

## **Forced migrants in Europe and their cultural rights: in need of minority protection**

Alexandra Xanthaki

Professor of Laws, Brunel University London  
UN Special Rapporteur in the field of Cultural Rights

### **Abstract**

Discussions and efforts to improve the rights of forced migrants in Europe are ongoing as the situation continues to be dire. All such discussions and policies though have completely neglected the minority protection that the human rights system recognises to members of minorities. This article argues that forced migrants are entitled to such minority protection. It further argues that such recognition, as beneficiaries of minority protection, will address more comprehensively their needs and strengthen their rights. The article focuses on the cultural rights of forced migrants, as important rights connected to their identity. It demonstrates the gaps in the international law machinery used at the moment as well as the added value that the minority protection would have on their rights. Using such protection for migrants' rights is consistent with international law, will strengthen their protection but also will be beneficial to the minority rights protection too.

**Keywords:** migrants, forced migrants, refugees, minorities, new minorities, cultural rights, identity, effective participation, integration

Cultural rights are often referred to as the Cinderella of human rights. This cannot be more true for the cultural rights of migrants around the world. Although migrants represent at least 280 million of the world's population, their cultural rights have yet to receive adequate attention. Their right to have access to and effectively participate in all aspects of cultures, both of the host State and their own cultures, their right not to be discriminated in cultural activities and to maintain, develop and practice freely their cultures are severely undermined and violated. Discussions and efforts to address especially the needs of forced migrants have been focused for some time on their right to life, the prohibition of non-refoulement and more recently on their socio-economic conditions. Maybe this makes sense: these have been and continue to be the immediate concerns of these individuals. Especially since 2015 where the so-called 'migration crisis' in the EU saw large numbers of forced migrants enter the EU states, the

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abuses of these rights have been in the forefront of the civil society concerns. Yet gradually as forced migrants find themselves living in the host States, their long term well-being necessitates the focus to also turn to socio-economic rights and of course rights relating to their identity. Since culture is intricately linked to one's identity, the way one views the world, one's right to aspire, their cultural rights cannot be ignored.

Cultural rights are at the core of minority protection. As minority protection aims at the protection for the 'existence and identity' of minorities as the UN Declaration of Minorities proclaims, the protection of cultural rights of minorities goes further than the general protection for cultural rights. In this paper, I argue that the minority rights protection must be extended to all forced migrants, including forced migrants and undocumented refugees. In the recent crisis of forced migration, I have been genuinely surprised that minority rights do not feature in any of the discussions. I use cultural rights of migrants to show that the international minority protection has the tools to address these individuals' current needs. Using such protection for migrants' rights is consistent with international law, will strengthen their protection but also will be beneficial to the minority rights protection too.

I will prove my argument by first summarising where the debate on 'new minorities' is currently. There is no doubt that there is a gap between scholarship and state practice on this very point. Even though the majority of scholarship would accept that new minorities are beneficiaries of minority protection, there is still fierce resistance by states and more widely parts of human rights circles. I argue that migrants in all situations are rightful beneficiaries of minority protection. Irregular migrants and refugees in particular have been left aside of this discussion. They too are members of minorities, I argue. I will then turn to their cultural rights and explain why I believe their protection is so important. After discussing the current weaknesses of the general cultural rights protection to protect migrants' rights, I will also show the inadequacy of the specific instruments on migrants and refugees to protect their cultural rights. Equipped with the understanding that forced migrants fall in the minority protection and that existing general systems are not adequate to protect their cultural rights, I will show that this is not a merely theoretical question. Hence, I will discuss the added value that the minority rights system offers to forced migrants and offer some examples of the added value that minority instruments have for the protection of migrants cultural rights.

**Do forced migrants fall within the scope of minority protection? Definitional issues**

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At the international level, there is no universally accepted definition of a ‘migrant’. The International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (Convention on Migrants) defines the ‘migrant worker’ as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’. The emphasis is on working migrants, so it is of limited applicability.

The International Organisation for Migration has defined migrants as

An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.<sup>1</sup>

The EU Fundamental Rights Agency defines migrant as a third country national but again adopts a wide scope. According to its data, ‘some 25 different categories of third-country nationals, each with different rights that vary according to the links they have with EU Member States or that result from their need for special protection’.<sup>2</sup>

On the basis of both international and EU law, the term ‘migrant’ is thus a generic socio-legal term that includes, among others, the following categories:

a. ‘*regular*’ migrants are those who have legal permission, usually either a visa or a resident permit within the EU.

b. ‘*undocumented*’ migrants, often referred to as ‘*irregular*’, quite a contested term.

c. in its widest scope as in the IOM definition, the term ‘migrant’ also includes *asylum seekers and refugees*, although these latter categories are regulated by additional instruments and are given specific guarantees in international and European law. The term ‘asylum seeker’ has recently been replaced by ‘non-recognised refugee’ which denotes that whether someone is a refugee or not does not depend on the mere declaration as such by the state, nor on whether

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<sup>1</sup> IOM, <https://www.iom.int/about-migration>, accessed on 27.10.2023.

<sup>2</sup> FRA, *Handbook on European law relating to asylum, borders and immigration*, (Dec, 2020), p.14.

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they have claimed asylum, but solely on whether the individual fulfils the criteria of the 1951 Refugee Declaration.<sup>3</sup>

Following such definitions, this article refers to migrants as people who have left their state for another state, irrespective of the reasons. The article focuses on forced migrants, which would include undocumented migrants, and refugees, recognised and not.

