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## DIRETTRICE

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## NON-NATIVE RELIGIOUS MINORITIES IN EUROPE AND THE RIGHT TO PRESERVE THEIR FAITH

Silvia Venier\*

SUMMARY: 1. Introduction. – 2. Old and New Minorities: Equal but Different? – 3. Balancing Self-identification and State Recognition. – 4. The Preservation of Religious Minorities' Intangible Cultural Heritage in the Host State. – 5. The Participation of Religious Minorities in the Social, Economic, and Cultural Life of the Host State.

### 1. Introduction

In many parts of the world, religious minorities experience discrimination, persistent human rights violations and ultimately even genocide,<sup>1</sup> as demonstrated by the recent cases of the Rohingya, a Muslim minority originally living in the Rakhine state in Myanmar,<sup>2</sup> or the Yazidi, a Kurdish ethnic group primarily found in the Sinjar region of Northern Iraq and professing a syncretic monotheistic religion.<sup>3</sup>

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<sup>1</sup> For an overview of the academic discussion around the nexus between religion and genocide, see K. TEMONEY, *Religion and genocide studies*, in D. SIMON, L. KAHN, *Handbook of Genocide Studies*, Cheltenham, 2023, pp. 197-212; see also D. BERGEN, *Religion and Genocide. A Historiographical survey*, in D. STONE, *The Historiography of Genocide*, Berlin, 2008, pp. 194-227.

<sup>2</sup> Extreme violence against the Rohingya recently erupted in 2016-2017, when a set of “clearance operations” were carried out by the Myanmar armed forces, which according to evidence collected by the UN Fact Finding Mission amount to the gravest crimes under international law. See UN Human Rights Committee (HRC), Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.32, 2018, paras. 1441 (on genocide), 1511 (on crimes against humanity), 1516 (on war crimes). The International Court of Justice is currently investigating these events in *The Gambia v. Myanmar* case.

<sup>3</sup> The crimes committed by the Islamic State of Iraq and Syria (ISIS) included mass executions, forced religious conversions to Islam, enslavement, and widespread sexual violence against women and girls. See UN HRC, Independent International Commission of Inquiry on the Syrian Arab Republic, *They Came to Destroy. ISIS Crimes against the Yazidi*, UN Doc. A/HRC/32/CRP.2, 2019.

The protracted violence suffered by these groups is often based on the lack of an official recognition of their religious identity in the country of origin. Constitutional and legal arrangements in Myanmar reflect the widespread narrative which considers the Rohingya as foreigners, coming from Muslim countries and threatening the majority of the population who pertains to the Bamar ethnic group and professes Buddhism. The Rohingya are thus not recognised as a distinctive ethnic and religious group, are *de facto* denied citizenship since the adoption of the 1982 Law on nationality,<sup>4</sup> and have suffered the most dramatic violations of basic human rights.<sup>5</sup> Since the “clearance operations” that were perpetrated in 2016 and 2017 by Tatmadaw, the Myanmar army, the Rohingya had been forced to move to Bangladesh to seek for protection. The majority of them now lives in the Cox’s Bazar, one of the largest and most overcrowded refugee camps in the world, in a condition that has been defined as a “prolonged refugee limbo status, as there are few clear paths towards repatriation, integration in Bangladesh society or third country resettlement”.<sup>6</sup>

Similar to the Rohingya, the Yazidi community has been significantly marginalised in the country of origin, Iraq, in particular due to considerations related to their religion, often represented as the “devil worship” by the Muslim majority. From decades they have been suffering from resource deprivation, inadequate service provision, forced land removals, and underrepresentation in Iraqi local governance and security forces. It is generally accepted that the targeted marginalization by the Iraqi State left the Yazidi particularly vulnerable to the attacks perpetrated by the Islamic State of Iraq and Syria (ISIS) in 2014, which have been found to amount to a genocide.<sup>7</sup> Nowadays, the Yazidi are still not recognised as a distinct national group in Iraq, where the National Card Law adopted in 2015 designated certain minors – including the children born of sexual violence experienced by Yazidi women in captivity during the ISIS genocide – as Muslim, regardless of their personal wishes, or those of their non-Muslim parents.<sup>8</sup>

<sup>4</sup> If on the one side, the 1982 Citizenship Law does not altogether deprive Rohingyas of citizenship *per se*, as, under the conditions laid down in Chapter II of the Law, an ethnic group not included in the “full” citizenship” could still qualify for “associate” or “naturalised” citizenship, on the other side the law is being applied in such a way as to render the Rohingyas not eligible for citizenship. For a discussion of this law as applicable to the Rohingya, see UN HRC, Report of the Detailed Findings, cit., paras. 477 ff.; M.M. HAQUE, *Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma*, in *Journal of Muslim Minority Affairs*, 2017, pp. 454-459. For an overview of the issue of statelessness and minority protection, see UN Human Rights Council, Report of the Special Rapporteur on Minority Issues, Statelessness: A Minority Issue, UN Doc. A/73/205, 2018.

<sup>5</sup> See UN HRC, Report of the Detailed Findings, cit.

<sup>6</sup> K. MARSHALL, *The Myanmar Rohingya Tragedy: Religious Dimensions of a Refugee Crisis*, 16 March 2023, [www.berkleycenter.georgetown.edu/blogs/berkley-forum](http://www.berkleycenter.georgetown.edu/blogs/berkley-forum).

<sup>7</sup> UN HRC, *They Came to Destroy*, cit.; UN Investigative Team to Promote Accountability for Crimes Committed by ISIL (Da’esh) (UNITAD), *The ISIL Attack on Sinjar in August 2014 and Subsequent Acts Committed Against the Yazidi Community in Iraq*, 2024.

<sup>8</sup> M. XIAO LIU, S. UPPAL, K. E. NASTAL, *No Way Home: How an ISIS-era Law Prevents Yazidi Women and Their Children Born of Conflict from Returning to Sinjar, Iraq*, 25 March 2025, [www.justsecurity.org](http://www.justsecurity.org).

Religious intolerance is now one of the leading causes of persecution of minorities in many parts of the world.<sup>9</sup> Members of such minorities who escape to other States, in which they hope to be granted protection, are often experiencing not only the risk of repatriation,<sup>10</sup> or the challenges of being accepted in the host societies, but also the need of preserving their cultural, religious and linguistic heritage, far away from their ancestral lands. Discrimination, violence and, now, forced migration risk disrupting the traditional mechanisms by which their knowledge system and beliefs are transmitted to younger generations. This is particularly relevant for those groups, such as the Yazidi, whose unique religious heritage is based on an extensive oral tradition, which may be severely jeopardised in their diaspora.

The right to preservation of the intangible cultural heritage is thus of special relevance for some new religious minorities that have been formed as a result of mass migration and are not in the position to return to their homeland anytime soon. It also appears to remain extremely relevant as, in many parts of the world, a growing number of countries are experiencing the rising popularity of political parties, ideologies and movements which regard immigration as a serious threat to their country's self-identity and prosperity. The conditions of these groups lie at the intersection of different forms of vulnerability, as they pertain to minorities, religious communities, and migrants, any of which can be the target of acts of violence and hate.

