

“*LIEUX DE MÉMOIRE*” IN INTERNATIONAL LAW: THE RIGHTS OF NATIONAL AND ETHNIC MINORITIES RELATED TO THEIR MEMORIAL SITES

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Introduction

The term “*lieux de mémoire*” or sites of memory, as the historian Pierre Nora formulated it, expresses “the problem of the embodiment of memory in certain sites where a sense of historical continuity persists.”¹ Contrary to history which is the reconstruction of the past, memory is the perpetual “transmission and conservation of collectively remembered values” by ethnic minorities, families or groups.² It binds a concrete group to which it is specific, thus it is “by nature multiple and yet specific; collective, plural, and yet individual.”³ Memory “takes root in the concrete, in spaces, gestures, images, and objects”,⁴ and “*lieux de mémoire*” are the embodiments of a memorial consciousness.⁵ Thus, *lieux de mémoire* could take a

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¹ Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 REPRESENTATIONS 7 (1989).

² *Id.*

³ *Id.* at 9.

⁴ *Id.*

⁵ “[L]ieux de mémoire are fundamentally remains, the ultimate embodiments of a memorial consciousness that has barely survived in a historical age that calls out for memory because it has abandoned it.” *See id.* at 12; even a French dictionary uses the definition of Pierre Nora: “unité significative, d’ordre matériel ou idéal, dont la volonté des hommes ou le travail du temps a fait un

series of materialized and intangible forms such as monuments, cemeteries, museums, anniversaries, statutes, natural landscapes, institutions, traditions, books or fine arts, due to their iconic importance for the memory of a group.⁶ It is not by accident that especially national and ethnic minorities defend a privileged memory and more generally their identity through *lieux de mémoire*; for religious, national and ethnic minorities, “without commemorative vigilance, history would soon sweep them away.”⁷

The term “minority” refers to national or ethnic, religious and linguistic minorities in United Nations (“U.N.”) documents, but no multilateral treaty defines the notion. However, the U.N. applies a broad definition, based on the non-dominant position of the given national or ethnic, religious and linguistic community, defining minority 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.⁸

The Human Rights Committee defines the term “minority” in a similar sense, as persons “who belong to a group and who share in

élément symbolique d’une quelconque communauté.” LE GRAND ROBERT DE LA LANGUE FRANÇAISE (1993), keyword “Lieu de mémoire.”

⁶ Nora, *supra* note 1, at 22-23; Etienne François, Hagen Schulze, *Einleitung [Introduction]*, in 1 DEUTSCHE ERINNERUNGSSORTE [German Sites of Memory] 17-18 (Etienne François & Hagen Schulze eds., 3rd ed. 2002) [*hereinafter* DEUTSCHE ERINNERUNGSSORTE].

⁷ See Nora, *supra* note 1, at 12.

⁸ Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), ¶ 568 U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979), U.N. Office of the High Commissioner for Human Rights [OHCHR], *Minority Rights: International Standards and Guidance for Implementation* 2 (2010), http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf.

common a culture, a religion and/or a language.”⁹ The definition applies to persons belonging to minorities which “exist” in a given State, thus the community shall have a certain degree of permanence.¹⁰

This understanding has the advantage of relying on objective criteria and does not depend upon a decision by the State. While indigenous peoples might fulfill the above-mentioned criteria, unlike minorities, they necessarily have “long ancestral, traditional and spiritual attachment and connections to their lands and territories that are usually associated with their self-identification as indigenous peoples.”¹¹ The main focus of the present paper is on non-indigenous national, ethnic, linguistic and religious minorities that will be called “national and ethnic minorities.”

Due to successive wars and territorial changes, national and ethnic minorities have been divided by State borders and live nowadays in the territory of various States.¹² It is primarily but not exclusively a European phenomenon, because the borders of newly independent States born out of the decolonization process have also divided ethnic minorities, not to mention the recent territorial

⁹ Hum. Rts. Comm., *General Comment No. 23: The Rights of Minorities* (Art. 27), ¶ 5.1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994) [hereinafter *General Comment No. 23*]; The UN Working Group on Minorities endorsed the same definition. See U.N. Secretary-General, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons belonging to National or ethnic, Religious and Linguistic Minorities*, ¶¶ 8-9, U.N. Doc. E/CN.4/Sub.2/AC.5/2005/2 (Apr. 4, 2005).

¹⁰ General Comment No. 23, *supra* note 9, at ¶ 5.2.

¹¹ See *Minority Rights: International Standards and Guidance for Implementation*, *supra* note 8, at 4.

¹² One can mention the examples of Serbs in various Balkan States (Krajina Serbs in Croatia, the Republika Srpska within Bosnia and Herzegovina or in the region of Mitrovica within Kosovo), Armenians in several States of the Caucasus (in Nagorno-Karabakh under the sovereignty of Azerbaijan, in Abkhazia within Georgia or in proper Armenia), or the Kurd ethnic community (inhabiting a contiguous area composed of adjacent parts of southeastern Turkey (Northern Kurdistan), northwestern Iran (Eastern Kurdistan), northern Iraq (Southern Kurdistan), and northern Syria (Western Kurdistan)). See in general JENNIFER JACKSON PREECE, NATIONAL MINORITIES AND THE EUROPEAN NATION-STATES SYSTEM 35-43 (1998).

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changes of postcolonial boundaries such as the separation of Eritrea from Ethiopia in 1993¹³ or that of South Sudan from the Republic of the Sudan in 2011.¹⁴ Thus, members of national minorities often find their memorial sites in a State other than the country where they form the majority population, also referred to as a kin State, and they have to move across borders to participate in cultural events taking place on that *lieu de mémoire*. It is revealing that the French, German or Italian historiographical canons of *lieux de mémoire* all contain one or more chapters on certain memorial sites situated abroad — it suffices to think of *Aix-la-Chapelle* for the French, *Tannenberg* for the Germans or *L’Africa italiana* for the Italians, which also includes Libya and some other sites of the short-lived Italian period of colonization.¹⁵

Once a *lieu de mémoire* is situated outside the territory of the kin State, the site’s historic and cultural importance is subject to the

¹³ The Eritrean independence led to a border dispute between Eritrea and Ethiopia and various discriminatory practices against national and ethnic minorities. See Sheila B. Keetharuth (Special Rapporteur), Report on the situation of human rights in Eritrea, ¶¶ 82, 103, U.N. Doc. A/HRC/23/53 (May 23, 2013); U.N. H.R.C., Report of the commission of inquiry on human rights in Eritrea, ¶ 44, U.N. Doc. A/HRC/32/47 (May 9, 2016). Furthermore, certain minorities such as the Tigrean minority were divided by the new State borders. See JAMES MINAHAN, *ENCYCLOPEDIA OF THE STATELESS NATIONS: ETHNIC AND NATIONAL GROUPS AROUND THE WORLD 1899-1901* (2002).

¹⁴ The independence of South Sudan did not decrease the persistence of old and the emergence of new ethnic tensions between numerous minorities in the two States. See CERD Concluding observations on the combined twelfth to sixteenth periodic reports of the Sudan, ¶¶ 6, 8, U.N. Doc. CERD/C/SDN/CO/12-16 (Jun. 12, 2015); U.N. Secretary-General, *Report of the Secretary-General on South Sudan*, ¶ 82, U.N. Doc. S/2013/651 (Nov. 8, 2013). There were also reports of discrimination against people of South Sudanese descent residing in the Sudan. See, e.g., Mashood A. Baderin, *Report of the Independent Expert on the situation of human rights in the Sudan*, ¶42, U.N. Doc. A/HRC/21/62 (Aug. 27, 2017).

¹⁵ See ROBERT MORRISSEY, *Charlemagne* in 3 *LES LIEUX DE MEMOIRE*, 630, 655-656 (Pierre Nora ed., 1992); Frithjof Benjamin Schenk, *Tannenberg/Grunwald* in 1 *DEUTSCHE ERINNERUNGSSORTE*, *supra* note 6, at 439-454; other German *lieux de mémoire* outside of Germany such as Versailles, Rapallo or Auschwitz are addressed in the same volume; Nicola Labanca, *L’Africa Italiana* in MARIO ISNENGHI, *I LUOGHI DELLA MEMORIA. SIMBOLI E MITI DELL’ITALIA UNITA* 255-289 (1998).

domestic law of the State exercising its sovereign title or *de facto* jurisdiction, such as an occupying power, over the memorial site.¹⁶ As several international disputes show, the same memorial site may give rise to rivaling or even opposing historical narratives of the concerned minority and the majority population of the territorial State.¹⁷ This is particularly the case of ongoing frozen conflicts having a mixed population such as Nagorno-Karabakh,¹⁸ Transnistria,¹⁹ northern Cyprus,²⁰ or of unsettled historical disputes such as the question of the Armenian genocide in Turkey,²¹ the inter-

¹⁶ The same applies to ethnic minorities, having no kin State, but living in a country where the majority population have other ethnic characteristics.

¹⁷ Farida Shaheed (Special Rapporteur in the field of cultural rights), *Memorialization processes*, ¶ 19, U.N. Doc. A/HRC/25/49 (Jan. 23, 2014).

¹⁸ Since the outbreak of the armed conflict, January 1992, both the Armenian and Azeri authorities issued a number of communications regarding the destruction of movable and immovable cultural heritage in the region of Nagorno-Karabakh. See UNESCO, Information on the implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 1954, 1995 Report, 8, UNESCO Doc. CLT-95/WS/13 (Dec. 1995); see also The War against Azerbaijani Cultural Heritage, U.N. Doc. A/62/691-S/2008/95 (Feb. 13, 2008); H.R.C. Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-Up To and Implementation of the Durban Declaration and Programme of Action, Note verbale dated 11 September 2007 from the Permanent Mission of the Republic of Armenia to the United Nations Office at Geneva addressed to the President of the Human Rights Council, 6-11, U.N. Doc. A/HRC/6/G/8 (Sept. 14, 2007) (see documents contained within regarding the alleged destruction of the Armenian cultural heritage of Nakhijevan).

¹⁹ See, e.g., the vandalism of Jewish cemeteries in Tiraspol, Transnistria, followed by the passivity of the de facto authorities. U.S. COMM'N FOR THE PRESERVATION OF AMERICA'S HERITAGE ABROAD, JEWISH HERITAGE SITES AND MONUMENTS IN MOLDOVA 7 (2010), http://heritageabroad.gov/Portals/0/Bilateral%20Agreements/Moldova_Report_FINAL.pdf?ver=2017-02-24-221622-197 (last visited on Oct. 18, 2017). Most disputes on cultural rights in Transnistria arose around the restriction of education in the Romanian language in schools. See DAMIEN HELLY, MOLDOVA COUNTRY REPORT 9-10 (Yudhishtir Raj Isar ed., Mar. 12, 2014), http://ec.europa.eu/assets/eac/culture/policy/international-cooperation/documents/country-reports/moldova_en.pdf (last visited on Oct. 18, 2017).

²⁰ Eur. Consult. Ass., *Cultural heritage in crisis and post-crisis situations*, ¶¶ 14, 40, Doc. No. 13758 (2015).

²¹ See e.g. M. Bibliowicksz, *The Armenian Genocide: Legacies and Challenges of a Silenced Past*, 16 SRI LANKA J. INT'L L. 27, 56-58 (2004), .

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ethnic massacres committed during the Bosnian war in 1992-1995,²² the Holocaust of the Jewish community,²³ or the controversies around Soviet liberation monuments in European States of the former socialist bloc.²⁴

Memorial sites, especially monuments, graves and cemeteries of the victims deceased in those conflicts raise controversies among States and national or ethnic communities because of their disputed symbolic significance. Such disputes might concern the restrictions imposed by the territorial State on the protection of or access to the memorial site by members of national and ethnic minorities. Those disputes place the State exercising the sovereignty or jurisdiction (territorial control) over the memorial site (together forming the territorial State) in conflict with a national or ethnic minority in the same State or a national or ethnic community living in another State, often represented by its government in an interstate conflict. Furthermore, especially in former socialist States, new and controversial commemorative monuments have been erected, provoking fierce political disputes both internally and internationally.²⁵

²² In the Balkan wars in the early 1990s, the built heritage, together with the civilian population, has become the target of violent actions of inter-ethnic violence. See *Cultural heritage in crisis and post-crisis situations*, *supra* note 20, at ¶ 55; see also Tadeusz Mazowiecki (Special Rapporteur), Report on the situation of human rights in the territory of the former Yugoslavia, ¶ 106, U.N. Doc. E/CN.4/1993/50 (Feb. 10, 1993).

²³ See, e.g., Wolfgang Benz, *Auschwitz and the Germans: The Remembrance of the Genocide*, 8 HOLOCAUST & GENOCIDE STUDIES 94-106 (1994).

²⁴ See Ewa Ochman, *Soviet War Memorials and the Re-construction of National and Local Identities in Post-Communist Poland*, 38 NATIONALITIES PAPERS 509, 509 (2010); see also Jan Repa, *Soviet memorials conjure mixed emotions*, BBC NEWS (Apr. 30, 2007, 4:20 PM), <http://news.bbc.co.uk/1/hi/world/europe/6608733.stm> (last visited on Oct. 4, 2017).

²⁵ Ioana Caloianu, *Politics and Psychology, Shaped in Bronze and Marble. Statues and monuments are an uncanny guide to a people's vices, grievances, and insecurities*, TRANSITIONS ONLINE (Jul. 5, 2011), <http://www.tol.org/client/article/22525-politics-and-psychology-shaped-in-bronze-and-marble.html> (last visited on Oct. 2, 2017); Ágnes Erőss, "In memory of

The consequence of such disputes on memorial sites of members of national and ethnic minorities is considerable: their cultural rights, their right to non-discrimination on the basis of national or ethnic origin, their entry into the territorial State, their freedom of assembly, freedom of movement, freedom of expression, their right to privacy and family life, right to property, freedom of thought, conscience and religion might be infringed or denied by the territorial State. While international cultural heritage law protects both cultural objects, i.e. the public patrimony and the cultural identity of a community such as a minority group,²⁶ it has no specialized enforcement mechanism²⁷ and States have a broad discretion as to the choice of the protected objects of cultural heritage. Therefore, members of national and ethnic minorities can hardly rely on norms of international cultural heritage law in order to protect and enjoy their memorial sites.²⁸

International minority rights present similar challenges: because minority rights are far from universally recognized and treaty instruments on the protection of national and ethnic minorities impose on States only certain minimum or broadly defined duties,²⁹ standards of protection are widely considered as falling within the discretion of each State.³⁰ Furthermore, numerous States guarantee

victims”: *Monument and counter-monument in Liberty Square, Budapest*, 65 HUNGARIAN GEOGRAPHICAL BULL. 237-254 (2016).

²⁶ Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law* in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 12, 16 (Francesco Francioni & James Gordley eds., 2013) [hereinafter *Francioni, Plurality*].

²⁷ *Id.* at 17.

²⁸ Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, 28 YALE J. INT’L L. 183-274 (2003) (seeing the case of destruction of their cultural heritage in peacetime).

²⁹ For treaty provisions specifically on minority rights, see International Covenant on Civil and Political Rights [ICCPR], art. 27, Dec. 16, 1966, 999 U.N.T.S. 171; European Charter for Regional or Minority Languages, art. 6, Nov. 5, 1992, E.T.S. 148; Framework Convention for the Protection of National Minorities, Feb. 1, 1995, E.T.S. 157 [hereinafter *Framework Convention*]; Convention on the Rights of the Child [CRC], art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3.

³⁰ Capotorti, *supra* note 8, at iv, 102 (obstacles to the idea that every

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minority rights only for their own citizens, but not for non-citizens residing in the country such as immigrants, refugees or tourists.³¹ Consequently, one might suppose that the above-mentioned human rights affected by controversial memorial sites can only be resolved at the level of individual rights and freedoms in accordance with universal or regional human rights instruments, but not on the basis of the rights of national and ethnic minorities.

This hypothesis could have the consequence that no State is obliged to grant specific protection to a memorial site of a national or ethnic community living outside its borders as such and has no positive obligations to promote the access of the members of such a community to the memorial site. While few legal experts have recognized that memorial sites of minorities should be protected through an interplay of various branches of international law such as cultural heritage law, international criminal law, and international human rights law together with the norms protecting minority

State must conform to international standards and Article 27 ICCPR does not define clearly the standards of protection); CoE, Framework Convention for the Protection of National Minorities and Explanatory Report (Feb. 10, 1995), <https://rm.coe.int/16800c10cf> (last visited on Oct. 15, 2017) [hereinafter *Framework Convention and Explanatory Report*], ¶ 11; CoE, Explanatory Report to the European Charter for Regional or Minority Languages, ETS 148, ¶¶ 39, 42, 95; Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HUM. RTS. Q., 184 (1996) (on the Framework Convention); Robert Dunbar, *Minority Language Rights in International Law*, 50 INT'L & COMP. L.Q. 107, 113 (2001) (Article 27 ICCPR and European Charter for Regional or Minority Languages).

³¹ Constitutional Law on the Rights of National Minorities [Croatia], art. 5, NN 01-081-02-3955/2, Dec. 19, 2002; National Minorities Cultural Autonomy Act [Estonia], art. 1, RT 1993, 71, 1001; Act on the Rights of Nationalities of Hungary, § 1, CoE, CDL-REF(2012)014; Constitution of the Republic of Lithuania, Oct. 25, 1992, art. 37, 45; Law of the Republic of Moldova on the Rights of Persons Belonging to National Minorities and the Legal Status of their Organizations, Jul. 19, 2001, No. 382-XV; Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym [Act on National and Ethnic Minorities and on Regional Languages of January 6, 2005] [Poland], art. 2(1), Journal of Laws of 2005, No. 17, item 141, as amended; Serbia, Law on National Councils of National Minorities, art. 52(1), (3), "Official Gazette of the RS", No 72/09, 20/14 – CC and 55/14; Ústava Slovenskej Republiky [Constitution of the Slovak Republic], art. 34, 460/1992 Coll.

rights,³² no analysis has examined the international legal regime and the threshold of protection applicable to memorial sites of national and ethnic minorities.

The present paper defends the latter hypothesis and demonstrates that international law has developed various instruments protecting *lieux de mémoire* of national and ethnic minorities on account of their cultural heritage and tends to impose more and more obligations on territorial States to promote access of members of the concerned community to the site, even if they are foreign nationals. The most far-reaching instruments at the European level (soft law instruments, multilateral and bilateral treaties on minority rights) require such positive action through the protection of the members of national and ethnic minorities living in the territorial State, whose rights to enjoy their memorial sites and to establish and maintain free and peaceful contacts across frontiers with persons of the same community are recognized.³³

Consequently, this article argues that the protection of *lieux de mémoire* of national and ethnic minorities is a set of connected obligations derived from international cultural heritage law, international criminal law, and international human rights law, including the rights of national and ethnic minorities. Although historians use the notion of “*lieux de mémoire*” or “memorial site” as a metaphor, a *topos* for the embodiment of a collective memory and identity, the article analyzes only those sites that have a materialized presence where members of a national or ethnic minority can commemorate. The memorial sites analyzed in the present article are

³² Francioni, *Plurality*, *supra* note 26, at 17-21; Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, in CULTURAL HUMAN RIGHTS 15 (Francesco Francioni & Martin Scheinin eds., 2008) [hereinafter Francioni, *Culture, Heritage*]; Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT'L L. 114-118 (2011) [hereinafter Lenzerini, *Living Culture*]; Dušan Rakitić, *Envisaging a Legal Framework for ensuring sustainable preservation of holy places with regard to the case of Kosovo and Metohia* in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: LEGAL AND RELIGIOUS PERSPECTIVES ON THE SACRED PLACES OF THE MEDITERRANEAN 241 (Silvio Ferrari & Andrea Benzo eds., 2016); EUR. PARL. ASS., Doc. 12930, ¶¶ 83-100, May 10, 2012.

³³ *Infra* Part III below.

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most often natural sites, monuments, statutes or local traditions such as commemorations or celebrations of a minority in a given place.