The discussion on whether migrants are entitled to the minority protection is not new, but has mainly been focused on long-term migrants. State practice is not encouraging: as Jacob-Owens has discussed in this journal,<sup>4</sup> only two State Parties of the signatories of the Framework Convention on National Minorities have currently elected to expressly apply the Framework Convention on National Minorities (FCNM) to immigrant-origin groups, the Czech Republic and the UK. The latter is known for having included a wide range of ‘ethnic minorities’ upon ratification, thus taking an exceptionally inclusive approach towards minorities. In contrast, Germany has been very vocal that their migrant communities do not fall within the scope of minority protection. Only in June 2022, Germany sent a letter responding to the Opinion of the Advisory Committee that:

The Framework Convention does not define the term ‘national minority’. It is instead the responsibility of the individual member states to define the various national minorities using objective criteria; the Federal Republic of Germany did this with its declaration at the signing of the Framework Convention on 11 May 1995.<sup>5</sup>

This statement is not fully in accordance with the spirit of international law. Germany noted:

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<sup>3</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011) (“*Handbook*”), at [28].

<sup>4</sup> T Jacob-Owens, ‘Immigration and Multicultural Citizenship in Europe: Insights from the Framework Convention for the Protection of National Minorities’ 29 (2021) 1 *International Journal on Minority and Group Rights* 167-197

<sup>5</sup> Comments of the Government of Germany on the Fifth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Germany, received on 7 June 2022, GVT/COM/V(2022)003

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The Advisory Committee's request that individual articles of the agreement be applied to specific groups of migrants, which, given the clear definition of national minorities in Germany, is legally unfounded.<sup>6</sup>

The dichotomy between “new” and “old” minorities which sometimes hides the separation of migrants from minorities has been widely criticised. Packer has noted that the distinction between old and new minorities would be discriminatory.<sup>7</sup> Nowak has stressed that members of so-called new minorities also must have the right “not to be assimilated into a melting pot type of newly created ‘European citizens’ but to enjoy their traditional culture, practice their own religion and speak their mother tongue”.<sup>8</sup> Medda-Windischer has noted that the differences between migrants and traditional minorities are mainly down to their respective formal legal status and the state's perceptions of them, rather than objective differences.<sup>9</sup> Berry has also clearly argued that even most recently arrived migrants fall in the definition of “new minorities”.<sup>10</sup> She reminds us that also the Commentary on Minorities has expressed the need to abandon such an approach, and the Advisory Committee of the Framework Convention on National Minorities has on several occasions discussed within the context of Article 6 of the FCNM rights of “new minorities”.<sup>11</sup> Henrard has noted that “there seems to be an emerging consensus that ‘new’ minorities should be considered ‘minorities’ for the purposes of minority protection”.<sup>12</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> J. Packer, ‘Problems in Defining Minorities’, in *Minority and Group Rights in the New Millennium*, ed. B. Bowring and D. Fottrell (The Hague: Martinus Nijhoff, 1999), 264.

<sup>8</sup> M. Nowak, ‘The Evolution of Minority Rights in International Law, Comments’, in *Peoples and Minorities in International Law*, ed. C. Brodman, R. Lefeber and M. Zieck (Dordrecht: Martinus Nijhoff, 1993), 118.

<sup>9</sup> B. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion – A Human Rights Model for Minority Integration* (Nomos: Verlagsgesellschaft, 2009), 247–8.

<sup>10</sup> S. Berry, “‘New Minorities’, Integration and the UN Declaration on Minorities”, in *The United Nations Declaration on Minorities, An Academic Account on the Occasion of its 20th Anniversary (1992–2012)*, ed. U. Caruso and R. Hofmann (The Hague: Brill Publishers, 2015), 192.

<sup>11</sup> Stephanie E Berry, Integrating Refugees: The Case for a Minority Rights Based Approach, *International Journal of Refugee Law*, Volume 24, Issue 1, February 2012, 1-36.

<sup>12</sup> K. Henrard and R. Dunbar, eds, *Synergies in Minority Protection*(Cambridge: Cambridge University Press, 2008), 12.

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The international human rights bodies seem to agree with scholarship. As far as in 1996, the UN Human Rights Committee noted with respect to Germany:

The Committee is of the view that article 27 applies to all persons belonging to minorities whether linguistic, religious, ethnic or otherwise including those who are not concentrated or settled in a particular area or a particular region or who are immigrants or who have been given asylum in Germany.<sup>13</sup>

The lack of citizenship of migrants may have been the main issue in the past, but not anymore: contrary to the widely used Capotorti definition in the 1970s,<sup>14</sup> lack of citizenship of the host state is no longer considered as an important criterion for minority protection. The Commentary of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities maintains that citizenship “should not be a distinguishing criterion”.<sup>15</sup> In 2005, the UN Working Group on Minorities recommended that governments protect the rights of all minority persons within their territory “irrespective of citizenship”.<sup>16</sup> Indeed, states should not be allowed to withhold protection to minority groups by denying them citizenship.<sup>17</sup>

This journal, the *International Journal of Group and Minority Rights* has extended its scope to migrants. Adopting a forward-looking approach, the journal has repeatedly published in the last 30 years articles important articles on among other, the status of migrant women workers as domestic workers in China; on the universal health coverage for undocumented migrants; on hate speech towards the immigrants etc. Including pieces on migrants’ situations in the journal on minority rights has been the right decision.

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<sup>13</sup> See HRC, ‘Concluding Observations of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Report of Germany’, UN doc CCPR/C/79/Add.73, para 13.

<sup>14</sup> See Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 205.

<sup>15</sup> See UN Commission on Human Rights, 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, UN Doc. E/CN.4/Sub.2/AC.5/2005/2, paras 10–11.