This paper focuses on the challenges posed by the protection of new religious minorities in the countries of arrival, with an emphasis on the right to preserve a distinct religious identity abroad, which include the conservation and development of Intangible Cultural Heritage (ICH). It is structured in four sections. The first provides some reflections on the definition of what constitutes a “non-native minority”, focusing on the different level of protection compared to old or historic minorities. The purpose is to take stock of the most recent attempts of defining the scope of the protection granted to new (religious) minorities.

The second section deepens this discussion by looking at the so-called subjective element in the widely accepted definition of “minority” (i.e. self-identification), with the aim to assess whether this can provide an added value in singling out groups who do not have any historic link with the territory in which they found themselves as a consequence of their diaspora. Self-identification may indeed contribute safeguarding a minority's intangible heritage, as the subjective element is often defined as an inclination towards preserving the typical traits of a minority's identity.

In the third section, the discussion centers around the contours of the right to preservation of intangible (religious) heritage abroad. The international legal landscape

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<sup>9</sup> UN Human Rights Council, Report of the Special Rapporteur on Freedom of Religion or Belief, *Elimination of All Forms of Religious Intolerance*, UN Doc. A/72/365, 2017.

<sup>10</sup> As recently occurred to some Yazidi asylum seekers in Germany, see J. HONI, *Germany and the Yazidi – Going back on a promise? Why International Law Obligates Germany to Stop Deportations of Yazidis to Iraq*, 5 February 2024, [www.voelkerrechtsblog.org](http://www.voelkerrechtsblog.org).



covering different sectors, such as ICH, minority protection, and human rights, is investigated to appreciate the existence and the contours of an entitlement of this kind.

The fourth section briefly touches upon the issue of whether promoting a distinct identity may facilitate or compromise the meaningful participation of non-native minorities in the public life of the host State.

## 2. Old and New Minorities: Equal but Different?

As it is generally known, in the long-standing efforts by the international community to develop the international protection of minority rights,<sup>11</sup> it has been impossible to agree on a definition of “minority”. This is due to the fact that States wish to maintain some sort of discretion with respect to the recognition of minority groups within their territories, as well as to the scope of the protection granted.

In any case, since the very beginning of the international debate on this topic, a sharp distinction emerged between, on the one side, old or historic minorities, which are often granted more protection compared to, on the other, new or non-autochthonous groups, which are mainly the result of migration movements.<sup>12</sup> It is indeed debatable whether the scope of application of international minority protection instruments, targeted to traditional minorities, can be extended to new minority groups stemming from migration. In general, States have different opinions and maintain wide discretion, scholarly debate on this topic is highly diversified, and international bodies usually call for a flexible approach.<sup>13</sup> As made clear by the two examples mentioned in the introductory section, in some part of the world also historic minorities may experience extreme violence and persecution simply because of their religion, while in the new countries of arrival these minorities may suffer from a lack of recognition of their special status and from different protection standards compared with traditional minorities.

Double standards in minority protection have always attracted scholarly attention, as evaluating their appropriateness or justification presupposes considering the evolution of the basic tenets of this field. Scholars have however suggested that, nowadays, with the development of universal human rights standards and basic norms of minority protection, there are very few claims that can be legitimately made only by

<sup>11</sup> For an overview of the historic evolution of minority protection in international law, see J. PEJIC, *Minority Protection in International Law*, in *Human Rights Quarterly*, 1997, pp. 666-685; G. PASCALE, *L'evoluzione storica della tutela internazionale delle minoranze religiose*, in M.I. PAPA, G. PASCALE, M. GERVAZI, *La tutela internazionale della libertà religiosa: problemi e prospettive*, Napoli, 2019, pp. 343-374.

<sup>12</sup> For a recent discussion on the importance of comparing the two protection systems of old vs. new minorities, see R. MEDDA-WINDISCHER, *New Minorities, Old Instruments? A Common but Differentiated System of Minority Protection*, in *International Community Law Review*, 2011, pp. 361-391.

<sup>13</sup> For an overview of the approach adopted by international monitoring authorities, see R. MEDDA-WINDISCHER, *Changing Paradigms in the Traditional Dichotomy of Old and New Minorities*, in K. HENRARD (ed.), *Double Standards Pertaining to Minority Protection*, Leiden, 2010, pp. 195-218.



old minorities compared to new migrant groups, such as for instance the right to use the minority language with public authorities or in schools.<sup>14</sup>

In order to appreciate whether and to what extent contemporary international law supports such distinction, it is necessary to consider practice within different regimes, such as minority protection law, as enshrined in the UN Minority Declaration adopted in 1992,<sup>15</sup> or the Council of Europe (CoE) Framework Convention on National Minorities (FCNM) adopted in 1998,<sup>16</sup> as well as standards under international and regional human rights law, which can be interpreted in a minority-sensitive way.

In seeking to clarify whether minority protection law can be extended to new migrant groups, the point of departure is often considered to be the effort made by the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti, in 1979, which relates in particular to Art. 27 of the International Covenant on Civil and Political Rights (ICCPR).<sup>17</sup> In this study, a minority is defined as

“a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.<sup>18</sup>

It now thus generally accepted that the constitutive elements of a minority group include some objective criteria (i.e. the group must be numerically inferior to the rest of the population, be in a non-dominant position and possess distinctive ethnic, religious or linguistic characteristics) and a subjective element (i.e. its perception of pertaining to a minority group and its willingness to show a sense of solidarity towards preserving its distinctive traits, which can also be implicit).<sup>19</sup> The criterion of nationality of the territorial State in which the minority group founds itself, included in Capotorti's definition, has been instead challenged as an essential constitutive element by both the practice of UN human rights bodies, in particular since the authoritative statements of

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<sup>14</sup> Ibid. p. 213.

<sup>15</sup> UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, adopted 18 December 1992 (hereinafter UN Minority Declaration).

<sup>16</sup> For a commentary on the FCNM, see R. HOFMANN, T. H. MALLOY, D. REIN, *The Framework Convention for the Protection of National Minorities. A Commentary*, Leiden, 2018.

<sup>17</sup> Art. 27 ICCPR reads “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”.

<sup>18</sup> F. CAPOTORTI, *Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, 1979, p. 96, para. 568. As it is known, this definition derives from the one elaborated by the Permanent Court of International Justice in its judgement of 26 April 1928 in the case of the *Rights of Minorities in Upper Silesia* and in the advisory opinion delivered on 31 July 1930 concerning the *Greek-Bulgarian Communities*.

<sup>19</sup> For a discussion of these constitutive elements, see M. N. SHAW, *The Definition of Minorities in International Law*, in Y. DINSTEIN, M. TABORY (eds.), *The Protection of Minorities and Human Rights*, Berlin, 1991, p. 23 ff.

the UN Working Group on Minorities in its Commentary to the UN Declaration<sup>20</sup> or the Human Rights Council in its General Comment on Art. 27 ICCPR,<sup>21</sup> and by the doctrine<sup>22</sup>.

That said, it is clearly to be expected that those individuals, who are members of a minority group and also citizens of the State where the minority exists, have stronger rights compared to non-citizens, in particular in relation to their participation in the political and public life of the State, or in accessing social protection and other public services. This is also confirmed by the texts of both Art. 21 of the Universal Declaration of Human Rights (UDHR) and Art. 25 ICCPR, which deal with the citizens' rights to take part in the government of one's country, directly or through freely chosen representatives, and to equal access to public service in one's own country.<sup>23</sup> This is also reflected in regional human rights instruments, such as Art. 13 of the African Charter on Human and Peoples' Rights.