The article examines the international law sources of the protection to be accorded both to the memorial sites of national and ethnic minorities and to the members of those communities with respect to the same sites. The first part of the paper analyzes the universal protection of *lieux de mémoire* of minority members, emphasizing the standards that most States of the international community have recognized. It will be argued that such standards recognize the specific protection of some objects of cultural heritage to be of universal importance and go as far as to impose positive obligations with regard to the cultural rights of national and ethnic minorities related to their cultural spaces. However, those universal norms leave a broad leeway for States as to the scope of the protected cultural objects and the cultural rights exercised by members of national and ethnic minorities and have no or very weak enforcement mechanism. Regional instruments, particularly in Europe, converge as to the substantial obligations of States vis-à-vis members of national and ethnic minorities, but go further in the sense that they set minimum standards, an emerging “European consensus,” and they establish enforcement mechanisms.

Accordingly, the second part examines the European instruments protecting the *lieux de mémoire* of minority members, and it argues that the regional instruments and bilateral treaties of the European continent have strengthened and gone beyond the universal standard. The specific legal protection of memorial sites beyond the local and universal community, namely in the interest of a national or ethnic community, has acquired the most far-reaching legal recognition in the practice of the treaty monitoring bodies of the Council of Europe and the neighborhood treaties of Central and Eastern European States.

II. Universal Protection of Lieux de Mémoire of Minority Members

International conventions have been adopted and universally ratified by the overwhelming majority of States to protect certain memorial sites as objects, on the one hand, and cultural rights of national or ethnic communities, on the other hand. Both international cultural heritage law and international human rights law protect the same values, namely the practice of persons belonging to national and ethnic minorities to create, maintain, transmit and enjoy their cultural heritage in certain symbolic sites.

A. Universal Protection of the Cultural Heritage of Minorities

Universally ratified international treaties have granted protection to memorial sites as objects both in times of war and peace. As this part will demonstrate, universal treaties have been gradually interpreted as protecting not only cultural properties representing universal importance for “every people” as initially foreseen by the drafters, but memorial sites of national, ethnic or religious minorities, thanks to the contemporary understanding of the concept of “cultural heritage.”

1. Protection in Time of War

International law firstly recognized the protection of cultural objects through the lenses of international humanitarian law (“IHL”), by protecting cultural objects in time of war. The Hague Convention of 1907 enshrined provisions protecting “buildings dedicated to religion, art, science, or charitable purposes, historic monuments” against bombardments, destruction or willful damage, without precisely defining those terms,³⁴ but listing the said properties in

³⁴ Laws and Customs of War on Land (Hague IV), art. 27, 56, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 653; *see also* Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, art. 1, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 [hereinafter *Roerich Pact*] (according a similar

terms of their nature or purpose.³⁵

More specifically, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”), widely regarded as reflecting customary international law,³⁶ defined cultural property as “movable or immovable property of great importance to the cultural heritage of every people.”³⁷ The addition of the term “of great importance to the cultural heritage of every people” restricted the scope of cultural objects to properties of great importance only.³⁸ It is up to the authorities of the territorial State to decide to place on a cultural object the distinctive emblem of The 1954 Hague Convention³⁹ and in practice States choose such objects in a highly restrictive way.⁴⁰ At least one can say that the protected objects are designated by the competent authorities on the basis of their great cultural importance for the national culture⁴¹ and not necessarily for the culture of

protection to “historic monuments, museums, scientific, artistic, educational and cultural institutions” in a regional treaty ratified by ten American States).

³⁵ JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 47 (1996) [hereinafter *Toman, Protection of Cultural Property*].

³⁶ UNESCO, Res. 3.1 adopted by the General Conference at its twenty-seventh session, preambular ¶ (b); see U.S., ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-26 fn. 122 (Nov. 15, 1997), <http://www.jag.navy.mil/distrib/instructions/AnnotatedHandbkLONO.pdf> (“While the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law.”); see also ICTY, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 98, 127 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (applying customary international law to both international and non-international armed conflicts).

³⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 1(a), May 14, 1954, 249 U.N.T.S. 215 [hereinafter *1954 Hague Convention*]; see also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4838 (Yves Sandoz et al. eds., 1987) (Additional Protocol I and Additional Protocol II rely on the same definition).

³⁸ TOMAN, PROTECTION OF CULTURAL PROPERTY, *supra* note 35, at 49.

³⁹ 1954 Hague Convention, *supra* note 37, at art. 6, 16, 17.

⁴⁰ TOMAN, PROTECTION OF CULTURAL PROPERTY, *supra* note 35, at 49.

⁴¹ *Id.* at 50.

national and ethnic minorities.⁴²

The 1977 Additional Protocols to the Geneva Conventions prohibited any acts of hostility directed “against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”⁴³ Whereas the Additional Protocols provide for objects “which constitute the cultural or spiritual heritage of peoples” and not of “every people” as the 1954 Hague Convention, the International Committee of the Red Cross interprets this clause as referring in particular to the “most important” objects, having a universal importance for “every people” in accordance with the 1954 Hague Convention.⁴⁴ Thus, IHL originally did not foresee

⁴² See JIŘÍ TOMAN, *Enhanced Protection, in* CULTURAL PROPERTY IN WAR: IMPROVEMENT IN PROTECTION. COMMENTARY ON THE 1999 SECOND PROTOCOL TO THE HAGUE CONVENTION OF 1954 FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 169, 208 (2009). As a commentator noted, the national designation procedure of cultural objects may result in the arbitrary denial of protection of cultural objects of an area inhabited by a minority. *Id.*

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Protocol II, art. 16 (Jun. 8, 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Protocol I, art. 53(a) (Jun. 8, 1977); see Laws and Customs of War on Land (Hague IV), *supra* note 34 at art. 27, 56 (the oldest instrument, the 1907 Hague Regulations provided for the protection of “historic monuments, works of art and science”, without the reference to the “cultural or spiritual heritage of peoples”).

⁴⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 37, at ¶¶ 2064, 4838, 4844. However, the ICRC Customary International Law Study seems to confuse slightly this approach when it requires an objectively visible cultural importance:

As underlined by numerous statements at the Diplomatic Conference leading to the adoption of the Additional Protocols, these articles were meant to cover only a limited amount of very important cultural property, namely that which forms part of the cultural or spiritual heritage of “peoples” (i.e., mankind), while the scope of the Hague Convention is broader and covers property which forms part of the cultural heritage of “every people”. The property covered by the Additional Protocols must be of such importance that it will be recognized by everyone, even without being marked.

to grant specific protection to cultural properties of particular national or ethnic groups which have no universal importance.⁴⁵

This is all the more regrettable since in several recent internal armed conflicts the parties aimed to attack or destruct material objects representing the values of certain national and ethnic minorities whose cultural objects did not necessarily fall within the special protection of IHL.⁴⁶ The above mentioned specific prohibition of the attack or destruction of cultural objects does not allow any exception, whereas the protection of other ordinary civilian objects is submitted to possible derogation in the case of imperative military necessity.⁴⁷

As international criminal law started to develop with the creation of international criminal tribunals, specific provisions were adopted to penalize the violations of the physical integrity of buildings dedicated to religion, art or historic monuments of a civilian nature, firstly as war crimes. The first case was before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the Statute of which considers the “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” as war crimes in its Article 3(d).⁴⁸ The ICTY held that this provision is “a rule of international humanitarian law which not only reflects customary international law but is applicable to both

Jean-Mary Henckaerts & Louise Doswald-Beck, *Cultural Property*, in I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 127, 130 (2005) (Commentary to Rule 38).

⁴⁵ See Serge Brammertz et al., *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, 14 J. INT’L CRIM. JUST. 1153 (2016).

⁴⁶ See *id.* at 1143–1174; see, e.g., Cultural heritage in crisis and post-crisis situations, EUR. PARL. ASS. DOC. 13758, ¶1 (2015) (“The Parliamentary Assembly notes with great concern that the deliberate eradication of culture, identity and existence of the ‘other’ through a systematic destruction of cultural heritage has become a central component of modern conflicts that are ethnically driven.”).

⁴⁷ Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgement, ¶¶ 89-90, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) [hereinafter *Kordić & Čerkez, Appeals Judgement*].

⁴⁸ S.C. Res. 827, art. 3(d) (May 25, 1993).

international and non-international armed conflicts.”⁴⁹

As for the meaning of cultural property, the Trial Chamber considered in the *Kordić & Čerkez* case all educational institutions as “undoubtedly immovable property of great importance to the cultural heritage of peoples.”⁵⁰ The Trial Chamber held that Article 3(d) protects objects which “constitute the cultural or spiritual heritage” under the Additional Protocols and in accordance with the criterion “of great importance to the cultural heritage” of the 1954 Hague Convention. However, the Appeals Chamber reversed the judgment: it held that the Trial Chamber had not shown how all educational buildings fulfil these criteria, namely the “great importance” requirement.⁵¹

Later, the Chamber in the *Strugar* case held that Article 3(d) of the ICTY Statute is based on Article 27 of the Hague Regulations, thus at first glance applying to any buildings dedicated to religion, art, science, or charitable purposes, and historic monuments, defined in terms of their nature or purpose and not on the basis of their great importance for the national culture.⁵² However, since the Chamber added that “such property is, by definition, of ‘great importance to the cultural heritage of every people,’” it seems that the Tribunal required nevertheless the same high degree of national cultural value as the 1954 Hague Convention.⁵³ This is confirmed by the fact that the ICTY emphasized the especially protected nature of the Old Town of Dubrovnik as a UNESCO World Cultural Heritage site.⁵⁴

⁴⁹ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶230 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005). The customary nature of the provision was reiterated in several cases, *see* Prosecutor v. Kordić & Čerkez, Case No. IT-35-14/2, Judgment, ¶206 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) [hereinafter *Kordić & Čerkez, Trial Judgement*]; *see also* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 595 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

⁵⁰ Kordić & Čerkez, Trial Judgement, *supra* note 49, at ¶ 360.

⁵¹ Kordić & Čerkez, Appeals Judgment, *supra* note 47, at ¶¶ 91-92.

⁵² Prosecutor v. Strugar, *supra* note 49, at ¶ 229.

⁵³ *Id.* at ¶¶ 232, 229, fn. 780; *Id.* at ¶223 (invoking the 1954 Hague Convention).

⁵⁴ Prosecutor v. Jokić, Case No. IT-01-42/1-S, Judgment, ¶51, 52, 55, (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004) (“an attack not only

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Nevertheless, in later judgments the ICTY did not require the “great importance” criterion but was satisfied with a lower standard. The Tribunal recognized that the provisions of the Hague Convention of 1954 and the Additional Protocol dealing with cultural property “have scopes of application different from Article 3(d) of the Statute,”⁵⁵ but held that the crime of destruction or willful damage to institutions dedicated to religion, arts or historic monuments under Article 3 of the Statute must satisfy the conditions “dealing with the gravity of the offence.”⁵⁶ The gravity criterion is met in the case of “certain property, namely religious buildings, owing to their spiritual value,” because “those values go beyond the scope of a single individual and have a communal dimension,” and “the victim here must not be considered as an individual but as a social group or community.”⁵⁷ While “the seriousness of the crime of destruction of or damage to institutions dedicated to religion must be ascertained on a case-by-case basis,”⁵⁸ the Tribunal would take “much greater account of the spiritual value of the damaged or destroyed property than the material extent of the damage or destruction.”⁵⁹

Consequently, institutions dedicated to religion automatically enjoy the same customary law protection as cultural property having a universal importance for “every people”, in accordance with the 1954 Hague Convention and the Additional Protocols,⁶⁰ even if they are institutions and monuments of religious minorities and not of

against the history and heritage of the region, but also against the cultural heritage of humankind”); *Prosecutor v. Strugar*, *supra* note 49, at ¶ 232.

⁵⁵ *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Judgement, ¶61, (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006).

⁵⁶ *Id.*, at ¶ 63.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*; The Trial Chamber concluded that vandalizing religious institutions, including writing graffiti or damaging or destroying paintings, steles, statutes, frescoes or the organ in churches, was sufficiently serious damage to constitute war crime. *See id.*, ¶¶ 1998-2005, 2012-2014.

⁶⁰ *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, ¶595, (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

“great importance.”⁶¹ It is suggested that the same level of damage to other institutions or historic monuments listed under Article 3(d) of the Statute, whenever they “go beyond the scope of a single individual and have a communal dimension” for a national or ethnic minority, should be sufficiently serious to constitute war crimes.

The Rome Statute of the International Criminal Court (“ICC”) provided for the Court’s jurisdiction not over “destruction” as the ICTY Statute, but over “the directing of attacks” “against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals [...] provided they are not military objectives” as a war crime.⁶² Like the Statute of the ICTY, the Rome Statute does neither require a character “of great importance to the cultural heritage of every people,” nor the constitution of “the cultural or spiritual heritage of peoples,” but leaves it to the Court to interpret the threshold of the cultural importance of the protected objects.

The intention not to limit cultural property to objects of universal importance is also clear from the *travaux préparatoires*: an early draft provision limiting the “directing of attacks” to “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”⁶³ was not accepted by the Rome conference which adopted the above-mentioned provisions without limiting them to objects having a universal or regional importance for the peoples.⁶⁴ For a strong protection of any memorial sites of national, ethnic or religious minorities, it is recommended that the ICC applies the provisions on attacks against

⁶¹ Prosecutor v. Hadžihasanović & Kubura, *supra* note 55, at ¶ 61.

⁶² ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8(2)(b)(ix) (2002) (international armed conflicts); *see id.* at art. 8(2)(e)(iv) (non-international armed conflicts).

⁶³ U.N. Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, at 7-12, U.N. Doc. A/AC.249/1997/L.5 (Mar. 12 1997).

⁶⁴ U.N. Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session held from 1 to 12 December 1997, at 6, 11, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (Dec. 18, 1997).

specially protected buildings to cultural properties not of universal significance, but constituting the cultural heritage of a national, ethnic or religious minority.⁶⁵

In the recent *Al Mahdi* case, the ICC laconically referred to the previous international instruments providing for special protection of cultural property, including The 1954 Hague Convention and the Additional Protocols,⁶⁶ and stressed that the Rome Statute governs “the directing of attacks against special kinds of civilian objects, reflecting the particular importance of international cultural heritage.”⁶⁷ Thus, by emphasizing the criterion of “particular importance of international cultural heritage” the ICC seems to follow the interpretation of the ICTY, requiring the criterion “of great importance to the cultural heritage” as foreseen by the 1954 Hague Convention.

In *Al Mahdi*, the Court had no difficulty in finding that the criteria of “the directing of attacks” against cultural objects were fulfilled given the fact that all the attacked sites of Timbuktu were dedicated to religion and historic monuments, were not military objectives and save one exception, all those buildings had the status of protected UNESCO World Heritage sites.⁶⁸ Although the registration of the cultural objects on the UNESCO world heritage list is not a constitutive condition of the protection, it is a strong proof of the object’s cultural importance; the Court noted that “UNESCO’s designation of these buildings reflects their special importance to international cultural heritage.”⁶⁹

⁶⁵ See Brammertz et al., *supra* note 45, at 1153-1154; see also Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in *ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW* 40, 56 (Francesco Francioni & James Gordley eds., 2013 [hereinafter Lenzerini, *Role of Courts*]; see also Paige Casaly, *Al Mahdi Before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. INT’L CRIM. JUST. 1203-1206 (2016) (arguing for a relativist approach).

⁶⁶ Prosecutor v. Al-Mahdi, Case No. ICC-01/12-01/15, ¶14, Judgment and Sentence, (Int’l Crim. Ct. Sept. 27, 2016).

⁶⁷ *Id.* at ¶ 17.

⁶⁸ See *id.* at ¶ 39.

⁶⁹ *Id.* at ¶ 46.

Whereas the *Al Mahdi* case cannot be considered as an attack against a religious minority, on the contrary it was a war crime committed by a radical Islamist against the majority, the traditional Islamic religious community of Timbuktu, the cultural objects of Timbuktu represent a unique cultural heritage born from a cross-section of Mali's various ethnic groups, including the Tuareg, Peuhl and other minorities. Indeed, the ICC took into consideration the *lieux de mémoire* character of the attacked religious sites from the point of view of the local religious community rather than the national or universal community; "[t]hus, the Chamber considers that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed."⁷⁰ It follows that the cultural value of the protected cultural object for a national, ethnic or religious minority has no relevance in the qualification of the war crime, but does play a role in the gravity of the crime when the ICC determines the appropriate sentence. This is confirmed by another element considered as an aggravating factor; the Court held the discriminatory religious motive invoked for the destruction of the sites "undoubtedly relevant to its assessment of the gravity of the crime."⁷¹

Beyond the *Al Mahdi* case, there are certain signs in the practice of the ICC confirming the tendency to extend the provisions on "attacks against specially protected buildings" to cultural properties not of universal significance but of national or ethnic minorities. In the context of the Georgian-Russian war of 2008, the majority of the Pre-Trial Chamber limited its decision on the Prosecutor's request for authorization of an investigation to the destruction and looting of civilian property of the ethnic Georgian

⁷⁰ *Id.* at ¶ 79. On the other hand, the qualification of the religious sites as UNESCO World Heritage sites were also considered as another aggravating factor, because "their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community." Prosecutor v. Al-Mahdi, Case No. ICC-01/12-01/15, ¶80, Judgment and Sentence, (Int'l Crim. Ct. Sept. 27, 2016).

⁷¹ *Id.* at ¶ 81.

population,⁷² while Judge Kovács proposed in his separate opinion to extend the investigation specifically to the destruction of educational institutions or historic monuments by both the Georgian and Russian armed forces on the basis of Article 8(2)(b)(ix).⁷³

Beyond protecting the physical integrity of cultural property through the criminalization of the war crime of destruction or attacks against specially protected buildings and monuments, international criminal tribunals singled out the destruction of cultural properties of national, ethnic or religious minorities as a clear case of persecution as a crime against humanity. In other words, attacks against cultural property can be prosecuted not only as a war crime that damages primarily the physical objects but also as a crime against humanity which primarily persecutes the civilian population. The International Military Tribunal at Nuremberg,⁷⁴ the International Law Commission⁷⁵ and finally the ICTY⁷⁶ also recognized that a

⁷² ICC, Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, ¶¶ 20, 22, 29, 43, Doc. No. ICC-01/15-12 (Jan. 27, 2016).

⁷³ See generally ICC, Situation in Georgia, Separate Opinion of Judge Peter Kovács, Doc. No. ICC-01/15-12-Anx-Cor (Jan. 27, 2016).

⁷⁴ Int'l. Mil. Trib. 20 Trial of the Major War Criminals Nuremberg, Proceedings 10, 19, 133 (Jul. 30, 1946 – Aug. 1, 1946) (burning of synagogues); see also Int'l Mil. Trib. 42 Trial of the Major War Criminals Nuremberg, Documents and Other Materials in Evidence: Col. Neave Report to Affidavit SS-87, 59, 103, 147 (Oct. 1, 1946); see also CrimC (TA) 40/60 Attorney General v. Eichmann, PM 5722(4), 1, 1 (1961) (Isr.).

⁷⁵ See Int'l Law Comm'n, Report on the Work of Its Forty-Third Session, U.N. Doc. A/46/10 ("Persecution may take many forms, for example, [...] systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group." *Id.* at 104).

⁷⁶ Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 231, 233, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) [hereinafter *Blaškić, Trial Chamber*]; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶¶ 144-149, (Int'l Crim. Trib. for the Former Yugoslavia Jul. 29, 2004) [hereinafter *Blaškić Appeals Chamber*]; Kordić & Čerkez, Trial Chamber, *supra* note 49, at ¶¶ 206-207; Kordić & Čerkez, Appeals Chamber, *supra* note 47, at ¶¶ 108-109; Prosecutor v. Milutinović et al., Case No. IT-05-87, Judgement, ¶ 205, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) [hereinafter *Milutinović et al., Trial Chamber*]; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgement, ¶¶ 2556-2559, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016)

widespread or systematic attack against the civilian population can encompass a variety of acts, *inter alia* the destruction of cultural objects of the civilian population. While under both war crimes and crimes against humanity, the same act of attack against cultural property is criminalized, the specific legal elements of persecution as a crime against humanity enable prosecutors to address the act in the full context in which these crimes were committed,⁷⁷ focusing especially on the discriminatory plan against a minority group.

