

CHAPTER 14

The Cultural Heritage of Minorities and Indigenous Peoples in the EU: Weaknesses or Opportunities?^[1]

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1. Introduction

The importance of the cultural heritage of minorities and indigenous peoples has only recently begun to be explored in law. International human rights law recognises to members belonging to minorities their right to culture, that includes protection of cultural heritage. For minorities within the European Union (EU), their cultural heritage is an essential tool for maintaining and strengthening their identity. In their joint article, Jakubowski, Fiorentini, and Manikowska have demonstrated how church bells have been vehicles of collective memory and cultural identity in parts of Eastern Europe.¹ In Desulo of Sardinia, traditional woven dresses, embroidered with colourful flowers and vibrant stitching, tell stories of life, death, and place. “Each stitch, every piece of fabric, all the colours talk about me,” one community member explains. “Red like embers when I got married, black like coal after I became a widow.” Pecora states: ‘In every dress I see a life, and in every life, a story.’² The recent interest of the international community in the protection of cultural heritage has revealed a serious gap in the protection of minorities internationally. Minority heritage is often appropriated by the State and presented as part of the national cultural heritage and/or undermined and trumped upon by other, often commercial, interests. For example, believers of the Old Belief religion in Estonia have commented that the use of their cultural heritage for touristic purposes by the government undermines its heritage value.³ The Jewish minority in

¹ Andrzej Jakubowski, Francesca Fiorentini, and Ewa Manikowska, ‘Memory, Cultural Heritage and Community Rights: Church Bells in Eastern Europe and the Balkans’ (2016) 5(2) *International Human Rights Review* 274.

² As quoted in ‘Folklife Friday: Shabbat in Zimbabwe, Sardinian Dresses, and More’ (*Smithsonian Center for Folklife & Cultural Heritage*, 3 November 2017) <<https://folklife.si.edu/news-and-events/folklife-friday-shabbat-in-zimbabwe-sardinian-dresses-and-more>> accessed 31 March 2018.

³ Aleksandr Aidarov, ‘Tourism and the Preservation of Old Belief in Estonia: The Frontstage and Backstage of Estonian Old Believers’ (2016) 22(2) *International Journal of Cultural Policy* 200.

Poland experiences surprise by the new law that makes it illegal to accuse the Polish nation of having taken part in the atrocities and the systematic mass murder of the Jews committed by the Germans during World War II.⁴

Indigenous peoples also ask for the realization of their rights to cultural heritage. For example, Saami in Finland continue to ask for the recognition and control of their artefacts and designs.⁵ In contrast to minorities, indigenous rights to cultural heritage have been very clearly recognized recently in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶ They derive from indigenous self-determination and include collective rights to the development and the management of cultural heritage as well as the free, prior and informed consent on decisions that affect them. And it seems that the indigenous movement may be more active in its claims rather minorities at the European Union level: In a meeting of indigenous delegations and the European Parliament in 2016, indigenous delegates asked the support of the EU to the idea of international repatriation, the establishment of an international mechanism to fight for the selling of indigenous artefacts illegally, and the establishment of capacity building programs for the preservation of indigenous cultural heritage.⁷

It is argued in this chapter that although the EU has declared that the rights of members belonging to minorities and indigenous peoples should be respected by the EU, its legal framework is wholly inadequate in protecting their rights to their cultural heritage. Such protection remains indirect and falls short of the emerging international human rights standards on cultural heritage. Interestingly, the intangible cultural heritage of EU minorities, although very recently recognized at the international level, at the EU level is better protected than other kinds of cultural heritage. In contrast, the tangible cultural heritage of minorities is left in the total control of the EU State.

⁴ Svenja Bethke, 'Poland is Trying to Rewrite History with This Controversial New Holocaust Law' (*The Conversation*, 16 February 2018) <<http://theconversation.com/poland-is-trying-to-rewrite-history-with-this-controversial-new-holocaust-law-91774>> accessed 31 March 2018.

⁵ Alexandra Xanthaki and others (eds), *Indigenous Peoples' Cultural Heritage* (Brill Nijhoff 2017).

⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.*

⁷ 'Indigenous delegates recommendations to the European Parliament', Meeting hosted and chaired by Mrs Hautala, European Parliament, 14th June 2016 in <https://www.docip.org/en/indigenous-peoples-at-the-eu/indigenous-peoples-meetings-with-the-eu/>.

2. The EU Legislative Framework: Yes but No...

2.1. The EU Treaties

Article 2 of the Treaty of Lisbon⁸ explicitly proclaimed the respect of the EU for minority rights:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3(3) of the Treaty on European Union also declares that the European Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection (...). It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.'⁹

Hence, both the rights of minorities and non-discrimination are deemed to be essential values of the EU. The Charter of Fundamental Rights of the European Union (EU Charter),¹⁰ a binding instrument, also proclaims in Article 21 that '[a]ny discrimination based on any ground such as (...) membership of a national minority (...) shall be prohibited.'¹¹ Article 22 proclaims: 'The Union shall respect cultural, religious and linguistic diversity.'¹²

Both the above provisions can be applied to the cultural heritage of minorities: the rights of persons belonging to minorities include recognition and protection of their culture and their heritage, whereas non-discrimination must also be insured with respect to the cultural activities of persons belonging to minorities. The above provisions also apply to the cultural heritage of indigenous peoples: Although minorities and indigenous peoples are different, the international

⁸ European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01.

⁹ OJ C 326, 26.10.2012, p. 13–390.

¹⁰ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

¹¹ Ibid.

¹² Ibid.

legislative regimes for the protection of minorities also applies to indigenous peoples in addition to the specific instruments for the protection of indigenous peoples.

Yet, despite the statement of the European Union Agency for Fundamental Rights that 'the Treaty of Lisbon puts a new emphasis on persons belonging to *minorities* and on diversity in general',¹³ the protection provided by the EU for the cultural heritage of minorities and indigenous peoples after Lisbon is indeed very limited. Both Article 3(3) of the Treaty on European Union (TEU)¹⁴ and the EU Charter do not constitute legal basis provisions. In other words, the EU cannot regulate neither in the field of cultural heritage nor in the field of minority rights.¹⁵ Therefore, no protection can be directly given to minority cultural heritage by the EU and no such policies can be directly applied by the EU. It is assumed that such measures will come from the individual Member States.