Leaving aside the issue of citizenship, it is far less clear whether and to what extent contemporary international law grants more rights to old minorities, which have historic links to the territory in which their members live or in which they have at least resided for a certain minimum period of time, compared to new minorities who have arrived more recently, often as a result of migratory movements. In reflecting on the rationale of this distinction, Eide suggests that while "in the building of a nation, all the different groups already living there should be respected and their cultural practices and languages should be taken into account", on the other hand "there seems to be a broad assumption that since [migrants minorities] have decided to immigrate of their own free

<sup>20</sup> UN Commission on Human Rights, Commentary of the Working Group of Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2005/2, 2005, para. 10.

<sup>21</sup> UN HRC, *General Comment no. 23: Art. 27 (Rights of Minorities)*, UN Doc. CCPR/C/21/Rev.1/Add.5, 1994, paras. 5.1 and 5.2, according to which "the individuals designed to be protected need not to be citizens of the State party". See also, more recently, the study adopted by the Council of Europe (CoE) Venice Commission Commission for Democracy through law, *Report on Non-citizens and Minority Rights*, CDL-AD(2007)001, 2006, para. 5. The Venice Commission clarifies that the definition based on the combination of subjective and objective criteria "remains a very broad scheme for addressing minority issues and States can therefore develop more detailed criteria – or even propose their own definition – to tackle minority issues, provided they do not rely on arbitrary or unjustified distinctions, which would be the source of discrimination". Ibid., para. 13.

<sup>22</sup> See P. PUSTORINO, *Questioni in materia di tutela delle minoranze nel diritto internazionale ed europeo*, in *Studi sull'integrazione europea*, 2006, p. 263.

<sup>23</sup> UN HRC, *General Comment no. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, UN Doc. CCPR/C/21/Rev.1/Add.7, 1996, para. 3, according to which "[i]n contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), Art. 25 protects the rights of "every citizen"". With respect to this point, it may be worth emphasizing that the debate over naturalization (i.e. procedures to grant citizenship) is an extremely sensitive topic, also related to migration flows and minority protection, upon which States desire to maintain all necessary discretion. Indeed, while some States practice the principle of *jus soli*, which means that children born on their territories, as a general rule, obtain citizenship even if their parents are not citizens, others restrict themselves to *jus sanguinis*, meaning that only children born of parents who already are citizens automatically obtain citizenship.

will, they should generally accept the cultural and linguistic make-up of the country in which they now want to settle”.<sup>24</sup> Yet, we have seen that the “free will” of migrant communities, especially when they pertain to persecuted groups in the country of origin, is debatable.

In the above cited Commentary on the UN Minorities Declaration, the Working Group seems to adopt this perspective when it concludes that the groups “who have been established for a long time on the territory may have stronger rights than those who have recently arrived”,<sup>25</sup> while suggesting that “the best approach appears to be to avoid making an absolute distinction between ‘new’ and ‘old’ minorities by excluding the former and including the latter, but to recognize that in the application of the Declaration the ‘old’ minorities have stronger entitlements than the ‘new’”.<sup>26</sup>

Yet, the exact contours of the “stronger entitlements” possessed by historic minorities compared to non-native minorities are not completely clear and are often highly context specific. As discussed above, it is now increasingly clear that some new religious minorities are forced to move to escape from discrimination, violence or even genocide. We may thus wonder whether recent international practice suggests the existence of a double protection standards between old and new minorities in the host country. Some clarifications can be offered in the frame of international human rights law, which has significantly contributed to enhancing the international framework for the protection of minorities, and in particular with regard to the inherent distinction between negative and positive obligations. Indeed, the text of Art. 27 ICCPR suggests that all persons belonging to religious minorities shall not be denied the right to profess their own religion when they simply “exist” in a given country and does not to the fact that a specific degree of permanence in a given territory is required and is thus applicable to all minorities living in a territory. On the other hand, Art. 27 ICCPR explicitly refers to negative obligations, i.e. States must refrain from denying any members of religious minorities the right to profess their religion, either as individuals or in group.<sup>27</sup>

It is instead exactly when considering positive obligations that the distinction between old and new minorities emerges as more relevant.<sup>28</sup> In other words, if it follows from Art. 27 ICCPR that States shall not prevent members of new minorities from expressing their characteristics and developing their own identity (negative duties), it is far less clear which types of positive measures States must take to ensure that different groups of immigrants shall be able to maintain their culture or profess their religion.

This discussion surely relates to the broader question of to what extent States are required to actively support the development of multicultural and multi-religious

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<sup>24</sup> A. EIDE, *The Rights of ‘Old’ versus ‘New’ Minorities*, in T. H. MALLOY, J. MARKO, *Minority Governance in and beyond Europe. Celebrating 10 Years of the European Yearbook of Minority Issues*, Leiden, 2014, p. 24.

<sup>25</sup> UN Commission on Human Rights, Commentary of the Working Group of Minorities, cit., para. 10.

<sup>26</sup> Ibid., para. 11.

<sup>27</sup> UN HRC, *General Comment on Art. 27*, cit., para. 6.1.

<sup>28</sup> As suggested by Eide, “when it comes to the requirement to take positive measures, the rights of the old minorities are stronger than the rights of new ones”, see EIDE, cit., p. 27.

societies. While some recognize a positive obligation to help new minorities in maintain their identity, on the opposite side of the spectrum others expect that the responsibility to take identity preservation measures only pertains to such minorities.<sup>29</sup> It has also to be noted that positive measures related to the protection and development of migrant minorities' religious identity may prove to be extremely complex to identify. Freedom of religion indeed encompass the freedom to adopt, change, choose, manifest, exercise, abandon, or even questioning and criticizing a religion, and incorporates also "beliefs" which is generally accepted to include non-beliefs, atheism and agnosticism.<sup>30</sup>

In any case, since the 1980s, international fora begun recognizing the existence of foreign minorities stemming from migration and recommended States to take measures to preserve the cultural identity of these groups, in view of their particular situation.<sup>31</sup> It was with the adoption of the 1992 UN Minority Declaration that it was clearly suggested that States "shall encourage conditions for the promotion of that identity" with the adoption of legislative and other measures to achieve these ends,<sup>32</sup> as well as "shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards",<sup>33</sup> which may entail the allocation of appropriate resources from the part of the State.<sup>34</sup>

A related issue that deserves attention is to what extent the individual human rights, especially freedom of thoughts, conscience, religion or belief, and other freedoms, contribute enhancing the new religious minorities' entitlements to positive measures aimed at developing their special identity.<sup>35</sup> Of note is that individuals pertaining to new religious minorities have the right not to be discriminated in the exercise of the rights granted by the UN human rights treaties, as well as by other conventions related to

<sup>29</sup> For an overview of States' approaches, see T. AGARIN, K. CORDELL, *Minority Rights and Minority Protection in Europe*, London, 2016.