In the *Blaškić* case, chronologically the first case where the ICTY examined in detail attacks against property as form of persecution, the Trial Chamber specifically stressed the collective character of the victims when it held that “persecution may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina.”⁷⁸ It concluded that the crime of “persecution” under Article 5(h) of the ICTY Statute encompasses not only attacks against physical integrity but also “acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community.”⁷⁹ The ICTY considered destruction and plunder of property as crime of persecution if it aims at “the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily.”⁸⁰

The discriminatory intention against “a given population” was singled out in later cases where the Tribunal found that destruction and damage of religious, educational or cultural institutions, “when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people” and “manifests a nearly pure expression of the notion of

[hereinafter *Karadžić, Trial Chamber*].

⁷⁷ Brammertz et al., *supra* note 45, at 1161.

⁷⁸ *Blaškić*, Trial Chamber, *supra* note 76, at ¶ 227.

⁷⁹ *Id.* at ¶ 233.

⁸⁰ *Id.* at ¶ 234.

‘crimes against humanity.’”⁸¹ Even beyond religious minorities, one can argue that this case law protects any national or ethnic minority against attacks of the cultural heritage of the community, because such acts acquire “an especially qualified degree of gravity, which transcends the element of the physical and economic value of the property concerned and acquires a spiritual connotation.”⁸² Indeed, in various cases the ICTY convicted individuals when the attacks on cultural monuments were executed with persecutory intent as symbols of the community’s heritage and identity in a conflict based on ethnic, religious, cultural or similar grounds.⁸³

As a result of the ICTY case law, international criminal law grants three categories of protection to cultural objects: general protection of civilian objects, cultural properties defined as “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science,” and cultural property of “great importance.”⁸⁴ While attacks against the first category may be prosecuted as unlawful destruction or plunder of civilian property,⁸⁵ attacks against the second and third kind of objects can be prosecuted as a separate crime, under Article 3(d) of the ICTY Statute. While certain judgments subsumed the destruction of religious or cultural property under the first, broader category of “destruction of property,”⁸⁶ the majority of judgments⁸⁷ and IHL

⁸¹ Kordić & Čerkez, Trial Chamber, *supra* note 49, at ¶ 207; *Milutinović et al.*, Trial Chamber, *supra* note 76, at ¶ 205.

⁸² Lenzerini, *Role of Courts*, *supra* note 65, at 52.

⁸³ Prosecutor v. Đorđević, Case No. IT-05-87/1-T, Judgement, ¶2151, (Int’l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011); *Milutinović et al.*, Trial Chamber, *supra* note 76, at ¶ 473; *Karadžić*, Trial Chamber, *supra* note 76, at ¶¶ 3521, 5996.

⁸⁴ Brammertz et al., *supra* note 45, at 1154.

⁸⁵ S.C. Res. 827, art. 2(d), 3(e) (May 25, 1993) (as a grave breach of the Geneva Conventions or as plunder of public or private property).

⁸⁶ *Blaškić*, Appeals Chamber, *supra* note 76, at ¶¶ 144-149; Kordić & Čerkez, Appeals Chamber, *supra* note 47, at ¶ 108; in the same sense, with regard to the ICC Statute: 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 410 (Antonio Cassese et al. eds., 2002).

⁸⁷ Kordić & Čerkez, Trial Chamber, *supra* note 49, ¶¶ 206-207; Prosecutor v. Milomir Stakić, Case No IT-97-24-T, Judgement, ¶¶ 765-768, (Int’l Crim. Trib. for the Former Yugoslavia Jul. 31, 2003); *Milutinović et al.*, Trial

experts⁸⁸ treat the destruction of cultural property of minorities as *lex specialis*, under a crime separate from the broader category of “destruction of property.”

2. *Protection in Time of Peace*

The most stringent protection that international law offers to tangible cultural properties is the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. Like the 1954 Hague Convention, this universal treaty grants protection exclusively to the most important cultural objects. It obliges States parties to protect namely “monuments”, “groups of buildings”, or “sites”, three objects considered as “cultural heritage”, which are “of outstanding universal value” from the point of view of history, art, science, or from aesthetic, ethnological or anthropological point of view.⁸⁹ It is for the national authorities of States parties to the Convention to identify and delineate the different properties considered as “cultural heritage” situated on their territory,⁹⁰ whereas the World Heritage Committee of 15 members will choose and enroll some protected objects to the “World Heritage List”, a list of properties forming part of the cultural heritage and the natural heritage, which it considers as having outstanding universal value.⁹¹

In several States with an ethnically diverse population, the cultural heritage of minority groups is excluded from international protection under the World Heritage Convention because of the central government’s policy not to nominate it.⁹² The Convention

Chamber, *supra* note 76, at ¶ 205.

⁸⁸ Lenzerini, *Role of Courts*, *supra* note 65, at 51-52; Brammertz et al., *supra* note 45, at 1154.

⁸⁹ UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S., 1977, art. 1 [hereinafter UNESCO World Cultural Heritage Convention].

⁹⁰ *Id.* at art. 3, 4.

⁹¹ *Id.* at art. 11(2).

⁹² Sophia Labadi, *Outstanding Universal Value: International History*, in CULTURAL HERITAGE, AND OUTSTANDING UNIVERSAL VALUE: VALUE-BASED

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leaves for each State Party a broad margin of appreciation as to how it implements its duty to “identify and delineate the different properties situated on its territory”⁹³ and does not oblige States parties to take into account the particular interests of national or ethnic communities.⁹⁴ It does only briefly mention that each State party shall submit to the World Heritage Committee a so-called tentative list, i.e. “an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion” in the World Heritage List after nomination in the following years.⁹⁵

However, since its thirty-first session in 2007, the UNESCO World Heritage Committee encourages States parties “to ensure the participation of a wide variety of stakeholders, ... local communities, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination and protection of World Heritage properties.”⁹⁶ Since this recommendation is not

ANALYSES OF THE WORLD HERITAGE AND INTANGIBLE CULTURAL HERITAGE CONVENTIONS 25, 29 (2013). This is arguably the case of the city of Kashgar, cultural center of the Uyghur minority in China. See EUR. PARL. RES. P7_TA(2011)0100, ¶ B. Likewise, in Burma (Myanmar), manifestations of tangible and intangible heritage which are ethnically Burman and Buddhist are given preferential treatment by the authoritarian government, at the expense of minority groups. See Janette Philp, *The Political Appropriation of Burma's Cultural Heritage and its Implications for Human Rights*, in CULTURAL DIVERSITY, HERITAGE AND HUMAN RIGHTS: INTERSECTIONS IN THEORY AND PRACTICE 83-100 (Michael Langfield et al. eds., 2010).

⁹³ UNESCO, World Cultural Heritage Convention, *supra* note 89, at art. 3.

⁹⁴ The Convention mentions only the national “community” in the country when it provides for the duty of each State party to “endeavor, in so far as possible, and as appropriate for each country,” “to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community.” See *id.* at art. 5(1); likewise, the General Conference considered that a State party has responsibilities under the Convention “both vis-à-vis their own nationals and vis-à-vis the international community as a whole.” See UNESCO, *Resolutions – Recommendations*, in 1 THE RECORDS OF THE SEVENTEENTH SESSION OF THE GENERAL CONFERENCE 147-148 (1972).

⁹⁵ UNESCO, World Cultural Heritage Convention, *supra* note 89, at art. 11(1).

⁹⁶ UNESCO & World Heritage Convention [WHC], Operational

enforceable and since ethnic and historic controversies often undermine the selection and nomination procedure,⁹⁷ the final decision is made by the government at the national level, often preferring the interests of the majority to the minority culture.⁹⁸

Similarly, at the international level, the selection of the nominated sites to the World Heritage List is made in a highly politicized procedure by States represented in the World Heritage Committee.⁹⁹ The World Heritage List is historically dominated by properties from Europe in relation to the rest of the world; Christianity is over-represented in relation to other religions and beliefs; “elitist” architecture is over-represented in relation to vernacular architecture; finally, living cultures, especially those of “traditional” societies, are largely under-represented.¹⁰⁰ Consequently, it is not exaggerated to say that the Convention prioritizes “the agendas of nation-states over those of minorities.”¹⁰¹

One of the reasons for this tendency is that the Convention protects only cultural property of universal importance rather than

Guidelines for the Implementation of the World Heritage Convention, ¶12, WHC.16/01, Oct. 26, 2016 [hereinafter *UNESCO & WHC, Operational Guidelines*]; see also UNESCO & WHC, Guidelines on the inscription of specific types of properties on the World Heritage List, Annex 3, ¶ 9 (n.d.) [hereinafter *UNESCO & WHC, Annex 3*]. “Following the Budapest Declaration in 2002 and the subsequent discussions, the World Heritage Committee decided at its 31st session in 2007 to add the participation of ‘communities’ in the implementation of the World Heritage Convention to its strategic objectives.” Mechtild Rössler, *Foreword: the changing landscape of indigenous heritage protection*, in MINORITY RIGHTS GROUP INTERNATIONAL, STATE OF THE WORLD’S MINORITIES AND INDIGENOUS PEOPLES 2016: EVENTS OF 2015 10, 15 (2016).

⁹⁷ See Lynn Meskell, *UNESCO’s World Heritage Convention at 40 Challenging the Economic and Political Order of International Heritage Conservation*, 54 CURRENT ANTHROPOLOGY 483, 485 (Aug. 2013).

⁹⁸ See the examples cited *supra*, note 92 and accompanying text.

⁹⁹ Meskell, *supra* note 97, at 490; Enrico Bertacchini et al., *The politicization of UNESCO World Heritage decision making*, 167 PUB. CHOICE 95, 96 (2016).

¹⁰⁰ UNESCO, Expert Meeting on the “Global Strategy” and thematic studies for a representative World Heritage List, 18th sess., 1,3-4 WHC-94/CONF.003/INF.6 (Oct. 13, 1994).

¹⁰¹ Rodney Harrison, *Intangible heritage and cultural landscapes*, in HERITAGE: CRITICAL APPROACHES 114, 136 (2013).

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cultural heritage of particular groups.¹⁰² The cultural objects to be selected and protected under the World Heritage Convention cannot constitute a cultural value only for a religious, national or ethnic community, but shall have a “cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.”¹⁰³ Among the ten alternative criteria formulated by the World Heritage Committee for the definition of “outstanding universal value,” the most relevant arguably concerning memorial sites requires that the property “be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.”¹⁰⁴

From 1978 to 2011, the World Heritage Committee had applied criterion (vi) to 205 properties out of 936 on the World Heritage List, but only in eleven cases with criterion (vi) alone.¹⁰⁵ The rarity of the independent use of this criterion might result from the difference between criterion (vi), which recognizes the outstanding universal value lies primarily in the association with the cultural site, “and the other criteria which recognize that outstanding universal value lies primarily in manifestation of that association in the site.”¹⁰⁶ An exceptional example where this criterion was used for nomination was the Old Bridge Area of the Old City of Mostar.¹⁰⁷ Rather than insisting on the architecture of the site of

¹⁰² Ana Filipa Vrdoljak, *Minorities, Cultural Rights and Intangible Heritage*, Conference Paper Series before the ESIL Research Forum on International Law: Contemporary Issues (May 2005) 18, <http://www.esil-sedi.eu/sites/default/files/Vrdoljak09-05.pdf> (last visited on Aug. 13, 2017).

¹⁰³ UNESCO & WHC, Operational Guidelines, at ¶ 49.

¹⁰⁴ *Id.* at ¶ 77(vi); Christina Cameron, *World Heritage Sites of Conscience and Memory*, in *WORLD HERITAGE AND CULTURAL DIVERSITY*, GERMAN COMMISSION FOR UNESCO 112, 113 (2010) (citing UNESCO & WHC, Operational Guidelines, at ¶ 7).

¹⁰⁵ UNESCO & WHC, REPORT OF THE INTERNATIONAL WORLD HERITAGE EXPERT MEETING ON CRITERION (VI) AND ASSOCIATIVE VALUES ¶10 (2012); see Cameron, *supra* note 104 (citing examples of sites under this criterion).

¹⁰⁶ *Id.* at ¶ 17.

¹⁰⁷ UNESCO & WHC, Convention Concerning the Protection of the World Cultural and Natural Heritage on Its Twenty-Ninth Session, 21, WHC-05/29.COM/8B (Jul. 10-17, 2005) (on Draft Decision 29 COM 8B.49, ¶¶ 3-4).

which authenticity is weakened by its devastation and reconstruction after the Balkan war, the decision on its admission to the List emphasized the intangible values of the site, characterizing it “as an exceptional and universal symbol of coexistence of communities from diverse cultural, ethnic and religious backgrounds.”¹⁰⁸

Another possibility where the cultural site of a national or ethnic minority could qualify as world cultural heritage is the category of so-called “cultural landscapes,” defined as cultural properties which represent the “combined works of nature and of man” designated in Article 1 of the Convention.¹⁰⁹ Areas inhabited by indigenous communities might especially constitute “clearly defined landscape designed and created intentionally by man.”¹¹⁰ Current examples of cultural landscapes admitted to the World Heritage List are the sacred Mijikenda Kaya Forests in Kenya’s Coast province, inhabited by the Mijikenda community;¹¹¹ the Konso Cultural Landscape in the Konso highlands of Ethiopia;¹¹² the Rice Terraces of the Philippine Cordilleras inhabited by the Ifugao ethnic group;¹¹³ and the Koutammakou landscape in north-eastern Togo, the land of the Batammariba people.¹¹⁴

To sum up, the UNESCO World Heritage Convention grants protection to the sites selected by the territorial State as being of “outstanding universal value.” The decision is highly politicized both at the national and the international levels, and national and ethnic minorities have no protection against arbitrary refusals in the decisions of listing. Furthermore, the Convention hardly accepts nominations where the memorial site directly or tangibly associated

¹⁰⁸ *Id.*

¹⁰⁹ UNESCO & WHC, Operational Guidelines, at ¶ 47.

¹¹⁰ UNESCO & WHC, Annex 3, *supra* note 96, at ¶10(i).

¹¹¹ SACRED MIJIKENDA KAYA FORESTS, <http://whc.unesco.org/en/list/1231> (last visited on Aug. 3, 2017).

¹¹² KONSU CULTURAL LANDSCAPE, <http://whc.unesco.org/en/list/1333> (last visited Aug. 3, 2017).

¹¹³ RICE TERRACES OF THE PHILIPPINE CORDILLERAS, <http://whc.unesco.org/en/list/722> (last visited Feb. 12, 2018).

¹¹⁴ KOUTAMMAKOU, THE LAND OF THE BATAMMARIBA, <http://whc.unesco.org/en/list/1140> (last visited Feb. 12, 2018).

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with events or living traditions does not constitute a universal symbol or where the intangible element dominates over the cultural property (such as a pilgrimage or a yearly festival). Consequently, the Convention does not automatically protect any memorial site of national and ethnic minorities.

The need for protection of intangible culture incited UNESCO member States to extend international protection beyond the limited scope of material cultural object of outstanding universal value to immaterial “living culture” such as traditions, social structures or processes that permit the production, safeguarding, maintenance and re-creation of the cultural heritage from one generation to the other.¹¹⁵ This protection was recognized in the adoption of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage in 2003 which has been ratified by more than 170 States and can be considered as a universal treaty.¹¹⁶ The treaty defines intangible cultural heritage as:

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, 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

¹¹⁵ *Culture: Safeguarding communities' living heritage*, UNESCO, <http://www.unesco.org/new/en/culture/resources/in-focus-articles/safeguarding-communities-living-heritage/> (last visited Feb. 12, 2018).

¹¹⁶ UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, MISC/2003/CLT/CH/14 (Oct. 17, 2003) [hereinafter *Intangible Cultural Heritage Convention*]; see also UNESCO, State Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, <http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E> (last visited Feb. 12, 2018).

creativity.¹¹⁷

Such intangible cultural heritage might be manifested in various domains, in particular in “social practices, rituals and festive events.”¹¹⁸ Thus, commemorations or festivities organized by religious, national and ethnic minorities might qualify as intangible cultural heritage.¹¹⁹ The new convention had the novelty to refer expressly to “communities and groups”¹²⁰ and to the importance of “cultural diversity and human creativity.”¹²¹ It connects the two when it recognizes that “communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.”¹²² UNESCO admits that “[f]or many populations (especially minority groups and indigenous populations), the intangible heritage is the vital source of an identity that is deeply rooted in history.”¹²³ Thus, the protection of intangible cultural heritage is the first international legal recognition of the strong link between intangible cultural heritage of minorities, cultural diversity and the protection of minority rights.¹²⁴

It is to be noted that intangible cultural heritage may have a

¹¹⁷ Intangible Cultural Heritage Convention, *supra* note 116, at art. 2(1).

¹¹⁸ *Id.* at art. 2(2)(c).

¹¹⁹ *See id.*

¹²⁰ *Id.* at art. 11(a)-(b).

¹²¹ *Id.* at preamble; *Id.* at art. 2(1).

¹²² *Intangible Cultural Heritage Convention*, *supra* note 116, at preamble. As a commentator stressed, there was a strong willingness to involve local communities in the protection procedure, as opposed to the World Heritage Convention where local communities had no role. *See* Mohammed Bedjaoui, *The Convention for the Safeguarding of the Intangible Cultural Heritage: The Legal Framework and Universally Recognized Principles*, 56 MUSEUM INT’L 150, 153 (2004).

¹²³ UNESCO, *Endangered Heritage. Intangible Heritage*. Information Sheet, www.xtec.cat/~mcarre28/misc/plaintexts/textsheritage.doc (last visited Sept. 16, 2016).

¹²⁴ *See* Francioni, *Culture, Heritage*, *supra* note 32, at 14-15. As Francioni observed, “the defence and promotion of cultural diversity cannot be divorced from the commitment to the fulfilment of human rights and fundamental freedoms of minorities, groups and indigenous peoples.” *Id.* at 15.

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physical materialization such as a natural or man-made site, a monument or a building, but the memory is embodied in the protected practices, not in the object.¹²⁵ As the International Council on Monuments and Sites (“ICOMOS”), a non-governmental international organization dedicated to the conservation of the world’s monuments and sites expressed “[t]he distinction between physical heritage and intangible heritage is now seen as artificial. Physical heritage only attains its true significance when it sheds light on its underlying values. Conversely, intangible heritage must be made incarnate in tangible manifestations, in visible signs, if it is to be conserved.”¹²⁶

Under the Intangible Cultural Heritage Convention, States parties undertake to “take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory.”¹²⁷ “Safeguarding” means “measures aimed at ensuring the viability of the intangible cultural heritage, including 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.”¹²⁸ Among a series of positive obligations considered as “safeguarding” measures, States parties shall “adopt appropriate legal, technical, administrative and financial measures aimed at [...] ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage.”¹²⁹ Furthermore, the Convention recognizes the importance of memorial sites in the sense that it obliges States to “promote education for the protection of natural spaces and *places of*

¹²⁵ Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 77 (2004).

¹²⁶ Jean-Louis Luxen, *The Intangible Dimension of Monuments and Sites with Reference to UNESCO World Heritage List*, 10 ICOMOS NEWS (Jul. 2000), http://www.icomos.org/victoriafalls2003/luxen_eng.htm (last visited Sept. 15, 2016).

¹²⁷ Intangible Cultural Heritage Convention, *supra* note 116, at art. 11(a).

¹²⁸ *Id.* at art. 2(3).

¹²⁹ *Id.* at art.13(d)(2).

memory whose existence is necessary for expressing the intangible cultural heritage.”¹³⁰ The State is also obliged to facilitate the process of identification and to draw up inventories of intangible cultural heritage.¹³¹

The Intangible Cultural Heritage Convention even expressly grants communities a role in the safeguarding of the cultural heritage since each State party shall involve “the participation of communities, groups and relevant non-governmental organizations” in identifying and defining the various elements of the intangible cultural heritage present in its territory.¹³² Furthermore, it “shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.”¹³³ Like in the case of the UNESCO World Heritage Convention, it is ultimately the State that identifies the intangible cultural heritage in its territory while all attempts to involve any entity other than the State in the selection were greatly resisted; however, the participation of communities and groups was recognized at least in the identification procedure as a compromise solution.¹³⁴

The monitoring body of the Convention, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (the “Intergovernmental Committee”), recommends States parties to strengthen the role of communities in safeguarding their own cultural heritage and stresses that access of communities, groups and individuals to the objects, “cultural and natural spaces and places of memory whose existence is necessary for expressing the intangible cultural heritage should be ensured.”¹³⁵

¹³⁰ *Id.* at art.14(c) (emphasis added).