The EU's position on this has recently been confirmed. A proposed European Citizens' Initiative to 'improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union'¹⁶ was halted by the European Commission in 2013. A European Citizens' Initiative enables EU citizens to request the European Commission to consider an idea as a possible basis for a legislative proposal.¹⁷ Commission Decision C (2013) 5969 of 13 September 2013 refused the registration of an initiative entitled 'Minority SafePack – one million signatures for diversity in Europe' that called 'upon the EU to adopt a set of legal acts to improve the protection of persons belonging to national and linguistic minorities and strengthen cultural and linguistic diversity in the Union.'¹⁸ In recognizing the gap that exists in the EU legal framework, the initiative asked for 'policy actions in the areas of regional and minority languages, education and culture, regional policy, participation, equality, audiovisual and other media content, and also regional (state) support.'¹⁹ The annex to the initiative mentioned 11 specific proposed legal acts including, inter alia, a recommendation of the Council on the protection of cultural diversity in the Union;

¹³ European Union Agency for Fundamental Rights, *Respect for and Protection of Persons Belonging to Minorities 2008–2010* (Publications Office of the European Union 2011) 24 (emphasis added).

¹⁴ OJ C 326, 26.10.2012, p. 13–390.

¹⁵ Tawhida Ahmed, 'The Treaty of Lisbon and Beyond: The Evolution of EU Minority Protection?' (2013) 30 *European Law Review* 36.

¹⁶ 'Minority SafePack – one million signatures for diversity in Europe' (*European Citizens' Initiative Official Register*) <<http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000004>> accessed 31 March 2018.

¹⁷ Anastasia Karatzia, 'The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Lawmaking' (2017) 54 *Common Market Law Review* 177.

¹⁸ 'Minority SafePack' as above.

¹⁹ *ibid.*

a decision of the Council and the Parliament for funding programmes accessible for minorities; regional funds available for the protection of minorities; a proposed centre for linguistic diversity; effective measures to address discrimination and lack of equality; and measures to promote copyright legislation more suitable for minorities. In February 2017, the General Court of the European Union annulled the Decision of the European Commission not to register the Citizens' Initiative on the ground that it had failed to state reasons.²⁰ However, in its new Decision 2017/652 of 29 March 2017, the Commission confirmed its legal position:

A legal act of the Union for the purpose of implementing the Treaties cannot be adopted either as regards effective measures to address discrimination and to promote equal treatment, including for national minorities (...) Whilst irrespective of their field of action, the Union institutions are bound to respect 'cultural and linguistic diversity' in accordance with Article 3(3) TEU and to refrain from discrimination based on 'membership of a national minority' in accordance with Article 21(1) of the Charter of Fundamental Rights of the European Union none of these provisions constitutes a legal basis for whatever action by the institutions.²¹

Therefore, the EU is under no obligation to take positive action to protect the cultural heritage of minorities. A window of opportunity could be the use of Article 19 of the Treaty on the Functioning of the European Union (TFEU),²² which establishes the possibility of legal action 'to combat discrimination'. If persons belonging to a majority benefited from measures that protected the cultural heritage of such majority groups, minorities could potentially claim discrimination and ask for similar measures for minority groups. However, the European Commission has rejected such a possibility:

Article 19 TFEU provides that without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after

²⁰ Case T-646/13 *Minority SafePack – one million signatures for diversity in Europe v Commission* [2013] ECLI:EU:T:2017:59.

²¹ Commission Decision (EU) 2017/652 of 29 March 2017 on the proposed citizens' initiative entitled 'Minority SafePack – one million signatures for diversity in Europe' [2017] OJ L92/100, para 7.

²² Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

obtaining the consent of the European Parliament may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. *However, this exhaustive list of grounds of discrimination does not include membership of a national minority.* Therefore, Article 19 TFEU cannot constitute the legal basis for the adoption of a legal act of the Union for the purpose of implementing the Treaties proposals for 'effective measures to address discrimination and to promote equal treatment, including for national minorities'.²³

In other words, the Commission drew a distinction between racial or ethnic origin and membership of a national minority. Such a distinction is inconsistent with international human rights standards, nor is it very clear. The UN Declaration on Minorities refers to them in the title as 'national or ethnic, religious and linguistic',²⁴ so people belonging to national minorities are persons of racial or ethnic origin. The Advisory Committee of the main instrument of the Council of Europe on minorities, the Framework Convention on National Minorities (FCNM),²⁵ also discusses within its remit persons of racial or ethnic origin. Therefore, minorities of ethnic or racial origin and national minorities fall within the same category. Making a distinction between their rights is quite arbitrary and not in accordance with current standards of international law.

Article 167(1) TFEU recognizes the responsibility of the EU to contribute 'to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'. Paragraph 2 proclaims that

[a]ction by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the (...) improvement of the knowledge and dissemination of the culture and history of the European peoples, conservation and safeguarding of cultural heritage of European significance.²⁶

²³ *ibid* para 8 (emphasis added).

²⁴ UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135.

²⁵ Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157.

²⁶ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

However this provision does not concern minority cultural heritage. Not only is it not helpful in gaining respect and protection of minority heritage, it actually leads to its disrespect, as shown below.

First, by focusing on cultural heritage of 'European significance', it adopts an understanding of culture focused only on significant cultural elements, rather than as a way of life. This is not in tune with the current understanding of culture and its meaning. Originally, international law focused on protecting specific tangible objects. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict,²⁷ the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property²⁸ and the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage²⁹ defined cultural heritage as monuments, groups of buildings and sites of outstanding universal value. Culture as a way of life was not considered within the remit of culture. However in 2018, the UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage deemed a host of new elements significant in protecting 'a way of life'.³⁰ And of course the UN Human Rights Committee (UNHRC) has long talked about culture as a 'way of life'.³¹

Second, in promoting EU culture, it leaves open the possibility of trampling on the rights of minorities to their cultural heritage for the sake of European culture. The only obstacle to such a process is implied in Article 167(4) TFEU, which states that the 'Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.' Yet this language is not very clear and the possible protection of minority cultural heritage against encroachment by measures aimed at strengthening EU culture is not very direct.

To date, the only clear reference to the cultural heritage of minorities comes from the European Parliament. In 2017, the Parliament urged States to 'pay particular attention to

²⁷ Adopted 14 May 1954, entered into force 7 August 1954, 249 UNTS 358. Article 1 describes cultural property as 'property of great importance',

²⁸ Adopted 14 November 1970, entered into force 24 April 1972, 823 UNTS 231. Article 1 defines cultural property as property 'of importance to archaeology, prehistory, history, literature, art or science'.