<sup>30</sup> Ferrari examines the dynamics of the transformation of the concept of religious minority in international law and suggests that specific social phenomena connected to belief organizations, migration, national minority, indigenous community, LGBT people, and women, innovate the international legal approach to the topic suggesting a broadening of the scope of protection. See D. FERRARI, *Mapping the Legal Definition of Religious Minorities in International and European Law*, in M. VENTURA (ed.), *The Legal Status of Old and New Religious Minorities in the European Union. Le statut juridique des minorités religieuses anciennes et nouvelles dans l'Union européenne*, Granada, 2021, pp. 61-93.

<sup>31</sup> See for instance the UNESCO World Conference on Cultural Policies, Final Report, 1982, *Recommendation no. 17 on Intercultural Practices of Migrants*, which refers to the very special situation of migrants and of their children who are faced with the challenges related to the formation of their cultural identity.

<sup>32</sup> UN Minority Declaration, cit., Art. 1(1).

<sup>33</sup> Ibid, Art. 4(4).

<sup>34</sup> UN Commission on Human Rights, Commentary, cit., para. 56.

<sup>35</sup> Freedom of religion is enshrined e.g. under Art. 18 ICCPR, Art. 9 ECHR and Art. 2 of Prot. 1 to the ECHR (concerning the right of parents to ensure the education of their children in accordance with their religious convictions), Art. 22 of the EU Charter of Fundamental Rights.

migration,<sup>36</sup> which as well may entail the adoption of positive measures not to discriminate and to eliminate conditions conducive to discrimination. The UN High Commissioner for Human Rights suggested indeed that the principle of non-discrimination is particularly relevant to new minorities.<sup>37</sup> In the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the UN General Assembly in 1981, States are required to “take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life”.<sup>38</sup>

In this respect, in Europe, mention has to be made to the fact that Art. 2 of the Treaty on the European Union explicitly mentions the rights of “persons belonging to minorities” among the human rights upon which the EU is founded. Furthermore, Art. 21 of the EU Charter of Fundamental Rights<sup>39</sup> and Art. 14 of the European Convention on Human Rights (ECHR), accompanied and expanded by Prot. 12 to the ECHR, represent unique provisions as, in addition to the traditional prohibited grounds for discrimination (which include religion), also refer to “association with a national minority”. Even if the definition of what constitutes a national minority under the ECHR has never been provided, and the ECHR is surely not a minority protection instrument, the European Court of Human Rights (ECtHR) has been keen to review the national processes for granting minority status.<sup>40</sup> That said, it must be kept in mind that violations of this Art. only occur in correlation with other substantive rights protected by the European Convention,<sup>41</sup> and individuals or organizations concerned must have exhausted all domestic remedies. In any case, scholars have suggested that there is room for greater coherence in the Court’s approach towards minority protection.<sup>42</sup>

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<sup>36</sup> The prohibition of discrimination is included in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 7), the 1954 Convention relating to the Status of Stateless Persons (Art. 3), the 1951 Convention relating to the Status of Refugees (Art. 3), and is mentioned in the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live, adopted by General Assembly resolution 40/144 of 13 December 1985 (preamble). Of relevance is also the right to equality before the law as granted for instance by Art. 26 ICCPR.

<sup>37</sup> UN Office of the High Commissioner for Human Rights, *Minority Rights: International Standards and Guidance for Implementation*, 2010, p. 5.

<sup>38</sup> UN General Assembly Resolution, UN Doc. A/RES/35/55, 1981, Art. 4.

<sup>39</sup> For an overview of the potential for EU law to contribute to minority protection, see O. DE SCHUTTER, *The Framework Convention on the Protection of National Minorities and the Law of the European Union*, in K. HENRARD (ed.), *Double standards.*, cit., pp. 71-115.

<sup>40</sup> European Court of Human Rights, Grand Chamber, judgement of 17 February 2004, application no. 44158/98, *Gorzelik and others v. Poland*, paras. 66-71. In this first case, the Court assessed the admissibility of an interference with the freedom of assembly of a minority that was not recognized as such by the State.

<sup>41</sup> These include freedom of assembly and association, freedom of expression, respect for private and family life, freedom of thought, conscience and religion.

<sup>42</sup> S. SPILIOPOULOU AKERMARK, *The Limits of Pluralism – Recent Jurisprudence of the European Court of Human rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?*, in *Journal on Ethnopolitics and Minority Issues in Europe*, 2002, pp. 1-24; L. PERONI, *Minorities before the European Court of Human Rights: Democratic Pluralism Unfolded*, in J. BOULDEN, W. KYMLICKA (eds.),

Looking at the practice under the CoE FCNM, the first multilateral instrument for the protection of minorities, while many European States appear to be inclined towards restricting the applicability of most minority rights to citizens or to historic minorities, the CoE organs have opted for a more flexible approach which makes it possible to include also persons belonging to new minorities in the application of the FCNM, albeit on an article-by-article basis. It is clear from the practice of the Advisory Committee on the Framework Convention (ACFC) that States, pursuant to Art. 6 FCNM, have to encourage a spirit of tolerance and intercultural dialogue between all groups that exist in their territory and to protect all minorities against threats and acts of discrimination. Yet, some doubts emerge with respect to the scope of the obligation to adopt proactive measures in all areas of economic, social, and cultural life, as established under Art. 4(2) FCNM, which also refers to the obligation to “take into due account the specific conditions of the persons belonging to national minorities”; or the obligation 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”, as indicated by Art. 5(1) FCNM, which are both particularly relevant to the present discussion.

It thus appears that the international legal regime regulating the protection of new religious minorities in the countries of arrival is in flux, highly context specific and usually understood by States as a sliding scale that entails that the longer the groups concerned stay, the stronger their entitlements would become. National authorities in Europe are granted a considerable margin of appreciation as concerns the active protection of national, historic or new minorities. The CoE monitoring authorities retain the role of assessing the possible arbitrariness of the decision at issue. This situation, however, may be seen as contrasting with some urgent protection needs that may be required by new minorities, such as to preserve unique religious identities abroad, as further discussed in section 4.

### 3. Balancing Self-identification and State Recognition

Before moving on to consider specific positive obligations related to the issue of preservation of intangible religious heritage abroad, it is worth briefly paying attention to the so-called subjective element in the definition of minorities. Indeed, in addition to the objective differentiation from the predominant population based on a set of determined characteristics, due consideration must be given to self-identification, i.e. the perception of members to pertain to the minority group, the solidarity among them,

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*International Approaches to Governing Ethnic Diversity*, Oxford, 2015, pp. 25–50; N. CHRONOWSKI, N. NAGY, *Minority Identity in the Making? Conceptualization and Operationalization of National and Ethnic Minorities in the Case Law of the European Court of Human Rights*, in *Hungarian Journal of Legal Studies*, 2025, pp. 405-431.



and their wish to maintain their identity abroad, as one of the elements that determines the existence of a minority in a given territory.

From this perspective, persons belonging to a particular minority are conscious that they represent a distinct group and share the desire to preserve their own traits. Indeed, since Capotorti's definition, the "subjective element" has been described in the literature as pointing to the fact that the sense of solidarity showed by the members of the group is "directed towards preserving their identity".<sup>43</sup>

Focusing on the subjective element may offer an added value for the present discussion, as it would require States of arrival, in their recognition of the minority groups existing in their territories, to devote more attention to the issue of whether these new groups are kept together by their desire to religious identity preservation and development. In other words, the attention towards the existence of the subjective element may support the identification of new minorities that do not have either the nationality or an historic link with the territories of the host State but are nevertheless entitled to specific positive protection measures. Self-identification can also be an instrument to resist assimilation and maintain a unique cultural and religious practice, while empowering the members of a community to resist discrimination and exclusion. It also points towards adopting a collective minority rights perspective in addition to the individual human rights-based approach.