¹³¹ *Id.* at art.13(a).

¹³² See Intangible Cultural Heritage Convention, *supra* note 116, at art.11(b)-(b)(1).

¹³³ *Id.* at art.15.

¹³⁴ See CRAIG FORREST, *Intangible cultural heritage*, in INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 362, 374 (2010).

¹³⁵ UNESCO & Intangible Cultural Heritage, *Ethical Principles for Safeguarding Intangible Cultural Heritage*, No. 5, <http://www.unesco.org/culture/>

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States parties are encouraged “to establish functional and complementary cooperation among communities, groups [...] who create, maintain and transmit intangible cultural heritage”¹³⁶ and “to create a consultative body or a coordination mechanism to facilitate” their participation in the identification and definition of the different elements of intangible cultural heritage present on their territories.¹³⁷ Thus, States parties have recognized that a purely State-oriented approach in the management of intangible heritage without the active participation of the concerned cultural community “may not be effective in achieving its proper safeguarding.”¹³⁸

Among the duties of States under the Convention, “[c]ustomary practices governing access to intangible cultural heritage should be fully respected, even where these may limit broader public access.”¹³⁹ The States Parties confirmed that beyond safeguarding measures, they shall raise awareness of the importance of the intangible cultural heritage and that the communities and groups concerned shall benefit from such awareness raising actions.¹⁴⁰ Thus, based on the principle that “communities, groups and, where applicable, individuals should never be alienated from their own intangible cultural heritage,”¹⁴¹ the Convention obliges States parties to ensure and promote broad access to members of the concerned communities to their intangible cultural heritage. It is to be noted that communities are not restricted to nationals of the State party but may include foreign nationals belonging to the same cultural community.¹⁴²

ich/en/ethics-and-ich-00866 (last visited on Sept. 16, 2016) [hereinafter *Ethical Principles*].

¹³⁶ *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, 2 G.A. (2008), ¶ 79. [hereinafter *Operational Directives*].

¹³⁷ *Id.* at ¶ 80(a).

¹³⁸ Lenzerini, *Living Culture*, *supra* note 32, at 112.

¹³⁹ *Ethical Principles*, *supra* note 135, at No. 5.

¹⁴⁰ *Operational Directives*, *supra* note 136, at ¶ 101.

¹⁴¹ *Ethical Principles*, *supra* note 135, at No. 12.

¹⁴² A meeting of twenty experts from eighteen countries, co-organized by the Intangible Heritage Section of UNESCO and the Asia/Pacific Cultural Centre for UNESCO, defined “community” as follows: “Communities are

It is the Intergovernmental Committee, composed of representatives of 24 States Parties, which selects certain cultural heritage to promote their visibility on a Representative List of the Intangible Cultural Heritage of Humanity.¹⁴³ The function of the list is, unlike the World Heritage List, not to provide a thesaurus of “universal”, “exceptional” or “outstanding” cultural heritage, terms rejected by the drafters,¹⁴⁴ but only to be “representative,” i.e. “to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity.”¹⁴⁵ Thus, the list as a whole must be representative, but each individual intangible cultural heritage is “valuable in light of the subjective perspective of its creators and bearers”¹⁴⁶ and does not need to be of outstanding universal value.¹⁴⁷

The Intergovernmental Committee is particularly keen on recognizing in its practice that intangible cultural heritage can contribute to the integration of cultural and linguistic minorities in the society and encourages their social and economic development.¹⁴⁸ It has selected several instances of intangible

networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their ICH.” See UNESCO & ACCU, Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention, 3 (Mar. 15, 2006), <http://www.unesco.org/culture/ich/doc/src/00034-EN.pdf> (last visited on Oct. 16, 2016).

¹⁴³ Intangible Cultural Heritage Convention, *supra* note 116, art. 16(1). Originally composed of 18 representatives of States parties, the number of members was increased to 24 after 50 States had ratified the Convention. See *id.* at art. 5(1)-(2).

¹⁴⁴ Forrest, *supra* note 134, at 378.

¹⁴⁵ Intangible Cultural Heritage Convention, *supra* note 116, at art. 16(1).

¹⁴⁶ Lenzerini, *supra* note 32, at 108.

¹⁴⁷ Thomas M. Schmitt, *The UNESCO Concept of Safeguarding Intangible Cultural Heritage: Its Background and Marrakchi Roots*, 14 INT’L J. HERITAGE STUDIES 95, 112 (2008).

¹⁴⁸ Operational Directives, *supra* note 136, at ¶ 194; Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, in Its Ninth session, ITH/14/9.COM/Decisions (Nov. 28, 2014) (Decision 9.COM 5.a, 5) [hereinafter *ICH Ninth Session*]; Intergovernmental Committee for the

cultural heritage on the Representative List of the Intangible Cultural Heritage of Humanity where a religious, national or ethnic community gathers in a particular site. Examples include the Festivity of Virgen de la Candelaria of Puno in Peru, a celebration of the rural and urban inhabitants of the Puno region who belong to the Quechua and Aymara ethnic groups, many of them emigrants from Puno;¹⁴⁹ the Busó festivities at Mohács, a masked end-of-winter carnival custom, in the south of Hungary which bring together the Croat minority of the region and their Hungarian, German, Serbian and Roma neighbors;¹⁵⁰ but one can also mention the nomination of the Whitsunday pilgrimage from Șumuleu Ciuc, Csíksomlyó, by the Romanian government to the Representative List which is the biggest religious and cultural festivity of Hungarians.¹⁵¹ While the admission of an item to the Representative List of the Intangible Cultural Heritage of Humanity does not imply any classification based on quality or value among the different manifestations of intangible cultural heritage, outside and in the list,¹⁵² the selection of the above mentioned examples on the List indicates their importance from the point of view of awareness-raising and cultural diversity.

Thus, one can conclude that the intangible cultural heritage of a religious, national or ethnic community which fulfils the criteria of the Intangible Cultural Heritage Convention shall be protected by the State even without any inscription to the Representative List of the Intergovernmental Committee. The obligations imposed by the

Safeguarding of the Intangible Cultural Heritage, in Its Ninth session, Item 5.a of the Provisional Agenda, ¶ 96, ITH/14/9.COM/5.a (Nov. 28, 2014).

¹⁴⁹ ICH Ninth Session, *supra* note 148, at 53, (Decision 9.COM 10.34).

¹⁵⁰ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, in Its Sixth Session, (Nov. 29, 2011) (Decision 4.COM 13.42).

¹⁵¹ Intangible Heritage Committee meeting in Ethiopia to focus on traditional songs, rituals, celebrations and know-how, UNESCO (Nov. 17m. 2016), (Whitsunday pilgrimage from Șumuleu Ciuc (Csíksomlyó), Romania, application); At its eleventh session, due to insufficient information in the file, the Intergovernmental Committee referred the nomination back to the submitting State and invited it to resubmit the nomination to the Committee for examination during a following cycle. *See* Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, in Its Eleventh Session, Dec. 2, 2016, ¶¶3-4, ITH/16/11.COM/Decisions, (Decision 11.COM 10.b.25).

¹⁵² *See* Lenzerini, *supra* note 32, at 110-111 (and accompanying text).

Intangible Cultural Heritage Convention on the States parties include various positive obligations towards living cultural practices of minorities linked to a physical site, especially the inclusion of the concerned community in the identification and preservation of the cultural heritage and the above-mentioned safeguarding measures.

However, the monitoring of the Intangible Cultural Heritage Convention can hardly enforce the above-mentioned international obligations if the domestic protection of intangible cultural heritage of minority groups proves to be inadequate. While States parties are required to periodically submit reports to the Intergovernmental Committee on the domestic implementation of the Convention¹⁵³ and on the basis of those periodic reports the Intergovernmental Committee submits a report to the General Assembly at each of its sessions,¹⁵⁴ the Committee is unlikely to analyze the domestic implementation in a critical manner. The reason lies in its procedural limits and the structure of its report; the Intergovernmental Committee is composed of State representatives rather than of experts,¹⁵⁵ it meets only once a year¹⁵⁶ and its overall report submitted to the General Assembly is limited to the comparison and the summary of the State reports. Even if the reports illustrate that in some States parties the community involvement is superficial,¹⁵⁷ the Intergovernmental Committee does not address recommendations to the concerned States but limits itself in general calls upon States parties.

For example, it usually invites States parties to address in their reports “the contributions that intangible cultural heritage can make to the integration of cultural and linguistic minorities into

¹⁵³ Intangible Cultural Heritage Convention, *supra* note 116, at art. 29.

¹⁵⁴ *Id.* at art. 30(1).

¹⁵⁵ *Id.* art. 6(2).

¹⁵⁶ UNESCO, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage in Its First Session, Item 2: Adoption of the Rules of Procedure, 2, ITH/06/1.COM/CONF.204/2 (Nov. 19, 2006), (looking specifically at Rule 2.1).

¹⁵⁷ This is a tendency visible in the periodic reports submitted over the first seven years of the Convention. See Janet Blake, *Seven Years of Implementing UNESCO's 2003 Intangible Heritage Convention - Honeymoon Period or the "Seven-Year Itch"?*, 21 INT'L J. CULTURAL PROP. 291, 299 (2014).

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society,”¹⁵⁸ but does not react to the individual States’ implementation problems. Consequently, national and ethnic minorities cannot expect that their memorial sites enjoy an enforceable international protection under the Intangible Cultural Heritage Convention if the State party is unwilling to select and protect those sites and living practices.¹⁵⁹

B. Universal Protection of Cultural Rights of Minority Members

Having concluded that universal treaties do grant protection to certain memorial sites of minorities, especially to those fulfilling the criteria of the Intangible Cultural Heritage Convention, although without a strong control mechanism, one may go further and ask whether members of national or ethnic communities have individual human rights to participate in cultural traditions related to memorial sites under international law. Due to the universality of human rights recognized in the major U.N. human rights conventions such as the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the Convention on the Rights of the Child (“CRC”) or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“CMW”), nationals of the territorial State and foreign citizens equally enjoy civil and political rights when visiting a memorial site. The relevant human rights include the freedom of movement within the State, the freedom of expression, the freedom of assembly, the freedom of freedom of thought, conscience and religion or the right to non-

¹⁵⁸ *E.g.*, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage in Its Ninth Session, Item 5a, ¶ 9, ITH/14/9.COM/5.a (Oct. 22, 2014).

¹⁵⁹ *See* Lucas Lixinski, *Selecting Heritage: The Interplay of Art, Politics and Identity*, 22 EUR. J. INT’L L. 81, 94 (2011) (formulating that the Convention has created “a system based on listing and ‘policy-oriented’ protection” rather than a legal system of protection).

discrimination in accordance with those universal human rights treaties.

As the dominant element of the visit of the memorial site by persons belonging to national or ethnic communities is the maintenance of their culture, this part of the paper addresses mainly their cultural rights, understood as the various manifestations of the right to take part in cultural life, related to memorial sites of a given national or ethnic minority. The ICESCR defined “culture” as “a broad, inclusive concept encompassing all manifestations of human existence” such as rites and ceremonies, natural and man-made environments, customs and traditions, etc. “through which individuals, groups of individuals and communities express their humanity.”¹⁶⁰

The treaty provisions and the subsequent practice of treaty monitoring bodies have clarified three dominant trends in the protection of cultural rights of persons belonging to religious, national or ethnic communities: (1) the protection of cultural rights is not dependent on citizenship and even non-citizens shall fully enjoy them, thus even foreigners belonging to the minority enjoy the same human rights; (2) any cultural activity in memorial sites shall be governed and protected by the State in a non-discriminatory manner (including the entry to the territory, equal access to culture); (3) finally, a key duty States have with regard to persons belonging to minorities is their obligation to fulfill cultural rights. All of those dominant trends will be examined further in detail.

1. No Condition of Nationality

The exercise of cultural rights is independent of citizenship. While certain civil and political rights, such as the right to participate in elections, to vote and to stand for election, may be confined to

¹⁶⁰ Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 21, Right of everyone to take part in cultural life (art. 15, ¶ 1 (a), of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 11, 13, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter *CESCR, General Comment No. 21*].

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citizens, “human rights are, in principle, to be enjoyed by all persons.”¹⁶¹

Cultural rights as such by definition exceed State borders and no multilateral instruments providing for cultural rights limit those rights to nationals of the State party. Rather, they provide for the right of “everyone” to “take part in cultural life” (ICESCR),¹⁶² “the right freely to participate in the cultural life of the community” (Universal Declaration of Human Rights),¹⁶³ “to equal participation in cultural activities” “without distinction as to race, colour, or national or ethnic origin” (ICERD),¹⁶⁴ the right of women “to participate in [...] all aspects of cultural life” (CEDAW),¹⁶⁵ the right of the child “to enjoy his or her own culture” in community of his or her minority and “to participate freely in cultural life” (CRC)¹⁶⁶ or “to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and

¹⁶¹ Committee on the Elimination of Racial Discrimination [CERD], General Recommendation 30, Discrimination against non-citizens, ¶3, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Aug. 19, 2004) [hereinafter *CERD, General Recommendation 30*].

¹⁶² International Covenant on Economic, Social and Cultural Rights [ICESCR], art. 15(1), Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁶³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27(1) (Dec. 10, 1948); While adopted in the form of a non-binding U.N. General Assembly resolution, the Universal Declaration of Human Rights is widely considered as reflecting customary international law. U.N. Secretariat, Vienna Declaration and Programme of Action, Note by the Secretariat, Word Conf. on Hum. Rts., ¶ 8, U.N. Doc. A/CONF.157/23 (Jun. 25, 1993) (the 1993 Vienna U.N. World Conference on Human Rights, where more than 100 States confirmed that the Declaration “is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments”). *Id.* The ICJ also confirmed that at least some norms of the Universal Declaration are customary international law norms. *See United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. 42, ¶ 91 (May 24, 1980).

¹⁶⁴ International Convention on the Elimination of All Forms of Racial Discrimination [CERD], art. 5(e)(vi), Mar. 7, 1966, 660 U.N.T.S. 195.

¹⁶⁵ Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], art. 13(c), Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁶⁶ Convention on the Rights of the Child [CRC], arts. 30-31(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

fundamental freedoms” (Universal Declaration on Cultural Diversity).¹⁶⁷

More expressly, the International Convention on the Protection of the Rights of All Migrant Workers (“CMW”) provides that “[m]igrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: [...] [a]ccess to and participation in cultural life.”¹⁶⁸ Even in civil and political rights, any limitation of individual rights must be reasonable, i.e. citizenship requirement as a necessary condition for the exercise of rights cannot make an arbitrary and discriminatory distinction between individuals.¹⁶⁹ Contrary to several national jurisdictions which limit the rights of minorities to nationals of the State,¹⁷⁰ the Human Rights Committee interprets the notion of “members of minorities” independently of their nationality; minorities must “exist” in the territory of the State and any individual may belong to the said community.¹⁷¹

Under Article 27 of the ICCPR, considered as the main provision protecting minorities at the universal level, “[i]n 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.”¹⁷² The Human Rights Committee interpreted the personal scope of minorities very broadly, since their members need not to be nationals or citizens, as they need not to be permanent residents either; thus, migrant workers or even foreign visitors to a State party where their community exists as a minority are entitled to the

¹⁶⁷ UNESCO, 1 Records of the 31st session of the General Conference: Resolutions, 31C/Res 25, art. 5, Nov. 2, 2001.

¹⁶⁸ G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families [CMW], art. 43(1)(g), Dec. 18, 1990, 2220 U.N.T.S. 3.

¹⁶⁹ Hum. Rts. Comm., *Slezák v. Czech Republic*, Communication No. 15 74/2007, Views adopted on Jul. 20, 2009, ¶ 7.3, U.N. Doc. CCPR/C/96/D/1574/2007 (Sept. 7, 2009) [hereinafter *Slezák Communication*].

¹⁷⁰ See the examples cited *supra* note 31 and accompanying text.

¹⁷¹ General Comment No. 23, *supra* note 9, at ¶ 5.2.

¹⁷² International Covenant on Civil and Political Rights [ICCPR], art. 27, Dec. 19, 1966, 999 U.N.T.S. 14668.

protection of the rights of members belonging to minorities under the ICCPR.¹⁷³ Other treaty monitoring bodies refer to this definition when they provide for the rights of minorities.¹⁷⁴ Some monitoring bodies expressly recommend that States shall guarantee the right of migrants to hold cultural, artistic and intercultural events¹⁷⁵ and take measures to enable non-citizens to preserve and develop their culture.¹⁷⁶

However, the broad personal scope of minority rights under the ICCPR is not universally accepted. As mentioned above, several States parties to the ICCPR limit the rights of national and ethnic minorities to the State's own nationals in their domestic legislation,¹⁷⁷ and two States parties made a reservation with regard

¹⁷³ *Id.* It should be noted that the broad interpretation of minorities does not apply to the so-called “double” minorities, i.e. to groups who belong to the majority ethnic, linguistic or religious population of the country but constitute a numerical minority in a given region (i.e. the German-speaking population of the French speaking cantons in Switzerland, the Spanish-speaking population in Catalonia or the English speaking population of Québec). The Human Rights Committee held that “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.” See Hum. Rts. Comm., *MacIntyre v. Canada*, Communication Nos. 359/1989 and 385/1989, Views adopted on Mar. 31, 1993, ¶ 11.2, U.N. Doc. CPR/C/47/D/359/1989 and 385/1989/Rev.1 (May 5, 1993); see also Athanasios Yupsanis, *Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority/Indigenous Participatory Claims in the Case Law of the Human Rights Committee*, 26 HAGUE Y.B. INT’L L. 358, 366 (2013).

¹⁷⁴ E.g., Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Art. 15, Para. 1 (c) of the Covenant), ¶33, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

¹⁷⁵ CESCR, General Comment No. 21: Right of everyone to take part in cultural life (art. 15, ¶ 1 (a), of the International Covenant on Economic, Social and Cultural Rights), ¶34, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

¹⁷⁶ CERD, General Recommendation 30, Discrimination against non-citizens, ¶37, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Aug. 19, 2004).

¹⁷⁷ E.g., in Europe, out of 14 declarations containing a definition and/or listing the groups protected, 8 explicitly mention the citizenship (or the nationality) of the state of residence as a condition for minority rights. See European

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to Article 27.¹⁷⁸

2. *Non-Discrimination and Equal Access*
(*Entry to the Territory, Access to Culture*)

Universal human rights conventions provide for the States' duties of non-discrimination and equal access of minority members to culture, both strengthening the access of members of minorities to their memorial sites. No human rights convention guarantees, however, a right of non-nationals to enter to or reside within a State of his or her choice, since States have as a matter of international law the right to control the admission of persons to their territory.¹⁷⁹ Consequently, any cultural rights a foreign national may claim in a State might be relevant for the present paper only provided that he or she was admitted to enter, but States have at least the duty not to make any discrimination on the basis of race, nationality, religion etc. in accordance with the non-discrimination provisions of human rights treaties.¹⁸⁰

Non-discrimination shall be complied with while protecting the institutions and memorial sites of various communities, too: States parties should ensure that laws and programs be equally devoted to the promotion of cultural institutions and the protection of memorial sites of religious communities.¹⁸¹ As the CESCR

Commission for Democracy through Law (Venice Commission), Report on Non-Citizens and Minority Rights, on its Sixty Ninth Plenary Session, ¶ 22, CDL-AD(2007)001 (Jan. 18, 2007).

¹⁷⁸ France and Turkey, *see* United Nations Treaty Collection, ICCPR, status as at 01-11-2016 05:00:38 EDT.

