee could be helpful, in addition to making clear the roles of the other officials involved, said P6, and the NTMAC itself could be a useful instrument if used appropriately.²⁶² The NTACC and LTACCs were called 'malfunctioning'²⁶³ committees by interviewees, sometimes with members who are 'extreme' in their views,²⁶⁴ and sometimes 'only as good as [they're] chaired'.²⁶⁵ The committees become 'battlegrounds' for Traveller issues, sometimes with new members deliberately joining in the run up to local elections, so

²⁵⁸ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as 'Participant No. 3' or 'P3'.

²⁵⁹ Interviews with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'; Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

²⁶⁰ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

²⁶¹ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

²⁶² Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

²⁶³ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

²⁶⁴ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

²⁶⁵ Interview with Gráinne O'Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as 'Participant No. 8' or 'P8'.

that they can progress their own anti-Traveller agenda.²⁶⁶ This has provided a difficulty for Traveller organisations, who have questioned the benefits of their own membership of the committees and whether their representation on them is possibly counterproductive.²⁶⁷ In the case of the NTMAC, again it was noted that it had become a receptacle for all Traveller issues. A chairperson who was a former chief executive of a local authority was not considered to be independent as a chairperson.²⁶⁸ Both the NTMAC's role and membership were questioned:

. . . they are supposed to monitor and advise about the implementing of policy . . . for that to happen, then there needs to be a very careful choice of the chair, of the leadership, first of all, and secondly, the role of the officials involved and, in particular their function as duty bearers needs to be much clearer to them.²⁶⁹

In 2008, the UN Human Rights Committee was 'concerned that members of the Traveller community were not represented in the High Level Group on Traveller Issues' and recommended that the state should 'ensure that in public policy initiatives concerning Travellers, representatives from the Traveller community should always be included'.²⁷⁰ It is also worth noting, at this point, the establishment of Traveller Interagency Groups (TIGs), intended to find ways of securing better outcomes for Travellers and dealing with the full range of services provided to Travellers, but without a statutory basis.²⁷¹

²⁶⁶ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'.

²⁶⁷ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as 'Participant No. 5' or 'P5'. See also Kitty Holland, 'Traveller representatives walk out of housing meeting', Irish Times (Dublin, 3 November 2015), reporting how four Traveller groups 'walked out' of a conference co-hosted by the Department of Environment, Community and Local Government and the NTACC to discuss improving LTACCs around the country, 'The organisations said they could no longer "collude with a system that is failing" Travellers.'

²⁶⁸ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

²⁶⁹ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as 'Participant No. 6' or 'P6'.

²⁷⁰ UN Human Rights Committee, Concluding observations on the second periodic report of Ireland, 30 July 2008, CCPR/C/IRL/CO/3, at 23.

²⁷¹ A framework which resulted from the recommendations of the HLG's 2006 Report. See Report of the High Level Group on Traveller Issues (2006), <http://www.justice.ie/en/JELR/HLGReport.pdf/Files/HLGReport.pdf> accessed 28 March 2015.

Also of relevance here is the process around the development of the National Traveller and Roma Inclusion Strategy 2017–2021 (NITRIS).²⁷² This involved the establishment of a Steering Group with a total of 10 out of 25 places allocated to Traveller organisations.²⁷³ Consultation phases took place over a two-year period and involved relatively close participation with Traveller groups and individuals.²⁷⁴ The Strategy was adopted in June 2017, so it remains to be seen what level of collaboration will continue in the rollout of the strategy, which does not contain any implementation targets within the text of the final document. At its launch, Minister David Stanton spoke of the ‘unprecedented step’ of a meeting between the Cabinet Committee and a delegation of four Traveller representatives in February 2017, prior to the adoption of the Strategy, at the time of discussions around the recognition of ethnicity.²⁷⁵ P12 spoke about a Traveller and Roma strategy as having to be a government strategy rather than ‘some sort of a social partnership’, but following adoption of the Strategy:

. . . there is no reason why we shouldn’t have just one committee whose job it is to monitor implementation of that, where the Traveller reps and the civil servants in the various departments come together to exchange information and to account for themselves.²⁷⁶

The Steering Committee for the oversight of NITRIS has been established and contains a broad representative mix of independent Travellers, Travellers organisations and a variety of state

²⁷² National Traveller and Roma Inclusion Strategy, 2017–2021, http://www.justice.ie/en/JELR/Pages/National_Traveller_and_Roma_Inclusion_Strategy_2017%E2%80%932021 accessed 7 July 2017. The Strategy is required as part of Ireland’s commitments under the EU Framework for the Implementation of Roma Integration Strategies. Colin Clark has referred to European Roma integration strategies generally as ‘deeply problematic’ in their ‘pathologisation’ of Roma/Traveller communities, with the aim ‘how can we make them like us?’ See Colin Clark, ‘Miro Romipen: contesting childhood stigma on Roma/Gypsy/Traveller terms’, presentation to ‘Cultural and social perspectives of stigma in childhood’ workshop, 26 May 2016, Scottish Universities Insight Institute, <https://soundcloud.com/cbo79/miro-romipen-contesting> accessed 13 July 2017. The 2017–2021 Irish strategy is the second such strategy in Ireland and uses the term ‘Inclusion’ in its title, rather than ‘Integration’ as used in the first strategy issued in 2011. See http://ec.europa.eu/justice/discrimination/files/roma_ireland_strategy_en.pdf accessed 14 July 2017.

²⁷³ See <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/nationalinclusionstrategy-en> accessed 8 July 2017.

²⁷⁴ See consultation details at http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/news_and_press-en accessed 8 July 2017.

²⁷⁵ Speech by Minister Stanton at Launch of the National Traveller and Roma Inclusion Strategy 2017 – 2021, 13 June 2017, <http://justice.ie/en/JELR/Pages/SP17000194> accessed 7 July 2017.

²⁷⁶ Interview with Deaglán Ó Briain, Department of Justice and Equality (Dublin, 22 September 2014), referred to as ‘Participant No. 12’ or ‘P12’.

agencies. However, it is too early to make any pronouncement on the effectiveness of its work. With increasing Traveller participation and representation on the four bodies mentioned here, an argument might be made that a greater Traveller presence in consultation and decision-making processes for these sorts of reviews has resulted in a greater consideration and inclusion of culturally appropriate provisions in relation to Traveller accommodation. The assimilation measures of the 1960s Commission on Itinerancy have little in common with the recommendation of the National Traveller and Roma Inclusion Strategy of 2017, which states that there should be ‘adequate provision of accessible, suitable and culturally appropriate accommodation available for Travellers’.²⁷⁷ However, this greater consideration, in each of the cases cited above, is evidenced at the level of policy statements and strategies, rather than being evident in outcomes *per se*.

We saw in Chapter 2 that there are domestic monitoring or measurement models within the international human rights framework, such as that set out in Article 33 of the UN Convention on the Rights of Persons with Disabilities and that in the UN Optional Protocol to the Convention against Torture. These models are clear examples that show that the international framework holds that there is no reason in principle that non-state actors cannot be involved in the measurement of compliance with rights.

Data collection

We saw in Chapter 2 how guidance from the international framework stresses the importance of systematic data collection when implementing human rights at national level and that this is something that can be challenging when it comes to socio-economic rights. P1 pointed out that the field of socio-economic rights tends to be dominated by measurement in a way that civil and political rights areas are not.²⁷⁸ We also saw in Chapter 2 how the international and regional human rights frameworks have provided detailed guidance on specific aspects of data collection that may have relevance to Travellers more generally in Ireland, from the collection

²⁷⁷ National Traveller and Roma Inclusion Strategy, 2017–2021, at 41, http://www.justice.ie/en/JELR/Pages/National_Traveller_and_Roma_Inclusion_Strategy_2017%E2%80%932021 accessed 7 July 2017.

²⁷⁸ Interview with Colm O’Cinneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as ‘Participant No. 1’ or ‘P1’.

of data on hate speech,²⁷⁹ to the recording of racist incidents.²⁸⁰ The Committee on the Elimination of Racial Discrimination's General Recommendation on data²⁸¹ suggests that states reporting to the Committee provide both quantitative and qualitative data on factors affecting the enjoyment of rights by vulnerable groups in particular, such as women, non-citizens and indigenous peoples.²⁸²

In the Introduction to the thesis, it was noted how the Irish Central Statistics Office (CSO) gathered and analysed specific data around Travellers in the 2011 Census.²⁸³ In highlighting

²⁷⁹ European Commission Against Racism and Intolerance, *ECRI Report on the United Kingdom (fifth monitoring cycle)*, 4 October 2016, CRI(2016)38, at para 69. ECRI also recommends the recording of data on racist incidents where sentences have been dropped through the process of accepting guilty pleas.

²⁸⁰ European Commission Against Racism and Intolerance, *ECRI Report on Ireland (fourth monitoring cycle)*, 19 February 2013, CRI(2013)1, at para 23, which states 'ECRI strongly encourages the Irish authorities to improve and to supplement the existing arrangements for collecting data on racist incidents and the follow-up given to them by the criminal justice system. In this respect, it draws the authorities' attention to the section of its General Policy Recommendation No. 11 on combating racism and racial discrimination in policing which concerns the role of the police in combating racist offences and monitoring racist incidents.' See, accordingly, European Commission Against Racism and Intolerance, *ECRI General Policy Recommendation no 11 on Combating Racism and Racial Discrimination in Policing*, adopted on 29 June 2007, CRI(2007)39.

²⁸¹ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XXIV concerning Article 1 of the Convention, 27 August 1999, A/54/18, relating to information on the demographic composition of the population, which states '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', at para 3 and 'The Committee recalls general recommendation IV, which it adopted at its eighth session in 1973, and paragraph 8 of the general guidelines regarding the form and contents of reports to be submitted by States parties under Article 9, paragraph 1, of the Convention (CERD/C/70/Rev.3), inviting States parties to endeavour to include in their periodic reports relevant information on the demographic composition of their population, in the light of the provisions of Article 1 of the Convention, that is, as appropriate, information on race, colour, descent and national or ethnic origin', at para 4.

²⁸² David Weissbrodt, 'The approach of the Committee on the Elimination of Racial Discrimination to interpreting and applying international humanitarian law' (2010) 19 *Minnesota Journal of International Law*, 327, 339, citing, for example, CERD, Concluding observations the Committee on the Elimination of Racial Discrimination, Uzbekistan, 15, CERD/CJUZH/CO/5, 4 April 2006, which states 'The Committee regrets that insufficient information was provided ... on the number of women of non-Uzbek ethnic origin occupying positions of responsibility within the State party's administrative, political or private sector . . . (t)he State party should provide further information on these issues, including disaggregated statistical data by sex, ethnic origin, occupational sector, and functions assumed.' See also, for example, CERD's Concluding observations on Finland's twentieth to twenty-second periodic reports in 2012 (CERD/C/FIN/CO/20-22), which, under the heading of 'Demographic composition of the population', recommends that the state 'collect and provide the Committee with reliable and comprehensive statistical data on the ethnic composition of its population and economic and social indicators disaggregated by ethnicity and gender, including data on Sámi indigenous peoples, other minority groups and immigrants, in order to enable the Committee to evaluate the enjoyment of civil, political, economic, social and cultural rights by various groups of its population'; and its Concluding observations on Mexico combined sixteenth and seventeenth periodic reports in 2012 (CERD/C/MEX/16-17) 'requests the State party to provide information on the subject in its next periodic report, which should be more substantive and shorter, with tables, data and information to clarify the progress made in implementing the Committee's recommendations'.

²⁸³ Central Statistics Office, *Census 2011 Profile 7 Religion, Ethnicity and Irish Travellers – Ethnic and cultural background in Ireland*, <http://www.cso.ie/en/census/census2011reports/census2011profile7religionethnicityandirishtravellers-ethnicandculturalbackgroundinireland/> accessed 5 August 2017. Census 2016 figures are due to be published in 2017. See <http://www.ucd.ie/issda/data/allirelandtravellerhealthstudy/> accessed 14 July 2017.

home ownership, the CSO showed how Traveller households ‘have a significantly lower home ownership rate than the general population’ and that over 30% of those ‘living in mobile or temporary accommodation had no sewerage facilities in 2011’.²⁸⁴ We also saw how the All Ireland Traveller Health Study (AITHS), despite being a pioneering piece of research conducted on a significant scale across the island of Ireland in 2011, and producing vast amounts of data, has not resulted in any significant health outcomes for Travellers in Ireland. This perhaps indicates that, even when data collection around Traveller issues is resourced and conducted thoroughly, there is a lack of political will to ensure that it feeds into outcomes. Some of those interviewed for this thesis drew attention in this context to the lack of resources and capacity as reason for the absence of meaningful efforts at the measurement of compliance with human rights.²⁸⁵ Each November, local authorities undertake an Annual Count of Traveller families in their administrative area on the last Friday of that month. While this provision may have been intended to provide some sort of accountability in terms of the operationalising of the Act, the idea that Travellers needed to be counted ‘seems archaic’ to P9, who wondered if there might be some other mechanism available to assess the accommodation needs of Travellers, particularly when the Department of the Environment ‘doesn’t seem to believe the figures’.²⁸⁶ P8 said that the template provided to local authorities for the purpose of this count is underused and poorly structured,²⁸⁷ and leads to discrepancies in measurement.²⁸⁸ Traveller organisations have disputed this measurement process as subjective, said P3, ‘. . . it all depends on your perspective, it all depends on how you count them and who you count’.²⁸⁹ These criticisms echo P1’s views, seen earlier in the chapter, who noted that while simple data may be useful in identifying problems, it will not necessarily help

²⁸⁴ Central Statistics Office, ‘Press Release Census 2011 Profile 7 Religion, Ethnicity and Irish Travellers’, 18 October 2012, <http://www.cso.ie/en/csolatestnews/pressreleases/2012pressreleases/pressreleasencensus2011profile7religionethnicityandirishtravellers/> accessed 20 September 2017.

²⁸⁵ Interview with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as ‘Participant No. 2’ or ‘P2’.

²⁸⁶ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

²⁸⁷ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²⁸⁸ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²⁸⁹ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’. Martin Collins also cited changes to local authority five-year accommodation plans from 2014 onwards as a facilitator in that, for the first time, TAPs will have a mid-term review and annual targets. This will help towards a more effective measurement process. Participant Damien Peelo also said that Traveller organisations had, in the past, conducted their own surveys on numbers; Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

to identify what states are doing and not doing in discharging their positive obligations or putting in place required policy measures.²⁹⁰

P2 also highlighted what was, in his view, a tendency on the part of government to focus their efforts on the passage of legislation rather than on any follow-up process:

I mean it is a huge achievement from a civil service perspective to get a piece of legislation through . . . And there tends to be a culture of saying well the legislation is there, it is somebody else's job now to decide on its application. And often that comes down to resources and capacity within individual departments. ²⁹¹

P1, a member of the European Committee on Social Rights, criticised measurement as 'a self-sustaining activity, which does little or nothing to change the situation on the ground', does not necessarily add value and can be responsible for the diversion of resources and enthusiasm and the depletion of energy on the part of civil society and academics, diverting attention away from the key issues about what is a violation 'and what's effective implementation'.

. . . which sometimes tends to neglect the fact that all this measuring and monitoring has to ultimately feed back to the question, you know, are rights being violated? Are rights not being implemented? What exactly does that consist of?²⁹²

In its state report to the UN Human Rights Council for Ireland's second universal periodic review in 2016, the Irish government responded to several recommendations in relation to Travellers received at the time of Ireland's first round UPR in 2011:²⁹³

Our work to promote equality and inclusion in Irish society of the Traveller and Roma communities includes putting in place strong monitoring methods to

²⁹⁰ Interview with Colm O'Conneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as 'Participant No. 1' or 'P1'.

²⁹¹ Interview with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as 'Participant No. 2' or 'P2'.

²⁹² Interview with Colm O'Conneide, Member European Committee on Social Rights (Durham, United Kingdom, 5 February 2014), referred to as 'Participant No. 1' or 'P1'.

²⁹³ Recommendations 106.30, 106.31, 160.32, 160.33, 107.31, 107.32 in UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Ireland, 21 December 2011, A/HRC/19/9.

evaluate the impact of inclusion actions in the key priority areas of health, education, employment, housing and anti-discrimination.²⁹⁴

The UPR report does not go on to elaborate on what these ‘strong methods’ might comprise, however. By the second round UPR in 2016, the state reported:

To ensure availability of accurate, detailed and complete data on the situation of Roma and Travellers in Ireland and to identify measures put in place to tackle exclusion and discrimination, the development of a Data Collection Strategy will form part of the new National Traveller and Roma Inclusion Strategy for implementation in 2016.²⁹⁵

P9 noted that ‘. . . the problem with Irish administration traditionally is the term “measuring” is almost an alien concept’.²⁹⁶ Another felt that any approaches to measuring ‘will be purely a box-ticking exercise’ rather than being used in the process of devising policy.²⁹⁷ P8 criticised measurement as being ‘linked to settled norms’, which can be problematic when measuring how provisions around Traveller accommodation are given effect to.²⁹⁸

In summary, we can see that data collection is seen by the international mechanisms as important, and that it can add value, yet in the case of Traveller accommodation in Ireland, it is not fully clear what type of data collection is carried out by the state, beyond the ‘annual count’. We saw how interviewees were mostly critical of the processes of data collection and felt they added little to the situation around Traveller accommodation. In learning from what followed the AITHS, the question remains whether, even if the gathering of data around accommodation was far more systematically carried out, would it result in any difference in outcomes around accommodation? This section has shown that this is possibly unlikely.

²⁹⁴ United Nations Human Rights Council, Working Group on the Universal Periodic Review, Twelfth session, 3–14 October 2011, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Ireland, 22 July 2011, A/HRC/WG.6/25/IRL/1, at 139.

²⁹⁵ UN Human Rights Council, Working Group on the Universal Periodic Review, Twenty-fifth session, 2–13 May 2016, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Ireland, 9 February 2016, A/HRC/WG.6/25/IRL/1, at 140.

²⁹⁶ Interview with Colin Wrafter, (then) Director, Human Rights Unit, Department of Foreign Affairs and Trade (Dublin, 24 February 2014), referred to as ‘Participant No. 2’ or ‘P2’.

²⁹⁷ Interview with senior official involved in operationalisation at a government level (Dublin, 9 May 2014), referred to as ‘Participant No. 9’ or ‘P9’.

²⁹⁸ Interview with Gráinne O’Toole, Researcher for Cena Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

3.5 Conclusion

This chapter brought together the three strands of how Ireland operationalises the right to culturally appropriate accommodation in the case of Traveller accommodation, by translating this right through law and policy; implementing the right through structures, resources and services; and measuring compliance with the right.

As regards the right to culturally appropriate accommodation in law and policy, different legislative and policy approaches since the assimilation measures of the 1960s have had significant effects on Traveller accommodation. We did witness a change in the 1980s flowing from the first acknowledgment of Travellers as having particular accommodation needs,²⁹⁹ with a quite significant milestone seen in the 1995 Task Force on the Travelling Community in June 1993.³⁰⁰ These were clearly reversed with the passage of the ‘trespass’ legislation in 2002.³⁰¹ We saw new possibilities emerging with the establishment of the Traveller-led voluntary housing body Cena; however, its progress has been slow. This section of the chapter concluded that the instances of Travellers and the state working together in blended or hybrid ways had been the most successful approaches to date.

In the section which followed, we saw positive developments in the creation of structures which are directly concerned with the delivery of the right to culturally appropriate accommodation resulting from the mandating and resourcing of Ireland’s national human rights institution and national equality body. In terms of the allocation of resources more directly to accommodation, however, this section also noted the significant reduction of resources allocated by the state to Traveller accommodation, and the implications of this, but also a marked increase in Travellers living in private rented accommodation.

In terms of the measurement of how this right is given effect to, the section that followed argued that a greater Traveller presence in consultation and decision-making processes for these sorts

²⁹⁹ In section 13 Housing Act 1998 (later amended by s 29 Housing (Traveller Accommodation) Act 1998).

³⁰⁰ For the Terms of Reference of the Task Force see n 80. See Department of Justice, Equality and Law Reform, Second Progress Report of the Committee to Monitor and Co-ordinate the Implementation of the Recommendations of the Task Force on the Travelling Community (Department of Justice, Equality and Law Reform 2005).

of reviews has resulted in a greater consideration and inclusion of culturally appropriate provisions in the consideration of Traveller accommodation, albeit to a minimal extent. It also highlighted that the data collection currently carried out by the state in relation to culturally appropriate accommodation has not been systematic, and it is not clear to what end it is carried out, with a suggestion that the Irish state may tend to focus its efforts on the passage of legislation in its overall compliance with rights rather than on follow-up processes *per se*.

In bringing together the three strands of the operationalisation of the right to culturally appropriate accommodation in the case of Traveller accommodation, it may be concluded that, given the complexity of the issues at hand, there is a need for a more innovative approach than that which has been put in place by the Irish state to date. Chapter 3 showed that, despite the many ways in which international human rights law tasks the state with responsibility for the delivery of rights at a domestic level, actual rights delivery frequently occurs by way of the state plus non-state actors acting together in a multitude of scenarios, suggesting human rights operationalisation that displays hybrid characteristics. It might be argued that a fuller and more conscious commitment to hybridity could address some of the risks and difficulties raised. Chapter 4 attempts to offer some answers to the questions and anxieties raised by hybrid approaches, and how these may apply in the operationalisation of the right to culturally appropriate accommodation in the case of Traveller accommodation.

Chapter 4 – Hybridity

4.1 Introduction

Existing conceptions of international law are grounded in the notion that everything begins and ends with the state. That is no longer true as a matter of fact. It should thus no longer gird the framework of the law.¹

International law has, to date, been firmly attached to the belief that the state is the sole entity tasked with responsibility for the operationalisation of human rights, thus the concept of hybridity in legal scholarship has been relatively underdeveloped.² Wider concepts of ‘governance’ that recognise the power exercised by non-state actors as well as government, however, have the potential to address the changing nature of state responsibility.³ Chapter 3, in bringing together the three strands of translation, implementation and measurement as features of the operationalisation of the right to culturally appropriate accommodation in Ireland, showed that actual rights delivery in this case occurs through state and non-state actors working together in ways that display hybrid characteristics. These hybrid structures and processes appear to show more effective results in the substantive fulfilment of the right, but there are accompanying risks and uncertainties, mostly originating in the informality of the hybrid arrangements. A lack of formalisation allows political volatility and other outside influences to negatively affect how the right is translated, implemented and measured.

Even when based in statute, as in the case of the National Traveller Accommodation Consultative Committee and Local Traveller Accommodation Consultative Committees, such arrangements are subject to political will and subject to appointment by the Minister and are thus affected by change of government. We also saw how they are unbalanced in terms of power and decision-making. It appears from these arrangements that perhaps a fuller and more conscious commitment to hybridity might address some of the risks and difficulties raised.

¹ Peter J Spiro, ‘New players on the international stage’ (1997) 2 Hofstra Law and Policy Symposium 19F, 24.

² Rosa Freeman, “‘Third generation’ rights: is there room for hybrid constructs within international human rights law?” (2013) 2 Cambridge Journal of International and Comparative Law 935, 935.

³ Alison Mawhinney and Iorweth Griffiths, ‘Ensuring that others behave responsibly: Giddens, governance, and human rights law’ (2011) 20 Social & Legal Studies 481, 482. The authors support sociologist Anthony Giddens’ theory of ‘the ensuring state’ where the state has a responsibility to ensure others behave responsibly.

The purpose of Chapter 4 is to explore whether hybridity and more formalised hybrid models could offer solutions for more effective operationalisation than that which currently takes place in Traveller accommodation, particularly in terms of addressing inequalities in power dynamics. Chapter 4 recognises that: (1) hybridity is a feature of the operationalisation of the right to culturally appropriate accommodation in Ireland, as seen in Chapter 3; (2) hybridity is a commonly found feature in contemporary governance; (3) hybridity has advantages and disadvantages; (4) even in light of these disadvantages, hybridity can and should be formalised and embraced as a mechanism of insulation against political influence and of realigning power dynamics in situations of endemic and structural disempowerment, as has been established to be the experience of Travellers in Ireland.

4.2 Identifying hybridity in operationalisation around Traveller accommodation

This section reaffirms the findings of Chapter 3 that hybridity is a feature of rights operationalisation in the context of Traveller accommodation in Ireland and is therefore worthy of consideration in relation to how it might be used in a positive way to advance rights operationalisation in this area.

We saw in Chapter 3 how, in a departure from the practice of the Commission on Itinerancy, 3 of the 23 members of the Travelling People Review Body set up in the 1980s were Travellers.⁴ We also saw how Travellers were, for the first time, explicitly included in legislation when the 1988 Housing Act gave new powers to local authorities to provide serviced halting sites,⁵ and it may not be unreasonable to assume that these are connected. Likewise, in the 1990s we saw a new trend of including Traveller-specific organisations⁶ in discussions

⁴ ‘The Review Body considers that in the light of experience and current knowledge the concept of absorption is unacceptable, implying as it does the swallowing up of the minority traveller group by the dominant settled community, and the subsequent loss of traveller identity.’ Department of the Environment and Department of Health and Social Welfare, *Report of the Travelling People Review Body* (Stationery Office 1983) 13.

⁵ As well as measures to deal with homelessness, in section 10: measures to deal with accommodation unfit for human habitation, in section 9(2)(c); and a number of other vulnerable groups, at section 9(2)(c), including young persons leaving institutional care, those in need of accommodation for medical or compassionate reasons, persons who are elderly or disabled, and those who could not reasonably meet the cost of the accommodation which they are occupying or to obtain a suitable alternative.

⁶ Such as Pavee Point, Irish Traveller Movement, National Traveller Women’s Forum Exchange House and the Parish of the Travelling People.

around policy formulation, ‘a process of “accommodating” Travellers and Travellers helping themselves, and having a responsibility towards the national community, the environment and the locality’.⁷ The establishment of the Task Force on the Travelling Community in June 1993 was seen as the first time the Irish state considered and recognised specific differences in the ways in which Travellers might wish to live.⁸ The legislation which followed the 1995 Task Force, the Housing (Traveller Accommodation) Act 1998, specifically provided for a National Traveller Accommodation Consultative Committee and Local Traveller Accommodation Consultative Committees,⁹ hybrid bodies that must be consulted in relation to Traveller Accommodation Plans.¹⁰ We also saw in Chapter 3 how the establishment of the Traveller-led voluntary housing body Cena has brought new possibilities in terms of hybridity and how the development of the National Traveller and Roma Inclusion Strategy 2017–2021 (NITRIS)¹¹ saw 10 out of 25 places allocated to Traveller organisations in its Steering Group.¹² Its monitoring committee also appears promising in terms of being a hybrid blend of Travellers, Traveller organisations and a variety of state agencies. Collectively, the hybrid models identified in Chapter 3 have also displayed shortcomings in how they are exposed to the risks of political volatility and the effects of the institutionalised racism seen in Chapter 1. Conversely, however, we have also seen the benefits that arise when non-state actors are partners in operationalisation.

⁷ Una Crowley and Rob Kitchin, ‘Paradoxical spaces of Traveller citizenship in contemporary Ireland’ (2007) 40 *Irish Geography* 128, 131. Coates et al note that: ‘Traveller accommodation policy outputs in the period between the 1983 Travelling People Review Body report and the 1995 Task Force report show three trends. First, there is a much greater increase again in the number of families accommodated on halting sites. Second, there is a substantial increase in the numbers being accommodated in group housing schemes. In just nine years (from 1981 to 1990) 233 families were accommodated in these schemes (DoEHLG, various years), compared with the 459 families being accommodated in standard housing in this same period (the Review Body recommended the provision of 1,400 such houses from 1982 to 1987). A third trend is that the numbers of families living on the roadside still do not significantly differ from the start to the end of this period. As with the 1963 report what actually happens in this period in terms of the accommodation of Traveller families appears to run counter to the recommendations of the 1983 report, and indeed to policy directives enacted on foot of these recommendations’. See Kasey Treadwell Shine, Fiona Kane and Dermot Coates, *Traveller-Specific Accommodation: Practice, Design and Management* (Centre for Housing Research 2008) at 39, <http://docplayer.net/372315-Traveller-specific-accommodation-practice-design-and-management.html> accessed 30 July 2017.

⁸ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

⁹ Sections 19 and 20 Housing (Traveller Accommodation) Act 1998.

¹⁰ At the time of enactment, Minister of State at the Department of the Environment and Local Government (Mr Molloy) said: ‘One of the main objectives of the Bill is the improvement in the existing arrangements for consultation between local authorities, travellers [sic] and the public’, Housing (Traveller Accommodation) Bill 1998, Seanad Bill amended by Dáil, Report and Final Stages, 2 July 1998.