These considerations appear to be supported by recent international practice, especially at the UN level, which considers self-identification as the decisive element for assessing minority membership.<sup>44</sup> Indeed, for instance, Art. 27 ICCPR explicitly refers to the minorities' right to profess their own religion "in community with other members of their group", even if the concept of "group" raises some questions, such as whether a certain number of persons is required or whether there should be geographical proximity between members. It has been suggested that the key factor for the existence of the group are the efforts towards maintaining its identity and the cohesion.<sup>45</sup>

From its part, the Human Rights Committee underlined that "[a]lthough the rights protected under Art. 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion".<sup>46</sup> It then stressed that "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".<sup>47</sup> It finally concluded that the protection of Art. 27 ICCPR is "directed to ensure the survival and

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<sup>43</sup> SHAW, *The Definition*, cit., p. 27 ff.

<sup>44</sup> For an overview of recent practice, see R. HOFMANN, M. MALKMUS, *Mapping the Field. How International Expert (Treaty) Bodies Approach the Concept of Minorities*, in *International Journal on Minority and Group Rights*, 2023, pp 854-859.

<sup>45</sup> P.V. RAMAGA, *The Group Concept in Minority Protection*, in *Human Rights Quarterly*, 1993, pp. 575-588.

<sup>46</sup> HRC, *General Comment no. 23*, cit., para. 6.2.

<sup>47</sup> Ibid.



continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole”.<sup>48</sup>

At the CoE level, the explanatory report of the FCNM suggests that pursuant to Art. 3 every person has the right to self-identification, i.e. the FCNM guarantees to every person belonging to a national minority the freedom to choose to be treated or not to be treated as such. That said, it must be kept in mind that while the negative connotation (not to be treated as a minority) is unlimited, an individual cannot choose arbitrarily to belong to any national minority. Their subjective positive choice is thus inseparably linked to objective criteria relevant to the person’s identity.<sup>49</sup>

In the ECtHR case law, the practice related to the balancing between self-identification and State recognition found its first attempts in the *Gorzelik* judgement. In this case, the Court stated that the only necessity capable of justifying an interference with freedom of association is the one that springs from “democratic society”.<sup>50</sup> It then suggested that associations seeking an ethnic identity or asserting minority consciousness are important to the proper functioning of democracy, as they contribute to diversity,<sup>51</sup> and that “forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights”.<sup>52</sup>

In the *Sidiropoulos* case, the Court clarified that “[m]ention of the consciousness of belonging to a minority and the preservation and development of a minority’s culture could not be said to constitute a threat to democratic society”.<sup>53</sup> Later, in the *Ciubotaru* case, the Court had to assess whether the State violated the ECHR because of its refusal to record an individual’s ethnic identity solely “on the basis of his or her declaration and in the absence of any objective grounds linking the individual to the ethnicity claimed”.<sup>54</sup>

It was however more recently, in *Molla Sali* case, that the Court recognised the right to free self-identification as “of cardinal importance in the field of protection of minorities”.<sup>55</sup> The Court held that refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounted not only to discriminatory treatment but also to a breach of their right to free self-identification, which includes not only to be recognised as a member of a minority but also to refuse to be treated as a member of a particular minority. In this case, the ECtHR suggests that individuals have the full right to choose to pertain or not to a specific minority, which must be respected by both the State and the minority itself.

<sup>48</sup> Ibid., para. 9.

<sup>49</sup> CoE, *Explanatory Report to the Framework Convention for the Protection of National Minorities*, 1995, paras. 34-35.

<sup>50</sup> European Court of Human Rights, Grand Chamber, *Gorzelik*, cit., para. 89.

<sup>51</sup> Ibid., para. 92.

<sup>52</sup> Ibid., para. 93.

<sup>53</sup> European Court of Human Rights, Grand Chamber, judgment of 10 July 1998, application no. 26695/95, *Sidiropoulos and others v. Greece*, para. 41.

<sup>54</sup> European Court of Human Rights, Grand Chamber, judgment of 27 April 2010, application no. 27138/04, *Ciubotaru v. Moldova*, para. 56.

<sup>55</sup> European Court of Human Rights, Grand Chamber, judgment of 19 December 2018, application no. 20452/14, *Molla Sali v. Greece*, para. 157.

In the more recent case law related to Art. 8 ECHR (protection of private and family life), the Court asserted that “any negative stereotyping of a group, if it reaches a certain level, is likely to affect the group’s sense of identity and the self-esteem and self-confidence of its members”,<sup>56</sup> even if the stereotyping’s required threshold for interference with private life was not specified. More recently, the Court found a violation of the ECHR for anti-minority speech, and asserted that Member States have an obligation, under Art. 8 ECHR in conjunction with Art. 14 ECHR, to act against persons who publicly incite hatred, violence, or discrimination against ethnic and religious minorities.<sup>57</sup> For our purposes, this case law is particularly relevant as the Court sets out criteria for assessing when the speech in question is sufficiently harmful to the sense of identity of a community or to the self-esteem of its members. According to some scholars, the attention devoted to the self-representation in these recent case law represents a significant shift in the way the ECtHR conceptualizes minorities.<sup>58</sup>

To conclude, self-identification is of crucial importance in the recognition and protection of minorities, even if it appears not to be the exclusive criterion for establishing membership. In any case, States must be aware of this constitutive element and must consider that focusing on a minority self-identity criterion is aimed at protecting not only the group as such, but also other individual rights, as well as the diversified societies that constitute the basis upon which democracy can function.

#### **4. The Preservation of New Minorities’ Intangible Cultural Heritage in the Host State**

In 2013, the UN Independent Expert on Minority Issues identified four areas of concern in relation to religious minorities, including: (1) the protection of their existence and the prevention of genocide; (2) the protection and promotion of their collective identity and their right to reject forced assimilation; (3) non-discrimination and equality, including with the promotion of affirmative action when necessary; and (4) the right to effective participation in public life and in decisions that affect them.<sup>59</sup>

The right to preservation of the “collective identity” of a religious minority, i.e. the second pillar identified by the UN Expert, constitutes the basis upon which the group

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<sup>56</sup> European Court of Human Rights, Grand Chamber, judgment of 15 March 2012, application no. 4149/04 and no. 41029/04, *Aksu v. Turkey*, para. 58.

<sup>57</sup> European Court of Human Rights, Grand Chamber, judgment of 16 February 2021, application no. 12567/13, *Budinova and Chaprazov v. Bulgaria*; European Court of Human Rights, Grand Chamber, judgment of 16 February 2021, application no. 29335/13, *Behar and Gutman v. Bulgaria*.