<sup>16</sup> See E/CN.4/Sub.2/2005/27, para. 16 (d).

<sup>17</sup>G. Alfredsson, ‘A Frame with Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures’, *International Journal of Minority and Group Rights* 9 (2011): 291 at 296.

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The so called migrant crisis in Europe has renewed the need to revisit the debate, now also including the undocumented migrants and refugees (recognised or not). The protection of these persons as members of minorities has been unexplored. The debate on new and old minorities has been completely absent when discussing the rights of refugees (recognised or not) and undocumented migrants. The clear side-lining of minority rights in the crisis of migration has been disappointing.

The current description of minorities does not exclude in any way forced migrants to be considered as such. Refugees (recognised and non-recognised) and undocumented migrants are indeed numerical inferior to the rest of the population, they are in a position of non-dominance, they have distinct ethnic or national, religious or linguistic characteristics and they want to maintain their identity.

The only obstacle in scholarship about including in the scope of the ‘minorities’ forced migrants would be the amount of time the migrants have passed in the host state. But the Human Rights Committee (HRC) has been clear in its General Comment 23:

Just as they need not be nationals or citizens, [members of minorities] need not be permanent residents. Thus, migrant workers or even visitors in the State party constituting such minorities are entitled not to be denied the exercise of [minority] rights.<sup>18</sup>

And the reality is that most of the forced migrants come from groups in Europe that at the moment are well-established minorities in the European states. Guinea, Syria, Cote d’Ivoire, Tunisia, Afghanistan, Egypt, Morocco, Bangladesh and Burkina Faso have been according to the International Organisation for Migration the top 10 nationalities of arrivals in Europe in 2023.<sup>19</sup> These join other recent migrants who have come from Pakistan, Morocco, Turkey, Algeria, India, Iraq and Ukraine, as reported by the European Commission.<sup>20</sup> These individuals are members of ethnic groups who have been concentrating in parts of Europe for a long time and form established minorities. Therefore, the newly arrived individuals do not really start the life of the group in a state, but rather they join the already existing group within the state. In

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<sup>18</sup> See UN Human Rights Committee, General Comment No. 23 on ‘The Rights of Minorities (Art 27)’, UN Doc. CCPR/C/21/Rev.1/Add.5, para. 5.2.

<sup>19</sup> See <https://dtm.iom.int/europe/arrivals>, last accessed on 27.10.2023.

<sup>20</sup> [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe\\_en#european-statistics-on-migration-and-asylum](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#european-statistics-on-migration-and-asylum), accessed on 27.10.2023.

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the multicultural societies of 2023, one would have difficulty finding a nationality or a religion or belief that is not already represented within the state. Hence, the argument that forced migrants cannot be the beneficiaries of minority protection because they have only just arrived in the state seems rather thin.

Hence one reaches the conclusion that the exclusion of forced migrants from the minority protection is a political, rather than a legal decision. Ignoring the natural inclusion of forced migrants to the scope of minorities is, I fear, another expression of the political wish to restrict rights of refugees and migrants. And indeed, several of the states receiving large numbers of forced migrants, including Turkey, Greece and Germany, have traditionally been vocal about non-recognising migrants as minorities.<sup>21</sup> And States have been reluctant to recognise refugees rights around their identity for some time: Berry and Taban note that states sought to reserve a right to assimilate refugees even during the drafting process of the UN Refugee Convention,<sup>22</sup> in violation of international law.

Is there any clear impact in the reluctance of states to accept forced migrants as members of minorities? Is it just a theoretical question or has this denial of the minority protection important and real consequences for the protection of the identity of these individuals? This is what I will try to answer in the next section.

### **The importance of cultural rights for forced migrants<sup>23</sup>**

Cultural rights protect the right of each person individually, in community with others and collectively, to access and participate in the cultural life of the society in which they live and also to maintain and develop their own cultural frameworks, and develop and express their humanity, their world views and the meanings they give to their existence and their development, including through, inter alia, values, beliefs, convictions, languages, knowledge

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<sup>21</sup> See reservation of Turkey 2004 in [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec); HRC. (1996) 'Fourth Periodic Report of Germany', 22 February, UN Doc CCPR/C/84/Add.5 [242]-[244]; HRC. (2004) 'Initial Report of Greece', 15 April, UN Doc CCPR/C/GRC/2004/1, p. 895.

<sup>22</sup> See UN Ad Hoc Committee on Refugees and Stateless Persons 1950, Second Session, Summary of the Thirty Ninth Meeting, 21 August E/AC.32/SR.39. See also Article 34 UN Refugee Convention.

<sup>23</sup> This section relies heavily on my 2023 UN Report to the Human Rights Council on Cultural Rights and Migration, A/HRC/52/35.

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and the arts, institutions and ways of life. Cultural rights protect the artistic freedom of individuals and the cultural heritage of individuals and groups. Cultural rights are therefore essential for the development of each person and community, their empowerment and the construction of their respective identities in a sustainable cultural ecosystem.

Cultural rights are especially important for migrants. Migration certainly brings with it a lot of positives. Moving to another cultural framework expands horizons, creates innovative ideas and theories through the fusion of cultural references and evolves cultures, individuals and groups. It offers the freedom to redefine oneself, to choose again or confirm the cultural references and norms that are important. Migration is also undeniably positive for the cultural dynamic of host societies. Such societies are also pushed, willingly or not, to face their attitudes, values and ideas and to renegotiate their cultural spaces. Such organic processes may create uncertainty and fear of “the other”, the unexpected and change, and can ultimately create resistance in more fused cultural frameworks.