²⁹ Adopted 16 November 1972, entered into force 17 December 1975, 1037 UNTS 151. Article 1 defines heritage as works or buildings 'of outstanding universal value'.

³⁰ 'Preserving Intangible Culture for Future Generations' (*UN News*, 16 January 2018) <www.un.org/apps/news/story.asp?NewsID=58430#.Wni5nmZ0c_U> accessed 31 March 2018.

³¹ UNHRC, 'General Comment No 23. Article 27 (Rights of Minorities)' (26 April 1994) CCPR/C/21/Rev.1/Add.5, para 7.

monuments, buildings, cemeteries and everyday implements which are of great importance to the cultural heritage of minority peoples, and to engage in enhanced cooperation by including them in any decision-making process that affects their cultural heritage.³²

2.2. The European Convention on Human Rights

Although still waiting for the accession of the EU to the European Convention on Human Rights (ECHR),³³ the latter enjoys a higher status than other international treaties. In addition to having the status of 'general principles of EU law', it also acts as interpretative tool to the EU's own human rights legal text, the European Charter of Fundamental Rights, that is 'closely modelled on the ECHR'.³⁴ Most importantly, it is the only international instrument chosen to be given the status of primary law (Article 6(2) Lisbon Treaty). As Psychogiopoulou notes:

Declared as an autonomous source of EU fundamental rights principles—insubordinate to national constitutionally protected human rights—the ECHR functions as a limitation on EU action. The CJEU is entrusted with the task of ensuring respect for its provisions by the European institutions, while national rules falling within the scope of EU law are also required to be compatible with the ECHR.³⁵

³² European Parliament, 'Motion for a resolution pursuant to Rule 133 of the Rules of Procedure on support for the preservation of the heritage of ethnic minorities in Europe' (26 January 2017) EU Doc B8-0131/2017, para 3.

³³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. For the accession of the EU to the ECHR, see European Parliament, *EU accession to the European Convention on Human Rights (ECHR)*, Briefing, July 2017, at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI\(2017\)607298_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf). Also see S Morano-Foadi and S Andreadakis, 'The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward', Paper submitted to the European Parliament's Committee on Constitutional Affairs Public Hearing on "Accession to the European Convention on Human Rights (ECHR): Stocktaking after the ECJ's Opinion and way forward", 20 April 2016,

³⁴ P Craig, G de Burca, *EU Law*, 5th ed, OUP, at 399. <http://www.europarl.europa.eu/cmsdata/104503/EP%20Hearing%20Contribution%20MoranoFoadi%20Andreadakis%20April%202016.pdf>.

³⁵ Evangelia Psychogiopoulou, 'The European Union and Cultural Rights' in Ana Filipa Vrdoljak (ed), *The Cultural Dimension of Human Rights* (OUP 2013) 162.

However, the ECHR has several limitations regarding the protection of minority cultural heritage. The Convention does not recognize minority rights, neither does it recognize the right to cultural heritage, nor the right to culture. In *Sylogos Ton Athinaion v the United Kingdom*,³⁶ the European Court of Human Rights held that Article 8 does not give rise to a general right to protection of cultural heritage. In *Hingitaaq 53 and Others v Denmark*,³⁷ the Court did not consider the importance that the forced relocation had for the Inughuit tribe's identity and heritage. And although the Court has accepted that protection of cultural heritage is a legitimate aim for the restriction of other human rights,³⁸ one can only hope that this would include, if not be even stronger, for minority cultural heritage.

Nevertheless, some protection has been given by the Court to minority cultural heritage in an indirect way, through the provisions on private and family life (Article 8), freedom of thought, conscience, and religion (Article 9), assembly and association (Article 11), discrimination (Article 13), and education (Article 2 of the First Protocol).³⁹ The Court's statement on Article 8 ECHR is noteworthy, where it stated that:

an emerging international consensus (...) recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (...) not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.⁴⁰

The Court has recognized the positive obligations of States to facilitate the Roma way of life, including consideration of their needs and their different lifestyle.⁴¹ This is part of the minorities' cultural heritage. The right to seek historical truth is another element of cultural heritage useful to minorities, and which has been protected. The Court has held that the negation or revision of clearly established facts, such as the Holocaust, does not fall within the protection of Article 10 ECHR (freedom of expression).⁴² Although the Court has repeated that

³⁶ App no 48259/15 (ECtHR, 31 May 2016).

³⁷ ECHR 2006-I 345.

³⁸ *Debelianovi v Bulgaria* App no 61951/00 (ECtHR, 29 June 2007).

³⁹ Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

⁴⁰ *Chapman v the United Kingdom* App no 27238/95 (ECtHR, 18 January 2001) para 93.

⁴¹ *ibid.*

⁴² *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) para 47; and *Garaudy v France* ECHR 2003-IX 333; and *Witzsch v Germany* App no 7485/03 (ECtHR, 13 December 2005). See also Paolo Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) 26 *European Journal of International Law* 237.

this applies only to 'clearly established historical facts',⁴³ these judgments can be used as the basis for protecting minorities' histories and traditions against revisionist ideas on the part of EU States.⁴⁴

The Court has also recognized the link between linguistic rights and the maintenance of the cultural identity of minorities.⁴⁵ The Court has criticized measures that prevent persons belonging to minorities to 'maintain contact with the culture and language of their country of origin',⁴⁶ including the removal of a satellite dish from the property of minority persons. The Court has also protected the right to education in one's mother tongue⁴⁷ and has held that restrictions in the use of and access to the minority language at school violates the right to education.⁴⁸ Finally, the Court has also protected the right of members belonging to minorities to form associations aimed at promoting their cultural heritage, ruling that the refusal of a State to register a non-profit association that aims at the protection of cultural heritage of minorities amounts to a violation of Article 11 ECHR.⁴⁹

Overall, one can see that the protection of minority cultural heritage has been very limited in the ECHR system. Minorities' tangible heritage has not even been considered to be protected by the ECHR so far.

2.3. Other international instruments

In view of the delay in the accession of the EU to the ECHR, and its limited use in such claims, one must look for the protection of the rights of minorities and indigenous peoples to their cultural heritage in other human rights provisions within the Council of Europe, and more widely in the UN. The Court of Justice of the European Union (CJEU) noted in *European Parliament v Council of the European Union* that 'the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the

⁴³ *Lehideux and Isorni* (n 26) para 47.