<sup>58</sup> M. S. ILIEVA, *Behar and Budinova v. Bulgaria: The Rights of Others in Cases of Othering – Anti-victim Bias in ECHR HATE SPEECH LAW?*, 15 April 2021, [www.strasbourgobservers.com](http://www.strasbourgobservers.com); E. VÁRNAGY, *Budinova and Chaprazov v Bulgaria – A Guide to Public Statements Degrading Minorities*, 17 March 2021, [www.echrblog.com](http://www.echrblog.com).

<sup>59</sup> UN Human Rights Council, Report of the Independent Expert on Minority Issues, UN Doc. A/68/268, 2013, para. 19. This section focuses on the second pillar identified by the Independent Expert (preservation of cultural and religious identity) while the next section is devoted to the fourth area of concern (participation in public life).

exists and one of the main challenges for new minorities in the host countries. Collective identity may be understood as composed by the common cultural, religious, linguistic traits that characterize a group of individuals. In this respect, the destruction of any of these traits, including cultural and religious heritage, renders communities vulnerable, as they are deprived of an important part of their identity. This was recently recognised by a UN General Assembly resolution,<sup>60</sup> while the UN Special Rapporteur on Freedom of Religion or Belief has recommended States to include minorities' religious sites in the protected lists.<sup>61</sup>

Among the priorities for the current mandate of the UN Special Rapporteur on Cultural Rights, it was included the need for further discussion on how to operationalize cultural rights of marginalized groups, refugees, migrants, minorities, and indigenous people, with a focus on strengthening the active participation of these groups in such discussions.<sup>62</sup> The expert devoted specific attention to the issue of cultural rights and migration in a dedicated report, where she stressed that, if on the one side, “[t]he mixing of communities, contexts and cultural resources that takes place through migration is certainly an enriching and dynamic exercise that promotes the cultural development of all involved”, on the other side, such processes “need the implementation of cultural rights and their realization for all to be continuously monitored”.<sup>63</sup>

These processes are often complex as they involve a redefinition of cultural norms by both the majority and the minority population. For some migrant groups, the enjoyment of their cultural rights may prove to be extremely difficult.<sup>64</sup> In any case, the interplay between cultural heritage and migration is twofold: on the one hand, migration may negatively affect the conservation and enjoyment of cultural heritage, but on the other hand countries of arrival may represent new places where religious and cultural sites are built and oral traditions and cultural memories are transmitted over generations, and thus play a key role in supporting the development of significant forms of culture.<sup>65</sup>

In particular, ICH has the “ability to transform itself, to be adapted by its practitioners and holders according to changing circumstances, and to adopt new elements and new meanings as its bearers endure movement and change”.<sup>66</sup> Migrant communities may have unique oral and storytelling traditions, which often constitute the

<sup>60</sup> UN General Assembly Resolution, *Promoting a Culture of Peace and TOLERANCE to safeguard Religious Sites*, UN Doc. A/RES/75/258, 2021, para. 12.

<sup>61</sup> UN Human Rights Council, Report of the Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/HRC/22/51, 2012, para. 74, which reads: “States should consider listing important religious sites or places of worship of minorities as official national or international cultural heritage and promote the preservation of such sites in consultation with the representatives of the relevant communities”.

<sup>62</sup> UN Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, *Cultural Rights: An Empowering Agenda*, UN Doc. A/HRC/49/54, 2022, para. 19.

<sup>63</sup> Ibid., para. 6.

<sup>64</sup> Ibid., para. 24.

<sup>65</sup> Ibid., paras. 3-4.

<sup>66</sup> C. AMESCUA, *Anthropology of Intangible Cultural Heritage and Migration. An Uncharted Field*, in L. ARIZPE, C. AMESCUA (eds.), *Anthropological Perspectives on Intangible Cultural Heritage*, Berlin, 2013, pp. 103. See also A. NEIKIRK et al., *Intangible Cultural Heritage and the Protection of Refugees and Refugee Camps*, in *Journal of Refugee Studies*, 2023, pp. 117-133.

only type of heritage that they bring with them when they are forced to move.<sup>67</sup> In some settings, migrant and refugee groups are connected only via their cultural heritage and the diaspora becomes the only place where the heritage is practiced.

That said, acting to preserve foreign cultural heritage, which may be perceived as disruptive of its own heritage, it is often not perceived to be in the interest of the receiving State. For instance, migrants may demand that workplaces and schools consider their religious holidays, or that the healthcare system integrates a culturally and religiously sensitive approach, as discussed in other contributions to this special issue. Yet scholars have suggested that accommodating the culture and heritage of migrant and refugee groups brings some evident long-term benefits, including that groups whose culture of origin is better safeguarded in a new State settle more easily and start contributing to that society more quickly.<sup>68</sup>

Academic work on this subject, in the field of conservation studies, has traditionally focused on institutionalized approaches to heritage conservation, i.e. those pursued by nation State or international actors, while the more dispersed heritage creation processes, such as those resulting from migratory movements, have only recently attracted scholarly attention.<sup>69</sup> This is also true for legal literature on heritage conservation, which in general adopts only a state-centric approach, while a more holistic framework could be pursued by integrating ICH law with standards from refugee, minority and human rights law.<sup>70</sup> Indeed, in his survey of the existing (sometimes aspirational) obligations incumbent upon the receiving States towards the preservation of migrants' ICH, Lixinski suggests that "there is a wide range of international legal obligations that, interpreted systemically, provide important guidance with respect to the importance to accommodate and protect the culture and heritage of these groups".<sup>71</sup>

Differently from tangible heritage, the international community considered the challenges posed by safeguarding immaterial cultural heritage only recently. Art. 2(1) of the 2003 UN Educational Scientific and Cultural Organisation (UNESCO) ICH Convention suggests that this type of heritage is "transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human

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<sup>67</sup> Some examples include those reported in C. AROKIASAMY, *Embedding Shared Heritage: The Cultural Heritage Rights of London's African and Asian Diaspora Communities*, in *International Journal of Heritage Studies*, 2012, pp. 339-345; L. GOOD GINGRICH, *Preserving Cultural Heritage in the Context of Migratory Livelihoods*, in *International Migration*, 2014, pp. 1-20.

<sup>68</sup> As indicated by A. CHECHI, *Migrants' Cultural Rights at the Confluence of International Human Rights Law and International Cultural Heritage Law*, in *International Human Rights Law Review*, 2016, p. 36.

<sup>69</sup> A. DESILLE, K. NIKIELSKA-SEKULA, *(Inter)Cultural Heritage and Inclusion for Migrants – Bridging the Gap*, in *Journal of Intercultural Studies*, 2024pp. 1-12.

<sup>70</sup> As proposed by S. AL SHALLAH, *Refugee Protection through Safeguarding Intangible Cultural Heritage of the Home Country and Refugee Journey*, in *International Journal of Cultural Property*, 2024, pp. 1-18.

<sup>71</sup> L. LIXINSKI, *Moving Cultures: Engaging Refugee and Migrant Cultural Rights in International Heritage Law*, in *Indonesian Journal of International Law*, 2018, pp. 1-27.

creativity”.<sup>72</sup> ICH is divided into five categories, including social practices, rituals, festive events; knowledge and practices on nature and the universe; traditional craftsmanship; oral traditions and expressions; performing arts.<sup>73</sup>

The type of obligations incumbent upon State parties include the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage<sup>74</sup>. Pursuant to the Convention, State parties maintain the authority to identify intangible heritage within their territories, but they must ensure the widest possible participation of civil society.<sup>75</sup>

This mirrors the provisions included in the CoE Convention on the Value of Cultural Heritage for Society (FARO Convention), whose Art. 5(f) requires States to “foster an economic and social climate which supports participation in cultural heritage activities”, while Art. 12 deals with the access to cultural heritage and democratic participation. In particular, under Art. 12(5)(a)(b), States undertake to “encourage everyone to participate in the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage” and in “public reflection and debate on the opportunities and challenges which the cultural heritage represents”.