Art also constitutes an important vehicle for migrants as it does for all individuals to develop and express their humanity, world views and meanings assigned to their existence and development. For migrants, creating and developing artistic expressions using different media provides spaces to express their identity and what is important to them, as well as avenues to work through the loss, challenges, grievances and questioning associated with migration and their new life situation in an aesthetic or symbolic manner. That is fundamental at the individual level, to find one’s own voice, but is also a powerful tool for building inclusion.

Yet, migration can have also negative effects on migrants’ cultural rights. It turns individuals from being part of a majority to being part of a minority; from being part of the mainstream society to being part of peripheral and often marginalized communities and hence makes their cultural rights more vulnerable. Migration brings with it the loss of important places, communities and relationships, tools or instruments; it brings the loss of goods and services that impact on the ability to continue meaningful heritage practices; the loss of a broader supportive community that fosters intergenerational transmission; and sometimes migration brings tension: tension because migrants face resistance or opposition to continuing certain heritage practices in the new home country.<sup>24</sup> But also tension within the community and

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<sup>24</sup> See International Council on Monuments and Sites and the British Institute of International and Comparative Law in <https://www.ohchr.org/en/calls-for-input/2022/call-inputs-report-cultural-rights-and-migration>, accessed on 30.10.2023.

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family because of a generational gap between the older generations of migrants, who have strong cultural frameworks from their societies of origin, and the younger generations, who have internalized the cultural values and practices of the host societies. The grief stemming from losing the connection with one's familiar cultural environment can lead to cultural bereavement and an identity crisis.<sup>25</sup>

How do international human rights deal with such obstacles that migrants face in the realization of their cultural rights? The next section will argue that the existing tools used to protect forced migrants have been so far ineffective, partly because they were never focused at protecting cultural rights of forced migrants; and partly because they have not being used for forced migrants.

### **General recognition of forced migrants' cultural rights**

Migrants can enjoy their cultural rights as recognised in general human rights instruments. International human rights law explicitly recognizes cultural rights for everyone. Article 27 of the Universal Declaration of Human Rights, a provision that has acquired customary international law, recognises that anyone, including any migrant of any background, status and in any situation has the right to enjoy cultural rights.<sup>26</sup> Similarly, Article 15 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; and (c) 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.

In interpreting this article, the Committee on Economic, Social and Cultural Rights clarified in its General Comment No. 21 (2009) that it is “the right of everyone – alone or in association with others or as a community – to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice”. States should not only abstain from violating and unnecessarily restricting the

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<sup>25</sup> Danilo Giglito, Luigina Ciolfi and Wolfgang Bosswick, “Building a bridge: opportunities and challenges for intangible cultural heritage at the intersection of institutions, civic society, and migrant communities”, *International Journal of Heritage Studies*, vol. 28, No. 1 (2022).

<sup>26</sup> Universal Declaration of Human Rights, art. 27.

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cultural rights of migrants; the Covenant requires that they take specific steps, legal and other, for the full realization of this right for all (art. 15 (2)). Steps must also be taken to guarantee the “freedom indispensable for scientific research and creative activity” (art. 15 (3)) and to “recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields” (art. 15 (4)). General Comment No. 21 (2009) specifically refers to migrants: “States parties should not prevent migrants from maintaining their cultural links with their countries of origin” (para. 34).

The realization of substantive equality in the exercise of migrants’ cultural rights is guided by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD): there should be no discrimination in purpose or in effect in the cultural field based on race, colour, descent, or national or ethnic origin (art. 1). The Convention reaffirms that there should be no distinctions between citizens and non-citizens (art. 1 (2)) and that States should (not merely could) take concrete measures, including positive measures, for the development and protection of the rights of vulnerable groups in the cultural field (arts. 1 (4) and 2 (2)).

The provisions above are important for the protection of the cultural rights of forced migrants. Article 15 in conjunction with the non-discrimination principle in ICERD can be effective in protecting forced migrants’ cultural rights, especially rights to access to cultural resources. Unrecognised refugees who receive in some countries a residence permit that restricts their movements<sup>27</sup> and persons living in reception centres have access to cultural spaces considerably curtailed. In reception centres, the coronavirus pandemic saw further restrictions on free movement, with residents able to leave only to visit doctors or lawyers, or do grocery shopping.<sup>28</sup> States must consider their obligations to take positive steps to realise Article 15 in these situations. Undocumented migrants face the most limitations when it comes to accessing cultural services and institutions, as many live in fear or in hiding, are faced with language barriers and have mental health concerns.<sup>29</sup> The general provisions that recognise the right of \*everyone\* to access to culture can be of utmost importance. In addition to access, Article 125 can protect all aspects of migrants rights: Refugee camps, for example, are places of culture as

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<sup>27</sup>See German Commission for UNESCO in <https://www.ohchr.org/en/calls-for-input/2022/call-inputs-report-cultural-rights-and-migration>, accessed on 30.10.2023.

<sup>28</sup>See Red Noses Clown doctors International in <https://www.ohchr.org/en/calls-for-input/2022/call-inputs-report-cultural-rights-and-migration>, accessed on 30.10.2023.

<sup>29</sup>See the Arts Connect in <https://www.ohchr.org/en/calls-for-input/2022/call-inputs-report-cultural-rights-and-migration>, accessed on 30.10.2023.

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places of personal history and such culture must also be recognised by the state and protected. Initiatives such as the Refugee Heritage that traces, documents, reveals and represents refugee history should be further pursued.<sup>30</sup> However, in most cases, protection of cultural rights within camps and with respect to forced migrants are left to civil society. States have shown very little consideration for cultural rights; and any initiative by the state or international organisations such as the UNHCR is not framed in terms of protection of cultural rights.