¹¹ National Traveller and Roma Inclusion Strategy, 2017–2021, http://www.justice.ie/en/JELR/Pages/National_Traveller_and_Roma_Inclusion_Strategy_2017%E2%80%932021 accessed 7 July 2017.

¹² See <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/nationalinclusionstrategy-en> accessed 8 July 2017.

Shortcomings of informality and political volatility in Traveller accommodation hybridity

Many expectations were raised by the establishment of the 1995 Task Force and its importance as a blended mechanism for the oversight of and progression towards improved Traveller rights.¹³ The Task Force was seen as the first time the Irish government listened to and recognised a specific need around Traveller accommodation, in a way that had not happened before,¹⁴ particularly given the assimilation measures that had preceded this approach. A clear line can be drawn between the 1995 *Report of the Task Force on Travelling People*¹⁵ and the enactment of the Housing (Traveller Accommodation) Act of 1998, which made some progress towards a recognition of nomadism, albeit in law and in a limited fashion.

The 1998 Act led to a significant development in the realm of hybrid models with the establishment of the National Traveller Accommodation Consultative Committee¹⁶ and corresponding Local Traveller Accommodation Consultative Committees at local authority level.¹⁷ However, as set out in Chapter 3, both committee types have been criticised for disparities in their operating methods and terms of reference,¹⁸ called ‘malfunctioning’,¹⁹ described as sometimes having members who are ‘extreme’ in their views,²⁰ described as being only as good as their chair²¹ and as having become ‘battlegrounds’ for Traveller issues.²² Of most relevance to the nature of these hybrid structures is the subjective ways in which appointments are made. The National Traveller Accommodation Consultative Committee’s

¹³ Interview with Gráinne O’Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

¹⁴ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

¹⁵ *Report of the Task Force on the Travelling Community* (Government Publications Office 1995).

¹⁶ Section 19 Housing (Traveller Accommodation) Act 1998.

¹⁷ Provided for in section 21 Housing (Traveller Accommodation) Act 1998.

¹⁸ L Costello, *Evaluation of Local Traveller Accommodation Consultative Committees* (Department Environment and Local Government 2000) at 59. See also *Summary Report on the Operation and Effectiveness of the Local Traveller Accommodation Consultative Committees June 2009–December 2010* (Irish Traveller Movement 2011) at 3–4, <http://www.itmtrav.ie/uploads/files/EffectivenessofLTACCs.pdf> accessed 12 August 2016.

¹⁹ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

²⁰ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

²¹ Interview with Gráinne O’Toole, Researcher for CENA Feasibility Study (Dublin, 29 April 2014), referred to as ‘Participant No. 8’ or ‘P8’.

²² Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

12 members are each appointed by ‘the Minister’,²³ and can include persons ‘who, in the opinion of the Minister’ have experience in relation to Traveller accommodation.²⁴ The Act also allows the Minister to appoint three representatives nominated by Traveller organisations who have experience with accommodation ‘as the Minister may determine’.²⁵ This begs the questions (1) where does the minister get his or her information in order to make such a determination? and (2) what processes, if any, are employed in this decision-making?²⁶

Despite the promising intended outcomes of these hybrid structures, a lack of stability and the presence of political volatility are their main shortcomings. Section 21 of the 1998 Act describes the composition of the Local Traveller Accommodation Consultative Committees, whose functions are to:

- (a) advise in relation to the preparation and implementation of any accommodation programme for the functional area of the appointing authority concerned,
- (b) advise on the management of accommodation for travellers, and
- (c) provide a liaison between travellers and members and officials of the appointing authority concerned.²⁷

As seen in Chapter 3, although the Act obliged local authorities to draw up a five-year Traveller Accommodation Programme (TAP), no sanctions are imposed if the plans are not implemented and no powers are given to LTACCs to influence the TAP. Significantly, section 21(6) of the 1998 Act states that ‘The proceedings of a local consultative committee shall not be invalidated by any vacancies among the membership’, which might be interpreted as meaning that an absence of appointments to committees at local level is not taken into account when assessing the effectiveness of the committee’s operation.²⁸ LTACCs do not have standard operating methods and have been criticised for having no ‘typical [i.e. uniform] experience’, resulting in

²³ Section 2(1) of the 1998 Act states: “‘the Minister’ means the Minister for the Environment and Local Government”.

²⁴ Section 21 Housing (Traveller Accommodation) Act 1998, at (3)(g).

²⁵ Section 20 Housing (Traveller Accommodation) Act 1998, at (2)(e).

²⁶ Similar concerns were expressed about the National Traveller Monitoring Advisory Committee, which again has become a ‘receptacle’ or dumping ground for all Traveller issues, not just those relating to accommodation, as well as the High Level Group on Traveller Issues, which has no Traveller representatives and meets infrequently.

²⁷ Section 21 Housing (Traveller Accommodation) Act 1998, at (3)(a)–(c).

²⁸ Section 21 Housing (Traveller Accommodation) Act 1998 (6).

both ‘strengths and weaknesses’.²⁹ It has been reported that Traveller representatives were concerned at how the meetings of the committees were organised and that there appeared to be a reluctance to hold meetings in places other than local council offices. Traveller representatives expressed concern at a ‘lack of responsiveness to the low literacy levels within the Traveller population’ by non-Traveller committee members.³⁰

The Irish Traveller Movement has also expressed concern at the disparities in the establishment, terms of reference, and working methods of some LTACCs. In 2010, ITM carried out research in conjunction with Traveller organisations based in each local authority area. Its findings concluded that just over half of LTACCs had a clear mechanism for reporting or had been meeting regularly.³¹ Pavee Point has also criticised the NTACC and LTACCs as ‘purely advisory bodies’:

[T]he lack of political will and the lack of incentives or sanctions in the legislation have resulted in local authorities failing to provide adequate accommodation for Travellers and the NTACC and LTACC are purely advisory bodies with no mandate to compel local authorities to comply with their obligations.³²

In essence, the NTACC and the LTACCs are, in title and in operation, ‘consultative’ rather than being engaged in meaningful oversight of the implementation of the legislative and policy provisions around Traveller accommodation or operating as monitors of the measurement of the right to culturally appropriate accommodation. Cian Finn’s 2017 PhD research showed how there ‘strong and widespread belief amongst Traveller representatives that elected representatives and local authority officials are hostile and resistant to the delivery of culturally appropriate accommodation, despite their provision in law, and that some representatives

²⁹ L Costello, *Evaluation of Local Traveller Accommodation Consultative Committees* (Department Environment and Local Government 2000) 59.

³⁰ L Costello, *Evaluation of Local Traveller Accommodation Consultative Committees* (Department Environment and Local Government 2000) 59.

³¹ Irish Traveller Movement *Summary Report on the Operation and Effectiveness of the Local Traveller Accommodation Consultative Committees, June 2009 – December 2010* (Irish Traveller Movement 2011) at 3–4, <http://www.itmtrav.ie/uploads/files/EffectivenessofLTACCs.pdf> accessed 12 August 2016.

³² Pavee Point Traveller and Roma Centre, *Towards a National Traveller and Roma Integration Strategy 2020* (Pavee Point Traveller and Roma Centre 2015) 24, <http://www.paveepoint.ie/wp-content/uploads/2015/04/Towards-a-National-Traveller-and-Roma-Integration-Strategy-2020.pdf> accessed 12 August 2016.

believed that participating in LTACCs in any way was somehow being ‘complicit’ in this non-delivery, letting down fellow Travellers, as it were.³³

Benefits of non-state actors as partners in Traveller accommodation hybridity

The voice of Traveller organisations underpins much of the narrative of Traveller accommodation rights over the past 40 years and has been a main driver in hybrid models that are positive in terms of outcomes for the Traveller community. In the 1980s when Pavee Point opened its doors, ‘there was nothing . . . and up until then Travellers were seen as objects of pity or objects of scorn and discrimination’ said P6.³⁴ Non-governmental organisations play an important role in shifting the power dynamic, as long as they can be independently critical of the state. This may pose a risk if they are dependent on state funding.³⁵

There are other ways in which Traveller organisations have been and continue to be part of hybrid structures and processes, apart from by way of the government-appointed committees listed above. For example, the 2010 All Ireland Traveller Health Study was the product of three years of research carried out by a team from the School of Public Health, Physiotherapy and Population Science in University College Dublin, the Department of Health and Children and a number of healthcare workers from the Traveller community who were specially trained in data collection methodologies used in gathering data from people with all levels of literacy.³⁶ Pavee Point facilitated the recruitment of 80 trainers, who coordinated over 400 primary healthcare workers, primarily Traveller women, who then went on to act as peer researchers in the process.³⁷ The innovative approach of using primary healthcare workers in the data collection process led to a high response rate, 80%, which was deemed unprecedented for a

³³ Cian Finn, ‘Deepening participation, deepening local democracy? The state of local participatory governance in Ireland’ (PhD thesis, University of Limerick 2017) 173.

³⁴ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

³⁵ See, for example, Michael Edwards and David Hulme (eds), *Ngos, States and Donors: Too Close for Comfort?* (Palgrave Macmillan 2013); John Clark, ‘The relationship between the state and the voluntary sector’, 1990 (website) available <http://www.gdrc.org/ngo/state-ngo.html> accessed 30 July 2017.

³⁶ See All Ireland Traveller Health Study Team, School of Public Health, Physiotherapy and Population Science, University College Dublin, *Our Geels: All Ireland Traveller health study: summary of findings* (Department of Health and Children 2010), <http://www.jenus.ie/hse/handle/10147/115606> accessed 5 August 2017.

³⁷ See Joint Oireachtas Committee on Health and Children debate on Traveller Health services, discussion with Pavee Point, 10 March 2009, available from <http://debates.oireachtas.ie/HEJ/2009/03/10/00004.asp> accessed 15 May 2014.

study of its kind, and attributed to the engagement of Travellers themselves in conducting the research.³⁸ Traveller organisations have been critical of a lack of action on the part of the state following the findings of the 2010 report, however.³⁹ In addition, the National Traveller Health Advisory Committee, which was established to develop a strategy to respond to the All Ireland Traveller Health Study, has not met since 2012.⁴⁰ The All Ireland Traveller Health Study could be said to have been a hybrid process that had huge potential to being about important change in health outcomes for the Traveller community in Ireland, yet that has been disappointing in the lack of action or follow up of its recommendations six years on. However, trained primary healthcare workers continue to operate at local level and promise is seen in new ways of engagement, such as that in the North Cork Traveller groups. These hybrid models have the potential to become meaningful operationalisation tools should the Irish state choose to support them and to formalise them in a way that ensures a mainstream approach.

Individual Travellers and Traveller organisations have continued to be part of other hybrid processes with the state, such as Pavee Point's facilitation of Roma women's peer research for the Health Service Executive Roma Women's Health Study.⁴¹ Other examples are the study on the use of hospital facilities by Travellers, which employed two Traveller women as research assistants on focus group studies,⁴² and the steering group established to 'ensure that a renewed emphasis is given across Government to making progress on implementing Ireland's National Traveller and Roma Inclusion Strategy', as seen above.⁴³ Once again, the presence of hybridity

³⁸ Pavee Point, *Selected Key Findings and Recommendations from the All-Ireland Traveller Health Study – Our Geels* (Pavee Point 2010) 2.

³⁹ See *Submission to the List of Issues in relation to the Third Periodic Report of Ireland under ICESCR* (Pavee Point 2014),

http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/IRL/INT_CESCR_ICO_IRL_18454_E.pdf accessed 1 September 2016.

⁴⁰ Cherished unequally (2016) Broadsheet, 16 March 2016, <http://www.broadsheet.ie/2016/03/14/cherished-unequally/> accessed 31 August 2016.

⁴¹ In conversation with staff members of Pavee Point Traveller and Roma Centre. This research is ongoing and is not completed as yet.

⁴² Traveller Health Unit (THU), Tallaght Travellers' Support Group, Pavee Point and the Adelaide and Meath Hospital (undated) *Use of Hospital Facilities by the Traveller Community*, <https://issuu.com/paveepoint/docs/tallaghthospital> accessed 31 August 2016.

⁴³ See website of the Department of Justice and Equality Traveller and Roma Inclusion Unit, which states 'Following a 2014 review of the effectiveness of structures for consultation with and improving outcomes for the Traveller and Roma communities, the Department of Justice & Equality (DJE) established a National Traveller & Roma Inclusion Strategy Steering Group to ensure that a renewed emphasis is given across Government to making progress on implementing Ireland's National Traveller & Roma Inclusion Strategy (NTRIS)', at <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/nationalinclusionstrategy-en>, accessed 31 August 2016.

in the processes may create hope around potential outcomes; however, it remains to be seen what their ultimate results will be.

A more conscious commitment to hybridity

Looking at these examples emphasises some of the difficulties raised by the hybrid structures involved in the co-delivery of Traveller accommodation rights. These hybrid structures and processes may be effective in terms of their mandate or terms of reference, but there are risks and uncertainties, mostly originating in the informality of the arrangements. They are casual, inconsistent and not based on statute, statutory instrument or regulation; they are subject to political will, subject to appointment by the Minister, at the mercy of any change of government or of minister; they are unbalanced in terms of power and decision-making, with the state having the final say on decisions; and they are funded by the state, which may withdraw the funding at any time.

The next section asks and answers the question ‘what does it mean to be hybrid?’ In exploring some of the conceptual underpinnings of hybridity, followed by the unpacking of the advantages and disadvantages of other hybrid models in the next section, insight is gained into more formalised hybrid structures that endure and the potential for a more conscious commitment to hybridity in the case of Traveller accommodation.

4.3 What does it really mean to be hybrid?

The concept of hybridity appears in many disciplines and is interpreted in multiple ways, yet we know it to be ‘a relatively underdeveloped area within legal scholarship’.⁴⁴ The meaning of hybridity varies over time and between cultures, and this informs different patterns of hybridity.⁴⁵ ‘New phenomena require new concepts. New concepts require new words’ says Christoph Möllers, in describing the emergence of hybrid structures that blur the boundary

⁴⁴ Rosa Freeman, ‘“Third generation” rights: is there room for hybrid constructs within international human rights law?’ (2013) 2 Cambridge Journal of International and Comparative Law 935, 935.

⁴⁵ Jan Nederveen Pieterse, ‘Hybridity, so what?’ (2001) 18 Theory, Culture and Society 219, 220.

between treaties and organisation public international law.⁴⁶ The concept of hybridity ‘has amassed layers of meaning’ over time, through extensive use of the term, with the label being applied to everything from ‘cars to musical genres to forms of governance’.⁴⁷

A shift in global power and politics has underscored the need for hybrid constructs in international law says Rosa Freeman. Freeman’s framework for understanding hybridity (as it relates to ‘third generation rights’⁴⁸) consists of three interconnected elements. Firstly, hybridity is a theory for understanding identities; a lens through which to view cultures. Secondly, it is a process through which identities and cultures are made. Lastly, hybridity is an entity in terms of making new constructs that emerge ‘based on the theory and resulting from the process’. All three elements of hybridity are, Freeman says, ‘integral for understanding international human rights law’s current evolutionary cycle’.⁴⁹ Fiona de Londras agrees that hybridity is about processes and products, but introduces the notion of power. She says hybridity is (1) the process of bringing together multiple things to make something new, and (2) the product of that process. ‘Underlying these two elements is the fundamental role of power in the context of hybridity: these processes seem to be concerned with mechanisms of challenging power and the product may represent a new form(s) of power.’⁵⁰ The challenge, however, is not to come up with an all-encompassing definition of ‘hybridity’ but to find a way of applying the different types of hybridity onto a usable framework, which in this case is the hybrid structures we see in the operationalisation of the right to culturally appropriate accommodation for Travellers in Ireland.

The term hybrid is derived from Latin *hybrida*.⁵¹ Minton Warren traces its etymology further, telling us in his ‘Notes on the Etymology of Hybrid’ in 1884 that:

⁴⁶ Christoph Möllers ‘European governance: meaning and value of a concept’ (2006) 43 *Common Market Law Review* 313, 334.

⁴⁷ Anita Blessing, ‘Magical or monstrous? Hybridity in social housing governance’ (2012) 27 *Housing Studies* 189, at 194.

⁴⁸ ‘Collective’ or ‘people’s’ rights, rather than individual rights, according to BH Weston, ‘Human Rights’ (1984) 6 *Human Rights Quarterly* 257.

⁴⁹ Rosa Freeman, ‘“Third generation” rights: is there room for hybrid constructs within international human rights law?’ (2013) 2 *Cambridge Journal of International and Comparative Law* 935, 935. See also Rosa Freeman, ‘Hybrid human rights’, in Paul Jackson (ed) *Handbook of International Security and Development* (Edward Elgar 2014) 386, 388.

⁵⁰ Fiona de Londras, ‘Hybridity: what does it have to offer?’ (Blog Entry, 16 March 2014) <http://fdelondras.wordpress.com/2014/03/16/hybridity-what-does-it-have-to-offer/> accessed 21 June 2015.

⁵¹ <http://www.oxforddictionaries.com/definition/english/hybrid>.

The Encyclopedia Britannica prefaces its full discussion of Hybrids with this explanation: ‘The Latin word *hybrida* or *hibrida*, a hybrid or mongrel, is commonly derived from Greek *ύβρις*, an insult or outrage, with special reference to lust, hence, an outrage on nature, a mongrel.’⁵²

The concept of hybridity is mostly believed to have originated in botany and in anthropology.⁵³ In botany, hybridity is the result of mixing different species of plants, or interbreeding between animal species. Catherine Kendig, whose research expertise lies in ‘the philosophy of biology’,⁵⁴ says:

In a very general sense, *hybrid* can be understood to be any organism that is the product of two (or more) organisms where each parent belongs to a different kind.⁵⁵

Outside of the fields of biology and botany, hybridity features strongly in post-colonial discourse.⁵⁶ Post-colonial theorist Homi Bhabha’s notions of hybridity arise from the process by which the coloniser undertakes to translate the identity of the colonised, during attempted imposition of culturally hegemonic practices, but instead blends elements of the coloniser and colonised in a form of ‘third space’.⁵⁷ In this third space, the colonised can, and do, articulate new spaces and identities.⁵⁸

⁵² Minton Warren, ‘On the etymology of hybrid (Lat. *Hybrida*)’ (1884) 5 *The American Journal of Philology* 501.

⁵³ Emily Grabham, ‘Taxonomies of inequality: lawyers, maps, and the challenge of hybridity’ (2006) 15(1) *Social and Legal Studies* 5, 18.

⁵⁴ Catherine Kendig, LinkedIn entry, <https://www.linkedin.com/pub/catherine-kendig/66/37a/654> accessed 1 August 2015.

⁵⁵ Catherine Kendig, ‘Hybridity in agriculture’ in *Encyclopedia of Food and Agricultural Ethics* (Springer 2014), 1. Kendig differentiates between the offspring of the process, which is a ‘hybrid’; the phenomenon of being a hybrid, which is ‘hybridity’; and the process itself, which is ‘hybridization’.

⁵⁶ Edward Said said that all cultures and civilisations are mixed in some way, having hybrid elements taken from other cultures, ‘[s]o much so, in my opinion, that it really is intellectually irresponsible to argue as if there were a pure, unmodified culture that is totally at one, self-identified with itself.’ See Edward Said, *The End of the Peace Process* (Granta Books 2002) 141.

⁵⁷ Homi Bhabha, *The Location of Culture* (Routledge 1994); Homi Bhabha, ‘Culture’s in between’, in David Bennett (ed) *Multicultural States: Rethinking Difference and Identity* (Routledge 1998). Bhabha, in criticising Edward Said’s notion of the fixed centrality of Europe in colonialism, says colonial discourse depends ‘on the concept of “fixity” in the ideological construction of otherness’, Homi Bhabha, ‘The other question ...’ (1983) 24(6) *Screen* 18.

⁵⁸ Homi Bhabha, *The Location of Culture* (Routledge 1994) 5.

Sociologist Jan Nederveen Pieterse has written extensively on hybridity within globalisation, or ‘globalization as hybridization’.⁵⁹ Up to the mid 1990s, Nederveen Pieterse says, hybridity was mainly argued in post-colonial studies, rather than the social sciences. But this has changed considerably, he says:

Hybridity has become a regular, almost ordinary fixture in popular and mainstream culture – widely recognized as ‘The Trend to Blend.’ The Tiger Woods and Barack Obama aesthetic and sensibility – pardon the shorthand – have become standard fixtures in media and marketing. In cultural studies, hybridity is inching up to become the leading paradigm with a steadily growing literature.

[. . .]

Since ‘everything is hybrid’, hybridity is an avalanche and discussing examples of hybridity is like drinking from a fire hydrant.⁶⁰

Framing the increase in cultural diversity resulting from migration in terms of hybridity has been helpful in the understanding complexity of beliefs and practices associated with new communities, says John Eade.⁶¹

The fluidity or shifting of boundaries that is evident in hybridity can also be seen in the hybrid identity of the multiple actors in the housing market of the modern welfare state, where we see both hybrid organisations and hybrid practices. Housing, in this case, is both a market commodity and a public good, turning the not-for-profit sector into ‘an agent of cross-pollination’ that mediates between government and local networks.⁶² In the 1980s, the term ‘hybrid’ was used to describe practices in the public sector domain that were not purely ‘public’.⁶³ An established policy of ‘treating borrowing by non-profit housing organisations in

⁵⁹ See Jan Nederveen Pieterse, *Globalization and Culture: Global Mélange* (3rd edn, Rowman & Littlefield 2015), preface to the second edition, x.

⁶⁰ See Jan Nederveen Pieterse, *Globalization and Culture: Global Mélange* (3rd edn, Rowman & Littlefield 2015), preface to the second edition, x.

⁶¹ John Eade, ‘Crossing Boundaries - Hybridity, Migration and the Development of Pilgrimage in Multicultural England’ (2014) *Jaarboek voor liturgieonderzoek* 30, 38.

⁶² Anita Blessing, ‘Magical or monstrous? Hybridity in social housing governance’ (2012) 27 *Housing Studies* 189, at 195.

⁶³ Mary Lee Rhodes and Gemma Donnelly-Cox, ‘Hybridity and social entrepreneurship in social housing in Ireland’ (2014) *Voluntas* 1630, 1632.

a different way to state housing' has led to hybrid governance models in the UK.⁶⁴ In this case, having mixed funding systems with capital subsidies being provided by the state and the remainder by private borrowing in a way that is not reckoned against public expenditure puts housing associations 'in a hybrid position between the state and the market'.⁶⁵

Strategic shifts in UK government policy since the 1980s led to hybrid funding models for housing and the evolution of housing associations from a historic context to their current status as 'entrenched hybrid third sector organisations', often 'performing a complicated balancing act between state, market and society'.⁶⁶ Hybridity here is defined as 'the permanent influence by public and private actors on the governance and operations of an organisation in return for the resources provided by these actors'.⁶⁷ By the 2010s, we see hybrid organisations and practices described as 'heterogeneous arrangements, characterized by mixtures of pure and incongruous origins'.⁶⁸ Mullins et al. also identify other forms of hybridity in housing to include hybrid financial dependencies, hybrid governance and hybrid products and services.⁶⁹

Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan recognise increasing hybridisation over time within the provision of public housing in the United States of America.⁷⁰ They trace the transformation of US housing programmes towards what they define as greater 'intra-organizational hybridity' (a body displaying hybrid characteristics within its own organisational structures), 'inter-organizational hybridity' (the collaboration of hybrid organisations with roots in different sectors) and 'programmatic hybridity' (housing enterprises

⁶⁴ David Mullins, Darinka Czischke and Gerard van Bortel 'Exploring the meaning of hybridity and social enterprise in housing organisations' (2012) 27 *Housing Studies* 405, at 411.

⁶⁵ David Mullins 'From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England' (1997) 12 *Housing Studies* 301, at 302. See also Mary Lee Rhodes and Gemma Donnelly-Cox, 'Hybridity and social entrepreneurship in social housing in Ireland' (2014) *Voluntas* 1630, 1632, citing C Joldersma and V Winter, 'Strategic management in hybrid organizations' (2002) *Public Management Review* 83.

⁶⁶ Halima Sacranie, 'Hybridity enacted in a large English housing association: a tale of strategy, culture and community investment' (2012) 27 *Housing Studies* 533, 535.

⁶⁷ Halima Sacranie, 'Hybridity enacted in a large English housing association: a tale of strategy, culture and community investment' (2012) 27 *Housing Studies* 533, 535, citing D Billis, *Hybrid Organisations And The Third Sector Challenges For Practice, Theory And Policy* (Palgrave 2010) 59.

⁶⁸ Taco Brandsen and Philip Marcel Karré, 'Hybrid organizations: no cause for concern?' (2011) 34 *International Journal of Public Administration* 827, citing T Brandsen, W van de Donk and K Putters, 'Griffins or chameleons? Hybridity as a permanent and inevitable characteristic of the third sector' (2005) 28 *International Journal of Public Administration* 749, 750.

⁶⁹ David Mullins, Darinka Czischke and Gerard van Bortel 'Exploring the meaning of hybridity and social enterprise in housing organisations' (2012) 27 *Housing Studies* 405, 407.

⁷⁰ See Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, 'Entrenched hybridity in public housing agencies in the USA' (2012) 27 *Housing Studies* 457, at 471.

partnering with other organisations from different sectors to offer additional services to clients, such as rehabilitation, education or healthcare), with the ‘hybridization’ of public housing in the United States moving towards an ‘entrenched hybridity’.⁷¹

Hybridity is a commonly found feature in contemporary governance and global civil society communities are becoming increasingly dynamic in ways that frequently cross boundaries between the state and non-state. Demanding more access to national and international structures and processes, ‘evolving concepts of governance’ are seen.⁷² And in turn, international human rights mechanisms are challenging ‘state-centrism’.⁷³ Andrew Clapham argues that non-state actors already have international human rights obligations and are held accountable in several ways.⁷⁴

Regulatory regimes offer some learning on hybridity, in terms of models, tools and modes of enforcement.⁷⁵ Regulation may include any attempt by the state to limit or influence the behaviour of individuals or organisations. It could be argued that all types of law, including human rights law, are regulatory in some form and have the potential to purposefully shape the domestic landscape in terms of rights operationalisation. More specifically, Bronwen Morgan and Karen Yeung understand regulation as:

[A] broad and open-ended category that can readily apply to many forms of intellectual inquiry concerning the purposive shaping of social behaviour, particularly state and non-state standard-setting, monitoring and behaviour-modification processes.⁷⁶

⁷¹ Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, 459.

⁷² Zoe Pearson, ‘Non-governmental organisations and international law: mapping new mechanisms for governance’ (2004) 23 *Australian Yearbook of International Law* 73, 83.

⁷³ Examples include the obligation on states parties to UN treaties to report to treaty-monitoring bodies, which are non-state actors. Even bodies such as the international courts are themselves ‘a further example of the extension of international law beyond states to individuals in terms of rights and responsibilities’ says Zoe Pearson. See Zoe Pearson, ‘Non-governmental organisations and international law: mapping new mechanisms for governance’ (2004) 23 *Australian Yearbook of International Law* 73, 76.

⁷⁴ Andrew Clapham, ‘Human rights obligations for non-state-actors: where are we now?’ (2015, forthcoming in F Lafontaine and F Larocque (eds) *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Intersentia)), <http://ssrn.com/abstract=2641390> accessed 29 September.

⁷⁵ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 1.

⁷⁶ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007), at *xiv*. Morgan and Yeung identify three theories of regulation: (1) public interest theories which pursue collective goals for communities, such as transport, environmental issues or nationalised industries; (2) private interest theories, or those based on the assumption that regulation happens because of the

Fabrizio Cafaggi has explored in depth the emergence of ‘Transnational Private Regulation’ (TPR) or the new body of rules, practice and processes that are being created by private actors, firms, NGOs and independent experts.⁷⁷ TPR is differentiated from international regulation primarily because it is not reliant on domestic enforcement, although TPR can precede the creation of public regimes and these new institutions can later be supplanted by hybrid ones.⁷⁸ As a hybrid model, TPR perhaps has most resonance for the purposes of this thesis in how it is less reliant on domestic enforcement and thus insulated somewhat from political influence or volatility.

In answering the question ‘what does it really mean to be hybrid?’, it could be said that hybridity is several things – a theory, a process and a product – but mostly it is about blending or mixing. Hybridity is ‘the combination of contradictory characteristics within one single unit’,⁷⁹ or a way of describing a complex landscape when there are multiple actors, processes and practices involved.⁸⁰

4.4 Theoretical shortcomings of hybridity

‘Any deployment of hybridity, however, has to take account of its potential shortcomings’, says Emily Grabham.⁸¹ ‘Hybridity is almost a good idea, but not quite’ says Marwan Kraidy,⁸²

self-interest of individuals or groups;⁷⁶ and (3) a wider category of ‘institutionalist’ theories which include forms of tripartism between public, private and public interest groups or non-state actors, in ‘regulatory spaces’ which blend the approaches in ‘hybrid forms that reflect current empirical complexities’ (at 75). It is this third form that offers most learning in the context of human rights operationalisation.

