clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia), judgment, I.C.J. Reports 1995*, p. 102, para. 29) …

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the 'Closed Area' … some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent … that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited. The Security Council has thus taken the view that such policy and practices 'have no legal validity'. It has also called upon 'Israel, as the occupying Power, to abide scrupulously' by the Fourth Geneva Convention and: 'to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories' (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described 'Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories' as a 'flagrant violation' of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territories (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature …, it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities …

In other terms, the route chosen for the wall gives expression in *loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the

Security Council ... There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing ... to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right ...

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

[Although the conclusion that Israel has acted in violation of international law by erecting the wall was reached by fourteen votes to one – with only Judge Buergenthal dissociating himself from the majority – six members of the Court attached separate concurring opinions to the Court's position. In his separate concurring opinion, Judge Koroma stressed that in its Opinion, the Court 'held that the right of self-determination as an established and recognized right under international law applies to the territory and to the Palestinian people. Accordingly, the exercise of such right entitles the Palestinian people to a State of their own as originally envisaged in resolution 181 (II) and subsequently confirmed. The Court has found that the construction of the wall in the Palestinian territory will prevent the realization of such a right and is therefore a violation of it.' By contrast, Judge Kooijmans expressed the view that the violation of the right to self-determination of the Palestinian should be examined in a wider context than that of the Opinion, and that the construction of the Wall, *per se*, should not be seen to constitute the sole or determining factor. Judge Rosalyn Higgins expressed her 'puzzlement' at the application by the Court of the principle of self-determination. While she stated her support for the 'post-colonial view of self-determination' which the Court espouses, she did not consider that the construction of the Wall, as such, violates the right of the Palestinian people to self-determination, when that right is continuously violated by Israeli occupation and the absence of a peace settlement:]

Separate concurring opinion of Judge Higgins:

30. ... Self-determination is the right of 'All peoples ... freely [to] determine their political status and freely pursue their economic, social and cultural development' (Art. 1(1), International Covenant on Civil and Political Rights and also International Covenant on Economic, Social and Cultural Rights). As this Opinion observes (para. 118), it is now accepted that the Palestinian people are a 'peoples' for purposes of self-determination. But it seems to me quite detached from reality for the Court to find that it is the wall that presents a 'serious impediment' to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions – that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right

to self-determination. It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than 'the larger problem', which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination.

31. Nor is this finding any more persuasive when looked at from a territorial perspective. As the Court states in paragraph 121, the wall does not at the present time constitute, *per se*, a *de facto* annexation. 'Peoples' necessarily exercise their right to self-determination within their own territory. Whatever may be the detail of any finally negotiated boundary, there can be no doubt ..., that Israel is in occupation of Palestinian territory. That territory is no more, or less, under occupation because a wall has been built that runs through it. And to bring to an end that circumstance, it is necessary that both sides, simultaneously, accept their responsibilities under international law.

(b) The internal and external dimensions of self-determination

The right to self-determination has both an external and an internal dimension: it implies both that peoples under colonial or other forms of alien domination or foreign occupation have a right to resist against such domination or occupation, and to be supported by the international community in this regard, although within the limits imposed by international law; and that the population has a right to a government representative of all the groups within the population. This second dimension is illustrated by the interpretation of Article 20 of the African Charter on Human and Peoples' Rights in the *Gambian coup* case, where the African Commission held that the coup of 11 November 1994, that brought into power a military government, deprived the 'Gambian people' of their right to 'freely determine their political status', as required by Article 20(1) (Joined Communications 147/95 and 149/96, *Jawara* v. *The Gambia*, (2000) A.H.R.L.R. 107 (ACHPR 2000) (Thirteenth Annual Activity Report), para. 73). There is a link between the two dimensions: although, in principle, the right to self-determination only may be interpreted as a right to seek independence in cases of colonial or foreign occupation, and should not otherwise justify questioning the territorial integrity of the State, a different interpretation may prevail if and when a group of the population, located within one portion of the territory, is denied the right to take part on the basis of the principle of non-discrimination in the political life of the country (see, on this issue, J. Brossard, 'Le droit du peuple québecois de disposer de lui-même au regard du droit international', *Canadian Yearbook of International Law*, 15 (1977), 84; J. Crawford, 'State Practice and International Law in Relation to Secession', *British Yearbook of International Law*, 69 (1998), 85 (which is the slightly amended version of a brief prepared for *amici curiae* intervening in the *Secession of Quebec* case examined below); J. Crawford, 'The Right to Self-determination in International Law: its Development and Future' in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, 2001), p. 7; D. Murswief, 'The Issue of a Right to Secession Reconsidered' in C. Tomuschat (ed.), *Modern Law of Self-determination* (Dordrecht: Martinus Nijhoff, 1993), p. 21)). Consider, arguably opening the door to this interpretation, the position of the African Commission on Human and Peoples' Rights in the *Katangese Secession* case:

African Commission on Human and Peoples' Rights, Communication 75/92, *Katangese Peoples' Congress* v. *Zaire* (2000) A.H.R.L.R. 72 (ACHPR 1995) (Eighth Annual Activity Report):

1. The communication was submitted in 1992 by Mr Gerard Moke, President of the Katangese Peoples' Congress requesting the African Commission on Human and Peoples' Rights to: recognise the Katangese Peoples' Congress as a liberation movement entitled to support in the achievement of independence for Katanga; – recognise the independence of Katanga; – help secure the evacuation of Zaire from Katanga.

The Law

2. The claim is brought under Article 20(1) of the African Charter on Human Rights. There are no allegations of specific breaches of other human rights apart from the claim of the denial of self-determination.

3. All peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in the case is not self-determination for all Zaireoise as a people but specifically for the Katangese. Whether the Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect.

4. The Commission believes that self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.

5. The Commission is obligated to uphold the sovereignty and territorial integrity of Zaire, member of the OAU and a party to the African Charter on Human and Peoples' Rights

6. In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

For the above reasons, the Commission

Declares that the case holds no evidence of violations of any rights under the African Charter. There quest for independence for Katanga therefore has no merit under the African Charter on Human and Peoples' Rights.

The position adopted by the Supreme Court of Canada a few years later seems to apply the same principle, refusing to identify a 'right to secede' in the internal dimension of the right to self-determination, although not excluding that, in certain cases of manifest oppression of a 'people' within a State, such a right might exist:

Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217:

[The Supreme Court of Canada was referred three questions, pursuant to section 53 of the Supreme Court Act which allows the Governor in Council to refer to the Court any important

question of law or fact. Among those questions was this one: 'Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?' The Court answers as follows:]

(1) Secession at International Law

111 It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state … Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of 'a people' to self-determination. The *amicus curiae* addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the *amicus curiae*, for reasons that we will briefly develop.

(a) Absence of a Specific Prohibition 112 International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g. the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), at pp. 8–9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination 113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the 'rights' of entities other than nation states – such as the right of a *people* to self-determination.

114 The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law. (A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171–72; K. Doehring, 'Self-determination', in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.) …

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining 'Peoples' 123 International law grants the right to self-determination to 'peoples'. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of 'peoples', the result has been that the precise meaning of the term 'people' remains somewhat uncertain.

124 It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a 'people', as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination 126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. *External* self-determination can be defined as in the following statement from the *Declaration on Friendly Relations* as '[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a *people* constitute modes of implementing the right of self-determination by *that people*.' [Emphasis added by the court.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128 The *Declaration on Friendly Relations*, the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are *not* to 'be construed as authorizing or encouraging any action that would dismember or *impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples* and thus possessed of a Government representing the whole people belonging to the territory without distinction …' [Emphasis added by the court.] …

130 While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples 131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of 'parent' states. However, as noted by Cassese, *supra*, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised 'externally', which, in the context of this Reference, would potentially mean secession: '… the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their "territorial integrity", all but destroyed by the colonialist or occupying Power, should be fully restored …'

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the *Declaration on Friendly Relations* [quoted above in this section].

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent 'the whole people belonging to the territory without distinction of any kind' adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold …

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a 'sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction'.

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138 In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of 'people' or 'peoples', nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

The two dimensions – external and internal – of the right to self-determination are made explicit by the Committee on the Elimination of Racial Discrimination:

Committee on the Elimination of Racial Discrimination, General Recommendation No. 21, *Right to Self-determination* (adopted at the forty-eighth session, on 23 August 1996):

4. In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples

to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.

5. In order to respect fully the rights of all peoples within a State, Governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of Governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens. Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.

6. The Committee emphasizes that, in accordance with the Declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or colour ... [I]nternational law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in [the report of the UN Secretary-General of 17 June 1992 (A/47/277-S/2411) *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*] (paras. 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.