Migrant artists who have fled their home country also face severe restrictions to their artistic freedom. Non-discrimination provisions in conjunction with article 15 ICESCR can address the wide underrepresentation of migrant artists in general in the cultural expressions in most host countries. All migrant artists face significant obstacles in accessing the appropriate resources, means and tools to create, produce and share their cultural expressions, both within their group and within the host society. They often talk about their invisibility in the host society and its arts world. Some arts councils and cultural ministries have a mandate to offer arts funding only to citizens of their countries.<sup>31</sup> Panels deciding on scholarships or funding are often comprised of experts in the host country's arts and turn away from foreign or different art. For forced migrant artists, even to apply for such grants is a real struggle. First, the communication of information relevant to the creation, production and dissemination of cultural expressions is quite difficult for the newly arrived people. That information must not only be available and visible, but it must also make its way to migrants in an appropriate format and language. Second forced migrants have often fled their countries abruptly and without proper documentation, so they are forced to go into hiding from the authorities and are thus unable to access their host country's social and cultural life. Such forced migrant artists are in a state of limbo, unable to fully participate in their host country's creative economy. They are struggling to secure legal documentation.<sup>32</sup> The difficulties are often even greater when artists settle outside urban centres, as state-of-the-art creative and production tools may be inaccessible. Barriers to accessing and understanding information on dissemination channels and establishing relationships with cultural actors are further amplified by language barriers. Physically accessing places of creation, production or dissemination of cultural expressions can be compromised by fears of experiencing paper checks or hate crimes, stereotyping or discrimination because of their status.

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<sup>30</sup>[www.e-flux.com/architecture/refugee-heritage/](http://www.e-flux.com/architecture/refugee-heritage/)

<sup>31</sup>See submission by Mary Ann DeVlieg.

<sup>32</sup>See submission by Artistic Freedom Initiative for examples in the United States of America.

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Unfortunately, general cultural rights provisions are yet to be used to address the situations discussed above. In addition to the states, the monitoring bodies of the relevant treaties have also not discussed the situations above. Some general observations that would include forced migrants have recently come out of such bodies: The Committee on the Elimination of Racial Discrimination has noted the importance of cultural rights in protecting vulnerable groups to restore the balance of power in society, promote intercultural understanding and tolerance, help deconstruct racial stereotypes, facilitate the free exchange of ideas and offer alternative points of view and counterpoints.<sup>33</sup> The Committee has asked states to address intersectional discrimination<sup>34</sup> and has referred to gender-based violence of migrant women of irregular status.<sup>35</sup> It has commented on the inadequate integration measures taken by states,<sup>36</sup> and has reinforced the importance of States addressing hate speech against these individuals effectively.<sup>37</sup>

The Human Rights Committee has also recently urged States to strengthen awareness-raising efforts aimed at promoting respect for human rights and tolerance for diversity, revisiting and eradicating stereotypical prejudices.<sup>38</sup> The Committee has not linked article 27 ICCPR to the rights of migrants and refugees, a missed opportunity so far. The Committee on Economic, Social and Cultural Rights has also discussed the duties of States towards refugees and migrants under the convention and asked for the adoption of ‘specific measures to promote the social integration of migrants, asylum seekers and refugees, in order to ensure their enjoyment of their economic, social and cultural rights in particular access to employment, education, housing and health’.<sup>39</sup> But even though the reference for cultural rights is there, the Committee has not made the link between article 15 ICESCR that protects cultural rights with forced

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<sup>33</sup> Committee on the Elimination of Racial Discrimination, general recommendations No. 30 (2004), paras. 37–38, and No. 35 (2013), paras. 24, 29, 31 and 34.

<sup>34</sup> Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 23. UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 39.

<sup>35</sup> UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 39. UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 21.

<sup>36</sup> Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 23(c).

<sup>37</sup> UN CERD, General Recommendation No. 15 (1993) on article 4 of the Convention and No. 35 (2013) on combating racist hate speech. See UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 14. Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 11. UN CERD, Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 15. UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 19.

<sup>38</sup> [CCPR/C/DEU/CO/7](#), para. 11. See also [CCPR/C/HUN/CO/6](#), para. 17.

<sup>39</sup> For example, UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 40.

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migrants yet. Finally, one can see some direct comments on cultural rights of migrants that include forced migrants. Commenting on the Austrian report, the Committee on Discrimination against Women asked the state to improve the education of migrant women and to ensure that the ban of ‘ideologically or religiously influenced clothing’ does not have a discriminatory effect on the education of migrant girls.<sup>40</sup>

However any comments on cultural expressions by monitoring bodies beyond minority cultural expressions are rare. Notwithstanding the attention of minority cultural rights, the United Nations bodies rarely comment on general cultural rights provisions, let alone forced migrants. There seems to be almost silence when it comes the two together, even though as noted above forced migrants face a plethora of violations to the cultural rights every day; even though cultural rights are rights to their identities. In my role as the UN Special rapporteur in the field of cultural rights, I have discussed such issues with several monitoring committees. However, until concluding observations explicitly make use of the general provisions on cultural rights for the protection of the identity and development of refugees and undocumented migrants, and until the states are pushed to use such provisions they have ratified, the general provisions will remain rather inadequate in protecting migrants’ cultural rights.

### **Migration and asylum legal system**

One may think that the main reason why general recognition of cultural rights is not used to protect forced migrants’ cultural rights would be the existence of specific instruments on the protection of these individuals. Unfortunately, a quick glance through the specific instruments for migrants and refugees shows that cultural rights of forced migrants are very peripherally addressed by such instruments.