¹⁷⁹ Hum. Rts. Comm., General Comment No. 15: The position of aliens under the Covenant, ¶¶5-6, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) [hereinafter *Hum. Rts. Comm., General Comment No. 15*]; Hum. Rts. Comm., General Comment No. 27 (67): Freedom of movement (article 12), ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999) [hereinafter *General Comment No. 27 (67)*]; *B.A.C. v. Greece*, App. No. 11981/15, Eur. Ct. H.R. ¶ 35 (2016).

¹⁸⁰ Hum. Rts. Comm., General Comment No. 15, *supra* note 179, at ¶ 5.

¹⁸¹ CERD, Concluding observations, Israel, ¶ 28, U.N. Doc. CERD/C/ISR/CO/13 (Jun. 14, 2007).

recommended, States shall “respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups”.¹⁸²

Another important aspect of the non-discrimination and equal access of minority members to culture is their right to maintain contacts with their State of origin. In other words, the State has a negative obligation not to prevent persons belonging to minorities to maintain free and peaceful contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.¹⁸³ Similarly, States shall not prevent migrants from maintaining their cultural links with their countries of origin.¹⁸⁴ This prohibits all undue restrictions of the rights of minority members to travel to memorial sites, attend cultural events of their minority or to accept financial aid from the State of origin.¹⁸⁵

Any limitations of human rights exercised by members of a national or ethnic community while visiting a memorial site shall not be arbitrary or unreasonable and any assessment as to the necessity of a limitation should be made on objective considerations. Thus, a permissible restriction such as the limitation of the freedom of movement must be proportional to the legitimate aims pursued and “must be the least intrusive instrument amongst those which might achieve the desired result.”¹⁸⁶ Applying this standard, the International Court of Justice found that the construction of the wall in the Occupied Palestinian Territories by Israel would

¹⁸² CESCR, General Comment No. 21, *supra* note 160, at ¶ 50(b).

¹⁸³ G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 2(5) (Dec. 18, 1992).

¹⁸⁴ G.A. Res. 45/158, CMW, article 31(1), Dec. 18, 1990, 2220 U.N.T.S. 3; CESCR, General Comment No. 21, *supra* note 160, at ¶ 34.

¹⁸⁵ See OSCE HCNM, THE BOLZANO/BOZEN RECOMMENDATIONS ON NATIONAL MINORITIES IN INTER-STATE RELATIONS & EXPLANATORY NOTE, 21 (June 2008) (looking at Recommendation No. 13). However, financing should be respect the laws of the territorial State and, as the OSCE High Commissioner on National Minorities proposed, “States should refrain from financing political parties of an ethnic or religious character in a foreign country, as this may have destabilizing effects and undermine good inter-State relations.” *Id.*

¹⁸⁶ General Comment No. 27 (67), *supra* note 179, at ¶ 14.

disproportionately restrict the freedom of movement of Palestinians and fail to meet a condition laid down by Article 4 of the ICESCR under which the implementation of a restriction must be “solely for the purpose of promoting the general welfare in a democratic society.”¹⁸⁷

A serious weakness of the universal protection of persons belonging to minorities against discrimination is the extremely broad margin of appreciation left for the State as to the extent of the permissible restrictions of Article 27 of the ICCPR.¹⁸⁸ The Human Rights Committee only found a violation of Article 27 where the challenged restriction had an impact so substantial that it does effectively deny to the complainants the right to enjoy their cultural rights.¹⁸⁹ In several cases, however, the Committee was unable to conclude, “given the limited evidence before it,” the impact of the challenged restriction on the entirety of the cultural life and the survival of the given minority and its members was such as to amount to a denial of the authors’ rights under Articles 26 (the duty of non-discrimination) and 27.¹⁹⁰ In other words, the threshold to be proven by the complainants is extremely high. States must demonstrate that the factual importance of the given cultural heritage in the minority’s life as a whole is so substantial that its restriction would amount to the denial of their rights under Article 27 of the Covenant.

¹⁸⁷ 2004 I.C.J. 193, ¶ 136.

¹⁸⁸ International Covenant on Civil and Political Rights [ICCPR], art. 27, Dec. 19, 1966, 999 U.N.T.S. 14668.

¹⁸⁹ Hum. Rts. Comm., *Länsman et al. v. Finland*, Communication No. 511/1992, Views adopted on Oct. 26, 1994, ¶ 5, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994) [hereinafter *Länsman Communication*]; Hum. Rts. Comm., *Mavlonov & Sa’di v. Uzbekistan*, Communication 1334/2004, Views adopted on Mar. 19, 2009, ¶ 8.7, U.N. Doc. CCPR/C/95/D/1334/2004 (Apr. 29, 2009) [hereinafter *Mavlonov Communication*].

¹⁹⁰ Hum. Rts. Comm., *Paadar et al. v. Finland*, Communication No. 2102/2011, Views adopted on Mar. 26, 2014, ¶ 7.7, U.N. Doc. CCPR/C/110/D/2102/2011 (Jun. 5, 2014) [hereinafter *Paadar Communication*]; Hum. Rts. Comm., *Äärelä & Näkkäläjärvi v. Finland*, Communication No. 779/1997, Views adopted on Oct. 24, 2001, ¶ 7.6, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001) [hereinafter *Äärelä Communication*].

The Committee must assess whether the challenged measure affects an essential element of the minority's culture which amounts to a denial of the rights under Article 27 or whether it has "only a limited impact on the way of life and livelihood" of the members of the minority.¹⁹¹ What is essential for the culture of a given minority cannot be determined in the abstract but depends on the context. In the case of indigenous peoples, reindeer herding,¹⁹² fishing¹⁹³ or a mountain having a spiritual significance¹⁹⁴ were considered as essential elements of the culture. In case of national and ethnic minorities other than indigenous peoples, whose cultures "consist in a way of life which is closely associated with territory and use of its resources,"¹⁹⁵ the restriction of cultural activities such as gatherings or visits at memorial sites are unlikely to amount to "a *de facto* denial" of the right to enjoy their minority culture under Article 27.¹⁹⁶ For example, a restriction of a national or ethnic minority's project to erect a statute in a public space of their choice might not amount to a denial of minority rights if the limitation is not arbitrary or unreasonable, e.g., if alternative places are provided, whereas the prohibition to use their mother tongue while celebrating their national day in a public space seems to deny the very essence of Article 27.¹⁹⁷

¹⁹¹ Hum. Rts. Comm., *Poma Poma v. Peru*, Communication No. 1457/2006, Views adopted on Mar. 27, 2009, ¶ 7.4, U.N. Doc. CCPR/C/95/D/1457/2006 (Apr. 24, 2009) [hereinafter *Poma Poma Communication*]; *Länsman Communication*, *supra* note 189, at ¶ 9.4.

¹⁹² *Id.* at ¶ 9.3.

¹⁹³ Hum. Rts. Comm., *Mahuika et al. v. New Zealand*, Communication No. 547/1993, Views adopted on Oct. 27, 2000, ¶ 9.3, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000) [hereinafter *Mahuika Communication*].

¹⁹⁴ *Länsman Communication*, *supra* note 189, at ¶ 9.3.

¹⁹⁵ General Comment No. 23, *supra* note 9, at ¶ 3.2; *Poma Poma Communication*, *supra* note 191, at ¶ 7.2.

¹⁹⁶ For this threshold, *see, e.g.*, Hum. Rts. Comm., *Raihan v. Latvia*, Communication No. 1621/2007, Views adopted on Oct. 28, 2010, ¶ 8.6, U.N. Doc. CCPR/C/100/D/1621/2007 (Nov. 30, 2010).

¹⁹⁷ In a case concerning the refusal of registration for a newspaper of an ethnic minority that informed readers among others about cultural events, the Human Rights Committee held that the use of a minority language press "is an essential element of the Tajik minority's culture." *See Mavlonov & Sa'di v.*

3. *The Obligation to Fulfill*

Cultural rights require from the State party both negative obligations, i.e. abstention (e.g., non-interference with the exercise of cultural practices and with access to cultural goods and services), especially the non-discrimination duty as detailed above, and positive action (“ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods”).¹⁹⁸ Positive obligations comprise the obligations to protect and to fulfill. Whereas the former requires the State to take steps to prevent third parties from interfering in the right to take part in cultural life, the obligation to fulfill requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional, and other measures aimed at the full realization of the right to culture.¹⁹⁹

Considering that the ICESCR provides for the “progressive” realization of the rights enshrined in its provisions and recognizes the problems arising from the scarcity of resources, “it imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life.”²⁰⁰ On the contrary, regressive measures taken in relation to cultural rights are not permitted under the ICESCR, but “if any such measure is taken deliberately, the State party has to prove that it was taken after careful consideration of all alternatives and that the measure in question is justified, bearing in mind the complete set of rights recognized in the Covenant.”²⁰¹ Thus,

Uzbekistan, *supra* note 189, at ¶ 8.7.

¹⁹⁸ CESCR, General Comment No. 21, *supra* note 160, at ¶ 6.

¹⁹⁹ *Id.* ¶ 48.

²⁰⁰ International Covenant on Economic, Social and Cultural Rights [ICESCR], art 2(1), Dec. 16, 1966, 993 U.N.T.S. 3; CESCR, General Comment No. 21, *supra* note 160, at ¶ 45.

²⁰¹ CESCR, General Comment No. 21, *supra* note 160, at ¶¶ 46, 65; CESCR, General Comment No. 3: The nature of States parties’ obligations (art. 2, Para. 1, of the Covenant), ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990) *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 7-10, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008).

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any limitation of the already taken positive measures with regard to memorial sites and cultural events of persons belonging to minorities would require the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

Very early in the history of international adjudication, the Permanent Court of International Justice already interpreted minority rights as requiring positive obligations from the State.²⁰² The General Comment of Article 27 of the ICCPR on the right of minorities, adopted in 1994, uses a reserved wording, at the most suggesting the States parties to take some positive measures, stressing the non-discrimination between different minorities.²⁰³ The Human Rights

²⁰² *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at ¶ 1. (Apr. 6). The Court held:

[t]he idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

Id. at ¶ 48. It also added that one of the basic obligations under minorities treaties was “to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.” *Id.* at ¶ 51; Eleni Polymenopoulou, *Cultural Rights in the Case Law of the International Court of Justice*, 27 *LEIDEN J. INT’L L.* 447, 451 (2014).

²⁰³ General Comment No. 23, *supra* note 9, at ¶ 6.2

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 practice 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

Committee leaves a broad margin of appreciation for States to decide on the extent of their positive measures fulfilling the rights of persons belonging to minorities as long as they comply with the non-discrimination principles with regard to other minorities. Even in its recent general comment on the position of aliens under the Covenant, the Committee did not go beyond the mere requirement of non-discrimination and equal access to culture when it recommended that the minority rights to enjoy their own culture of those aliens under Article 27 “shall not be denied.”²⁰⁴

As for the rights holders, Article 27 enshrines individual rights, while it does not accord any status to the collectivity of the minority group.²⁰⁵ Notwithstanding the reserved wording of Article 27, the Human Rights Committee recognized that beyond the mainly individual character of the right to enjoy minority culture, it has a collective aspect that requires positive obligations from States parties. It 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.”²⁰⁶

Other treaty bodies such as the CESCR seemed to go somewhat further in the recognition of the collective aspect of minority rights when it opined that “cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.”²⁰⁷ In its concluding observations, the Human Rights Committee has been more willing to emphasize the positive obligations of States not only with regard to

objective criteria.

Id.

²⁰⁴ Hum. Rts. Comm., General Comment No. 15: The position of aliens under the Covenant, *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 189, 190, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008).

²⁰⁵ General Comment No. 23, *supra* note 9, at ¶ 6.2; Yupsanis, *supra* note 173, at 362.

²⁰⁶ General Comment No. 23, *supra* note 9, at ¶ 6.2.

²⁰⁷ CESCR, General Comment No. 21, *supra* note 160, ¶ 9.

individual members of minorities, but also towards national and ethnic minorities as such. Examples are the inclusion of “holy sites of religious minorities” in Israel’s list of holy sites,²⁰⁸ or the State party’s active engagement “in nurturing respect for the Roma culture and history through symbolic acts such as removing the pig farm located on a World War II Roma concentration camp in Lety,” that the Committee recommended to the Czech Republic.²⁰⁹ These measures address the cultural needs of an entire collectivity and not only of individuals with regard to memorial sites. Thus, there is an increasing tendency within UN treaty bodies to recognize the collective nature of cultural and minority rights.

As a specific positive obligation, the Human Rights Committee considers necessary for the effectiveness of minority culture that members of the minorities, especially indigenous communities, could effectively influence the decisions that impact their way of life.

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, specially 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.²¹⁰

The opportunity to participate in the decision-making process requires at the minimum some form of consultation of the affected indigenous community. Other U.N. treaty bodies and Charter-based

²⁰⁸ Hum. Rts. Comm., Concluding observations, Israel, ¶ 20, U.N. Doc. CCPR/C/ISR/CO/3 (Sept. 3, 2009).

²⁰⁹ Hum. Rts. Comm., Concluding observations on the third periodic report of the Czech Republic, ¶ 8(b), U.N. Doc. CCPR/C/CZE/CO/3 (Aug. 22, 2013).

²¹⁰ General Comment No. 23, *supra* note 9, at 209.

bodies confirmed the same positive obligation with respect to minority communities.²¹¹

The major weakness of this recommendation is the unclear consultation procedure expected from States. In two quasi-judicial cases where the Human Rights Committee dealt with this issue, i.e. the *Länsman et al. v. Finland* and the *Apirana Mahuika et al. v. New Zealand* cases,²¹² the Committee accepted the respondent State's position and did not clarify the criteria that makes a consultation procedure conform to Article 27.²¹³ In one case where the Committee found a violation of Article 27, it took into account that the indigenous community was not consulted at all and that "the State did not require studies to be undertaken by a competent independent body in order to determine the impact of the challenged domestic measure on traditional economic activity of the community."²¹⁴

Furthermore, the Committee recommended that the consultation "must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."²¹⁵ While the case law remains scarce, the concluding observation of the Human Rights Committee to the States parties' reports further clarified that the prior consultation of the concerned indigenous community should be conducted "in a timely manner" "with a view to obtaining their free and informed consent prior to the adoption and application of any measure that may have a substantial impact on their way of life and culture."²¹⁶

In its general comment on the right of everyone to take part in

²¹¹ See Farida Shaheed (Special Rapporteur in the field of cultural rights), Mission to the Russian Federation, ¶108(a), U.N. Doc. A/HRC/23/34/Add.1 (Mar. 11, 2013), ¶ 108(a).

²¹² *Länsman* Communication, *supra* note 189; see also *Mahuika et al. v. New Zealand* Communication, *supra* note 193.

²¹³ *Yupsanis*, *supra* note 173, at 390.

²¹⁴ *Poma Poma* Communication, *supra* note 191, at ¶ 7.7.

²¹⁵ *Id.*, ¶ 7.6.

²¹⁶ Hum. Rts. Comm., Concluding observations on the seventh periodic report of Colombia, ¶ 43(b)-(c), U.N. Doc. CCPR/C/COL/CO/7 (Nov. 17, 2016); Hum. Rts. Comm., Concluding observations on the fourth periodic report of the United States of America, ¶ 25, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

cultural life, the CESCER extended the opportunity to participate in the decision-making process beyond indigenous peoples to any minorities. It recommended that article 15, paragraph 1(a) of the Covenant entails at least one core obligation.

To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.²¹⁷

Doctrinal commentaries interpret the duty as requiring the State on the one hand that the indigenous people “be clearly, fully and accurately informed and on the other that they be given real and fair opportunities to be heard and to influence the decisions that will affect their lives.”²¹⁸

During the recent years, U.N. human rights treaty bodies went further and detailed even more and more precisely the positive measures that States are required to take in order to fulfill the cultural rights of minorities. The most wide-ranging positive obligations have been recommended with regard to Article 15(2) of the ICESCR, obliging States to take steps to achieve the full realization of the right to culture which “shall include those necessary for the conservation, the development and the diffusion of science and culture.”²¹⁹ The CESCER recommended a series of positive measures such as:

- the protection of cultural heritage which includes “the care, preservation and restoration of historical sites, monuments”,²²⁰
- the adoption of “policies enabling persons belonging to

²¹⁷ CESCER, General Comment No. 21, *supra* note 160, at ¶ 55(c).

²¹⁸ Yupsanis, *supra* note 173, at 392.

²¹⁹ International Covenant on Economic, Social and Cultural Rights [ICESCR], art 15(2), Dec. 16, 1966, 993 U.N.T.S. 3.

²²⁰ CESCER, General Comment No. 21, *supra* note 160, at ¶ 50(a).

diverse cultural communities to engage freely and without discrimination in their own cultural practices”;²²¹

- the promotion of “the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights”;²²²
- “[g]ranting assistance, financial or other, to artists, public and private organizations”;²²³
- “[t]aking appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture”;²²⁴
- education and awareness-raising on the need to respect cultural heritage and cultural diversity with respect to minorities;²²⁵
- “States parties must provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal.”²²⁶ This may be satisfied for example through programs aimed at preserving and restoring cultural heritage.

The CESCR addresses to States parties those positive obligations with regard to the cultural heritage of minorities in its concluding observations too.²²⁷ Likewise, the CERD Committee widened the content of the right to culture, on the one hand in its general recommendations by recommending States “to take measures to enable non-citizens to preserve and develop their culture,”²²⁸ and

²²¹ *Id.* at ¶ 52(b).

²²² *Id.* at ¶ 52(c).

²²³ *Id.* at ¶ 52(d).

²²⁴ *Id.* at ¶ 52(e).

²²⁵ CESCR, General Comment No. 21, *supra* note 160, at ¶ 52(f).

²²⁶ *Id.* at ¶ 53.

²²⁷ *Id.* at ¶ 54.

²²⁸ *E.g.* CESCR, Concluding observations, France, ¶¶ 30, 50, U.N. Doc. E/C.12/FRA/CO/3 (Jun. 9, 2008); CESCR, Concluding observations on the fourth periodic report of France, ¶¶ 14-15, U.N. Doc. E/C.12/FRA/CO/4 (Jul. 13, 2016); CESCR, Concluding observations on the combined second and third periodic

to promote intercultural education of Roma and people of African descent, to encourage and support the publication and distribution of books about their history and culture and to develop educational and media campaigns to educate the public about the life, society and culture of those communities.²²⁹ On the other hand, similarly to the CESCR, the CERD Committee recommended States parties in its concluding observations to take specific measures for the preservation and development of cultures of minority groups.²³⁰

The above-mentioned recommendations outline positive obligations of States parties to fulfill the right to culture of national and ethnic minorities in various ways. States are required to protect and promote the cultural heritage of minorities and the cultural practices related to the sites. The great variety of general comments and concluding observations show that States can fulfill cultural rights in various ways, by “appropriate measures or programmes,” i.e. with legislative, administrative, economic or financial assistance. The degree to which States are expected to fulfil the right to culture is a due diligence standard,²³¹ i.e. within the means at their disposal. States parties to the ICESCR shall undertake to take steps, “to the maximum of its available resources, with a view to achieving progressively the full realization”²³² of the cultural rights of persons

reports of Albania, ¶ 35, U.N. Doc. E/C.12/ALB/CO/2-3 (Dec. 18, 2013); CESCR, Concluding observations on the second periodic report of the Islamic Republic of Iran, ¶ 30, U.N. Doc. E/C.12/IRN/CO/2 (Jun. 10, 2013); CESCR, Concluding observations, Estonia, ¶30, U.N. Doc. E/C.12/EST/CO/2 (Dec. 16, 2011).

²²⁹ CERD, General Recommendation 30, Discrimination against non-citizens, ¶ 37, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Aug. 19, 2004).

²³⁰ CERD, General Recommendation XXVII on discrimination against Roma, U.N. Doc. A/55/18, annex V *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 289, 293, ¶¶ 18, 26, 38, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (May 27, 2008); CERD, General Recommendation No. 34 on Racial discrimination against people of African descent, ¶¶ 32, 66, U.N. Doc. CERD/C/GC/34 (Oct. 3, 2011).