The insistence of the Committee for the Elimination of Racial Discrimination on the need to have 'a Government representing the whole people belonging to the territory, without distinction as to race, creed or colour' illustrates the link between the right to self-determination of peoples, considered in its internal dimension, and the protection of minority rights. This link also clearly appears from the views adopted by the Human Rights Committee in the case of *Kitok* v. *Sweden*, presented below, as well as from the recent Concluding Observations adopted by the Committee on the implementation of the ICCPR in Canada in which the Committee, 'while noting with interest Canada's

undertakings towards the establishment of alternative policies to extinguishment of inherent aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of aboriginal rights' (CCPR/C/CAN/CO/5, 20 April 2006, para. 8 – see below, section 5.2., a)). *Kitok* is also significant, however, in another respect: it excludes the use of the individual communications procedure in order to raise an issue under Article 1 ICCPR, since the right-holder of the right to self-determination is the 'people', rather than any individual victim.

(c) The lack of justiciability of the right to self-determination in the context of individual communications

Human Rights Committee, *Ivan Kitok* v. *Sweden*, Communication No. 197/1985 (CCPR/C/33/D/197/1985), final views of 27 July 1988:

[The author of the communication is a Swedish citizen of Sami ethnic origin, who belongs to a Sami family which has been active in reindeer breeding for over one hundred years. He claims to have been denied the right to reindeer breeding inherited from his forefathers as well as the rights to land and water in Sörkaitum Sami Village, after having lost his membership in the Sami village. Indeed, in an attempt to reduce the number of reindeer breeders, the Swedish authorities have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the village, which he cannot re-enter unless by special permission: as a result, having become a non-member of the village, he cannot exercise Sami rights to land and water. Thus it is claimed that the Crown arbitrarily denies the immemorial rights of the Sami minority and that the author of the communication is the victim of such denial of rights. Ivan Kitok claims to be the victim of violations by the Government of Sweden of articles 1 and 27 of the Covenant.]

6.3 With regard to the State party's submission that the communication should be declared inadmissible as incompatible with article 3 of the Optional Protocol or as 'manifestly ill-founded', the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article 1 of the Covenant deals with rights conferred upon peoples, as such. However, with regard to article 27 of the Covenant, the Committee observed that the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. Therefore, it decided that the issues before it, in particular the scope of article 27, should be examined with the merits of the case …

9.1 The main question before the Committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of the communication has been denied the right to 'enjoy [his] own culture', as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such

membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant, which provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

9.3 The Committee observes in this context that the right to enjoy one's own culture in community with the other members of the group cannot be determined in abstract but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much a conflict between the author as a Sami and the State party but rather between the author and the Sami community ..., the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged. As the State party itself points out, an appeal against a decision of the Sami community to refuse membership can only be granted if there are Special reasons for allowing such membership; furthermore, the State party acknowledges that the right of the County Administrative Board to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reinder breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant. Section 11 of the Reindeer' Husbandry Act provides that: 'A member of a Sami community is: 1. A person entitled to engage in reindeer husbandry who participates in reindeer husbandry within the pasture area of the community. 2. A person entitled to engage in reindeer husbandry who has participated in reindeer husbandry within the pasture area of the village and who has had this as his permanent occupation and has not gone over to any other main economic activity. 3. A person entitled to engage in reindeer husbandry who is the husband or child living at home of a member as qualified in subsection 1 or 2 or who is the surviving husband or minor child of a deceased member.' Section 12 of the Act provides that: 'A Sami community may accept as a member a person entitled to engage in reindeer husbandry other than as specified in section 11, if he intends to carry on reindeer husbandry with his own reindeer within the pasture area of the community. If the applicant should be refused membership, the County Administrative Board may grant him membership, if special reasons should exist.'

9.7 It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the *ratio decidendi* in the *Lovelace* case (No. 24/1977, *Lovelace* v. *Canada*), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.

The view according to which Article 1 ICCPR is not justiciable in the context of individual communications has since been confirmed by the Human Rights Committee on a number of occasions. One of these was the case of *Diergaardt* v. *Namibia*, which also raised an issue under Article 25 ICCPR, which guarantees a right to effective political participation.

Human Rights Committee, *Diergaardt et al.* v. *Namibia*, Communication No. 760/1997 (CCPR/C/69/D/760/1997), final views of 25 July 2000:

[The applicants are representatives and members of the Rehoboth Baster Community, which numbers 35,000 persons. The Basters are the descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to an area of Namibia (south of Windhoek) in 1872. In this area they developed their own society, culture, language and economy, with which they largely sustained their own institutions, such as schools and community centres. They submit that the Namibian Government has confiscated the assets of the Rehoboth Basters, and that, more generally, the assimilation policy of the government endangers the traditional existence of the community as a collective of mainly cattle-raising farmers. The counsel explains that in times of drought the community needs communal land, on which pasture rights are given to members of the community on a rotating basis. The expropriation of the communal land and the consequential privatization of it, as well as the overuse of the land by inexperienced newcomers to the area, has led to bankruptcy for many community farmers, who have had to slaughter their animals. As a consequence, they cannot pay their interests on loans granted to them by the Rehoboth Development Corporation (which used to be communal property but has now been seized by the Government), their houses are then sold to the banks and they find themselves homeless. Counsel emphasizes that the confiscation of all property

collectively owned by the community robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity. This is said to constitute a violation of Article 27 ICCPR.

The authors also claim to be victims of a violation by the Government of Namibia of Article 1 of the Covenant. They claim that their right to self-determination inside the Republic of Namibia (so-called internal self-determination) has been violated, since they are not allowed to pursue their economic social and cultural development, nor are they allowed to dispose freely of their community's national wealth and resources. By enactment of the Law on Regional Government 1996, the 124-year long existence of Rehoboth as a continuously organized territory was brought to an end. The territory is now divided over two regions, thus preventing the Basters from effectively participating in public life on a regional basis, since they are a minority in both new districts. Counsel claims that this constitutes a violation of Article 25 of the Covenant.

In addition, the authors further claim a violation of Article 14 ICCPR, since they were forced to use English throughout the court proceedings, a language they do not normally use and in which they are not fluent. Moreover, they had to provide sworn translations of all documents supporting their claims (which were in Afrikaans) at very high cost. They claim therefore that their right to equality before the Courts was violated, since the Court rules favour English speaking citizens. While Article 3 of the Constitution declares English to be the only official language in Namibia, para. 3 of this article allows for the use of other languages on the basis of legislation by Parliament. But such a law has still not been passed, and this, in the view of the authors, constitutes discrimination against non-English speakers. According to counsel, attempts by the opposition to have such legislation enacted have been thwarted by the Government which declared having no intention to take any legislative action in this matter. In this connection, counsel refers to the 1991 census, according to which only 0.8 per cent of the Namibian population uses English as its mother tongue. This situation is said to be a violation of their rights under Articles 26 and 27 ICCPR.]

10.3 The authors have alleged that the termination of their self-government violates article 1 of the Covenant. The Committee recalls that while all peoples have the right of self determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive (4)(5). As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.

10.4 The authors have made available to the Committee the judgement which the Supreme Court gave on 14 May 1996 on appeal from the High Court which had pronounced on the claim of the Baster community to communal property. Those courts made a number of findings of fact in the light of the evidence which they assessed and gave certain interpretations of the applicable domestic law. The authors have alleged that the land of their community has been expropriated and that, as a consequence, their rights as a minority are being violated since their

culture is bound up with the use of communal land exclusive to members of their community. This is said to constitute a violation of Article 27 of the Covenant.

10.5 The authors state that, although the land passed to the Rehoboth Government before 20 March 1976, that land reverted to the community by operation of law after that date. According to the judgement, initially the Basters acquired for and on behalf of the community land from the Wartbooi Tribe but there evolved a custom of issuing papers (*papieren*) to evidence the granting of land to private owners and much of the land passed into private ownership. However, the remainder of the land remained communal land until the passing of the Rehoboth Self-Government Act No. 56 of 1976 by virtue of which ownership or control of the land passed from the community and became vested in the Rehoboth Government. The Baster Community had asked for it. Self-Government was granted on the basis of proposals made by the Baster Advisory Council of Rehoboth. Elections were held under this Act and the Rehoboth area was governed in terms of the Act until 1989 when the powers granted under the Act were transferred by law to the Administrator General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. And in terms of the Constitution of Namibia, all property or control over property by various public institutions, including the Government of South West Africa, became vested in, or came under the control, of the Government of Namibia. The Court further stated:

'In 1976 the Baster Community, through its leaders, made a decision opting for Self-Government. The community freely decided to transfer its communal land to the new Government. Clearly it saw advantage in doing so. Then in 1989, the community, through the political party to which its leaders were affiliated, subscribed to the Constitution of an independent Namibia. No doubt, once again, the Community saw advantage in doing so. It wished to be part of the new unified nation which the Constitution created ... One aim of the Constitution was to unify a nation previously divided under the system of apartheid. Fragmented self-governments had no place in the new constitutional scheme. The years of divide and rule were over.'