⁴⁴ It would be interesting to see how the Court would view the new Polish legislation that makes it illegal to accuse the Polish nation of having taken part in the atrocities and the systematic mass murder of the Jews committed by the Germans during World War II. See Bethke (n 4).

⁴⁵ *Podkolzina v Latvia* ECHR 2002-II 419.

⁴⁶ *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 December 2008) para 44.

⁴⁷ *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (Merits)* App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR, 23 July 1968).

⁴⁸ *Catan and Others v Moldova and Russia* ECHR 2012-V 309.

⁴⁹ *Sidiropoulos and Others v Greece* App no 26695/95 (ECtHR, 10 July 1998) para 43.

European Union, on all the institutions and bodies of the Union.⁵⁰ The EU is also under the obligation to respect international human rights obligations only to the extent that these are binding on the EU under treaties or customary international law.⁵¹ In *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, the CJEU reiterated:

Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.⁵²

Unfortunately, largely because of lack of exclusive competence, and with the exception of the 2005 UNESCO Cultural Diversity Convention, the EU has not signed any treaty that would be relevant to the protection of minority cultural heritage. It has not signed the FCNM, which recognizes the right of members of minorities to their culture; neither has it signed the Faro Convention⁵³ which explicitly protects the cultural heritage of minorities. It has also not signed the 1992 European Charter for Regional and Minority Languages,⁵⁴ the European Cultural Convention,⁵⁵ nor the revised European Convention on the Protection of the Archaeological Heritage.⁵⁶ In any case, it may be questioned whether the latter would be of great help, as it gives a voice for the modification of development plans likely to have adverse effects on archaeological heritage to 'archaeologists, town and regional planners' who according to Article 5 should 'systematically consult one another' to permit such modification. Contrary to current international law standards, it makes no mention of minorities having an input to such decisions.

Similarly, the EU has not signed any relevant human rights treaty that would push forward the protection of minority and indigenous cultural heritage. For example, the UN Convention

⁵⁰ Case C-130/10 *European Parliament v Council of the European Union* [2012] ECLI:EU:C:2012:472, para 83.

⁵¹ Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071.

⁵² Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, paras 101 and 123.

⁵³ Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS 199.

⁵⁴ (opened for signature 5 November 1992, entered into force 1 March 1998) ETS 148.

⁵⁵ (adopted 19 December 1954, entered into force 5 May 1955) ETS 018.

⁵⁶ (adopted 16 January 1992, entered into force 25 May 1995) ETS 143.

on the Elimination of All Forms of Racial Discrimination requires that States must ensure the equal right to participate in cultural activities.⁵⁷ Article 15 of the International Covenant on Economic, Social and Cultural Rights⁵⁸ clearly recognizes the right to culture and has been interpreted as including the right to maintain and develop one's cultural heritage in its collective aspect. And Article 27 of the International Covenant on Civil and Political Rights⁵⁹ creates obligations on the part of States to at least not discriminate in their recognition of minorities' right to profess their culture. In reality, the relationship between human rights and cultural heritage has only recently started being explored in international law.⁶⁰ Yet, in the last decade, the provisions mentioned above have been interpreted in a manner more reflective of the need to protect cultural heritage. Unfortunately, all these provisions and their underlying principles can only be indirectly taken into account, as the EU has not become a Party to them. An exception is the 2005 UNESCO Convention on Cultural Diversity, which the EU has actually signed and is therefore bound by its contents. Hence it is worthy of further examination.

2.4. The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the commitment to minority rights

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 UNESCO Convention) is not a treaty on cultural heritage per se.⁶¹ It focuses on cultural goods and expressions and does not specifically aim to protect human rights related to cultural diversity (and subsequently, heritage).⁶² However, it does take a human rights' approach, linking its content to human rights and fundamental freedoms. The Preamble confirms that the State Parties take into account 'the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create,

⁵⁷ (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 art 5(e)(vi).

⁵⁸ (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁵⁹ (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁶⁰ For the relationship between human rights and cultural heritage, see United Nations, Report of the Independent Expert in the field of Cultural Rights, Farida Shaheed, UN Doc A/HRC/17/38 of 21 March 2011; also see UN Report of the Special Rapporteur Karima Bennouna in the field of cultural rights, UN Doc A/71/317 of 9 August 2016; also see EMRIP, Study on the Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage, UN Doc A/HRC/30/53 of 19 August 2015.

⁶¹ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311 art 2(1).

⁶² Yvonne Donders, 'Cultural Rights in the Convention on the Diversity of Cultural Expressions: Included or Ignored?' in Toshiyuki Kono and Steven van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions* (Intersentia 2012) 177.

disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit from them for their own development'.⁶³ Article 2 of the 2005 UNESCO Convention states that: 'The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.' Finally, Article 7 states that State Parties shall create the necessary conditions to encourage

individuals and social groups (...) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.

However, as cultural diversity is closely linked to minority and indigenous cultures and cultural heritage, one can see links between the 2005 UNESCO Convention as a whole and sub-national cultural heritage. In particular, the explicit attention to the preservation of cultural diversity may be of particular interest to both minorities and indigenous peoples.⁶⁴

Unfortunately, the 2005 UNESCO Convention and its Governing Body seem to have placed very limited emphasis on the cultural heritage of minorities. This is reflected in the 2018 Global Report of the Convention,⁶⁵ where one can find chapters on gender and on artists but not on minorities. In fact, the whole 251 pages of the Report contain only three references to minorities. Given that the Report notes in its subtitle (*Monitoring the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions*) its emphasis on monitoring, one can have very limited hope in the role that the 2005 UNESCO Convention will play in monitoring and ensuring that the cultural expressions of minorities within the EU are protected. The report includes statistics that 65% of the civil society organizations have contributed to national cultural policy or consultations; however, nowhere are any of these organizations specified as minority organizations.⁶⁶

⁶³ *ibid* para 16.

⁶⁴ Anna Meijknecht, 'The Convention on the Diversity of Cultural Expressions: What is its Added Value for Minorities and Indigenous Peoples?' in Toshiyuki Kono and Steven van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions* (Intersentia 2012) 201–07.

⁶⁵ UNESCO, *Reshaping Cultural Policies: Advancing Creativity for Development. Monitoring the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (UNESCO 2017).

⁶⁶ *ibid* 86.