⁷⁷ Fabrizio Cafaggi, ‘New foundations of transnational private regulation’ (2011) 38(1) *Journal of Law and Society* 20.

⁷⁸ TPRs are sector specific but take on different forms. Cafaggi identifies several models: (1) industry driven, such as financial and retail markets and food regulation; (2) led by global International Non-Governmental Organisations (IGOs) such as Oxfam International or Amnesty International; (3) expert-led, such as in the case of Internet governance; and (4) those with multiple stakeholders, such as sports anti-doping bodies, or environmental stewardships. Their unifying features, Cafaggi says, is that they tend to be driven by regulatory gaps, arise from a need for harmonisation, or result from a weakness in state compliance with international regulation. See Fabrizio Cafaggi, ‘New foundations of transnational private regulation’ (2011) 38(1) *Journal of Law and Society* 20.

⁷⁹ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, at 3, http://www.hybridorganizations.com/file_download/15 accessed 12 September 2016.

⁸⁰ Erin McCandless & Necla Tschirgi, ‘Hybridity and policy engagement’ (2012) 7 *Journal of Peacebuilding & Development* 2, 1.

⁸¹ Emily Grabham, ‘Taxonomies of inequality: lawyers, maps, and the challenge of hybridity’ (2006) 15(1) *Social and Legal Studies* 5, 18.

⁸² Marwan Kraidy, *Hybridity, Or the Cultural Logic of Globalization* (Temple University Press 2005) vi.

who speaks of the difficulties of making hybridity ‘empirically intelligible’.⁸³ The lack of intelligibility could be said to have its origins in the fact that hybridity is not a single idea or concept; it is a collection of ideas, concepts and themes that sometimes contradict each other. Hybridity has been described as a concept widely used but lacking in usefulness to theorists and policy-makers.⁸⁴

The public administration literature uses the concept of hybridity to describe situations where policy designs involve the interaction of government, business, civil society, and not-for-profits. Yet the concept lacks a theoretical context and poses the empirical problem of distinguishing between hybrid and non-hybrid forms.⁸⁵

Grabham says that hybridity ‘is located between two paradoxes’; one that it is dependent upon an assumption of difference and the second that if all cultures are hybrid, then there is no need for hybridity as a concept at all.⁸⁶

Hybridity also essentialises and focuses upon ‘the other’. Although, as we have seen, the concept of hybridity facilitates a move away from unhelpful binaries or ‘homogenous forms’, once we deal with separate forms or entities in any way, we are assuming that these entities are themselves definable or pure, and therefore we are required to essentialise them, even unwillingly, resting upon the notion of ‘the other’.⁸⁷ It might be said that the non-state actor is viewed as the weaker player, the ‘recipient of intervention’, or ‘the other’ in hybrid models, which might place them at a disadvantage in terms of decision-making and control of outcomes.⁸⁸ D’Aspremont et al., in exploring the issues of shared responsibility between state

⁸³ Marwan Kraidy, *Hybridity, Or the Cultural Logic of Globalization* (Temple University Press 2005) viii.

⁸⁴ Chris Skelcher (2012) ‘What do we mean when we talk about “hybrids” and “hybridity” in public management and governance?’ Working Paper, Institute of Local Government Studies, University of Birmingham, 1–27, at 2, <https://core.ac.uk/download/pdf/1633090.pdf> accessed 30 September 2016.

⁸⁵ Chris Skelcher (2012) ‘What do we mean when we talk about “hybrids” and “hybridity” in public management and governance?’ Working Paper, Institute of Local Government Studies, University of Birmingham, 1–27, at 2, <https://core.ac.uk/download/pdf/1633090.pdf> accessed 30 September 2016.

⁸⁶ Emily Grabham, ‘Taxonomies of inequality: lawyers, maps, and the challenge of hybridity’ (2006) 15(1) *Social and Legal Studies* 5, 19.

⁸⁷ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 13.

⁸⁸ See Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 20, where she states that the ‘consumption of and reaction to hybridity by local actors can also be quite varied and largely depends on their points of view and complex histories’ and this needs to be taken into account.

and non-state actors in international law for the potential contribution of each to harmful outcomes, focus upon a setting where the non-state actor is not in a less powerful position in the international legal order, rather one of diminished responsibility (such as multi-national groups, private security companies or even terrorist actors).

Non-state actors may differ fundamentally from states, thereby making the transposition of traditional rules of state responsibility artificial and inadequate: their loosely organised, temporary, diverse, illegitimate, or even outright criminal character may militate against applying the classic responsibility paradigm to non-state-state interactions.⁸⁹

In view of the limitations that surround non-state actors due to their informal nature, the authors suggest that an *ex ante* approach to shared responsibility might help.⁹⁰ Emily Grabham also notes the lack of analysis of power relations in the consideration of hybridity as a concept. She says the interaction of cultures, ethnicities and languages is not sufficiently taken into account:

A line of critique is emerging that hybridity, as an account of the interaction of cultures, ethnicities, and languages, is not sufficiently rooted in an analysis of power relations, material conditions of inequality, and exclusion.⁹¹

‘Power, politics, and money play important and potentially corrupting roles in any sector’ say Dees and Anderson.⁹² They note the impulse to see the non-profit sector as purely charitable and some sort of ideal organisations built on noble principles that facilitate trust because of their ‘nondistribution constraint’.⁹³ This is a ‘crude and often ineffective instrument’ Dees and Anderson say, that is not necessarily a guarantee against corruption and does not necessarily ensure effective performance either. Fear of risks surround organisational culture when

⁸⁹ Jean d’Aspremont, André Nollkaemper, Ilias Plakokefalos and Cedric Ryngaert, ‘Sharing responsibility between non-state actors and states in international law’ (2015) 62 *Netherlands International Law Review* 49, 50.

⁹⁰ Jean d’Aspremont, André Nollkaemper, Ilias Plakokefalos and Cedric Ryngaert, ‘Sharing responsibility between non-state actors and states in international law’ (2015) 62 *Netherlands International Law Review* 49, 50.

⁹¹ Emily Grabham, ‘Taxonomies of inequality: lawyers, maps, and the challenge of hybridity’ (2006) 15(1) *Social and Legal Studies* 5, 18.

⁹² J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16, 26.

⁹³ See also Alan Fowler and Kees Biekart (2011) ‘Civic driven change: a narrative to bring politics back into civil society discourse’, International Institute of Social Studies, Working Paper No. 529, 1, 16, http://econpapers.repec.org/scripts/redis_pf?u=http%3A%2F%2Frepub.eur.nl%2Fpub%2F30559%2Fwp529.pdf;h=repec:ems:euriss:30559 accessed 2 October 2016.

bringing together public and private, with some concerns that the combination of ‘public’ and ‘private’ cultures of service provision will even ‘lead to confusion and moral degeneration’.⁹⁴

Hybridity (in peacekeeping and development) does not address, or downplays, the issues of injustice or power. It can be used to justify actions on the part of the ‘hegemon’ or absolve it from blame altogether, says Jenny Peterson.⁹⁵ A focus upon hybridity forgets the historical exploitation and structural inequalities.⁹⁶ Even the research on hybridity is primarily carried out by ‘privileged, northern intellectuals (on balance, men)’.⁹⁷ Hybridity (in peacebuilding and development) continues to place the liberal West at the centre of analysis.⁹⁸

Hybrid regimes can represent conflicting interests. There are conflicting meanings associated with the state, market and community in social housing, for example.⁹⁹ Some researchers have developed frameworks that consider ‘descriptor, motivator and behaviour variables’ to track the ways in which hybridity contributes to organisational behaviour in different contexts, arguing that it is important to understand the ways in which competing hybrid principles apply in the strategies and decisions undertaken by organisations.¹⁰⁰

Kate Bedford says that it is a ‘driving concern’ of political scientists, policy-makers and activists whether and how marginalised groups can actually achieve change within mainstream spaces:

⁹⁴ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, at 9, http://www.hybridorganizations.com/file_download/15 accessed 12 September 2016.

⁹⁵ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 17.

⁹⁶ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 14.

⁹⁷ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 15, citing Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (Palgrave Macmillan 2011).

⁹⁸ See, generally, Fergal Davis and Fiona de Londras (eds) *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014).

⁹⁹ David Mullins, Darinka Czischke and Gerard van Bortel, ‘Exploring the meaning of hybridity and social enterprise in housing organisations’ (2012) 27 *Housing Studies* 405, 409.

¹⁰⁰ David Mullins, Darinka Czischke and Gerard van Bortel ‘Exploring the meaning of hybridity and social enterprise in housing organisations’ (2012) 27 *Housing Studies* 405, 409, citing Darinka Czischke, Vincent Gruis and David Mullins ‘Conceptualising social enterprise in housing organisations’ (2012) 27 *Housing Studies* 418.

The extent to which organizations can really change to accommodate new interests remains unclear given the influence of past policy decisions, the costs of shifting to a new approach, and the counter-commitments of those supporting the status quo.¹⁰¹

In hybrid situations, there can be conflicting interests between state and non-state actors, and between states and other states. Basak Cali and Anne Koch say that states become interested in human rights in other states for reasons of self-interest and this self-interest distorts the collective ownership of rights (in the example of the Council of Europe's monitoring of ECtHR judgments).¹⁰²

Chris Skelcher describes 'the competitive pressures' that operate in hybrid situations:

In comparison to firms, the competitive pressures in hybrids operate in two ways. First, the partners remain independent actors and thus have the capacity to make autonomous decisions. Thus there is a potential for competition between partners. Second, hybridity tends to develop in highly competitive markets where resource pooling is a preferred strategy for gaining advantage.

[. . .]

This means that hybrids as corporate entities have to design ways to establish areas where decisions must be taken jointly, and inappropriate autonomous behaviour constrained.¹⁰³

It is possible that in hybrid situations of state and non-state actors, the state has smoother collaborations in areas that are 'safer'. For example, in the area of LGBT issues, HIV/AIDS and sexual health in China, the Chinese state is sensitive to these issues, making collaboration

¹⁰¹ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xvi-xvii.

¹⁰² Basak Cali and Anne Koch, 'Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301, 302, 306.

¹⁰³ Chris Skelcher (2012) 'What do we mean when we talk about "hybrids" and "hybridity" in public management and governance?' Working Paper, Institute of Local Government Studies, University of Birmingham, 1, 8, http://epapers.bham.ac.uk/1601/1/Hybrids_working_paper_-_march_2011.pdf accessed 30 September 2016.

more difficult.¹⁰⁴ Jennifer Hsu argues that, while NGOs may seek to educate state authorities on sensitive issues, perhaps the ‘lack of knowledge’ on the part of state institutions can be used strategically.¹⁰⁵

In the case of development, civil society is always going to be affected by what Alan Fowler and Kees Biekart refer to as the ‘centrality of politics’ as a driver for change¹⁰⁶ In aid and development, where there are many hybrid models of operation in localised projects, there will always be bilateral interests at play, sometimes conflicting. Up to the 1990s, development organisations were the primary non-state actor. Originally, Fowler and Biekart say, it was civil society organisations that were the non-state actors in hybrid development arrangements. Over time, space has opened up for the inclusion of other types of entities such as faith-based groups, trade unions and professional organisations.¹⁰⁷

In the hybrid creation of ‘New Public Management’ in the public sector, combining characteristics and objectives is not that straightforward and can generate ambiguity:

To combine organisational characteristics from two different sectors in one organisation is, therefore, far from simple and are by scholars from different fields regarded to generate ambiguity (Borys and Jemison, 1989; Child, 2005; Kickert, 2001; and Koppell, 2003). This can be traced back to the demand imposed on these organisations by stakeholders acting in the environment in which they operate.¹⁰⁸

Hybrid bodies that have characteristics and objectives from both private and public sectors are

¹⁰⁴ Jennifer YJ Hsu (2015) ‘Strategic collaboration, avoidance and ignorance in state-NGO relations’, 1, 11, University of Alberta Department of Political Science, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660633 accessed 30 September 2016.

¹⁰⁵ Jennifer YJ Hsu (2015) ‘Strategic collaboration, avoidance and ignorance in state-NGO relations’ 1, University of Alberta Department of Political Science, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660633 accessed 30 September 2016.

¹⁰⁶ Alan Fowler and Kees Biekart (2011) ‘Civic driven change: a narrative to bring politics back into civil society discourse’, International Institute of Social Studies, Working Paper No. 529, 1, 5, http://econpapers.repec.org/scripts/redis_pf?u=http%3A%2F%2Frepub.eur.nl%2Fpub%2F30559%2Fwp529.pdf;h=repec:ems:euriss:30559 accessed 2 October 2016.

¹⁰⁷ Alan Fowler and Kees Biekart (2011) ‘Civic driven change: a narrative to bring politics back into civil society discourse’, International Institute of Social Studies, Working Paper No. 529, 1, 10, http://econpapers.repec.org/scripts/redis_pf?u=http%3A%2F%2Frepub.eur.nl%2Fpub%2F30559%2Fwp529.pdf;h=repec:ems:euriss:30559 accessed 2 October 2016.

¹⁰⁸ Anna Thomasson, ‘Exploring the ambiguity of hybrid organisations: a stakeholder approach’ (2009) 25 Financial Accountability and Management 353, 354, <http://web.a.ebscohost.com.ezproxyd.bham.ac.uk/ehost/pdfviewer/pdfviewer?vid=4&sid=a30ec053-e754-4ac3-a477-1f0493081e8e%40sessionmgr4001&hid=4112> accessed 2 October 2016.

exposed to the demands and burdens of both sectors. The mixed interests of hybrid bodies therefore lead to more stakeholders to consider. Defining 'stakeholders' is not agreed upon and, even though it is a managerial task to balance the interest of different stakeholders, management themselves are also regarded as stakeholders.¹⁰⁹

In discussing the challenge of conflicting interests, the private sphere is not homogenous, says Cafaggi, and one of the difficulties raised by Transnational Private Regulation is conflicting interests at global level, for example, between industry, non-governmental organisations and trade unions. In this new, intertwined and transformed relationship between the public and private spheres, models of co-regulation are increasingly likely to be both hybrid, involving both governmental and non-state actors, and multi-level, involving national, European and international levels, say Colin Scott, Fabrizio Cafaggi, and Linda Senden.¹¹⁰

Hybridity is an important theme not only in respect of standard setting, but also with respect to monitoring and enforcement, a relatively neglected topic in the literature on transnational governance generally.¹¹¹

TPR regimes raise significant problems of legitimacy because of a degree of detachment from traditional government mechanisms. Weaknesses of national governments, particularly in developing economies, may have themselves stimulated the emergence of TPRs to address matters which national governments could not effectively address. In the context of TPR, the identification of an accountability relationship is complicated because of the problem of the many hands. It can be difficult to identify who is responsible for outcomes in transnational contexts with regulatory regimes that are of a diffuse, hybrid public-private nature and include many different (public and private), organizationally often disconnected, actors at various moments in time. An important question around accountability arises where hybrid models of regulation are seen, namely whether a body that is essentially private in nature has a legitimate

¹⁰⁹ Anna Thomasson, 'Exploring the ambiguity of hybrid organisations: a stakeholder approach' (2009) 25 *Financial Accountability and Management* 353, 356, <http://web.a.ebscohost.com.ezproxyd.bham.ac.uk/ehost/pdfviewer/pdfviewer?vid=4&sid=a30ec053-e754-4ac3-a477-1f0493081e8e%40sessionmgr4001&hid=4112> accessed 2 October 2016, citing Eva Jansson, 'The stakeholder model: the influence of the ownership and governance structure' (2005) 56 *Journal of Business Ethics* 1.

¹¹⁰ Colin Scott, Fabrizio Cafaggi and Linda Senden, 'The conceptual and constitutional challenge of transnational private regulation' (2011) 38(1) *Journal of Law and Society* 1.

¹¹¹ Colin Scott, Fabrizio Cafaggi and Linda Senden, 'The conceptual and constitutional challenge of transnational private regulation' (2011) 38(1) *Journal of Law and Society* 1, 11.

function in making decisions that are binding on third parties and ultimately have consequences for the public good. ‘The investigation of any particular policy domain reveals complex structures of extended accountability, best characterized as hybrid in character’ says Colin Scott.¹¹²

Deirdre Curtin and Linda Senden identify the issues of accountability that arise out of the hybrid mix of public–private elements in TPR, saying the regimes themselves suffer from a fragmentation of responsibility in the regulatory state and this is part of the difficulty.¹¹³ They hypothesise that traditional, democratic processes at national level ‘simply cannot keep up with the migration of power and authority to the transnational level’,¹¹⁴ and call for more empirical research in order to define norms around public accountability.¹¹⁵

The identification of accountability in TPR is complicated by the presence of many hands. With a multiplicity of officials contributing to decisions it is difficult, even in principle, to identify who is responsible for outcomes. The problem presents itself with even more force in transnational contexts with regulatory regimes that have many parts. In the context of TPR, the identification of an accountability relationship is complicated by the problem of the many hands (where the private nature limits the scope for judicial review, for example). The delegating of authority on the part of the state does not relieve the state of its responsibilities says Giovanna De Minico:

[T]he State is no longer completely in charge of rulemaking, as private bodies, too, can, at least partially, hold this right; the State’s role, however, will be still decisive as the State has the task of defining the characteristics of the self-regulatory bodies, of indicating the proper course for the regulatory process and of correcting it if necessary.¹¹⁶

¹¹² Colin Scott, ‘Accountability in the regulatory state’ (2000) 27(1) *Journal of Law and Society* 38, 49, citing G Teubner, ‘After privatization? The many autonomies of private law’ (1998) 51 *Current Legal Problems* 393, 406.

¹¹³ Deirdre Curtin and Linda Senden, ‘Public accountability of transnational private regulation: chimera or reality?’ (2011) 38 *Journal of Law and Society* 163.

¹¹⁴ Deirdre Curtin and Linda Senden, ‘Public accountability of transnational private regulation: chimera or reality?’ (2011) 38 *Journal of Law and Society* 163, 186.

¹¹⁵ Deirdre Curtin and Linda Senden, ‘Public accountability of transnational private regulation: chimera or reality?’ (2011) 38 *Journal of Law and Society* 163, 188.

¹¹⁶ Giovanna De Minico, ‘A hard look at self regulation in the UK’ (2006) 1 *European Business Law Review* 1, 32.

As we have seen, ‘power, politics, and money’ have the potential to be corrupting in any sector.¹¹⁷ We see the tendency to view the non-profit sector as having the type of principles that will uphold financial integrity.¹¹⁸ However, in a hybrid public–private mix, when financial risks do appear, there is a concern that commercial interests will prevail. Brandsen, Karré and Helderma note fears that commercial ventures ‘will rock the public purse’ as well as ‘hopes that they may generate additional revenues to strengthen it’.¹¹⁹ Brandsen, Karré and Helderma also identify fears that the diversification of funding and increased autonomy of management might lead hybrid organisations to lose sight of their goals and focus primarily on their commercial activities.¹²⁰ Alan Fowler fears that the financing of NGOs for development activities has led to a loss of their ‘activist’ nature; seeking public finance for their work may lead to ‘self-restraint when adopting theory or practice which is affected by politics. Service delivery will win out over civic activism, in other words.’¹²¹

In the setting of sectors with limited resources and financial constraints, there is a fear that the choice between state, market and community drivers will become narrower and hybrid bodies might be forced to sacrifice social aspects of their work because of public sector cuts.¹²² In the case of hybrid housing bodies, for example, Halima Sacranie wonders if it could be decided that personalised community support services targeting specific sections of society are no longer financially feasible? ‘Or are the valuable social benefits of specialised CI [Community Investment] programmes for vulnerable communities a price worth paying?’¹²³

¹¹⁷ J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16, 26.

¹¹⁸ See also Alan Fowler and Kees Biekart (2011) ‘Civic driven change: a narrative to bring politics back into civil society discourse’, International Institute of Social Studies, Working Paper No. 529, 1, 16, <http://econpapers.repec.org/scripts/redirector.php?u=http%3A%2F%2Frepub.eur.nl%2Fpub%2F30559%2Fwp529.pdf;h=repec:ems:euriss:30559> accessed 2 October 2016.

¹¹⁹ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, at 8–9, http://www.hybridorganizations.com/file_download/15 accessed 12 September 2016.

¹²⁰ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, at 9, http://www.hybridorganizations.com/file_download/15 accessed 12 September 2016.

¹²¹ Alan Fowler and Kees Biekart (2011) ‘Civic driven change: a narrative to bring politics back into civil society discourse’, International Institute of Social Studies, Working Paper No. 529, 1, 11, <http://econpapers.repec.org/scripts/redirector.php?u=http%3A%2F%2Frepub.eur.nl%2Fpub%2F30559%2Fwp529.pdf;h=repec:ems:euriss:30559> accessed 2 October 2016.

¹²² Halima Sacranie, ‘Hybridity enacted in a large English housing association: a tale of strategy, culture and community investment’ (2012) 27 *Housing Studies* 533.

¹²³ Halima Sacranie, ‘Hybridity enacted in a large English housing association: a tale of strategy, culture and community investment’ (2012) 27 *Housing Studies* 533, 549.

During the 2004 All-Party Oireachtas Committee on the Constitution, when the issue of private property was examined, the Committee stated that in common with many of its European counterparts, a system had evolved whereby Ireland's 'infrastructure provision is for the most part delivered by local authorities or state bodies, with the use of Private Public Partnerships (PPPs) becoming more common'.¹²⁴ Among submissions received by the Committee as part of its consultation process, the Foundation for the Economics of Sustainability or 'Feasta' criticised the PPP model as being flawed in its distributive basis:

The cost of major transport infrastructure projects has led the government to consider Public Private Partnerships financed by taxes and tolls on users. It is unfair to require the community to pay all the costs of these projects while the millions of capital value added to private property is largely untouched. In fact, were the government to decide to capture this value through an annual site tax or levy or bond on benefiting landowners, the PPP process might be unnecessary as the government might well be able finance the project on the projected tax income stream.¹²⁵

The dependence of TPR regimes on supply-chain contracts for monitoring and enforcement raises challenges. In a parallel fashion, in the absence of routine in-built monitoring and evaluation of many international human rights instruments, civil society provides an important monitoring role but may have a corresponding conflict of interest where the same civil society organisations are also involved to some extent in service provision.¹²⁶

In hybrid situations, there may be a risk of the mission, values, ideologies or ways of working of either body becoming dominant and used in a way that does not contribute to the desired outcomes on the part of the other. Where programmatic work to do with the implementation of rights (providing education, training, running/building centres) is funded by non-state actors,

¹²⁴ Government of Ireland (2004) *All-Party Oireachtas Committee on the Constitution, Ninth Progress Report, Private Property* 1, 125, <http://archive.constitution.ie/publications/default.asp?UserLang=EN> accessed 30 September 2016.

¹²⁵ Government of Ireland (2004) *All-Party Oireachtas Committee on the Constitution, Ninth Progress Report, Private Property*, 1, Appendix 3, *Submission from Feasta*, at A80, <http://archive.constitution.ie/publications/default.asp?UserLang=EN> accessed 30 September 2016.

¹²⁶ Indeed in the interviews conducted for this thesis, government officials who were interviewed cited civil society as a monitor before citing any other monitoring and evaluation processes.

as in the provision of philanthropic funding for example, the funder may seek to control the ways in which the work is delivered. Dees and Anderson identify ‘mission drift’ as a significant concern in areas where sector boundaries are blurred:

Business structures and methods could pull social-purpose organizations away from their original social missions. Social service organizations that intended to serve the very poor may find that it is easier to generate fees or contracts by serving clients who are less disadvantaged than to raise funds to subsidize their charity work. Similarly, a homeless shelter that starts a business to train and employ shelter residents may find that it is too difficult and costly to make this option available to the homeless who are hardest to employ.¹²⁷

As noted by Morgan and Yeung, private interest theories tend to gain prominence under political ideologies which favour deregulation and may result in ‘regulatory failure’ and ‘regulatory capture’, whereby officials of regulatory institutions develop such close relationships in the sector that they risk over-promoting the narrow interests of those they regulate. Frédéric Boehm says regulatory capture may also stretch to politicians, who ‘may abuse regulatory powers for their own purposes’ in a form of what Boehm calls ‘regulatory opportunism’.¹²⁸

In relation to capture, Walter Mattli and Ngaire Woods say the institutional context within which regulation takes place is key:

The more open, accessible, transparent, and accountable the process, the less prone it will be to capture. That said, while some rules are formulated in open and transparent negotiations, the implementation of the rules may subsequently be delegated to far less open, transparent, or accountable agencies, heightening the risks of capture.¹²⁹

¹²⁷ J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16, 21.

¹²⁸ Frédéric Boehm ‘Regulatory capture revisited – lessons from economics of corruption’ (2007) Working Paper, <http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf> accessed 3 August 2015.

¹²⁹ Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press 2009) Introduction, *x*.

When a new regulatory system is established, the risk of regulatory capture is at its strongest, says Declan Purcell, as new bodies must rely on the entities they seek to regulate in order to set standards.¹³⁰ Colin Scott says this is not unusual as, even though the formal legal power is held by the regulator, they are ‘dependent on firms they notionally regulate for their view of what is appropriate and feasible . . . but the operation and outcomes within the regime are determined, often implicitly, by leading firms’.¹³¹

David Mullins, in examining the regulation of housing associations in England, suggests that the development of the English regulatory regime is shown to have been strongly influenced by the interests of the providers themselves, indicating a degree of ‘regulatory capture’.¹³² Although regulatory regimes representing not-for-profit organisations are expected to replicate the range of interests involved, such as, in the case of a housing association, the existing tenants, future tenants and wider community, as well as taxpayers, Mullins states that the balance of interests represented in any regulatory regime is always likely to be temporary, as regimes usually reflect the control and influence of the different interest groups involved.¹³³

The dominant model of accountability in Ireland is one of ministerial responsibility to the legislature, the Comptroller and Auditor General, and the courts. However, as Muiris MacCárthaigh and Colin Scott state, ‘as in other jurisdictions, there has been a recent tendency to supplement traditional forms of executive oversight with quasi-judicial and other mechanisms for ex-post accountability’ resulting in a fragmentation of accountability structures within the state.¹³⁴ This fragmentation presents challenges to the core issue of accountability and a lack of coherence.

¹³⁰ Declan Purcell, ‘A rough guide to Irish regulators’, Competition Authority First Annual Review of Irish Regulatory Affairs, conference presentation, 26 November 2008, 1, 10, <http://www.tca.ie/EN/Promoting-Competition/Speeches--Presentations/Declan-Purcell-A-Rough-Guide-to-Irish-Regulators.aspx> accessed 14 March 2015.

¹³¹ Colin Scott, ‘Regulating everything’, Inaugural Lecture by Colin Scott, Professor of EU Regulation and Governance at UCD, 26 February 2008, 7.

¹³² David Mullins ‘From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England’ (1997) 12 *Housing Studies* 301, at 301.

¹³³ David Mullins ‘From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England’ (1997) 12 *Housing Studies* 301, at 317.

¹³⁴ Muiris MacCárthaigh and Colin Scott, ‘A thing of shreds and patches: fragmenting accountability in a fragmented state’ (2009) Discussion Paper Series, Geary Institute, University College Dublin, 1, 16. MacCárthaigh and Scott identify accountability mechanisms shaped by three types of forces: (1) top-down, via pressures from international mechanisms; (2) horizontal, learning or benchmarking from other jurisdictions; and (3) bottom-up reforms in response to policy problems, such as tribunals of inquiry.

When there is more than one actor involved, i.e. the state and the non-state, there may be a problem with accountability. It may be difficult to know who is fully accountable for implementation and for outcomes; who is accountable for making sure the results are achieved or when things don't go to plan. Flowing from this accountability is the responsibility that the state has for creating mechanisms of monitoring and for assessing the degree to which delegated entities are doing what is expected, that is, both formal international legal accountability (i.e. the state) and everyday 'practical' accountability (i.e. politically, legally and practically).

The presence of multiple actors in the operationalisation of human rights also causes difficulty. Individual interests, executive staff turnover and changes of government may result in different focuses and priorities at different times. Hybrid models of human rights operationalisation raise similar concerns in relation to detachment from the Irish state. The Irish state is responsible for the weaknesses that have allowed a hybrid model to emerge. This has resulted in a lack of effective domestic mechanisms to begin with and therefore a hybrid model arises to address matters or issues which the government has not addressed to date.

MacCárthaigh and Scott call for a reconceptualisation of accountability, where a mixed model is inevitable but more consideration should be given to the independence between networks, and also the potential for 'non-mandated organizations such as the media and NGOs to hold others to account'.¹³⁵ The proposed model is, perhaps, a more formalised version of hybridity.