10.6 To conclude on this aspect of the complaint, the Committee observes that it is for the domestic courts to find the facts in the context of, and in accordance with, the interpretation of domestic laws. On the facts found, if 'expropriation' there was, it took place in 1976, or in any event before the entry into force of the Covenant and the Optional Protocol for Namibia on 28 February 1995. As to the related issue of the use of land, the authors have claimed a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the *de facto* exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples. However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government,

the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.

10.7 The Committee further considers that the authors have not substantiated any claim under article 17 that would raise separate issues from their claim under article 27 with regard to their exclusion from the lands that their community used to own.

10.8 The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under Article 25(a) and (c) of the Covenant. The right under Article 25(a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under Article 25(c) is a right to have equal access, on general terms of equality, to public service in one's country. These are individual rights. Although it may very well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

10.9 The authors have claimed that they were forced to use English during the proceedings in court, although this is not their mother tongue. In the instant case, the Committee considers that the authors have not shown how the use of English during the court proceedings has affected their right to a fair hearing. The Committee is therefore of the opinion that the facts before it do not reveal a violation of article 14, paragraph 1.

10.10 The authors have also claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

Individual opinion of Abdalfattah Amor (dissenting):

I cannot subscribe to the Committee's finding of a violation of article 26 of the Covenant, for the following reasons:

1. In article 3 of its Constitution, Namibia, which had declared its independence on 21 March 1991, made English the country's official language out of a legitimate concern to improve the

chances of integration. It was thought that granting any privilege or particular status to one of the many other minority or tribal languages in the country would be likely to encourage discrimination and be an obstacle to the building of the nation. Since then, all languages other than English have been on an equal footing under the Constitution: no privileges, and no discrimination. It is the same for all languages, including Afrikaans, the introduction of which into Namibia was tied up with the history of colonization and which, in any case, ceased to be used as an official language on 21 March 1991.

2. Article 3(3) of the Constitution of Namibia permits the use of other languages in accordance with legislation adopted by Parliament. No such legislation, which in any case could have no effect on the use of English as the official language, has yet been adopted. The guarantees it might have provided or the restrictions it might have introduced have not been decreed and as the situation is the same for everyone, no distinction could have been established legislatively in either a positive or a negative sense. Naturally this also applies to the Afrikaans language.

3. The use of minority languages as such has not been limited, far less questioned, at any level other than the official level. In their personal relationships, among themselves or with others, people speaking the same language are able to use that language without interference – which would be difficult to imagine anyway – from the authorities. In other words, there is nothing to limit the use of Afrikaans as the language of choice of the Basters in their relations between themselves or with others who know the language and agree to communicate with them in that language.

4. Whatever legislative weaknesses there may have been so far, the right to use one's mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens. The State may impose the use of the common language on everyone; it is entitled to refuse to allow a few people to lay down the law. In other words, everyone is equal in relation to the official language and any linguistic privileges – unless they apply to all, in which case they would no longer be privileges – would be unjustifiable and discriminatory. The Basters complain that they are not able to use their mother tongue for administrative purposes or in the courts. However, they are not the only ones in this situation. The situation is exactly the same for everyone speaking the other minority languages. In support of their complaint, the Basters provide a copy of a circular issued by the Regional Commissioner of the Central Region of Rehoboth dated 4 March 1992, in which, according to their counsel, 'the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded'. This circular, although not very skillfully drafted, actually says something else and, in any case, certainly says more than that. [It] refers to the fact that on 21 March 1992 Afrikaans ceased to be the official language and that since then English has been the official language of Namibia. As a result, Afrikaans has the same official status as the other tribal languages, of which there are many. [The circular also bans] the continuing use by State officials of Afrikaans in their replies, in the exercise of their official duties, to telephone calls and letters; [and it requires] that all telephone calls and official correspondence should be carried out exclusively in English, the official language of Namibia.

In other words, State services must use English, and English only, and refrain from giving privileged status to any unofficial language. From this point of view, Afrikaans is neither more nor less important than the other tribal languages. This means that minority languages must be treated without discrimination. Consequently, there is no justification, unless one wishes to discriminate against the other minority languages and disregard article 3 of the Constitution of Namibia, for continuing to deal with the linguistic problem in a selective manner by favouring one particular language, Afrikaans, at the expense of the others. In that respect, the Regional Commissioner's circular does not reveal any violation of the principle of equality and certainly not of the provisions of article 26 of the Covenant …

Other dissenting opinions

[The views expressed by Mr Amor were shared by five other members of the Committee. Mr Nisuke Ando filed a separate dissenting opinion on the matter. In their joint dissenting opinion, P. N. Bhagwati, Lord Colville, and Maxwell Yalden noted the following:]

The circular is clearly intended to provide that all official phone calls and correspondence should be treated exclusively in English, which is the official language of the State. That is the thrust, the basic object and purpose of the circular and it is in pursuance of this object and purpose that the circular directs that the Government officials should refrain from using Afrikaans when responding to official phone calls and correspondence. The circular refers specifically only to Afrikaans and seeks to prohibit its use by Government officials in official phone calls and correspondence, because the problem was only in regard to Afrikaans which was at one time, until replaced by English, the official language and which continued to be used by Government officials in official phone calls and correspondence, though it had been ceased to be the official language of the State. There was apparently no problem in regard to the tribal languages because they were at no time used in administration or for official business. But Afrikaans was being used earlier for official purposes and hence it became necessary for the State to issue the circular prohibiting the use of Afrikaans in official phone calls and correspondence. That is why the circular specifically referred only to Afrikaans and not to the other languages. This is also evident from the statement in the circular that Afrikaans now enjoys the same status as other tribal languages. It is therefore not correct to say that the circular singled out Afrikaans for unfavourable treatment as against other languages in that there was hostile discrimination against Afrikaans. We consequently hold that there was no violation of the principle of equality and non-discrimination enshrined in article 26.

[In his dissenting opinion, Rajsoomer Lallah noted:]

The real complaint of the authors with regard to Article 26, when seen in the context of their other complaints, would suggest that they still hanker after the privileged and exclusive status they previously enjoyed in matters of occupation of land, self-government and use of language under a system of fragmented self-governments which apartheid permitted. Such a system no longer avails under the unified nation which the Constitution of their country has created.

The cases of *Kitok* and *Diergaardt* may be usefully contrasted with the approach adopted by the African Commission on Human and Peoples' Rights under Article 21 of the African Charter on Human and Peoples' Rights, in the context of the *actio popularis* recognized under the Charter.

African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Comm. No. 155/96 (2001):

[This case was already examined in chapter 3, section 1. It will be recalled that this communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People. The complainants invoked, among other provisions, Article 21 of the African Charter of Human and Peoples' Rights:]

55. The Complainants ... allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21.

Article 21 provides:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.

57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (see *Union des Jeunes Avocats/Chad* [Communication 74/92]).

This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velàsquez Rodríguez* v. *Honduras* [Inter-American Court of Human Rights, *Velàsquez Rodríguez* case, judgment of 19 July 1988, Series C, No. 4]. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y* v. *Netherlands* [26 March 1985: see chapter 4, section 1.2.]. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

5.2 Minority rights

There are three ways, arguably, through which minority rights can be protected under human rights instruments (for further discussions about the relationship between human rights and minority rights, see M. Scheinin and R. Toivanen (eds.), *Rethinking Non-Discrimination and Minority Rights* (Turko/Abo: Institute for Human Rights of Abo Akamedi University and Berlin: German Institute for Human Rights, 2004); and J. Ringelheim, *Diversité culturelle et droits de l'homme* (Brussels: Bruylant, 2006)). First, minorities – whether they are ethnic, linguistic, religious, or cultural – can be protected through the general prohibition of non-discrimination. Second, minorities can be protected through other human rights provisions, such as freedom of religion, freedom of association, or the right to respect for private life. Third and finally, the right of minorities 'to enjoy their own culture, to profess and practise their own religion, or to use their own language', can be protected as such, under Article 27 of the International Covenant on Civil and Political Rights: although this provision refers to the 'persons belonging to minorities' as the rights-holders, it nevertheless begins with the recognition that such rights matter because of the existence of minorities under the State's jurisdiction. This latter form of protection may be called 'direct', since it refers explicitly to the rights of minorities rather than 'indirectly' allowing for members of minority groups to exercise their individual rights collectively. The boundaries between these different techniques of protection are sometimes blurred: for instance, as we shall see below, the right to respect for private life has occasionally been read as providing, in substance, a protection similar to that of Article 27 ICCPR.

These approaches may of course be combined, as they are under the ICCPR. Similarly, under the Council of Europe Framework Convention for the Protection of National Minorities adopted in 1995, the parties not only undertake to 'promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage' and to 'refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation' (Art. 5), they also commit to 'guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law' and to prohibit discrimination (Art. 4(1)) as well as to 'ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion' (Art. 7).