Similar recommendations are provided under the UN human rights framework, for instance by the Independent Expert in the Field of Cultural Rights, who, in consideration of the human rights issues raised by cultural heritage protection, explicitly includes migrants in the list of right-holders of the right to access and enjoy cultural heritage, which enshrines also the right to participate in the definition of what constitutes cultural heritage.<sup>76</sup>

While not explicitly integrating considerations on the preservation of ICH of migrant communities, the UNESCO ICH Convention’s principles and mechanisms offer a framework for safeguarding cultural expressions that are affected by population movements. In an interesting publication on this topic, Ghaka however questions if the traditional listing system, which targets ICH “present in a State” (pursuant to Art. 11(a)), while presumably excluding ICH “in transit” across territories, contributes to the effective protection of migrants’ heritage.<sup>77</sup> The author reviews recent State practice

<sup>72</sup> For a commentary, see J. BLAKE, L. LIXINSKI, *The 2003 UNESCO Intangible Heritage Convention. A Commentary*, Oxford, 2020.

<sup>73</sup> UNESCO Convention, cit., Art. 2(2).

<sup>74</sup> Ibid., Art. 2(3).

<sup>75</sup> Ibid., Arts. 11(b) and 15.

<sup>76</sup> Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, UN Doc. A/HRC/17/38, 2011, paras. 61 (on right holders), 10, and 36 (on participation in the definition and conservation of cultural heritage).

<sup>77</sup> A. GHAKA, *Living Heritage in Transit: Migration and the Safeguarding of the Intangible Cultural Heritage in International Law*, in G.C. BRUNO, F.M. PALOMBINO, A. DI STEFANO, G.M. RUOTOLO (eds.), *Migration and Culture: Implementation of Cultural Rights of Migrants*, Rome, 2021, pp. 55-75.

related to migrants' ICH listing and suggests that protection of cultural rights under human rights law can provide a complementary framework to enhance protection.<sup>78</sup>

Turning then our attention to human rights law, at the UN level the Human Rights Committee stressed that the application of Art. 18 ICCPR on freedom of religion is not limited to traditional or predominant religions and that equal protection must be granted to smaller or newly arrived religious communities.<sup>79</sup> The Committee tasked with monitoring the implementation of the International Covenant of Economic Social and Cultural Rights (CESCR) has recognized that States "should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events" and "should not prevent migrants from maintaining their cultural links with their countries of origin".<sup>80</sup>

More recently the CESCR released a statement specifically devoted to clarifying obligations of States towards refugees and migrants under the ICESCR,<sup>81</sup> where it noted that even if cultural rights are subject to limitations inherent to the ICESCR (i.e. progressive realization and maximum of available resources), States must not indefinitely postpone the adoption of concrete measures to ensure the achievement of such rights for all individuals and must be aware that some obligations are of immediate effect.<sup>82</sup>

Among the key concerns of human rights law, vulnerable groups, including older persons,<sup>83</sup> women,<sup>84</sup> children,<sup>85</sup> migrant workers,<sup>86</sup> must be recognized specific ICH protection measures.<sup>87</sup>

The rights to preservation of religious identity abroad and to protection of religious symbols and of cultural heritage of migrant communities are finally informed by European minority law under the CoE. In its preamble, the FCNM recognizes that "a

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<sup>78</sup> See P. MATTIOLI, *Building Inclusive Societies with the Promotion of Cultural Rights of Migrants. Legal Challenges and Potential Solutions*, in G.C. BRUNO, F.M. PALOMBINO, A. DI STEFANO, G.M. RUOTOLO (eds.), *Migration and Culture*, cit., pp. 31-39.

<sup>79</sup> Un Human Rights Committee, *General Comment no. 22 on Art. 18 (Freedom of Thoughts, Conscience and Religion)*, UN Doc. CCPR/C/21/Rev.1/Add.4, 1993, para. 2.

<sup>80</sup> Committee on Economic, Social and Cultural Rights (CESCR), *General Comment no. 21 on Art. 15(1)(a), Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21, 2009, para. 34.

<sup>81</sup> CESCR, *Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2017/1, 2017.

<sup>82</sup> Ibid. para. 4.

<sup>83</sup> L. COLOMER, *Managing the Heritage of Immigrants. Elderly Refugees, Homesickness, and Cultural Identities*, in *European Archaeologist*, 2013, pp. XXX-XXX.

<sup>84</sup> UN Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, UN Doc. A/HRC/31/59, 2016, para. 38.

<sup>85</sup> Arts 14 and of the 1989 UN Convention on the Rights of the Child.

<sup>86</sup> Art. 12 of the 1975 ILO Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.

<sup>87</sup> For a discussion of the intersectionality of minorities within minorities, see T.H. MALLOY, *Standards to Eliminate Compounded Discrimination: The Case of the Intersectionality of 'Minorities within Minorities' or, Why Universal Legal Standards Must Engage with the Concept of Culture*, in K. HENRARD (ed.), *Double standards*, cit., pp. 259-296.



pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity” and emphasizes that “the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society”. These considerations are reinforced by Art. 5, which establish an obligation “to promote the conditions necessary [...] to maintain and develop their culture”, while refraining from forced assimilation.<sup>88</sup> Pursuant to Art. 6, States shall encourage a spirit of tolerance and inter-cultural dialogue in particular in the fields of education, culture, and media. Art. 7 FCNM enshrines the rights to freedom of assembly, association, expression, thoughts conscience, and religion, while Art. 8 FCNM is specifically devoted to freedom of religion. In general terms, it has been suggested that under the CoE FCNM, integration is composed of four dimensions, namely legal (i.e., the acquisition of rights, access to positions in the core institutions of the mainstream society), cultural (including cognitive, behavioural and attitudinal change), social (building of social relations) and identificational (i.e. a formation of feelings of belonging and identification by minorities towards the community in which they live).<sup>89</sup>

From its part, the ECtHR has also acknowledged the right of migrant communities to maintain their cultural ties in spite of restrictions in the receiving State, through the right to freedom of expression<sup>90</sup> and the right to freedom of association.<sup>91</sup>

## 5. The Participation of Religious Minorities in the Social, Economic, and Cultural Life of the Host State

The preservation of a distinct religious identity of migrant communities may facilitate their integration and meaningful participation in the social, economic, and cultural life of the host State, as suggested by some scholarly work on this topic.<sup>92</sup> While some political participatory and voting rights, and representation in the administrative apparatus of the State, are usually granted to citizens and traditional minorities, new minorities may also actively contribute to the host societies in different ways.

<sup>88</sup> For a recent discussion on the integration vs. assimilation (i.e. absorbing the majority culture and values) dichotomy in migration studies, see P. STATHAM, N. FONER, *Assimilation and Integration in the Twenty-First Century: Where Have We Been and Where Are We Going? Introduction for a Special Issue in Honour of Richard Alba*, in *Journal of Ethnic and Migration Studies*, 2024, pp. 4-26.