The emergence of new types of government, fragmented ones, pose a challenge to the operationalisation of human rights law via its tradition protection mechanisms. Alison Mawhinney and Iorweth Griffiths argue that the traditional model of human rights law never envisaged a state that privatised and contracted out its responsibilities. If human rights law is to remain relevant, it must adapt to the reality of these new forms of government which are here to stay. Mawhinney and Griffiths suggest that adopting a wider concept of 'governance', one which also recognises the power exercised by non-state actors, rather than government, has the potential to address the changing nature of state responsibility.¹³⁶

¹³⁵ Muiris MacCárthaigh and Colin Scott, 'A thing of shreds and patches: fragmenting accountability in a fragmented state' (2009) Discussion Paper Series, Geary Institute, University College Dublin, 1, 24.

¹³⁶ Alison Mawhinney and Iorweth Griffiths, 'Ensuring that others behave responsibly: Giddens, governance, and human rights law' (2011) 20 *Social & Legal Studies* 481, 482. The authors support sociologist Anthony Giddens' theory of 'the ensuring state' where the state has a responsibility to ensure others behave responsibly.

If we recognise that operationalisation of human rights is done through a hybrid mechanism, then we must recognise that simply approaching improving rights through statute, for example, is insufficient. Creating a legal standard may be doctrinal implementation, but it is not human rights operationalisation, or putting rights in place throughout the state, in ways that are measurable. In this hybridised ‘third space’ the new entities tasked with matters of operationalisation are, in a way, Bhabha’s colonised, articulating new spaces and new identities for themselves.

Muiris MacCárthaigh and Colin Scott’s model of accountability mechanisms shaped by a triad of top-down, horizontal and bottom-up forces may be transposed quite easily onto a hybridised operationalisation of human rights, where (1) top-down pressures are placed by international and regional human rights mechanisms; (2) horizontal benchmarking is seen with other jurisdictions; and (3) bottom-up human rights reforms take place in response to policy issues. A more effective hybridised operationalisation might occur if these forces were more equally distributed and subject to accountability in the form of monitoring and sanctions for non-compliance, as part of a process of domestic political accountability.

When there is more than one actor involved, there may be a conflict of interests and mixed messages. The state might have one desired outcome (implementation of the right to a standard that is acceptable, in keeping with domestic law, but within a ‘value for money’ matrix, for example. This can be seen in the *ex gratia* scheme for symphysiotomy victims managed by the State Claims Agency: “Where claims do arise our objective is to manage these claims so as to ensure that the state’s liability and associated expenses are contained at the lowest achievable level.” Non-state actors may have other desired outcomes (implementation of the right to the best possible standard for the rights holder in question, or implementation of the right in a way that requires them to continue to play a part in the process, if they are a charitable organisation involved in service provision, for example). NGOs may be providing services on behalf of the state as well as lobbying government for changes in service provision. There may be conflicts of interest when a private service provider, on a for-profit basis, is providing a state service with serious human rights implications.

There are concerns around a lack of formal/regularised monitoring and evaluation and a lack of sanctions in Ireland generally. This may be made more problematic when there are multiple actors involved. State actors may cite the existence of non-state actors as a form of monitoring, rather than a more formalised system of self-monitoring. If non-state actors are also involved in operationalising rights (or indeed are in receipt of funding from the state) it may potentially be difficult for them to provide independent oversight of the operationalisation.

4.5 Theoretical benefits of hybridity

‘Hybridity, so what?’ says Jan Nederveen Pieterse.¹³⁷ Hybridity is ‘unremarkable’ and noteworthy only in how it essentialises boundaries, says Pieterse. What hybridity means varies over time and between cultures.¹³⁸ This section explores some of the theoretical benefits or advantages of hybridity.

Hybrid models of compliance which combine political, judicial and ‘technocratic’ elements may be more effective in facilitating compliance with human rights than are orders from international courts such as the European Court of Human Rights or recommendations of experts such as the Committee of Ministers alone, for example.¹³⁹ Basak Cali and Anne Koch have analysed the peer review process whereby the Committee of Ministers of the Council of Europe, composed of the ambassadors of the Council’s member states, supervise the implementation of judgments of the European Court of Human Rights.¹⁴⁰ Cali and Koch have identified that an additional form of post-judgment interpretation and monitoring is carried out by formal and informal delegation to the Department for the Execution of Judgments of the European Court of Human Rights, or ‘the Secretariat’ of the Court. Delegating tasks to the Secretariat has moved the focus of enforcement of judgments from the political, peer-based process of the Committee of Ministers to the more rule-based domain of the Secretariat. This hybrid of Court/Committee/Secretariat, Cali and Koch have found, has the effect of indirectly inducing compliance with human rights law, signalling ‘the development of a hybrid form of

¹³⁷ Jan Nederveen Pieterse, ‘Hybridity, so what?’ (2001) 18 *Theory, Culture and Society* 219, 220.

¹³⁸ Jan Nederveen Pieterse, ‘Hybridity, so what?’ (2001) 18 *Theory, Culture and Society* 219, 220.

¹³⁹ Basak Cali and Anne Koch, ‘Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe’ (2014) 14 *Human Rights Law Review* 301.

¹⁴⁰ See discussions on Council of Europe operationalisation mechanisms in chapter 3.

human rights monitoring in which the governments and a technocratic body jointly share competences under the shadow of a Court'.¹⁴¹

Recognising hybridity, as it applies in development, facilitates a move away from 'unhelpful' binaries and absolutes.¹⁴² It is presented by some theorists as a challenge 'to the essentializing tendencies of "boundary fetishism"'.¹⁴³ Hybridity can allow for a more nuanced and context-specific analysis, says Jenny Peterson, and she calls for the advancing of a research agenda on hybridity in relation to development, for a number of reasons: (1) because the majority of current analyses places the dominant, liberal 'West' at its centre and a hybrid approach has the potential to consider other centres or even 'moving centres';¹⁴⁴ (2) studies could encourage better understanding of hybridity and explore pathways to it;¹⁴⁵ and (3) more investigation into hybridity might counteract suspicions towards it as a concept, given that it is sometimes seen as a threat and therefore either deliberately controlled or destroyed.¹⁴⁶ Hybridity (in peacekeeping and development) has a 'progress' rhetoric, and allows us to imagine that an alternative is possible.¹⁴⁷

J Gregory Dees and Beth Battle Anderson argue for a 'fit-for-purpose' hybrid approach in health, education and a number of other social services.¹⁴⁸ These hybrid models are 'sector-bending', including 'approaches, activities, and relationships that are blurring the distinctions between non-profit and for-profit organizations, either because they are behaving more

¹⁴¹ Basak Cali and Anne Koch, 'Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301, 314.

¹⁴² Jenny H Peterson, 'A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces' (2012) 7(2) *Journal of Peacebuilding & Development* 9, 12, citing A Moreiras, 'Hybridity and double consciousness' (1999) 13 *Cultural Studies* 373.

¹⁴³ Emily Grabham, 'Taxonomies of inequality: lawyers, maps, and the challenge of hybridity' (2006) 15(1) *Social and Legal Studies* 5, 17, citing Jan Nederveen Pieterse, 'Hybridity, so what?' (2001) 18 *Theory, Culture and Society* 219, 220.

¹⁴⁴ Jenny H Peterson, 'A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces' (2012) 7(2) *Journal of Peacebuilding & Development* 9, 18.

¹⁴⁵ Jenny H Peterson, 'A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces' (2012) 7(2) *Journal of Peacebuilding & Development* 9, 19.

¹⁴⁶ The meaning of 'regulation' is subject to interpretation, yet 'is increasingly seen as a distinct field of academic inquiry' say Bronwen Morgan and Karen Yeung. See Jenny H Peterson, 'A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces' (2012) 7(2) *Journal of Peacebuilding & Development* 9, 19.

¹⁴⁷ Jenny H Peterson, 'A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces' (2012) 7(2) *Journal of Peacebuilding & Development* 9, 16.

¹⁴⁸ J Gregory Dees and Beth Battle Anderson, 'Sector bending: blurring lines between non-profit and for-profit' (2003) 40 *Society* 16, 26.

similarly, operating in the same realms, or both'.¹⁴⁹ An increasing turn to business methods and models in order to find better ways to address social problems is not problematic, in the opinion of Dees and Anderson. 'Boundary blurring' activities have the potential to build a sector with increased accountability, greater financial strength and financial capacity, and more sustainable solutions to 'social problems', the researchers say.¹⁵⁰ It is difficult to say whether the boundary blurring has driven an increased interest in finding solutions to systemic difficulties, or the opposite, but 'they are certainly intertwined and complementary'.¹⁵¹ Given the social issues and problems in society, it seems reasonable to assume that hybrid for-profits/not-for-profits will continue to be necessary and will evolve over time.

International regulatory frameworks tend to be based on the assumption that state responsibility is the primary factor in ensuring effective incentives to implement transnational regulation. Cafaggi gives particular emphasis to the hybrid nature of much of TPR, where there is a blending of public and private legal instruments and collaboration between government and non-government actors. The conventional view is that public and private regulation are alternatives to each other, whereas there is no question of a strict public-private divide in TPR. The nature of the relationship between the public and private spheres is intertwined.

Donal Casey and Colin Scott argue that the institutionalisation or embedding of norms within the wider structure of organisations is the way in which regulatory norms become crystallised and this is one of the processes by which regulatory norms (TPR in particular) become effective.¹⁵² Interested parties can exploit the process of crystallisation, but Casey and Scott argue that legitimising strategies puts a focus upon the making of rules that can expose weaknesses and limits and, where a TPR is perceived as legitimate, a sense of obligation and support naturally flows. The hybrid approach that is a feature of TPR helps to improve outcomes and the delivery of what is being regulated, bringing a benefit to understanding human rights operationalisation in this way.

¹⁴⁹ J Gregory Dees and Beth Battle Anderson, 'Sector bending: blurring lines between non-profit and for-profit' (2003) 40 *Society* 16.

¹⁵⁰ J Gregory Dees and Beth Battle Anderson, 'Sector bending: blurring lines between non-profit and for-profit' (2003) 40 *Society* 16.

¹⁵¹ J Gregory Dees and Beth Battle Anderson, 'Sector bending: blurring lines between non-profit and for-profit' (2003) 40 *Society* 16, 19.

¹⁵² Donal Casey and Colin Scott, 'The crystallization of regulatory norms' (2011) 38 *Journal of Law and Society*.

Mary Lee Rhodes and Gemma Donnelly-Cox argue that the concept of hybridity ‘is more analytically valuable as a dynamic process rather than a static description’.¹⁵³ They suggest viewing hybridity as a process tool, rather than an outcome, a means to incorporating new or different practices to facilitate organisational objectives.¹⁵⁴ ‘New Public Management’ in the UK public sector in recent decades is a development that encompasses a number of different reform processes in areas such as organisational management and accounting.¹⁵⁵ This phenomenon has produced hybrid organisations which have the advantage of being autonomous and exempt from the types of laws and regulations that may normally apply to public sector organisations. This hybridity in turn can provide a certain degree of flexibility around service provision services that might not be possible in public agencies.¹⁵⁶

The requirement for organisations to commit to performance management can be challenging in a hybrid non-profit/public setting.¹⁵⁷ Understanding of these challenges can be helped by looking at a number of significant organisational characteristics, such as inter-stakeholder relationships; tension across objectives, culture and power; and ‘interdependent stress’ or possible negative outcomes that might result from a loss of identity or autonomy in the individual players.¹⁵⁸

Brandsen, Karré and Helderma say that, despite predictions that hybrid organisations would create unacceptable hazards in the way public services are provided, risks of abuse in hybrid organisations are generally overstated. ‘One of the recurring fears in the literature critical about hybrid organisations’ they say, ‘is that public funds being used for commercial ventures could result in gaining an unfair advantage over private competitors.’¹⁵⁹ Potential financial risks of hybrid public–private organisations also have the potential to provide strength and resistance

¹⁵³ Mary Lee Rhodes and Gemma Donnelly-Cox, ‘Hybridity and social entrepreneurship in social housing in Ireland’ (2014) *Voluntas* 1630.

¹⁵⁴ Mary Lee Rhodes and Gemma Donnelly-Cox, ‘Hybridity and social entrepreneurship in social housing in Ireland’ (2014) *Voluntas* 1630, 1646.

¹⁵⁵ Anna Thomasson, ‘Exploring the ambiguity of hybrid organisations: a stakeholder approach’ (2009) 25 *Financial Accountability and Management* 353.

¹⁵⁶ Anna Thomasson, ‘Exploring the ambiguity of hybrid organisations: a stakeholder approach’ (2009) 25 *Financial Accountability and Management* 353, 354.

¹⁵⁷ FJ Conaty, ‘Performance management challenges in hybrid NPO/public sector settings – An Irish Case’ (2012) 61 *International Journal of Productivity and Performance Management* 290.

¹⁵⁸ FJ Conaty, ‘Performance management challenges in hybrid NPO/public sector settings – An Irish Case’ (2012) 61 *International Journal of Productivity and Performance Management* 290, 305.

¹⁵⁹ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, 1–20, at 9–10, http://www.hybridorganizations.com/file_download/15 accessed 29 September 2016.

in how they do their business. Concerns over accountability, control and legitimacy in hybrid organisations are mostly theoretical and rarely materialise into real difficulties.¹⁶⁰ Two conditions that help allay potential tensions in hybrid organisations are ‘a degree of professionalism’ and clear guidelines from supervisory bodies for handling finances.¹⁶¹ In fact, increased accountability in hybrid for-profits/not-for-profits can come from having paying customers instead of non-paying clients, Dees and Anderson point out.¹⁶² Paying customers may be likely to hold organisations to account by complaining about poor service or moving their business, they say.¹⁶³

In the case of public housing in the United States, Nguyen, Rohe and Cowan have traced the move away from conventional public housing which was ‘decidedly un-hybrid’ in its origins in the 1930s US, when state authorities owned, built and maintained public housing,¹⁶⁴ towards a reconceptualisation of public housing as more than bricks and mortar. Nguyen, Rohe and Cowan describe this phenomenon, a system that encompasses the kinds of support services that best benefit poor and vulnerable households,¹⁶⁵ as ‘programmatically’ hybridity, when housing bodies partner with services offering additional support to householders in the areas of literacy, education and training, or transport, for example.¹⁶⁶ This has led to ‘a fundamental shift in viewing housing as a means to provide both roots and wings – roots that allow affordable

¹⁶⁰ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, 1–20, http://www.hybridorganizations.com/file_download/15 accessed 29 September 2016.

¹⁶¹ Taco Brandsen, Philip Karré and Jan-Kees Helderma ‘The risks of hybrid organisations: expectations and evidence’, paper prepared for the NISPACEE conference, Budva, May 2009, 1–20, at 16, http://www.hybridorganizations.com/file_download/15 accessed 29 September 2016.

¹⁶² J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16, 20, https://centers.fuqua.duke.edu/case/knowledge_items/sector-bending-blurring-lines-between-nonprofit-and-for-profit/ accessed 28 September 2016.

¹⁶³ J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16, 20, https://centers.fuqua.duke.edu/case/knowledge_items/sector-bending-blurring-lines-between-nonprofit-and-for-profit/ accessed 28 September 2016. A transition ‘largely attributed to neoliberal views that promote greater individual autonomy, reliance on market mechanism, and less state intervention in the delivery of goods and services’ say Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, at 460.

¹⁶⁴ With the passage of the 1937 US Housing Act which established the United States Housing Authority, a Federal Agency responsible for public housing agencies in order to provide housing for ‘the poor’. See Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, 460.

¹⁶⁵ Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, 458.

¹⁶⁶ Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, 459.

housing residents to settle comfortably into a home and neighborhood and wings that enable these residents to achieve socioeconomic mobility'.¹⁶⁷

In the case of public housing in the United States, a shift towards hybridity has created financial leverage for housing projects that might be otherwise out of the reach of both the private sector and public housing.¹⁶⁸ Privatisation of the construction and management of affordable housing has certain advantages when these functions are given to private companies with experience of the standards that apply in the private sector.¹⁶⁹

Hybrid public–private partnership (PPP) development in Ireland can be traced back to the early 1990s, when a deficit of physical infrastructure created a need for faster delivery of construction in areas such as transport, health, education and environmental services.¹⁷⁰ The PPP model allows for the transfer of risk in a way that is not possible under traditional procurement methods as well as potentially lower financing costs for the public sector.¹⁷¹

4.6 Conclusion

A shift in global power and politics more recently has underscored the need for hybrid constructs in international law.¹⁷² Chapter 4 has argued that hybrid models of operationalisation

¹⁶⁷ Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, 'Entrenched hybridity in public housing agencies in the USA' (2012) 27 *Housing Studies* 457, 472.

¹⁶⁸ Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, 'Entrenched hybridity in public housing agencies in the USA' (2012) 27 *Housing Studies* 457, 470.

¹⁶⁹ Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, 'Entrenched hybridity in public housing agencies in the USA' (2012) 27 *Housing Studies* 457, 471.

¹⁷⁰ Eoin Reeves (2013) 'Public-private partnerships in Ireland: a review of the experience', Paper presented to the Nevin Economic Research Institute, Dublin, 23 January 2013, 1, 5, http://www.nerinstitute.net/download/pdf/reeves_neri_2013_ppp.pdf accessed 29 September 2016. Reeves says that recent economic stimulus plans are the sign of a renewed wave of PPP procurement that originally commenced in 1999 and, up to 2013, resulted in over €6 billion of investment in infrastructure and public services, at 1. This has continued into 2016 with the launch of the most recent Government's Rebuilding Ireland – Action Plan for Housing and Homelessness in July 2016. Housing Minister Simon Coveney has said 'A social housing PPP programme is underway which will deliver 1,500 much-needed social housing units with a capital value of €300m. [...] The programme uses the PPP delivery model which has successfully delivered key infrastructure in Ireland such as primary healthcare facilities, schools and roads. The homes it delivers will be allocated to people on our all-too-long social housing waiting lists.' See <http://www.housing.gov.ie/housing/home-ownership/minister-coveney-address-irish-times-property-forum> accessed 29 September 2016.

¹⁷¹ Eoin Reeves (2013) 'Public-private partnerships in Ireland: a review of the experience', Paper presented to the Nevin Economic Research Institute, Dublin, 23 January 2013, 1, at 10, http://www.nerinstitute.net/download/pdf/reeves_neri_2013_ppp.pdf accessed 29 September 2016.

¹⁷² 'Collective' or 'people's' rights, rather than individual rights, according to BH Weston, 'Human rights' (1984) 6 *Human Rights Quarterly* 257, 283.

may be more effective in facilitating compliance with human rights than orders from international bodies.¹⁷³ We also saw that sharing responsibility can lead to increased accountability, greater financial strength and more sustainability,¹⁷⁴ particularly in the case of Transnational Private Regulation, which has created more efficient organisational structures.¹⁷⁵ Chapter 4 has also shown that hybridity is not without challenges. Although it can facilitate a shift away from unhelpful binaries,¹⁷⁶ its balance of power can still be unequal in terms of decision-making and it is still susceptible to outside influence.¹⁷⁷

Even with these disadvantages, however, this chapter has argued that hybridity ought to be formalised and embraced. The possibility of more formal hybrid structures is explored in Chapter 5, which further develops the argument that formalisation might address weaknesses of hybridity in the case of Traveller accommodation. Chapter 5 considers some emerging examples of more formal hybridity in human rights operationalisation, such as domestic monitoring mechanisms established under Article 33 of the United Nations Convention on the Rights of Persons with Disabilities, called ‘arguably the most complete provision on national level implementation and monitoring ever in an international human rights treaty’.¹⁷⁸

¹⁷³ Basak Cali and Anne Koch, ‘Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe’ (2014) 14 *Human Rights Law Review* 301.

¹⁷⁴ J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16, 26.

¹⁷⁵ Fabrizio Cafaggi, ‘New foundations of transnational private regulation’ (2011) 38(1) *Journal of Law and Society* 20.

¹⁷⁶ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 13.

¹⁷⁷ See Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 20, where she states that the ‘consumption of and reaction to hybridity by local actors can also be quite varied and largely depends on their points of view and complex histories’ and this needs to be taken into account.

¹⁷⁸ Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (United Nations Office of the High Commissioner for Human Rights Regional Office for Europe 2014) 4, http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf accessed 1 September 2016.

Chapter 5 – Towards Formalisation

5.1 Introduction

We have already identified that there are hybrid elements to the ways in which the right to culturally appropriate accommodation is operationalised in the context of Travellers in Ireland and argued that, in places where hybridity is present, it can be effective in operationalisation. Not only has this effectiveness been displayed, but in the context of a historically and structurally discriminated-against minority such as the Traveller community in Ireland, post-colonial theory has suggested that engaging in a hybrid approach may also be a method of re-establishing the balance of power, and serve to equalise or re-imagine the relationship between the state and the minority.

Chapter 4 also established that, although hybrid operationalisation is putatively possible, it suffers from a level of informality that makes it vulnerable to unwelcome influence from external factors. There are risks and uncertainties when hybrid structures are subject to political will, at the mercy of change of government, unbalanced in terms of power and decision-making, and funded by the state in a manner that may be subject to change as the state decides.

Building on the findings in Chapter 3, Chapter 4 went on to look at hybridity as a concept in more detail. Having explored its meaning from a variety of perspectives, it unpacked the advantages and disadvantages of hybridity across a number of different contexts. This led to the suggestion that a greater formalisation of the relevant hybrid systems involved in operationalisation may serve to insulate the operationalisation of rights from potential vulnerabilities, such as that of political volatility. In order to seek routes to greater formalisation, Chapter 5 now examines models from other contexts in which a hybrid approach is formalised, as well as analysing how these kinds of models might work in the context of Traveller accommodation. This will entail reverting to the stages of operationalisation, already identified in Chapter 2, i.e. translation through the creation of laws and policies; implementation through the creation of domestic bodies with rights mandates, the allocation of resources and the actual delivery of rights; and monitoring or measuring.

This chapter provides three exemplars of formalised hybridity relevant to rights, which are chosen because they may be appropriate to providing some insight or guidance as to ways forward in the specific context of Traveller accommodation. These models are: (1) market/community hybridity present in housing associations in England; (2) technocratic hybridity in civil society's role in larger, established organisations, in this case the World Bank; and (3) existing hybrid human rights mechanisms under UN treaties and principles, specifically the UN Convention on the Rights of Persons with Disabilities Article 33 monitoring mechanisms,¹⁷⁹ and domestic implementation mechanisms for the United Nations Guiding Principles on Business and Human Rights (the 'Ruggie Principles').¹⁸⁰

This chapter goes on to consider the implications of more formal recognition for the operationalisation of the right to culturally appropriate accommodation in the case of Traveller accommodation in Ireland, as well as the implications of more formal recognition for human rights operationalisation more generally. It provides a concrete proposal for better embedding and formalising hybridity in this context in Ireland, with a view to enhancing the right to culturally appropriate accommodation for Travellers.

5.2 Hybridity in housing associations in England

The first hybrid model that is of interest is that of 'social housing', or housing that is allocated according to need, rather than the ability to pay, where the recipients of this type of accommodation pay less than market rent.¹⁸¹ Since the late 1990s, more than one third of Britain's social housing stock has been transferred from the control and management of local authorities to the control of housing associations, with the majority in England.¹⁸² The transfer has been said to have resulted in new ways of working that could be said to be hybrid,

¹⁷⁹ United Nations Convention on the Rights of Persons with Disabilities, GA Res. 61/106 (2007), entered into force 3 May 2008. Article 33 sets out how States parties 'shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation' of the Convention.

¹⁸⁰ *Report of the Special Representative of the Secretary-General on the issues of human rights, transnational corporations and other business enterprises*, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, A/HRC/17/31.

¹⁸¹ Dr Tim Brown, former head of De Montfort University's Centre for Comparative Housing Studies, public lecture, Secular Hall, Leicester, 6 July 2014, <https://youtu.be/LodBzTdq65c> accessed 22 October 2016.

¹⁸² Hal Pawson and David Mullins, *After Council Housing: Britain's New Social Landlords* (Palgrave Macmillan 2010) at 2.

particularly with respect to greater tenant involvement, but also possibly to a more financially dominated housing sector, albeit with the potential that effectively managed resources may have a greater benefit for all parties involved.¹⁸³ ‘The UK government has said that, of the estimated 23.4 million households in England in 2014, 14.3 million or 63% households were owner-occupied, 19% of households lived in private rented accommodation and 17% of households lived in the ‘social rented sector’. Of this 17%, 7% of tenants live in council housing and 10% in what are known as ‘housing associations’ (numbering 1,174) in England, providing in the region of 2.67 million homes.¹⁸⁴ They have been defined as:

[I]ndependent societies, bodies of trustees or companies established for the purpose of providing low-cost social housing for people in housing need on a non-profit-making basis.¹⁸⁵

Some scholars have traced the ‘genealogy’ of the UK’s housing associations back to medieval ‘almshouses’ of the tenth century, founded by charities and offering accommodation to people who were poor, old and dispossessed.¹⁸⁶ Others claim that many of the modern housing associations have their origins in the ‘liberal welfare regime’ of the late nineteenth and twentieth centuries, with Victorian philanthropic housing bodies such as the Peabody and Guinness Trusts.¹⁸⁷ However, it is likely that most modern housing associations are the products of recent history,¹⁸⁸ with the most significant period of transformation happening

¹⁸³ Hal Pawson and David Mullins *After Council Housing: Britain's New Social Landlords* (Palgrave Macmillan 2010) at 321, 322.

¹⁸⁴ Department for Communities and Local Government (2015) English Housing Survey, Headline Report 2014–2015, at 2, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501065/EHS_Headline_report_2014-15.pdf accessed 22 October 2016. The English Housing Survey notes that ‘a significant number of Housing Association tenants wrongly report that they are Local Authority tenants. The most common reason for this is that their home used to be owned by the Local Authority, and although ownership was transferred to a Housing Association, the tenant still reports that their landlord is the Local Authority’, at 50.

¹⁸⁵ Department for Communities and Local Government (2016) Definitions of general housing terms (website), <https://www.gov.uk/guidance/definitions-of-general-housing-terms#housing-associations> accessed 22 October 2016.

¹⁸⁶ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, at 8, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

¹⁸⁷ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, at 8, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

¹⁸⁸ See Peter Malpass, ‘The discontinuous history of housing associations in England’ (2000) 1 *Housing Studies* 195, 210.

since the 1970s, with large-scale transfer of housing stock from local authorities to housing associations.¹⁸⁹

Housing – in the modern welfare state – is both ‘an individual market commodity’ and ‘a public good demanding state involvement’.¹⁹⁰ In descriptions of the housing association as a market commodity, a public good and ‘an agent of cross-pollination’ that mediates between government and local networks,¹⁹¹ it is clear that they perform ‘a complicated balancing act between state, market and society’.¹⁹² David Mullins et al. have identified hybridity in the ways in which finance, governance, products and services are all managed:

Other forms of hybridity that are relevant to understanding change in housing organisations include hybrid financial dependencies (mixing state and market funding), hybrid governance structures (reflecting stakeholder mix or separating charitable and commercial activities) and hybrid products and services (combining housing with social and neighbourhood support services).¹⁹³

David Billis makes the distinction between ‘organic hybrids’, where classical voluntary housing associations move away their original form, and ‘enacted hybrids’, established from the outset as hybrid bodies with mixed ownership, such as in the case of stock transfer housing

¹⁸⁹ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, at 9, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

¹⁹⁰ Anita Blessing, ‘Magical or monstrous? Hybridity in social housing governance’ (2012) 27 *Housing Studies* 189, citing Bo Bengtsson, *Housing – Market Commodity of the Welfare State* (Uppsala University Institute for Housing Research 1995).

¹⁹¹ Anita Blessing, ‘Magical or monstrous? Hybridity in social housing governance’ (2012) 27 *Housing Studies* 189, at 195.

¹⁹² Halima Sacranie, ‘Hybridity enacted in a large English housing association: a tale of strategy, culture and community investment’ (2012) 27 *Housing Studies* 533, 535.