The potential of the non-discrimination provisions contained in international human rights instruments has been explored above. Here, we review the two other routes through which the rights of minorities – or of persons belonging to minorities – can be protected, beginning with the 'direct' approach.

(a) The direct route: the explicit protection of rights of minorities

According to Article 27 ICCPR, 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. As a number of the cases above illustrate, claims based on the right to self-determination may occasionally also raise issues which concern the protection of minority rights. This link is recognized by the Human Rights Committee:

Human Rights Committee, Concluding Observations: Canada (CCPR/C/CAN/CO/5, 20 April 2006), paras. 8–10:

8. The Committee, while noting with interest Canada's undertakings towards the establishment of alternative policies to extinguishment of inherent aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of aboriginal rights (arts. 1 and 27).

The State party should re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights. The Committee would also like to receive more detailed information on the comprehensive land claims agreement that Canada is currently negotiating with the Innu people of Quebec and Labrador, in particular regarding its compliance with the Covenant.

9. The Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. It is also concerned about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regrets that the State party has not provided information on this specific issue (arts. 1 and 27).

The State party should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.

10. The Committee, while noting the responses provided by the State party in relation to the preservation, revitalization and promotion of Aboriginal languages and cultures, remains concerned about the reported decline of Aboriginal languages in Canada (art. 27). The State party should increase its efforts for the protection and promotion of Aboriginal languages and cultures. It should provide the Committee with statistical data or an assessment of the current situation, as well as with information on action taken in the future to implement the recommendations of the Task Force on Aboriginal Languages and on concrete results achieved.

Human Rights Committee, *Chief Bernard Ominayak and the Lubicon Lake Band* v. *Canada*, Communication No. 167/1984 (UN Doc. Supp. No. 40 (A/45/40) at 1), final views of 26 March 1990:

[Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta, which are subject to the jurisdiction of the Federal Government of Canada. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy. It is claimed that the Canadian Government, despite the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), which recognized the right of the original inhabitants of that area to continue their traditional way of life, has allowed the provincial Government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g. leases for oil and gas exploration). The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene Canada's obligations under article 1, paras. 1–3, of the International Covenant on Civil and Political Rights.]

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and

gas exploration) and destroyed, thus depriving the Lubicon Lake Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communications in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an ex gratia payment to the Band of $C1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible 'in so far as it may raise issues under article 27 or other articles of the Covenant'. In view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure 'to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band'.

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its long-standing policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations.

29.5 Since October 1987, the parties have made a number of submissions, refuting each other's statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community, that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community

constitutes cruel, inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1, and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17 and 23, paragraph 1; that the Band members have been 'robbed of the physical realm to which their religion attaches' in violation of article 18, paragraph 1; and that all of the above also constitutes violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lubicon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognlze the jurisdiction of the Canadian courts. The author further accused the State party of 'practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people'.

29.8 FollowIng an agreement between the provincial government of Alberta and the Lubicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Band withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the federal Government amounted to approximately $C45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, 'which committed the Federal Government to virtually nothing', and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounding the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth $C45 million would amount to almost $C500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for $C167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, *inter alia*, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30. The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in articles 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made the consideration of the claims on the merits most difficult ...

Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. Sweeping allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1, and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly of a sweeping nature and will not be taken into account except in so far as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

Violations and the remedy offered

33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

Human Rights Committee, *Ballantyne, Davidson, McIntyre* v. *Canada*, Communications Nos. 359/1989 and 385/1989 (CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993)), final views of 31 March 1993:

[The authors of the communications are Canadian citizens residing in the Province of Quebec. The authors, one a painter, the second a designer and the third an undertaker by profession, have their businesses in Sutton and Huntingdon, Quebec. Their mother tongue is English, as is that of many of their clients. They allege to be victims of violations of Articles 2, 19, 26 and 27 of the International Covenant on Civil and Political Rights by the Federal Government of Canada and by the Province of Quebec, because they are forbidden to use English for advertising purposes, e.g. on commercial signs outside the business premises, or in the name of the firm. Indeed, Bill No. 178 enacted by the Provincial Government of Quebec on 22 December 1988 intends to ensure that only French may be used in public billposting and in commercial advertising outdoors. It stipulates that this rule shall also apply inside means of public transport and certain establishments, including shopping centres.]

11.2 As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the 'State' or to 'States' in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.

11.3 Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor

advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3(a) and 3(b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

11.5 The authors have claimed a violation of their right, under article 26, to equality before the law; the Government of Quebec has contended that Sections 1 and 6 of Bill 178 are general measures applicable to all those engaged in trade, regardless of their language. The Committee notes that Sections 1 and 6 of Bill 178 operate to prohibit the use of commercial advertising outdoors in other than the French language. This prohibition applies to French speakers as well as English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking, may not do so. Accordingly, the Committee finds that the authors have not been discriminated against on the ground of their language, and concludes that there has been no violation of article 26 of the Covenant.

12. The Human Rights Committee ... is of the view that the facts before it reveal a violation of article 19, paragraph 2, of the Covenant.

Human Rights Committee, General Comment No. 23, *The Rights of Minorities* (Art. 27) (CCPR/C/21/Rev.1/Add. 5) (8 April 1994):

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The Committee observes that this

article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant …

3.1. The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

4. The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not. Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2. Article 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term 'exist' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3(f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3(f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.

6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

8. The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

The definition of minorities in international law

One obstacle to the protection of the rights of minorities in international law, whether under Article 27 ICCPR or under other instruments such as the Council of Europe Framework Convention for the Protection of National Minorities (FCNM), may reside in the absence of a generally agreed upon definition of 'minorities' which should benefit from this protection. The attempts to arrive at an authorized definition have failed. When asked to prepare a comment on the protection of the rights of minorities in the European Union, the EU Network of Independent Experts on Fundamental Rights – a group of independent experts charged with preparing reports and opinions on the basis of the EU Charter of Fundamental Rights, to inform the work of the European Commission and the European Parliament – remarked:

EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3, *The Protection of Minorities in the European Union* (25 April 2005), para. 1.1.:

Several definitions of 'minorities' or 'national minorities' have been proposed within international organisations. Mr Francesco Capotorti drafted a study in 1977 for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities [F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991)]. Mr Jules Deschênes was charged in 1985 by the same body with the study of the question of the definition of minorities [J. Deschênes, *Proposal concerning the Definition of the Term 'Minority'*, E/CN.4/Sub.2/1985/31, 14 May 1985] ... Although these definitions are not legally binding, they serve as a reference to determine the meaning of the notion of a 'minority' in international law. Indeed, although States are recognized a margin of appreciation in identifying the 'minorities' which exist under their jurisdiction, they may not use this margin of appreciation in order to evade their obligations under international law. Thus, international bodies have been led to note that the qualification of 'minority' is a matter of fact and not of law [Permanent Court of International Justice, Advisory opinion regarding Greco-Bulgarian communities, 31 July 1930, *P.C.J. Reports, Series B* No. 17]: a group has to be recognised as a 'minority' in the sense of international law when it possesses all the characteristics, independent of whether it is recognised as such by national law. In its General Comment on Article 27 ICCPR, the UN Human Rights Committee states: 'The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.' [Human Rights Committee, General Comment on Article 27 ICCPR, para.5.2. See also the Advisory Committee of the Framework Convention for the Protection of National Minorities: '[T]he applicability of the Framework Convention does not necessarily mean that the authorities should in their domestic legislation and practice use the term "national minority" to describe the group concerned.' (Opinion on Norway, 12 September 2002, ACFC/INF/OP/I (2002)003, para.19); and Parliamentary Assembly of the Council of Europe, Recommendation 1623 (2003), para. 6.]

In the absence however of a consensus among states on the definition of a minority, neither the FCNM, nor any other legally binding international instrument contains such a definition [see the Explanatory Report of the FCNM: 'It was decided to adopt a pragmatic approach, based on

the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States.' (para.12)]. The [Advisory Committee on the Framework Convention] recognises that the states parties have a margin of appreciation to determine the personal scope of application of the FCNM in order to take the specific circumstances prevailing in their country into account. However, it notes … that this margin of appreciation 'must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions.' [See, e.g. Opinion on Albania, (ACFC/INF/OP/I(2003)004), 12 September 2002, para.18; Opinion on Croatia, (ACFC/INF/OP/I(2002)003), 6 April 2001, para.15; Opinion on Italy, (ACFC/INF/OP/I(2002)007), 14 September 2001, para.14.]