<sup>89</sup> MEDDA-WINDISCHER, *Changing paradigms*, cit., p. 207.

<sup>90</sup> European Court of Human Rights, Grand Chamber, judgment of 16 December 2008, application no. 23883/06, *Khurshid Mustafa and Tarzibachi v. Sweden*.

<sup>91</sup> European Court of Human Rights, Grand Chamber, *Sidiropoulos*, cit., and *Gorzelik*, cit. For an overview of the ECtHR case law, see MATTIOLI, *Building Inclusive Societies*, cit., pp. 45-49.

<sup>92</sup> V.M. ESSES, *Immigration, Migration, and Culture*, in *Oxford Research Encyclopedia of Psychology*, Oxford, 2018, note 38.

The right to effective participation is indeed one of the cornerstones of minority protection law and has attracted considerable academic attention. The focus has historically been on political participation arrangements of traditional minorities, while the socio, economic, and cultural part is comparably less developed, despite being inextricably linked with the former. The Lund Recommendations on the Effective Participation of National Minorities in Public Life, published in 1999 by the High Commissioner on National Minorities (HCNM) of the Organisation for Security and Co-operation in Europe (OSCE), were one of the first international standards in this field and dealt with participation in public affairs, namely in the central and local governance, self-governance as well as constitutional and legal guarantees and remedies.

In 2023, the OSCE HCNM has proposed a new set of recommendations on participation in social and economic life, some of which mirror existing international obligations incumbent upon States to guarantee social and economic rights to all persons under their jurisdiction, including migrant groups, without discrimination of any kind. This was the outcome of a research project that sought to fill the gap of the lack of focus on socio-economic disparities faced by national minorities and on the possible avenues for improving their effective participation.<sup>93</sup> This research suggests that part of the problems lies in the fact that international minority protection instruments have historically been conceived with a predominant focus on political participation and cultural and language rights. From this derives, for instance, the fact that the monitoring carried out by the FCNM Advisory Committee is much more focused on civil and political rights, rather than socio-economic perspectives. Of course, depending on the type of participation sought, the measures to be adopted may significantly differ.

In the CoE FCNM, Art. 15 is the key provisions as it requires States to “create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”.<sup>94</sup> In one of the first thematic reports released, the FCNM Advisory Committee highlights the different types of participation that must be considered, i.e. in the social, economic, cultural life and in public affairs, which correspond to the “four areas of human integration that cover the broad spectre of human integration”.<sup>95</sup>

The Committee also acknowledged the great variety of forms of effective participation. In social and economic life, it requires States to “remove barriers which prevent persons belonging to national minorities from having equal access to various spheres of economic life and social services and to promote their equal access to employment and market opportunities and to a range of public services, including social

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<sup>93</sup> A. CÂRSTOCEA, C. WILLIS, *Less Equal Than Others: National Minorities and the Overlooked Challenge of Socio-Economic Inequalities*, 30 September 2021, [www.ecmi.de/publications/minorities-blog](http://www.ecmi.de/publications/minorities-blog).

<sup>94</sup> For a commentary on Art. 15 FCNM, see T.H. MALLOY, *Commentary of Art. 15 of the Framework Convention for the Protection of National Minorities*, in R. HOFMANN, T.H. MALLOY, D. REIN, *The Framework Convention*, cit., pp. 269-288.

<sup>95</sup> *Ibid.* p. 270.

housing and health care”;<sup>96</sup> in public affairs it involves the “exchange of information, dialogue, informal and formal consultation and participation in decision-making”.<sup>97</sup>

The rights of migrants to participate in the cultural life of the host State were explicitly outlined by the CESCR in correlation with its discussion on the migrants’ cultural heritage conservation that was mentioned in the previous section. The CESCR indicated that States have an obligation “to facilitate the right of everyone to take part in cultural life by taking a wide range of positive measures, including financial measures, that would contribute to the realization of this right” which includes taking “appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture”.<sup>98</sup> There is also an obligation upon States to take “appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life”.<sup>99</sup> The Convention on the Rights of All Migrant Workers and Members of Their Families mirrors this provision.<sup>100</sup>

The CESCR also dedicated attention to protection of minorities’ rights in relation to other socio-economic rights, including to social security<sup>101</sup> or to just and favourable working conditions.<sup>102</sup>

To conclude, migrant religious minorities may experience many difficulties in the host societies, including not only in relation to the preservation of their special identity abroad, but also with respect to their active participation in the social, economic, cultural life and public affairs. States maintain a wide margin of discretion as per the measures

<sup>96</sup> Advisory Committee on the FCNM, *Commentary no. 2. The Effective Participation of Persons belonging to National Minorities in Cultural, Social and Economic Life and Public Affairs*, ACFC/31DOC(2008)001, 2008, para. 26.

<sup>97</sup> Ibid, para. 70. For a discussion of the types of measures that can ensure participation of minorities in the public life of the host State, see Y. GHAI, *Participation as Self-Governance*, in M. WELLER (ed.) *Political Participation of Minorities. A Commentary on International Standards and Practice*, Oxford, 2010, p. 616.

<sup>98</sup> CESCR, General Comment n. 21, cit., para. 52(f).

<sup>99</sup> Ibid., para. 52(g).

<sup>100</sup> Art. 45(1)(d) of the Convention on the Rights of All Migrant Workers and Members of Their Families states that “[m]embers of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: [...] access to and participation in cultural life”.

<sup>101</sup> CESCR, *General Comment no. 19, The Right to Social Security (Art. 9)*, Un Doc. E/C.12/GC/19, 2018, para. 31, in which the Committee underlined that States “should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular [...] minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees”; and para. 35, in which the Committee stressed that States “should take particular care that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information”.

<sup>102</sup> CESCR, *General Comment no. 23 on the Right to Just and Favourable Conditions of Work (Art. 7 of the International Covenant on Economic, Social and Cultural Rights)*, 2016, para. 5, in which it clarified that “[t]he reference to “everyone” highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as [...] migrant workers, workers from ethnic and other minorities”, and made references to minorities in a few other paragraphs, including the right to a minimum wage and to participate in trade unions.

to be adopted to facilitate the protection of new minorities, even if applicable international norms can offer some guidance, for instance with respect to ensuring new minorities' participation in any decision that may affect them, or their involvement in the definition of the (evolving) cultural and religious intangible heritage of the host State.

**ABSTRACT:** In many parts of the world, religious minorities experience discrimination, persistent human rights violations, and ultimately even genocide. When they escape to other States, preserving their intangible heritage far away from their ancestral lands may prove to be complex. This paper first looks at the definition of what constitutes a “new minority” and at the different level of protection compared to old or historic minorities. It then focuses on the so-called subjective element, i.e. self-identification. In the third section, the discussion centres around the contours of the right to preservation of intangible (religious) heritage abroad. The fourth section briefly touches upon the issue of whether promoting a distinct identity may facilitate or compromise the meaningful participation of non-native minorities in the public life of the host State.

**KEYWORDS:** religious minorities – non-native minorities – self-identification – intangible cultural heritage – participation in public life.