In light of the above, it is apparent that the EU has taken on very limited obligations regarding the protection of minority and indigenous cultures. This is also because of its lack of exclusive competence; or even because of the lack of commitment of Member States which would allow in turn the EU to take on more obligations with regard to shared competences. Whatever the specific reasons, the protection of minority and indigenous cultural heritage is not seen as falling within the remit of the EU. Hence, when EU projects may violate minority and indigenous cultural heritage there is a very limited obligation on the part of EU institutions to prevent such a violation.

3. The Reality: Indirect Action towards the Protection of the Cultural Heritage of Minorities and Indigenous Peoples

Even though the EU legal framework does not give the EU the responsibility to actively, positively protect minorities' cultural heritage, some protection has been given in an indirect manner.

3.1. Actions for migrants

Migration is a very topical issue within the EU at this time and many actions, policies, and practices have been carried out and implemented to protect the intangible cultural heritage of migrants.⁶⁷ In 2015, at the start of the 'migration crisis' in Europe, the EU Culture Ministers agreed to create a working group of Member State experts to explore the ways that culture and art could help alleviate the crisis.⁶⁸ The group identified more than 200 initiatives that fall within its mandate. They put a clear emphasis on intercultural dialogue and integration. The 2017 Report repeats that these are policies and actions for the integration of migrants and refugees. The Report identifies 'prerequisites to effective intercultural dialogue', which include 'a positive attitude towards integration and a willingness to engage in dialogue, among both migrant and host communities' and 'acceptance of and respect for the rule of law, among both

⁶⁷ Also see A Chechi, 'Migration, Cultural Heritage, and Cultural Rights: A Critical Assessment of European Law and Policy' in this volume.

⁶⁸ Directorate-General for Education and Culture, *How Culture and the Arts Can Promote Intercultural Dialogue in the Context of the Migratory and Refugee Crisis* (Publications Office of the European Union 2017).

migrant and host communities, including support for fundamental human rights, and condemnation of violence and terror'. This language points towards a rather one-way understanding of integration, with few obligations attaching to the State and most placed on the migrants and refugees themselves. One would hope that future documents will also touch upon States' obligations to encourage the integration of migrants and refugees by, inter alia, allowing them control and empowerment over their heritage.

Migrants at the receiving end of actions protecting their heritage are also often minorities. 'Old migrants', ie migrants who have been living in a State for some time, clearly fall within the definition of minorities in the prevailing opinion of international law scholarship. The length of time that the migrants should be living in the state is a matter of continuing discussion.⁶⁹ Clearer is the recognition of the migrants as members of minorities irrespective of their citizenship. Contrary to the widely used Capotorti definition of the 1970s,⁷⁰ a lack of host State citizenship 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.'⁷¹ In 2005, the UN Working Group on Minorities recommended that governments protect the rights of all minority persons within their territory, 'irrespective of citizenship'.⁷² As stated, members of such 'migrant groups' are often minorities. In addition, if the group is well-established but other individuals arrived recently, then they also fall within the definition of both migrants and members of minorities. UNHRC noted in its General Comment No 23 that: '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.'⁷³ The Advisory Committee of the Framework Convention on National Minorities has on several occasions discussed, within the context of Article 6 FCNM, the rights of 'new minorities'.⁷⁴

⁶⁹ R Medda-Windischer, 'Old and New Minorities: Diversity Governance and Social Cohesion from the Perspective of Minority Rights' (2017) 11 *Acta Univ. Sapientiae, European and Regional Studies* 25-42.

⁷⁰ Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub.2/384/Rev.1, para 205.

⁷¹ 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' (4 April 2005) UN Doc E/CN.4/Sub.2/AC.5/2005/2, paras 10–11. Also see Chechi in this volume, as above.

⁷² UN Commission on Human Rights, 'Prevention of Discrimination and Protection of Minorities: Report of the Working Group on Minorities on its eleventh session' (8 July 2005) UN Doc E/CN.4/Sub.2/2005/27, para 16(d).

⁷³ UNHRC (n 18) para 5.2.

⁷⁴ Stephanie Berry, 'Integrating Refugees: The Case for a Minority Rights Based Approach' (2012) 24

Henrard has rightly confirmed that ‘there seems to be an emerging consensus that (...) “new minorities” should be considered to be “minorities” for the purposes of minority protection.’⁷⁵

The situation of refugees in EU Member States is similar. After they have settled in a State, they also form members of minorities of that State if their ethnic group has had a presence for a considerable amount of time in the receiving State.⁷⁶

Most of the migrants in the EU have joined others of the same ethnicity or race, language, religion, or culture who have been living in European States for a long time. Therefore, most of the migrant groups and refugees that are the beneficiaries of EU protective actions are indeed minorities.

3.2. Old minorities

Protection to old minorities has mainly been given through the EU regional policy. Often, the regional policies of the EU regarding cultural heritage also protect minority and indigenous cultures. As mentioned earlier, the European cultural heritage benefits from a range of supportive measures (policies, programmes, and funding) aimed at its preservation (Article 3 TEU) and promotion (Article 167 TFEU). The EU regional policy has indirectly helped some minorities and indigenous peoples within the EU, viewing them as regional or local cultures. For example, in 2005, a centre in the Chanov Quarter of Most, in the Czech Republic, was renovated into the Svet Roma Cultural Centre.⁷⁷ The beneficiary was a minority even though the project did not announce this. In 2012–13, the EU-funded project Art School ‘Walk’ established a common cultural cross-border educational centre between the twin cities of Valka in Latvia and Valga in Estonia. Among other aspects, including inter-cultural education, the centre provided Estonian-speaking children in Latvia with art classes in Estonian.⁷⁸ The linguistic Estonian minority was the beneficiary of this project. While minorities may be

International Journal of Refugee Law 1.

⁷⁵ Kristin Henrard and Robert Dunbar (eds), *Synergies in Minority Protection* (Cambridge University Press 2008) 12.

⁷⁶ Berry (n 55) 1.

⁷⁷ European Commission, ‘A Centre of Roma Culture in the Chanov Quarter of Most’ (17 October 2011) <http://ec.europa.eu/regional_policy/en/projects/czech-republic/a-centre-of-roma-culture-in-the-chanov-quarter-of-most> accessed 31 March 2018.