[I]t is this latter requirement which is crucial. Where certain specific rights or protections are granted only to groups who are recognized as 'minorities', or to individuals under the condition that they are considered members of 'minorities', the definition relied upon by the States should not lead to arbitrary distinctions being introduced, which would be the source of discrimination. For instance, a State defining 'minorities' under its jurisdiction as a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language, although it would be resorting to a definition which appears dominant in Europe, should not be allowed to rely on that definition to exclude non-citizens from a full range of protections granted to its own nationals, even where these protections contribute to the preservation of 'minority rights'. As recalled by the UN Committee on the Elimination of Racial Discrimination in its General Recommendation 30 on 'Discrimination against non-citizens', although some fundamental rights 'such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, *human rights are, in principle, to be enjoyed by all persons*. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law' [General Recommendation 30 adopted at the sixty-fourth session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3), para. 5 (emphasis added)]. Nor should such a State be allowed to use such a definition in order to reserve to the category of citizens certain rights, while imposing excessive barriers to the access to nationality for persons who are under its jurisdiction and have strong and permanent links to the State.

(b) The indirect route: the protection of the rights of minorities and the right to respect for private and family life

As illustrated by the decisions below, a broad understanding of the requirements of the right to respect for private life have allowed human rights bodies to protect minority rights even where a State denies that minorities exist under its jurisdiction, or in the absence of a specific clause relating to such rights. In the decision it adopted in the *Hopu and Bessert* case, the Human Rights Committee – while accepting that it is not competent to assess whether France has complied with Article 27 ICCPR, due to a declaration

by France that this provision did not apply to it – protects the rights of indigeneous peoples by relying on the definition of 'family' it offered in its General Comment No. 16 (1988) where it stated that 'Regarding the term "family" [which appears in Article 17 ICCPR], the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned' (para. 5).

Human Rights Committee, *Hopu and Bessert* v. *France*, Communication No. 549/1993 (CCPR/C/60/D/549/1993/Rev.1), final views of 29 July 1997:

[The authors are the descendants of the owners of a land tract (approximately 4.5 hectares) called Tetaitapu, in Nuuroa, on the island of Tahiti. They argue that their ancestors were dispossessed of their property by a judgment of the *Tribunal civil* of Papeete on 6 October 1961, awarding the ownership of the land to the Société hôtelière du Pacifique sud (SHPS), and as a result of which construction work has begun on a luxury hotel complex on the site. The authors and other descendants of the owners of the land contend that the land and the lagoon bordering it represent an important place in their history, their culture and their life. They add that the land encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground and provides the means of subsistence for some thirty families living next to the lagoon. Although the authors claimed, *inter alia*, a violation of article 27 of the Covenant, since they are denied the right to enjoy their own culture, the Committee recalled in respect to that claim that 'France, upon acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable as far as the Republic is concerned"'. The Committee confirmed its previous jurisprudence that the French 'declaration' on article 27 operated as a reservation and, accordingly, concluded that it was not competent to consider complaints directed against France under article 27 of the Covenant.]

10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State

party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

[This generous reading of Article 17 ICCPR was challenged by four members of the Committee. Committee members David Kretzmer and Thomas Buergenthal wrote the following dissenting individual opinion, co-signed by Nisuke Ando and Lord Colville:]

4. In reaching the conclusion that the facts in the instant case do not give rise to an interference with the authors' family and privacy, we do not reject the view, expressed in the Committee's General Comment 16 on article 17 of the Covenant, that the term 'family' should 'be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned'. Thus, the term 'family', when applied to the local population in French Polynesia, might well include relatives, who would not be included in a family, as this term is understood in other societies, including metropolitan France. However, even when the term 'family' is extended, it does have a discrete meaning. It does not include all members of one's ethnic or cultural group. Nor does it necessarily include all one's ancestors, going back to time immemorial. The claim that a certain site is an ancestral burial ground of an ethnic or cultural group, does not, as such, imply that it is the burial ground of members of the authors' family. The authors have provided no evidence that the burial ground is one that is connected to their family, rather than to the whole of the indigenous population of the area. The general claim that members of their families are buried there, without specifying in any way the nature of the relationship between themselves and the persons buried there, is insufficient to support their claim, even on the assumption that the notion of family is different from notions that prevail in other societies. We therefore cannot accept the Committee's view that the authors have substantiated their claim that allowing building on the burial ground amounted to interference with their family.

5. The Committee mentions the authors' claim 'that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life'. Relying on the fact that the State party has challenged neither this claim nor the authors' argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds interferes with the authors' right to family and privacy. The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.

6. Contrary to the Committee, we cannot accept that the authors' claim of an interference with their right to privacy has been substantiated. The only reasoning provided to support the Committee's conclusion in this matter is the authors' claim that their connection with their ancestors plays an important role in their identity. The notion of privacy revolves around protection of those aspects of a person's life, or relationships with others, which one chooses to keep from the public eye, or from outside intrusion. It does not include access to public property,

whatever the nature of that property, or the purpose of the access. Furthermore, the mere fact that visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy. One can think of many activities, such as participation in public worship or in cultural activities, that play important roles in persons' identities in different societies. While interference with such activities may involve violations of articles 18 or 27, it does not constitute interference with one's privacy.

7. We reach the conclusion that there has been no violation of the authors' rights under the Covenant in the present communication with some reluctance. Like the Committee we too are concerned with the failure of the State party to respect a site that has obvious importance in the cultural heritage of the indigenous population of French Polynesia. We believe, however, that this concern does not justify distorting the meaning of the terms family and privacy beyond their ordinary and generally accepted meaning.

An early decision of the European Court of Human Rights was *Noack and others* v. *Germany* (Appl. No. 46346/99, decision (inadmissibility) of 25 May 2000), which concerned the transfer – scheduled to take place at the end of 2002 – of the inhabitants of Horno, a village in the *Land* of Brandenburg near the Polish border. Horno has a population of 350, approximately a third of whom are from the Sorbian minority, of Slav origin. Approximately 20,000 Sorbs (*Sorben*) live in the *Land* of Brandenburg. They have their own language and culture. The inhabitants of Horno were to be transferred to a town some twenty kilometres away because of an expansion of lignite-mining operations in the area. The Court noted that 'for the purposes of Article 8 of the Convention, a minority's way of life is, in principle, entitled to the protection guaranteed for an individual's private life, family life and home (see, among other authorities, *G. and E.* v. *Norway*, applications nos. 9278/81 and 9415/81, decision of the Commission of 3 October 1983, DR 35, p. 30; and *Buckley* v. *United Kingdom*, application no. 20348/92, report of the Commission of 11 January 1995, §64; and *Chapman* v. *United Kingdom*, application no. 27238/95, report of the Commission of 25 October 1999, §65). Independently of the issue of the protection of minority rights – those of the Sorbs in this instance – the Court considers that transferring the population of a village raises a problem under Article 8 of the Convention, since it directly concerns the private lives and homes of the people concerned.' The position according to which Article 8 ECHR protects the rights of minorities was made explicit the following year:

European Court of Human Rights (GC), *Chapman* v. *United Kingdom* (Appl. No. 27238/95), judgment of 18 January 2001:

[The applicant is a Gypsy by birth. Since her birth she has travelled constantly with her family in search of work. When she married, the applicant and her husband continued to live in caravans, stopping for as long as possible on temporary or unofficial sites while he found work as a landscape gardener. They were on the waiting list for a permanent site but were never offered a place. They were constantly moved from place to place by the police and representatives of

local authorities. Their four children's education was constantly interrupted because they had to move about. Due to harassment while she led a travelling life, which was detrimental to the health of the family and the education of the children, the applicant bought a piece of land in 1985 with the intention of living on it in a mobile home. The applicant and her family moved on to the land and applied for planning permission. This was to enable the children to attend school immediately. The District Council refused the application for planning permission on 11 September 1986 and served enforcement notices. The appeals lodged against the notices were unsuccessful. There are no local authority sites or private authorized sites in the Three Rivers district, which is defined as a Green Belt area. However, the Government submit that there are local authority and authorized private sites elsewhere in the same county of Hertfordshire, which contains 12 local authority sites which can accommodate 377 caravans. Figures on Gypsy caravans in England from 2000 disclosed that of 13,134 caravans counted, 6,118 were stationed on local authority pitches, 4,500 on privately owned sites and 2,516 on unauthorized sites. Of the latter, 684 Gypsy caravans were being tolerated on land owned by non-Gypsies (mainly local authority land) and 299 Gypsy caravans tolerated on land owned by Gypsies themselves. Of these figures, about 1,500 caravans were therefore on unauthorized and untolerated sites while over 80 per cent of caravans were stationed on authorized sites. The applicant complained that the refusal of planning permission to station caravans on her land and the enforcement measures implemented in respect of her occupation of her land disclosed a violation of Article 8 of the Convention.]

73. The Court considers that 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. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. 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.