In the case of all migrants, the *Global Compact for Safe, Orderly and Regular Migration* reiterates the general provision that: “Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times.” The States parties also reaffirmed in the Global Compact that the respect for human rights of migrants must be effective, regardless of their migration status, across all stages of the migration cycle. Commitment No. 16 of the Compact affirms the need for States to

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<sup>40</sup> CEDAW, Concluding Observations on Austria, UN Doc CEDAW/C/AUT/CO/9 of 30 July 2019, para 30.

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empower migrants and communities to achieve full integration and social cohesion. As part of objective 16 of the Compact, States commit explicitly to: “Promote mutual respect for the cultures, traditions and customs of communities of destination and of migrants by exchanging and implementing best practices on integration policies, programmes and activities, including on ways to promote acceptance of diversity and facilitate social cohesion and inclusion”. Objective 17 promotes the abolition of all forms of discrimination and the promotion of evidence-based public discourse to influence public perceptions of migration.

It is obvious that the Global Compact does not put any real pressure on states to respect migrants’ rights apart from a very generic reiteration that they should respect their cultures and traditions. One would not expect any different anyway as the compact’s aim was always to renew the commitment of States to respect the obligations they have already undertaken. In any case, cultural rights do not enjoy any attention which gives away, I believe, the spirit of indifference of states towards this respect of cultural rights of forced migrants. One wonders whether this lukewarm reinstatement of the need to respect migrants’ cultural rights is also due to the insistence of European states of perceiving a gap between the ‘European way of life’ and migrants ways of life, as so often emphasised by politicians. It is undeniable that migrants’ cultures are not discussed as positively within the EU as European so called culture.<sup>41</sup>

Turning to refugees, they rely on the (1951) United Nations *Convention relating to the Status of Refugees* and its (1967) *Protocol*. The main underlying principles of the convention is that refugees should be guaranteed non-refoulement, non-penalisation and non-discrimination. The principles of non-refoulement and non-penalisation have been quite prominent in the discussions and action for the protection of refugees, as these principles often ensure the survival of these individuals. However, the principle of non-discrimination has been mainly interpreted as a negative obligation, an obligation of the state not to interfere with the rights of refugees. This is evident also in the proclamation in the Refugee Convention of non-discrimination in ‘rights in literary, artistic, and scientific works’: the convention ensures that in these cases, ‘a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that state.’<sup>42</sup> Even with the

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<sup>41</sup> In 2006, the UN Special Rapporteur on Violence against Women had already discussed after his visit to Sweden this point. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Erturk, Addendum, Mission to Sweden, UN Doc. A/HRC/4/34/Add.3 of 6 February 2007, para. 16.

<sup>42</sup> Article 14 of the Refugee Convention.

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limitation of focusing on negative protection rather than positive protection, this provision has not been the focus of attention.

The Global Compact on Refugees does not go any further: it recognises in paragraph 44 ‘the important role that sports and cultural activities can play in social development, inclusion, cohesion, and well-being, particularly for refugee children (both boys and girls) adolescents and youth, as well as older persons and persons with disabilities’ and promises more partnerships to pursue access to sporting and cultural facilities and activities in refugee-hosting areas’. It is interesting though to note that the Compact focuses on access rather than participation to cultural activities. In this respect the Compact shows the states’ limited political will to implement the participation aspects of cultural rights as recognised in article 15 ICESCR.

The UNHCR has not focused on the cultural rights of refugees either, with some members within the organisation believing that this would go further than the remit of the UNHCR. The recent project ‘MADE 51’ is perhaps the only project focusing on cultural rights of refugees.<sup>43</sup> In the MADE51 model, UNHCR identifies refugees with artisanal skills, helps refugees create strong artisan groups and connects these groups to experienced local social enterprise partners. Together, they develop market-ready products. MADE51 convenes strategic partners from the private sector to curate collections, create marketing opportunities and make products available for sale to consumers worldwide. Although the project is a fantastic initiative by the UNHCR, it uses the understandings of migrants cultures that are the more ‘palatable’ in host states: it uses the rather folkloric elements of refugee cultures. Still, the empowerment of refugees through use of their cultures promotes their human rights including their cultural rights. One would wish to see a more comprehensive plan by the UNHCR on protecting the identities of refugees that would sit besides their other commendable work.

### **Minority rights system: what is its added value for cultural rights of forced migrants?**

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<sup>43</sup> <https://www.unhcr.org/uk/what-we-do/build-better-futures/livelihoods-and-economic-inclusion/crafted-refugees-made51>.

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The previous section has demonstrated that the general human rights recognition of the rights of forced migrants can be important tools for the realisation of their cultural rights. More elevation of these provisions and better use would certainly help their realisation.

In this framework, recognising that forced migrants are also members of minorities would contribute further to the realisation of their cultural rights. General human rights and minority rights are not separate independent systems; rather, they work together to ensure the adequate protection of minorities. The standards are the same; essentially minority instruments clarify and apply Article 15 ICESCR and the non-discrimination provisions in the case of minorities. The one set reinforces the other and vice versa. Therefore, recognising forced migrants within the scope of minority protection would reinforce the rights that are already recognised in the general provisions.

This ‘reinforcement’ is particularly visible in three areas, I believe:

*a. Recognition of cultural identity*

Minority rights standards establish more robust protection than generally applicable human rights standards and provide a clearer understanding of the measures required to preserve minority cultural identity. Forced migrants are not discriminated solely on the ground of their migration status, but also (mainly sometimes?) as member of well-defined ethnic groups. Although General Comment 21 (2009) has explained that Article 15 ICESCR has a collective element, their discrimination as members of these groups is better tackled by minority rights instruments. The Declaration on Minorities clarifies that its reason d’être is the protection of ‘the existence and the national or ethnic, cultural, religious and linguistic identity of minorities’.<sup>44</sup> The Declaration explains clearly how the general provision of cultural rights applies on minorities: ‘States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs (...)’ Article 5 of the FCNM also places an obligation upon states parties to facilitate the preservation of minority cultural identity. States are

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<sup>44</sup> UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted on 18 December 1992, UNGA Resolution 47/135, article 1.