¹⁹³ David Mullins, Darinka Czischke and Gerard van Bortel ‘Exploring the meaning of hybridity and social enterprise in housing organisations’ (2012) 27 *Housing Studies* 405, 407. Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan recognise increasing hybridisation over time within the provision of public housing in the United States of America. See Mai Thi Nguyen, William M Rohe and Spencer Morris Cowan, ‘Entrenched hybridity in public housing agencies in the USA’ (2012) 27 *Housing Studies* 457, 471. They trace the transformation of US housing programmes towards what they define as greater ‘intra-organizational hybridity’ (a body displaying hybrid characteristics within its own organisational structures), ‘inter-organizational hybridity’ (the collaboration of hybrid organisations with roots in different sectors) and ‘programmatic hybridity’ (housing enterprises partnering with other organisations from different sectors to offer additional services to clients, such as rehabilitation, education or healthcare); the ‘hybridization’ of public housing in the United States towards an ‘entrenched hybridity’, at 459.

associations in England which have hybrid forms of governance between tenants, local authority representatives and ‘independents’.¹⁹⁴

Hybridity is also evident in the ways in which English housing associations typically receive public funding in the form of grant aid, with new investment sourced from a combination of government grants, private loans and surplus revenue from rents.¹⁹⁵ In time a practice has come about of ‘treating borrowing by non-profit housing organisations in a different way to state housing’.¹⁹⁶ In this case, having mixed funding systems with capital subsidies being provided by the state and the remainder by private borrowing in a way that is not reckoned against public expenditure puts housing associations in a hybrid place, ‘squarely between the state and the market’.¹⁹⁷

Public or private?

Regardless of their independence, housing associations must register with the Homes and Communities Agency, the UK’s social housing regulator, and comply with its regulatory framework.¹⁹⁸ On the question of whether housing associations are ‘public bodies’, there

¹⁹⁴ Billis defines these more entrenched forms of hybridity as ‘the permanent influence by public and private actors on the governance and operations of an organisation in return for the resources provided by these actors’. See D Billis, *Hybrid Organisations And The Third Sector Challenges For Practice, Theory And Policy* (Palgrave 2010) 59.

¹⁹⁵ Stuart Adam, Daniel Chandler, Andrew Hood and Robert Joyce (2015) ‘Social housing in England: a survey’, Institute for Fiscal Studies, 1, 6, <https://www.ifs.org.uk/uploads/publications/bns/BN178.pdf> accessed 22 October 2016. Although, Nicky Morrison says, in England, an increasing number of housing associations are looking to private rented housing ‘to generate additional cash flows and fill gaps in the housing market’. See Nicky Morrison, ‘Institutional logics and organisational hybridity: English housing associations’ diversification into the private rented sector’ (2016) 31 *Housing Studies* 897.

¹⁹⁶ David Mullins, Darinka Czischke and Gerard van Bortel, ‘Exploring the meaning of hybridity and social enterprise in housing organisations’ (2012) 27 *Housing Studies* 405, 411.

¹⁹⁷ David Mullins, ‘Housing associations’ (2010) 16 *Third Sector Research Centre, Working Paper 1*, at 3, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016. See also David Mullins ‘From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England’ (1997) 12 *Housing Studies* 301,302. Mary Lee Rhodes and Gemma Donnelly-Cox, ‘Hybridity and social entrepreneurship in social housing in Ireland’ (2014) *Voluntas* 1630, 1633, citing C Joldersma and V Winter ‘Strategic management in hybrid organizations’ (2002) *Public Management Review* 83.

¹⁹⁸ The Localism Act 2011 amended parts of the Housing and Regeneration Act 2008 which established and provided for the powers of the social housing regulator. The provisions of the Localism Act that make these changes come into effect on 1 April 2012. Under the Localism Act, responsibility for social housing regulation transferred to the Homes and Communities Agency (HCA) Regulation Committee from 1 April 2012. See Homes and Communities Agency (2012), ‘The regulatory framework for social housing in England from April 2012’, 3, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320616/regfwk-2012.pdf accessed on 22 October 2016.

appears to be no straightforward answer.¹⁹⁹ The Human Rights Act 1998 requires all public authorities and other bodies which execute public functions to treat people in accordance with their rights under the European Convention on Human Rights, unless required to do otherwise by an Act of the Westminster Parliament.²⁰⁰ In the Court of Appeal case *London and Quadrant Trust v Weaver* in 2009, on the question as to whether a housing trust was a ‘public authority’ under the Human Rights Act, Lord Justice Elias said factors which should be taken into account should include ‘the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service’,²⁰¹ and allowed that a housing association was carrying out public functions when operating social housing and was therefore required to take account of the human rights of housing association tenants in doing so.²⁰²

It is important to note, perhaps, the wide variation in size of housing associations, with the largest models controlling over 60,000 homes and the smallest fewer than 250 homes.²⁰³ But it is also worth noting that the rise of larger, ‘stock transfer’ housing associations in the 1990s resulted in what was seen by some as the corresponding rise of a new ‘accountability deficit’, visible in an absence of procedures for tenants to vote on their concerns, for example. ‘More streamlined and professionalized governance structures provided fewer opportunities for local committees or tenant board members’ says David Mullins.²⁰⁴ Mullins says it is important to note the ‘added value’ of the community-based aspects of housing associations and their social, as well as financial, return. Mullins says that English housing associations are ‘torn between market, state and community drivers and must make their own decisions about where they

¹⁹⁹ Housing Rights (2016), ‘High court considers whether housing association is public body’, 27 May 2015, <http://housingrights.org.uk/news/legal/peabody-public-body> accessed on 22 October 2016.

²⁰⁰ Equality and Human Rights Commission (2011) ‘Human rights at home: guidance for social housing providers’, 1, 6, https://www.equalityhumanrights.com/sites/default/files/human_rights_at_home.doc accessed on 22 October 2016.

²⁰¹ *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, at para 35, citing Lord Nicholls in *Aston Cantlow PCC v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, at para 12.

²⁰² *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 WLR 363; [2009] HLR 40, CA.

²⁰³ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, 14, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

²⁰⁴ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, 11, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

stand'.²⁰⁵ It is important for housing associations not to lose sight of their public value role, and not to simply be 'contractors of the State'.

Regulatory capture

Scholars say, unsurprisingly, that the enforcement of regulatory norms is vital to their successful implementation.²⁰⁶ As was seen in Chapter 4, private interest theories may gain prominence under political ideologies which favour deregulation and may result in 'regulatory failure' and 'regulatory capture' whereby officials of regulatory institutions develop such close relationships with those they regulate that they tend to promote the narrow interests of those they regulate rather than the collective good.²⁰⁷ In examining the regulation of housing associations in England, Mullins suggests that the development of the English regulatory regime is shown to have been strongly influenced by the interests of the providers themselves, indicating a degree of such regulatory capture.²⁰⁸ However, Mullins also claims that the Housing Act 1996 signalled a move from regulatory capture, in which the interests of housing associations were reflected in the regulatory framework, to 'regulated competition', in which housing associations are one of a variety of 'delivery agents' for social housing.²⁰⁹

The balance of interests represented in any regulatory regime is always likely to be temporary, as regimes usually reflect the control and influence of the different interest groups involved.²¹⁰ However, regulatory regimes representing not-for-profit organisations are expected to replicate the range of interests involved, such as, in the case of a housing association, the existing

²⁰⁵ David Mullins (2015) 'Why we need hybridity analysis more than ever' (Housing and Communities blog entry, 20 October 2015) <https://housingandcommunities.wordpress.com/2015/10/20/why-we-need-hybridity-analysis-more-than-ever/> accessed 22 October 2016.

²⁰⁶ Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 329.

²⁰⁷ Bronwen Morgan and Karen Yeung *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press 2007) 43. Although it has also been said that regulatory capture is overstated and less common than we think and that there is a tendency of 'saying that any policy we don't like is an example of regulatory capture. If the policy is too stringent we think it's because of pressure from incumbents to keep others out of the industry. If it's too weak it's also because of pressure from the industry'. See Joel Schectman, 'The morning risk report: is "regulatory capture" a myth?' *Wall Street Journal* (New York, 20 March 2015).

²⁰⁸ David Mullins 'From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England' (1997) 12 *Housing Studies* 301.

²⁰⁹ David Mullins, 'Housing associations' (2010) 16 *Third Sector Research Centre, Working Paper 1*, 44, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

²¹⁰ David Mullins 'From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England' (1997) 12 *Housing Studies* 301, 317.

tenants, future tenants and wider community as well as taxpayers, and housing associations have been criticised for underperformance and lack of leadership during the recent housing crisis in Britain:

Housing associations are a bit like Network Rail. They are what Tony Blair christened his ‘Third Way’ between capitalism and socialism, in the hope they would combine the best elements of both. Instead, they combine some of the worst: public sector lethargy and private sector greed.²¹¹

Perhaps this is also a risk that should be taken into account in drawing conclusions about this type of hybridity in the case of a Traveller accommodation model. There may be a risk that the participation of individuals and groups in any hybrid model might result in apathy and diminished activism on their part in holding the state to account.

5.3 Hybridity of civil society’s role in established organisations – the World Bank

The second hybrid model that is of interest is that of civil society’s role in established organisations. Whether marginalised and disadvantaged groups can bring about change within mainstream organisations is a concern of activists and political scientists alike, says Kate Bedford.²¹² Attempts by activist groups to bring about change from within, or the use of ‘integrationist tactics’, can be shown to serve institutional agendas as well as their own.²¹³ Feminists engaging with development organisations have been called ‘femocrats’,²¹⁴ ‘insider advocates’ and ‘feminist policy entrepreneurs’,²¹⁵ terms that suggest their occupation

²¹¹ Ross Clarke, ‘Why housing associations are the true villains of the property crisis’, *The Spectator* (London, 25 July 2015), <http://www.spectator.co.uk/2015/07/housing-associations-have-failed-to-build-houses/> accessed 22 October 2016.

²¹² Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009), at xvi.

²¹³ Naila Kabeer (2000) ‘From feminist insights to an analytical framework: an institutional perspective on gender inequality’ in Naila Kabeer and Ramya Subrahmanian (eds) *Institutions, Relations, and Outcomes: Frameworks and Case Studies for Gender-Aware Planning* (Zed Books 2000) 33.

²¹⁴ Carol Miller and Shahra Razavi (eds) *Missionaries and Mandarins: Feminist Engagement with Development Institutions* (Intermediate Technology Publications 1998) 7.

²¹⁵ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xvii, citing Carol Miller and Shahra Razavi (eds) *Missionaries and Mandarins: Feminist Engagement with Development Institutions* (Intermediate Technology Publications 1998) 2.

demonstrates a hybrid space that links ‘both a government machinery and a social movement’.²¹⁶

The World Bank was established in 1944 at the Bretton Woods Monetary Conference in Bretton Woods, New Hampshire in the United States.²¹⁷ It is primarily an investment bank, but also a co-operative organisation made up of 189 member states which act as its shareholders, overseen by a Board of Governors and Executive Directors. The World Bank’s initial purpose was to help rebuild European countries following their destruction during the Second World War, but by the 1950s and 1960s the Bank began to shift its funding loans towards large-scale infrastructure projects such as dams, electrification and irrigation systems in the Americas, Africa and Asia.²¹⁸ The Bank says that its first interactions with civil society took place in the 1970s, arising from environmental concerns related to Bank-financed projects at this time. During the 1980s and 1990s, the Bank’s focus broadened to include social development, communications and educational projects. In 1981, the first operational policy note on the Bank’s relationship with civil society organisations was approved and, in 1982, the ‘NGO-World Bank Committee’ was established.²¹⁹

The World Bank interacts with civil society in multiple ways, defining civil society or Civil Society Organisations (CSOs) as:

[T]he wide array of non-governmental and not for profit organizations that have a presence in public life, express the interests and values of their members and others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.²²⁰

²¹⁶ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xvii.

²¹⁷ The World Bank is an investment bank, comprising the International Bank for Reconstruction and Development (IBRD), which ‘lends to governments of middle-income and creditworthy low-income countries’ and the International Development Association (IDA), which provides loans and grants ‘to governments of the poorest countries’. See www.worldbank.org/en/about, accessed 30 October 2016. To become a member of the Bank, under the IBRD Articles of Agreement, a country must first join the International Monetary Fund. See <http://www.imf.org/>, accessed 20 November 2016. See World Bank ‘Articles of Agreement’, http://siteresources.worldbank.org/EXTABOUTUS/Resources/IBRDArticlesOfAgreement_links.pdf accessed 20 November 2016.

²¹⁸ See <http://www.worldbank.org/en/about/archives/history>, accessed 20 November 2016.

²¹⁹ See <http://www.worldbank.org/en/about/partners/brief/history>, accessed 20 November 2016.

²²⁰ See <http://www.worldbank.org/en/about/partners/civil-society>, accessed 20 November 2016.

Scholars say that the Bank has been a target for civil society longer than any other institution apart from the United Nations, resulting in a number of policy changes, such as stricter environmental standards, transparent disclosure, debt forgiveness for developing countries and a robust mechanism for consulting with ‘grassroots stakeholders’, to the point that the Bank has been called ‘a trendsetter in civil society engagement’.²²¹ The Bank has a ‘Global Civil Society Team’ located in its External and Corporate Relations Department that coordinates engagement, which includes consultation on policy and strategy matters more generally, as well as specifically by way of operational collaboration on Bank-funded projects.²²² The Bank’s annual ‘Civil Society Program’ includes a CSO Roundtable with Executive Directors, a CSO interactive ‘Townhall’ event and a Civil Society Forum with policy dialogue sessions.²²³ As well as these formal mechanisms, the Bank also employs over 120 experts in its Washington, DC headquarters and in country offices that act as ‘Civil Society Focal Points’ responsible for engagement at this level. In 2013 and 2014, a ‘Strategic Framework for Mainstreaming Citizen Engagement in World Bank Group-Supported Operations’ was launched.²²⁴

As part of an examination of gender and sexuality in the policies of the post-Washington Consensus²²⁵ World Bank, Kate Bedford has considered participatory approaches to social policy decision-making and how they may contribute to good governance.²²⁶ She claims that

²²¹ Christopher Pallas and Anders Uhlin, ‘Civil society influence on international organizations: theorizing the state channel’ (2014) 10 *Journal of Civil Society* 184, 193.

²²² The projected involvement of civil society organisation in World Bank-financed projects has increased from 21 percent in 1990 to 82 percent in Fiscal Year 2012. See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20092185~menuPK:220422~pagePK:220503~piPK:220476~theSitePK:228717,00.html> accessed 20 November 2016.

²²³ See <http://www.worldbank.org/en/about/partners/civil-society#4>, accessed 20 November 2016.

²²⁴ See <https://consultations.worldbank.org/Data/hub/files/consultation-template/engaging-citizens-improved-resultsopenconsultationtemplate/materials/finalstrategicframeworkforce.pdf> accessed 20 November 2016.

²²⁵ ‘Washington Consensus’, Bedford says, is a term coined by economist John Williamson in the 1990s to describe an agenda of free market pursuit among regional and US policymakers. Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xviii.

²²⁶ See, for example, the ‘World Bank Advisory Council on Gender and Development’, which ‘is charged with promoting collaboration on gender and development between members (and others) also when the World Bank isn’t necessarily a primary partner, and to help overall efforts to raise awareness in countries of gender-related issues as well as of the benefits to societies and economies of improving opportunities for women and girls’, www.worldbank.org/en/topic/gender/publication/world-bank-advisory-council-on-gender-and-development accessed 30 October 2016. Bedford’s monograph goes way beyond participatory approaches, exploring the wider difficulties associated with the World Bank’s new post-Washington Consensus development model. Bedford details how, in the mid 1990s, the Bank turned its attention to the impact of economic recession on gender relations and family breakdown and attempted to address the imbalance resulting from the structural adjustment period of the 1980s, which impacted most upon women whose entry into the paid workforce was not accompanied by a recognition of unpaid labour in the home as well as a corresponding impact on male masculinity resulting from a diminishment in their traditional ‘male breadwinner’ roles.

the extent to which more powerful bodies are willing to change and are prepared to accommodate interests other than their own is unclear, given the costs involved and the implications of a shift in the status quo.²²⁷ Bedford points out that feminist experts inside the World Bank, and indeed the local feminist movements that the Bank works with, are often critical of the neoliberal principles of the Bank, and that this new model is still based on the principles of market efficiency rather than a particular commitment to gender equality per se. The impact, especially upon women, of World Bank and International Monetary Fund loans²²⁸ has been said to sidestep democratic practices and add to the feminisation of poverty, leading to an unwillingness on the part of feminist organisations and individuals to engage with organisations they see as exemplifying ideologies and practices to which they are ideologically opposed.²²⁹ They may wish to avoid a form of ‘sleeping with the enemy’, as it were.²³⁰

Another example of significant structural change forced on the World Bank by the influence of civil society organisations is the creation of the World Bank Inspection Panel. This is a non-judicial independent appeals mechanism to which individuals (two or more individuals, groups or organisations) may lodge requests for an inspection if they feel they have been adversely affected or that Bank operational policies and procedures have been violated in a World Bank-funded project such as an infrastructural development project or resettlement as a result of these projects, and that the response of the Bank has been inadequate when this was brought to its attention.²³¹ A successful investigation will result in an action plan to address and remedy the issues raised in the complaint.²³² This mechanism was created in 1993 in response to a lengthy period of advocating for reform throughout the 1980s by large, US-based environmental

²²⁷ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xvii.

²²⁸ I.e. loans – often to developing countries – that may require governments to bring about reforms to economic, financial and trade policies that may have unequal consequences for women. ‘Policy-based loans often help creditors more than women and men in developing countries’ say Suzanna Dennis and Elaine Zuckerman. See Suzanna Dennis and Elaine Zuckerman, ‘Gender guide to World Bank and IMF policy-based lending’ (2006) Gender Action 1, 5, www.genderation.org/images/GA%20Gender%20Guide%20to%20World%20Bank%20and%20IMF%20FINAL.pdf accessed 30 October 2016.

²²⁹ Suzanna Dennis and Elaine Zuckerman, ‘Gender guide to World Bank and IMF policy-based lending’ (2006) Gender Action 1, 5, www.genderation.org/images/GA%20Gender%20Guide%20to%20World%20Bank%20and%20IMF%20FINAL.pdf accessed 30 October 2016.

²³⁰ See Ines Smyth, ‘Napping with the enemy: gender equality work in different organisational settings’ in Ines Smyth and Laura Turquet, ‘Strategies of feminist bureaucrats: perspectives from international NGOs’, IDS Working Paper, 2012, Volume 2012, No 396, 1, 21, www.ids.ac.uk/files/dmfile/Wp396.pdf accessed 30 October 2016.

²³¹ See <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx> accessed 27 November 2016.

²³² The World Bank Inspection Panel (2016) ‘How does the World Bank inspection panel work?’ YouTube video, <https://www.youtube.com/watch?v=UGxu-UtUCEU> accessed 27 November 2016.

organisations such as the National Wildlife Federation and Friends of the Earth, who had concerns about World Bank projects that involved the resettlement of poor or marginalised populations in developing countries.²³³ Christopher Pallas and Anders Uhlin argue that the dominant narrative is one where civil society organisations facilitate direct stakeholder representation in international policy-making but this narrative fails to take account of the fact that a significant ‘state channel’ is still required for civil society to be influential. In the case of the World Bank Inspection Panel, they say, the influence brought to bear on the Bank by the lead environmental players in question was directly influenced by the fact that the organisations had significant contacts in the US Congress due to time spent working in Washington DC.²³⁴

5.4 Existing hybrid human rights mechanisms in international human rights

The third hybrid model that is of interest is seen in international human rights frameworks and two examples are identified here: the domestic monitoring mechanism envisaged by the UN Convention on the Rights of Persons with Disabilities, and the United Nations Guiding Principles on Business and Human Rights or ‘Ruggie Principles’.

CRPD Article 33 monitoring mechanisms

Article 33 of the UN Convention on the Rights of Persons with Disabilities is an important and innovative article which obliges states to create a national mechanism that will coordinate and monitor progress in how the state in question achieves the aims of the Convention. The UN Convention on the Rights of Persons with Disabilities is the first UN human rights treaty to contain a requirement for the establishment of a monitoring mechanism within the text of the treaty itself, rather than by way of an additional Optional Protocol. Gerard Quinn has described Article 33 as a significant innovation that has the potential to transform the ‘majestic generalities’ of the Convention into concrete reform at domestic level.²³⁵

²³³ Christopher Pallas and Anders Uhlin, ‘Civil society influence on international organizations: theorizing the state channel’ (2014) 10 *Journal of Civil Society* 184, 194.

²³⁴ Christopher Pallas and Anders Uhlin, ‘Civil society influence on international organizations: theorizing the state channel’ (2014) 10 *Journal of Civil Society* 184, 194.

²³⁵ Gerard Quinn, ‘Resisting the “temptation of elegance”: can the Convention on the Rights of Persons with Disabilities socialise states to right behaviour?’ in Gerard Quinn and Oddny Mjoll Arnardóttir (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 217.

Article 33 specifies that state mechanisms should display four key elements to ensure compliance with the article: (1) a focal point within government; (2) where necessary, a coordination mechanism, also located within central government; (3) an implementation framework that contains an independent mechanism; and (4) a high level of participation by civil society:

Article 33

National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Of most relevance to potential hybrid mechanisms in the case of Traveller accommodation, the Convention requires that the framework must contain at least one mechanism that is independent of government and that the participation of people with disabilities and organisations representing people with disabilities is key to monitoring the implementation of the Convention. The Committee on the Rights of Persons with Disabilities has particularly highlighted the importance of the characteristics of Disabled Persons Organisations (DPOs)

that participate in the implementation and monitoring of the Convention.²³⁶ For this purpose, a distinction is drawn between ‘civil society’ and the more specific term ‘disabled people’s organisations’ or DPOs. The Committee has stated that, in order to qualify as a DPO, it is necessary for at least half of the membership of any such organisation to be people with disabilities, as opposed to family members or other interested parties, and the organisation in question must be governed, led and directed by persons with disabilities.²³⁷

For example, following ratification of the Convention, the Government of New Zealand established a New Zealand Convention Coalition Monitoring Group. This is described as ‘a governance-level steering group by disabled people’s organisations’ and is tasked with providing the civil society input into the process of monitoring the application of the Convention at domestic level. The Monitoring Group, the New Zealand Human Rights Commission and the Ombudsman together constitute the independent monitoring mechanism²³⁸ in keeping with principles of engagement developed by the New Zealand government.²³⁹ Despite this developed mechanism, in its Concluding Observations the UN Committee on the Rights of Persons with Disabilities recommended that New Zealand improve on its involvement of disabled persons organisations in the development of its second periodic report.²⁴⁰

²³⁶ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Turkmenistan, CRPD/C/TKM/CO/1 (13 May 2015); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the Dominican Republic, CRPD/C/DOM/CO/1 (8 May 2015); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Peru, CRPD/C/PER/CO/1 (16 May 2012); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of China, CRPD/C/CHN/CO/1 (15 October 2012); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Hungary, CRPD/C/HUN/CO/1 (22 October 2012); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Argentina (CRPD/C/ARG/CO/1 (22 October 2012).

²³⁷ Committee on the Rights of Persons with Disabilities, *Guidelines on the Participation of Disabled Persons Organizations (DPOs) and Civil Society Organizations in the work of the Committee*, CRPD/C/11/2 (April 2014) paragraph 3, Annex II in: *Report of the Committee on the Rights of Persons with Disabilities on its eleventh session (31 March–11 April 2014)*, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2F11%2F2&Lang=en accessed 20 April 2016.

²³⁸ Ministry of Social Development of New Zealand, Office for Disability Issues, ‘Framework to promote, protect and monitor implementation’, <http://www.odi.govt.nz/what-we-do/un-convention/framework/index.html> accessed 15 March 2016.

²³⁹ Ministry of Social Development of New Zealand, Office for Disability Issues, ‘Disability Action Plan 2014–2018, We worked with DPOs to develop the new plan’, <http://www.odi.govt.nz/what-we-do/ministerial-committee-on-disability-issues/disability-action-plan/2014-2018/we-worked-with-dpos-to-develop-the-new-plan.html>, accessed 15 March 2016.

²⁴⁰ Committee on the Rights of Persons with Disabilities, Concluding observations on the Rights of Persons with Disabilities – New Zealand, 31 October 2015, CRPD/C/NZL/CO/1, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FNZL%2FCO%2F1&Lang=en accessed 15 March 2016.

Article 33 of the Convention calls for ‘participation’ rather than ‘consultation’. It also requires that people with disabilities be facilitated to participate in the monitoring of the Convention at domestic level in a manner that is separate from the participation of Disabled Persons Organisations, if they choose.²⁴¹

The existence of such a hybrid mechanism – the Convention’s Article 33 framework – formalises the mechanism at state level, in a way that the state must adhere to (if it has ratified the Convention), yet still allows some flexibility in how the state puts the mechanism in place, in accordance with domestic context. The creation of a domestic body with a rights mandate is evidence of the state’s translation of the Convention and implementation. Such frameworks are also evidence of the state’s engagement with ongoing monitoring and measuring of the implementation of the Convention.

Business and human rights implementation models

The current human rights framework is said to be limited in the degree to which it addresses and engages with non-state actors in relation to business.²⁴² To this end, the United Nations Guiding Principles on Business and Human Rights (the ‘Ruggie Principles’)²⁴³ were endorsed by the UN Human Rights Council in July 2011.²⁴⁴ The Principles centre around three main pillars: (1) the state’s duty to protect against violations of human rights by third parties, achieved through appropriate policies and regulation, (2) corporate responsibility to respect human rights, and (3) access to effective remedies by victims.

The Guiding Principles clarify the core requirement of the state’s duty to protect under Pillar 1:

²⁴¹ Mental Disability Advocacy Centre (2011) *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities*, 15, http://mdac.info/sites/mdac.info/files/Article_33_EN.pdf accessed 5 November 2016.

²⁴² See Aoife Nolan, ‘Not fit for purpose? Human rights in times of financial and economic crisis’ (2015) 4 *European Human Rights Law Review* 358.

²⁴³ *Report of the Special Representative of the Secretary-General on the issues of human rights, transnational corporations and other business enterprises*, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011, A/HRC/17/31.

²⁴⁴ Human Rights Council, ‘Human rights and transnational corporations and other business enterprises’, Resolution A/HRC/RES/17/4, 6 July 2011.

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.²⁴⁵

Until the 1990s, reference to human rights in the world of business rested in the fairly niche area of Corporate Social Responsibility (CSR), the concept that businesses and corporations should be socially responsible to the local community with which they interact.²⁴⁶ This changed quite significantly in the 2000s, when UN Special Representative on Business and Human Rights John Ruggie presented a conceptual and policy framework for business and human rights to the Human Rights Council in 2008, in the form of the United Nations Guiding Principles on Business and Human Rights.²⁴⁷ Although the Guiding Principles state that nothing they contain ‘should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights’,²⁴⁸ it has been stated that a National Action Plan ‘needs to be more than just a round-up of CSR initiatives’.²⁴⁹ The Guiding Principles state:

The framework comprises three core principles: the State's duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.

²⁴⁵ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1–46, at 6, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁴⁶ Saumitra Bhaduri, ‘Corporate social responsibility around the world—an overview of theoretical framework’ in SN Bhaduri and E Selarka, *Corporate Governance and Corporate Social Responsibility of Indian Companies and Evolution* (Springer 2016) 11.

²⁴⁷ See UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, 7 April 2008, A/HRC/8/5.

²⁴⁸ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 6, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁴⁹ Christian Aid Ireland, *Submission to Government of Ireland consultation on a National Action Plan for Business and Human Rights* (Christian Aid Ireland 2015) 1, 2, http://www.christianaid.ie/Images/1%20March%202013%20Christian%20Aid%20Ireland%20submission%20%20FINAL_tcm19-82506.pdf accessed 5 November 2016.

It is now recognised that ‘the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State’.²⁵⁰ The United Nations Working Group on Business and Human Rights has set out clear steps to be taken by states in the preparation of a National Action Plan on Business and Human Rights,²⁵¹ seeing state-based legal frameworks and other mechanisms as forming ‘the foundation of a wider system of remedy’,²⁵² along with the operation of judicial and non-judicial mechanisms within the state to ensure that individuals have access to effective remedies if they become victims of business-related human rights abuses.

In addition, and of significance to hybrid domestic models of operationalisation, the Guiding Principles envisage the establishment at domestic level of a National Committee on Business and Human Rights, comprising representatives from across relevant government departments, statutory bodies, civil society, business and relevant experts. This Committee should be responsible for overseeing the implementation of the National Action Plan on Business and Human Rights, and for monitoring and evaluating progress.²⁵³

For the purpose of guidance on implementation and monitoring, the Guiding Principles set out 31 detailed steps for all States and ‘all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure’ to take, so that they may ‘achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization’.²⁵⁴ Even though they contain some

²⁵⁰ United Nations Human Rights Council, ‘Human rights and transnational corporations and other business enterprises’, Resolution A/HRC/RES/26/22, 15 July 2014.

²⁵¹ United Nations Working Group on business and human rights, Guidance on National Action Plans on business and human rights, December 2014.

²⁵² Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights, (2011), UN Doc HR/PUB/11/04, 1–46, at 22, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁵³ Danish Institute for Human Rights, *National Action Plans on Business And Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (Danish Institute for Human Rights 2014) 58.