²³¹ CERD, Concluding observations, Turkmenistan, ¶ 21, U.N. Doc. CERD/C/TKM/CO/6-7 (Apr. 13, 2012); CERD, Concluding observations, Switzerland, ¶ 19, U.N. Doc. CERD/C/CHE/CO/6 (Sept. 23, 2008).

²³² International Covenant on Economic, Social and Cultural Rights [ICESCR], art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3. The due diligence is a standard, i.e. a norm which prescribes the limits of legal conduct while allowing a

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belonging to minorities.

As to the rights holders, U.N. treaty bodies have a tendency to recognize that the entire collectivity of a national or ethnic minority and not only individual members are entitled to the protection and promotion of memorial sites. However, the broad concept of “minorities” in the practice of U.N. human rights treaty bodies and the corresponding positive obligations to fulfill might raise the question whether any minority group could claim a right to maintain and promote a cultural practice of its own at any site. Here, the above-mentioned rule on the careful consideration of regressive measures with regard to cultural rights can be reiterated; the State party can only limit the cultural rights of minority members if it can prove that it was taken after careful consideration of all alternatives and that the measure in question is justified. Furthermore, universal human rights treaties require as a minimum the respect of “existing rights,” i.e. States shall not deny or impair existing culture and traditions in respect of religious or memorial sites and should safeguard freedom of worship or the freedom of assembly in conformity with existing rights.²³³

Summarizing the main obligations States have under the above mentioned universal conventions in international cultural heritage law, IHL and international human rights law, it is appearing that those specific branches of international law provide protection both for the object of the cultural heritage, be it material or intangible, and persons belonging to national and ethnic minorities creating, maintaining or enjoying that cultural heritage. As a major principle reiterated by both international cultural heritage law and international human rights law instruments, safeguarding the intangible cultural heritage of minority communities contributes to social cohesion, overcomes all forms of discrimination and strengthens “the social fabric of communities and groups in an

certain leeway for States. It expresses “with regard to what should be legitimately expected to be secured [...] by a reasonably well organized modern State”. *See Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 77, (Jun. 27, 1990).

²³³ International Covenant on Economic, Social and Cultural Rights [ICESCR], art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3.

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inclusive way.”²³⁴ One can add that if there is a cross-border element, namely the participation of persons belonging to a religious, national or ethnic community from another State, the pacifying effect of cultural diversity and the mutual solidarity between peoples as legal policy objectives apply *a fortiori*.

Both international cultural heritage law and universal human rights treaties impose positive obligations on States to take positive steps to protect both *lieux de mémoire* and the exercise of human rights related to the culture of the community, such as the adoption of general policies protecting the cultural heritage and the promotion of the cultural traditions of persons belonging to minorities, even those who are not citizens of the territorial State. However, the analyzed international conventions leave a broad leeway for States parties to determine which communities they consider as minorities and to what extent they comply with their obligations to fulfil cultural rights. As it will be demonstrated, the European protection of *lieux de mémoire* of minority members provides for similar substantial obligations, but with certain minimum standards, more elaborated and far-reaching positive obligations and enforcement mechanisms.

III. Regional Protection of Lieux de Mémoire of Minority Members

The European legal instruments protecting the memorial sites of minority members are of two types regional treaties expressly providing for the cultural rights of persons belonging to national and ethnic minorities and the European Convention on Human Rights. The latter does neither provide for the rights of minorities, nor for cultural rights, but its binding judicial control mechanism guarantees the effective protection of the exercise of human rights without

²³⁴ Asma Jahangir (Special Rapporteur on freedom of religion or belief), Mission to Israel and the Occupied Palestinian Territory, ¶ 76, U.N. Doc. A/HRC/10/8/Add.2 (Jan. 12, 2009) (in respect of religious sites); *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Reparations Order, ¶ 14, (Aug. 17, 2017) (“Those destroying cultural heritage seek to disrupt the social fabric of societies.” *Id.*).

discrimination. The two kinds of treaty regime and their supervision mechanisms arguably constitute a minimum threshold that European States shall comply with in the matter of memorial sites.

It should be briefly noted that while the protection of rights of national or ethnic minorities has been developed mostly in Europe, the Inter-American²³⁵ and African²³⁶ regional human rights systems have also contributed to the protection of memorial sites. However, they do it through the protection of indigenous rights, especially by imposing the duty of erecting memorial sites as a collective form of reparation, the study of which would, however, exceed the limits of

²³⁵ See the recently created Unit on Memory, Truth and Justice within the Inter-American Commission on Human Rights (IACHR), responsible for the protection of the right to memory and truth among other tools through the promotion of memorial sites. IACHR Creates New Thematic Units and Announces New Distribution of Rapporteurships, OAS (May 24, 2017), http://www.oas.org/en/iachr/media_center/preleases/2017/066.asp (last visited May 15, 2017); CIDH convoca para participar en consulta pública sobre la Unidad Temática Memoria, Verdad y Justicia, OAS (Sept. 27, 2017), <http://www.oas.org/es/cidh/prensa/comunicados/2017/146.asp> (last visited May 15, 2017); in the practice of the IACHR, see e.g. IACHR, Precautionary Measures 2006 (n.d.), <http://www.cidh.org/medidas/2006.eng.htm> (last visited May 15, 2017) (Precautionary measure granted in favor of the Maya-Sitio Community of El Rosario-Naranjo granted by the IACHR). On the practice of the Inter-American Court of Human Rights deciding on reparation through memorial sites, see Frédéric Mégret, *Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice*, 16 BUFFALO HUM. RTS. L. REV. 1, 27 (2010); Maria Chiara Campisi, *From Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights*, 8 INT'L J. CONFLICT & VIOLENCE 62, 67-68 (2014).

²³⁶ A case law similar to the Inter-American has emerged within the African system of human rights protection, see African Commission on Human and Peoples' Rights [ACHPR], General Conference Res. 372, ACHPR/Res. 372 (LX) 2017, May 22, 2017. In the first indigenous peoples' rights case before the African Court of Human and Peoples' Rights, Kenya's Ogiek indigenous community requested the Court to order the erection of "[a] public monument acknowledging the violation of Ogiek rights to be erected within the Mau Forest by the Respondent State, in a place of significant importance to the Ogieks and chosen by them". See African Commission on Human and Peoples' Rights v. Kenya, App. No. 006/2012, Judgment, ¶ 43(e)(v) (May 26, 2017). While the Court recognized various violations of human rights of the indigenous community, it decided that it would rule on reparations in a separate decision. *Id.* at 223.

this paper.

A. *Regional Treaties Protecting Minority Rights*

Two kinds of special treaties seem to have influenced the case law and the practice of European States with regard to cultural rights of persons belonging to national and ethnic minorities, the Framework Convention for the Protection of National Minorities (“Framework Convention”),²³⁷ the first binding convention on minority rights adopted in 1995 and ratified by thirty-nine States, and bilateral treaties protecting minority rights, concluded usually between neighboring States in Central Europe. Despite the fact that both the Framework Convention and bilateral neighbor treaties specifically protect minorities, they deliberately do not define the term “minority” for different reasons. As for the Framework Convention, the drafters conceived it “as a living instrument whose interpretation must evolve and be adjusted regularly to new societal challenges,”²³⁸ while the bilateral neighbor treaties mutually specify that the linguistic or national minority of the State party is protected in the other State party.²³⁹

Nevertheless, these treaties, rather than asking “who” should be protected, provide an answer to the question as to “what” is required to ensure the effective protection of minority rights.²⁴⁰ With

²³⁷ Operational Directives, *supra* note 136, at ¶ 194; ICH, Ninth Session, *supra* note 148, at ¶ 10; General Comment No. 23, *supra* note 9, ¶ 9 (the protection of the rights of persons belonging to minorities is directed to “enriching the fabric of society as a whole”); Poma Poma Communication, *supra* note 191, ¶ 7.2.

²³⁸ Framework Convention, *supra* note 29.

²³⁹ The Framework Convention: a key tool to managing diversity through minority rights, Thematic Commentary No. 4: The scope of application of the Framework Convention for the Protection of National Minorities, ¶ 5, ACFC/56DOC(2016)001 (Sept. 2016) [hereinafter *Commentary No. 4*].

²⁴⁰ See Treaty on the relations of good neighbourliness and cooperation between Romania and Ukraine (with exchange of letters) art. 13(1), Jun. 2 1997, 2159 U.N.T.S., 311 (“In order to protect the ethnic, cultural, linguistic and religious identity of the Romanian minority in Ukraine and Ukrainian minority in Romania” *Id.*); Treaty between the Republic of Georgia and Ukraine on Friendship, Cooperation and Mutual Assistance, Geor.-Ukr., art. 9, Apr. 13, 1993,

regard to cultural rights of members of national and ethnic minorities, the treaty provisions expressly provide for two main groups of rights, the right to establish and maintain free and peaceful contacts across frontiers; and the right to maintain and develop one's culture, including cultural heritage. While the first broadens the non-discrimination and equal access rule of universal human rights treaties and translates it into the European context of minority protection, the second extends the positive obligations to fulfill.

*1. The Right to Establish and Maintain Free and Peaceful
Contacts Across Frontiers*

Article 17(1) of the Framework Convention provides that “[t]he Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.”²⁴¹ Contrary to Article 5, “to promote,” the latter article, “not to interfere,” requires negative conduct from the State.

Furthermore, another provision, Article 18 of the Framework Convention, imposes on the State a duty to cooperate internationally, stressing that positive State action is also required; the “[p]arties shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned,” and “[w]here relevant, the Parties shall take measures to encourage transfrontier co-operation.”²⁴² This duty might complement the negative duty to respect the right to establish and maintain free and peaceful contacts across frontiers with the State's active international cooperation in the cultural field.

This correlation between the right to establish and maintain

2472 U.N.T.S. 7. (“In order to ensure access to their national culture by national minorities whose ethnic homeland is in the territory of the other Party.”).

²⁴¹ Framework Convention, *supra* note 29, art. 17(1).

²⁴² *Id.* art. 18.

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free and peaceful contacts across frontiers and the State's duty to cooperate internationally is confirmed by the monitoring body, the Advisory Committee on the protection of National Minorities ("Advisory Committee") which recommended to States:

- "to continue seeking ways of facilitating contacts across borders, without undue restrictions on the rights of persons belonging to minorities"²⁴³ and to pursue the efforts to conclude visa-free regime agreements with neighbouring countries;²⁴⁴
- "to implement the existing bilateral agreements in the spirit of good neighbourliness, friendly relations and co-operation between states",²⁴⁵
- to consult with representatives of the concerned minority when such trans-frontier co-operation projects are planned and implemented;²⁴⁶
- to "continue and strengthen, when possible, the measures taken to facilitate movement between the Government controlled territory and the territory outside its control",²⁴⁷

²⁴³ Commentary No. 4, *supra* note 239, at 3.

²⁴⁴ Compilation of Opinions of the Advisory Committee relating to Article 17 of the Framework Convention for the Protection of National Minorities (3rd cycle), CoE 17 (May 13, 2016), <https://rm.coe.int/16805a9a44> (last visited Mar. 18, 2018); *see also* Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Albania adopted on Nov. 23, 2011, ¶15, ACFC/OP/III(2011)009 (Jun. 4, 2012).

²⁴⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Romania adopted on Mar. 21, 2012, ¶196, ACFC/OP/III(2012)001 (Oct. 5, 2012)

²⁴⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities: Fourth Opinion on Hungary adopted on Feb. 25, 2016, ¶ 22 ACFC/OP/IV(2016)003 (Sept. 12, 2016); Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on the Slovak Republic adopted on May 28, 2010, 47, ACFC/OP/III(2010)004 (Jan. 18, 2011).

²⁴⁷ *See* Compilation of Opinions of the Advisory Committee relating to Article 17 of the Framework Convention for the Protection of National Minorities (3rd cycle), *supra* note 244, at 6.

- “[s]ufficient resources should be allocated to support the continuation of cross-border projects” between persons living on the two sides of the borders belonging to the same national minority;²⁴⁸
- to pursue the efforts “with respect to regional co-operation and dialogue in order to promote the implementation of” minority rights;²⁴⁹
- “to continue their efforts to open in consultation with neighbouring countries further border crossings that would allow persons belonging to national minorities to establish and maintain contacts across frontiers”,²⁵⁰
- “to implement visa requirements in a manner that does not cause undue delays and restrictions on the right of persons belonging to national minorities to establish and maintain contacts across frontiers”;²⁵¹

These wide-ranging recommendations enrich the interpretation of the positive obligations enshrined in the Framework Convention and provide various objectives that States parties should strive to achieve in due diligence. It is remarkable that beyond the mere negative obligations of non-discrimination and equal access, the Advisory Committee translated the right to establish and maintain free and peaceful contacts across frontiers into positive obligations to facilitate and promote cooperation and the movement of persons belonging to national and ethnic minorities in the field of culture.

Bilateral treaties between neighboring States consistently confirmed the duty to respect the right of minority members to maintain contacts among themselves and across borders with the

²⁴⁸ *Id.* at 7, 12.

²⁴⁹ *Id.* at 7; Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Kosovo adopted on Mr. 6, 2013, 159, ACFC/OP/III(2013)00 (Sept. 10, 2013).

²⁵⁰ Framework Convention For the Protection of National Minorities: Third Opinion of the Advisory Committee on Poland adopted on Nov. 28, 2013, ¶195, CM(2014)18 (Feb. 7, 2014).

²⁵¹ Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on the Slovak Republic adopted on May 28, 2010, *supra* note 246, at 198.

citizens of other states,²⁵² and to support the development of direct contacts such as cultural cooperation across borders.²⁵³ Thus, States shall take positive measures to promote the cross-border access of minority members to their cultural events and memorial sites.

2. *The Right to Maintain and Develop the Minority's Cultural Heritage*

Article 5(1) of the Framework Convention provides that “[t]he Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”²⁵⁴ This obligation is broadly framed and does not set a threshold for the meaning of the expression “promote the conditions necessary.” Notwithstanding the general wording of this provision, the Advisory Committee has developed a very progressive interpretation of the

²⁵² *Id.*

²⁵³ Andrew D. Sorokowski, *Treaty between the Polish Republic and Ukraine on Good-Neighborliness, Friendly Relations, and Cooperation*, 20 HARV. UKR. RES. INST. 305, 311 (1996); Agreement between the Republic of Hungary and the Republic of Croatia on the protection of the Hungarian minority in the Republic of Croatia and the Croatian minority in the Republic of Hungary, art. 11, Hung.-Croat., Apr. 5, 1995, 2043 U.N.T.S. 535 [hereinafter *Agreement between Hungary and Croatia*]; Declaration on the Principles of Cooperation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in Guaranteeing the Rights of National Minorities, Hung.-Ukr., art. 14, May 31, 1991), <http://adattar.adatbank.transindex.ro/ketoldal/d910531ang.htm> (last visited Feb. 3, 2017) [hereinafter *Hungary-Ukraine Declaration*]; Treaty on the relations of good neighbourliness and cooperation between Romania and Ukraine (with exchange of letters), *supra* note 140, at art. 7; Hungary and Romania, Treaty of understanding, cooperation and good neighbourliness (with appendix), Hung.-Rom., art. 15(7), Sept. 16, 1996, 1966 U.N.T.S. 77 [hereinafter *Hungary and Romania, Treaty of understanding*]; Convention on Providing Special Rights for the Slovenian Minority Living in the Republic of Hungary and for the Hungarian Minority Living in the Republic of Slovenia, Hung.-Slovn., art. 10, Nov. 6, 1992, <http://www.forost.ungarisches-institut.de/pdf/19921106-1.pdf> (last visited Feb. 3, 2017) [hereinafter *Convention Hungary-Slovenia*].

²⁵⁴ Framework Convention, *supra* note 29, at art. 5(1).

above-mentioned provision. With regard to the promotion of the cultural rights, the Advisory Committee recommended in its country opinions especially the following positive measures:

- the identification in close consultation with minority representatives of suitable premises that can serve as cultural centers for the relevant groups;²⁵⁵
- the increase of the State support for the cultural activities of minority communities;²⁵⁶
- to ensure “that the views and interests of the representatives are effectively taken into account in all planning and decision-making”;²⁵⁷
- to facilitate the expansion of the official list of cultural heritage sites with a view to promote cultural diversity;²⁵⁸
- “to continue and expand their support to national minority museums to promote the dissemination of positive images

²⁵⁵ Treaty on the relations of good neighbourliness and cooperation between Romania and Ukraine, *supra* note 253, at ar. 11; Hungary-Ukraine Declaration, *supra* note 253, art. 14; Treaty between the Polish Republic and Ukraine on Good-Neighborliness, *supra* note 253, arts. 13(1), 13(3); Agreement between Hungary and Croatia, *supra* note 253, at art. 11; Convention Hungary-Slovenia, *supra* note 253, at art. 10; Treaty on friendship, good-neighbourliness and cooperation, Belarus-Ukraine, Belr.-Ukr., art. 16, Jul. 17, 1995, 1993 U.N.T.S. 93; Declaration on the Principles Guiding the Co-operation between the Republic of Hungary and the Russian Federation regarding the Guarantee of the Rights of National or Ethnic, Religious and Linguistic Minorities, art. 14, Nov. 11, 1992, *repr. in* BJÖRN ARP, *Chapter IV: The Contemporary Bilateral Protection of National Minorities*, in INTERNATIONAL NORMS AND STANDARDS FOR THE PROTECTION OF NATIONAL MINORITIES: BILATERAL AND MULTILATERAL TEXTS WITH COMMENTARY 217, 316 (2008); Declaration on Strategic Partnership and Cooperation between Hungary and Romania in a Europe of the XXI Century, Rom.-Hung., ¶5, Nov. 29, 2002, *repr. in* Arp, at 463 .

²⁵⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities: Fourth Opinion on Cyprus adopted on Mar. 18, 2015, ¶31, ACFC/OP/IV(2015)001 (Mar. 18, 2015) [hereinafter *Fourth Opinion on Cyprus*].

²⁵⁷ *Id.*

²⁵⁸ Advisory Committee on the Framework Convention for the Protection of National Minorities: Fourth Opinion on Denmark adopted on May 20, 2014, ¶ 43, ACFC/OP/IV(2014)001 (Jan. 20, 2015) [hereinafter *Fourth Opinion on Denmark*]

of national minority identities”,²⁵⁹

- “to take account of the specific needs of all national minorities in the field of the preservation and development of their culture”,²⁶⁰
- to continue and intensify measures to facilitate travel by a given minority to their traditional villages and “to support the revitalisation of their cultural and religious heritage.”²⁶¹

The Framework Convention and the Advisory Committee leave a wide margin of appreciation for States as to the modality and the extent to comply with those obligations. For example, the Advisory Committee was ready to recognize certain differences in the support provided for minorities with different size; it held that substantial size of a particular minority should give rise to an increased public funding for its cultural activities.²⁶² On the one hand, one cannot automatically apply the recommendations to any State because each country report’s recommendations are addressed to the concerned State party, in the light of the given context.

As in the case of universal human rights treaties, the threshold to be applied is arguably that of due diligence, requiring from the State positive measures in accordance with its powers and capabilities. On the other hand, the Advisory Committee’s practice has led to the crystallization of certain general comments on the interpretation of the Framework Convention. On the basis of its “extensive knowledge and experience through its country-specific

²⁵⁹ Advisory Committee on the Framework Convention for the Protection of National Minorities: Fourth Opinion on the Slovak Republic, adopted on Dec. 3, 2014, ¶34, ACFC/OP/IV(2014)004 (Jun. 4, 2015).

²⁶⁰ Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Bulgaria adopted on Feb. 11, 2014, ¶ 61, ACFC/OP/III(2014)001 (Jul. 30, 2014).

²⁶¹ Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Cyprus adopted on Mar. 19, 2010, ¶ 62, ACFC/OP/III(2010)002 (Oct. 8, 2010).