⁷⁸ European Commission, ‘Cross-border Education Proves a Work of Art for Latvia and Estonia’ (23 November 2017) <http://ec.europa.eu/regional_policy/en/projects/estonia/cross-border-education-proves-a-work-of-art-for-latvia-and-estonia> accessed 31 March 2018.

included in 'local' and 'regional' cultures—terms and entities which are used in the EU legal framework—nevertheless local cultures are not always minority, nor indigenous cultures. Neither does the term signify the vulnerability of minorities and their need for enhanced protection. Specifically on indigenous peoples notable is the example of the project Sámi Cultural Centre, completed in 2012 in Inari, Lapland (Northern Finland), which obviously benefited the Sámi people, as it aimed at creating better opportunities for the Sámi people in Finland to preserve and develop their own language, culture, business activities, Sámi cultural self-government, and improve their living conditions.⁷⁹

Calligaro notes that

the concept of heritage was mobilized to defend local cultural expressions, but also local social and economic interests against the homogenizing effects of European integration. This use of heritage is not necessarily oriented against the European integration process; sustained and sometimes initiated by the EU, it can also provide a way to develop a model of integration from below.⁸⁰

A substantial level of protection is specifically given to minority and indigenous languages, as within the EU there are over 60 regional or minority languages, including, inter alia, Basque, Catalan, Frisian, Saami, Welsh, and Yiddish, spoken by about 40 million people.⁸¹ Protection for Europe's linguistic diversity is enshrined in Article 22 of the EU Charter: 'The Union shall respect cultural, religious and linguistic diversity.' Council Directive 77/486 establishes the duty of Member States to promote 'the teaching of the mother tongue and culture of the country of origin for the children.'⁸² It is important that a legally binding instrument moves beyond non-discrimination and imposes an obligation on States to take positive measures to protect minority and indigenous children. Regrettably, the implementation of the Directive has been disappointing,⁸³ even though Education Ministers of the EU have insisted on the importance

⁷⁹ European Commission, 'Project of the Week: Sámi Cultural Centre to Keep Sámi People's Cultural Heritage Alive' (23 April 2012) <http://ec.europa.eu/regional_policy/en/newsroom/news/2012/04/project-of-the-week-sami-cultural-centre-to-keep-sami-people-s-cultural-heritage-alive> accessed 31 March 2018.

⁸⁰ Oriane Calligaro, 'From "European Cultural Heritage" to "Cultural Diversity"? The Changing Core Values of European Cultural Policy' (2014) 3 *Politique européenne* 60.

⁸¹ European Commission, 'Languages: Facts' <http://ec.europa.eu/languages/languages-of-europe/facts_en.htm> accessed 31 March 2018.

⁸² Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers [1977] OJ L199/32, art 3.

⁸³ Bruno de Witte, 'The European Communities and its Minorities' in Catherine Brölmann, René Lefebvre, and Marjoleine Zieck (eds), *People and Minorities in International Law* (Kluwer Academic Publishers 1993) 182.

of languages in their 'Conclusions on the education of children with a migrant background' of 2009.⁸⁴ On the issue of migrant children, the Ministers see a link between integration and economic competitiveness on one hand, and social stability and cohesion on the other. The Conclusions note the importance of migrant children being taught the official language of the Member States, but also encourage the teaching of their mother tongue. Member States are invited to provide specialized training in linguistic and cultural diversity for school leaders, teachers, trainers, and administrative staff. The Rome Declaration, adopted on 25 March 2017, asserts that the EU should be one which 'preserves [Europe's] cultural heritage and promotes cultural diversity.'⁸⁵ European leaders met on 17 November 2017 in Gothenburg to discuss the future role of education and culture in strengthening the sense of belonging together and being part of a cultural community. The European Commission contributed to this meeting via a Communication, wherein it identified key issues and set out possible ways forward with respect to education and culture.⁸⁶ While nowhere in the Communication does the Commission refer to the cultural heritage of members belonging to minorities, it does note that:

Europe's cultural diversity is a strength that fuels creativity and innovation and, at the same time, there is common ground that makes up the distinct feature of the European way of life. Education and culture play a pivotal role for people to (i) know better each other across borders, and (ii) experience and be aware of what it means to be 'European'. Understanding and preserving our cultural heritage and diversity are prerequisites to maintain our cultural community, our common values and identity.⁸⁷

The reference to cultural diversity as a strength and to the need to understand and preserve 'our' cultural heritage may be interpreted as including minority and indigenous heritage. However, the omission of an explicit reference is telling, especially in an era where the world has now become so aware of minority rights. The failure to explicitly mention such communities implies a very limited understanding of their needs.

⁸⁴ Council of the European Union, 'Council conclusions on the education of children with a migrant background' (26 November 2009)

www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/111482.pdf accessed 31 March 2018.

⁸⁵ European Council and the Council of the European Union, 'The Rome Declaration' (25 March 2017)

www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration accessed 31 March 2018.

⁸⁶ European Commission, 'Strengthening European Identity through Education and Culture: The European Commission's contribution to the Leaders' meeting in Gothenburg, 17 November 2017' (Communication) COM (2017) 673 final.

⁸⁷ *ibid* 3.

The European Capitals of Culture project, established by Decision No 445/2014/EU of the European Parliament and of the Council of 16 April 2014, also provides a degree of protection, albeit indirectly, to minority and indigenous cultural heritage. The project includes the aim to widen access to and participation in culture and encourages ‘the creation of new and sustainable opportunities for a wide range of citizens to attend or participate in cultural activities, in particular young people, volunteers and the marginalised and disadvantaged, including minorities’.⁸⁸ During the nomination and the monitoring processes of the European Capitals of Culture, the panels have often insisted on plans involving the minorities of these capitals.

Creative Europe, the latest framework cultural policy programme of the EU Commission,⁸⁹ has also been indirectly helpful to the protection of minority cultural heritage. The programme explicitly refers to Articles 11, 21, and 22 of the EU Charter and the 2005 UNESCO Convention. Several of the projects funded have focused on persons belonging to both the ‘new minorities’ as well as traditional old ones. However, the emphasis seems to be mainly on the *integration* of members belonging to minorities and migrants, rather than their *empowerment* to be in control of their cultural heritage.⁹⁰ In April 2016, the EACEA funded 12 projects aimed specifically at the integration of refugees through culture.⁹¹ Most of them also have an impact on minority cultural heritage, as the refugees—some of whom share an ethnic origin with a specific minority within the receiving State—strengthen their own cultural heritage.