²⁵⁴ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 6, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

relatively vague language such as ‘tak[e] appropriate steps’,²⁵⁵ ‘provide effective guidance’,²⁵⁶ and ‘exercise adequate oversight’,²⁵⁷ the Principles also go into a level of detail not usually seen in international instruments, which could be said to be more helpful to states than the guidance contained in the core human rights treaties of the United Nations and Council of Europe.

In 2011, Ireland signed up to the framework. The Human Rights Council has called on states to adopt National Action Plans on Business and Human Rights in order to ensure the ‘effective implementation’ of the Guiding Principles.²⁵⁸ At the time of writing, preparations for a National Action Plan on Business and Human Rights in Ireland are ongoing.²⁵⁹ In Ireland, it has been argued, state obligations to protect rights by way of effective policies, legislation and regulation of this kind require ‘a re-imagining of the current Irish regulatory framework for addressing the responsibilities of business’.²⁶⁰

In Chapter 4 it was argued that, in the context of historically discriminated-against minorities, hybrid approaches might act as a way of rebalancing power dynamics. Something analogous arises in the context of business and human rights, where ‘those furthest away from the centres of power and decision-making are those most likely to experience violations and those least

²⁵⁵ At Step 1, Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 3, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁵⁶ At Step 3(c), Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 4, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁵⁷ At Step 5, Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 8, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁵⁸ Human Rights Council, ‘Human rights and transnational corporations and other business enterprises’, Resolution A/HRC/RES/26/22, 15 July 2014, paragraph 2; European Commission, ‘A renewed EU strategy 2011–14 for Corporate Social Responsibility’, Brussels, 25 November 2011, at 14, http://ec.europa.eu/enterprise/policies/sustainablebusiness/files/csr/new-csr/act_en.pdf accessed 5 November 2016.

²⁵⁹ See Department of Foreign Affairs and Trade, ‘Business and human rights – DFAT call for input’ Press release 13 January 2015, <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2015/january/business-and-human-rights/> accessed 30 October 2016.

²⁶⁰ Ciara Hackett, ‘Ruggie, Rights and Regulation: Ireland and UN Framework on Business and Human Rights’ (Human Rights in Ireland blog 2012) <http://humanrights.ie/announcements/ruggie-rights-and-regulation-ireland-and-un-framework-on-business-and-human-rights/> accessed 3 August 2015.

able to inform the business and human rights agenda as it develops'.²⁶¹ The need to ensure adequate remedies for victims is a central quality of the Guiding Principles and a key component of a state's human rights obligations.²⁶²

The Guiding Principles view state-based judicial and other mechanisms as forming 'the foundation of a wider system of remedy'²⁶³ for business-related human rights abuses, and it is debatable if the Irish state's existing judicial and non-judicial mechanisms currently ensure access to an effective remedy in this regard. According to one senior counsel, '[t]here is little doubt that much of what caused and exacerbated the financial crisis in this country can fairly be attributed to criminal conduct', yet difficulties in holding those responsible to account are particularly acute within a criminal justice system where the laws of evidence are 'eye-wateringly complex and in large part irrational'.²⁶⁴ This model therefore offers a wider range of remedies, in the form of 'administrative, legislative or other appropriate means'²⁶⁵ and 'non-judicial grievance mechanisms'.²⁶⁶ The Guiding Principles then go on to set out in detail 'effectiveness criteria' for such non-judicial mechanisms, including characteristics such as being accessible, trustworthy, transparent and predictable in terms of timeframes for processes and outcomes, and ensuring that 'outcomes and remedies accord with internationally recognized human rights'.²⁶⁷ The establishment of any such non-judicial mechanisms should,

²⁶¹ Christian Aid Ireland, *Submission to Government of Ireland consultation on a National Action Plan for Business and Human Rights* (Christian Aid Ireland 2015) 1, 2, http://www.christianaid.ie/Images/1%20March%20202013%20Christian%20Aid%20Ireland%20submission%20%20FINAL_tcm19-82506.pdf accessed 5 November 2016. See also Shane Darcy, 'Dealings by Irish companies in repressive countries raise concerns about business and human rights' (Human Rights in Ireland blog, 13 March 2012) <http://humanrights.ie/tag/national-human-rights-institutions/> accessed 5 November 2016.

²⁶² Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 27, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁶³ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights, (2011), UN Doc HR/PUB/11/04, 1, 22, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁶⁴ Remy Farrell, 'The criminal justice system has failed us', *Irish Independent* (Dublin, 26 June 2013), <http://www.independent.ie/business/irish/anglo/remy-farrell-the-criminal-justice-system-has-failed-us-29372434.html> accessed 5 November 2016.

²⁶⁵ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 27, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁶⁶ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 30, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁶⁷ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 33,

the Guiding Principles say, be on the basis of engagement with ‘affected stakeholder groups’ in how they are designed.²⁶⁸

5.5 Lessons of formalised hybridity

This section examines the transferability of the three exemplars above and analyses some of the strengths and weaknesses of each model, in order to consider what might be beneficial in the case of the operationalisation of the right to culturally appropriate Traveller accommodation.

Transferability of the hybrid housing association model

As was seen in section 5.2 of this chapter, housing associations have a history that can be traced back to serving the housing needs of the poor and vulnerable in society.²⁶⁹ Housing associations must generate revenue, mostly through the collection of rent, that will cover the cost of the management of the association itself as well the maintenance of properties.²⁷⁰ Because they are non-profit organisations, any revenues over and above their costs will be reinvested back into the housing stock. Historically, housing associations were known as ‘the voluntary housing movement’, mostly to set them apart from council social housing, but also due to their characterisation as bodies which were run with input from volunteers, whether in person or

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁶⁸ Office of the High Commissioner for Human Rights (2011) United Nations Guiding Principles on Business and Human Rights (2011), UN Doc HR/PUB/11/04, 1, 35,

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf accessed 5 November 2016.

²⁶⁹ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, 8, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

²⁷⁰ Stuart Adam, Daniel Chandler, Andrew Hood and Robert Joyce (2015), ‘Social housing in England: a Survey’, Institute for Fiscal Studies, 1, 6, <https://www.ifs.org.uk/uploads/publications/bns/BN178.pdf> accessed 19 November 2016.

philanthropically.²⁷¹ This has changed over time to the point where the voluntary nature of housing associations has diminished.²⁷²

Housing associations have recently struggled with balancing the demands of the state, the market and the community, resulting in a ‘push for greater value for money alongside welfare reform creating new tensions between commercialism and social purpose’.²⁷³ The ‘right to buy’ has enabled many people to own their homes but has also depleted available social housing stock, which has not been replaced.²⁷⁴ Approximately two million social housing dwellings were sold off in the UK between 1980 and 2013.²⁷⁵ As we have seen, housing associations are now the predominant provider of social housing in England. Since the 1970s, however, government spending on housing has shifted away from capital funding towards the provision of housing benefit to individuals.²⁷⁶ Decisions around who receives housing benefit are made as part of wider sectoral plans on welfare policy and do not necessarily take the housing market into account, creating uncertainty for housing associations.²⁷⁷ If housing associations are therefore reliant for their funding on benefit payments, they suffer the knock-on effects of welfare policy reform decisions such as the capping of total household benefits and of the ‘bedroom tax’.²⁷⁸ This challenge can manifest itself in a change in direction of strategies and

²⁷¹ David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, 26, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

²⁷² David Mullins, ‘Housing associations’ (2010) 16 Third Sector Research Centre, Working Paper 1, 7, <http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-16.pdf> accessed 22 October 2016.

²⁷³ John Morris, ‘What are housing associations becoming?’ *Guardian* (London, 14 March 2013), <https://www.theguardian.com/housing-network/2013/mar/14/housing-associations-state-market-community> accessed 22 October 2016.

²⁷⁴ A shift towards the role of the market over the state took place following the election of Margaret Thatcher as UK Prime Minister in 1979. The 1980 Housing Act created a ‘right to buy’ policy that enabled social housing tenants to purchase their homes at a large discount to market value. See generally, Colin Jones and Alan Murie *The Right to Buy: Analysis and Evaluation of a Housing Policy* (Wiley 2006).

²⁷⁵ UNHCR, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right of non-discrimination in this context, Raquel Rolnik: Mission to the United Kingdom of Great Britain and Northern Ireland* (hereafter *Report of the Special Rapporteur*) (30 December 2013) UN Doc. A/HRC/25/54/Add 2, 17.

²⁷⁶ Nigel Keohane and Nida Broughton (2013) ‘The politics of housing’, Social Market Foundation for National Housing Federation, 56, <http://www.smf.co.uk/wp-content/uploads/2013/11/Publication-The-Politics-of-Housing.pdf> accessed 20 November 2016.

²⁷⁷ Nigel Keohane and Nida Broughton (2013) ‘The politics of housing’, Social Market Foundation for National Housing Federation, 56, <http://www.smf.co.uk/wp-content/uploads/2013/11/Publication-The-Politics-of-Housing.pdf> accessed 20 November 2016.

²⁷⁸ The Social Sector Size Criteria or ‘Bedroom Tax’ is a reduction in state benefits introduced in the UK in April 2013, where working-age social housing tenants who are deemed to have bedrooms surplus to their needs have had housing benefit reduced by up to 25%. See <https://www.citizensadvice.org.uk/benefits/housing-benefit-restrictions-for-social-housing-tenants/housing-benefit-size-restrictions-in-social-housing/> accessed 20 November 2016. In November 2016, the UK Supreme Court in *R v Secretary of State for Work and Pensions*

business plans of housing associations who find themselves striving to find a balance between social and commercial aspirations:

For some associations, the growing emphasis on the commercial aspects of the business is moving the sector away from its social roots. For others it is liberating, allowing greater autonomy and more opportunity to cross-subsidise submarket rented housing.²⁷⁹

For the purposes of making a comparative analysis with a proposed more formal hybrid model of human rights operationalisation of the right to culturally appropriate accommodation for Travellers in Ireland, there are some aspects of English housing association hybridity that have applicability in the Irish context. The ‘Voluntary and Co-operative housing sector’ has become a ‘significant provider’ of social housing in Ireland today to vulnerable groups of people with a housing particular need.²⁸⁰ Voluntary housing provision in Ireland dates back to the late eighteenth century with ‘almshouses’ or ‘poorhouses’ connected in some way with religious organisations or with the Crown, tending to be voluntarily managed and funded by voluntary contributions.²⁸¹ The nineteenth century saw a more significant development of ‘endowed trust and limited profit companies’ largely independent of the state,²⁸² and innovations such as the Dublin Artisan Dwelling Co. Ltd and other housing associations that sought to provide more affordable housing in Ireland. The Guinness Trust, established by the Earl of Iveagh in 1890, for the purpose of housing homeless urban workers, was a hybrid public–private arrangement seen as a leading example of a ‘voluntary’ act of charity and social service provision. The Trust was given separate legal status in Ireland under the Iveagh Trust Act of 1899, which combined a local authority improvement scheme with powers invested in the trustees to carry out the aims of the original scheme.²⁸³ As of October 2016, over 500 bodies appear on the Register of

[2016] UKSC 58 found that some aspects of the scheme breach human rights laws because it discriminates against those with a medical need for an extra room.

²⁷⁹ Denise Chevin (2013) ‘Social hearted, commercially minded: a report on tomorrow’s housing associations’, The Smith Institute, 4, 6, <http://www.d4multimedia.com/genesis/Social-hearted.pdf> accessed 19 November 2016.

²⁸⁰ Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 953.

²⁸¹ Mary Lee Rhodes and Gemma Donnelly-Cox, ‘Hybridity and social entrepreneurship in social housing in Ireland’ (2014) *Voluntas* 1630, 1638.

²⁸² David Mullins, Mary Lee Rhodes and Arthur Williamson (2003) ‘Non-profit housing organisations in Ireland, North and South: Changing forms and challenging futures’, Northern Ireland Housing Executive, 34.

²⁸³ Mary Lee Rhodes and Gemma Donnelly-Cox, ‘Hybridity and social entrepreneurship in social housing in Ireland’ (2014) *Voluntas* 1630, 1639.

Housing Bodies with Approved Status Under Section 6 of the Housing Act 1992 in Ireland,²⁸⁴ and over 270 housing associations across Ireland are represented by the Irish Council for Social Housing (ICSH), the national social housing federation.²⁸⁵

In 2008, the then Centre for Housing Research (which merged into the Housing Agency in 2010) called for the voluntary housing sector to ‘be encouraged to further develop and facilitate programmes for the delivery of Traveller accommodation, including Traveller-specific accommodation.’ suggesting that a Traveller Voluntary Housing Association should be established, with the support of Traveller representative groups.²⁸⁶ A number of Traveller families have been accommodated by the voluntary housing sector in Ireland, however primarily in mainstream housing provision.²⁸⁷ Respond! Housing Association proposed a Traveller Accommodation and Support Policy in 2006 which emphasised ‘the importance of the recognition of Traveller culture, a holistic and multi-disciplinary approach, political buy-in, good design, and meaningful consultation’.²⁸⁸ In 2007, Clúid Housing Association developed a group housing scheme with ten Traveller families in south Dublin and in 2008, Respond! completed a group housing scheme with six families in Kildare.²⁸⁹

As set out in Chapter 3, in 2010, the Department of Environment, Community and Local Government funded the Irish Traveller Movement to conduct a feasibility study into the establishment of a Traveller-led accommodation organisation.²⁹⁰ ‘Cena – Culturally

²⁸⁴ Section 6 of the Housing (Miscellaneous Provisions) Act 1992 enables housing authorities, among other things, to provide assistance to Approved Housing Bodies (also called housing associations or voluntary housing associations) for the provision of housing. See Department of Housing Planning, Community and Local Government, <http://www.housing.gov.ie/housing/social-housing/voluntary-and-cooperative-housing/approved-housing-bodies-abhs>, accessed 20 November 2016. Padraic Kenna says that approved bodies in Ireland are usually constituted as companies limited by guarantee of their members and not having a shareholding. However, some bodies may be subsidiaries or agents of state bodies, such as the Health Services Executive and that ‘the criteria and procedure for the approval of these bodies by the Minister is not readily available, and is not subject to any independent regulatory framework’. See Padraic Kenna, *Housing Law, Rights and Policy* (Clarus Press 2011) 957.

²⁸⁵ See <http://www.icsh.ie>, accessed 20 November 2016.

²⁸⁶ See Dermot Coates, Fiona Kane and Kasey Treadwell Shine, *Traveller Accommodation in Ireland: Review of Policy and Practice* (Centre for Housing Research 2008) 21.

²⁸⁷ Gráinne O’Toole, *Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building a better future for Traveller Accommodation* (Irish Traveller Movement 2009) 21.

²⁸⁸ Dermot Coates, Fiona Kane and Kasey Treadwell Shine, *Traveller Accommodation in Ireland: Review of Policy and Practice* (Centre for Housing Research 2008) 51.

²⁸⁹ Gráinne O’Toole, *Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building a better future for Traveller Accommodation* (Irish Traveller Movement 2009) 21.

²⁹⁰ Gráinne O’Toole, *Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building a better future for Traveller Accommodation* (Irish Traveller Movement 2009).

Appropriate Homes Ltd',²⁹¹ a Traveller-led voluntary housing body was established in 2011 and granted Approved Housing Body status in October 2013.²⁹² Cena lists its aims as:

- To develop a Traveller-led model for the delivery and management of Traveller Accommodation that will support Travellers to take a lead and participate in all levels of Cena including creating opportunities for the employment of Travellers.
- To design and deliver with Travellers a range of culturally appropriate accommodation (standard housing, group housing, halting sites, provision for Nomadism) that meets their needs and is innovative, child centred energy efficient and sustainable.
- To develop management systems, including self-management, for Traveller accommodation that has the flexibility and capacity to meet the needs of Travellers and ensure sustainability of Traveller accommodation.
- To develop a range of key relationships with social housing providers, Traveller organizations and other relevant stakeholders to support the implementation of Traveller accommodation across a range of options.²⁹³

Two pilot schemes are currently in planning, in partnership with local authorities: a four-bay halting site in Galway city and a group housing scheme of four units in County Offaly, both due to be completed in 2017.²⁹⁴ The hybrid governance of English housing associations featuring tenants/local authority representatives/independents certainly has resonance with a Traveller accommodation hybrid model of state and civil society working together in a Traveller-led housing association. In the feasibility study conducted prior to the establishment of Cena, the central involvement of Travellers in the development of their own accommodation was a key recommendation.²⁹⁵ One of the shortcomings of the English housing association model in this context is, as is shown above, the increasing challenge of balancing market-led

²⁹¹ 'Cena' translates as 'house' in Traveller language Cant. See www.cena.ie.

²⁹² Under s 6 of the Housing (Miscellaneous Provisions) Act 1992.

²⁹³ Cena (2013) *Submission on behalf of Cena-Culturally Appropriate Homes Ltd to the Traveller Accommodation Programme 2014–2018*, http://itmtrav.ie/uploads/publication/Cenas_Submission.pdf accessed 20 November 2016.

²⁹⁴ Kitty Holland, 'Housing association led by Travellers targets new homes' *Irish Times* (Dublin, 23 September 2015).

²⁹⁵ Gráinne O'Toole, *Feasibility Study for the Establishment of a Traveller led Voluntary Accommodation Association: Building a better future for Traveller Accommodation* (Irish Traveller Movement 2009) 8.

demands for profitability and value for money with the original social purpose of meeting the housing needs of marginalised groups. Profitability requirements placed upon Traveller-led accommodation schemes would be likely to be problematic.

Transferability of the World Bank model

Traditional ‘state-centric assumptions’ of international human rights law continue to define the margins of its framework, but no longer fully reflect the extent of civil society involvement.²⁹⁶ Increasingly, global civil society communities are being seen as ‘dynamic groups that interact with increasing frequency and intensity in ways that cross traditional state boundaries’²⁹⁷ and are demanding and gaining access to structures and processes that contribute to the development of international human rights norms and to ‘evolving concepts of governance’.²⁹⁸

We have seen in Chapter 4 the potential advantages of ‘sector-bending’ hybrid activities that are blurring the distinctions between non-profit and for-profit organisations,²⁹⁹ and that can result in increased accountability, greater financial strength and financial capacity, and more sustainable solutions.³⁰⁰ Critiques of ‘the development enterprise’³⁰¹ have drawn attention to its inherent imbalance in power relations, however, which assumes that certain populations are less developed (usually those in the Global South) and are worthy of the expert advice and knowledge of those who are more developed (usually those in the Global North), who will lead their lesser-developed counterparts towards modernity.³⁰²

Chapter 3 of this thesis examined the emergence of informal, hybrid structures in Ireland that exist between civil society and the state. Irish scholars have been critical of inconsistency and

²⁹⁶ Zoe Pearson, ‘Non-governmental organisations and international law: mapping new mechanisms for governance’ (2004) 23 *Australian Yearbook of International Law* 73.

²⁹⁷ Zoe Pearson, ‘Non-governmental organisations and international law: mapping new mechanisms for governance’ (2004) 23 *Australian Yearbook of International Law* 73, 83.

²⁹⁸ Zoe Pearson, ‘Non-governmental organisations and international law: mapping new mechanisms for governance’ (2004) 23 *Australian Yearbook of International Law* 73, 83.

²⁹⁹ J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16.

³⁰⁰ J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 *Society* 16.

³⁰¹ Jane Parpart, ‘Deconstructing the development “expert”: gender, development and “vulnerable” groups’ in Marianne Marchand and Jane Parpart (eds) (1995) *Feminism/ Postmodernism/ Development* (Routledge International Studies of Women and Place 1995) 221.

³⁰² Jane Parpart, ‘Deconstructing the development “expert”: gender, development and “vulnerable” groups’ in Marianne Marchand and Jane Parpart (eds) (1995) *Feminism/ Postmodernism/ Development* (Routledge International Studies of Women and Place 1995) 221.

lack of clarity in the evolution of relationships between the state and civil society and, increasingly, a tendency for power relations to be defined around service provision on the part of civil society.³⁰³ Travellers speaking out for themselves, both individually and through the collective voice and campaigns of civil society and community development organisations, was cited as an important facilitating factor to the effective realisation of Traveller accommodation rights.³⁰⁴ This took the form of ‘grass roots advocacy work’ and legal interventions in the past by the Irish Traveller Movement Law Centre.³⁰⁵

One of the facilitators, I think, of beginning to move things, has been from 1985 onwards, has been the way in which Travellers themselves have developed the analysis and understanding to articulate themselves the issues and the rights associated with them.³⁰⁶

Interview participants cited hybrid domestic Traveller Committees in Ireland (such as the NTMAC and NTACC) as both potential and actual ways of measuring compliance with international mechanisms,³⁰⁷ but sadly such committees have also been said to have become ‘battlegrounds for fighting about other Traveller issues’.³⁰⁸ In examining – through a gender and sexuality lens – partnerships developed by the World Bank, Kate Bedford has concluded that there may be ‘radical potential’ in alliances built through gender-sharing models,³⁰⁹ but they may also pose serious problems,³¹⁰ creating

³⁰³ Brian Harvey, ‘Ireland and civil society: reaching the limits of dissent’ in Deiric Ó Broin and Peadar Kirby (eds) *Power, Dissent and Democracy* (A & A Farmar 2009) 25; Mary Murphy and Peadar Kirby (2009) ‘State and civil society in Ireland: conclusions and prospects’ in Deiric Ó Broin and Peadar Kirby (eds) *Power, Dissent and Democracy* 43; Rory Hearne, ‘No revolution please, we’re Irish’ (2013) *Village Magazine*, 3 October 2014, <http://villagemagazine.ie/index.php/2014/10/the-failure-of-irish-social-partnership-and-soft-ngo-advocacy/> accessed 30 October 2016; Mary Murphy ‘Irish civil society: rearranging the deckchairs on the Titanic? A case study of fighting Irish social security retrenchment’ (2016) 12(1) *Journal of Civil Society* 17.

³⁰⁴ Interviews with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’; Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as ‘Participant No. 11’ or ‘P11’.

³⁰⁵ Interview with Aoife Nolan, Nottingham University (Skype, 18 August 2014), referred to as ‘Participant No. 11’ or ‘P11’.

³⁰⁶ Interview with Anastasia Crickley, Chairperson UN Committee on the Elimination of Racial Discrimination (Dublin, 16 April 2014), referred to as ‘Participant No. 6’ or ‘P6’.

³⁰⁷ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’; Anastasia Crickley, Participant No. 6, at 12.

³⁰⁸ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

³⁰⁹ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) at 209.

³¹⁰ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) at 209. Bedford examines two post-Washington Consensus World Bank initiatives that

. . . the need to walk the line, somehow, between the new development regime and naive celebrations of projects and policies that render us clearly complicit in oppressive social relations.³¹¹

In addition, the hybrid models that were once thought to be alternative approaches to development, ‘are increasingly being funded by the very megaliths we mocked’, says Bedford.³¹² We have seen this potential conflict replicated in Ireland when voluntary bodies or non-governmental organisations are largely funded by the state in support of their operations, with the possible consequence of being unable to be critical of government in their lobbying and campaigning work for fear of funding cuts.

Transferability of the CRPD and business and human rights models

While there is, in theory, no barrier to the application of either the CRPD Article 33 framework or the Business and Human Rights framework in the case of the operationalisation of the right to culturally appropriate Traveller accommodation, ideally both mechanisms must be considered in light of the justiciability of international human rights law more generally and, in the case of Traveller accommodation, socio-economic rights more specifically. Debating justiciability versus non-justiciability may be a distraction from the undertaking of rights operationalisation and, as a debate, it has been described as ‘generating more heat than light’, guaranteed ‘to maximise disagreement and minimise consensus.’³¹³ However, in terms of the

display hybrid characteristics, PROFAM and PRODEPINE. PRODEPINE is the Development Project for Indigenous and Afro-Ecuadorian Peoples, aiming to ‘strengthen the technical, administrative, and managerial capacity of indigenous and Afro-Ecuadorian communities at the local, regional, and national levels in order to promote more effective participation in official policy-setting and improve the provision of economic services to those communities’. See <https://www.ifad.org/evaluation/reports/ppa/tags/ecuador/1043/1867035>, accessed 5 November 2016. PROFAM, operational between 2001 and 2006, was a development objective of the Argentina Family Strengthening and Social Capital Promotion Project, which aimed ‘to test and monitor a social capital approach to address the vulnerability of the poor by targeting families as comprehensive units and promoting gender equality’, see <http://www.projects.worldbank.org/P070374/profam-family-strengthening-social-capital-promotion?lang=en>, accessed 5 November 2016.

³¹¹ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xxxiii.

³¹² Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) 211.

³¹³ Rory O’Donnell, ‘Beyond justiciable rights—standards and quality’, Paper presented at conference ‘Global trends in disability law—the context for Irish law reform’, Irish Human Rights Commission, Law Society of Ireland and the National Disability Authority, 13 September 2003, 35.

enforceability of international human rights standards in the domestic context, there is always a risk that states will dismiss such standards as ‘non-binding’.³¹⁴

As was seen in Chapter 1, Ireland’s legal system is dualist, which means that domestic law does not automatically incorporate international law, demonstrated in *Re Ó Laighléis*,³¹⁵ when the Supreme Court refused to give effect to the European Convention on Human Rights because the Oireachtas had not at that time ‘determined that the [Convention] is to be part of the domestic law of the State’.³¹⁶ However, Hogan and Whyte argue that international treaties may be indirectly given effect to by way of the actions of the executive, or due to a presumption of compatibility of the domestic legal framework with international obligations.³¹⁷

The UN Committee on Economic, Social and Cultural Rights, in its General Comment No. 9, states:

[W]hile the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts.³¹⁸

In capturing arguments for and against justiciability of the Guiding Principles on Business and Human Rights, Shane Darcy states that those in favour of a binding instrument would argue that the Principles, as they stand, are ‘merely guidance’ and have not provided accountability for corporate harms nor ensured a right to a remedy, whereas a binding instrument would

³¹⁴ See, for example, Pat Leahy, ‘UN abortion ruling is “not binding”, Enda Kenny says’, *Irish Times* (Dublin, 15 June 2016). For a counter-argument to Enda Kenny’s position, see also Siobhán Mullally, ‘Mellet v Ireland: legal status of the UN Human Rights Committee’s “views”’ (Centre for Criminal Justice and Human Rights, UCC Faculty of Law blog, 16 June 2016,

<http://blogs.ucc.ie/wordpress/ccjhr/2016/06/16/mellet-v-ireland-legal-status-un-human-rights-committees-views-2/> accessed 5 November 2016.

³¹⁵ *Re O’Laighléis* [1960] IR 93. In this case, the Irish Supreme Court held that it could not give effect to the European Convention on Human Rights because it was not part of domestic law.

³¹⁶ This interpretation of the Convention continued until the enactment of the European Convention on Human Rights Act of 2003.

³¹⁷ GW Hogan and GF Whyte, *J M Kelly: The Irish Constitution* (Tottel Publishing 2004) para 5.3.125, citing *Fakih v Minister for Justice* [1993] 2 IR 427. The Law Reform Commission in Ireland is undertaking an examination of the application of international obligations in domestic law in light of Ireland’s dualist system.

³¹⁸ Committee of Economic, Social and Cultural Rights General Comment No. 9, ‘The domestic application of the Covenant’, E/C.12/1998/24, 3 December 1998, at 8.

provide better measures for implementation. On the other side, Darcy says, those against a binding instrument argue that pursuing a formal treaty might detract from existing work around the guidance of the Principles as they stand, undermining implementation programmes and processes already in train. A treaty on business and human rights could be ‘so abstract as to be meaningless’ and might run the risk of having a low uptake with minimal ratification.³¹⁹ In addition, says Rory O’Donnell of the National Economic and Social Council (NESCC), a danger exists that any compromise on justiciability ‘could put us in the worst of all worlds’ and result not alone in lack of the symbolic benefits of rights that are defined in law, but also ‘many of the pathologies of a juridified system’.³²⁰

However, in terms of operationalisation, it is perhaps better to consider ‘voluntary’ guidelines such as business and human rights principles as a context that is non-paradigmatic in terms of international human rights law. Thus even though access to the paradigmatic methods of remedy, such as courts and tribunals, may be desirable, and the UN Special Rapporteur on Housing has said that a courts-based complaints mechanism for housing rights should be as normal as a courts-based criminal justice system,³²¹ these sorts of remedies can pose challenges. The courts system can be inaccessible and daunting. Interviews conducted for this thesis showed that traditional judicial approaches to remedy are not always effective either because the rights are non-judiciable or because the remedy is weak. Alternatively, a case may be settled prior to a Supreme Court hearing, as happened in the case of *Doherty and Others v South Dublin County Council and Others*,³²² which ultimately resulted in the Dohertys receiving the kind of accommodation they had fought for, but did not result in any longer-term gain.³²³

³¹⁹ Shane Darcy, ‘Key issues in the debate on a binding business and human rights instrument’ (Business and Human Rights in Ireland Blog, 12 April 2015), <https://businesshumanrightsireland.wordpress.com/2015/04/13/key-issues-in-the-debate-on-a-binding-business-and-human-rights-instrument/> accessed 5 November 2016.