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encouraged to take specific measures that enable the development of minority cultures, traditions and customs, and assimilation is clearly prohibited.

Minority instruments include special measures in a more visible, prominent way to the special measures included in general provisions. States have to take special measures to protect religious rights,<sup>45</sup> linguistic rights<sup>46</sup> and the right to establish and access minority media.<sup>47</sup> Restrictions of states to allow for example the manifestation of religion by forced migrants, a phenomenon we have seen repeatedly, can be addressed more suitably by the minority rights system rather than the general human rights system. The right to maintain cross-border contacts<sup>48</sup> and the need for intercultural dialogue and education<sup>49</sup> are specific elements that are of particular importance to forced migrants, many of whom aims at relocation and family reunification. These issues are not addressed by general human rights standards.

The Declaration on Minorities also urges States to take measures in education, “in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory”. The recent traumas of the newly arrived forced migrants in Europe have to be reflected in the curricula. In states where substantial numbers of forced migrants live, curricula may also include their histories, their cultural resources. And beyond formal education, museums, galleries and bookshops must be urged to exhibit items that relate to the cultures of forced migrants, often underrepresented. All these elements form parts of the cultural rights of forced migrants. They can of course derive from article 15 ICESCR but they are laid out explicitly in minority instruments. Forced migrant claims to their identity are better served by minority protection for cultural rights.

*b/ The protection from dehumanising forced migrants’*

Cultural rights protect much better the migrants from current attacks to their ways of life, as these attacks have elements of intersectionality, discriminating against them on the grounds of

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<sup>45</sup> See Article 7–8 FCNM; articles 2(1), 2(2) and 4(2) UN Declaration on Minorities.

<sup>46</sup> See Articles 9–11 FCNM; article 4(3) UN Declaration on Minorities.

<sup>47</sup> See Articles 9(2), (3), (4) FCNM; Human Rights Council, Recommendations of the Forum on Minority Issues at its Fifth Session: Implementing the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Identifying Positive Practices and Opportunities (27 and 28 November 2012) (28 December 2012) UN doc A/HRC/22/60 para 47.

<sup>48</sup> See Article 17 FCNM; article 2(5) UN Declaration on Minorities.

<sup>49</sup> See Articles 6(1), 12 FCNM; article 4(4) UN Declaration on Minorities.

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being migrants but equally importantly of being of a different ethnic, national, religious or linguistic background.<sup>50</sup> Forced migrants often face the undermining of their cultural values, the uncritical perception that their cultures of origins are of an inferior nature, and ultimately their dehumanization. The undermining of forced migrants' cultures usually starts with the lack of knowledge and understanding by the local population.<sup>51</sup> The State therefore has an important role to play in changing negative attitudes through formal and informal education. In Europe, the Europeanization discourse of human rights maintains and increases the artificial gap between "us, the Europeans", who represent the noble values of human rights and gender equality, and "the others".<sup>52</sup> "We", the Europeans, need cultural rights, often in the sense of access to high arts, whereas "they", the migrants, claim cultural rights to preserve their traditional practices, practices that Europeans should be very wary of. Populist media, politicians and parts of civil society often talk about the alleged perils of migrant cultures, whereas very seldom do we see them interpreting their negative practices as part of their cultures, their identities. The recent 'me too' movement, the femicides of women in Europe were not discussed in terms of 'European' or local cultures, did not raise suspicion about the European cultures, and did not undermine all Europeans.

Negative representations of migrants are the main engine of current efforts to introduce neo-assimilationist policies.<sup>53</sup> In certain host countries, "our way of life" (not even our ways of life, plural) is considered the "right" interpretation of human rights, implying a kind of ownership of human rights by the host State and ignoring problematic values, practices and even the colonial past of some States. The criminal activities of any migrant are portrayed as either an inherent part of their culture or the outcome of cultural values; existing problematic cultural practices are singled out; unacceptable hate speech is confused with freedom of speech; and ultimately migrants are dehumanized, which leads to tolerance of discrimination and prejudice against them and suppression of their cultural rights. Ultimately, that can lead to legitimization

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<sup>50</sup> Berry and Taban have talked about the intersectionality of minority status and refugee status, see S berry and I Taban, 'The right of minority-refugees to preserve their cultural identity: an intersectional approach' (2021) *Netherlands Quarterly of Human Rights* 1-22.

<sup>51</sup> See Lenka Dražanová and others, "Meta-analysis of micro and macro level factors affecting attitudes to immigration" (2021).

<sup>52</sup> Alessandro Chechi, "Migration, cultural heritage, and cultural rights: a critical assessment of European Union law and policy" in *Cultural Heritage in the European Union*, Andrzej Jakubowski, Kristin Hausler and Francesca Fiorentini, eds. (Leiden, Netherlands, Brill Nijhoff, 2019).

<sup>53</sup> Peter Holtz, Janine Dahinden and Wolfgang Wagner, "German Muslims and the 'integration debate': negotiating identities in the face of discrimination", *Integrative Psychological and Behavioral Science*, vol. 47, No. 2 (June 2013).

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of widespread and coordinated rights violations, as has been seen by the activities of right-wing criminal organizations.