²⁶² Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Finland adopted on Oct. 14, 2010, ¶ 63, ACFC/OP/III(2010) (Oct. 14, 2010).

work,” the Advisory Committee has started to provide more general thematic findings in so-called thematic commentaries.²⁶³ The right to maintain and develop the minority’s cultural heritage is closely linked to the right to effectively participate in cultural life, stipulated in Article 15 of the Framework Convention. It provides that “Parties shall 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.”²⁶⁴

The second thematic commentary adopted by the Advisory Committee addresses “the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs,”²⁶⁵ which includes certain common guidelines as to the effectiveness of the participation of persons belonging to national minorities in cultural life. Effective participation imposes on the State the duty not only “to formally provide for the participation of persons belonging to national minorities,” but also to “ensure that their participation has a substantial influence on decisions which are taken, and that there is, as far as possible, a shared ownership of the decisions taken.”²⁶⁶ This threshold is similar to that of “free, prior and informed consent” as required by the Human Rights Committee in the sense that minorities shall have the opportunity to influence the decisions affecting their culture.²⁶⁷

In cultural policies, any differentiation should be based on objective and reasonable grounds; for example; the allocation of support for the activities of national minority organizations should be made in a transparent and participative manner, involving the

²⁶³ Antti Korkeakivi, *Frameworking: Review of the Monitoring Process of the Council of Europe Framework Convention on the Protection of National Minorities*, 6 EUR. Y.B. MINORITY ISSUES 255, 264 (2005).

²⁶⁴ Framework Convention, *supra* note 29, at art. 15.

²⁶⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, 4, ACFC/31DOC(2008)001 (May 5, 2008) [hereinafter *Effective Participation Commentary*].

²⁶⁶ *Id.* at ¶ 19.

²⁶⁷ Poma Poma Communication, *supra* note 191, at ¶ 7.6.

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representatives of national minorities.²⁶⁸ Processes of decentralization, in particular cultural autonomy arrangements, can play an important role in creating the conditions necessary for persons belonging to national minorities to participate effectively in cultural life.²⁶⁹ They should have the possibility to create and use their own media, on one hand, and should have access to and are present in mainstream media, on the other hand, including their traditions or commemorations.²⁷⁰ Similarly, as a two-way process between minority and majority, the mandatory educational curriculum should include information on the history and contribution of minorities to the cultural heritage of the State Party.²⁷¹

Like the ICCPR, the Framework Convention protects individual rights²⁷² and does not imply the recognition of collective rights,²⁷³ while its Article 3(2) provides that persons belonging to national minorities may exercise the rights enshrined in the Framework Convention “individually as well as in community with

²⁶⁸ Effective Participation Commentary, *supra* note 265, at ¶¶ 66; Advisory Committee on the Framework Convention for the Protection of National Minorities: Thematic Commentary No. 3, The Language Rights of Persons belonging to National Minorities under the Framework Convention, ¶ 23, ACFC/44DOC(2012)001 rev (Jul. 5, 2012) [hereinafter *Commentary No. 3*]; Advisory Committee on the Framework Convention for the Protection of National Minorities: Third Opinion on Moldova adopted on Jun. 26, 2009, ¶¶ 68, 71, ACFC/OP/III(2009)003 (Dec. 11, 2009).

²⁶⁹ Effective Participation Commentary, *supra* note 265, at ¶ 67.

²⁷⁰ *Id.* at ¶ 68.

²⁷¹ Commentary No. 3, *supra* note 268, at ¶ 82; Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on Education under the Framework Convention for the Protection of National Minorities, ¶ 13, ACFC/25DOC(2006)002 (Mar. 2, 2006) [hereinafter *Education Commentary*].

²⁷² Commentary No. 4, *supra* note 239, at ¶ 2; Anders Ronquist, *The Council of Europe Framework Convention for the Protection of National Minorities*, 6 HELSINKI MONITOR 38, 40 (1995); Stefan Troebst, *From paper to practice: The Council of Europe’s Framework Convention for the protection of national minorities*, 10 HELSINKI MONITOR 19, 20-22 (1999).

²⁷³ Framework Convention and Explanatory Report, *supra* note 30, at ¶¶ 13, 31.

others.”²⁷⁴ The Advisory Committee further recognized that minority rights, especially linguistic rights such as the right to use a minority language in public and the right to effective participation “in cultural, social and economic life” under Article 15 have “a collective dimension.”²⁷⁵ In fact, most of the above-mentioned positive measures recommended by the Advisory Committee protect the cultural heritage of the collectivity as such.

It is apparent that the majority of the above-mentioned recommendations has been adopted by U.N. treaty bodies; for example, the expansion of the national list of cultural heritage sites to the cultural heritage of minorities,²⁷⁶ the support for the cultural activities of minorities,²⁷⁷ or the awareness-raising/dissemination of information about national minority identities within the majority population²⁷⁸ have all been recommended by U.N. treaty bodies. Like some U.N. treaty bodies, the Advisory Committee extended the duty to ensure the opportunity to participate in the decision-making process from indigenous communities to the representatives of national minorities.²⁷⁹

Bilateral neighbor treaties confirm the above-mentioned

²⁷⁴ Framework Convention, *supra* note 29, at art. 3(2).

²⁷⁵ Effective Participation Commentary, *supra* note 268, at ¶ 6 (*citing* Framework Convention, *supra* note 29, art. 3(2)); Commentary No. 3, *supra* note 268, at ¶¶ 3, 26.

²⁷⁶ *See* Hum. Rts. Comm., Concluding observations, Israel, *supra* note 208, at ¶ 20; CERD, Concluding observations, Israel, *supra* note 181, at ¶ 28.

²⁷⁷ CESCR, General Comment No. 21, *supra* note 160, at ¶¶ 52(c), (f).

²⁷⁸ Especially through the school curriculum, in museums and other forums for future generations, *e.g.* CESCR, General Comment No. 21, *supra* note 160, at ¶¶ 53, 54(c); CERD, General Recommendation XXVII, *supra* note 230, at ¶ 26; CERD, General recommendation No. 34, *supra* note 230, at ¶ 66; CERD, Concluding observations on the fifth to the seventh periodic reports, Kyrgyzstan, ¶ 12, U.N. Doc. CERD/C/KGZ/CO/5-7 (Apr. 19, 2013); CERD, Concluding observations on the fifteenth to seventeenth periodic reports, Portugal, ¶ 27, U.N. Doc. CERD/C/PRT/CO/15-17 (Jan. 31, 2017); CERD, Committee Concluding observations, Czech Republic, ¶21, U.N. Doc. CERD/C/CZE/CO/7 (Apr. 11, 2007).

²⁷⁹ Fourth Opinion on Cyprus, *supra* note 256, at ¶ 31; Document of the Copenhagen Meeting of the CSCE, ¶ 33 (Jun. 29, 1990), in 2 INT’L J. ON GROUP RTS. 71-74 (1994).

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positive obligations; many of them expressly recognize the neighbor States' duty to cooperate/take measures for the preservation and restoration of historical and cultural monuments and memorial sites of the given minority,²⁸⁰ or the duties to raise awareness/disseminate information about national minority identities within the majority population.²⁸¹ Some of them are more specific and demanding, requiring the States parties to "erect statutes of prominent

²⁸⁰ Agreement between Hungary and Croatia, *supra* note 253, at art. 3; Treaty between Romania and Ukraine, *supra* note 253, at art. 20; Treaty between the Polish Republic and Ukraine on Good-Neighborliness, *supra* note 253, at art. 12(1); Convention Hungary-Slovenia, *supra* note 253, at art. 15(2)(h); Hungary and Romania, Treaty of understanding, *supra* note 253, arts. 13, 15(6); Hungary-Ukraine Declaration, *supra* note 253, at art. 11; Georgia-Ukraine Treaty, *supra* note 240, at art. 16; Treaty on Good Neighbourliness, Partnership and Cooperation between the Federal Republic of Germany and the Union of Soviet Socialist Republics, *repr. in* Arp, *supra* note 255, at 260-261 (Article 16); Agreement on Cooperation for the Purpose of Ensuring the Rights of the Russian Minority in Turkmenistan and the Turkmenian Minority in the Russian Federation between the Russian Federation and Turkmenistan, Moscow, *repr. in* Arp, *supra* note 2535, at 359 (Article 9(d)); Cooperation Agreement between the Ukrainian Ministry for the Problems of Nationalities and Migration and the Department for National Relations of the Moldovan Government, Kiev, *repr. in* Arp, *supra* note 255, at 367 (Article 4); Treaty on Cooperation between the Government of the Republic of Moldova and the Government of the Republic of Belarus for the guarantee of the rights of national minorities, *repr. in* Arp, *supra* note 255, at 417 (Article 4); Treaty on Special Relations between the Republic of Croatia and the Federation of Bosnia and Herzegovina, with annexes *repr. in* Arp, *supra* note 255, 437 (Article 7); Treaty on Cooperation for the Guarantee of the Rights of Persons belonging to National Minorities between Ukraine and Belarus, *repr. in* Arp, *supra* note 2535, at 443 (Article 9); Treaty on Cooperation in the Field of National Minority Protection between the Federal Government of the Federal Republic of Yugoslavia and the Government of Romania, Belgrade, *repr. in* Arp, *supra* note 255, at 459 (Article 5(5)); Treaty on the Foundations of the Relations between the Republic of Finland and the Russian Federation, Jan. 20, 1992, Fin.-Russ., art. 10(4), 1691 U.N.T.S., 251; Treaty between the Republic of Hungary and Serbia and Montenegro on the protection of Rights of the Hungarian Minority living in Serbia and Montenegro, and the Serbian Minority living in the Republic of Hungary, *repr. in* Arp, *supra* note 255, at 473 (Article 3(3)).

²⁸¹ Hungary and Romania, Treaty of understanding, *supra* note 253, at art. 15(6); Hungary-Ukraine Declaration, *supra* note 253, at art. 11; Georgia-Ukraine Treaty, *supra* note 240, at art. 16.

representatives of culture,”²⁸² to support “the organization of all cultural and artistic events which may serve the enrichment of the culture and identity of the minorities in both countries.”²⁸³

As in the case of universal treaties or the Framework Convention, the threshold of positive obligations is that of due diligence because some of the treaties refer to the available means as a limit. For example the Hungarian-Romanian Declaration provides that “[a]s far as possible, they [the Parties] shall take measures for the protection of the architectural and art monuments considered to be historical monuments by the Romanian national minority in Hungary and the Hungarian national minority in Romania.”²⁸⁴ The wording “as far as possible,” equally used by the Framework Convention with regard to instruction in minority language, indicates that the obligation is dependent on the available resources of the State party.²⁸⁵ Accordingly, the European treaty practice in minority rights recognizes positive obligations of the State to promote the cultural and religious heritage of national minorities and the activities related thereto, without discrimination as to the State support.

The right to establish and maintain free and peaceful contacts across frontiers and the extension of the right to participate in the decision-making to national and ethnic minorities are significant developments with respect to the practice of universal human rights bodies, while the context-based positive obligations to fulfil are required by all the analyzed treaty regimes. As a general objective, the Advisory Committee recognized, as the universal treaty bodies did, that “protecting cultural heritage is not only an essential aspect

²⁸² Hungary-Ukraine Declaration, *supra* note 253, Article 11.

²⁸³ Agreement between Hungary and Croatia, *supra* note 253, at art. 3; Georgia-Ukraine Treaty, *supra* note 240, at art. 9 (“support the activities of cultural associations of the other Party”); Treaty on Cooperation between Yugoslavia and Romania, *supra* note 280, at 459, art. 5(4); Treaty between the Republic of Hungary and Serbia and Montenegro on the protection of Rights of the Hungarian Minority living in Serbia and Montenegro, and the Serbian Minority living in the Republic of Hungary, *repr. in* Arp, *supra* note 253, 473 (art. 3(2)).

²⁸⁴ Romania-Hungary Declaration, *supra* note 253, at ¶ 4.

²⁸⁵ Framework Convention and Explanatory Report, *supra* note 30, at ¶ 75.

of the preservation of the identity of persons belonging to the majority but also to persons belonging to the minorities.”²⁸⁶ To these treaty standards, the European Convention on Human Rights added a binding supervisory mechanism that is likely to protect some aspects of those obligations, especially the State’s duty not to discriminate while limiting the free access to memorial sites.

B. The European Convention on Human Rights

As is well-known, the European Convention of Human Rights (“ECHR”)²⁸⁷ does neither include any direct reference to cultural rights, nor to minority rights, and the initiative to adopt an additional protocol on minority rights was not accepted.²⁸⁸ However, given the pioneering role of the European Court of Human Rights (“ECtHR”) in the interpretation and the evolution of the Convention as a living instrument, the Court’s case law provides various examples where judgments on the protection of core civil and political rights could indirectly protect the exercise of cultural rights.

The ECtHR has applied mainly the conventional provisions related to the right to respect for private and family life,²⁸⁹ the freedom of thought, conscience and religion,²⁹⁰ the freedom of expression,²⁹¹ the freedom of assembly,²⁹² the right to education,²⁹³

²⁸⁶ Fourth Opinion on Denmark, *supra* note 258, at ¶ 42.

²⁸⁷ CoE, European Convention on Human Rights [ECHR], as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, E.T.S. 5 (formally known as the European Convention for the Protection of Human Rights and Fundamental Freedoms) [hereinafter *ECHR*].

²⁸⁸ Parliamentary Assembly, Council of Europe, Recommendation 1201 (1993), Additional protocol on the rights of minorities to the European Convention on Human Rights, 1 February 1993.

²⁸⁹ ECHR, *supra* note 287, at art. 8.

²⁹⁰ *Id.* at art. 9.

²⁹¹ *Id.* at art. 10.

²⁹² *Id.* art. 11.

²⁹³ CoE, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2, E.T.S. 9 [hereinafter Protocol No. 1].

and the right to property²⁹⁴ to decide on disputes concerning cultural rights.²⁹⁵ In its judgments, the Court could effectively apply similar non-discrimination and proportionality tests that non-judicial treaty-monitoring bodies recommend in their non-binding opinions. The Court's case law provides various precedents in which the Court could progressively interpret the non-discrimination rule with regard to the exercise of civil and political rights by members of religious, national and ethnic minorities at memorial sites. Cases where the Court ruled on human rights of minority members with respect to memorial sites have mainly related to the freedom of religion; the right to respect for private and family life; the freedom of assembly; and the right to property.

1. *Freedom of Religion*

Article 9 of the ECHR on the freedom of religion protects manifestation of belief or religion with others both in the private and public spheres, in worship, teaching, practice and observance.²⁹⁶ As the Court stresses, “[w]orship with others may be the most obvious form of collective manifestation.”²⁹⁷ In some judgments related to northern Cyprus such as the *Cyprus v. Turkey* case, the Court held that the systematic restrictions placed on the freedom of movement of the enclave Greek Cypriot population considerably curtailed their ability to organize Greek Orthodox religious ceremonies, especially their right to access to places of worship outside their villages.²⁹⁸ Through the condemnation of a violation of the freedom of religion under the ECHR, the Court protected the free movement of the members of the Greek Cypriot community so that they could visit

²⁹⁴ *Id.* at art. 1.

²⁹⁵ See EUR. CT. H.R., RESEARCH DIVISION, CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, 4 (2017), at 19 [hereinafter *Eur. Ct. H.R., Cultural Rights*].

²⁹⁶ ECHR, *supra* note 287, at art. 9.

²⁹⁷ EUR. CT. H.R., CULTURAL RIGHTS, *supra* note 295, at 19.

²⁹⁸ *Cyprus v. Turkey* [GC], 55, Eur. Ct. H.R. 2001 XI, at ¶¶ 245-246 (2001).

their monasteries and practice their religious traditions.²⁹⁹

As a further step, the Court dealt in the *Karaahmad v. Bulgaria* case with the clash between freedom of religion of ethnic Turks at a major mosque during the Friday prayer and freedom of assembly of a group demonstrating against the volume of the Friday call to prayer at the same place, provoking the worshippers.³⁰⁰ While analyzing the State's duty to protect against the interference by third parties, the Court held that the police authorities enjoy a wide margin of appreciation in operational matters, but in the concrete case the police response to the restriction of the worshipper's religious practice was manifestly inadequate.³⁰¹ Several hundred demonstrators within touching distance of the mosque enjoyed a virtually unfettered right to protest, while the Muslim worshippers had their prayers entirely disrupted.³⁰² The judgment shows that States have an obligation to strike the appropriate balance in ensuring respect for the effective exercise of the freedom of religion and other human rights by third parties at the same memorial site.

2. *Right to Respect for Private and Family Life*

Generally speaking, the Court recognizes that there is a positive obligation imposed on the States parties by virtue of Article 8 to facilitate the particular lifestyle of a minority group. For example, with regard to the Gypsy way of life, the Court held that "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."³⁰³ Furthermore, the right to respect for private and family life could relate to a particular

²⁹⁹ *Id.*

³⁰⁰ *Karaahmad v. Bulgaria*, App. No. 30587/13, Eur. Ct. H.R., Judgment (2015).

³⁰¹ *Id.* at ¶ 105.

³⁰² *Id.* at ¶¶ 106-107.

³⁰³ *Chapman v. the United Kingdom*, 2001-I; 33 Eur. H.R. Rep. 18, ¶ 96 (2001).

site of cultural importance for a minority.

The Court's judgment in *Sargsyan v. Azerbaijan* recognized that the visit of the graves of the relatives may come within the protection of the "private and family life."³⁰⁴ In *Sargsyan*, the applicant argued that the authorities' ban to return to his village because of permanent armed hostilities violated his private and family life in the sense that he could not visit the graves of his relatives in the village cemetery.³⁰⁵ The Court found that the concept of "private life" is a broad term not susceptible to exhaustive definition which may extend to certain situations after death.³⁰⁶ It concluded that the applicant's cultural and religious attachment with his late relatives' graves in his village of origin falls within the notion of "private and family life", which was not disputed even by the respondent government.³⁰⁷ The impossibility for the applicant to have access to his relatives' graves "without the Government taking any measures in order to address his rights or to provide him at least with compensation for the loss of their enjoyment," constituted a continuing violation of the applicant's right to private and family life.³⁰⁸

3. *Freedom of Assembly*

As a part of the organizers' autonomy, the Court recognizes that the right to freedom of assembly "includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in paragraph 2 of Article 11."³⁰⁹ Thus, "the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target

³⁰⁴ *Sargsyan v. Azerbaijan* [GC], App. No. 40167/06, Eur. Ct. H.R., Judgment (2015)..

³⁰⁵ *Id.* ¶ 3.

³⁰⁶ *Id.* ¶ 255.

³⁰⁷ *Id.* ¶¶ 257, 248.

³⁰⁸ *Id.* ¶ 260.

³⁰⁹ *Sáska v. Hungary*, App. No. 58050/08, Eur. Ct. H.R., Judgment, ¶ 21 (2012); *Lashmankin and Others v. Russia*, App. Nos. 57818/09 and 14 others, Judgment, ¶ 405 (2017).

object and at a time when the message may have the strongest impact.”³¹⁰ Therefore, the Court stresses that in cases where the place of the assembly are crucial to the participants, an order to change the place may constitute an interference with their freedom of assembly, “as does a prohibition on speeches, slogans or banners.”³¹¹

In several cases, the Court expressly protected the choice of the site of minority assemblies. In a series of *United Macedonian Organisation Ilinden v. Bulgaria* cases, an ethnic Macedonian association intended to organize a rally at the grave of a Macedonian national hero in Sandansky to commemorate the anniversary of his murder. The event consisted of laying flowers, making speeches and gathering with representatives of the Macedonian State. The mayor, the municipality and the Bulgarian police regularly banned or restricted the timing and the manner of the organization of the events. The Court found that those measures “aimed at hindering or even altogether preventing the events” planned by the minority members.³¹² The Court examined which measures other than an outright ban could constitute an interference with the freedom of assembly at the memorial site. It held that the series of restrictive measures constituted interference with the freedom of assembly and since a condition of lawful limitation, the “necessary in a democratic society” was not fulfilled, the restrictions were contrary to the ECHR.³¹³

³¹⁰ See *Lashmankin and Others v. Russia*, *supra* note 309, at ¶ 405 (citing various international law sources).

³¹¹ *Id.*; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, App. Nos. 29221/95 and 29225/95, Eur. Ct. H.R., Judgment, ¶¶ 79-80, 108-109 (2001); *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, App. No. 44079/98, Eur. Ct. H.R., Judgment, ¶ 103 (2005); *Disk and Kesk v. Turkey*, App. No. 38676/08, Eur. Ct. H.R., Judgment, ¶ 31 (2012).