³²⁰ Rory O’Donnell, ‘Beyond justiciable rights—standards and quality’, Paper presented at conference ‘Global trends in disability law—the context for Irish law reform’, Irish Human Rights Commission, Law Society of Ireland and the National Disability Authority, 13 September 2003, 5.

³²¹ Interview with Leilani Farha, UN Special Rapporteur on the Right to Housing (Skype, 20 October 2014), referred to as ‘Participant No. 13’ or ‘P13’.

³²² *Doherty and ors v South Dublin County Council and ors*, Final Judgment [2007] IEHC 4; ILDC 1066 (IE 2007), 22 January 2007.

³²³ Interview with Damien Peelo, (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

As P3 said, ‘Constitutional protection for economic, social and cultural rights might enable groups and individuals to seek to have their rights to accommodation vindicated through the courts.’³²⁴ A current lack of constitutional protection, however, together with a lack of incorporation of the International Covenant on Economic, Social and Cultural Rights,³²⁵ might lead to a call for the consideration of diversity or innovation in remedial terms as well as structural terms, and both the CRPD Article 33 and the Business and Human Rights frameworks may offer possible non-paradigmatic solutions in this regard.

Apart from the issue of justiciability, both the CRPD Article 33 and the Business and Human Rights frameworks, as examples of hybrid models of operationalisation, do benefit from a more formal establishment in each case. Both models offer relatively clear steps to states in the translation, implementation and monitoring of their provisions. In the case of the operationalisation of the right to culturally appropriate Traveller accommodation, it is likely that the CRPD Article 33 model would offer tangible benefits that might address many of the anxieties raised around a lack of formality and a lack of enforcement of existing housing law in Ireland.

As stated earlier in this section, CRPD Article 33 framework mechanisms consist of four parts: (1) a focal point within government; (2) a coordination mechanism within government; (3) an independent monitoring framework that is preferably Paris Principles compliant; and (4) the involvement of civil society in the form of people with disabilities and their organisations being involved in all parts of the monitoring process. The Office of the High Commissioner for Human Rights has recommended that whenever a state has identified more than one focal point, the multiple points should also create a coordinating committee.³²⁶ Such a committee can serve several functions, in addition to those of the focal points, and can assist the various focal points in their functions and also act as a neutral platform where parties with different policy

³²⁴ Interview with Martin Collins, Co-Director, Pavee Point Traveller and Roma Centre (Dublin, 26 February 2014), referred to as ‘Participant No. 3’ or ‘P3’.

³²⁵ Ireland has been examined by the UN Committee on Economic, Social and Cultural Rights three times since its ratification of the Convention, in 1999, 2002 and 2015. At each examination, the CESCR drew attention to the fact that Ireland has not incorporated the Convention into domestic law. See Concluding observations, ICESCR, Ireland, UN Doc. E/C.12.1/Add. 35 (14 May 1999) at para 9; Concluding observations, ICESCR, Ireland, UN Doc. E/C.12/1/Add. 77 (05 June 2002) at para 12 and CESCR, Concluding observations on the Third Periodic Report of Ireland, UN Doc. E/C.12/IRL/CO/3 (19 June 2015), para 7.

³²⁶ United Nations Office of the High Commissioner for Human Rights (2009) ‘Thematic study by the office of the High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities’, 27, UN Doc. A/HRC/13/29, 36.

responsibilities can meet. To properly serve this function, the coordination mechanism should not be situated in any particular ministry.³²⁷

The involvement of civil society found in the Article 33.3 of the Convention requirement that ‘Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process’ calls for ‘participation’ rather than simply consultation, which has significance for Traveller accommodation. A similar mechanism in Ireland in this case might allow Ireland to move beyond the frequently criticised NTACC/LTACC committees, which are tasked only with overseeing the implementation of the 1998 Act, and to a position of considering the wider intersectional issues that apply in the case of culturally appropriate Traveller accommodation. Also of significance, the Article 33.3 structure envisaged by the CRPD also allows people with disabilities to participate separately from DPOs, if they so choose.³²⁸ A similar model in the case of Traveller accommodation would allow the participation of individual Travellers outside of the core Traveller civil society groups in Ireland.

5.6 Conclusion

Previous chapters have established that the right to culturally appropriate accommodation in Ireland in the case of Traveller accommodation is not fully operationalised, in that international human rights law tasks the state with responsibility for the delivery of rights at domestic level yet actual rights delivery occurs by way of the state plus non-state actors, hinting at a domestic system of human rights operationalisation that displays hybrid characteristics.

While such hybrid models are not inherently problematic, the difficulty with this model in Ireland is that it is made vulnerable by outside influences, such as political volatility, lack of effective oversight and little or no monitoring. As we have seen by way of an examination of

³²⁷ Gauthier de Beco and Alexander Hoefmans, ‘National structures for the implementation and monitoring of the UN Convention on the Rights of Persons with Disabilities’, in Gauthier de Beco (ed) *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention* (Brill Nijhoff 2013) 26.

³²⁸ Mental Disability Advocacy Centre, *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities*, 15, http://mdac.info/sites/mdac.info/files/Article_33_EN.pdf accessed 24 September 2017.

post-colonial hybridity theory in Chapter 4, in the context of a historically and structurally discriminated-against minority such as the Traveller community in Ireland, engagement in a hybrid approach may be a way of re-establishing power and rebalancing somewhat the relationship between the state and the minority.

In seeking routes to greater formalisation, Chapter 5 examined models from other contexts in which hybrid approaches are formalised to a greater degree. The three examples explored were: hybridity in housing associations in England; hybridity in civil society's role in the case of the World Bank; and existing hybrid human rights mechanisms between the UN and the state in the cases of the UN Convention on the Rights of Persons with Disabilities and the UN Guiding Principles on Business and Human Rights.

Of these models, this chapter argued that the Article 33 mechanism put forward by the UN Convention on the Rights of Persons with Disabilities appears to be the most transferable in terms of operationalisation in practice, by way of translating, implementing and monitoring. The CRPD, similar to other core United Nations human rights treaties, calls for states to implementing the Convention in law and policy, to 'adopt all appropriate legislative, administrative and other measures',³²⁹ and to:

[T]ake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.³³⁰

As we have seen, in comparison to other UN treaties, Article 33 of the CRPD is a unique innovation that requires a state party to the Convention to establish a national mechanism which will implement, coordinate and monitor the progress of the state in achieving the ambitions of the CRPD. The CRPD is the first UN human rights treaty to contain a requirement for such a monitoring mechanism in the text of the treaty itself rather than in an additional Optional Protocol. Guidance from the UN Office of the High Commission for Human Rights recommends the designation of a state's justice ministry (as opposed to health ministry) as its

³²⁹ At Article 4(1)(a).

³³⁰ At Article 4(1)(b).

focal point, in order to acknowledge a shift from the medical to the social model of disability.³³¹ Article 33(1) of the CRPD does not prescribe the government department or departments best suited to taking responsibility for this role. State practice includes both the appointment of a single government department and multiple focal points and each approach has been seen to have benefits.³³² To date, a number of EU member states that have ratified the CRPD and established monitoring mechanisms have appointed ministries of social affairs or ministries with broader competences including social affairs as the focal point,³³³ which is encouraging as a sign of a move away from a medical model of disability.

Given that just nine years have passed since the entry of the CRPD into force, we are still in the early stages of guidance from the UN Committee on the Rights of Persons with Disabilities, the Committee having completed 16 sessions to date³³⁴ and issued Concluding Observations for 48 states who have been examined.³³⁵ The text of the CRPD itself and the Concluding Observations of the UN Committee would indicate that the Committee considers the involvement and full participation of people with disabilities and civil society to be essential if a state is to fully comply with its obligations under the Convention. In its Concluding Observations following the examination of the first periodic report of Germany, for example, the CRPD Committee expressed concern that Germany had not provided enough resources to its national monitoring mechanism to fulfil its goals and Germany was urged to strengthen the capacity of the mechanism and ensure in future that it would be supplied with adequate resources.³³⁶

We saw in Chapter 2 how the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill 2016 outlined a provision for the Irish Human Rights and Equality

³³¹ Human Rights Council (2009) *Thematic Study by the Office of the High Commission for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*, UNDoc A/HRC/13/29.

³³² Irish Human Rights and Equality Commission and NUI Galway Centre for Disability Law and Policy (2016) *Establishing a Monitoring Framework in Ireland for the United Nations Convention on the Rights of Persons with Disabilities* Dublin: NUI Galway and the Irish Human Rights and Equality Commission, 7, <http://www.ihrec.ie/publications/list/establishing-a-monitoring-framework-in-ireland-for-1/> accessed 5 November 2016.

³³³ Gauthier de Beco (no date) *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe*, Geneva: UN Office of the High Commission on Human Rights, 46.

³³⁴ See http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD, accessed 5 November 2016.

³³⁵ See http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5, accessed 5 November 2016.

³³⁶ Committee on the Rights of Persons with Disabilities, Concluding observations on the Initial Report of Germany, paras 61–62, UNDoc CRPD/C/DEU/CO/1 (13 May 2015).

Commission ‘to act as the independent mechanism to promote, protect and monitor implementation of the Convention.’ We also saw in that Chapter 2 how the published Bill (retitled as the ‘Disability (Miscellaneous Provisions) Bill 2016’) made no reference either to the independent mechanism or to the Convention on the Rights of Persons with Disabilities more broadly.³³⁷ However, the relevant Minister has indicated in a parliamentary debate that the Commission is still the intended body. The Minister stated:

If Deputies look closely, they will see that the Bill provides for the establishment of an advisory committee and that at least half of the members should have, or have had, a disability. The facilitation of the participation of all members of the committee will be ensured by the Irish Human Rights and Equality Commission.³³⁸

As also seen in Chapter 2, some developments in national mechanisms for follow up occurred following Ireland’s examination by the UN Committee on Economic, Social and Cultural Rights in 2015, with the establishment of an Inter-Departmental Committee on Human Rights, chaired by the then Minister of State for Development, Trade Promotion, and North-South Co-operation within the Department of Foreign Affairs and Trade.³³⁹ And in 2015 there was movement towards parliament becoming more involved in the realisation of human rights at a domestic level by way of a Sub-Committee on Human Rights and Equality Relative to Justice Matters established to ‘examine issues, themes and proposals, legislative or otherwise, in regard to compliance with the human rights of persons within the State’.³⁴⁰ While both

³³⁷ See Irish Human Rights and Equality Commission, Supplementary Observations on the Disability (Miscellaneous Provisions) Bill 2016, January 2017, 4. <https://www.ihrec.ie/app/uploads/2017/01/Supplementary-Observations-on-Disability-Miscellaneous-Provisions-Bill-2016.pdf> accessed 24 September 2017.

³³⁸ Finian McGrath TD, Minister of State at the Department of Health, Dáil Éireann Debates, 23 February 2017, Disability (Miscellaneous Provision) Bill 2016, Second Stage (Resumed) (Continued), Vol 940, No 2, <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017022300025#X00200> accessed 25 September 2017.

³³⁹ See <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2015/march/minister-chairs-human-rights-committee> accessed 5 November 2016. This committee has not met frequently, however, and the Committee established in 2015 did not meet again until September 2016, when it was reconvened by the subsequent minister with responsibility for this area. See <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2016/september/mchugh-committee-on-human-rights/>, accessed 5 November 2016.

³⁴⁰ See <http://www.oireachtas.ie/parliament/mediazone/pressreleases/name-27376-en.html>, accessed 5 November 2016. As yet, with the return of the 32nd Dáil, there has not been notification of the establishment of a new Oireachtas committee on Human Rights, either in its own right or as a sub-committee to the Committee on Justice and Equality.

interdepartmental and parliamentary committees are steps towards more effective state engagement with international human rights mechanisms, they are – by their make-up – not hybrid bodies. Although they can employ methods of engagement with rights holders, either by extending invitations to particular interest groups to address them, or by the use of Pre-Legislative Scrutiny in the parliamentary process, for example,³⁴¹ these methods are not strictly speaking types of hybrid engagement and decisions to use them are at the discretion of the committees in question. They are therefore by their nature informal and, much as in the case of already highlighted types of hybrid Traveller accommodation operationalisation methods, subject to political volatility.

In answer to the question ‘how do we achieve a more formal hybridity?’ in the case of the operationalisation of the right to culturally appropriate accommodation, there is no reason why replication of such a formal hybrid mechanism as that contained in CRPD Article 33 would not be possible in the case of Traveller accommodation in Ireland. However, this would require additional, more specific provisions to flow from the international human rights legal framework that outlines the right to culturally appropriate accommodation, and a corresponding mechanism to be reflected in the domestic legal and policy framework.

Such a mechanism might usefully entail the establishment of a focal point at government level, as well as a monitoring mechanism that is independent of the state, by way of compliance with the Paris Principles or similar. In addition, the mechanism could require the input of an ‘expert’ committee consisting of members of Traveller-led civil society organisations as well as individual Travellers, which would feed into the model by way of regular meetings and engagement. Such a committee would require resourcing, in terms of staffing and other administrative support, training and transportation costs or per diems. Ideally the mechanism would regularly host its meetings in culturally appropriate Traveller community spaces around Ireland, such as temporary and permanent halting sites and group-based housing schemes.

The Report of the Task Force on the Travelling Community published in July 1995 contained a recommendation to establish a Traveller accommodation agency as an independent statutory

³⁴¹ Oireachtas Library and Research Service (2014) Pre-Legislative Scrutiny (PLS) by Parliament, Spotlight No. 8 of 2014, https://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Final_Spotlight_PLS_17Dec2014_172050.pdf accessed 5 November 2016.

body which would draw up and coordinate ‘a National Programme for the provision of Traveller-specific accommodation in order to achieve the Government’s objective of provision of such accommodation by the year 2000’.³⁴² The Task Force recommendation goes on to detail very specific criteria for such an agency, including how its governing board, directors and Chief Executive Officer should be appointed and what its functions should be, including that of oversight and enforcement:

- where the Agency is of the opinion that a local authority fails to meet the annual targets agreed with the Agency without reasonable cause, it should direct the authority to carry out the necessary works within a time specified by the Agency;
- where the Agency is of the opinion that a planning authority fails to include appropriate provision for Traveller-specific accommodation in its development plan or a revision of the plan, the Agency shall direct the authority to make such provision within a time specified by the Agency;
- in the event of a local authority or planning authority failing to carry out a directive by the Agency without reasonable cause, it shall apply to the High Court for an appropriate Court order to compel compliance.³⁴³

Several times since the 1995 Task Force, Traveller NGOs have called for the establishment of such an agency.³⁴⁴ It is likely that such an agency might act as the state focal point in a mechanism that followed the CRPD Article 33 model; however, the hybrid characteristics

³⁴² Department of the Environment (1995) *Report of the Task Force on the Travelling Community*, Department of the Environment, 124, <http://www.lenus.ie/hse/handle/10147/560365> accessed 28 November 2016.

³⁴³ Department of the Environment (1995) *Report of the Task Force on the Travelling Community*, Department of the Environment, 126, <http://www.lenus.ie/hse/handle/10147/560365> accessed 28 November 2016.

³⁴⁴ See the Irish Traveller Movement’s Shadow report to first CERD examination in 2005, for example, which states: ‘The State should establish a National Traveller Accommodation Agency as outlined in the Report of the Task Force on the Travelling Community 1995 to ensure a centrally driven approach which would address the current fundamental weakness in the National Traveller Accommodation Strategy.’ Irish Traveller Movement, *Report in Response to Ireland’s First Examination under the International Covenant on the Elimination of Racial Discrimination* (Irish Traveller Movement 2005), 22.

would not be fulfilled by a Traveller accommodation agency alone and ideally would require the establishment of an additional, independent expert committee.

An example of one function related to the monitoring of Traveller accommodation as it relates to the right to culturally appropriate accommodation is one that is currently conducted in an informal way by the Irish Traveller Movement National Accommodation Working Group. The Group has developed and circulated a monitoring template to its members to seek feedback regarding provision to date under the current Traveller Accommodation Plans 2014–2018. ITM uses the information it gathers in order to critique Department of Housing data that they are provided with as a member of the NTACC.³⁴⁵ This is the sort of informal method of working in a hybrid way that might be better achieved by a more formal hybridity which would feed into the state's reporting to international human rights obligations.

³⁴⁵ Irish Traveller Movement Weekly News Update, Friday 8 April 2016.

Conclusion

1. Introduction

Us, the Traveller community, we don't need help. We need empowerment. We're just fine the way we are, we just need empowerment.¹

In the view of the Irish Traveller Movement, Traveller accommodation 'has reached an all-time crisis in Ireland'.² Taking as its starting point the existence of a robust international human rights legal framework around culturally appropriate accommodation, where a right to culturally appropriate housing exists in international human rights law and a central part of Traveller ethnicity is recognised to rest upon this right, this thesis has explored that framework against the stark contrast of actual delivery on Traveller accommodation in Ireland. A lack of delivery of existing legislative obligations, the criminalisation of nomadism, political volatility and an enduring and institutionalised racism have all played a part over many decades in this 'difficult and controversial area of public policy in Ireland'.³

Several UN and Council of Europe mechanisms have been highly critical of shortcomings with Traveller accommodation in Ireland, saying that there is a need for urgent measures to be taken by the Irish state,⁴ with concerns ranging from how Travellers access accommodation in the

¹ Eileen Flynn, Traveller Educator and Activist, Acceptance speech to Traveller Pride Awards (Rotunda Round Room, Dublin, 1 June 2017).

² Irish Traveller Movement, Fact Sheet on Accommodation (Irish Traveller Movement 2013) http://itmtrav.ie/uploads/Fact_sheet_on_accommodation_Nov_2013.pdf accessed 30 January 2016. See also, more recently, Cian Reinhardt, 'Housing crisis hits Limerick halting site' *Limerick Post* (Limerick, 17 August 2017).

³ Philip Watt and Karla Charles, *Ireland – RAXEN National Focal Point Thematic Study, Housing Conditions of Roma and Travellers* (EU Fundamental Rights Agency 2009) 4, <http://fra.europa.eu/sites/default/files/frauploads/584-RAXEN-Roma%20Housing-Irelanden.pdf> accessed 11 August 2016. RAXEN is the EU Fundamental Rights Agency's group of National Focal Points involved in gathering information and data on racism and xenophobia in EU Member States.

⁴ Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, recommends 'all necessary measures be taken urgently to improve access by Travellers to all levels of education, their employment rates as well as their access to health services and to accommodation suitable to their lifestyle', at 21.

first instance,⁵ to the criminalisation of trespass,⁶ the lack of cultural adequacy and respect for nomadism,⁷ research and data gaps,⁸ the allocation of funding,⁹ the lack of sanctions for failure to provide,¹⁰ poor maintenance,¹¹ and the effects of evictions.¹² Yet the Irish government has consistently claimed that Travellers are free to live in any kind of accommodation they choose and, as such, they are adequately accommodated. The state has claimed that its efforts are ‘fully compliant’¹³ with the standards required ‘for the achievement of complex and costly goals’,¹⁴ and Ireland says it recognises ‘the special position’ of Travellers in ‘a range of legislative, administrative and institutional provisions’ in relation to Traveller health, education and

⁵ Committee on the Rights of the Child, Concluding observations on the initial periodic report of Ireland, 4 February 1998, CRC/C/15/Add.85, at 14 and 34; Committee on Economic, Social and Cultural Rights, Concluding observations on the initial periodic report of Ireland, 14 May 1999, E/C.12/1/Add.35, at 20; Committee on Economic, Social and Cultural Rights, Concluding observations on the Second periodic report of Ireland, 5 June 2002, E/C.12/1/Add.77, at 32; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 78; Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Ireland adopted on 10 October 2012, ACFC/OP/III(2012)006, at 30; European Committee Against Racism and Intolerance, *ECRI Report on Ireland (Fourth Monitoring Cycle)*, adopted 5 December 2012, CRI(2013)1, at 92; *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 43.

⁶ UN Human Rights Committee, Concluding observations on the third periodic report of Ireland, 30 July 2008, CCPR/C/IRL/CO/3, at 23; UN Human Rights Committee, Concluding observations on the fourth periodic report of Ireland, 19 August 2014, CCPR/C/IRL/CO/4, at 23; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 69.

⁷ Committee on the Elimination of Racial Discrimination, Concluding observations on the initial and second periodic reports of Ireland, 14 April 2005, CERD/C/IRL/CO/2, at 21; Committee on the Elimination of Racial Discrimination, Concluding observations on the third and fourth periodic reports of Ireland, 10 March 2011, CERD/C/IRL/CO/3-4, at 13; Committee on Economic, Social and Cultural Rights, Concluding observations on the Third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3, at 27; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 69–70.

⁸ Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of Ireland, 5 June 2002, E/C.12/1/Add.77, at 33; Committee on the Rights of the Child, Concluding observations on the second periodic report of Ireland, 29 September 2006, CRC/C/IRL/CO/2, at 79.

⁹ Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, 8 July 2015, E/C.12/IRL/CO/3, at 27; Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Ireland, 1 March 2016, CRC/C/IRL/CO/3-4, at 15, 69 and 70.

¹⁰ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland, 3 March 2017, CEDAW/C/IRL/CO/6-7, 48–49.

¹¹ *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, at 86–92.

¹² *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, Decision on the Merits, Case No. 3, adopted 1 December 2015, 135–147, 164–167.

¹³ *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, *Submission of the Government on the Merits, Case No. 3*, 28 February 2014, 32.

¹⁴ *European Committee of Social Rights, European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, *Submission of the Government on the Merits, Case No. 3*, 28 February 2014, 32.

accommodation.¹⁵ Given that there are clearly significantly conflicting views on both sides, this research has sought to look beyond the law to situate the right to culturally appropriate housing in practice, thus teasing out the tensions and contradictions between the law, policies and practices.

2. Arbitrary processes, political volatility and racism in Traveller accommodation

Chapter 1 showed that, despite legislative and policy achievements, as well as civil society campaigning and activism, the assimilation imagined by the Commission on Itinerancy in the 1960s, ‘to reduce to a minimum the disadvantage to themselves and to the community resulting from their itinerant habits’,¹⁶ has become to a reality. In Ireland, there is inconsistency in the extent to which socio-economic rights are defined in legislation generally.¹⁷ The Irish state repeatedly re-emphasises its dualist stance as a barrier to the domestic standing of international human rights law in Ireland,¹⁸ whereby constitutional provisions ensure that domestic law will not be overruled by international agreements.¹⁹ But the right to housing in particular also suffers from a lack of constitutional recognition or statutory definition,²⁰ and this has had implications for Traveller accommodation in a number of domestic Irish cases.²¹ The situation

¹⁵ United Nations, Common core document forming part of the reports of States parties Ireland (2014) HRI /CORE/IRL/2014, 207.

¹⁶ Department of Social Welfare, *Report of the Commission on Itinerancy* (Stationery Office 1963) 11.

¹⁷ See, generally, Elaine Dewhurst, Noelle Higgins and Los Watkins, *Principles of Irish Human Rights Law* (Clarus Press 2012); Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014); Tanya Ní Mhuirthile, Catherine O’Sullivan and Liam Thornton, *Fundamentals of the Irish legal System: Law, Policy and Politics* (Round Hall 2016); Laura Cahillane, James Gallen and Tom Hickey (eds) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017).

¹⁸ See, for example, Ireland’s Common Core Document to the United Nations in 2014, which states ‘Ireland has a dualist system under which international agreements to which Ireland becomes a party do not become part of domestic law unless so determined by the Oireachtas through legislation.’ United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 96.

¹⁹ Under Article 29(6) of the Irish Constitution. See *amicus curiae* submission on behalf of the Irish Human Rights Commission in the case of *Lawrence & Others v Ballina Town Council & Others*, 1 October 2007, at 2.1, https://www.ihrec.ie/download/doc/sub_amicus_lawrence.doc, accessed 13 July 2017, *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008).

²⁰ Irish Human Rights Commission, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document* (Irish Human Rights Commission 2005) 113.

²¹ Such as *County Meath VEC v Joyce* [1997] 3 IR 402; *O’Reilly v Limerick Corporation* [1989] ILRM 181; *Doherty v South Dublin County Council* [2007] 1 IR 246; *O’Donnell (a minor) & Others v South Dublin City Council & Others* [2007] IEHC 204; *McDonagh v Kilkenny County Council* [2007] IEHC 350; *Fingal County Council v Gavin & Others* [2007] IEHC 444; *Dooley v Killarney Town Council* [2008] IEHC 242; *O’Donnell v South Dublin County Council* [2007] IEHC 204; *O’Donnell v South Dublin County Council* [2008] IEHC 454; *Lawrence & Others v Ballina Town Council & Others* (HC, 31 July 2008).

around the delivery of accommodation ‘remains dire’,²² including a lack of delivery on target numbers,²³ transient sites operating as temporary sites,²⁴ considerable overcrowding,²⁵ and poor maintenance and conditions.²⁶ In addition, evictions, or at least the threat of them, pose a direct risk to nomadism, leaving Travellers with a choice of either abandoning the practice of nomadism, or parking illegally.²⁷ These features are accompanied by a persistent racism on the part of some public officials, decision makers and the public, often underpinned by a belief that somehow Travellers are to blame for their own difficulties.²⁸

The first chapter also set out how guidance from international bodies states that provision of culturally appropriate housing needs go beyond a simple symmetrical approach to equality, which protects against discrimination by guaranteeing identical treatment, and instead should enable cultural identity and nomadic life, differential outcomes, in a way, rather than

²² *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, para 95.

²³ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, paras 97–102.

²⁴ *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 19 April 2013, para 96. Irish Traveller Movement, *Shadow Report to Committee on Economic, Social and Cultural Rights* (Irish Traveller Movement 2014) states ‘today there is not one single site in Ireland with an operating unit of transient accommodation’, 14.

²⁵ According to the National Traveller Accommodation Consultative Committee’s 2013 annual report, there has been an increase in the numbers of Traveller families living both on unauthorised sites and in shared accommodation, with the number of families sharing accommodation increasing from 451 in 2010 to 663 in 2013. Pavee Point believes that Traveller families are responding to the national housing crisis by moving from private rented accommodation, which is reporting a decrease in Traveller numbers, to unauthorised sites or shared accommodation. See Department of Justice and Equality, *National Traveller and Roma Inclusion Strategy, 2017–2021* (Department of Justice and Equality 2017) 13.

²⁶ Senator Colette Kelleher, during the ‘Fire safety in Traveller accommodation’ Seanad Debates, 19 October 2016, stated ‘In our home city of Cork, there is a halting site in Blackpool called Spring Lane that was built for ten families but now houses 30. Many families remain without water or toilets, some families continue to live in old damp mobile homes and all of the families live with overcrowding on a daily basis. Even though almost 100 children live on the site they have nowhere to play’. See also Olivia Kelleher, ‘Cork Traveller halting site “chronically overcrowded”’, *Irish Times* (Dublin, 31 May 2016), which states ‘Cork Traveller Women’s Network (CTWN) and the Traveller Visibility Group (TVG) have called for the development of quality, long-term, culturally appropriate accommodation for families living at the Spring Lane halting site. The groups described Spring Lane as “chronically overcrowded”, with more than 30 families occupying a space initially built for 10. “While some very necessary emergency work was carried out over the last year, a long-term plan to deal with this crisis is essential. “The reality of life on Spring Lane site is that many families remain without water or toilets, some continue to live in old damp mobile homes, all families live with daily overcrowding, and the almost 100 children on site continue to have no safe place to play.”’

²⁷ In response to a report in the Bucks Free Press, where the mayor of High Wycombe is reported as commenting on a local encampment, saying ‘I don’t think there is a lot you can do. If they were squirrels you would cull a few, unfortunately you can’t cull human beings’. The Gypsy, Roma and Traveller Police Association (GRTPA) tweeted ‘Perhaps if we had places to stop we wouldn’t need to either abandon our culture or stop in places we shouldn’t.’ 15 April 2017. Accessed https://twitter.com/GRTPA_UK/status/853129591510249472 15 July 2017. See Jasmine Rapson, ‘Next mayor, cllr Brian Pearce, slammed for ‘inciting racism’ after joking about traveller cull’, 14 April 2017. Accessed http://www.bucksfreepress.co.uk/news/15223659.Next_mayor_slammed_for_inciting_racism_after_joking_about_traveller_cull/?ref=twshr&shareimg=6231060# 15 July 2017.

²⁸ Robbie McVeigh, Expert Witness Testimony in the case of *O’Leary v Allied Domecq* (Central London County Court, 29 August 2000).

homogeneous opportunities. Although the right to culturally appropriate housing is translated, to a degree, in Ireland by way of the Housing (Traveller Accommodation) Act 1998,²⁹ the Act refers to the ‘distinct needs’ of Travellers,³⁰ and ‘annual patterns of movement’,³¹ rather than cultural or nomadic identity.