74. The Court finds, therefore, that the applicant's right to respect for her private life, family life and home is in issue in the present case …

78. Having regard to the facts of this case, it finds that the decisions of the planning authorities refusing to allow the applicant to remain on her land in her caravans and the measures of enforcement taken in respect of her continued occupation constituted an interference with her right to respect for her private life, family life and home within the meaning of Article 8 §1 of the Convention. It will therefore examine below whether this interference was justified under paragraph 2 of Article 8 as being 'in accordance with the law', pursuing a legitimate aim or aims and as being 'necessary in a democratic society' in pursuit of that aim or aims …

82. The Court notes that the Government have not put forward any details concerning the aims allegedly pursued in this case and that they rely on a general assertion. It is also apparent that the reasons given for the interference in the planning procedures in this case were expressed primarily in terms of environmental policy. In these circumstances, the Court finds that the measures pursued the legitimate aim of protecting the 'rights of others' through preservation of the environment. It does not find it necessary to determine whether any other aims were involved …

90. An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention …

91. In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions …

92. The judgment by the national authorities in any particular case that there are legitimate planning objections to a particular use of a site is one which the Court is not well equipped to challenge. It cannot visit each site to assess the impact of a particular proposal on a particular area in terms of beauty, traffic conditions, sewerage and water facilities, educational facilities, medical facilities, employment opportunities and so on. Because planning inspectors visit the site, hear the arguments on all sides and allow the examination of witnesses, they are better placed than the Court to weigh the arguments. Hence, as the Court observed in *Buckley* (*Buckley* v. *United Kingdom* (judgment of 25 September 1996, *Reports of Judgments and Decisions* 1996–IV), p. 1292, §75 *in fine*), '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation', although it remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities. In these circumstances, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Buckley*, pp. 1292–93, §76).

93. The applicant urged the Court to take into account recent international developments, in particular the Framework Convention for the Protection of National Minorities, in reducing the margin of appreciation accorded to States in light of the recognition of the problems of vulnerable groups, such as Gypsies. The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle …, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

94. However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental

protection, and the interests of a minority with possibly conflicting requirements renders the Court's role a strictly supervisory one.

95. Moreover, to accord to a Gypsy who has unlawfully stationed a caravan site at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under Article 14 of the Convention.

96. Nonetheless, although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented. As intimated in *Buckley*, the vulnerable position of Gypsies 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 (judgment cited above, pp. 1292–95, §§76, 80 and 84). 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 (see, *mutatis mutandis*, *Marckx* v. *Belgium*, judgment of 13 June 1979, Series A No. 31, p. 15, §31; *Keegan* v. *Ireland*, judgment of 26 May 1994, Series A No. 290, p. 19, §49; and *Kroon and Others* v. *Netherlands*, judgment of 27 October 1994, Series A No. 297–C, p. 56, §31).

97. It is important to appreciate that, in principle, Gypsies are at liberty to camp on any caravan site which has planning permission; there has been no suggestion that permissions exclude Gypsies as a group. They are not treated worse than any non-Gypsy who wants to live in a caravan and finds it disagreeable to live in a house. However, it appears from the material placed before the Court, including judgments of the English courts, that the provision of an adequate number of sites which the Gypsies find acceptable and on which they can lawfully place their caravans at a price which they can afford is something which has not been achieved.

98. The Court does not, however, accept the argument that, because statistically the number of Gypsies is greater than the number of places available on authorised Gypsy sites, the decision not to allow the applicant Gypsy family to occupy land where they wished in order to install their caravan in itself, and without more, constituted a violation of Article 8. This would be tantamount to imposing on the United Kingdom, as on all the other Contracting States, an obligation by virtue of Article 8 to make available to the Gypsy community an adequate number of suitably equipped sites. The Court is not convinced, despite the undoubted evolution that has taken place in both international law, as evidenced by the framework convention, and domestic legislations in regard to protection of minorities, that Article 8 can be interpreted as implying for States such a far-reaching positive obligation of general social policy (see paragraphs 93–94 above).

99. It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.

100. In sum, the issue to be determined by the Court in the present case is not the acceptability or not of a general situation, however deplorable, in the United Kingdom in the light

of the United Kingdom's undertakings in international law, but the narrower one of whether the particular circumstances of the case disclose a violation of the applicant's – Mrs Chapman's – right to respect for her home under Article 8 of the Convention.

101. In this connection, the legal and social context in which the impugned measure of expulsion was taken against the applicant is, however, a relevant factor.

102. Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under Article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection (see paragraph 81 above). When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of the home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community.

103. A further relevant consideration, to be taken into account in the first place by the national authorities, is that if no alternative accommodation is available the interference is more serious than where such accommodation is available. The more suitable the alternative accommodation is, the less serious is the interference constituted by moving the applicant from his or her existing accommodation.

104. The evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the rights of the local community to environmental protection. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment.

105. The seriousness of what is at stake for the applicant is demonstrated by the facts of this case. The applicant followed an itinerant lifestyle for many years, stopping on temporary or unofficial sites. She took up residence on her own land by way of finding a long-term and secure place to station her caravans. Planning permission for this was refused, however, and she was required to leave. The applicant was fined twice. She left her land, but returned as she had been moved on constantly from place to place. It would appear that the applicant does not in fact wish to pursue an itinerant lifestyle. She was resident on the site from 1986 to 1990, and between 1992 and these proceedings. Thus, the present case is not concerned as such with the traditional itinerant Gypsy lifestyle.

106. It is evident that individuals affected by an enforcement notice have in principle, and this applicant had in practice, a full and fair opportunity to put before the planning inspectors any material which they regard as relevant to their case and in particular their personal financial and other circumstances, their views as to the suitability of alternative sites and the length of time needed to find a suitable alternative site.

107. The Court recalls that the applicant moved on to her land in her caravans without obtaining the prior planning permission which she knew was necessary to render that occupation lawful. In accordance with the applicable procedures, the applicant's appeals against refusal of planning permission and enforcement notices were conducted in two public inquiries by inspectors who were qualified independent experts. In both appeals, the inspectors visited the site themselves and considered the applicant's representations. As is evidenced by the extension of the time-limit for compliance ..., some notice was taken of the points which the applicant advanced.

108. The first inspector had regard to the location of the site in the Metropolitan Green Belt and found that the planning considerations, both national and local, outweighed the needs of the applicant ... The second inspector considered that the use of the site for the stationing of caravans was seriously detrimental to the environment, and would 'detract significantly from the quiet rural character' of the site, which was both in a Green Belt and an Area of Great Landscape Value. He concluded that development of the site would frustrate the purpose of the Green Belt in protecting the countryside from encroachment. The arguments of the applicant did not in his judgment justify overriding these important interests ...

109. Consideration was given to the applicant's arguments, both concerning the work that she had done on the site by tidying and planting and concerning the difficulties of finding other sites in the area. However, both inspectors weighed those factors against the general interest of preserving the rural character of the countryside and found that the latter prevailed.

110. It is clear from the inspectors' reports ... that there were strong, environmental reasons for the refusal of planning permission and that the applicant's personal circumstances had been taken into account in the decision-making process. The Court also notes that appeal to the High Court was available in so far as the applicant felt that the inspectors, or the Secretary of State, had not taken into account a relevant consideration or had based the contested decision on irrelevant considerations.

111. The Court observes that during the planning procedures it was acknowledged that there were no vacant sites immediately available for the applicant to go to, either in the district or in the county as a whole. The Government have pointed out that other sites elsewhere in the county do exist and that the applicant was free to seek sites outside the county. Notwithstanding that the statistics show that there is a shortfall of local authority sites available for Gypsies in the country as a whole, it may be noted that many Gypsy families still live an itinerant life without recourse to official sites and it cannot be doubted that vacancies on official sites arise periodically.

112. Moreover, given that there are many caravan sites with planning permission, whether suitable sites were available to the applicant during the long period of grace given to her was dependent upon what was required of a site to make it suitable. In this context, the cost of a site compared with the applicant's assets, and its location compared with the applicant's desires are clearly relevant. Since how much the applicant has by way of assets, what expenses need to be met by her, what locational requirements are essential for her and why are factors exclusively within the knowledge of the applicant, it is for the applicant to adduce evidence on these matters. She has not placed before the Court any information as to her financial situation or as to the qualities a site must have before it will be locationally suitable for her. Nor does the Court have any information as to the efforts she has made to find alternative sites.

113. The Court is therefore not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land without planning permission in a Green Belt area. As stated in *Buckley*, Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest (judgment cited above, p. 1294, §81). If the applicant's problem arises through lack of money, then she is in the same unfortunate position as many others who are not able to afford to continue to reside on sites or in houses attractive to them.

114. In the circumstances, the Court considers that proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interests under Article 8 and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The decisions were reached by those authorities after weighing in the balance the various competing interests. It is not for this Court to sit in appeal on the merits of those decisions, which were based on reasons which were relevant and sufficient, for the purposes of Article 8, to justify the interferences with the exercise of the applicant's rights.

115. The humanitarian considerations which might have supported another outcome at national level cannot be used as the basis for a finding by the Court which would be tantamount to exempting the applicant from the implementation of the national planning laws and obliging governments to ensure that every Gypsy family has available for its use accommodation appropriate to its needs. Furthermore, the effect of these decisions cannot on the facts of this case be regarded as disproportionate to the legitimate aim pursued.