On this flawed basis, integration, is used to promote policies that “gently” assimilate migrants, old and new. ‘Expecting members of cultural groups to accept our way of life’, a phrase often repeated, translates to rejecting their identity because it is viewed as negative, as an obstacle to the harmony and well-being of the society as a whole.

The undermining and in several occasions dehumanising of forced migrants would benefit tremendously by minority instruments. Minority rights emphasise the importance of interculturality and mutual tolerance. The Framework Convention on National Minorities is especially explicit on the issue. Article 5 explicitly urges States ‘to refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation’. In article 6, the convention recognises the importance of tolerance and inter-cultural dialog among all sections of the population. The provisions touch at the core of forced migrants’ current challenges regarding their cultural rights. Being able to use them would be important ammunition in tackling attempts to undermine and dehumise them.

*c. Participation in cultural expressions*

Maybe the most tangible contribution that the use of minority rights would make in forced migrants’ cultural rights would be on participation rights. Minority instruments insist on the ‘effective participation’ of members of minorities in the life of the state.<sup>54</sup> Forced migrants will have to become active members in the designing and delivery of services and programmes that affect them. Measures will need to be taken for the empowerment of these individuals.

The participation of forced migrants in any programmes, discussions or measures that affect them is an essential aspect of cultural rights and is not absent from general protection on cultural rights. In its general comment No. 21 (2009), the Committee on Economic, Social and Cultural Rights has clearly noted that cultural rights include the right to take part in the

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<sup>54</sup> See Articles 2(2) and (3) UN Declaration on Minorities; article 18 UNDRIP; article 15 FCNM.

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development of the community to which a person belongs and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights (para. 15 (c)). However, we see very often that this rights is not implemented, particularly with respect to vulnerable sections of the population.

Often, other persons speak in the name of migrants, be it experts, State officials or even civil society organizations. Forced migrants are absolutely silent from the public domain, even though their presence is often a high agenda item in the news. It is imperative that migrants share their own experiences and claims. The need for the direct participation of migrants must be guaranteed in the cultural sector, as well as in all other sectors. The understanding of their values, philosophies and knowledge benefits the wider society and the infusion of such values in the public domain its economic, political and social life.<sup>55</sup> That interaction, which includes criticism and even rejection, leads to development and innovation and benefits society as a whole.

The participation of migrant artists and communities in discussions about ways forward is of paramount importance. Securing the presence of migrants in the State's administration and in strategic positions in culture, their interaction with other artists within the country and their visibility as artists in national cultural centres is important.

Regarding programmes to ensure their cultural rights, seldom do we see the participation of migrants. Yet, this is a necessary condition for empowering these people and also for creating programmes that would really enhance their lives. Their participation must be at the inception of any measure and not only in the delivery. Any such measure must also be regularly evaluated by the migrants themselves. Their effective participation ensures an inclusive society. At the 1995 World Summit for Social Development, participants described inclusive society as “a society for all, in which every individual, each with rights and responsibilities, has an active role to play” and which should be based on the respect “for all human rights and fundamental freedoms, cultural and religious diversity, social justice and the special needs of vulnerable and disadvantaged groups, democratic participation and the rule of law”.<sup>56</sup>

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<sup>55</sup>See YoSoyElOtro Asociación Cultural submission to the UNSR cultural rights for the 2023 report on Migration and Cultural Rights, as above.

<sup>56</sup>[A/CONF.166/9](#), para. 66.

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The “Sesame” research project led by the Musée de la Civilisation de Québec is a positive example of how migrants can be included in cultural activities. The project aims at improving both access to the Museum and participation of people who experience particular realities (situations of exclusion, marginalization, disability, etc.) in the design of exhibitions. By working and collaborating with the individuals and communities concerned, including forced migrants, the Museum documents historical aspects of their reality, develops its collections to reflect them, and sets up contexts for artistic co-creation.

The active participation of forced migrants in all aspects of matters that affect them including the promotion of their cultures and cultural rights is an important element of their cultural rights. It can better be served by including in their armoury the minority protection that ensures ‘effective’ participation, as an element of added protection to the general provisions.

## **Conclusions**

For the last 30 years, the International Journal on Minority and Group Rights has been leading discussions on applying minority protection in a manner that is consistent with existing international law standards and improves the lives of minorities and groups. At every stage, the journal has not shunned away from difficult discussions but has been pushing through scholarship of high quality and continuing reflection the evolution of minority protection.

Currently, the situation around the world and specifically in Europe necessitates that the light is shed on the rights of forced migrants. Cultural rights of forced migrants are especially in need of being crystallised and implemented. The omission of using minority rights to protect forced migrants is an overlook that fails migrants as much as minority rights protection. Forced migrants continue to be without an effective panoply of rights concerning their need to maintain their identity, their cultural expressions and resources in the host states. Minority rights become irrelevant in a space that is currently highly contested and where they, minority rights, have a lot to offer.

This paper has argued that recognising minority protection for the cultural rights of forced migrants is a natural evolution of minority rights. This is the case because these individuals fall within the description put forward for minorities, so not recognising them as beneficiaries of minority protection would raise questions of discrimination. Their claims also fall within

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minority protection as they are based on their national or ethnic, religious and linguistic origin. Neither the general instruments, not the specific additional instruments that refer to their specific situation have proven adequate to protect their cultural rights. In their quest for a life with meaning in the new realities in which they are found, their empowerment can only come as individuals and members of groups who are allowed to enjoy, express, develop and evolve their cultures. My belief is that the desperate need to protect their identities and to stand tall as equal partners in the society in which they are found, their effective participation and their real integration in the host society will be better served by including in their armoury the protection recognised by minority rights.