The collective effects of a lack of delivery and budget underspends on Traveller Accommodation Programmes, which as we saw have resulted by a complex mix of circumstances but which have been underpinned by a lack of political will as well as stigma, combined with the criminalisation of nomadism and institutionalised racism, has resulted in a move to private rented accommodation, a decrease in cultural practices, and a decrease in nomadism, resulting in what is effectively a ‘climate of constructive assimilation’ of Travellers in Ireland.³²

3. The benefits of trying to understand operationalisation

The seriousness of the current state of play regarding Traveller accommodation shows that there is a need for more than mere legal measures to effect a substantial change in outcomes in how the right to culturally appropriate accommodation is delivered upon for the Traveller community in Ireland. To be fully aware of what is occurring here, structural and procedural aspects of how this right is provided for must be appreciated. This perspective offers a greater

²⁹ Housing (Traveller Accommodation) Act 1998. The State’s Common Core Document to the UN states: ‘Government policy in relation to the accommodation of Travellers is implemented through the Housing (Traveller Accommodation) Act 1998.’ See United Nations, Common core document forming part of the reports of States parties, Ireland, 30 April 2014, UN Doc HRI /CORE/IRL/2014, para 217. Robbie McVeigh notes the difference between Ireland and the UK in this regard, where the 1988 Housing Act (at s 13) ‘regards Travellers as a people who are nomadic (regardless of ethnicity) and the Northern Ireland 1997 Race Relations Order which defines Travellers as a ‘racial group’ (almost regardless of nomadism).’ See Robbie McVeigh, ‘The “final solution”: reformism, ethnicity denial and the politics of anti-Travellerism in Ireland’ (2007) 7 Social Policy and Society 91, 92. The Department of Justice and Equality has maintained that the 1998 Traveller Accommodation Act represents a ‘planned, integrated and comprehensive response to meet the accommodation needs of Travellers’, see Department of Justice and Equality, ‘Background Document on the Development of a Revised National Traveller and Roma Inclusion Strategy in Ireland’, June 2015, <http://www.travellerinclusion.ie/website/TravPolicy/travinclusionweb.nsf/page/nationalinclusionstrategy-en> accessed 14 June 2016.

³⁰ At s 10(3)(b).

³¹ At s 10(3)(c).

³² Darren O’Donovan, ‘Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights’ (2016) 16 International Journal of Discrimination and the Law 5, 8.

understanding of what is envisaged by the international human rights framework as well as locating how this can apply in a domestic human rights context.

We saw how the key concepts of ‘operationalisation’, ‘enforcement’ and ‘implementation’ throughout the guidance offered by international bodies suffer from a definition gap and the distinction between them is unclear. This raises difficulties to states in how they should deal with the provisions of the international human rights framework at domestic level. In Chapter 2 an understanding of ‘operationalisation’ was developed and it was theorised that operationalisation takes place by (1) translating, through the creation of laws and policies; (2) implementing, through the creation of domestic bodies with rights mandates, the allocation of resources and the actual delivery of rights; and (3) monitoring or measuring.

This innovative framework was then applied in practice in the case of Traveller accommodation in Chapter 3. Through this ‘lens’, this chapter demonstrated how the translation of the right to culturally appropriate accommodation since the foundation of the Irish state has often been affected positively or negatively by whether state actors and non-state actors were working together towards the same end, in a blended or hybrid manner. Unambiguous differences are visible when tactics are compared. For example, the measures adopted by the Commission on Itinerancy in the 1960s, when no Travellers were involved in the decision-making,³³ had drastic outcomes in terms of assimilation. This was contrasted with a more considered understanding of Traveller identity by the Travelling People Review Body in the 1980s, with both participation of and submissions by Travellers.³⁴ This was followed by the enactment of the Housing Act 1988, the first piece of legislation to consider nomadism and expressly mention Travellers as a group with particular accommodation needs. Further, the Task Force on the Travelling Community in the 1990s signalled an important move towards including Traveller-specific organisations³⁵ in discussions around policy formulation at national level. Many expectations were raised by the establishment of the Task Force and its importance as a blended mechanism for oversight was an important progression towards improved Traveller rights in Ireland. This ultimately led to the enactment of the 1998 Traveller

³³ The Commission was chaired by a Supreme Court judge and made up of senior officials in various government departments and State bodies. There were no Traveller representatives.

³⁴ *Report of the Travelling People Review Body* (Stationery Office 1983) 7, <http://www.lenus.ie/hse/handle/10147/46682> accessed 7 July 2017.

³⁵ Such as Pavee Point, Irish Traveller Movement, National Traveller Women’s Forum Exchange House and the Parish of the Travelling People.

Accommodation Act, providing for Traveller Accommodation Programmes, a National Traveller Accommodation Consultative Committee and Local Traveller Accommodation Consultative Committees. In contrast, the effective criminalisation of nomadism came with the introduction of the Housing (Miscellaneous Provisions) Act 2002, an Act which contained no reference to Traveller ethnicity or nomadism and was introduced without any consultation with the Traveller community.³⁶

Chapter 3 also considered the implementation of the right in the creation of domestic bodies with rights mandates, such as the former Irish Human Rights Commission, the former Equality Authority and the newer Irish Human Rights and Equality Commission, where the hybrid ‘pluralism’ contained in the Paris Principles became enshrined in the founding legislation of the latter in the form of the Irish Human Rights and Equality Commission Act 2014.³⁷ In addition, the implementation of the right through resourcing was considered, where significant overall reductions in capital funding to Traveller Accommodation Plans at local level have been seen to be exacerbated by underspends of budgets allocated at local level’,³⁸ causing much upset to the Traveller community,³⁹ as well as being widely reported in national media.⁴⁰ The establishment of Cena, a Traveller-led voluntary housing body, which gained Approved Housing Body status in October 2013,⁴¹ has been an important departure for the central involvement of Travellers in the development of their own accommodation and for the delivery and management of accommodation. Its progress has been slow, however. We also saw in Chapter 3 how domestic monitoring committees such as the NTMAC, NTACC and LTACCs have been criticised,⁴² with a core part of their difficulty appearing to be the arbitrary and informal ways in which they operate, influenced by lack of stability and the presence of political volatility,⁴³ with just over half of LTACCs having a clear mechanism for reporting or

³⁶ Treacy Hogan, ‘Traveller fury as McAleese signs tougher trespass laws’, *Irish Independent* (Dublin, 11 April 2002).

³⁷ Irish Human Rights and Equality Commission Act 2014.

³⁸ Irish Human Rights and Equality Commission (2015) *Report to UN Committee on Economic, Social and Cultural Rights on Ireland’s Third Periodic Review*, 70, <http://www.ihrec.ie/download/pdf/icescrrreport.pdf> accessed 12 August 2016.

³⁹ See testimony of Ronnie Fay, Pavee Point appearance before Oireachtas Joint and Select Committees Committee on Housing and Homelessness, Thursday, 19 May 2016, <https://www.kildarestreet.com/committees/?id=2016-05-19a.44> accessed 12 August 2016.

⁴⁰ Jack Power, ‘Over €1.2m in Traveller housing funding left unspent’ *Irish Times* (Dublin, 5 May 2017).

⁴¹ Under s 6 of the Housing (Miscellaneous Provisions) Act 1992.

⁴² Interview with Damien Peelo (then) Director, Irish Traveller Movement (Dublin, 11 April 2014), referred to as ‘Participant No. 5’ or ‘P5’.

⁴³ L Costello, *Evaluation of Local Traveller Accommodation Consultative Committees* (Department Environment and Local Government 2000) 59.

regular meetings.⁴⁴ In this regard, the NTACC/LTACC approach to Traveller accommodation has to date largely been a partnership one, a participatory democracy one or an advocacy one, not one based within a human rights framework. It may well be that a human rights approach is what is needed to push local authorities to finally deal properly with the issues and to engage with their partners, formal or otherwise, in a more meaningful way.

Chapter 3 also demonstrated how the voice of Traveller organisations has been a main driver in hybrid models of operationalisation in Ireland since the 1980s, particularly in more formalised ways of working together, such as the 2010 All Ireland Traveller Health Study. This involved innovative training and use of Traveller women as primary healthcare workers, gathering primary data as peer researchers,⁴⁵ leading to an 80% response rate, unprecedented for a study of its kind.⁴⁶ High hopes were held for the All Ireland Traveller Health Study, a hybrid process with huge potential for Traveller health outcomes, yet it is disappointing how many of the study's recommendations have not been acted upon. As Chapter 3 concluded, hybrid structures and processes may be successful, but their informality and inconsistency has left them exposed to political will, at the mercy of political change, and with decision-making primarily weighted towards the state. Given the complexity of the issues at hand, there is a need for a more innovative approach, and a fuller and more conscious commitment to hybridity might address some of the risks and difficulties raised.

4. When operationalisation is hybrid

In attempting to explore successful hybrid models and processes, as well as to answer questions about their effectiveness in terms of operationalisation, Chapter 4 examined 'hybridity' by exploring its origins in biology, botany, post-colonial discourse, globalisation and other disciplines. In asking the central question 'what does it mean to be hybrid?' and exploring insights from more formalised and enduring hybrid structures and the potential of a more

⁴⁴ *Summary Report on the Operation and Effectiveness of the Local Traveller Accommodation Consultative Committees, June 2009 – December 2010* (Irish Traveller Movement 2011) at 3–4, <http://www.itmtrav.ie/uploads/files/EffectivenessofLTACCs.pdf> accessed 12 August 2016.

⁴⁵ See Joint Oireachtas Committee on Health and Children debate on Traveller Health services, discussion with Pavee Point, 10 March 2009, available from <http://debates.oireachtas.ie/HEJ/2009/03/10/00004.asp> accessed 15 May 2014.

⁴⁶ Pavee Point, *Selected Key Findings and Recommendations from the All-Ireland Traveller Health Study – Our Geels* (Pavee Point 2010) 2.

conscious commitment to hybridity in the case of Traveller accommodation, it was argued that a greater formalisation of the relevant hybrid systems involved in operationalisation may serve to insulate the operationalisation of these rights from potential vulnerability. International law has, to date, been grounded in the belief that everything begins and ends with the state.⁴⁷ The concept of hybridity in legal scholarship has been relatively underdeveloped,⁴⁸ until a shift in global power and politics more recently has underscored the need for hybrid constructs in international law.⁴⁹

Chapter 4 argued that hybridity is focused on less oppositional ways of engagement,⁵⁰ and that hybrid models of compliance, which often combine political, judicial and ‘technocratic’ elements, may be more effective in facilitating compliance with human rights than orders from international courts or expert bodies.⁵¹ Sharing responsibility also has the potential for increased accountability, greater financial strength and more sustainable solutions.⁵² International regulatory frameworks, for example, tend to be based on the assumption that state responsibility is the primary factor in ensuring effective implementation. We saw in Chapter 4 how Transnational Private Regulation blends public and private legal instruments and, with it, closer collaboration between government and non-government actors without a strict public–private divide, becoming a hybridity which leads to more efficient organisational structures, as well as helping to improve outcomes and the delivery of the regulated practices.⁵³

We also saw how hybridity is not without its challenges. Although it can facilitate a shift away from unhelpful binaries,⁵⁴ the balance of power can be unequal in terms of decision-making and control of outcomes. Hybridity is possibly as susceptible to the machinations of power and spheres of influence as other forms of decision-making and means of consensus-building

⁴⁷ Peter J Spiro, ‘New players on the international stage’ (1997) 2 Hofstra Law and Policy Symposium 19F, 24.

⁴⁸ Rosa Freeman, ‘“Third generation” rights: is there room for hybrid constructs within international human rights law?’ (2013) 2 Cambridge Journal of International and Comparative Law 935.

⁴⁹ ‘Collective’ or ‘people’s’ rights, rather than individual rights, according to BH Weston, ‘Human rights’ (1984) 6 Human Rights Quarterly 257, 283.

⁵⁰ Rosa Freeman, ‘Hybrid human rights’, in Paul Jackson (ed) *Handbook of International Security and Development* (Edward Elgar 2014) 386, 390.

⁵¹ Basak Cali and Anne Koch, ‘Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe’ (2014) 14 Human Rights Law Review 301.

⁵² J Gregory Dees and Beth Battle Anderson, ‘Sector bending: blurring lines between non-profit and for-profit’ (2003) 40 Society 16.

⁵³ Fabrizio Cafaggi, ‘New foundations of transnational private regulation’ (2011) 38(1) Journal of Law and Society 20.

⁵⁴ Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) Journal of Peacebuilding & Development 9, 13.

and reaching agreements.⁵⁵ Hybrid regimes can include conflicting interests, and it is a ‘driving concern’ whether and how marginalised groups can actually achieve change within mainstream spaces at all.⁵⁶ Hybrid structures can also suffer from lack of accountability and it can be difficult to identify who is responsible for outcomes in a hybrid regime.⁵⁷

Each of these potential benefits and challenges also translate to the context of Traveller accommodation, however. The dominant model of accountability in Ireland is one of ministerial responsibility to the legislature; however, when there is more than one actor involved, i.e. the state and the non-state in a hybrid model, there may be a problem with accountability.⁵⁸ Traditional versions of human rights law never envisaged a state that privatises and contracts out its responsibilities, and the adoption of wider concepts of ‘governance’ which recognise the power exercised by non-state actors as well as government may have the potential to address the changing nature of state responsibility.⁵⁹

5. In favour of formalised hybridity

Building on the arguments set out in the preceding chapters, Chapter 5 contended that in the case of Traveller accommodation, a hybrid approach to operationalisation seems appropriate where the nature of Travellers as a marginalised and vulnerable group with a distinct history requires a greater, more targeted level of protection. As a socio-economic right with consequential positive duties attached, the issue of Traveller accommodation is not a straightforward ‘state as provider’ situation; it is highly complex. The thesis argued that the

⁵⁵ See Jenny H Peterson, ‘A conceptual unpacking of hybridity: accounting for notions of power, politics and progress in analyses of aid-driven interfaces’ (2012) 7(2) *Journal of Peacebuilding & Development* 9, 20, where she states that the ‘consumption of and reaction to hybridity by local actors can also be quite varied and largely depends on their points of view and complex histories’ and this needs to be taken into account.

⁵⁶ Kate Bedford, *Developing Partnerships: Gender, Sexuality and the Reformed World Bank* (University of Minnesota Press 2009) xvi-xvii.

⁵⁷ Deirdre Curtin and Linda Senden, ‘Public accountability of transnational private regulation: chimera or reality?’ (2011) 38 *Journal of Law and Society* 163, 188.

⁵⁸ Muiris MacCárthaigh and Colin Scott, ‘A thing of shreds and patches: fragmenting accountability in a fragmented state’ (2009) Discussion Paper Series, Geary Institute, University College Dublin, 1, 16. MacCárthaigh and Scott identify accountability mechanisms shaped by three types of forces: (1) top-down, via pressures from international mechanisms; (2) horizontal, learning or benchmarking from other jurisdictions; and (3) bottom-up reforms in response to policy problems, such as tribunals of inquiry.

⁵⁹ Alison Mawhinney and Iorweth Griffiths, ‘Ensuring that others behave responsibly: Giddens, governance, and human rights law’ (2011) 20 *Social & Legal Studies* 481, 482. The authors support sociologist Anthony Giddens’ theory of ‘the ensuring state’ where the state has a responsibility to ensure others behave responsibly.

right to culturally appropriate housing, in the case of Traveller accommodation in Ireland, might be better operationalised by a more formalised hybrid approach that is somehow protected from political influence and from an inconsistency and informality in approach, and that acts as a form of transparent and accountable non-political oversight. In such a model, the power and influence of non-state actors, such as civil society, would be recognised, particularly given the essential role that Traveller representatives play in accommodation committees of local authorities. Recognition of a hybrid approach might establish, in a more sophisticated way, ‘bottom-up’ reforms in response to policy issues.

In order to investigate potential routes to greater formalisation, Chapter 5 examined models from other contexts with more formalised hybrid approaches to consider how these models might work in the context of Traveller accommodation: (1) hybridity in housing associations in England; (2) hybridity in civil society’s role in established organisations, such as in the case of the World Bank; and (3) existing hybrid human rights mechanisms between the UN and the state such as in the cases of Article 33 monitoring mechanisms under the UN Convention on the Rights of Persons with Disabilities,⁶⁰ and domestic implementation mechanisms of the United Nations Guiding Principles on Business and Human Rights.⁶¹

By considering the implications of these more formalised models in the context of a potential hybrid model for the operationalisation of the right to culturally appropriate housing in the case of Traveller accommodation in Ireland, Chapter 5 concluded that the involvement of civil society actors and rights holders, similar to that envisaged by Article 33.3 of the Convention on the Rights of Persons with Disabilities, has potential if it were to be applied in the case of Traveller accommodation. A similar mechanism in Ireland in this case might allow Ireland to move beyond the frequently criticised accommodation consultative committees tasked solely with overseeing the implementation of the 1998 Act, and into a position of considering the wider intersectional issues that apply in the case of culturally appropriate Traveller accommodation. Chapter 5 also considered the place in such a mechanism of a statute-based

⁶⁰ United Nations Convention on the Rights of Persons with Disabilities, GA Res. 61/106 (2007), entered into force 3 May 2008. Article 33 sets out how States parties ‘shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation’ of the Convention.

⁶¹ *Report of the Special Representative of the Secretary-General on the Issues of Human Rights, Transnational Corporations and Other Business Enterprises*, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011, A/HRC/17/31.

Traveller accommodation agency, often proposed by Traveller organisations as a preferred central coordination model, and concluded that such a body could also play a useful role.

6. Conclusion and recommendations for further research

This thesis asked the questions: (1) How is the international human right to culturally appropriate housing operationalised in Ireland in the case of Traveller accommodation?; and (2) how might this operationalisation be improved upon? The research findings suggested that, in theory, international human rights law recognises the state as the entity that is required to respect, protect and fulfil rights at domestic level. Yet in practice, moving past doctrinal and policy accounts of Traveller accommodation rights, human rights are often operationalised through a hybrid mix of state and non-state actors and this is evident in the case of Traveller accommodation. Hybrid approaches can raise certain anxieties but, when formalised, also have potential to improve on how human rights are operationalised, which is also the case in the right to culturally appropriate accommodation.

The evidence from this research strongly suggests that (1) there is a gap between the substantive content of the human right to housing, as expressed in international human rights law, and how it is operationalised or given effect to by the state in ways that can be measured; and (2) operationalisation of the right to culturally appropriate housing in Ireland happens in a hybrid fashion, with the state and non-state actors acting together, but this hybridity is informal and is not recognised by the international human rights legal framework, creating a vulnerability that reduces effectiveness. The assumption that there is a gap between what international human rights law says and what happens in people's daily lived reality appears to be justified.

In achieving a more formal hybridity and thus more effective operationalisation of the right to culturally appropriate accommodation, there is no reason why replication of such a formal hybrid mechanism as that contained in Article 33 of the UN Convention on the Rights of Persons with Disabilities would not be possible in the case of Traveller accommodation in Ireland. A formal hybrid mechanism such as that contained in Article 33 would be possible in the case of Traveller accommodation in Ireland, yet would require additional, more specific provisions to flow from the international human rights legal framework that outlines the right to culturally appropriate housing, as well as a corresponding mechanism to be reflected in the

domestic legal and policy framework. Further research could usefully explore what such a mechanism might entail, in terms of structure, purpose and process.

[/ENDS]

Appendices

Appendix 1 – Sample letter of invitation

Ruth Gallagher

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

E-mail: [REDACTED]

20th January 2014

Dear [name]

This letter is an invitation to participate in a research case study. As a part-time PhD student in the School of Law at Durham University, I am currently conducting research on how human rights are operationalised in Ireland. I am in the second year of my PhD research, which is being carried out under the supervision of Professor Fiona de Londras in the School of Law at Durham University.

Research Overview

‘Operationalisation’ is a process of translating the standards contained in human rights sources (covenants, conventions, treaties, etc) and putting them into operation, throughout the state, in practical ways that can be measured. I wish to focus upon Traveller accommodation as a case study, which will illustrate operationalisation in a single rights area.

The case study will examine where international and regional human rights law provides for this type of accommodation in treaties, general comments, the output of monitoring bodies in concluding observations, work of commissioners and special procedure mechanisms. This will be followed by a comprehensive mapping of how these provisions are translated in the domestic context in Ireland.

I hope that by completing this case study, I will be able to gain a greater insight into both how international human rights law is operationalised in Ireland and also how the issue of Traveller accommodation is dealt with in this way.

Your Involvement

For the case study, I would like to conduct some one-to-one interviews with individuals who have experience in various aspects of Traveller accommodation, in order to corroborate or verify the findings of my desk research.

I have identified some potential interview participants as those who can bring multiple perspectives to the issue. I hope that the individual perspectives provided by interviews will contribute to the general thesis question as well as the case study.

If you agree to participate, I will follow up to arrange a time and location that is convenient for you. There will be no costs involved and should be no inconvenience on your part. I have prepared a list of guiding questions that I can share with you beforehand. I will be scheduling interviews to begin in 2014.

I expect that interviews will take between 60 and 90 minutes (maximum). All interviews will be conducted in person and will, with your permission, be recorded. All conversations will be transcribed and are therefore liable to be used. If you wish, it is also possible to conduct the interview without recording. I hope to complete the interview in one session. However, with your consent, I may contact you again following this, for the purposes of checks or clarifications. Recordings will be kept securely and for a period of time until the research and thesis are completed, before being destroyed.

You may also opt to remain anonymous if you choose. Should you opt for anonymity, your data will be destroyed once material has been transcribed and checked.

Participation in the interview is entirely voluntary and there are no known or anticipated risks to taking part. You may decline to answer any of the questions you do not wish to answer. You may also decide to withdraw from the case study at any time, without any negative consequences, simply by letting me know.

Any quotations will only be attributed to you with your consent. After the interview data has been analysed, you will receive a copy of the executive summary. If you wish, a copy of the entire thesis can be made available to you, once it is completed. I hope to complete the final research in 2016.

Contact Information

If you have any questions about the case study, or would like additional information about taking part, please contact me at telephone: [mobile number] or by email at:

████████████████████ You may also contact my supervisor, Professor Fiona de Londras, at telephone: ████████████████████ or by email at: ████████████████████

I would appreciate if you could let me know as soon as possible if you are available to be interviewed. If you are not able to participate, perhaps you could suggest an alternative, suitable contact.

The case study has been reviewed and received ethics clearance by the Durham University Research Ethics Committee. However, the final decision to participate is yours.

With kind regards,

Ruth Gallagher
PhD Candidate

Appendix 2 – Interview questions

Template 1 – Domestic State Actors

1. From your perspective, what does ‘effectively realising the right to housing’ mean?
2. What, in your opinion, are the facilitators to the effective realisation of the right to housing in the context of Traveller accommodation?
3. What, in your opinion, are the barriers to the effective realisation of the right to housing in the context of Traveller accommodation?
4. What has been the most challenging issue concerning Traveller accommodation that you have become aware of? What kinds of issues arose? Were they resolved? How?
5. In its 2005 Concluding Observations to Ireland’s Report on the Convention on the Elimination of Racial Discrimination (CERD), the CERD Committee recommended that Ireland ‘strengthen its efforts to implement the policy advice offered by the National Traveller Monitoring and Advisory Committee’ and ‘all necessary measures be taken urgently to improve access by Travellers to... accommodation suitable to their lifestyle.’ (among other issues). Were you involved in any process that followed on from this recommendation? How, in your opinion, did the process work?
6. In its 2011 Concluding Observations, the CERD Committee recommended ‘concrete measures are undertaken to improve the livelihoods of the Traveller community by focusing on improving students’ enrolment and retention in schools, employment and access to health care, housing and transient sites.’ Have you been involved in any process in the period since this report? How has this worked? In general, is this how an issue of compliance or non-compliance (with international human rights law) might be approached?
7. From your perspective, what are the ways in which has Ireland attempted to translate international human rights law on housing into concrete ways within the State?
8. From your perspective, how has Ireland measured the ways in which international human rights law on housing has been put in place or given effect to?
9. In our discussions on the challenges or issues in the context of Traveller accommodation, is there anything in your experience that we can learn about Ireland’s approach to international human rights law generally?
10. Is there anything else you would like to add on how Ireland gives effect to the right to housing?

Template 2 – Domestic Non-State Actors

1. From your perspective, what does ‘effectively realising the right to housing’ mean?
2. What, in your opinion, are the facilitators to the effective realisation of the right to housing in the context of Traveller accommodation?
3. What, in your opinion, are the barriers to the effective realisation of the right to housing in the context of Traveller accommodation?
4. What has been the most challenging issue concerning Traveller accommodation that you have become aware of? What kinds of issues arose? Were they resolved? How? Were you involved in any ways of attempting to resolve these issues?
5. In its 2011 Concluding Observations to Ireland’s Report on the Convention on the Elimination of Racial Discrimination (CERD), the CERD Committee recommended ‘concrete measures are undertaken to improve the livelihoods of the Traveller community by focusing on improving students’ enrolment and retention in schools, employment and access to health care, housing and transient sites.’ Have you been involved in any process in the period since this report? How has this worked? In general, is this how an issue of compliance or non-compliance (with international human rights law) might be approached?
6. From your perspective, what are the ways in which has Ireland attempted to translate international human rights law on housing into concrete ways within the State?
7. From your perspective, how has Ireland measured the ways in which international human rights law on housing has been put in place or given effect to? Have you been involved in any parts of this process? What was your experience?
8. In our discussions on the challenges or issues in the context of Traveller accommodation, is there anything in your experience that we can learn about Ireland’s approach to international human rights law generally?
9. Is there anything else you would like to add on how Ireland gives effect to the right to housing and Traveller accommodation?

Template 3 – International Non-State Actors

1. From your perspective, what does ‘effectively realising the right to housing’ mean when applied in a domestic context?
2. What, in your experience, have been the facilitators to the effective realisation of the right to housing in the context of Traveller accommodation in Ireland?
3. What, in your experience, have been the barriers to the effective realisation of the right to housing in the context of Traveller accommodation?
4. From a human rights perspective, what has been the most challenging issue concerning Traveller accommodation that you have become aware of? Are you aware of how these issues were dealt with or resolved?
5. In its 2005 Concluding Observations to Ireland’s Report on the Convention on the Elimination of Racial Discrimination (CERD), the CERD Committee recommended that Ireland ‘strengthen its efforts to implement the policy advice offered by the National Traveller Monitoring and Advisory Committee’ and ‘all necessary measures be taken urgently to improve access by Travellers to... accommodation suitable to their lifestyle’ (among other issues). Were you aware of any process adopted by the Irish state that followed on from this recommendation? How, in your opinion, did the process work?
6. Are you aware of any other processes that Ireland adopts to give effect or put in place its international human rights legal obligations on housing?
7. From your perspective, what are the ways in which has Ireland attempted to translate international human rights law on housing into concrete ways within the State?
8. From your perspective, how has Ireland measured the ways in which international human rights law on housing has been put in place or given effect to?
9. In our discussions on the challenges or issues in the context of Traveller accommodation, is there anything in your experience that we can learn about Ireland’s approach to international human rights law generally?
10. Is there anything else you would like to add on how Ireland gives effect to the right to housing?

Appendix 3 – Interview Consent Form

Note: By signing this consent form, you are not waiving any rights or releasing Ruth Gallagher or Durham University from any legal or professional responsibilities.

This project has been reviewed by, and received ethics clearance from, Durham Law School Research Ethics Committee.

Question	Please cross out as necessary
I have read the information given to me in a supporting letter about the case study being conducted by Ruth Gallagher of the Law School at Durham University, under the supervision of Professor Fiona de Londras.	YES / NO
I have had an opportunity to ask any questions related to the case study.	YES / NO
I have received satisfactory answers to my questions and any additional details I wished to receive.	YES / NO
I was given enough time to consider whether I wanted to participate in the case study.	YES / NO
I am aware that I am allowing my interview to be audio recorded to ensure an accurate recording of my responses to the interview questions.	YES / NO
I am aware that I am allowing my interview to be passed to a third party for transcription.	YES / NO
I have received enough information about the intended use of any data which I supply.	YES / NO
I am aware that the researcher may contact me again, following the interview, for the purposes of small clarifications.	YES / NO
I am aware that excerpts from the case study interview may be included in the thesis and/or publications that are associated with the research, with the understanding that any quotations will only be attributed to me with my consent.	YES / NO
I was informed that I may withdraw my consent at any time, without penalty, by advising the researcher.	YES / NO
I give my consent to participate in the case study.	YES / NO

Participant Name: _____ (Please print)

Participant Signature: _____

Date: _____

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