116. In conclusion, there has been no violation of Article 8 of the Convention.

7.11. Questions for discussion: self-determination, minority rights, and multicultural societies

1. According to the principles exposed above concerning the relationship between internal and external self-determination, were the Kosovars entitled to claim secession from Serbia in 2008? Consider the following view:

Dajena Kumbaro, *The Kosovo Crisis in an International Law Perspective: Self-determination, Territorial Integrity and the NATO Intervention*, prepared for the NATO Office of Information and Press, 16 June 2001, pp. 47–8:

The Kosovo Albanians as a group are entitled to the right to self-determination for the reason that they traditionally lived and continue to do so in a distinct territory with clearly defined borders. They have persistently cultivated and preserved their own ethnic identity through the development of their language, customs and traditions, and by practising their religion, in defiance of the systematic repression consistently exerted by the Serbian authorities.

For almost a decade, the Kosovo Albanians truly believed and advocated for a peaceful solution of the crisis in conformity with their right to self-determination, while continuously and steadily being subject to Serbian authorities' ethnic oppression. The outbreak of the war in

Kosovo completely destroyed this delusive equilibrium, and triggered the urgent need for a political settlement of the crisis.

The recent state practice has demonstrated and confirmed that peaceful changes of borders are already a possibility, such as the dissolution of Soviet Union, or Czechoslovakia. On the other hand, state practice has also recognised the legitimacy of secessionist movements performed through violent attempts to gain effective control over a territory, such as the cases of the secession of Eritrea from Ethiopia, the dissolution of Yugoslavia, and the relative success of the secessionist movement in Chechnya.

The fear that the recognition of a right to secession of Kosovo Albanians would open a Pandora's Box of problems related to other secessionist claims, could not be an argument *per se* against the Kosovo Albanians claim for independence. Each secessionist claim has its individuality and distinct features. Furthermore, the complete inconsistent state practice with regard to secession, even if the Kosovar Albanians claim is upheld and subsequently recognised, is genuinely not very encouraging. The support of the Kosovo Albanians right to self-determination, is relied upon the interpretation of the Saving Clause of the Declaration on Friendly Relations that, at a last resort, though debated, recognises a right to external self-determination if a people is completely denied from meaningfully exerting the right to self-determination internally. The exercise of the right to self-determination of the Kosovo Albanians grounds in the establishment of an occupation like situation in Kosovo featured by a long period of oppression by the Serbian regime. It encompassed the infliction of systematic and gross human rights violations against the ethnic Albanians, their complete expulsion from Kosovo's public life, the thorough frustration of their political, economic, social and cultural development. In addition, the attacks against their physical existence amounting to the performance of ethnic cleansing practices through indiscriminate and deliberate violence exerted by the Serb forces against ethnic Albanian civilians ...

2. Has the absence of a generally agreed upon definition of 'minorities' in international law constituted an obstacle, in practice, to the protection of the rights of minorities or of the persons belonging to minorities? Is the approach proposed by the EU Network of Independent Experts on Fundamental Rights plausible?
3. The debates about the desirability of recognizing the existence of minorities with distinct rights to the preservation of their identity against the pressure to integrate have often revolved around the opposition between liberalism and communitarianism. For communitarians such as Alasdair MacIntyre, Michael Sandel, Michael Walzer or Charles Taylor, individualist views of society are wrong to postulate a fictitious 'unencumbered self', detached from community affiliations; and the procedural approaches to justice that liberals put forward – essentially, that liberal societies should develop procedures that can be neutral towards competing views of the 'good life' – are simply implausible, since we cannot simply shed off the values we inherit and the universe of social norms we inhabit. For instance, while John Rawls, an early and prominent representative of the liberal view, posits an 'ignorance veil' at the basis of his political philosophy, stating that any just society should be built upon principles that we would arrive at should we ignore the position we would occupy within that society (J. Rawls, *A Theory of Justice* (Cambridge,

Mass.: Harvard University Press, 1971)), Walzer remarks: 'Even if they are committed to impartiality, the question most likely to arise in the minds of the members of a political community is not, "What should rational individuals choose under universalizing conditions of such-and-such a sort?" but rather "What would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it?" And this is a question that is readily transformed into "What choices have we already made in the course of our common life? What understandings do we (really) share?" Justice is a human construction, and it is doubtful that it can be made only one way' (M. Walzer, *Spheres of Justice. A Defence of Pluralism and Equality* (Oxford: Martin Robertson, 1983), p 5). On the other side of the debate, the liberals retort that a communitarian approach risks either locking individuals into a fixed identity, or justifying the imposition of the norms of the majority on the historically marginalized groups.

3.1. In your view, on which side of the debate between liberals and communitarians could a human rights approach be situated? Do human rights serve to protect collective identities forged by cultural, religious or moral norms, or do they instead put such norms into question, by imposing that they pass the test of human rights? If they do both, could you argue that human rights are neutral towards different cultures, or instead favour one culture over the other? Relate this to the examples seen in chapter 3, section 3.5., where the issue of restrictions to religious freedom through vestimentary codes was examined. Consider also the view expressed by W. Kymlicka, who writes in the vein of multiculturalism, and attempts to move beyond the liberal/communitarian debate: 'Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating, and supporting the needs and identities of particular ethnic and national groups. The state unavoidably promotes certain cultural identities, and thereby disadvantages others' (W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), p. 108).

3.2. Some writers have proposed 'critical multiculturalism' as a way to accommodate difference in liberal societies: 'Critical multiculturalism seeks to use cultural diversity as a basis for challenging, revising, and relativizing basic notions and principles common to dominant and minority cultures alike, so as to construct a more vital, open, and democratic common culture' (T. Turner, 'Anthropology and Multiculturalism: What is Anthropology that Multiculturalists Should be Mindful of It?', *Cultural Anthropology*, 8, No. 4 (1993), 411). Do you agree? Are human rights an asset or a liability in the promotion of a 'critical multiculturalism' thus conceived?

4.1. As we have seen in chapter 7, the requirement of non-discrimination has a number of ramifications, from the prohibition of direct discrimination to the imposition of positive action. Keeping in mind the meaning of the requirement of non-discrimination, how do you evaluate the views expressed by the Human Rights Committee in *Ballantyne, Davidson, McIntyre* v. *Canada*? Is the decision defensible as a means to ensure that the francophone minority in Canada shall be able to preserve its linguistic identity?

4.2. Could you relate the previous question to the question of self-determination as discussed by the Canadian Supreme Court in the *Secession of Quebec* case? Consider the following view: 'there is growing acceptance that, for real equality to be achieved for [groups that are ethnically or culturally distinct within the State], measures of a collective kind may be necessary. These

can include measures of local autonomy, provisions for separate representation in legislative and executive bodies at central or regional level, land rights (especially in the case of indigenous groups with historical links to areas of land) and so on. The state's acknowledged interest in territorial integrity does not require the subjection of distinct groups within the state to a unitary government dominated by an ethnically defined majority. On the contrary, "arithmetical" equality in such cases may involved a denial to a minority group of any adequate way of life other than that of assimilation into the majority group – in effect, a denial of their right to respect' (J. Crawford, 'The Right to Self-determination in International Law: Its Development and Future' in P. Alston (ed), *Peoples' Rights* (Oxford University Press, 2001), p. 7 at p. 65).

5. Is there a difference between protecting the rights of minorities and protecting the rights of the (individual) members of minorities? Can the latter be achieved without the former? Consider in this respect para. 6.2. of the Human Rights Committee's General Comment No. 23 on *The Rights of Minorities*. Consider also Article 3 of the Framework Convention for the Protection of National Minorities, that states that 'Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice' (para. 1) and adds that 'Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others' (para. 2). The Explanatory Report states that 'no collective rights of national minorities are envisaged' (para. 31), and that the wording of Article 3 should not be interpreted otherwise. What are the implications of this distinction?

PART III

The Mechanisms of Protection

8

Ensuring Compliance with International Human Rights Law: The Role of National Authorities

INTRODUCTION

Since the general framework of international human rights law has been built in the 1960s to the 1980s, a new generation of questions has arisen, which focuses more on the effectiveness of that framework and, particularly, on its impact at national level. The role of national authorities is vital in this respect. International human rights can only be effective on the ground, where they really matter, if national courts, parliaments, and governments rely on them, and if civil society mobilizes in order to hold authorities accountable on that basis (see, e.g. D. Beyleveld, 'The Concept of a Human Right and Incorporation of the European Convention on Human Rights', (1995) *Public Law*, 577; C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002); O. Schachter, 'The Obligation to Implement the Covenant in Domestic Law' in L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p. 311; on the role of national courts in applying international human rights, see B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997)).