³¹² *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria* (No. 2), App. No. 37586/04, Eur. Ct. H.R., Judgment, ¶ 127 (2011).

³¹³ *Id.* at ¶¶ 131-132 (identical judgments in the other *United Macedonian Organisation Ilinden v. Bulgaria* cases, *see Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, *supra* note 311, at ¶¶ 91-112; *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, *supra* note 311, at ¶¶ 113-17; *Ivanov and Others v. Bulgaria*, App. No. 46336/99, Eur. Ct. H.R., Judgment, ¶¶ 63-65 (2005)).

What makes the judgment particularly relevant is the importance of the events' location, the Bulgarian authorities often diverted the event to a location other than the organizers' chosen memorial site which the Court considered in itself as an interference. It expressly recognized in two cases that "[b]earing in mind that the time and place of the events were apparently crucial to them [...] the Court considers that this amounted to an interference with the applicants' freedom of assembly."³¹⁴ Therefore, events held at memorial sites chosen by their importance for a given religious, national or ethnic minority cannot be arbitrarily relocated since even such measures amount to interference and shall comply with the conventional criteria of permissible limitations under Article 11 of the ECHR, "prescribed by law" and "necessary in a democratic society."³¹⁵

4. *Right to Property*

The symbolic character of the above-mentioned sites was always examined by the Court from the point of view of the applicants; the importance of places of worship such as churches or monasteries,³¹⁶ graves of the relatives for visits,³¹⁷ or memorial sites for minority commemorations³¹⁸ all seemed undisputed for the Court. However, new situations might arise where the location of a minority's cultural practice is not self-evident and needs a legal threshold. In other words, the above-mentioned cases did not clarify the already raised question whether any minority group could claim a right to maintain and promote an own cultural practice at any site.

The Court's cases on private property and cultural rights

³¹⁴ The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria, *supra* note 311, at ¶ 103; Singartiyski and Others v. Bulgaria, App. No. 48284/07, Eur. Ct. H.R., Judgment, ¶ 42 (2011).

³¹⁵ ECHR, *supra* 287, at art. 11.

³¹⁶ See Cyprus v. Turkey, *supra* note 298; see also Karaahmad v. Bulgaria, *supra* note 300.

³¹⁷ See Sargsyan v. Azerbaijan, *supra* note 304.

³¹⁸ See United Macedonian Organisation Ilinden v. Bulgaria, *supra* note 311.

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provide sufficient basis for arguing that the State shall take into account the historic and cultural value of the given site from the point of view of the given minority. Most cases where the Court had to find a balance between the demands of the general interest of the community concerned the protection of cultural heritage and the protection of the right to property of individual applicants. In cases of expropriation of private properties, the Court consistently reiterated that the conservation of cultural heritage, “the preservation of the historical, cultural and artistic roots of a region and its inhabitants” “are an essential value, the protection and promotion of which are incumbent on the public authorities.”³¹⁹ Thus, an interference with this right such as expropriation of a real estate may pursue a legitimate aim if it is deemed to protect the country’s, a region’s, or a minority’s cultural heritage.³²⁰

In cases concerning expropriation of private property for the purpose of the protection of cultural heritage, the Court consistently held that the measure pursued a legitimate aim, but had to examine on a case-by-case basis whether the State party had found a “fair balance between the demands of the general interest of the community and the requirements of the protection of the right of property,” i.e. interests of the State to protect a minority’s cultural heritage and those of the expropriated individual.³²¹ In its decisions on the protection of a country’s historical or cultural heritage, the State enjoys a wide margin of appreciation as to what is “in the public interest” unless that decision “is manifestly without reasonable foundation.”³²² The Court took into account the specific historic and cultural features of the expropriated cultural object when it decided on the proportionality of the compensation due to the owner.³²³

³¹⁹ *Kozacıoğlu v. Turkey* [GC], App. No. 2334/03, Eur. Ct. H.R., Judgment, ¶ 54 (2009); *Potomska & Potomski v. Poland*, App. No. 33949/05, Eur. Ct. H.R., Judgment, ¶ 64 (2011); *Petar Matas v. Croatia*, App. No. 40581/12, Eur. Ct. H.R., Judgment, ¶35 (2016).

³²⁰ *Potomski v. Poland*, *supra* note 319, ¶ 64.

³²¹ *Id.* at ¶ 80.

³²² *Kozacıoğlu v. Turkey*, *supra* note 319, ¶ 53.

³²³ *Id.* at ¶¶ 67, 72.

However, the Court can also be confronted with the protection of cultural or natural heritage as a right vindicated by persons belonging to national minorities or indigenous peoples as part of their right to peaceful enjoyment of their possessions.³²⁴ In those cases, the Court had to find a balance between the interests of the majority population and those of the minority. For example, in *Hingitaq 53 and Others v. Denmark*, the applicants, members of the Inughuit tribe in Greenland, complained that as a consequence of their forced relocation following the establishment of a U.S. Air Base, they had been deprived of their homeland and hunting territories and denied the opportunity to use, enjoy and control their land.³²⁵ The Court had to examine whether the State party did strike a fair balance between the proprietary interests of the persons concerned and found no violation of the applicants' right to property.³²⁶

In the *Catholic Archdiocese of Alba Iulia v. Romania* case, the Court emphasized the exceptional historic and cultural value of a museum and library that the Catholic Archdiocese of Alba Iulia was entitled to receive on the basis of a domestic law providing for restitution of properties to the national minorities from whom they had been confiscated.³²⁷ The Romanian order of 1998 on the restitution of the assets had not however indicated either a deadline or the procedure to be followed to ensure the transfer of property, nor did it provide for any judicial review with regard to the application of the order. The fourteen years of uncertainty the applicant association had had to contend with regarding the legal status of the properties "was all the more incomprehensible in view of their cultural and historical importance, which ought to have called for rapid action to

³²⁴ EUR. CT. H.R., CULTURAL RIGHTS, *supra* note 295, at ¶ 84.

³²⁵ *Hingitaq 53 v. Denmark* (dec.), App. No. 18584/04, Eur. Ct. H.R. (2006).

³²⁶ *Id.*

³²⁷ Archidiocèse Catholique d'Alba Iulia c. Roumanie [Catholic Archdiocese of Alba Iulia v. Romania], App. No 33003/03, Eur. Ct. H.R., Judgment ¶¶ 87-88 (2012) ("la Cour relève l'exceptionnelle valeur culturelle et historique de ce patrimoine, notamment de la bibliothèque . . . pour que la question de la propriété de ces biens soit réglée rapidement, au vu de leur importance non seulement pour le requérant, mais aussi étant donné l'intérêt général en cause.").

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ensure their preservation and appropriate use in the general interest.”³²⁸ In other words, the Court recognized that the timely settlement of the legal status of objects of cultural heritage serves not only the interest of the concerned minority, but the general interest of the entire population.

In practice, several of the above-mentioned rights protected by the ECHR are exercised at the same time while members of a minority engage in cultural activities at a memorial site. A pertinent example is a case decided by the Human Rights Review Panel (“HRRP”), a non-judicial supervisory body charged with the control of the conduct of the European Union’s Rule of Law Mission in Kosovo (“EULEX Kosovo”). In *A, B, C and D against EULEX* case, the Complainants, all ethnic Serbians, were on their way towards to attend the memorial service to mark the Serbian holiday of Vidovdan on June 28.³²⁹

The Complainants alleged that they were insulted either by the Kosovo authorities, or by third parties, whereas EULEX police was absent at the scene, or was watching all of this and did not respond at all. They alleged that the inaction by the EULEX violated, among other human rights, their right to respect for private and family life, right to freedom of thought, conscience and religion and their right to freedom of assembly and association.³³⁰ Referring to the case law of the ECtHR, the HRRP stressed that

bearing in mind the well established importance of the Vidovdan celebrations, the large number of people who generally participated in it, the political and ethnic tensions to which it could give rise in the volatile security environment in Kosovo, the Panel is satisfied that EULEX knew or ought to have known prior to the Vidovdan celebrations of 2012 of the existence of a real and immediate risk of human rights

³²⁸ *Id.* at ¶ 97.

³²⁹ HRRP, *A, B, C and D against EULEX*, Case No. 2012-09, 2012-10, 2012-11 and 2012-12, Decision and Findings (2013).

³³⁰ *Id.* at ¶ 41.

violations occurring during these events.³³¹

In the ECtHR's case law, the authorities' knowledge about a real and immediate risk of human rights violations instigate the State's positive obligation to take "reasonable steps" to prevent the foreseeable violation.³³² Given the foreseeable human rights violations with respect to the Serbian commemoration, the HRRP held that EULEX had failed to comply with its positive obligations to protect.

The Panel concluded, EULEX should have made adequate efforts "in cooperation with KP to ensure that the routes likely to be used by participants had been properly identified and secured with a view to preventing and discouraging attacks by private parties" and "should have ensured that an adequate number of EULEX police officers were assigned to monitor those events, that they be placed at critical locations."³³³ Consequently, the HRRP found a violation of among the right to respect for private and family life, the freedom of thought, conscience and religion and the freedom of assembly and association. The case shows that whenever a cultural event of a minority community at a memorial site entails a real and immediate risk of human rights violations, the State authorities are bound to take positive measures to protect a series of human rights against violations by private parties.

While the ECHR does not protect collective rights, the Court has recognized in its case law the importance of the cultural heritage of national and ethnic minorities. The State enjoys a wide margin of appreciation as to what is "in the public interest" in choosing the historical or cultural heritage to be protected unless that decision "is manifestly without reasonable foundation." However, the Court took into account memorial or cultural sites of minorities as a crucial element of the freedom of religion, cultic sites; the right to respect for private and family life, graves of relatives; the freedom of assembly, a chosen location of the assembly; or the right to property,

³³¹ *Id.* at ¶ 47.

³³² *See id.* at ¶ 47 (citing *P. F. and E. F. v. the United Kingdom* (dec.), App. No. 28326/09, Eur. Ct. H.R., Decision, ¶ 37 (2010)).

³³³ HRRP, A, B, C and D against EULEX, *supra* note 329, at ¶¶ 58, 60.

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the legitimate aim to protect cultural heritage and the general interest of the settled status of cultural heritage. The protection of the minority cultural heritage was examined either in balancing its legitimate interest with the restriction of individual rights or as part of the individual's identity exercised in community with other minority members.

As a convergence between the practice of the ECHR, the European minority treaties and universal human rights conventions, it is remarkable that the Court observed the common interest in protecting minority culture both for the minority and the majority population. The Court considers the protection of minority culture not only as a condition of the minority consciousness, but also as an important tool for the proper functioning of democracy, because “[t]he harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.”³³⁴ It reiterated in several cases that there could be “an emerging international consensus among 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 to “safeguard[] the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.”³³⁵

IV. Conclusion

All national and ethnic minorities have memorial sites of cultural and historic importance which embody the memorial consciousness and strengthen the identity of the given community. However, the same memorial site may give rise to rivaling or even opposing historical narratives of the concerned minority and the

³³⁴ Gorzelik and Others v. Poland [GC], App. No. 44158/98, Eur. Ct. H.R., Judgment, ¶ 92, (2004).

³³⁵ Chapman v. the United Kingdom, *supra* note 303, at ¶ 93; Coster v. the United Kingdom [GC], App. No. 24876/94, Eur. Ct. H.R., Judgment, ¶ 107 (2001); Oršuš and Others v. Croatia [GC], App. No. 15766/03, Eur. Ct. H.R., Judgment, ¶ 148 (2010); D.H. and Others v. the Czech Republic [GC], App. No. 57325/00, Eur. Ct. H.R., Judgment, ¶ 181 (2007).

majority population of the territorial State. The *lieux de mémoire* of national and ethnic minorities have led to various international disputes that give rise to an emerging international law of memorial sites. The analysis of IHL, international criminal law, international cultural heritage law, and international human rights law illustrates that the various special branches of international law converge much more than they diverge in the protection of the cultural practices of national and ethnic minorities at memorial sites.

As the first part demonstrated, international cultural heritage law, IHL and international human rights law provide protection both for the object of the cultural heritage and persons belonging to national and ethnic minorities creating, maintaining or enjoying that cultural heritage. Monitoring bodies of universal human rights conventions, in accordance with the Intangible Cultural Heritage Convention, require the States parties to adopt positive measures to fulfill the cultural rights of national and ethnic minorities with respect to their memorial sites. However, international cultural heritage law and universal human rights regimes rely on weak enforcement mechanisms such as monitoring by a political body (the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage), periodic reports or at the most non-binding quasi-judicial procedures (U.N. human rights treaty bodies). Therefore, the enforcement practice of the most developed regional treaty system, that of the European States, further develops the same trends of obligations and provides minimum thresholds with regard to the protection of cultural practices of minorities.

As a consequence of the lack of consensus on the definition of minorities and the extent of cultural rights, states have necessarily a broad margin of appreciation as to the identification and protection of cultural heritage of national and ethnic minorities. While European instruments face the same substantial law problems (lack of consensus on the definition of minorities and the extent of cultural rights), European multilateral and bilateral treaties enshrine similar, but more stringent substantial obligations as those recommended by universal human rights treaty bodies. Especially the Advisory Committee on the Framework Convention for the Protection of National Minorities and the European Court of Human Rights

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developed further the similar universal norms. The ECtHR case law demonstrates that through the broad and dynamic interpretation of civil and political rights, Council of Europe Member States all have positive obligations vis-à-vis persons belonging to national and ethnic minorities with regard to their cultural activities at memorial sites. It is argued that the European standards, enshrining a close relationship between minority rights and memorial sites, should inspire other States outside the continent to comply with those standards, all the more that they create the progressive development of universal standards too.

Various State obligations related to cultural rights of persons belonging to national and ethnic minorities show that the high degree of convergence between cultural heritage law, human rights law and minority treaties. Similarly to the Intangible Cultural Heritage Convention that requires States to involve in the identification and safeguarding of intangible cultural heritage the participation of the concerned communities,³³⁶ human rights treaty bodies stressed the State's duty to ensure the effective participation of members of minority communities in decisions which affect them.³³⁷ The threshold required by U.N. treaty bodies is that of prior consultation of the concerned minority community, conducted "in a timely manner" with a view to obtaining their free and informed consent to the planned measures affecting their culture.³³⁸ While the Human Rights Committee requires the free and informed prior consent in case of indigenous peoples, other U.N. treaty bodies and the Framework Convention extend it to national and ethnic minorities.

Non-discrimination and equal access underline all human rights regimes: the respective treaty bodies require from States

³³⁶ Intangible Cultural Heritage Convention, *supra* note 116, Article 11(b).

³³⁷ General Comment No. 23, *supra* note 9, ¶ 7; CESCR, General Comment No. 21, *supra* note 160, ¶ 55(c); *see also* Framework Convention, *supra* note 29.

³³⁸ Hum. Rts. Comm., Concluding observations on the seventh periodic report of Colombia, ¶ 43(b)-(c), U.N. Doc. CCPR/C/COL/CO/7 (Nov. 17, 2016); Hum. Rts. Comm., Concluding observations on the fourth periodic report of the U.S.A., ¶ 25, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

parties that they ensure that laws and programs be equally devoted to the promotion and the protection of memorial sites of minorities. While universal treaty bodies recommended the State has a negative obligation not to prevent persons belonging to minorities to maintain free and peaceful contacts across frontiers with citizens of the kin State and with their kin State, the Framework Convention provides for a positive duty to support such cross-border relations. In the practice of the Human Rights Committee, a restriction of minority rights under Article 27 of the ICCPR is lawful unless the complainants demonstrate that the factual importance of the given cultural heritage in the minority's life as a whole is so substantial that its restriction would amount to the denial of their rights under Article 27 of the Covenant.

As this threshold is high, States parties enjoy a broad leeway as to the permissible restrictions of access to memorial sites: they are deemed to be lawful if the limitation is not arbitrary or unreasonable. However, if one adds the case law of the ECtHR where the Court recognized the cultural, historic or symbolic importance of the place where fundamental rights and freedoms are enjoyed from the point of view of a given national or ethnic minority, the measurement of the proportionality analysis might be different. In other words, the case law of the ECtHR has crystallized that the restriction of the place of the enjoyment of certain human rights can in itself lead to unlawful restrictions, especially in case of the freedom of religion (cultic sites), the right to respect for private and family life (graves of relatives), the freedom of assembly (a chosen location of the assembly) or the right to property (the legitimate aim to protect cultural heritage and the general interest of the settled status of cultural heritage).

Both cultural heritage law,³³⁹ U.N. human rights bodies³⁴⁰ and European minority treaties³⁴¹ expect from States that they adopt

³³⁹ Operational Directives, *supra* note 136, ¶ 101, esp. ¶ 101(d).

³⁴⁰ See *supra* note 278 (and accompanying text).

³⁴¹ See Framework Convention, *supra* note 29; see also Hungary and Romania, Treaty of understanding, *supra* note 253, at art. 15(6); Hungary-Ukraine Declaration, *supra* note 253, at art. 11; Georgia-Ukraine Treaty, *supra* note 240, at art. 16.

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positive measures aimed to raise awareness of the importance of the cultural heritage of minorities, especially through education. The obligations to fulfill cultural rights have been interpreted and extended by treaty bodies; they require States parties to protect and promote the cultural heritage of minorities and the cultural practices related to their memorial sites. The degree to which States are expected to fulfill the cultural rights of minority members is subject to a due diligence standard, i.e. within the means at their disposal. While States have due diligence duties, i.e. they are required to take positive measures towards memorial sites of minorities to the extent of their available capabilities, they arguably have to comply with a higher degree of diligence in case of already existing cultural traditions. Under the ICESCR, regressive measures taken in relation to cultural rights are not permitted, but “if any such measure is taken deliberately, the State party has to prove that it was taken after careful consideration of all alternatives and that the measure in question is justified, bearing in mind the complete set of rights recognized in the Covenant.”³⁴²

Both universal and European treaties consider cultural rights as individual rather than collective rights, while they increasingly tend to recognize the collective nature of cultural and minority rights. Their recommendations illustrate that the entire collectivity of a national or ethnic minority and not only individual members are entitled to the protection and promotion of memorial sites. While universal treaty practice extends the protection of minority culture to foreign nationals, this is not the case with European minority treaties. In cultural heritage law, the duty to involve communities in the selection and preservation of intangible cultural heritage is interpreted as including, beyond nationals of the State party, even non-citizens belonging to the same cultural community.³⁴³ Universal human rights treaty bodies similarly interpret the exercise of cultural

³⁴² CESCR, General Comment No. 21, *supra* note 160, at ¶¶ 46, 65; CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, ¶ 1, of the Covenant), ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990).

³⁴³ See UNESCO & ACCU, Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention, *supra* note 142, at 5-6.

rights as independent of citizenship. However, the European minority treaties deliberately leave the States parties to define their domestic notion of minority that enable European States to continue to limit domestic minority laws to the protection of nationals. Notwithstanding this difference in the personal scope, the substantial State duties converge.

As an ultimate objective of the protection of memorial sites, both universal and European treaty monitoring bodies have recognized the strong link between the protection of cultural heritage of minorities, their social integration and the cultural diversity as a value of the entire society. As they formulated, the protection of memorial sites and the cultural rights related thereto contributes to cultural diversity and strengthens social cohesion.³⁴⁴

³⁴⁴ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, in Its Eighth Session, Item 6.a of the Provisional Agenda, ¶ 101, ITH/13/8.COM/6.a, (Nov. 4, 2013); Operational Directives, *supra* note 136, at ¶ 194; CoE, Framework Convention on the Value of Cultural Heritage for Society, Oct. 27, 2005, art. 8(c), E.T.S. 199; Commentary No. 3, *supra* note 268, ¶ 25; Gorzelik and Others v. Poland, *supra* note 334, ¶ 92; EUR. PARL. ASS., Doc. 13428, ¶ 50 Feb. 18, 2014, (stating Europe's endangered heritage); *see also* General Comment No. 23, *supra* note 9, ¶ 9 (the notion of "the fabric of society as a whole"); Poma Poma Communication, *supra* note 191, at ¶ 7.2.