Finally, the 2016 Proposal of the European Commission for a European Year of Cultural Heritage does not specifically refer to minorities or indigenous peoples as interested parties, even though it mentions the protection and involvement of persons with disabilities, the elderly, and those with reduced mobility.⁹² Once again, any protection provided is indirect: the document discusses the ‘local’ level and notes that

⁸⁸ Decision No 445/2014/EU of the European Parliament and of the Council of 16 April 2014 establishing a Union action for the European Capitals of Culture for the years 2020 to 2033 and repealing Decision No 1622/2006/EC [2014] OJ L132/1, art 5(5)(b).

⁸⁹ Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC [2013] OJ L347/221.

⁹⁰ ‘Report on the Role of Public Arts and Cultural Institutions in the Promotion of Cultural Diversity and Intercultural Dialogue’ (January 2014) <https://ec.europa.eu/culture/policy/strategic-framework/intercultural-dialogue_en> accessed 31 March 2018. See Voices of Culture, ‘The Inclusion of Refugees & Migrants Through Culture’ <www.voicesofculture.eu/the-inclusion-of-refugees-migrants-through-culture> accessed 31 March 2018.

⁹¹ <https://eacea.ec.europa.eu/sites/eacea-site/files/02_-_selected_applications_with_partners.pdf> accessed 31 March 2018.

⁹² Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018) [2017] OJ L131/1, paras 9 and 10.

[c]ultural heritage plays an important role for community cohesion at a time when cultural diversity is increasing in European societies. (...) New participatory and intercultural approaches to heritage policies and educational initiatives that attribute equal dignity to all forms of cultural heritage have the potential to increase trust, mutual recognition and social cohesion.⁹³

The explanation of the European Commission is that '[p]olicies for the maintenance, restoration, conservation, reuse, accessibility and promotion of cultural heritage and related services are primarily national, regional or local responsibilities.'⁹⁴ This is a valid argument so long as other stakeholders are not mentioned or prioritized in policies relating to cultural heritage. However, the specific references to historians and experts and to disabled persons, the elderly etc. call the approach into question. At the same time the documents explicitly prioritize the interpretations of the local (minority) heritage by the State or experts and historians; and in this way actively weaken the rights of minorities to control their cultural heritage.

3.3. Protection of minorities and indigenous peoples in the EU's external relations with other States

Unfortunately, although external agreements between the EU and third countries refer to co-operation in matters related to cultural heritage, there is no mention of the cultural heritage of minorities, nor of indigenous peoples in specific. In a partnership agreement that was published in January 2017 between the members of the African, Caribbean, and Pacific Group of States on the one part and the European Community and its Member States on the other part, both parties jointly agreed that to 'promote the preservation and enhancement of the cultural heritage of each ACP country, at the international, bilateral and private level'. Rather than local populations, minorities or indigenous groups, the parties acknowledge the importance of historians and researchers in promoting the development and exchange of information of the

⁹³ *ibid* para 11.

⁹⁴ *ibid* para 14.

cultural heritage of these States.⁹⁵ Similarly, in an agreement between Georgia and the EU, both parties agreed to cooperation in the Cultural Field, including 'to co-operate on the development of an inclusive cultural policy in Georgia and on the preservation and valorisation of cultural and natural heritage with a view to fostering socio-economic development'.⁹⁶ However, there is no discussion of the protection of cultural heritage of the Crimeans⁹⁷ or any reference to other non-State heritage.

Specifically on indigenous peoples, the EU has expressed its support for the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),⁹⁸ that includes a detailed analysis and recognition of rights to cultural heritage. In 2016, the High Representative of the European Union for Foreign Affairs and Security Policy and the European Commission made concrete plans to further develop EU policy in line with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Outcome document of the 2014 World Conference on Indigenous Peoples.⁹⁹ Interesting is also the effect on the indigenous heritage of the European Union policy on the Arctic.¹⁰⁰ The policy aims at protecting among other aspects, the natural and cultural heritage of the Arctic and falls within the external policy of the Union. Specifically the Northern Periphery and Arctic Programme promotes and develop cultural and natural heritage. The programme includes the nine partner countries in the European Arctic plus Canada and Russia.

Although any attention to indigenous cultural heritage is very welcome, it seems that the European Union is currently paying more attention to the protection of indigenous cultural heritage outside the Union, rather than within its borders. It is ironic that initiatives on cultural

⁹⁵ 'Declaration XI: Joint Declaration on the ACP cultural heritage' in Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 – Protocols – Final Act – Declarations [2000] OJ L317/3.

⁹⁶ European Commission, 'Annex to the Joint Proposal for a Council Decision on the Union position within the Association Council established by the Association Agreement between the European Union, the European Atomic Energy Community and its Member States, of the one part and Georgia, of the other part with regard to the adoption of the EU-Georgia Association Agenda' JOIN (2017) 12 final, 46.

⁹⁷ See Evelien Campfens, 'Whose Cultural Heritage? Crimean Treasures at the Crossroads of Politics, Law and Ethics' (2017) 22 Art, Antiquity and Law Journal 193.

⁹⁸ Council of the European Union, Council Conclusions on Indigenous peoples, Brussels, 15 May 2017, 8814/17.

⁹⁹ The Joint Staff Working Document "Implementing EU External Policy on Indigenous Peoples" (SWD (2016) 340 Final) by the High Representative of the European Union for Foreign Affairs and Security Policy and the European Commission was published on 17 October 2016.

¹⁰⁰ European Commission, Joint Communication to the European Parliament and the Council, 'An integrated European Union policy for the Arctic' JOIN(2016) 21 final, Brussels, 27.4.2016.

heritage in EU Member states do not identify the indigenous cultural heritage as a priority, whereas outside the Union, the principles incorporated in the UNDRIP seem to be taken seriously and upheld.