Pressure from below is especially important since neither foreign governments, nor international actors, can substitute for the role of local actors. As we have seen, international human rights treaties are specific in that they are concluded not in the interest of the parties, but for the benefit of the population under the jurisdiction of the parties. As noted by Louis Henkin, the implication is that 'the principal element of horizontal deterrence is missing': 'the threat that "if you violate the human rights of your inhabitants, we will violate the human rights of our inhabitants" hardly serves as a deterrent' (L. Henkin, 'International Law: Politics, Values and Functions', *Recueil des cours*, 216 (1989), at 253). Or, as Oona Hathaway puts it: '... a nation's actions against its own citizens do not directly threaten or harm other states. Human rights law thus stands out

as an area of international law in which countries have little incentive to police non-compliance with treaties or norms' (O. A. Hathaway, 'Do Human Rights Treaties Make a Difference', *Yale Law Journal*, 111 (2002), 1935 at 1938). Nor are other international actors, such as foreign non-governmental organizations or international organizations, in a position to compel compliance effectively, either because they lack the incentives to do so, or because they cannot access the information they would require to act effectively. Indeed, Hathaway argues that the ratification of human rights treaties essentially serves a symbolic – or expressive – function, sending a message that the State concerned wishes to be considered a trustworthy partner, but that it otherwise makes no difference in the reality of the lives of people living on the territory of that State. Thus, internalization is essential: it can compensate for the weaknesses of the international regime in bringing about compliance with the international obligations a State has agreed to upon ratifying a treaty.

This chapter examines how the national authorities can contribute to the implementation of the obligations imposed under international human rights law. A first section examines the measures which States may adopt, and in certain cases are obliged to adopt, in order to ensure that they will not violate international human rights treaties to which they are parties. Their basic obligation in this regard is to provide effective remedies to victims of human rights violations (see, generally, D. Shelton, *Remedies in International Human Rights Law*, second edn (Oxford University Press, 2005), particularly chapter 2 on remedies before national courts). While the principle of this obligation is relatively uncontested, its extension to economic and social rights – those enumerated, for instance, in the International Covenant on Economic, Social and Cultural Rights (ICESCR), in the European Social Charter (ESC), or in the Additional (San Salvador) Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights (ACHR) – still remains controversial, as illustrated by the current debates on the 'justiciability' of rights belonging to this category (see, in particular, opposing the justiciability of economic and social rights, A. Neier, 'Social and Economic Rights: a Critique', *Human Rights Brief* 13–2 (2006), 1–3; G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991); C. Tomuschat, 'An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?' in *Weltinnenrecht. Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot, 2005), pp. 815–834). The first section offers a number of illustrations of the tools national courts may use in order to ensure the justiciability of economic and social rights.

However, even where they also benefit economic and social rights, remedies provided to victims of violations may not be sufficient. First, it would not be acceptable for States to avoid having their international responsibility engaged simply by providing, on a case-by-case basis, a reparation to victims, without removing the structural causes of such violations and, thus, adopting the necessary measures to avoid their repetition. Second, there are a number of weaknesses inherent in litigation as a means of ensuring that human rights violations will not be committed. Courts are dependent on the applications they receive. Therefore, in certain cases, for example where the violations are widespread but only minimally affect each individual concerned, where they are

committed without the individuals ever being aware of them – as in the case of the imposition of secret surveillance measures – or where individuals have reasons to fear reprisals if they file an application before a court, judicial mechanisms may prove ineffective. In addition, courts are ill-equipped to deal with general issues, which concern a collectivity of individuals or general policies: the case they are presented with may not be representative of the full range of situations concerned by the same problem; the impact of any particular decision on other individuals, in a situation similar or not to that of the private litigant, may be difficult to anticipate; jurisdictions may have neither the expertise nor the legitimacy to deal with issues which, for instance, raise questions about how the public budgets are spent, or how choices are made between conflicting priorities. For both these reasons, judicial remedies may have to be complemented by other, non-judicial mechanisms, which will ensure that the law- and policy-making in a State will comply with its obligations under the human rights treaties to which it is a party. The second section of this chapter, therefore, examines which non-judicial tools States should put in place in order to ensure the effective protection of human rights.

1 JUDICIAL REMEDIES

1.1 The general requirement to provide effective remedies

It is a general requirement that States provide effective remedies to individuals whose rights have been violated. Under Article 2 para. 3 of the International Covenant for Civil and Polticial Rights (ICCPR) for instance,

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

The implications of this provision have been described as follows by the Human Rights Committee:

Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (29 March 2004):

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to

vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children. The Committee attaches importance to States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

Despite the absence of a clause similar to Article 2 para. 3 ICCPR in the Convention on the Rights of the Child, the Committee on the Rights of the Child stated:

Committee on the Rights of the Child, 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) (CRC/GC/2003/5, 27 November 2003), paras. 24–5:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [CRC] ..., the Committee emphasizes that economic, social and cultural rights, as well as civil and political rights, must be regarded

as justiciable. It is essential that domestic law sets out entitlements in sufficient detail to enable remedies for non-compliance to be effective.

The requirement to provide effective remedies to victims of human rights violations is also stipulated in regional human rights instruments, but with certain variations. Although its wording is otherwise very close to that of Article 2(3) ICCPR, Article 25 ACHR goes much further. It guarantees a right to an effective judicial remedy to the individual whose fundamental rights are violated, not only under the ACHR, but also under the domestic constitution: 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties' (Art. 25 para. 1 ACHR). This autonomous right to an effective remedy where fundamental rights are violated complements specific guarantees under the habeas corpus clause of Article 7 para. 6 ACHR (see generally E. Davidson, 'Remedies for Violations of the American Convention on Human Rights', *International and Comparative Law Quarterly* (1995), 405; on the case below see P. Macklem and E. Morgan, 'Indigenous Rights in the Inter-American System: the Amicus Brief of the Assembly of First Nations in *Awas Tingni* v. *Republic of Nicaragua*', *Human Rights Quarterly*, 22, No. 2 (2000), 569). The following case illustrates how the requirement of an effective remedy is interpreted, in line with the broader obligations of the States parties to the ACHR under Articles 1 and 2:

Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, judgment of 31 August 2001 [2001] I.A.C.H.R. Petition No. 11,577:

[The Mayagna Awas Tingni Community (the Community) of the North Atlantic Autonomous Region filed a petition against Nicaragua under the American Convention on Human Rights with the Inter-American Commission on Human Rights in October 1995. According to the petition, the State was about to grant Sol del Caribe, SA (SOLCARSA), a Korean company, a concession to commence logging on Awas Tingni communal lands. In parallel proceedings, the Community brought its claims before the Nicaraguan courts. This resulted in a judgment by the Constitutional Court of the Supreme Court of Justice, ordering the logging to be stopped. The logging, however, continued despite the judgment.

In November 1997, the petitioners further stated to the Commission that the central element of the petition was Nicaragua's lack of protection of the rights of the community to its ancestral lands, and that this situation still persisted. Furthermore, they requested that the Commission issue a report in accordance with Article 50 of the Convention, which allows the Commission to state its conclusions when settlement cannot be reached and sets the stage for referral to the Inter-American Court of Human Rights (the Court).

The Commission concluded in favour of the Community. It made an application to the Court in June 1998 on the grounds that Nicaragua had not acted to demarcate the Community's land and to compensate it for lost resources. The Commission further stated that Nicaragua had not adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources and that the State did not ensure an effective remedy in response to the Community's protests regarding its property rights. The Commission requested from the Court declarations that the State must establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Community, and must abstain from granting or considering the granting of any concessions used and occupied by the Community until the issue of land tenure has been resolved. The Commission also requested that the State be required to pay equitable compensation for damages suffered by the Community, as well as costs incurred in prosecuting the case under domestic jurisdiction and before the inter-American system.]

111. The Court has noted that article 25 of the Convention has established, in broad terms: 'the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention, but also to those recognized by the Constitution or the law' [see Judicial Guarantees in States of Emergency (Arts 27.2, 25 and 8 ACHR) Advisory Opinion OC–9/87 of 6 October 1987, Series A No. 9, para 23].

112. The Court has also reiterated that the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, 'is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention' [see *Bámaca Velásquez* case, judgment of 25 November 2000, Series C No. 70, para 191].

113. The Court has also pointed out that the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it [*Cantoral Benavides* case, judgment of 18 August 2000, Series C No. 69, para 164].

114. This Court has further stated that for the State to comply with the provisions of the aforementioned article, it is not enough for the remedies to exist formally, since they must also be effective [*Cesti Hurtado* case, judgment of 29 September 1999, Series C No. 56, para 125] …

135. Furthermore, the Court has already said that article 25 of the Convention is closely linked to the general obligation of article 1(1) of the Convention, which assigns protective functions to domestic law in the States Party, and therefore the State has the responsibility to designate an effective remedy and to reflect it in norms, as well as to ensure due application of that remedy by its judicial authorities.

136. Along these same lines, the Court has expressed that '[t]he general duty under article 2 of the American Convention involves adopting protective measures in two directions. On the one hand, suppressing norms and practices of any type that carry with them the violation