4. Missed Opportunities for a More 'Integrated Approach' to Cultural Heritage

The above discussion reveals that the cultural heritage of minorities falls generally outside the scope of the discussion of cultural heritage in the EU. This runs against the current international trend, where the topic is gaining momentum. Indeed, there are currently important ongoing discussions in existing scholarship¹⁰¹ as well as in several organizations, including the UN, UNESCO and WIPO, regarding the effect of their existing instruments on minorities' cultural heritage. The Council of Europe has also recently promoted 'an integrated approach' to cultural heritage.¹⁰² The 'European Cultural Strategy for the 21st Century'¹⁰³ has recommended the creation of 'a suitable framework to enable local authorities and communities to take action for the benefit of their heritage and its management' (Recommendation S6). The strategy demonstrates some sensitivity towards communities and specifically asks the States to draw up charters for the involvement of heritage communities in public actions. In addition, in 2014 the European Council itself promoted the participatory governance model on cultural heritage.¹⁰⁴ The European Experts Network on Culture explained that such a model aims at seeing that 'authority is released and empowerment ensured' and that 'responsibility is shared and decisions are taken by communities rather than by individuals.'¹⁰⁵ The work plan acknowledges that the concept of participation in the cultural heritage sector 'reflects a general cultural shift in the 21st century which has transformed individuals from

¹⁰¹ Isnart notes that in ethnology, terms such as 'indigenous curation', "'non-official" heritage claims', 'autonomous archives', or 'public folklore' have been used to capture communities' participation in heritage practices. Cyril Isnart, 'Self Heritage-Making and Religious Minority in Greece: An Ethnography of Heritage Activities outside of the Cultural Institutions' in Nicolas Adell and others (eds), *Between Imagined Communities of Practice, Participation, Territory and the Making of Heritage* (Göttingen University Press 2015) 180.

¹⁰² John Bold and Robert Pickard (eds), *An Integrated Approach to Cultural Heritage: The Council of Europe's Technical Co-operation and Consultancy Programme* (Council of Europe 2018).

¹⁰³ Council of Europe, 'Recommendation of the Committee of Ministers to Member States on the European Cultural Heritage Strategy for the 21st century' (22 February 2017) CM/Rec(2017)1.

¹⁰⁴ Council conclusions on participatory governance of cultural heritage [2014] OJ C463/1.

¹⁰⁵ Margherita Sani and others, 'Mapping of practices in the EU Member States on Participatory governance of cultural heritage to support the OMC working group under the same name (Work Plan for Culture 2015–2018)' (June 2015) 3.

cultural consumers to cultural producers.'¹⁰⁶ And although the Work Plan gives some interesting examples of participatory governance, so far the wider picture tells a different story.

Unfortunately, there have been some glaring missed opportunities to adopt a participatory and integrated approach to the protection of cultural heritage that is inclusive of minorities. The 2012 Report of the European Commission on measures to protect and promote the obligations of the 2005 UNESCO Convention, to which the EU is a party, constituted an opportunity to introduce minorities and indigenous communities as stakeholders in the preservation of heritage. The Report mentions how the European Broadcasting Union must 'pay attention to social and cultural needs of ethnic and linguistic minorities, as well as migrants' and refers to EU States that have dedicated newsrooms for and about historical minorities in their countries.¹⁰⁷ However, minorities and indigenous peoples are nowhere to be seen on the list of stakeholders in the preservation of heritage. The Report mentions artists, cultural enterprises, cultural institutions, third countries, and even 'local cultural policies',¹⁰⁸ but does not once refer to minorities or groups.

Directive 2014/60/EU of the European Parliament and of the Council on the return of cultural objects¹⁰⁹ also adopts an approach that views culture as either belonging to the State or to the individual, and recognizes no role for or interest of any sub-national community.

But even more recently, EU documents and policies have failed to adopt an inclusive approach to heritage. The Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018) emphasizes the importance of various civilizations that exist in the EU and the importance of cultural diversity. However, Paragraph 16 reads:

In order to realise fully the potential of cultural heritage for European societies and economies, the safeguarding, enhancement and management of cultural heritage require effective participatory (i.e. multi-level and multi-stakeholder) governance and enhanced cross-sectoral cooperation, as stated by the Council in its conclusions of 25

¹⁰⁶ *ibid.*

¹⁰⁷ European Commission, 'Quadrennial Periodic Report on behalf of the European Union on measures to protect and promote the diversity of cultural expressions in the framework of the 2005 UNESCO Convention' SWD (2012) 129 final, 87.

¹⁰⁸ *ibid.* 4.

¹⁰⁹ Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 [2014] OJ L159/1.

November 2014. Such governance and cooperation involve all stakeholders, including public authorities, the cultural heritage sector, private actors and civil society organisations, such as NGOs and organisations in the voluntary sector.

This paragraph completely undermines the rights to cultural heritage of minorities and indigenous populations living within the EU. It enumerates stakeholders, including public authorities, the private sector, and civil society, but ignores groups, communities, or local populations, in other words omits any term that could be perceived as referring to minority groups. This omission is even more surprising because it goes against the current trend in academic scholarship, international practice, and EU work. It is very surprising that Decision 2017/864 does not reflect these developments in any way.

5. Conclusions

The discussion above reveals an emphasis on European heritage and a reluctance on the part of EU bodies and EU Member States to bring the protection of cultural heritage of minorities, and even more so indigenous peoples, into the EU forum. This is understandable in view of the competences of the EU. Certainly the EU has protected—albeit in an indirect way—the cultural heritage of some minorities and indigenous groups (mainly the Saami), often labelled as local populations. However, such protection has been unplanned and random, without any reflection on the principles that need to govern cultural heritage initiatives that relate to minorities. Certainly, the focus has recently been on the protection of the cultural heritage of refugees and new migrants as a way to reverse discriminatory policies and stereotypes developed in European States. Old, long-standing minorities and to a lesser degree indigenous groups may get the benefits of initiatives aimed at protecting the regional or local cultural heritage. The tangible heritage of minorities is especially at risk of being appropriated and presented as national heritage, or seen through the lens of the majority. Intangible heritage has at times been protected through initiatives that aim at protecting cultural diversity. Finally, as the focus is clearly on protection of the ‘European cultural heritage’, one is left wondering how the EU will minimize the negative effect that these priorities and actions aimed at protecting the European culture have on minority heritage.

One would hope that discussions in other legal systems, such as the human rights system and the UNESCO system, will quickly infiltrate also the EU regime on cultural heritage. There are some signs that this may be the case, at least through the 'participatory governance model' that is being promoted in the EU. A notable example is the EYCH decision (2017).¹¹⁰ However, more reflection needs to take place and proactive policies put into effect in order to ensure that minorities and communities are seen as stakeholders in the same way as experts, historians, and vulnerable persons. A real participatory model would ensure that minority cultural heritage is not trumped by other considerations, policies, and politics in the EU.

¹¹⁰ EU, Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural heritage (2018) OJ L131/1 of 20.05.2017.